



**Baruk v Board of Management St Georges High School (Appeal
E024 of 2023) [2024] KEELRC 1491 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1491 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E024 OF 2023**

**M MBARÚ, J
MAY 23, 2024**

BETWEEN

OMAR CHARO BARUK APPELLANT

AND

BOARD OF MANAGEMENT ST GEORGES HIGH SCHOOL RESPONDENT

*(Being an appeal from the judgment of Hon. Ritab Amwayi delivered
on 20 September 2023 in Kaloleni CMELRC No. E009 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 20 September 2023 in Kaloleni CMELRC No. E009 of 2023. Aggrieved the appellant is seeking that the finding by the learned magistrate on the issue of overtime be set aside with an award as pleaded in the Memorandum of Claim for overtime worked and not paid. He is claiming payment of costs.
2. In his claim, the appellant had pleaded that on 1st October 2008, he was employed by the respondent as a groundsman. On 6 September 2011, he was redeployed as a night watchman. He worked until his summary dismissal on 11 August 2021. He claimed that his employment was unlawfully and unfairly terminated without payment of his terminal dues and claimed the following;
 - a. One month notice pay Ksh.15,090;
 - b. 12 months compensation Ksh.181,080;
 - c. Accrued leave days Ksh.12,188;
 - d. House allowance from 1st September 2008 to 6 September 2011 Ksh.45,002;
 - e. Overtime from 6 September 2011 to 11 September 2021 while working from 6 pm to 6 am with overtime of 4 hours per day Ksh.849,700;

- f. Certificate of service;
 - g. Costs.
3. In response, the respondent admitted the employment particular and that through a letter dated 11 August 2021, the appellant was dismissed for gross misconduct. Such did not require payment in lieu of notice or compensation. The claim for accrued annual leave days is without evidence and all security guards worked for 12 days and would take 2 days off hence no claim for overtime pay and the claims made should be dismissed.
 4. In the judgment, the learned magistrate held that there was an unfair termination of employment and made the following awards;
 - a. Unpaid annual leave days Ksh.12,188;
 - b. Notice pay Ksh.15,090;
 - c. House allowance Ksh.46,002;
 - d. 3 months compensation Ksh.45,270;
 - e. Certificate of service.
 5. With regard to the claim for overtime, the trial court analyzed the same with a finding that under Section 27 of the *Employment Act*, 2007 (the Act), an employee has a day off each week, under Rule 5(2) of the *Labour Institutions Act* Regulation of Wages (General) Order provides for a total of 52 working hours per week and the claim by the appellant that he worked overtime for 4 hours each day was without evidence. This claim was dismissed.
 6. Aggrieved by the judgment, the appellant lodged this appeal on the grounds that the finding by the trial court that for overtime worked and not paid had not been supported by any evidence whereas the same was predicated on facts that had been disputed by the respondent was in error. The appellant addressed his burden of proof and raising the same to that of beyond reasonable doubt was an error by the trial court. There was no appreciation of the records that each day the appellant worked 4 hours overtime and the records are in the custody of the respondent who failed to adduce the same contrary to the evidence on the fact of overtime worked and not paid for. The appellant proved that he was a night guard clocking in at 6 pm and out at 6 am and the days worked were particularized in the Memorandum of Claim.
 7. Parties attended and agreed to address the appeal by way of written submissions.
 8. The appellant submitted that in his pleadings, the appellant particularized his claim for working overtime and that upon being deployed as a night security guard from 6 September 2011 to 11 September 2021 he worked from 6 pm to 6 am with overtime of 4 hours per day all at Ksh.849,700. The respondent called its witness in evidence and did not dispute these work hours and overtime. The appellant would clock in at 6 pm and exit at 6 am each day. The witness admitted keeping these records which were not filed in court. In the case of *Yaa v SGA Security Solutions Limited ELRCA No. E002 of 2022* (Malindi) the court held that in the absence of evidence by the employer in terms of Section 10(7) of the Act, the claim for overtime is justified.
 9. In this case, the appellant pleaded and testified to the fact of his overtime hours and should have been awarded for such time in the absence of any evidence to challenge this claim. In the case of *Abigail Jepkosgei Yator & Another v China Hanan International Co. Ltd [2018] eKLR* the court held that the employer should keep all work records for a period of 5 years. These records should be produced once

the suit is filed under the provisions of Section 10(6) of the Act. Inferring that the appellant had the burden of proving he worked extra hours was an error by the trial court. Once the appellant pleaded and testified to these facts, he discharged his burden of proof. In the case of *Martin Ileri Ndwiga v Olerai Management Co. Ltd* [2017] eKLR the court held that if the employee had taken his annual leave as alleged by the employer, the burden of proof shifted to the employer to prove such matter with work records under Section 28 of the Act.

10. In this case, the claim for overtime should be awarded as claimed.
11. The respondent submitted that the claim that there was overtime worked for 4 hours each day is not supported by any evidence. The appellant failed to discharge his burden of proof in this regard. The Court of Appeal in the case of *Myanyasa v Lavington Security Limited Civil Appeal 55 of 2019* held that upon considering the provisions of Section 10(7) of the *Employment Act*, it disproved that the records were forwarded to the employer and no contract was submitted to the contrary. In the case of *Ngunda v Ready Consultancy Limited Civil Appeal, 129 of 2019* the Court of Appeal held that the payment for 33 public holidays, 152 Sundays and 5184 hours of overtime, had no firm basis and these claims were dismissed. There was no proof of the employee working during public holidays or on Sunday or overtime.
12. In this case, the trial court well addressed the claim for overtime and made a correct finding.
13. The respondent submitted that the trial court applied the proper standard of proof being that of a balance of probabilities. In the case of *Daniel Toroitich arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR the Court of Appeal held that where a respondent has not denied the claim by filing a response or an affidavit or even where the respondent did not appeal, formal proof proceedings are conducted, the claimant must lay out his evidence.
14. In this case, without the appellant giving any evidence on his claim for overtime, the court could not award. The appeal should be dismissed with costs.

Determination

15. This is a first appeal. The court is mandated to re-evaluate the entire record, re-assess the findings by the trial court and make conclusions. However, take into account that the lower court had the opportunity to hear witnesses and ask questions.
16. The particulars of employment are not denied.
17. It is common cause that from 6 September 2011 the appellant was deployed to work as a night security guard. He worked until his summary dismissal on 11 August 2021.
18. He pleaded in the Memorandum of Claim that he worked overtime by reporting to work at 6 pm to 6 am. He clocked in and out and these work records are in the custody of the respondent as the employer.
19. The issue at hand is that of overtime claimed by the appellant from 6 September 2011 to 11 August 2021. While working from 6 pm to 6 am with overtime of 4 hours per day Ksh.849, 700;
20. In his evidence on 4 July 2023, the appellant testified to the fact that his work hours were 6 pm to 6 am each day upon deployment as the night security guard.
21. The respondent called its witness Mwachofi Mwaghesha Simon the Principal of St. George's High School who testified that the appellant would be allowed to take annual leave and that the school has all records of the employees when they clock in and out although some records are missing as they were stolen.

22. Keeping of work records and production in court once a suit is filed is the legal duty of the employer. The rationale is that the employer is allowed to lock out the employee from the workplace to preserve any matter and hence, once a suit is filed, the legal burden to produce records rests on the employer.
23. Section 10(7) of the Act outlines this legal burden in the following terms;
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
24. Hence, upon the employer filing a claim, the employer in response should and ought to file the work records. The employer is the legal custodian of all work records. The motion of the *Evidence Act* Cap 80 Laws of Kenya are removed from the procedures of the court. The regulatory framework for the court is the Employment and Labour Relations Court (Procedure) Rules, 2016 but more fundamentally, with regard to keeping and production of work records, the statutory underpinning rests under Section 10(7) of the Act.
25. In response to the claim, the respondent in the Memorandum of Response in paragraph (9) pleaded that;

The respondent in response to paragraph 9(d) of the Memorandum of Claim states that all persons employed as watchmen [Security Guard] at the school work for 12 days and take 2 days off hence the claim for overtime is denied.
26. These pleadings were not accompanied by any work records. It was left bare.
27. The appellant was specific and clear to the extent that upon being deployed as a night security guard from 6 September 2011 to 11 August 2021, he was working from 6 pm to 6 am each day. He did 4 hours of overtime daily.
28. On these claims, the appellant discharged his duty under Section 47(5) of the Act. The burden then shifted to the respondent as the employer under Section 43 of the Act to justify why the appellant worked 4 hours overtime and if he was compensated with 2 off days, how much time was allocated. Where the appellant took his annual leave and hence no overtime worked in such period, as the custodian of work records, how such matter was addressed.
29. Without the respondent as the employer discharging this duty, the court is only left with the evidence by the appellant. He worked 4 hours of overtime each day at work from 6 September 2011 to 11 August 2021.
30. The lapse in keeping work records seems an endemic issue for the respondent. In the witness statement of the respondent's witness Mwachofi Mwaghesha Simon, most dates are recorded in error. In his evidence in court, he could not recall major and important events such as when the board meetings that were held to ratify the dismissal of the appellant were held. Ultimately his evidence was that most work records were stolen. Nothing was done about it. No report to the police to assist in retrieving these records.
31. Employment records should be kept by the employer for at least up to 5 years from the date employment ceased under the provisions of Section 10(6) of the Act;
 - (6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.
32. These records should be made available to the court once a claim is filed.

- 33. Without the work records to negate the claim for working overtime for 4 hours each day, the learned magistrate should have analyzed the same and made an award.
- 34. The appellant applied a rate of 26 days per month to claim overtime for 4 hours each day.
- 35. Indeed, as correctly outlined by the learned magistrate, under the Wage Orders, particularly Regulation of Wages (Protective Security Services) Order 1998, a security guard is allowed to work for 52 hours spread within a week of 7 days. This translates to 8 hours per day.
- 36. On the claim that the appellant was at work for 26 days each week, the total rest days are 4 in a month as required under Section 27 of the Act.
- 37. Working for 12 hours each day gave him 4 overtime hours. This translated to 104 hours each month. The appellant had admitted to taking 164 leave days.

From 6 September 2011 to 11 August 2021, the total claim for overtime at Ksh.849, 700 is modest and is hereby awarded.
- 38. The appeal is successful and the judgment of the trial court is hereby reviewed with an award for overtime assessed at ksh.849, 700 to be paid within 30 days after which time the same shall accrue costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 23 DAY OF MAY 2024.

M. MBARŪ

JUDGE

in the presence of:

Court Assistant:

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