



Regency Slots Limited v Omwoyo (Employment and Labour Relations Appeal E172 of 2021) [2025] KEELRC 1713 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E172 OF 2021**

**JW KELI, J
JUNE 12, 2025**

BETWEEN

REGENCY SLOTS LIMITED APPELLANT

AND

PETER OSUGO OMWOYO RESPONDENT

(Being an Appeal from the Judgment of the Honourable A.N Makau (PM) delivered at Nairobi on the 10th December 2021 in Milimani MCERLC No. 1992 of 2019)

JUDGMENT

1. The Appellant, dissatisfied with the Judgment of the Honourable A.N Makau (PM) delivered at Nairobi on the 10th December 2021 in Milimani MCERLC No. 1992 of 2019 between the parties filed a Memorandum of Appeal dated 21st December 2021 seeking the following Orders:-
 - a. That this appeal be allowed
 - b. That the judgment of A.N. Makau (Ms)(PM) delivered on 10/12/2021 on unpaid overtime dues be set aside in entirety and be substituted with a judgment that the respondent failed to prove his case on unpaid overtime dues against the respondent (appellant) in Milimani CMEL Cause No. 1992 of 2019.
 - c. costs of this appeal be granted to the Appellant.

The Grounds Of The Appeal

2. The Honourable trial Magistrate erred in law and fact and misdirected herself in finding that the Claimant had proved his claim on overtime for Kshs. 536,000/- when there was no evidence to prove the claim.



3. The Honourable trial Magistrate erred in law and fact and misdirected herself by holding that the Respondent did not avail sufficient evidence to prove payment of the claimed extra hours when there was overwhelming evidence that the Claimant had not worked for the extra hours claimed.
4. The Honourable trial Magistrate erred in law and fact and misdirected herself by holding that the Respondent did not avail sufficient evidence to prove payment of the claimed extra hours when the burden of proof was on the Claimant.
5. The Honourable trial Magistrate erred in law and fact and misdirected herself in finding that the Claimant was entitled to unpaid overtime dues despite the Claimant having confirmed in cross examination that he was paid overtime thereby leading to a contradicting decision.
6. The Honourable trial Magistrate erred in law and fact and misdirected herself in holding that the Claimant was entitled to overtime dues despite finding in the same judgment that the Claimant signed a discharge voucher and did not raise any question hence she arrived at a conflicting decision.
7. The Honourable trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Respondent hence she arrived at an erroneous decision.
8. The Honourable trial Magistrate erred in law and fact by failing to consider binding authorities submitted by the Respondent.
9. The Honourable trial Magistrate erred in law and fact by failing to give reasons to support her decision.

Background Of Appeal

10. The Claimant/Appellant filed a claim against the Respondent vide a Memorandum of Claim dated 1st November 2019 seeking the following Orders:-
 - a. A declaration that the Claimant's terminal dues were wrongfully and/or unfairly withheld by the Respondent.
 - b. Payment of the Claimant's full terminal dues of Kshs. 849,000/=as per Paragraph 8 above.
 - c. Costs of the suit
 - d. Interests at commercial rates from date of termination of the Employment Contract till payment in full.
 - e. A Certificate of Service.
 - f. Any other relief that this Honourable Court may deem fit to award. (page 4-8 of ROA was the claim).
11. The Claimant filed his Witness statement and list and bundle of documents on same date (see pages 9-99 of ROA).
12. The claim was opposed by the Respondent who entered appearance and filed a Respondent's statement of response dated 27th April 2021 , list of witnesses of same date and the witness statement of Jane Achieng dated 21st May 2021, respondent's list of documents dated 28th April 021 and the bundle of documents (Pages 100- 296 of ROA). The Respondent further filed the letter of termination (at page 298 of ROA).
13. The claimant further filed reply to the response on the 17th May 2021 (at pages 299-300 of ROA)



14. The claimant's case was heard by the lower court on the 24th May 2021 where the claimant/ respondent testified on oath in the case and adopted his witness statement as his evidence in chief. He was cross-examined by Counsel for the Appellant, Mr. Odoyo and re-examined by his counsel.
15. The Appellant's/Respondent's case was heard on the 16th July 2021 where Jane Macbeth Achieng was RW1. She adopted her witness statement dated 21st May 2021 as a her testimony in chief, produced 2 sets of list of documents filed for the respondent dated 21st May 2021 and 2nd April 2021 respectively. RW1 was cross-examined by counsel for the Respondent/ claimant,
16. Mr.Sirma and re-examined by appellant's counsel. (pages 1-10 of the supplementary record of appeal was the proceedings of the trial court)
17. The parties filed written submissions after the hearing.
18. The trial court delivered its judgment on the 10th December 2021 in favour of the claimant with respect to the claim for overtime for the sum of Kshs. 536,000 only with interest at court rates from date of judgment and costs.

Determination

19. The appeal was canvassed by way of written submissions. Both parties complied.
20. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [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."
21. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation 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."

Issue for determination

22. The court from the grounds of appeal found there was only one grievance being the decision on overtime. Consequently, the court found the issue for determination in the first appeal was whether the appeal was merited.

The appellant's submissions:-

23. Who bears the burden of proving matters of working extra hours in employment suits? Backdrop of this issue is that the Respondent herein vide his Statement of Claim dated 1st November, 2019 claimed that his employment contract was unfairly terminated and his final dues withheld. The trial Court dispensed with the issue of unfair termination as all due process was followed to the letter. However, the trial-court-awarded the Respondent herein claim of Kshs. 536,000 which the Respondent asserted



as his unpaid dues resulting from overtime. At all material times the assertions by the Respondent are denied in toto by the appellant herein. The Appellant's position that the learned magistrate at the trial court erred in fact and in awarding the Respondent the aforestated dues. The trial court failed to consider whose burden of proof is in employment matters. At trial court, the Respondent herein failed to adduce any shred of evidence to prove that final dues were not paid. On the other hand, the Appellant herein produced bundles of indicating when the Respondent worked for extra hours than he was required to and he was paid for his services. The learned magistrate failed to consider the evidence before the court and it concluded that the Appellant had failed to prove its case. (See 10-296 of the Record of Appeal).

24. It is trite law that the burden of proof in Civil matters rests upon the plaintiff/claimant, however sometimes shifts the burden to the Defendant/Respondent's. Additionally, it is paramount to note that at all times, he who alleges must prove. (See Section 107 and 109 of *Evidence Act*). It is incumbent upon the Respondent to prove that the facts he alleged existed. The basic rule on the shifting of the evidential burden is that a claimant/ petitioner is under the obligation to discharge the initial burden of proof before Respondent's are invited to bear the evidential burden. The Respondent did not discharge both his legal and evidential burden of proof as provided in sections 107 and 109 of the *Evidence Act* respectively. He did not prove on a balance of probabilities any of the allegations levelled against the Appellant. (See *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*). At all material time, the Respondent/Claimant had the burden to prove his allegations, and the burden could only be shifted upon the Appellant after the Respondent proved his allegations. The Court of Appeal has set precedent that although the employer is usually the custodian of employment records, the employee who claims they haven't been paid must produce evidence to prove his case. Therefore, the trial magistrate holding that the Appellant herein failed to prove his case is not only erroneous but also grievous to the pursuit of justice. (See *Rogoli Mandiege v General Cargo Limited (2016) eKLR*).
25. The appellant invited the court on first appeal to re-evaluate the evidence adduced at the trial court and its judgement and arrive at its own judgement after exhaustive scrutiny of the same (See *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR)*).
26. The appellant submitted that this Honourable court be persuaded by the Court of Appeal in *Rogoli Manadiege v General Cargo Limited* and find that indeed the Respondent herein failed to dispense the burden placed on him to prove that he had worked during extra hours.
27. On whether the respondent proved his case on a balance of probabilities? It is trite law that employment matters are civil cases and as a result the standard of proof is on balance or preponderance of probabilities. At the trial court, it was the Respondents' averment that he had worked extra hours at the Appellants establishment consequently he sought a total of Ksh 536,000/= for the extra hours worked. However, the Respondent failed to provide any shred of evidence proving that indeed he worked at the Establishment during extra hours, yet the learned trial court proceeded to award him the reliefs sought plus interest, which begs us to interrogate what really is the standard of proof. Simply put, precedents denote that balance of probabilities is a legal standard used primarily in civil cases to determine the outcome based on the evidence presented. It refers to the requirement that a party must show that their claims are more likely true than not. This means that the evidence must lead the court to believe that there is a greater than 50% chance that the assertion is correct. Unlike criminal cases, which require proof "beyond a reasonable doubt," civil cases operate under the balance of probabilities. This makes it easier for plaintiffs/ claimants to succeed, as they don't need to meet the higher threshold of certainty. (See *William Kabogo Gitau v. George Thuo & 2 Others [2010] 1 KLR*).



526, *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, *Ngugi v Karanja & another* (Civil Appeal 161 of 2018) [2023] KEHC 2368 (KLR). In arriving to decision that a claimant has proved its case on a balance of probability, the court must make an assessment guided by factors which include but are not limited to credibility of witnesses, reliability of documents and consistency of testimonies. In that regard, it is the Appellant's assertion that the trial court failed to consider that the Appellant produced a discharge voucher signed by the Respondent to signify that all his dues were paid and indemnified the Appellant on further liability arising from the same.

28. A discharge voucher is a legal contract that signifies the completion of obligations between parties. It can only be cancelled under specific conditions, such as mutual agreement between the parties involved, a material breach of contract, or if it was obtained through fraud or misrepresentation. (See *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR, *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR) During cross examination, the Respondent herein agreed to the fact that he had signed the discharge voucher, and he did not allude to being coerced into signing the said discharge voucher. Being a legally binding contract the court has no right to interfere with the contract as no vitiating factors have been pleaded or proved. Therefore, the court erred in fact and in law by awarding the Respondent Kshs. 536,000 as claimed, yet the discharge voucher was properly executed. The trial court failed to consider the principle that the legal burden of proof lies upon the party that invokes the aid of the law in totality. The Respondent failed to provide any substantial evidence to support his claim of additional hours worked, relying solely on his assertions as if they were irrefutable facts. In contrast, the Appellant provided compelling evidence demonstrating, on a balance of probabilities, that the extra hours claimed by the Respondent were fully compensated and timely paid. (See *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR)
29. On whether the respondent is entitled to the reliefs awarded? Having dispensed with the issues of the burden and standard of proof and the answer being in the negative, that the Respondent neither dispensed his burden of proof nor proved his case as per the required standard of proof.

The respondent's submissions

30. Whether the learned magistrate erred in law and fact in the award of overtime to the Respondent? It is apparent from the record that the Respondent worked diligently for the Appellant for a period of five (5) years and upon being declared redundant, the Respondent's unpaid dues for overtime were withheld by the Appellant with no justification among other terminal remedies. The Respondent was entitled to earn a pay for each day worked as overtime as shown by the Duty Rosters prepared by the employees and produced by the Respondent/Claimant in evidence. (See pages 17-19 of the Record). This position was confirmed by the Appellant's witness during cross examination on 16/7/2021 as appears at page 429 of the Supplementary Record of Appeal dated 3/2/2025 (hereafter "the Supplementary Record") The Respondent dispensed with the burden of establishing hours or days, months and years served in excess of the legal maximum as appears at pages 17-19 of the Record & pages 425 & 426 of the Supplementary Record. Particularly, the Respondent tabulated in the Statement of Claim the pending overtime dues as follows for the period 2015 to 2019; a) Year 2015. b) Year 2016 c) Year 2017. d) Year 2018. e) Year 2019 TOTAL: Kshs. 123,500.00; Kshs. 120,000.00; Kshs. 152,500.00;; Kshs. 89,000.00; Kshs. 51,000.00; .Kshs. 536,000.00.
31. During the hearing on 24/5/2021, the Respondent clearly stated that he used to work more than the agreed 12 hours. He also stated during cross examination and gave a clear breakdown of the year, month and hours worked overtime and the dues payable (see pages 424-426 of the supplementary Record), a fact which the Appellant purported to challenge but failed to produce any single iota of evidence



to counter that fact as is required under section 107 of the Evidence Act, Cap 80 Laws of Kenya. The respondent urged the Court to uphold the finding of the trial Court on the award of overtime dues.

32. The Respondent submitted that the employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. An analysis of the record does disclose that the claim for overtime was properly established by the Respondent. Evidentiary proof was provided that the Respondent worked on those days. Figures, hours and days were demonstrated to the court with proper substantiation even when the Respondent was referred to his payslips by the Appellant. There were details or particulars given of the extra hours worked and amounts payable (see pages 424-426 of the supplementary Record) *Togom -v- Radar Limited [2024] KEELRC 112 (KLR)*, the court when handling the issue of overetime noted as follows: "that the claimant indeed stated that he worked from 6am to 6pm daily. This position was not contested by the respondent...Individual organizations make arrangements on how to compensate the employee for the overtime...The claim for overtime is therefore payable in respect of the period between 25th November 2018 to which claim was not time barred since this claim was filed on 25th November, 2021". The evidence of the Appellant when she admitted that the employees previously filed the rosters for overtime and would be paid based on the same (See page 429 of the supplementary Record).
33. The Respondent submitted that there was evidentiary proof that the Respondent worked on public holidays and that he specifically pleaded and proved the hours overtime claimed. It is further submitted that the appellant failed to discharge the burden of proving that the Respondent was not entitled to the sums claimed for overtime, and therefore, the learned judge was right in reaching this finding and urge this Honourable Court to uphold the finding. It was the Respondent's evidence before the trial Court that he was not fully compensated for all the time he worked overtime despite this being a term of the Agreement. Further, it was the Respondent's Evidence that every time he worked during public holidays, he was to be paid but the Appellant declined, refused and or failed to remit the entire amount as due. (See page 14 (paragraph on Working Hours) of the Record). The Appellant's witness who worked in the Accounts Department admitted on cross examination that the Respondent and his co workers used to prepare duty rosters by themselves and that she paid them based on the same. (See page 429 of the Supplementary Record). This was an admission that indeed the Respondent worked for extra hours, over and above those stipulated in his employment contract. In the case of *Board Of Management Milo Boys High School -vwakhungu [2024] KEELRC 1685 (KLR)*, the Court found that the Appellant admitted to the Respondent having worked overtime and not paid. Consequently, the Court held that there was no misapprehension of the evidence by the trial Court and hence no basis to disturb the award of overtime.
34. The Respondent urged the Court to find that the Appellant admitted to the Respondent having worked extra over time, prepared the rosters on which he recorded the days he worked overtime and the same formed basis for his payment, which payment the Appellant partly paid leaving an outstanding balance of Kshs. 536,000.00. There is no evidence on record to show that the Appellant processed the Respondent's release in accordance with fair procedure by paying all his terminal dues that included overtime. The Appellant's witness stated on cross examination stated that the company stopped paying overtime but did not avail any evidence in support of the said claim (See page 429, paragraph 5 of the Supplementary Record) and as such, the said amounts remained unpaid todate. There is no evidence to suggest that the Appellant discharged this burden. Consequently, the respondent urged the court



to holds that there was no misapprehension of the evidence by the trial Court and hence no basis to disturb the award of overtime in the sum of Kshs. 536,000.00.

Decision

35. The claimant/Respondent admitted to have signed a discharge voucher on the 8th October 2019 for payment of terminal dues under redundancy (page 000296 of ROA). The reason for termination of redundancy was upheld by the trial court as procedural. Under the discharge voucher the Respondent was paid 2 days worked in the month, benefits at 15 days worked for 5 years (severance pay/gratuity), leave days pending, one month salary in lieu of notice. The document read: "I peter Omwoyo Osugo ID No. 20353182 receive and confirm the above as my full and final settlement of my dues from Regency Slots Ltd. I further confirm that I do not have any other claim against the company and its directors." The Respondent signed and dated the document on 8th October 2019. The Trial court held the discharge as valid in paragraph 14 of its judgement as follows: "The termination was there procedural and lawful since there were sufficient reason for doing away with the claimants department. The claimant has not demonstrated he was forced to sign the same, he accepted to execute the discharge voucher and cannot thereafter claim misrepresentation of facts."
36. It is settled law that a discharge voucher like one signed by the Respondent amounts to waiver of any future claims against the employer. In Sheila Kiplangat v Uniliver Tea Kenya Limited [2022] eKLR the Honourable Justice Onesmus Makau cited with approval the Court of Appeal decision in Costal Bottlers Limited v Kimathi Mithika [2018] eKLR where the court in determining whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim, held that: "In our minds, it is clear that the parties had agreed that Payment of the amount stated in the settlement Agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondents' termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as adequate. As it stood, the agreement was a binding contract between the parties... All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ... Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant" The above finding was also reiterated by the Court of Appeal in Trinity Prime Investment Limited -v- Lion of Kenya Insurance Company Limited [2015] eKLR where in discussing the import of a discharge letter the Court held that: "The execution of a discharge voucher we agree with the Learned Judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other..." The trial court ought to have stopped at paragraph 14 of its judgment having found the claimant willingly signed the discharge voucher and was paid pursuant to acceptance of the terms. The lower court was bound by the foregoing superior courts' decisions.

On merit of the overtime claim

37. At the trial the claimant told the trial court the overtime payment done by the employer was not as agreed. He relied on his statement and stated the appellant had his records on hours worked. He did not have any records and did not know how he was paid. The court noted the claimant produced documents names surveillance rota on working timelines with his colleagues. The respondent on other had produced the records of staff attendance to work sheets to prove hours worked and payslips which



indicated overtime paid. The trial court held as follows:- ‘In cross examination the claimant was taken over a number of his payslip and he confirmed overtime was paid. He however stated he was paid halfway and not as agreed. He emphasized his claim and maintained it was justified. I consider his case and find the respondent did not avail sufficient evidence to prove payment of the claimed extra hours the claim succeed. He is awarded Kshs 536,000/= ‘The burden of proof of claim of overtime is on the employee. The court finds that the decision of the trial court was not based on any evidence. The claimant had the burden to prove the extra hours claimed outside the overtime paid. The trial court did not make a finding on the prove of the extra hours. During re-examination the claimant told the trial court that he maintained his claim for overtime. That the respondent/appellant had his records, by November he did not have the records and how he was paid. So what was the basis of disputing the paid overtime? The trial court held there was no sufficient evidence to prove overtime was paid. The court on perusal of the records found the attendance sheets were filed and payslip produced with evidence of payment of overtime.

38. The court did not find the basis of the trial court’s holding that the evidence by the appellant was not sufficient. The claimant relied on documents titled surveillance rota which he submits were admitted by RW who testified the employees previously filed their rotas and would be paid overtime. The trial court did not make any finding on these documents. The court noted the said documents had no stamp of employer as received. So how could the claimant have been paid based on documents not received by the employer? The court on perusal of the rota could not discern the actual hours worked in excess. On perusal of evidence in chief the claimant he did not produce the documents(rota) (page 3 of the supplementary record of appeal.) The trial court did not make any findings on the said documents, correctly so as they were not produced by the owner. The court finds that the documents having not been produced at trial they were not part of the evidence before the trial court and that explains the lack of finding on the document by the trial court. Documents filed in court and not produced at the hearing are of no consequence to decision making by the court. They are just mere papers. The Court on re-evaluation of evidence before the trial court found that Respondent/ claimant did not lay any basis to doubt the sufficiency of the paid overtime.(Selle v Associated Motor Boat Co. Ltd [1968] EA 123). Section 107 of Evidence Act is to the effect that he who asserts proves.
39. I find the trial court erred in its findings, thus reaching the wrong conclusion on 2 fronts, one being the failure to uphold the discharge voucher and two, for reaching wrong conclusion on the overtime claim without basis of rejecting the evidence of the appellant, of payment of overtime to the claimant. The 2 reasons formed a basis for the court to interfere with the trial court decision (Mbogo v Shah). The overtime claim was not proved on the balance of probabilities and the entire award is set aside.

Conclusion

40. In the upshot, the appeal is allowed. The Judgment of the Honourable A.N Makau (PM) delivered at Nairobi on the 10th December 2021 in Milimani MCERLC No. 1992 of 2019 is set aside in entirety and substituted with Judgment that the claim is dismissed. To temper justice with mercy the court orders each party to bear own costs in the suit and appeal taking into account the status of the respondent, a former security guard of the appellant. The file is marked as closed.
41. It is 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

