



Muthomi v Brinks Security Services Limited (Employment and Labour Relations Cause 1590 of 2017) [2024] KEELRC 1715 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1715 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1590 OF 2017**

K OCHARO, J

JUNE 28, 2024

BETWEEN

KENNETH MUTHOMI CLAIMANT

AND

BRINKS SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide Memorandum of Claim dated 14th August 2017 seeking: -
 - a. A declaration that the Respondent's failure to pay the Claimant's employment dues is unfair, unlawful and unconstitutional.
 - b. Certificate of Service
 - c. A refund of uniform charges
 - d. A fine of Kshs. 100,000/- against the Respondent for failure to comply with the mandatory provision of Section 51 of the *Employment Act* 2007.
 - e. Pay for untaken leave days.
 - f. Overtime pay.
 - g. Deducted salary amounts.
 - h. Severance pay.
 - i. House Allowance.
 - j. Punitive and aggravated damages.



- k. Refund of Sacco Savings.
 - l. Costs of this suit.
 - m. Interest on (e), (f), (g) and (h)
 - n. Any other relief that the Court may deem appropriate to grant.
2. In response to the Memorandum of Claim, the Respondent filed a Memorandum of Response dated 20th February 2018, denying the Claimant's cause of action against it and his entitlement to the reliefs sought.
3. At the hearing, the Claimant adopted his witness statement dated 14th August 2017 as part of his evidence in chief and produced the documents filed under his list of documents of the same day as his documentary evidence. Equally, the Respondent adopted the Statement of Annastacia Mwendwa dated 15th May 2023 as part of its evidence and had produced the documents it filed herein as its exhibits.

Claimant's case

4. The Claimant's case is that he was employed by the Respondent as a Security Guard in the year 2009 on permanent terms at a monthly salary of Kshs. 10,800/-. He was subsequently assigned security guard number 06159, and issued with uniforms and shoes, the cost of which was recovered from his first salary.
5. He contended that throughout his employment with the Respondent he worked every day of the week including public holidays from 6.00 am to 6.00 pm, therefore 12 hours a day. This meant he worked 4 hours every weekday. Further, though it was in the practice of the Respondent to allow its employees 4 days off per month in addition to the statutory 21 days annual leave, it could so allow and arbitrarily. As a result, he never enjoyed the off days.
6. The Claimant asserted that at all material times he was paid below the set minimum wages. Further, inexplicably his four days' salary was deducted annually.
7. In March 2016, he resigned from his employment as a result of unfavorable working conditions. Upon resignation he expected to be paid all his terminal dues, the Respondent failed to pay him. Further, he expected the Respondent to cause Brinks Security Sacco, which he had joined in 2013, to refund his savings and dividends, again the Respondent didn't. His savings and dividends haven't been paid to date.

Respondent's case

8. It was the Respondent's case that the true Claimant was its employee from 13th July 2009 to 28th February 2016, on a monthly salary of Kshs. 10,800/-. Under the contract of employment signed by the parties, the Claimant's salary was all inclusive and the Claimant was entitled to 1 day off every week. He was also entitled to leave days, all of which he had utilized at the time he left employment.
9. The Respondent's witness further stated that on the 1st February 2016, the Claimant proceeded for annual leave and was supposed to report back to work on 1st March 2016. Contrary to the Claimant's assertion, he did not at any time express an intention to resign or resign. He simply failed to turn up to work on the day when he was supposed to after his leave.
10. The Respondent denied making any deductions to the Claimant's salary save for statutory deductions which were duly remitted to the relevant authorities.



11. The Respondent through the witness argued that it was unable to calculate and pay the Claimant's terminal dues and issue him with a Certificate of Service as he left work and never returned. However, she is not entitled to the reliefs itemized in his Memorandum of Claim.
12. On the claim for refund of Sacco savings and dividends, the Respondent states that this claim should be made against Brinks Security Sacco, as it is a separate legal entity from the Respondent.

Claimant's Submissions

13. The Claimant filed submissions dated 30th May 2023 together with a List of Authorities dated 30th May 2023.
14. The Claimant submitted that despite its claim that he deserted duties, the Respondent did not demonstrate any efforts they made to contact him and understand why he was not reporting to work, or issue him with a notice to show cause on his desertion of duty, and subject him to a disciplinary hearing if necessary. As it didn't do this, its assertion cannot stand. To support this submission reliance was placed on the case of *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR.
15. On the claim for a Certificate of Service, the Claimant submits that all employees are entitled to the same despite the circumstances of their termination. The Respondent's allegation that it never refused to issue the same isn't convincing as if that was true, nothing would have been easier than to tender a copy of the same before the Court. This failure should attract a penalty of Kshs. 100,000/- converted into damages.
16. On the claim for a refund of uniform charges and the cost of shoes, the Claimant submits that it was the employer's duty to provide the uniforms and shoes. He also submits that he did not provide a pay slip to prove the deduction, because the Respondent only began issuing pay slips in 2015. However, the Claimant states that he produced his pay slips for the year 2009. In July 2009, he received Kshs. 2,130/- instead of Kshs. 10,000/-. In any event, under Section 74 of the *Employment Act* 2007, the employer is the keeper of employment records and should have produced them before the Court.
17. On the claim for overtime, unpaid leave days, and public holiday allowance, the Claimant submits that he worked every day from 6.00 am to 6.00 pm, which is corroborated by the contract of employment which provides that the working hours would be 12 hours, and he may be required to work during public holidays. The Claimant's evidence that he worked on Sundays is uncontroverted. There is no evidence produced by the Respondent that the Claimant was ever paid overtime. The Regulation of Wages (Protective Security Services) Order, 1998 provides that the working hours for employees such as the Claimant are 52 hours per week and any hours worked beyond that should be compensated as overtime. The formula for tabulating overtime pay should be 1.5 pay per hour for weekdays, and 2 times pay for public holidays. The Claimant calculates in detail the overtime and holiday pay for the entire duration of his employment.
18. Further to the above, the Claimant submits that the Respondent gave him 25 days annual leave of its own discretion and deducted 4 days pay from his salary. In relation to underpayment of salary, the Claimant contends that as per the Regulation of Wages (General) (Amendment) Order, 2015, he should have received Kshs. 10,954.70 as his basic salary from 1st May 2015 to February 2016.
19. The Claimant submits that the basis of house allowance is Section 31 of the *Employment Act* 2007, which provides that the employer shall provide reasonable accommodation or a sufficient sum as rent for its employees in addition to their wages. It is the Claimant's position that his basic salary did not include house allowance. In Section 2 of the *Employment Act* 2007, "basic salary" is defined as an employee's gross salary excluding allowances and other benefits. He relies on the case of *Mary*



Mumbi Kariuki v Director, Pamoja Women Development Programme [2015] eKLR for the submission that where a wage is consolidated, this needs to be indicated in the contract. The Claimant submits that his contract of employment dated 13th July 2009 did not indicate that his salary was inclusive of house allowance, hence it should be awarded and calculated at 15% of the Claimant's salary for the full duration of his employment.

20. On the refund of savings and dividends from the Sacco, the Claimant submitted that the Respondent does not dispute that he is entitled to the savings. He rightly sued the Respondent as the Sacco members were primarily the employees of the Respondent. Further, Sacco membership is a benefit he enjoyed by the fact that he was an employee of the Respondent.

The Respondent's Submissions

21. The Respondent submitted that the terms and conditions of the Claimant's service were regulated by a written agreement contrary to his assertion. The contract adhered to the provisions of Section 9 of the *Employment Act*.
22. The Claimant's allegation that he resigned from its employment is not only untrue but also unproven. If indeed he resigned as he alleged, nothing could prevent him from producing the resignation notice in court as evidence. The truth of the matter is that he deserted duty.
23. It was further submitted that in the circumstances of this matter, the Respondent cannot be faulted for having not issued a certificate of service to the Claimant. He deserted duty. He was nowhere to be issued with the certificate. The demand that it be penalized as sought by the Claimant is unfounded.
24. The Respondent further submitted that the Claimant did not quantify in his pleadings the amount he wished to be refunded as uniform charges, and did not show that indeed an amount for the purpose was charged on his salary. The claim should be rejected.
25. Submitting on the Claimant's prayer for compensation for overtime worked and underpayments, the Respondent argues that the Claimant besides giving figures under these prayers in his pleadings, he did not give sufficient details for instance a clear computation on how the figures were arrived at, to enable it defend itself adequately. The Claimant has purported to compute the same in his submissions, however this is a step taken too late in the day. In any event, the totals in the submissions differ from those in the pleadings. The Claimant did not lead evidence to demonstrate that he worked overtime on specific days and times. Minus this, his claim for overtime is for rejection. To support this point, the Respondent relies on the case of *Charles Nguma Maina v Riley Services Limited* [2018] eKLR.
26. His entitlement to the relief sought under the head of underpayments is challenged on the basis that the Claimant did not specify whether he worked in Nairobi or outside Nairobi. The Respondent cites the case of *Sarah Angienda Oyange v One Heart Children Home & School* [2017] eKLR to buttress the submission that the location of the performance of the contract is key in determining whether an employee was underpaid. Nevertheless, it is submitted that the Claimant's last salary was Kshs. 10,800/-. The Respondent always complied with the Regulation of Wages (General) (Amendment) Orders.
27. With regard to unpaid leave days, the Respondent's submission is that the Claimant's Leave Form which was produced by both the Claimant and Respondent shows that as at the date of signing the same, the Claimant only had 25 leave days pending, all of which he took. This demonstrates that the Claimant had been taking his annual leave all through the years religiously. The Claimant failed to prove that he had pending leave days for prior periods. In the circumstances his claim under this head should be dismissed.



28. The Respondent submitted that the *Employment Act* does not provide for holiday and rest allowances. Such allowances could be given at the employer's discretion. In his evidence under cross examination, the Claimant admitted that his contract didn't provide for an allowance[s] of this nature. Consequently, there cannot be a justification for an award under this head.
29. The Court is also urged to dismiss the Claimant's claim for service pay as he was a member of the National Social Security Fund (NSSF), and therefore precluded from pursuing the benefit by didn't of the provisions of Section 35 (6) of the *Employment Act* 2007.
30. On the issue of house allowance, it is submitted that the Claimant's salary was all-inclusive as evidenced by the Claimant's contract of employment which he willingly signed. The Claimant also failed to comprehensively tabulate the house allowance he was claiming to allow the Respondent to defend itself.
31. Finally, the Respondent submits that Brinks Sacco is a separate legal entity from it with its own procedures for claiming refunds. The Claimant did not dispute the fact that the Respondent is incapable of refunding the Claimant's Sacco savings. The Claimant should seek the refund from the Sacco.

Issues for Determination

32. I have reviewed the parties' pleadings, oral and documentary evidence, and submissions as well as attached authorities. The sole issue for determination is as follows: -
 - a. Whether the Claimant is entitled to the remedies sought in his Memorandum of Claim.

Whether the Claimant is entitled to the remedies sought in his Memorandum of Claim.

33. Before I delve further into this issue, it is imperative to state that all the reliefs sought are those I consider independent of a claim for unfair termination. In essence therefore, it becomes unnecessary to interrogate and determine whether the separation between the Respondent and the Claimant was as a result of a resignation or desertion.
34. I have no doubt in my mind, that where the nature of the employment of an employee entails that he puts on a uniform while in the course of his employment, it is the duty of the employer to provide the uniform at his or her own cost. There cannot be any reasonable and or legal justification to deduct the cost of the uniform from the employee's salary. In this position I am inspired by the holding in *Peter Kimeu Mose and 13 Others v Mang Hotel and another* [2015] eKLR where the Court held that :

“Where an employee is required to put on uniform while at work, the employer must provide the uniform at its own cost. To require an employee to buy their own uniform amounts to an unfair labour practice which cannot be cured by the employee's acquiescence.”
35. The Claimant pleads that a deduction was made to him salary when he joined the Respondent company in 2009. The suit herein was filed in 2017. Section 90 of the *Employment Act*, militates against this Court considering and making any award on it. It is time barred. Assuming I am wrong, still this relief cannot be availed to the claimant as the claimant didn't not specifically plead how much he seeks under this head and or sufficiently establish that his salary was deducted for this purpose.
36. The Claimant seeks that he be compensated for overtime and public holidays worked. He alleged that he could work 12 hours every day including Sundays and public holidays. The Contract of Employment corroborates this position and more specifically on the aspect of working hours. It



provides that: “Your working hours will be based on a 12 hours system as guard/guardette since this is operations. You may, however, be required to work on public holidays depending on work demand.” In view of this, this Court could ordinarily grant the relief sought for overtime having in consideration the provisions of Section 90 of the *Employment Act*, Limitation of time. However, in the instant matter I am not persuaded to make the award for the reasons; from the Claimant’s pleadings, witness statement and oral evidence, one cannot fathom how the sum sought under the head was arrived at. The Claimant purported to tabulate the amounts in his submissions. In my view, this doesn’t cure the deficiency in his pleadings and evidence. Submissions by a party does not equate evidence and will never be a substitute for evidence.

37. Further, one will not be off mark to conclude that the Claimant is even claiming for overtime worked even for days when he was on leave. This is a testament on how badly his claim presented.
38. This very Court has held in the case of *James Orwaru Nyaundi v Kilgoris Klassic Sacco Limited* [2022] eKLR as follows:-

“78. The Claim for overtime and public holidays worked compensation has just been thrown to Court. This Court has incessantly urged that this practice must come to a stop. It is not enough for a Claimant to just give figures to court, asserting that he or she is entitled to them, cross her or his fingers hoping that the Respondent does not place before Court documents, and as a consequence of the failure say “behold the claim is proved, the employer has not tendered in evidence any documents.” The Claimant must if she or he has to succeed in the Claim, be specific on the days when he worked overtime, the specific public holidays, when he worked and wasn’t paid for.

39. The Claimant did not specify, in his pleadings or in his evidence tendered before this Court, which particular days he worked overtime, and on public holidays. For this reason, the claims for overtime and public holidays fail.
40. I have carefully studied the contents of paragraph 6 of the Claimant’s statement of claim, and conclude that therein in he expressly stated that he took all his 25 leave days that were outstanding. The only misgiving he had was that the Human Resource Manager forced him to take all the days against his intention of utilizing the same wholly at once. One wonders then the basis for the claim under the head.
41. The claim for holiday and rest allowance lacks a basis in law or in the Claimant’s contract of service. I decline to grant the same.
42. The claim for salary underpayment is pegged on the fact that the Regulation of Wages (General) (Amendment) Order 2015 capped the basic minimum monthly salary for a security guard at Kshs. 10,954/-. The Claimant avers that he was underpaid between 1st May 2015 and 1st March 2016. In seeking the relief, the Claimant seems to have lost sight of the fact that a station of work of an employee and to be specific the town, is a crucial factor in matters minimum wages. The Claimant didn’t mention at all where his station of work was, the Court was left to speculate, but I am not ready to.
43. A cursory perusal of the Regulation of Wages (General) (Amendment) Order 2015 reveals that the basic salary for a security guard working in Nairobi, Mombasa and Kisumu was Kshs. 10,954.70; the basic salary for an employee working in All former municipalities and Mavoko, Ruiru and Limuru Town councils was Kshs. 10,107.10; and the basic salary for employees working in All Other Areas was Kshs. 5, 844.20. Minus the evidence I have alluded to hereinabove, It is not possible to justly determine whether or not there was an underpayment. I therefore decline to grant the prayer for underpayment.



44. The Claimant contends inexplicably the Respondent could deduct 4 days' salary annually from his remuneration. I see no evidence in support of this claim. The Claimant being the party asserting had a duty to put forth sufficient evidence to establish the deduction, however, he didn't. I decline to grant the relief for want of evidence.
45. On service pay, Section 35 (5) and (6) provide that: -
- “(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund.”
46. The Claimant's pay slips for February 2016 and March 2016 demonstrate that a deduction of Kshs. 200/- per month was made from the Claimant's salary and applied towards his NSSF contributions. He is therefore excluded from pursuing the benefit of service pay under Section 35 (6) aforesaid.
47. On the claim for house allowance, I note that the Claimant's employment contract dated 13th July 2009 produced by the Respondent, and which is duly executed by the Claimant Provided that the Claimant's salary was Kshs. 10,000/- (All Inclusive). I gather a clear impression that the figure included house allowance, therefore. It is not the business of this Court to rewrite contracts for parties. Mine is to enforce them. See also *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* [2017] eKLR.
48. On Sacco refunds, I hold that there cannot be any legal justification for this Court to award the relief in favour of the Claimant. The Respondent's evidence that it was a separate entity, and it makes sense, was not rebutted in my view. The submissions by the Claimant on this point were with great respect unattractive and unconvincing. On the refund, recourse lies against the Sacco, not the Respondent.
49. There is no doubt that per Section 51 of the *Act*, the Claimant is entitled to a Certificate of Service.
50. Finally, I turn to the claim for a fine of Kshs. 100,000/- against the Respondent for failing to issue the Claimant with a Certificate of Service. I am of the view that this relief sought cannot be availed to him in the circumstances of this matter. Damages can only be granted to an employee who has suffered a loss or prejudice as a consequence of non-issuance of the certificate. The Claimant has not asserted that he suffered any loss or prejudice, or that he went picking the certificate and the same was denied.
51. In the upshot, judgment is hereby entered for the Claimant as against the Respondent in the following terms: -
- a. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
- b. Each party to bear their own costs.



READ, DELIVERED AND SIGNED THIS 28th DAY OF JUNE, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Keiro for the Claimant

No appearance for the 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

