Tana v Asmara Entertainment Limited t/a Asmara Restaurant (Employment and Labour Relations Appeal E234 of 2024) [2025] KEELRC 2029 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2029 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E234 OF 2024

JW KELI, J

JULY 4, 2025

BETWEEN

DAVID TANGAZO TANA ..... APPELLANT

AND

ASMARA ENTERTAINMENT LIMITED T/A ASMARA RESTAURANT ..... RESPONDENT

(Being an appeal from the entire judgment of the Honourable Hosea M. Ng'ang'a at the Chief Magistrates Court at Nairobi delivered on 15th July, 2024 in CMEL Cause No. E1066 of 2020)

JUDGMENT

1. The appellant filed a claim against the respondent before the lower court seeking for unpaid terminal dues upon resignation from employment. In the judgment of the Honourable Hosea M. Ng'ang'a at the Chief Magistrates Court at Nairobi delivered on 15th July, 2024 in CMEL Cause No. E1066 of 2020 the claim was dismissed, leading to the instant appeal seeking the following Orders: -
    a. That the Appellant's appeal be allowed.
    b. That the judgment delivered on 15th July 2024 be set aside in its entirety.
    c. That the Honourable Court be inclined to order and declare that the Appellant is entitled to the claims prayed for in the Statement of claim amounting to Kshs. 571,615/ or any other sum the Honourable Court may deem just to grant.
    d. The Appellant be awarded costs of the Claim and costs in the Appellate court.
    e. The Honourable Court do issue such orders and give such directions as it may consider appropriate to meet the ends of justice.

Grounds of the appeal

2. The learned Magistrate erred in law and in fact by making a finding that the Appellant voluntarily resigned, whereas that was not an issue in dispute between the parties and hence proceeded on wrong principles leading to miscarriage of justice.

3. The learned Magistrate erred in law and fact by dismissing the entire claim of the Appellant against the overwhelming evidence and facts showing that the Appellant had proved his case on a balance of probabilities.

4. The Honourable court erred in law and fact by failing to award the Claimant accrued leave days in the sum of Kshs. 49,500/= as prayed in the statement of claim which he had earned.

5. The Honourable Court erred in law and fact by failing to award the Claimant /Appellant the sum of 468,000/despite evidence showing that the Appellant used to report to work at 10:00 am and work up to 11:00 pm.

6. The Honourable Court erred in law and fact by failing to consider and have due regard to the Claimant's case and to the facts and evidence presented in support thereof.

7. The Honourable court erred in law and fact in failing to award the Claimant costs of the suit.

Background to the claim

8. The claimant having resigned from employment, which the court finds was not in dispute and the only issue before it was terminal dues and certificate of service, filed a statement of claim dated 30th October 2020 seeking for the following reliefs:-

    i. The Claimant be paid his terminal benefits as set out in paragraph #7 hereinabove amounting to Kshs. 571,615/=.

    ii. The Respondent be ordered to issue the Claimant with a Certificate of Service in accordance with the provisions of Section 51 of the *Employment Act*, 2007.

    iii. The Honorable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

    iv. The Respondents to pay the costs of this claim.

    v. Interest on the above at Court rates.

9. The particulars of the total claimed amount was stipulated in paragraph 7 of the claim as follows:-

    a) Leave not granted for the years 2015,2016 and 2017 Total of 90 days 90 x 500 (daily wage)..Kshs.45,000.

    b) Leave balance for the year 2018: 9 days x500(daily pay)=.....Kshs. 4,500.

    c) Public holidays worked and not compensated:

    2015:-11 days

    2016:11 days

    2017: 11 days

    2018:- 6 days

Total: 39 Days -39X500(daily wage)=Kshs. 19,500.

d) Service Pay..... 15/26x15000x4 years.Kshs. 34,615.

e) Overtime(4 hours x 62.5(hourly rate) x 26 days x 4x12x1.5).... Kshs. 468,000

Total claim Kshs 571.615.

10. The claim was heard orally with the claimant testifying in his case and producing his documents and the respondent calling one witness (relevant proceedings at pages 98- 103 of ROA).

11. The trial magistrate delivered his judgement in the suit on the 15th July 2024 dismissing the claim with costs to the respondent (judgment at pages 78-83 of ROA)

Determination

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

13. 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."

14. 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

15. The court on perusal of the grounds of appeal and the submissions, found it was not in dispute that the voluntariness of the resignation was not in issue. The only claim before the lower court was of terminal dues. The court held that the trial court erred in making a determination on the voluntariness of the resignation as it was not an issue. The court then finds that the only issue for determination in the judgment at appeal is whether the trial court erred in its finding on the terminal dues as sought in the claim. The court proceeds to re-evaluate the evidence before the trial court to reach its own conclusion on all the prayers in the statement of claim. (Selle v Associated Motor Boat Co. [1968] EA 123)

a. Leave pay

Appellant's submissions

16. Section 74(f) of the *Employment Act* provides that the employer has a duty to keep true employee records and produce evidence to adduce that the Appellant went on leave. In Rajab Barasa & 4 Others v Kenya Meat Commission (2014) eKLR the Court held that an employer must ensure each employee takes leave when due or make payment in lieu thereof. The Respondent failed to compensate or provide true evidence to contend leave days not granted for ninety (90) days, they failed to provide evidence showing that they provided leave or compensated. The Appellant testified during hearing as shown in page 99 of the Record of appeal that he never went for leave for the years 2015,2016 and 2017 totalling to ninety days, and a further 9days leave for 2018. This is clearly propounded and tabulated in page 67 of the Record of Appeal. The Respondent produced documents purporting leave application, though thorough scrutiny of the leave application documents contained in page 49 to 56 of the Record of Appeal alterations can be detected as the numerical values don't add up. Page 50 of the Record of Appeal purports that the Appellant took leave for nine days yet the leave started from 11th February 2019 to 12th February 2019. In light of such the court not to consider those documents as evidence for the case as they contain no probative value. In Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR where the Court held that it is the employer's duty to keep certain records including annual leave taken and leave due and produce the same in legal proceedings. The Respondent has failed to produce proper documents highlighting the above thus the Appellant's claim for prorata leave is valid. The Appellant prayed in the statement of claim amounting to Kshs. 49,500/=.

Respondent's submissions

17. The Appellant alleged non-payment of leave for several years. However, under Section 74(1)(f) of the *Employment Act*, it is the employer's duty to keep leave records, which the Respondent did. The documents provided by the Respondent in their list of documents remain unrebutted and show that the Appellant did in fact proceed on leave during the course of his employment. This evidence included duly executed leave application forms and internal records of leave taken, all of which were admitted without material contradiction. The trial court correctly found, based on the said evidence, that the Appellant had utilized their annual leave entitlement and was not owed any payment on account of accrued leave. In Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & Another [2016] eKLR, the Court of Appeal underscored that he who alleges must prove, and a party who claims to have been denied a right must substantiate the claim through cogent evidence. Further in Bernard Wanjohi Muriuki v Kirinyaga Water & Sanitation Company Ltd[2012] eKLR, it was held that leave not expressly denied or proven must be inferred to have been taken. The Appellant's broad assertions lack specificity or documentary support.

Decision on leave

18. The claimant sought for accrued 39 leave days upto 2018. The appellant at the hearing told the trial court he took leave in 2018. He said he did not take leave in 2019. The trial court found evidence of the appellant, as per the leave forms produced by the respondent, took leave throughout his employment. At the cross-examination, the claimant said he took leave in 2018 but did not take leave in 2019(see page 100 ROA). The court perused the leave forms before the trial court produced by the respondent and found evidence of the claimant having taken leave throughout including in 2019. The court found no objection to the production of the leave forms at trial. The leave forms were admitted as evidence and the content of the leave forms was not challenged at cross-examination. The claimant had not claimed

for accrued leave days with respect to 2019. The court found no basis to interfere with the findings of the trial court.

Service pay

Appellant submissions

19. Section 35 (5) of the *Employment Act*, 2007 is clear that where an employee's employment has been terminated as with the Appellant through a notice of resignation, he shall be entitled to service pay of 15days for each completed year worked. The Appellant herein served the Respondent for 4 complete years and was not paid service gratuity at the time of his termination. Furthermore the Respondent failed to prove that they used to deduct and remit for NSSF and NHIF. As per page 16 of the Record of Appeal, the Respondent's letter of appointment clearly at section 4 that the Appellant would be eligible to receive a portion of the service charge but has failed to live to their promise. The appellant pleaded for the court to grant 34,615/= being service gratuity for the 4 years he served the Respondent.

Respondent's submissions

20. Service pay under Section 35(5) and (6) of the *Employment Act* is barred where an employee is a member of a registered pension scheme like NSSF. In Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR, the Court held that employees enrolled in NSSF are not entitled to service pay. The Appellant offered no evidence that he was excluded from NSSF coverage. Moreover, pay slips and oral testimony confirm that statutory deductions were made. The Respondent contends that the trial court's findings were well-founded in law and fact and ought to be affirmed by this Honourable Court.

Decision on service pay.

21. The appellant produced his letter of appointment with terms of service. Among his salary and benefits was eligibility to receive service charge. Is service charge same as service pay? The respondent was in the hospitality industry and that could only be related to the income of the business of the employer. That is why it was stated as a portion of service charge. The respondent's witness at evidence in chief stated that NSSF and NHIF were deducted and paid. This testimony was not challenged in cross-examination. The trial court held that service pay was not available as stated under section 35(5) and (6) of the *Employment Act* where the employee is under NSSF. The court upheld the decision of the trial court.

Claims f or overtime and public holidays

Appellant's submissions

22. Overtime. - Section 27 of the *Employment Act* enacts that; - "27. Hours of work (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law." It was the Appellant's testimony that he worked four extra hours every day but was never compensated for the same. Accordingly, any hours worked in excess of what is provided in the law must be compensated for as per the Regulation of Wages (General) Order. In the present case, the Appellant through an additional list of documents filed and dated on 29th April 2021, at page 33 of the record of appeal, brought forth evidence of working an extra four hours in the work attendance sheet. The Respondents have failed to provide any evidence contradicting the same. The Appellant worked from 10.30am to 11.00pm. The Appellant as per page 67 of the Record of Appeal has tabulated on how the sum claimed for overtime arrived at. The Appellant worked for six days a week for four weeks

in a month, twelve months a year for the four years he worked for the Respondent. In the case of Rogoli Ole Manadiegi Vs General Cargo Services Limited [2016] e KLR where the Court held that;-"It is true the Employer is the custodian of employment records. The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee." As per the above authority the Appellant in page 27 of the Record of Appeal, filed the Claimant's additional list of documents dated 29th April 2021 where a copy of the work attendance sheet clearly shows the hours/days that the Appellant served in excess. The Regulation of Wages (Protective Security Services) Order, 1998 stipulate that:

''7. Overtime (1) An employee who works for any time in excess of the normal hours of work specified in paragraph *6* shall be entitled to be paid for the overtime thereby worked at the following rates -

(a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and

(b) twice the normal rate of wages per hour in respect of any time worked on a rest day."

The Appellant avers that the records he brought forth from page 33 to 37 of the Record of Appeal clearly indicates that he worked overtime. Furthermore, the Appellant during the hearing as shown in page 100 of the Record of Appeal claimed that the Respondent failed to avail any contradicting evidence to his claim or the validity of the record he brought forth. The Respondent's witness during the hearing testified that the Employees signed through a finger print clocking system as evidenced in page 102 of the Record of Appeal, the Respondents have failed to produce those records to court to contend our claim if the so contradict. The Appellant sought for his accrued overtime for the 4 years he served the Respondent amounting to Kshs. 468,000/= as prayed in the statement of claim.

23. Unpaid public holidays. The appellant submitted that in rejecting the relief of public holidays, the trial magistrate erred in law by failing to note that the said relief is statutory right under the *Public Holidays Act* and Other Labour Laws and Regulations. It was the Appellants testimony as on page 99 of the Record of Appeal, that he worked on the following holidays (2015;11days, 2016;11days, 2017;11days, 2018;6days=39days). Although the Respondent purports that no employees worked on public holidays, they have failed to produce any evidence retrospect as required in section 107 of the *Evidence Act*. In Patrick Lumumba Kimuyu Vs Prime Fuels(K) Limited [2018] ekIr where the Court held that;- "Whereas we appreciate that the *Employment Act* enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked." In light of the above, the Appellant testified as recorded in page 99 of the Record of Appeal that he was working on public holidays. As per page 27 of the Record of Appeal, the Appellant provided evidence of working during the said public holidays. The Respondent has failed to follow up with evidence contradicting the same. The trial magistrate erred in fact by relying on the Respondent's testimony, that the Respondent did not allow employees to work on public holidays, in dismissing the claim for dues for public holidays as in page 82 of the Record of Appeal whereas the Respondent's witness testified as shown in page 101 of the Record of Appeal that the Respondent compensated with one off day if the employees worked during public holidays. This is clearly a contradictory scenario reneging the Respondent's claim that no employees worked

during public holidays, thus the Respondent failed to bring any evidence showing the compensation for public holidays worked. The appellant sought for the Kshs. 19,500/= compensation

Respondent's submissions

24. Overtime -The Appellant claims he worked four extra hours daily over a 4-year period. These claims must meet the strict proof standard set in Rogoli Ole Manadiegi v General Cargo Services Ltd [2016] eKLR, where the Court held that evidence of actual hours worked is mandatory. The Appellant did not tender any credible evidence to demonstrate that he performed overtime work. As such, the claim is without merit and ought to be dismissed by this Honourable Court.

25. Work on Public Holidays- Regarding the Appellant's claim for unpaid dues allegedly arising from public holidays worked, the Respondent submits that the trial court correctly dismissed the same. In order for such a claim to succeed, the Claimant was under a duty to not only plead but also specifically prove the public holiday(s) allegedly worked, including the date(s), nature of work done, and absence of compensatory rest or payment. This principle was reiterated in Abigael Jepngetich Kosgei v Westmont Power (K) Limited [2021] eKLR, where the Court held that: "A party who alleges that they worked during rest days or public holidays must adduce evidence detailing which specific days were worked, as a mere general claim is insufficient." Similarly, in Evans Kisiero v Suraya Property Group Ltd [2017] eKLR, the court held that the burden of proof lies with the employee to show that they indeed worked on a public holiday and were not compensated accordingly. In the present matter, the Appellant failed to discharge this evidentiary burden. Moreover, the Respondent had in place a clear and consistently enforced internal policy prohibiting employees from working on public holidays unless specifically authorized. There is no evidence on record that the Appellant was ever authorized or required to work on any public holiday, nor that such work was actually performed. In the circumstances, the Respondent respectfully submits that the trial court properly evaluated the evidence and applied the law correctly in dismissing this claim, and accordingly, its judgment should be upheld in its entirety.

Decision

26. The court found that the appellant had not particularised the public holidays worked nor produced evidence of overtime. The claimant produced work attendance sheets to prove he worked from 10 am to 11pm (page 32-47). He stated that he had photocopied the sheets from the employer. He did not have the original. He took a copy of the register without permission. He had not shown the actual public holidays worked but stated it was in the book. He said the book was from Asmara and that he had no witness. RW1 at exam in chief told the trial court that the hotel had two shifts 8am to 5p 2pm to 1 pm 8 hours shift and that they did not work on public holidays. The respondent did not avail its own record to rebut what was produced by the appellant as evidence of overtime work as lawful custodian of records of the employee. The court found the appellant had proved on a balance of probabilities that he worked for more than the official working hours and that the allegation of 2 shifts by the respondent was not supported by evidence. The claim for overtime was valid based on evidence before the lower court save for the fact that the claim was a continuing injury and ought to have been filed within 12 months of the resignation. The claimant resigned on the 19th August 2019(page 20 of ROA was the resignation letter). The claim ought to have been filed before 19th August 2020. The claim was dated 30th October 2020 thus filed out of time. Section 89 of the *Employment Act* provides for continuing injury claims to be filed within 12 months as follows:- '89. Limitations- Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

27. The issue of continuing injury is now settled by the Court of Appeal in The German School Society & another v Ohany & another [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- ''There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of "a continuing injury" as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase "a continuing injury" and whether the respondent's claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes "a continuing injury." From the record, we note that the respondent's counsel only cited the definition of 'back pay" in the Black's Law Dictionary 9th Edition at page 159 which defines it as "the wage or salary that an employee should have received but did not because of an employer's unlawful action as setting or paying the wages or salary" to support her claim that back pay was a continuing state of affairs.'' The Court adopted with approval the elaborate definition of continuing injury claims in M. R. Gupta v Union of India, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held:"The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred...."The court holds that overtime is wages due to the employee during employment and awardable as back pay hence under continuing injury and ought to be sought in court within 12 months of termination under section 89 of the *Employment Act*. The claim for overtime filed outside 12 months of the resignation is held to have bene statute time barred. The claim for public holidays was not proved on balance of probabilities.

Certificate of service.

28. Issuance of certificate of service is unqualified right of the employee on separation with the employer under section 51 of the *Employment Act*. RW1 told the court that it was not issued. The same is due under section 51 and was awarded by the trial court.

Costs

29. The Respondent having not issued the certificate of service was not entitled to costs. It was the claimant who was entitled to costs for breach of section 51 by the employer. The court interferes with the decision of the trial court to that limited extend of costs.

Conclusion

30. The court allows the appeal on issue of costs only and sets aside the judgment of the Honourable Hosea M. Ng'ang'a at the Chief Magistrates Court at Nairobi delivered on 15th July, 2024 in CMEL Cause No. E1066 of 2020 and replaces it with judgment that the judgment is entered for the claimant for issuance of certificate of service under section51 of the *Employment Act*. Costs of suit awarded to the claimant.

31. Each party to bear own in the appeal.

32. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant –absent

Respondent: Ms Kirui h/b Ayieko