Ndili v Fidelity Security Limited (Appeal 58 of 2019)
[2024] KEELRC 174 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 174 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 58 OF 2019

K OCHARO, J

FEBRUARY 9, 2024

BETWEEN

NGUMBI NDILI ..... APPELLANT

AND

FIDELITY SECURITY LIMITED ..... RESPONDENT

(Being on appeal from the entire judgment and decree of the Honourable Orenge K. I (SRM) at the Chief Magistrates Court at Nairobi delivered on 16th October, 2019 in CMEL NO. 86 OF 2018) Arising from C.M.E.L No. 86 of 2019)

JUDGMENT

Background

1. Contending that he was an employee of the Respondent at all material times, the Appellant sued the Respondent in the above-mentioned claim (CMEL Case No 86 of 2018) seeking for a declaration that the termination of his employment was unlawful and unfair, and payment of terminal dues; compensation for earned but unutilized leave days, public holidays worked but not paid for; house allowance, uniform deductions refund, service pay, and salary for December, 2017. The trial court rendered itself on the cause, awarding the Appellant some of the reliefs and declining others. Specifically, he declined to grant, compensation for earned but unutilized leave days, overtime, and public holidays worked but not paid for. The rejection is the central issue in this appeal.

The Appeal

2. The Appellant assails the Judgment of the trial court, setting forth the following principal grounds:

    a. That the learned trial magistrate erred in fact and law in denying the Appellant's claim on overtime in total disregard of the Appellant's testimony that he used to work for 4 extra hours daily which evidence was not challenged.

b. That the learned magistrate erred in law and fact in failing to award the Appellant the amount in lieu of leave and thereby implication endorsing the Respondent's employment contract which expressly denies the right to annual leave, in blatant disregard to section 28 of the *Employment Act* despite the claimant having worked for more than 5 years.

c. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's claim on public holiday in contravention to section 9 of *Regulation of Wages (protective Security Services) Order 1998*.

The Appellant's submissions

3. Submitting on the first ground, Counsel submitted that the appellant testified, and the testimony was not challenged, that he used to work from 6.00 a.m. to 6.00 p.m. or 6.00 p.m. to 6.00 a.m.

4. Sections 10 and 74 of the *Employment Act* require employers to key records of employees including the dates of commencement of employment, hours of work, the rate of pay, interests for payment, the date of which employee's period of continuous employment began and other terms of annual leave, public holidays including calculation of entitlement upon termination.

5. It was further submitted that in contravention of the above stated provisions of the law, the learned Trial Magistrate shifted the burden of proof to the Appellant by holding that the burden of establishing hours or days served in excess of the legal maximum rests with the employee. According to counsel, under section 10(7) of the *Employment Act*, where an employer fails to keep the prescribed employment records, the burden of proving or disproving an alleged term of employment is on him or her.

6. Counsel further submitted that the Claimant's claim was not denied in the Respondent's memorandum of response. Counsel invited the court to note that in the memorandum of response, the Respondent pleaded that the Appellant's remuneration was inclusive of overtime pay. The contract of employment specifically provided that the Appellant was to work for 12 hours. No doubt, this is a testament that the Appellant used to work overtime throughout his tenure.

7. The Respondent being the custodian of the employee's employment records ought to have tendered in evidence an attendance register and discount the Appellant's claim for overtime.

8. On the 2nd issue, it was argued that the learned trial Magistrate erred when he declined the Appellant's claim for unpaid leave days, thereby endorsing a contract of employment that expressly denied an employee the statutory right to annual leave. The learned Trial Magistrate's decision on this, was in total disregard of the provisions of section 28 of the *Employment Act*, 2007.

9. The Learned Trial Magistrate's holding that the Appellant failed to take leave and that the failure could not be attributed to the Respondent was contrary to the evidence that was presented before him. The contract of employment that was placed before him expressly denied the Appellant his right to leave. The Appellant's claim that he worked continuously for 5 years without proceeding for leave was not controverted. The trial court fell in error in not awarding him the sought compensation.

10. Lastly Counsel submitted that the Learned Trial Magistrate denied the Appellant compensation for public holidays worked but not paid for contrary to section 9 of the *Regulation of Wages (Protective Security Services, Order 1998)*. Despite being aware of the Appellant's claim, the Respondent did not place any material before the trial court, in form of documents, to dispel the Appellant's claim. As the custodian of employment records, the onus was on them to produce the documents.

11. The appeal should be allowed with costs to the Appellant.

The Respondent's submissions

12. Counsel for the Respondent submitted that the Learned Trial Magistrate rightfully held that the Appellant was not entitled to any award under the head "overtime" as the Appellant did not prove that he worked overtime. Further, the Appellant did not demonstrate that he at any time requested for compensation for the overtime from his employer, the Respondent.

13. It was argued by Counsel that the wage guidelines for security guards allow work for 60 hours a week. The Appellant worked for 12 hours for five days, translating to 60 hours cumulatively.

14. Counsel further urged this court to discern from the material placed before the trial court, and conclude that the Appellant had four rest days every month.

15. Counsel argued further that the fact that the Appellant worked all through without demanding for overtime pay, only to turn and start claiming for the same after existing employment is indicative either that there was no agreement on overtime pay and or the pay was consolidated in the monthly salary of the Appellant.

16. To support his argument hereinabove, Counsel placed reliance on the case of *George Ogwene v Autolites Limited*.

17. Submitting in support of the trial magistrate's decision on the claim for compensation for public holidays worked. Counsel for the Respondent submitted that the claim as was presented before the Honourable Magistrate lacked specificity and sufficient detail. The Appellant just sought for a global figure of Kshs 35,000. He did not specifically state the public holidays on which he worked. In the circumstances, it was rightfully rejected. To buttress these submissions, reliance was placed on the decision in *Rogoli Ole Manadiegi v General Cargo Servies Ltd* (2016) eKLR.

18. Lastly, Counsel submitted that there cannot be any contestation that annual leave is a statutory entitlement. Utilization of the same by an employee is given by way of taking leave days or taking pay in lieu thereof. Further, in the instant case, the Appellant did not ask for leave days or payment in lieu thereof. The failure to ask for the leave days or payment in lieu thereof cannot be blamed on the Respondent. Taking leave is voluntary, taken only at the request of the employee.

Analysis and Determination

19. The appeal, herein, raises only one central issue, whether the Learned Trial Magistrate erred in law and fact, in failing to make an award in favour of the Appellant under the various heads mentioned hereinabove.

20. Before I delve further into interrogating the merits of the appeal herein, I find it imperative to appreciate the role of this court as a first appellate court in this appeal.

21. In the case of *Prudential Assurance Company of Kenya Ltd v Sukhwinder Sigh Jatley and another* (2007) eKLR, the Court of Appeal stated;

> " As a first Appellate court, it is our duty to treat the evidence and the material tendered before the superior court to a fresh scrutiny and draw our own conclusion bearing in mind that we have not seen or heard the witnesses and giving due allowance for this – *Selle v Associated Motor Boar Company Ltd* (1968) EA 123."

22. It shall be with this lens that I will approach the Appellant's appeal herein.

23. The Appellant stated in his statement of claim;

> " 5. The Claimant avers that during the period of his engagement with the Respondent, he was never granted house allowance, leave allowance or overtime despite the fact that he was working for one extra hour by reporting to work daily from 6.00 a.m. to 6.00 p.m. or from 6.00 p.m. to 6.00 a.m. without any extra payment."

He specifically reiterated this in his witness statement dated 15th August 2018, turned part of his evidence in chief. In sum he claimed for compensation for overtime worked.

24. Part V of the *Employment Act*, 2007 provides for rights and duties in employment. A keen consideration of the provisions of this part of the Act, reveals that promoting the health and safety of employees is a theme that underlies many of them.

25. Overtime refers to time that an employee works in excess of ordinary working hours during a day or a week.

26. Section 26 of the *Employment Act*, provides;

> " (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
>
> (2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

27. In my view, this provision does not afford flexibility, the basic minimum conditions of employment provided under Part V, mentioned hereinabove must be granted by the employers to their employees. This is to give effect to the right to fair labour practices. In my further view, employers are prohibited from employing employees on terms and conditions that are less favourable than those prescribed under the part, even if an employee agrees to them. In essence therefore, employers and employees cannot contract out of the provisions of the Act or regulations and statutory provision that provide for better conditions and terms of employment.

28. Section 27 of the Act provides;

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.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

29. In the context of this matter the above stated provision of the *Employment Act*, should be read not in isolation from the provisions of *Regulation of Wages (Protective Security Services) Order 1998*. Regulation (2) of the order provides for its application thus;

> " This order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking, which is involved in the carrying on of any of the following activities –
>
> a. Private investigations or security consultancy;
>
> b. Guarding of Industrial Plants, warehouses, shops, private homes or any other property or establishment against theft, illegal entry or fire; and
>
> c. Escort of money or other valuable property.
>
> Provides that persons employed in an undertaking which is operated by the Government, a local authority, a quasi-governmental body, a charitable religious organization or an educational body, or a medical institution shall excluded."

30. No doubt, the order applied to the Appellant.

31. Regulation 6 provides for hours of work thus:

> " The normal working week of all employees including day and night shall be fifty-two hours a week spread over six days of the week."

Counsel for the Respondent submitted that the order provides for 60 hours of work a week, the submissions were glaringly erroneous.

32. Regulation 7 provides:

> "
>
> " 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 his normal rate 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 rest day.
>
> c. For the purpose of calculating payment of overtime in accordance with sub paragraph (1) the basic hourly rate shall, where the employee is not employed by hour, be deemed to be one-two hundred and twenty -fifth of the employee's basic monthly wage."

In dismissing the Appellant's claim the Learned Trial Magistrate held that the Appellant had not demonstrated that he had demanded for overtime pay in the course of his employment and therefore his claim had to fail. I have really agonized over this finding and take the view that it does not flow from any known provision of the law. In fact, the Honourable Magistrate did not state that there is any. In my view, the holding of the magistrate is clearly

against the spirit of part V of the *Employment Act*, 2007 and the provision of the Wage Order herein above mentioned. The provision make payment for overtime worked a legal entitlement to the employee, to receive, and a legal obligation on the employer, to effect. The employer is not left with any residual right to decide whether or not to pay. The employee's right is not made to be subject to any condition, like the one suggested by the Learned Trial Magistrate.

33. Imperative to state here, that it is worthnoting by all that the Regulation employs the term, "entitled to". *Blacks Law Dictionary* defines entitle, "To grant a legal right" and entitlement as an absolute right to a (usu. monetary) benefit, such as social security granted immediately upon meeting a legal requirement."

34. The court has carefully considered the employment contract dated 1st May 2017 tendered in evidence by the Claimant. Clause 2(3) thereof provides:

> " Work for a period of twelve hours daily either reporting at 6.00 a.m. and handing over at 6.00 p.m. or reporting at 6.00 p.m. and handing over at 6.00 a.m. depending on shift allocations and as required by the company."
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> Undeniably the Appellant used to work 60 hours a week. In fact, in his evidence under cross-examination the Respondent's witness admitted that he used to work for 12 hours a day. The normal hours of work in a week are set as fifty-two under Regulation 6, cited above. It is not difficult to conclude therefore that under the contract of employment and true as the Appellant asserted, he was working eight hours overtime every week therefore 1.3 hours every day of work.

35. Having found as I have hereinabove that the Appellant used to work overtime, the next question should be, was he compensated? In addressing this issue before the trial magistrate, the Respondent through the evidence of its witness took the position that the Appellant's remuneration was inclusive of overtime pay, and that he was duly paid.

36. This court notes that the above stated contract of employment under clause 4(1) provided:

> " The employer shall pay to the employee a flat rate inclusive of overtime for the number of days worked at the rate of 655 payable to his Bank account subject to such deductions as the company may be law be required or permitted to issue as provided hereunder. Please note that overtime pay has been included and consolidated in the salary based on a 12-hour work shift."

37. The Appellant's case was that throughout his employment with the Respondent he was not paid for overtime. In light of the contractual term hereinabove brought out, I am not convinced that he wasn't earning overtime pay. The pay was consolidated with the basic pay. It would have been different if the Appellant had pleaded underpayment and anchored his case on the provisions of section 48 of the *Labour Institutions Act*. I say no more.

38. By reason of the premises, though different from those that termed basis for the rejection of the Appellant's claim for overtime pay by the Learned Trial Magistrate, I find that he did not merit an award of the compensation. The first ground of appeal fails therefore.

39. The Appellant contended that the Learned Trial Magistrate erred when he failed to find that he was entitled to pay for earned but unutilized leave days. I have carefully considered the evidence by the Respondent's witness on the issue of untaken leave days, and more specifically under cross-

examination. He expressly admitted that the Appellant did not proceed for leave at any time in the course of his employment with the Respondent.

40. Where the employee earns leave days but does not utilize the same, he is entitled to compensation in lieu. The entitled compensation becomes part of his remuneration in the month when the entitlement is earned, leaving no option to the employer to hide behind the fact that the employee did not demand for it, but pay compensation for the earned but unutilized leave days. To allow the employer to successfully assert that the employee waived his or her right to the compensation simply because, he or she did not demand for payment of the same, shall be with due respect to look at the statutory employment rights of the employee, and obligations of the employer from a very constrained angle.

41. The Learned Trial Magistrate holding that:

> " .....The employee is entitled to leave and any leave not taken then he is supposed to request to be paid in lieu of having not taken the leave in the particular year. The Claimant never took leave and never sought to be paid, therefore he was not entitled to payment. The Claimant waived his statutory entitlement. There is no evidence that was tendered to show that the Claimant applied for leave and the same was declined by the Respondent. The Claimant never made any request in the course of employment and the claim should fail."
>
> is therefore wholly erroneous, it finds no basis in law. Consequently, I hereby set aside the rejection of the Respondent's claim by the Learned Trial Magistrate and allow the same. The Appellant is hereby awarded Kshs 58,800, being compensation for leave days that were earned in three years, but not compensated for.

42. I uphold the Learned Trial Magistrate's decision on the claim for public holidays worked but not paid for. I agree that the claim lacked specificity and details. It was just "thrown to court".

43. In the upshot, the Appellant's appeal is allowed only to an extent that he is awarded compensation for leave days earned but not utilized, Kshs 58,800. The sum shall attract interest at court rates from the date of the judgment of the lower court till full payment.

44. As the appeal succeeded partially, each party shall bear its own costs.

READ, DELIVERED AND SIGNED THIS 9TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Nyabena for the Appellant

Nyakoa for Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of

the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE