



REPUBLIC OF KENYA



**S.S. Hotels Ltd t/a Royal Court Hotel v Ondunga (Appeal E029 of 2024)  
[2024] KEELRC 2404 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2404 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E029 OF 2024  
M MBARÚ, J  
OCTOBER 1, 2024**

**BETWEEN  
S.S. HOTELS LTD T/A ROYAL COURT HOTEL ..... APPELLANT  
AND  
BENSON ONDUNGA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E M Kadima delivered  
on 7 February 2024 in Mombasa CMCC Cause No.846 of 2019)*

**JUDGMENT**

1. The appeal arises from the judgment delivered at Garsen on 7 February 2024 in Mombasa CMELRC No.846 of 2019. The appellant is seeking that the judgment be set aside with substitution of an order dismissing the claim with costs.
2. The back to the impugned judgment is a claim filed by the respondent on the basis that he was employed as a health and fitness instructor on 17 February 2003 but on 5 May 2018, the appellant terminated his employment without payment of terminal dues. The dues paid were without taking into account that the respondent had worked double shifts and was entitled to severance pay. The gross wage was Ksh.51, 462 and he claimed the following;
3.
  - a. Double shifts worked for 15 years Ksh.566.082;
  - b. Severance pay for 15 years Ksh.385;
  - c. Costs of the suit.
4. In response, the appellant admitted that the respondent was employed as a health and fitness instructor in February 2003. He was paid all his wages until 5 May 2018 when he resigned. He was paid for accrued



leave and off days and signed a discharge voucher to confirm payment of final dues. The claims made should be dismissed with costs since the respondent is abusing the court process.

5. The learned magistrate delivered judgment on 7 February 2024 and held that the respondent had proved his case and was entitled to the claims made and hence awarded the following:
  - a. Unpaid double shift;
  - b. Service pay;
  - c. Costs plus interests of the suit from the date of judgment.
6. Aggrieved by the judgment, the appellant filed this appeal on 12 grounds summarized that the trial court erred in failing to consider the evidence before it. The trial court failed to address the fact that the respondent was undeserving of severance pay and service pay and had not pleaded service pay and by awarding such service pay was in error. The respondent testified and admitted that he was only claiming unpaid double shifts but had failed to demonstrate how such double shifts arose. Had the evidence adduced been addressed in its totality, the claims made should have been dismissed.
7. Both parties attended and agreed to address the appeal by way of written submissions.
8. The appellant submitted that the awards by the trial court were not based on the pleadings. The respondent had claimed unpaid double shifts and severance pay but was awarded service pay in error. In the case of *Galaxy Paints Ltd v Falcon Guards Ltd* [2000] eKLR the court held that the issues for determination by the court should generally flow from the pleadings and unless the pleadings are amended, a court cannot depart from what is presented before it.
9. In this case, the respondent's claim related to a claim for severance pay and the trial court substituted this with service pay. This is in error as held in *Douglas Odhiambo Apel & another v Telkom Kenya Limited*.
10. The appellant submitted that on the claim for double shifts, the respondent was paid all his dues and signed an acknowledgement voucher. He cleared and was issued a Certificate of Service.
11. For pending off days and work during public holidays, the appellant submitted all these records and had the trial court considered the entirety of the materials before it, the award of the alleged double shift was not justified. The cheques issued to the respondent in payment of terminal dues were inclusive of the balance of off days, being the balance of the double shifts. He has not tabulated what amounted to double shifts to justify any more payments. In the case of *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR the court held that the execution of a discharge voucher is sufficient evidence of payment of terminal dues with the approval of the employee.
12. The judgment of the trial court awarding double shifts and service pay was in error and should be set aside and the claims dismissed with costs.
13. The respondent submitted that the award of service pay was justified based on the submissions before the trial court. In the case of *Odd Jobs v Mubia* [1970] EA the court held that a court may base its decision on an unpleaded issue it appears from the course followed at the trial that the issue had been left to the court for decision.
14. The respondent submitted that the non-payment of service pay is not justified. Such service pay is a statutory requirement and the trial court properly considered such a matter and based on the applicable law correctly made the award. The double shift claim is justified and there was no proof that the appellant made these payments. In the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015]



eKLR the court held that the legal burden of proof lies upon the party who alleges and under Section 107 of the *Evidence Act*, the appellant did not prove payment of the double shifts. The appeal should be dismissed with costs.

### Determination

15. This is a first appeal. The court must re-evaluate the entire record of appeal analyse it and make its conclusions.
16. The twin issues for determination are whether the award of double shifts and service pay was justified and whether the appeal should be allowed as prayed.
17. The general principle of law is that parties are bound by pleadings. In the case of *Okoth v Nyaberi & another* (Civil Appeal 248 of 2018) [2024] KECA 427 (KLR) the Court of Appeal held that;
18. ... Parties are bound by pleadings and it is wrong for a party to introduce an issue which is not pleaded; such an issue cannot be brought through submissions. On parties being bound by pleadings see the case of *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR where this Court agreed with the holding of the Supreme Court, Malawi, in *Malawi Railways Ltd vs. Nyasulu* [1998] MWSC 3, where that Court quoted with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in 1960, *Current Legal Problems*, at p.174 where the author had stated:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

19. In this case, the respondent in the Memorandum of Claim had his case on two issues upon termination of employment, he was not paid;
  - a. Double shifts; and
  - b. Severance pay.
20. In the judgment of the learned magistrate, he analyzed the claims and held that;

... On the issue of severance pay or service pay gratuity, this court comes to the following conclusion. That the issue of not pleading service pay the *Employment Act* of Kenya places



a statutory requirement on all employers. In essence, the Employment Act 2007 states an employee is entitled to receive [one] month's pay for every year of service, up to a maximum of 12 months' pay. This means that an employee who has been continuously employed for 12 years is entitled to receive 12 months' pay as service pay. In this instance he is entitled to be paid (years) 15x25,731 (gross salary) for the years worked, 15 x 25,731 = 385,965 as the respondent has not demonstrated that he made statutory deductions and remitted to the National Social Security Fund which is compulsory under the law. ...

21. As outlined above, the respondent had claimed severance pay. He did not amend his pleadings to claim service pay.
22. Service pay is indeed due where there is no evidence of the employer paying statutory dues for the employee. This only arises under the provisions of Section 35(5) and (6) of the Employment Act and must be pleaded.
23. Severance pay only arises in a redundancy in terms of Section 40 of the Employment Act. The respondent's case is that he resigned from his employment and was paid his terminal dues less double shifts and severance pay.
24. There was no redundancy to justify a claim for severance pay. This cannot be substituted for a claim for service pay. Each is regulated under different provisions of the Employment Act.

**To award a service pay was in error.**

25. On the claim for double service, in his evidence before the trial court, the respondent testified that he was on a duty roaster as a fitness instructor. On Mondays and Wednesdays, he worked the afternoon shift from 2 pm to 8.30 pm but could not leave until 3 pm or 10 pm. On Tuesdays and Thursdays, he would be in the morning shift starting at 6.30 am until 2 pm but on Fridays, he would work in the morning and afternoon shifts. He took his rest on Saturday and Sunday, there was a shift from 8.30 am to 2 pm but usually closed at 3 pm. On Sundays, he would alternate with a colleague only taking two rest days each month.

On this basis, the respondent claimed payment for the double shift.

26. The respondent was paid a wage of ksh.51, 462 per month. This is above the minimum wage.
27. Ordinarily, an employee on a minimum wage is allowed 8 working hours each day with a rest day each week in terms of Section 27 of the Employment Act.
28. The respondent admitted in evidence that his rest day was Saturday. The legal threshold under Section 27 of the Employment Act was achieved.
29. On his evidence, he worked on Monday and Wednesday from 2 pm to 8.30 pm a period of 6 ½ hours. When he worked until 10 pm, he clocked his 8 hours allowed under the law.
30. On Tuesdays and Thursdays, he worked from 6.30 am to 2 pm for 8 hours. He was within his working hours.
31. On Sunday, he worked in shifts and had two days each month. The rest days due are addressed on Saturday and Sunday was his full working day where he worked for 6 hours only.
32. Where there was any overtime work within the week, the fewer hours scheduled on Sunday well compensated the respondent for his working hours. He cannot justify a claim for a double shift within the legal threshold under Section 27 of the Employment Act which only allows for one day of rest in a given week unless the employer has given an additional benefit for more rest time.



- 33. At the end of his employment, the respondent admitted that he was paid terminal dues for accrued dues. He signed the voucher to confirm the settlement of his terminal dues.
- 34. Without any legal foundations to claim outside the provisions of Sections 27 and 40 for double shifts and severance pay respectively, the awards by the trial court are in error. These claims well assessed should have been dismissed with costs.
- 35. Accordingly, the appeal herein is with merit and is hereby allowed. Judgment in Mombasa CMELRC No.846 of 2019 is set aside and substituted with an order dismissing the claim. The appellant is awarded the costs of the appeal and for the lower court proceedings.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 1ST DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

