



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Pride Security Services Ltd (Appeal E033 of 2023)  
[2024] KEELRC 486 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 486 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E033 OF 2023  
S RADIDO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JANNES OMONDI OTIENO ..... 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. Jannes Omondi Otieno (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, 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 248,587.88/- 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 was entitled to compensation for underpayment for the period he worked for the Respondent.
  - (6) The Learned Trial Magistrate erred in law and fact by failing to award the unremitted NHIF contributions that were deducted from the Appellant's pay.
  - (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.
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 Senior Principal Magistrate found that the Appellant had voluntarily resigned.
10. The Appellant wrote a resignation letter dated 13 February 2021, and the reason he gave was that he intended to resume studies/education. The letter did not talk of any hostile work environment or frustrations from the Respondent.
11. This Court, therefore, agrees with the Senior Principal Magistrate that the case was not one of unfair termination of employment/constructive dismissal, save that the applicable threshold for proof for actions for unfair termination of employment is outlined in sections 47(5) of the *Employment Act*, 2007, and not sections 107 and 108 of the *Evidence Act*.

#### **Breach of contract/Statute**

12. 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.
13. The Court has relooked at the Record.



## **Underpayments**

14. The Appellant testified that he was earning Kshs 7,400/- per month and that the Respondent did not issue to him pay slips or a written contract.
15. 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 testimony the respective Regulation of Wages Orders which applied in the sector the Respondent operated in but he cited the Regulation of Wages (General)(Amendment) Order, 2017 in the submissions.
16. The Respondent as an employer had a duty to keep and maintain certain employment records including pay records and it did not bother to produce any such records before the Court.
17. 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 by the Appellant, because the Appellant had testified as to how much he was earning.
18. The Appellant joined the Respondent on 23 March 2020, and he tendered his resignation on 1 March 2021. He served for some 12 months.
19. 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).
20. A simple arithmetic would establish that the Appellant was underpaid during the 12 months by Kshs 92,892/- (exclusive of house allowance).

## **Overtime/Accrued leave**

21. The Appellant testified that he was a security guard working from 6. 00 pm to 6.00 am 7 days a week. He prayed for Kshs 15,257/- as overtime and a similar amount for accrued annual leave.
22. 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 and overtime for holiday work. The Senior Principal Magistrate did not consider the impact of the aforesaid provision of law.
23. 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.
24. This Court, consequently would allow these heads of the claim.

## **Unremitted NHIF contributions**

25. The National Hospital *Insurance Act* has provisions for the Fund to recover unremitted contributions, and the Appellant should pursue those options with the Fund.

## **Conclusion and Orders**

26. 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.



27. The Court substitutes the dismissal of these heads of the claim with an order entering judgment for the Appellant as follows:

i. Underpayments Kshs 92,892/-

ii. Accrued leave Kshs 15,257/-

iii. Overtime Kshs 15,257/-

Total Kshs 123,406/-

28. 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 22<sup>ND</sup> DAY OF FEBRUARY 2024.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

**Appearances**

For Appellant Otieno Asewe & Co Advocates

For Respondent Otieno & Achieng Advocates

Court Assistant Chemwolo

