



**Amwanga v Senaca East Africa Limited (Appeal E047 of 2025)
[2025] KEELRC 2323 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E047 OF 2025**

**M MBARŪ, J
JULY 31, 2025**

BETWEEN

VINCENT KARANI AMWANGA APPELLANT

AND

SENACA EAST AFRICA LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. Lucy Sindani delivered
on 13 March 2025 in Mombasa CMELRC No. E268 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 13 March 2025 in Mombasa CMELRC No. E268 of 2023. The appellant aggrieved is seeking that the judgment dismissing his claim be set aside and the orders sought for overtime pay and underpayments be awarded.
2. The appellant claimed that the respondent employed him on 28 April 2019 as a night security guard working in the Chagamwe area in Mombasa. He worked until 24 January 2023, when he resigned, and his last working day was 31 January 2023. He cleared but was not paid his terminal dues. His wage was Ksh. 13,000 per month, which was an underpayment and contrary to the Wage Orders. He worked from 6 pm to 6 am, 6 days a week, without overtime compensation and was not allowed to take his annual leave for the 9 months from April 2022 to January 2023. He thus claimed the following:
 - a. Underpayments Ksh. 217,402.20
 - b. Overtime Ksh. 346,965.24
 - c. leave for 9 months Ksh. 11,814.22
 - d. Costs of the suit.



2. In reply, the respondent denied the claims and counterclaimed against the appellant. The case was that the appellant worked as a day guard, not a guard as alleged. He was under a written contract indicating the nature of his day duties, and hence the claim for underpayment and overtime is not correct. The appellant took all his leave days before resignation. Part of the claims made are time-barred, as these arose in January 2020. A certificate of service was issued, and the claims made should be dismissed.
3. In the counterclaim, the respondent claimed that the appellant resigned on 24 January 2023 with effect from 31 January 2023. The notice due was for one month; hence, he owes the respondent Ksh. 13,000 in notice pay.
4. In the judgment of the trial court, the appellant was awarded the following:
 - a. underpayments Ksh.33,564.45
 - b. pro-rated leave Ksh.1,814.22
 - c. 50% costs.
 - d. Interests.
 - e. Certificate of service.
5. On the counterclaim, the respondent was awarded notice pay of Ksh. 9,500.
6. Based on the judgment, the appellant asserts that the finding that he was a day guard was in error since he worked at night. The basis for calculating overtime and underpayment should have been the time worked. The learned magistrate thus erred in failing to correctly apply the principle that an employee earning a minimum wage is entitled to additional compensation for extra hours worked, and the failure to pay such amounts constitutes an unfair labour practice. The calculation of overtime and underpayment should be reassessed, including a house allowance.

Both parties attended and filed written submissions.
7. The appellant submitted that the trial court failed to appreciate that, under the Regulation of Wages (Protective Security Services) Order, the wage of a security guard is regulated at 60 hours per week. Any overtime work should be compensated. The upholding of the contractual clause purporting to waive overtime is contrary to the law, and hence, tabulating overtime and underpayment without the due house allowance was an error. This is contrary to the applicable law, Wage Orders, and should be reassessed.
8. The appellant submitted that he worked for 12 hours a day for 6 days a week, amounting to 72 hours. Under the *Labour Institutions Act* and the Wage Orders, overtime hours should be paid together with the monthly wage. Under section 26 of the *Employment Act*, an employee should not be deprived their earned wages. A contract that is inconsistent with the law should be declared null and void, as held in *Kenya Chemicals Allied Workers Union v Leather Life EPZ Limited* [2014] eKLR. The 12 extra hours worked each week should be compensated.
9. In the case of *Christopher Komen Chebet v Brinks Security Service Limited* [2019] eKLR, the court held that a security guard is allowed 10 hours spread over 6 days a week, all at 60 hours. The claimed overtime is due.
10. On the underpayment, the appellant submitted that the wage paid at Ksh. 13,000 was not inclusive of the house allowance in Mombasa. Rule 4 of the Wage Orders allows for a 15 per cent house allowance,



as held in *John Rioba Maugo v Reley Falcon Security Services Limited* [2016] eKLR. The claimed underpayment is due with costs.

11. The respondent submitted that the applicant was employed as a day guard and not a night guard, as alleged. The alleged underpayment is incorrect since he was paid under his written contract, which was binding as held in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR.
12. In this regard, the claims going back to May 2020 are time-barred under section 90 of the *Employment Act* (the Act). In *Vipingo Ridge Limited v Swalebe Ngonge Mpitta* [2022] eKLR, the court held that a continuing injury does not stop and must be addressed within 12 months. In *Mary Kitsao Ngowa & 36 others v Krystaline limited* [2015] eKLR, the court defined a continuing injury as ongoing and a party must move the court within 12 months stipulated under section 90 of the *Act*. Hence, the claims by the appellant that he was alleged to have continuing injuries were time-barred when he filed his claim.
13. On overtime and public holidays, these were without proof, as held in *Ngunda v Ready Consultancy Limited* [2022] eKLR. Working hours were stipulated under the contract, and the appellant did not justify working extra hours, if at all.
14. For the underpayments: In 2018, basic pay was Ksh.13, 572 plus 15 percent house allowance Ksh 2,035 = Ksh.15, 201.65 and for 24 months Ksh.52, 839.60 is due
15. In 2022, basic pay was Ksh. 15,201.65 plus a 15 per cent house allowance. 2,280.25 total due Ksh.17, 481.90 and for 9 months ksh.40, 337.10 is due.
16. The correct underpayment should be Ksh. 93,176.70. The respondent has already paid the appellant Ksh. 69,443.12, and if the appeal is allowed, the only balance due is as tabulated above; hence, the appeal is without merit and should be dismissed.

Determination

17. This is a first appeal. The court is required to review the record, reassess the findings and make its conclusions. However, consideration should be given to the fact that the trial court had the opportunity to hear witnesses.
18. The appellant resigned from his employment with the respondent. What is contested is his position of whether he was a night or day guard, and the tabulation of underpayments and overtime.
19. Under section 10(3) of the *Act*, the employer must issue the employee with a written contract of service. The respondent issued the appellant with a contract dated 28 April 2019 for the position of security guard. Under clause (6), the appellant was to work from 6 am to 6 pm.
This was a position for the day guard.
20. The wage due to a security guard in January 2023 is Ksh. 15,201.65 plus a 15 percent house allowance of Ksh. 2,280.25, totaling Ksh. 17,481.90 per month.
There was an underpayment of Ksh. 17,481.90 – Ksh. 13,000 = 4,481.90 per month.
21. From 1 May 2022, when the wage increased to January 2023, for 9 months, Ksh. 40,337.10 is due.
22. From 28 April 2019 to 30 April 2022, the minimum wage was Ksh. 13,572 plus 15 percent house allowance Ksh 2,035 = Ksh.15, 201.65 per month. There was an underpayment of Ksh.3, 201.65.
23. The respondent has raised the question on the application of section 90 of the Act in the tabulation of dues owed to the appellant. Indeed, under section 90 of the act, there is work injury and continuing injury which must be addressed within 3 years or 12 months, respectively.



24. A wage or benefit that is due daily, weekly or monthly must be claimed within 12 months, as this forms a continuing injury as defined under the *Act*. See *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* [2016] KECA 213 (KLR) and the case of *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) that benefits such as allowances in housing, overtime and work hours accrue daily, weekly or monthly and must be addressed within the meaning of a continuing injury under section 90 of the Act.
25. Employment terminated on 31 January 2023, and the appellant can only claim back to January 2022. From January to April 2022, for the four months of accrued underpayment of Ksh. 3,201.65 x 4, the total due is Ksh. 12,806.60.
Total underpayment is Ksh.53, 144.70.
The appellant confirmed that he worked 6 days a week.
26. Indeed, under the Regulation of Wages (Protective Security Services) Order, a security guard is permitted a total of 60 hours per week, spread over the specified period. A rest day is also included. Where the appellant worked from 6am to 6pm for 6 days each week, the total time was 12 hours, totalling 72 hours each week.
27. On the same principle of a continuing injury that accrued daily, the claim can only go back to 12 months being January 2022.
28. On the wage due from January to April 2022 being 15,201.65 the hourly rate is Ksh.121.30 x 12 hours x 4 weeks x 4 months, total due is Ksh.23, 289.60
29. From May 2022 to January 2023 the wage increased and the hour rate is ksh.124.20 x 12 hours x 4 weeks x 9 months = Ksh.52, 654.40.
Total overtime Ksh.76, 944.
30. The respondent has already paid Ksh.69, 443.12 which should be taken into consideration.
31. On the counterclaim, indeed, the appellant did not contest that his notice fell short of the required one-month notice. This was calculated based on the wage of Ksh. 13,000. This ought to be based on the last gross wage of Ksh. 17,481.90.
32. On the matter of costs and interests, the motions under section 12(3) of the *Employment and Labour Relations Court Act* require that this discretionary award be supported by reasons, which are not provided in this case. Based on the claims made and the justified counterclaim, each party should bear its own costs.
33. Accordingly, judgment in Mombasa CMELRC No. E268 of 2023 is hereby reviewed in the following terms:
 - a. Underpayment is Ksh. 53,144.70.
 - b. Overtime Ksh.76, 944.
Counterclaim,
 - c. counterclaim is allowed at Ksh. 17,481.90
 - d. Dues (a) and (b) to be paid less what is due under (c) and what is already paid at Ksh. 69,443.12
 - e. Each party to bear its costs for the appeal and trial court proceedings.



DELIVERED IN OPEN COURT AT MOMBASA, THIS 31ST DAY OF JULY 2025

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

