Marua v Security Group Africa (Employment and Labour Relations Appeal E104 of 2024) [2025] KEELRC 1819 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1819 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E104 OF 2024

JW KELI, J

JUNE 12, 2025

BETWEEN

WILLIS OCHIENG MARUA ..... APPELLANT

AND

SECURITY GROUP AFRICA ..... RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable S.N. Muchungi (PM) delivered at Nairobi on the 15th of March, 2024 in MCELRC No. 206 of 2020)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable S.N. Muchungi (PM) delivered at Nairobi on the 15th of March, 2024 in MCELRC No. 206 of 2020 between the parties filed a memorandum of appeal dated the 22nd day of March, 2024 seeking the following orders: -

    a. Paragraph 9,14,15,11 of the judgment of the court made on the 15th March 2024 be substituted with allowing prayers d, e, h, and g as stipulated in the copy of the claim.

    b. The court grants any orders upon such terms as this court deems fair and just.

Grounds of the Appeal

2. The Honourable Magistrate erred in law and in fact in declining to award the appellants prayers in items b, c and d of the particulars of special damages by stating the same had been computed in his pay.

3. The Honourable Magistrate albeit relying on the evidence stipulated in the time sheets completely disregarded the indication of the varying numbers of hours worked and the numbers of days worked.

4. The Honourable Magistrate erred in law and in fact in declining to award prayers for constructive dismissal and finding that the respondent had not breached any fundamental terms of the contract

and/or that by its conduct the respondent made it intolerable for the appellant to continue working for them.

5. The Honourable Magistrate erred in law and in regarding the appellant as a term contract employee yet all the documents tabled in evidence stated that he was a temporary employee.

Background to the Appeal

6. The Appellant filed a claim before the lower court against the Respondent vide a statement of claim dated 13th February 2020, whose first amendment was dated 29th March 2021, and further amendment dated 12th May 2021 seeking the following orders:-

    i. A declaration that the Respondent's termination of the Claimant's employment was unlawful and unfair.

    ii. One month's salary in lieu of notice being the sum of Kshs.19,802/-

    iii. Salary for the month of October 2019 of Kshs.19,802/-

    iv. Unpaid holiday work allowances of Kshs. 88,448/-

    v. Unpaid Sundays worked of Kshs.617,822/-

    vi. 12 months' pay as damages for constructive unfair termination being the sum of Kshs. 78,000/-

    vii. Unpaid leave days of Kshs.61,804.17

    viii. Unpaid overtime from January 2013 to October 2019 being Kshs. 760,320/-

    ix. Gratuity pay from January 2013to October 2019 being Kshs. 67,656.83

    x. Costs of this cause

    xi. Interest on (a) to (m) above at court rates

    xii. Any other or further orders the court may deem just to grant

    xiii. House allowance from January 2013 to October 2019 being Kshs. 240,594.30

    (Statement of Claim on pages 1-5 of ROA dated 22nd October 2024; Amended Statement of Claim on pages 15-19 of ROA; and Further Amended Statement of Claim on pages 31-35 of ROA).

7. The Appellant filed his verifying affidavit, list of witnesses, witness statement and list of documents all dated the 13th of February 2020 (see pages 6-14 of ROA); the amended verifying affidavit, list of witnesses, witness statement, and list of documents (page 20-27 of ROA); and the further amended verifying affidavit, list of witnesses, and witness statement (page 36-42 of ROA)

8. The claim was opposed by the Respondent, who entered appearance and filed a Memorandum of Defence dated 24th July 2020 (pages 28-30 of ROA). The Respondent also filed their list of witnesses, witness statement of Joan Birech, and list of documents all dated 3rd June 2021(pages 43-54 of ROA). They also filed a Supplementary List of Documents dated 22nd July 2022 (pages 55-140 of ROA).

9. The Claimant/Appellant's case was heard on the 24th of October 2023. The claimant relied on his witness statement, and produced his documents. He was cross-examined by counsel for the Respondent, Mr. Mbaabu (pages 217-222 of ROA).

10. The Respondent's case was heard on the same day. RW1, Joan Birech, relied on her witness statement, and produced the Respondent's documents contained in their list of documents and supplementary list of documents. She was cross-examined by counsel for the Claimant, Ms. Waweru (pages 222- 225 of ROA).

11. The Trial Court issued directions on filing of written submissions after the hearing. Both parties complied.

12. The Trial Magistrate Court delivered its judgment on the 15th of March 2024 partially allowing the Claimant's case in respect of the balance of his October 2019 salary (Kshs. 7,118/-) and unpaid leave days for 18 months (Kshs. 23,991/-) plus costs of the suti and interest (Judgment at pages 204-209 of ROA).

Determination

13. The appeal was canvassed by way of written submissions. Both parties filed.

14. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

16. The appellant identified the following issues for determination in the appeal:-

    i. Whether the Appellant was constructively dismissed, and as such, entitled to damages for the same.

    ii. Whether the Appellant is entitled to holidays and Sundays work allowance, in addition to unpaid overtime.

    iii. Whether the Appellant is entitled to the pleaded Kshs. 61, 804.17/= for unpaid leave days instead of the awarded the Kshs. 23,991/=

17. The respondent addressed the merits of all the grounds of appeal.

18. The court then finds that the issues placed before the court for determination in the appeal were:-

iv. Whether the Appellant was constructively dismissed, and as such, entitled to damages for the same.

v. Whether the Appellant is entitled to holidays and Sundays work allowance, in addition to unpaid overtime.

vi. Whether the Appellant is entitled to the pleaded Kshs. 61, 804.17/= for unpaid leave days instead of the awarded the Kshs. 23,991/=

Whether the Appellant was constructively dismissed, and as such, entitled to damages for the same

Appellant's submissions

19. The very case quoted in the said judgment delivered on 15th March, 2024; Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR) stipulates that constructive dismissal occurs where; "an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct...Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal." The Appellant herein, was employed in January 2013 with an understanding that he shall be absorbed into permanent employment after six months of employment. However, six years later, the Appellant was yet to be absorbed into permanent employment by the Respondent, and with no indication of the Respondent doing so anytime soon. Notably, the Respondent at paragraph 7 of the said judgment delivered on 15th March, 2024 admits that; "...the rates for permanent and temporary employees are different and that they have assignments that support the two different rates; that the guards' responsibilities are the same whether employed on temporary or permanent basis; that there is no difference in qualifications between the guards employed on permanent and temporary basis; that there is no reason why the Claimant was not confirmed on permanent basis.." As such, for the Appellant to be put on temporary employment basis for six years, with no reason fronted for not being confirmed on permanent basis, and to watch other employees coming after him, with the same qualifications as his being confirmed as permanent employees, and enjoying the benefits of being a permanent employee, in addition to the employer not being forthcoming with when his confirmation into permanent employment will happen was frustration enough for the Appellant to terminate his contract of employment with the Respondent.

20. Further, in the case of Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR Honourable Justice Rika J., on constructive dismissal, stated as follows:- 'The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African *Labour Relations Act* Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct."

21. The Appellant submits that indeed, the Respondent conduct of keeping his confirmation into permanent employment in limbo for six years, while confirming those who came after him with the

same qualifications as him, breached the duty of trust and confidence, leaving the Appellant with no other option but to resign. The said continued action of the Respondent, indeed, constituted constructive dismissal.

The Respondent's submissions

22. The Appellant had raised an allegation of constructive dismissal. His grounds were purported to be discrimination and remaining as a temporary employee for six years, he worked. He stated during cross-examination that "we were told temporary workers would earn gross salary until we attained 6 months" and proceeded to state that "those on temporary did not give notice just the casual workers".The court considered the principles laid down in the case of Coca-Cola East and Central Africa Ltd -vs- Maria Kagai Ligaga (2015) eKLR and found that this case did not at all satisfy the principles set out in the said case. The reasoning by the Court is sound, based on facts and clear evaluation thereof and there is no basis for this Court to find otherwise. (paragraphs 8 and 13 of the judgment). The trial Court made a finding of fact that the resignation by the Application was voluntary and clear acknowledgment that he enjoyed the benefits of a permanent employee. The resignation letter does not show frustration at the place of work or any fundamental changes in his engagement. He resigned for personal reasons. The reasoning and the finding of the court as set out in pages 207 and 208 of the record are sound and no reasons is shown why they should be disturbed.

Decision

23. The claimant told the lower court that he had a pay slip. That he resigned from employment but did not produce the pay slip. That he was earning a gross sslary of Kshs. 19,800 as per witness statement. That his understanding of a gross salary was that he did not have a basic pay. He did not have to give notice as temporary employee just like casual workers. He was a member of a trade union. On re-examination the appellant told the court that his personal reasons for resignation concerned working conditions for while other workers were confirmed, he was left as temporary for six years. The lower court stated that while the claimant stated that as a temporary employee he did not need to give notice, he issued a resignation letter and that connoted he was aware his employment was permanent. The lower court further found the resignation letter did not indicate he resigned out of frustration.

24. The claimant pleaded in his claim that after expiry of his contract of 6 months running from January 2013 to June 2013 his employment continued without execution of new contract. The court agreed with the trial court that on end of his 6-month contract the continued engagement meant that the contract was permanent though not paid at the rates with employees designated as permanent . The court noted that RW1 stated the said two category of employees were given different assignments though no difference in responsibilities or qualifications. In the list of documents, the claimant did not produce his resignation letter (page 12 of ROA was the list of documents).

25. The trial court found that a temporary employee enjoyed all benefits of a permanent employees save for the said different rates of payment. The resignation letter stated he resigned for personal reasons (page 54 of ROA). The trial court stated the tone of the letter did not indicate any frustrations. The prove of frustration of the employee by the employer and repudiation of contract are key elements of construction dismissal. The failure to be promoted perse is not tantamount to frustration. There was no indication of frustration in the resignation letter. Taking the foregoing into account I find no basis to interfere with the decision of the trial court (Mbogo v Shah).

Whether the Appellant is entitled to holidays and Sundays work allowance, in addition to unpaid overtime.

Appellant's submissions

26. In the case of Humphrey Munyithya Mutemi v Soluxe International Group of Hotels and Lodges Limited [2020] KEELRC 1090 (KLR), faced with the similar facts as herein, the court held that; "..The Claimant in his pleadings and evidence averred that he worked overtime and was not paid for the same. In the absence of any evidence from the Respondent to controvert this assertion I find that the Claimant is entitled to the same. In the case of Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR the Court held that it is the employer's duty to keep certain records including hours of work and to produce the same in legal proceedings. In this case the claimant submitted the sign in sheets. I have noted from the sign in sheets that the claimant worked on average one hour per day which I award him for 12 months only, being a continuing injury, at 6 days a week. Since the amount claimed is lower than the amount due, I award the claimant the amount claimed at Kshs.104,920." The Appellant herein claims Kshs. 760,320.0/= for unpaid overtime from January, 2013 to October, 2019 and has proved that he indeed worked overtime without pay, sometimes staying at work from 6 am in the morning to 9 pm in the night for the assigned colleague to relieve him off duty. The Appellant submits that given the foregoing, he is entitled to compensation for overtime worked. Consequently, on unpaid Public Holidays and Sundays worked, the court in Peter Munga v African Seed Investment Fund LLC [2017] KEHC 5232 (KLR) stated that; ".Section 57 (b) of the *Interpretation and General Provisions Act* (Cap 2) which reads thus: "(b) if the last day of the period is a Sunday or a public holiday or an official non-working day (which are in this section referred to as excluded days), the period shall include the next following day not being an excluded day" True, the first two days in the computation of time fell on a Saturday and a Sunday. Saturdays are official non–working days within our civil service. The last day also fell on a Sunday. It must however be noted that section 57(b) of the *Interpretation and General Provisions Act* (Cap 2) stipulates that excluded days (being Sunday, public holidays and official non-working days) are not to be reckoned in the computation of time where the act or proceeding is directed or allowed to be done or taken within any time not exceeding six days. Where the period exceeds six days then the excluded days are to be reckoned in. They count guided by the foregoing statutory provision, and decision, and given that the Appellant herein worked from Sunday to Sunday, it therefore follows that the last day being a Sunday is an excluded day, and when worked ought to be compensated as with public holidays and official non-working days. The Appellant thus submits that he is entitled to the same as pleaded.

Respondent's submissions

27. In respect of the holidays allowance, Sunday worked and overtime, there was sufficient evidence that the Appellant used to take his rest days and whenever he worked he was paid upon computation. Nothing has been shown to Court to bring out a contrary view. These claims touch on special damages which falls under the trite law that they should not only be pleaded but specifically proved.

28. On the ground 2 of the Appeal, the Appellant is purporting to challenge the hours worked and days worked. The Claimant's claim as set out, the claim for holiday, alleged worked and Sundays, alleged worked but there was no evidence adduced to show that the Appellant worked for the said holidays and all the Sundays without compensation. He agreed that he used to be given 4 rest days every month. Based on the evidence adduced and the testimony before the Court, the issue was fully addressed by the Court.

29. On overtime- The Claimant led no evidence to show that he worked on the overtime and/or give particulars of the hours worked. In the matter of Rogoli Ole Manadiegi -vs- General Cargo Services Ltd (2016) eKLR Justice Rika stated in paragraph *7*, 'The employee in claiming overtime pay however is not deemed to establish the claim for overtime pay by default of the employer bringing to the Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The Claimant did not show in the trial Court when he put the excess hours, when he served on Public Holidays or even rest days. The evidence on record does not even separate normal overtime from time on restdays and Public holidays. The rates of compensation are different. He did not justify the global figure earned in overtime showing specifically how it was arrived at based on the Regulation of Wages (Protective Security Services) Order 1998 and gave no consistent evidence showing the hours worked and how these hours gave rise to the figure of KShs. 222,350/= claimed as the overall overtime."

30. The trial court on the issue held that from the time sheets and payslips produced, the appellant had off days and if he worked on holidays overtime was computed and the same computed in the payslips. The court perused the payslips and the time sheets produced at trial court(pages 46-136 of ROA) and found the finding of the trial court as factual. The court found no basis to interfere with the decision of the trial court (Mbogo V Shah)

Whether the Appellant is entitled to the pleaded Kshs. 61, 804.17/= for unpaid leave days instead of the awarded the Kshs. 23,991/=

Appellant 's submissions

31. The said judgment delivered on 15th March, 2024 at paragraph *15* finds that indeed the Appellant herein never went on annual leave throughout his employment, and goes ahead to award Kshs. 23,991/= as compensation for the same instead of the claimed Kshs. 61, 804.17/=. The Appellant submits that given the imbalance of power between him and the Respondent, he had no say when it came to taking leave days or not, that the same was solely the decision of the Respondent. Therefore, the Respondent ought not to benefit from its malicious mechanizations by not paying all the unpaid leave days due. The Appellant submits that the said imbalance of power should be put into consideration when awarding compensation for leave days not taken, and with it, award the full amount owing as claimed, the same being Kshs. 61, 804.17/=.

Respondent's submissions

The Court found that the Claimant had not taken leave. The Court proceeded to compute the amount payable for untaken leave which was limited to 18 months. This is based on Section 28(4) of the *Employment Act* 2007 which provides:- 4 The uninterrupted part of the annual leave with pay referred to insubsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later that eighteen months from the end of the leave earning period referred to in subsection (1) (a) being the period in respect of which the leave entitlement arose.'

Decision

32. The trial court found that the claimant did not go on leave and held that he was only legally entitled to 18 months' leave under section 28 of the *Employment Act*. The court found the decision by the trial court was legally sound, and this position had been held by the Court before. In a similar ground of

appeal in Chakaya v Meat Magic Enterprises Limited [2024] KEELRC 13451 (KLR) Justice Mbaru held:-

> 'On the claim for unpaid leave, under Section 28 of the *Employment Act*, an employee has the right to annual leave for at least 21 days annually. However, this can be accumulated up to 18 months. No record was filed of the appellant taking any annual leave. He is entitled to 18 months' annual leave, which is 33 days. On the monthly wage of Ksh.25 000, annual leave pay is Ksh.27 500.' In the said case, the appellant had not taken leave in the entire period of employment by the respondent as a salesperson from July 2017 until 31 May 2022. The award on appeal is upheld.

33. In the upshot the appeal is dismissed for lack of merit. The Judgment of the Honourable S.N. Muchungi (PM) delivered at Nairobi on the 15th of March, 2024 in MCELRC No. 206 of 2020 is upheld.

34. On costs in the appeal, the court took into account the employer employee relationship and to temper justice with mercy made no order as costs in the appeal. The file is marked as closed.

35. It so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Appellant : -absent

Respondent: absent