



REPUBLIC OF KENYA



**Oliyo v Pride Security Services Ltd (Appeal E032 of 2023)
[2024] KEELRC 487 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 487 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E032 OF 2023
S RADIDO, J
FEBRUARY 22, 2024**

BETWEEN

DUNCAN OCHIENG OLIYO APPELLANT

AND

PRIDE SECURITY SERVICES LTD RESPONDENT

*(Being an Appeal from the judgment of Honourable E.A. Obina
SPM in Kisumu CMEELRC Cause No. E206 of 2021 delivered on
11/05/2023 in Jannes Omondi Otieno v Pride Kings Security Services)*

JUDGMENT

1. Duncan Ochieng Okiyo (the Appellant) sued Pride Kings Security Services Ltd (the Respondent) before the Senior Principal Magistrates Court alleging unfair termination of employment and breach of contract/statute (failure to pay accrued leave days, holidays, unpaid salaries, underpayments and remit National Hospital Insurance Fund contributions).
2. The Cause was defended and in a judgment delivered on 11 May 2023, the Senior Principal Magistrate dismissed the claims by the Appellant.
3. The Appellant was aggrieved and he lodged a Memorandum of Appeal with this Court on 5 June 2023, contending that:
 - (1) The Learned Trial Magistrate erred in law and fact by finding that the Appellant did not prove that he was entitled to contractual dues amounting to Kshs 212,010/- as prayed in the Appellant's Memorandum of Claim.
 - (2) The Learned Trial Magistrate erred in law and fact by failing to consider that the Respondent did not controvert the evidence by the Appellant on his claim for contractual dues under section 18 of the Employment Act, 2007.



- (3) The Learned Trial Magistrate erred in law and fact by failing to appreciate that claims for contractual dues are independent from a claim for unfair termination.
 - (4) The Learned Trial Magistrate erred in law and fact by failing to find that the Appellant was entitled to leave pay for the leave days not taken and proven by the Appellant.
 - (5) The Learned Trial Magistrate erred in law and fact by failing to find that the Appellant is entitled to the unpaid salaries, which were pleaded and proven.
 - (6) The Learned Trial Magistrate erred in law and fact by failing to find that the Appellant was entitled to compensation for underpayment for the period he worked for the Respondent.
 - (7) The Learned Trial Magistrate erred in law and fact by failing to award compensation for the holidays worked by the Appellant, which were uncontroverted by the Respondent.
 - (8) The Learned Trial Magistrate erred in law and fact by finding that the Plaintiff did not prove his case on a balance of probabilities.
4. The Record of Appeal was filed on 11 October 2023, and the Court gave directions on 23 October 2023 (the Appellant filed a Supplementary Record of Appeal on 29 November 2023).
 5. The Appellant filed his submissions on 24 November 2023 and the Respondent on 18 January 2024.
 6. The Court has considered the Record and submissions.

Role of the Court in a First Appeal

7. The role of a first appellate Court on Appeal was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. This Court will bear in mind the interdict on its role.

Unfair termination of employment/Constructive dismissal

9. The Appellant had pleaded a case for unfair termination of employment/constructive dismissal. In the Statement of Claim he alleged that the Respondent had treated him unfairly by failing to pay his wages for February, March and April 2021. The assertions were repeated in the witness statement adopted as part of the evidence.
10. The Senior Principal Magistrate found that the Appellant had voluntarily resigned.
11. The Appellant wrote a resignation letter dated 24 April 2021 but a copy was not part of the Record.
12. The Respondent did not produce any pay records to counter the Appellant's testimony that he was not paid wages for February to April 2021. The payment of wages is one of the essentiala of an employment contract.
13. By failing to pay the wages, the Respondent was indicating an intention to repudiate a fundamental term of the contract and the Appellant was within his rights to resign and assert constructive dismissal.
14. This Court, consequently, finds that the Senior Principal Magistrate fell into an error of law and fact in finding unfair termination of employment was not proved.



15. The Court also notes that the Senior Principal Magistrate made reference to the burden of proof outlined in sections 107 and 108 of the Evidence Act. The applicable threshold for proof in cases of unfair termination of employment is the one set out in sections 35(1), 41, 43, 45 and 47(5) of the Employment Act, 2007 and not sections 107 and 108 of the Evidence Act.
16. Because of the other reliefs the Court will allow, the Court is of the view that compensation for unfair termination of employment is not appropriate.

Breach of contract/Statute

17. While rejecting the heads of claim for breach of contract/statute, the Senior Principal Magistrate stated that the Appellant had not produced any evidence of underpayments or overtime work.
18. The Court has looked at the Record.

Underpayments

19. The Appellant testified that he was earning Kshs 8,400/- per month, and that the Respondent did not issue to him pay slips or a written contract.
20. The remuneration of security guards is prescribed by Regulation of Wages (Amendment) Orders issued from time to time. The Appellant did not bother to bring to the attention of the Court during the oral hearing the respective Regulation of Wages Orders which applied in the sector the Respondent operated in during the hearing, but he cited the Regulation of Wages (General)(Amendment) Order, 2017 in his submissions.
21. The Respondent as an employer had a duty to keep and maintain certain employment records including pay records and it did not produce any such records before the Court.
22. Despite the non-production of pay records, the Senior Principal Magistrate should have looked up the prescribed minimum wage in the Regulation of Wages (General)(Amendment) Order, 2017 cited in the submissions by the Appellant, because the Appellant had testified as to how much he was earning.
23. The Appellant joined the Respondent on 2 February 2020 and he tendered his resignation on 24 April 2021. He served for some 14 months.
24. During the period the prescribed minimum wage for a night security guard was Kshs 15,141/- (exclusive of house allowance. There was no evidence whether the Respondent provided the Appellant with housing).
25. A simple arithmetic would establish that the Appellant was underpaid during the 14 months by Kshs 94,374/- (exclusive of house allowance).

Overtime (work during holidays)

26. The Appellant testified that he was a security guard working from 6. 00 pm to 6.00 am 7 days a week including off days and he prayed for Kshs 13,715/-.
27. Under section 10(3) of the Employment Act, 2007, the Respondent as the employer should have kept, maintained, and placed before the Court a statement indicating the Appellant's entitlement to overtime. The Senior Principal Magistrate did not consider the impact of the legal provision.
28. By not considering the effect of section 10(3) of the Employment Act, 2007, the Senior Principal Magistrate fell into an error of the law.



29. This Court, therefore, would allow this heads of the claim.

Unpaid leave

30. The Appellant claimed Kshs 13,715/- unpaid leave for 2020 and a similar amount for 2021.
31. Under section 10(3) of the *Employment Act*, 2007, the Respondent as the employer should have kept, maintained, and placed before the Court a statement indicating the Appellant's entitlement to annual leave.
32. However, the Appellant did not mention the question of leave in his witness statement adopted as part of the evidence nor during oral testimony.
33. The Appellant, therefore, failed to lay an evidential foundation for this head of the claim.
34. The Court in the circumstances does not find fault with the Senior Principal Magistrate for dismissing this head of the claim.

Unremitted NHIF contributions

35. The *National Hospital Insurance Act* has provisions for the Fund to recover unremitted contributions and the Appellant should pursue those options with the Fund.
36. The Court notes that the Appellant did not produce a copy of a statement from the Fund to corroborate allegations of non-remittance of deducted contributions.

Unpaid salaries

37. The Senior Principal Magistrate also dismissed the Appellant's claim for unpaid salaries for February, March and April 2021 in the sum of Kshs 21,000/-. The Appellant produced an extract copy of his bank statement up to 17 February 2021.
38. The Respondent did not place before the Court any records to demonstrate that it paid the Appellant his due wages up to the date of resignation as demanded by section 20 of the *Employment Act*, 2007.
39. The head of the claim is allowed.

Conclusion and Orders

40. From the above, the Court holds that the Senior Principal Magistrate fell into errors of law and fact in rejecting the heads of claim for underpayments, accrued leave, and overtime pay, and the Court vacates and sets aside those findings.
41. The Court substitutes the dismissal of these heads of the claim with an order entering judgment for the Appellant as follows:
- i. Underpayments Kshs 94,374/-
 - ii. Overtime Kshs 13,715/-
 - iii. Unpaid salaries Kshs 21,000/-
- Total Kshs 129,089/-
42. The Appellant has partly succeeded. He is awarded costs of the Appeal on half scale and costs before the Subordinate Court.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF FEBRUARY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Otieno Asewe & Co Advocates

For Respondent Otieno & Achieng Advocates

Court Assistant Chemwolo

