



**Abdallah v Twiga Car Hire & Tours Ltd (Cause 126 of 2018)  
[2023] KEELRC 232 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 232 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 126 OF 2018  
SC RUTTO, J  
JANUARY 27, 2023**

**BETWEEN**

**TWALLIB NTHIWA ABDALLAH ..... CLAIMANT**

**AND**

**TWIGA CAR HIRE & TOURS LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent as a tour guide with effect from April 6, 1994. He avers that the respondent terminated his services on January 13, 2018 without any reason and failed to pay his terminal dues. It is on this account that the claimant has sought against the respondent the sum of Kshs 3,398,150.00 being payment for 13 days worked in January, 2018, 30 days payment in lieu of notice, severance pay, 253 official public holidays at 11 days per year for 23 years, 1104 weekly resting days and 14,352 hours overtime.
2. The respondent which is a Tour Operator, opposed the claim through its Memorandum of Response dated March 15, 2018. It avers that it engaged the claimant as a tour guide/driver on or about March, 2006. That prior to this, the claimant had been engaged at diverse times and diverse durations of time from 1994 upto December 29, 2004. That before being reengaged in March, 2006, the claimant had resigned from employment through a letter dated December 29, 2004. The respondent has denied the claimant's averments and contends that it did not terminate his employment and that it is him who repudiated his contract of employment by abandoning his work.
3. It further states that the claimant is not entitled to the prayers sought and adds that the claims are time barred pursuant to section 90 of the *Employment Act*. The respondent has further termed the claims as unwarranted and has asked the Court to dismiss the same with costs.



4. The matter proceeded for part hearing on March 28, 2018 and subsequently on June 22, 2018 when the respondent presented and closed its case. At the trial, the claimant testified in support of his case while the respondent called six witnesses.

### **Claimant's Case**

5. To start with, the claimant adopted his witness statement and bundle of documents filed on his behalf to constitute his evidence in chief. It was his testimony that he worked for the respondent continuously from April 6, 1994 until January 13, 2018 when he was served with a letter to sign for benefits which he was not paid. That he refused to sign the same hence the respondent terminated his services without any notice.
6. That he was not issued with any notice prior to his termination. That he reported the matter to the Labour office. That he delivered the letter from the Labour office to his employer but he was not reinstated. That the respondent neither communicated to him nor called him for a disciplinary hearing.
7. That while working as a tour guide for the respondent, he was not allowed to leave before 9:30 p.m in the evening hence his claim for overtime of two hours per day for 23 years. That he used to work from 8:30 am in the morning to 9:30 pm in the evening. He further told Court that he was always at work and did not proceed on leave. That further, it was only in 2007 that the respondent started remitting his NSSF dues hence his claim for service pay from 1994 to 2007. He further stated that he never took off days and did not enjoy public holidays as he was always working. That nonetheless, the respondent did not compensate him for the same.
8. It was his further evidence that during his employment with the respondent, he never committed any mistake, suspended from work, reported late or quarreled with his employers.
9. Testifying under cross examination, the claimant stated that his termination was verbal.

### **Respondent's case**

10. The respondent tendered oral evidence through six witnesses. The first to go was Minazali Manji who testified as RW1. He described himself as a shareholder and Managing Director of the respondent company. At the outset, he sought to adopt his witness statement, supplementary witness statement, the documents and supplementary documents filed on behalf of the respondent to constitute his evidence in chief.
11. He stated in evidence that the respondent is a family owned company founded in 1980 with its primary business being tour operations. That its services include planning and execution of safaris in and around Kenya for its international and local clients.
12. He stated that the claimant, who was also known as TJ or TJT, was first employed as a Tour Driver in 1994 and his duties included driving the clients to various destinations as per the itinerary, taking the clients on game drives at specific times and sharing knowledge and information on the country with the clients. That the claimant terminated his services prior to the year 2000 and was re-employed in 2002 and resigned again in 2004 at which time he was paid all his terminal benefits. That the claimant rejoined the respondent company in March 2006 and has been in continuous employment with Twiga Tours since. That hence, his claim that he has worked continuously from 1994 to 2018 (a period of 23 years) is false.



13. It was RW1's further evidence that any claims that he had up to December, 2004 were settled in full up to and including December, 2004 for which he has signed a Payment Voucher and thus, his claim for a period of 23 years, is false.
14. That further, as per the respondent's record, and to the best of his knowledge, the claimant has been in its employment from March, 2006 and he has duly been paid his salary for all the months he worked for the company in the usual manner of payment to him and his statutory payments made to the relevant authorities. That his salary for January, 2018 has been credited to his outstanding account and all statutory payments remitted to the relevant Authorities.
15. RW1 denied that the claimant's employment was terminated. He stated in evidence, that the claimant proceeded on leave and was to resume sometimes in January, 2018. That he came back on January 11, 2018 then disappeared on January 13, 2018. That this is confirmed by the respondent's two responses dated January 25, 2018 and February 5, 2018 to a letter received from the Labour and Wages Advisory Services dated January 25, 2018 which the claimant and the Agency have chosen to ignore. That in the said letter's, they responded that the claimant had not been terminated and that he should report back to work but he never showed up.
16. That the respondent's working hours for the office staff are 08:30 am to 5:30 pm from Monday to Friday and 08:30 am to 1 pm Saturday. That the office remains closed on all Sundays and public holidays.
17. That working hours for the tour drivers are slightly different. That when the tour drivers are in Nairobi, before or after completing their safari, they are allowed to take days off to attend to their personal matters due to the nature of their work but they must report their absence to the Operations Department in good time for the department to be aware of their absence. That these off days are given in consideration of any Sundays, public holidays and overtime they may have worked or will work during the time they are on safari. That the company does not look unfavourably upon any tour driver who may have taken excess leave days even if they are not legally entitled to such excess days off.
18. It was his further testimony that the claimant's work as a tour guide had an itinerary and was seasonal. He gave the itinerary of the safaris as follows; that they would go on morning game drives (usually at 6:30 am to return to the Lodge for breakfast before closure of the breakfast service at 9:00am) and for an afternoon game drive (at 4:00 pm to return to the lodge by 6:00 pm-7:00 pm). That the Park Regulations also dictate the hours for game drives and in this regard, the park is not open for game drives before 6:00 am and after 6:00 pm for all KWS parks and before 6:00 am to 7:00 pm for Masai Mara Game Reserve.
19. He further stated that all the safari itineraries are designed to provide ample rest time for the visitors hence the driver, will take a rest between 9:00 am to 4:00 pm and do his personal things. That some visitors, may choose to go on the game drive after breakfast at 8:00-8:30 am to either return for a hot lunch by 12 noon or do a full day game drive with a picnic lunch and return to the lodge by 3:00 pm-4:00 pm instead of going on the early morning and afternoon game drives. That hence, all the respondent's itineraries offer adequate rest time for the visitor as well as the tour driver. That as such, the claimant had a lot of free time and there are no back to back safaris as the work is seasonal. That in between the safaris, the claimant would take his off days and rest days.
20. That on checking the respondent's records the claimant has taken an average of 63 days per annum for the period he has been in its employment, which was well in excess of the 21 days per annum prescribed by law. That however, these excess days were favourably considered by the company due to the nature of his work. That in addition, the tour drivers are paid a safari allowance that includes accommodation,



out of station and overtime compensation which is Kshs 2,000 per day. That the present rate of full board accommodation at most lodges in Kenya is on average Kshs 1,000 per day so the drivers are paid Kshs 1,000 per day as their compensation for any out of post, Sunday, public holiday or overtime that they might put in. He was emphatic that the safari itineraries do not normally require more than 6 to 9 hours of work.

21. He further stated that the claimant's claim that he was forced to work from 08:30am to 9:30pm every day is false. That the company office hours are clearly communicated to all staff and only select staff have the keys to open and close the office. That none of the Tour Drivers have keys to the office.
22. That therefore, the claimant's claim that he worked up to 9:30pm for the given number of days over 23 years has no basis. That in the event the tour driver had to pick or drop clients to or from the airport in the evening or early morning, the respondent always allowed the driver to report to work later than the normal 8:30am if they were in Nairobi and if they proceeded on safari, then the additional rest days were always offered to compensate for the arrival and departure airport transfers.
23. RW1 further told Court that the respondent did not forge the claimant's signatures as alleged.
24. Emanuel Kenga Karisa who identified himself as a Forensic Document Examiner, testified as RW2. He confirmed signing his witness statement. He further confirmed authoring the report dated November 22, 2019. He told Court that he is a document examiner and that he reviewed the respondent's documents and did an analysis of exhibit A1 and A2 and confirmed that the signatures belonged to the claimant. That however the handwriting on exhibit marked as B1 and B4 were by a different author as they show different styles.
25. Florence Gitu testified as RW3. She identified herself as a Financial Controller at the respondent company. That she joined the respondent on May 15, 2000 as an Accounts Assistant She proceeded to adopt her witness statement to constitute her evidence in chief. She told the Court that her main responsibilities are: - overlooking and managing all accounting processes across all offices and divisions; managing and overlooking all taxation related matters; managing and overlooking at the audit process; producing the payroll and ensuring timely payment of salaries and all statutory deductions; monitoring time attendance; and any other duties related to company administration assigned by the management.
26. That as an Accountant, it is also one of her primary responsibilities to calculate and pay to the driver/guide the amount of Safari Imprest required for each safari itinerary. That this imprest covers for fuel, driver guide, overnight full board accommodation, overtime allowance, Park fees and any other miscellaneous items.
27. That when she joined the respondent in the year 2000, the claimant was not working there. That he joined the company in 2002 and after working for 2 years and 9 months handed in his letter of resignation in December, 2004. That she worked out all his final dues which were paid to him and which he signed for accordingly.
28. That in March 2006, the claimant again rejoined the respondent company and continued to work there until January 12, 2018 when he left after lunch and has not reported on duty ever since. That the claimant requested for time off from November 28, 2017 to January 6, 2018 and this leave was granted by Rahim Manji even though he had exhausted his leave days. That he was to report back on January 6, 2018 but, instead extended his off days without notification and reported on January 11, 2018.
29. RW3 testified that the claimant absconded duty and was not terminated. That on January 25, 2018, he went to the office very early, delivered a letter to her from the Labour & Wages Advisory Agencies and left. That she responded to the letter on the same day, confirming that the company had not terminated the claimant's services and if he wished to resign, then he should follow the labour law and give the



- respondent the required notice. That the said Agency did not respond to her letter, hence she followed up with a letter on February 5, 2018 which was also copied to the County Labour Office.
30. It was RW3's testimony that the respondent also paid all the statutory dues to the claimant for the month of January, 2018 knowing that it had not terminated his services.
  31. That the claimant remained in the respondent's payroll until January 2018 and all his statutory deductions were paid. That his salary payment for January, 2018 still remained with the respondent in consideration that he owed the company one month salary in lieu of the notice and that he also has an outstanding amount owing to the company.
  32. That on the issue of leave days, all the respondent's driver guides are given time off before or after safaris and during the off-peak season. That in the case of the claimant, the respondent's records show that he has taken an average of 63 day every year for the last 10 years as leave and off days while the annual leave days are 21days per the law. That the additional 45 days or thereabouts per annum that he has taken compensates him for any Sunday, Public Holidays and Overtime that he may have worked.
  33. That in addition, the respondent paid the claimant an allowance when he was on safari that covers the Sundays, public holidays and any extra time he may have worked during that period. That thus, his claim for Sunday, public holidays and overtime are false.
  34. That further, 2 hours overtime claimed per day is false as the respondent's working hours for the office staff is 8.30 am to 5.30 pm. That she is the one who opens the office at 7.30 am and closes at 5.30 pm. That the second key is normally with the respondent's Senior Tour Consultant who would perform the same duties just in case she is not in the office. That the claimant is not an office staff and therefore has no key to access the office after working hours.
  35. That as for the driver guides, while on safari, their working hours start at 6:30 am to 9:00 am for morning game drive. That the rest of the day is for leisure until 4.00 pm when they would go on the afternoon game drive to return by 6:00 pm. That they are also paid an allowance of Kshs 2,000 being accommodation on full board basis at Kshs 1,000.00 and are allowed to keep the Kshs 1,000 should there be any overtime worked by the driver and, she believes the Kshs 1,000 is indeed more than enough as compensation although in most, if not all cases, the drivers work less than 8 hours on most days whilst on safari.
  36. Rahim Manji testified as RW4. He described himself as the Sales and Marketing Director of the respondent company. Similarly, he adopted his witness statement to constitute his evidence in chief. That in his capacity as a Director, he handles the driver guide leave applications. That the claimant went to him to apply for his leave from November 27, 2017 to January 6, 2018.
  37. That he approved his leave application on behalf of the respondent company and he proceeded on leave from November 27, 2017.
  38. Kenneth Wambugu testified as RW 5. He also adopted his witness statement to constitute his evidence in chief. He stated that he is an employee of the respondent company having been employed with effect from October 6, 2006. That he knows the claimant and that he was shown the claimant's statement dated February 7, 2018. He denied signing the said statement and averred that the signature appearing thereon is not his. It was his evidence that the said statement is therefore false.
  39. Jaston Lusasi Mbimwa testified as RW6. Similarly, he adopted his witness statement to constitute his evidence in chief. He stated he has worked as an office assistant at the respondent company for the last twelve years. He confirmed knowing the claimant having worked with him. That he was shown a statement by his RW1 which claims that he is the claimant's witness in the case herein. That he confirms



not meeting the claimant on 12<sup>th</sup> and 13<sup>th</sup> January and February 6, 2018. That he never prepared the statement dated February 7, 2018 and did not sign it hence is false and his signature in the said statement is a forgery.

### Submissions

40. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that the manner and way in which he was terminated was unlawful, without any notice, reason or ground. That in the year 2004, he attempted to resign but was restrained by the respondent hence in 2005, he was still working for the respondent.
41. That he reported back to work from leave on January 6, 2018 and worked until January 13, 2018 when he was called by the respondent's managing director and asked to write a letter forfeiting his holiday and terminal benefits. That he was ordered out of the premises the following day for refusing to write the said letter thus his termination from employment. That therefore, he did not desert duty rather was unlawfully terminated from employment.
42. It was his further submission that the claim consists what he was entitled to as at the date of his unlawful termination. In support of his submissions, the claimant referred to the cases of *Samson Owill v Kenya Ports Authority* and *Queenelle Atieno Owala v Centre for Corporate Governance* [2013] eKLR.
43. On the other hand, the respondent submitted that the claimant had not adduced any evidence to demonstrate that he continuously served in its employment from 1994 until January, 2018. That it had no legal obligation to maintain the claimant's employment records prior to 2006 as the same was guided by the *Limitation of Actions Act*.
44. Placing reliance on the case of *Jane Nduta Muchendu v Eastern Deanery Aids Relief Programme* [2021] eKLR, the respondent further submitted that it is not enough for an employee to allege unfair termination. That he must prove that the respondent dismissed him without regard to the law. That it is only then that the burden shifts to the employer to prove the reasons for the termination. That the claimant has failed to discharge this burden. It was the respondent's further submission that the claimant was not terminated as he absconded duty. Citing the case of *Samson Mbiti Mbane v Inter Security Services Limited* [2018] eKLR, the respondent stated that it made efforts to reach the claimant through its letters of January 25, 2018 and February 5, 2018.
45. With regards to whether it had produced forged documents, the respondent relied on the evidence of RW2, and submitted that the verification of the claimant's signatures was done against his known signatures. The respondent thus urged the Court to find that the letter of resignation and discharge voucher were indeed, signed by the claimant. On this issue, the respondent referred to the case of *Gitau & another v Republic* [1989] eKLR and the provisions of section 48 of the *Evidence Act*.

### Analysis and determination

46. I have considered the pleadings on record, the evidentiary material placed before me and the rival submissions, and the following issues stand out for determination:
  - i. Whether the claimant was in continuous service of the respondent from April 6, 1994 upto January 13, 2018;
  - ii. Whether the claimant was terminated or absconded duty;
  - iii. If terminated, was the claimant's termination unfair and unlawful?
  - iv. Is the claimant entitled to the reliefs sought?



## Continuous service?

47. It is the claimant's case that he served the respondent from April 6, 1994 upto January 13, 2018 when he was terminated from employment. The respondent opines otherwise and maintains that the claimant was employed in 1994 and served upto December 29, 2004 when he resigned from employment. That he was later re-engaged in March, 2006 upto January 13, 2018. In support of its position, the respondent exhibited a letter dated December 29, 2004, through which the claimant allegedly tendered his resignation. The letter reads in part:

“I do hereby wish to submit my resignation from the company (Twiga Car Hire & Tour) this is with effect from 29 Dec 04.... However, given another opportunity, I would be very much wiling to work with you on new terms and conditions.”

48. The respondent further exhibited a Discharge Voucher dated December 29, 2004 through which the claimant allegedly confirms receiving the sum of Kshs 13,750.00 being his final dues.

49. In his Reply to the respondent's Memorandum of Response, the claimant denied resigning from the respondent's employment as alleged. Consequently, he termed the respondent's exhibits as forgery and fake.

50. It is worth noting that despite the claimant's assertions, he did not prove that the documents produced by the respondent were an act of forgery.

51. Having alleged that the respondent's exhibits confirming his resignation, were an act of forgery, it was incumbent upon the claimant to prove the same. It is trite law that “he who alleges must prove”.

52. In this regard, I find the following expression from the Court Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, to be apt:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742 wherein the court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

53. And further, in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR, the Learned Judges of the Court of Appeal reckoned thus:

“As the appellant was the one claiming that the documents were forgeries, the burden was on her to prove that the documents were not authentic government documents as claimed by the respondent. Section 107 of the *Evidence Act*, provides as follows: -

- (1) “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

54. Turning to the instant case, the claimant did not lead any evidence to discount the authenticity of his signatures as appearing in the letter dated December 29, 2004 and in the discharge voucher.
55. On its part, the respondent engaged a document examiner who testified as RW2. In his report which was exhibited before Court, RW2 stated that he examined and compared the handwriting and signatures in the said exhibits and concluded that they were by the same author.
56. In the circumstances, I do not find any reason to doubt the authenticity of the respondent’s exhibits and I am enjoined to consider them in evidence.
57. Besides the allegations of forgery, the claimant did not adduce evidence in any form or manner to prove that he was in the respondent’s employment between December 29, 2004 upto March, 2006 when he was re-engaged. Indeed, evidence in the form of a pay slip over that period would have sufficed.
58. Taking into consideration the above, it is my finding that there was a break in the claimant’s service with the respondent from December 29, 2004 upto March, 2006. Consequently, his service cannot be said to have been continuous from April 6, 1994 upto 1January 3, 2018.

#### **Abscondment of duty or Termination?**

59. The claimant has stated that he was terminated from employment with effect from January 13, 2018 when he refused to sign a letter by the respondent to the effect that he did not have any outstanding claim in respect of leave days against the respondent.
60. He further averred that he reported the matter to the Nairobi County Labour Office who in turn served the respondent with a letter. On record, is a letter referenced “Lock out of Mr Twalib Abdala from performing his duties by Twiga Car Hire and Tours Ltd” from the Labour Commissioner to the County Labour office, Nairobi requesting for investigations into the claimant’s complaints.
61. Beyond this letter, there is no evidence as to what transpired thereafter and specifically, whether investigations into the claimant’s complaints were undertaken by the County Labour Office.
62. The claimant further stated that he sought assistance of the Labour & Wages Advisory Agency which demanded payment of his terminal dues. In this regard, the claimant exhibited a letter dated January 25, 2018 from a Disputes Officer of the said Labour & Wages Advisory Agencies, which reads in part:

“Re: Claim Of Twalib Nthiwa Abdallah Under *Employment Act* Cap No. 226 & 299 Laws Of Kenya

The above-mentioned person states that he was employed by you as a Tour guide/ driver from April 6, 1994 to January 13, 2018 when you terminated his services and failed to settle his final dues as follows...”

63. It is apparent that upon receiving the claimant’s demand letter, the respondent reverted through its letter dated January 25, 2018 addressed to the Disputes Officer of the said Agency as follows:

“Re: Twalib Nthiwa Abdallah

We are in receipt of your letter dated January 25, 2018 under reference No TNA.241/2018.



We are surprised that your client Twallib Abdalla who is also our staff states that we have terminated his services.

Twallib has been on leave from December 1, 2017 and reported back to the office on January 10, 2018. He reported on duty upto January 13, 2018. Since then he has not showed up on duty until this morning when he personally brought us your letter.

The company has no intention of sacking him but should he feel that he does not want to work for us anymore, then kindly advise him to follow the labour law procedure of informing us in writing about this resignation and give us one month notice as stipulated any the law.

Thank you and best regards”

64. In a further letter dated February 5, 2018, the respondent addressed the Disputes Officer of the Labour & Wages Agency as follows:

“Re: Twallib Nthiwa Abdalla

We are in reference to our letter dated January 25, 2018 in regards to the above person. Kindly note that Twallib Nthiwa Abdalla has still not reported back to work and we are now assuming that he has absconded duty.

Thank you and best regards.”

65. What manifests from the reproduced correspondence, is that in the respondent’s mind, it had not terminated the claimant. Indeed, in the letter of January 25, 2018, it acknowledges the claimant as its employee and is categorical that it had no intention of terminating his services.
66. Additionally, in the follow up letter of February 5, 2018, the respondent indicated its concern that the claimant was yet to report back to work. One therefore, wonders where the claimant got the idea that he had been terminated, as the correspondence exhibited states otherwise.
67. Assuming there had been miscommunication between the claimant and the respondent on January 13, 2018 or prior to, one wonders why he did not report for duty following the respondent’s letter of January 25, 2018, which was categorical, that his employment had not been terminated. To this end, I cannot help but conclude that the claimant was not keen on reporting back to work.
68. It is further worth noting that pursuant to section 47(5) of the *Employment Act*, the claimant had the onus to prove that indeed, his employment had been terminated by the respondent. I will reproduce the said provision thus:

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”

69. In expounding the import of the above statutory provision, the Court of Appeal had this to say in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR:

“So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the



reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

70. Under cross examination, the claimant testified that he was verbally terminated from employment. As such, there is no letter of termination on record. In addition, the correspondence emanating from the respondent’s end confirm that it still considered the claimant its employee and he was welcome to report back to work. Connected to this, the claimant did not state, let alone suggest that he reported to work after January 25, 2018 and was turned away.
71. In light of the above, it is apparent that the claimant was not terminated from employment but instead, opted to keep away from duty. In other words, he has failed to discharge his evidential burden by proving that he was terminated from employment.
72. Having found as such, the question as to the fairness and lawfulness of the claimant’s termination does not arise as it falls by the wayside.
73. I now turn to consider whether the claimant is entitled to any of the reliefs sought.

## **Reliefs**

### **Notice pay**

74. The claimant has asked for payment of one month’s salary in lieu of notice. Having found that he was not terminated from employment, this claim cannot be sustained. Salary for 13 days worked in January, 2018
75. The respondent admitted that it did not pay the claimant’s salary for the month of January, 2018 as he absconded duty. It further confirmed that the claimant worked upto January 13, 2018, which was shortly after he had resumed from leave. In this regard, the claimant is entitled to his salary for the 13 days as he was either at work on some days and on approved leave, on the other days.

### **Leave days**

76. The claimant is seeking against the respondent, a sum of Kshs 287,499.00 being 229 leave days balance. The respondent has denied this claim and exhibited a summary of the leave days taken by the claimant covering the period starting 2008 upto 2018. Notably, the claimant did not dispute the said leave record.
77. From the said leave summary, it is evident that the claimant took leave every year from 2008 upto 2018 and indeed exceeded the statutory 21 days. In fact, at the time the claimant alleges to have been terminated from employment, he had just resumed from leave. Therefore, his version that he was not allowed to take leave, for 23 years does not sound plausible.
78. In any event, pursuant to the provisions of Section 28 (4) of the Employment Act, the claimant cannot claim leave for 23 years. The said provision is couched as follows:

“The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.”



79. In this regard, the claimant is only entitled to claim outstanding leave, for 18 months preceding his exit from employment. As I have found that the respondent has proved that the claimant proceeded on leave during the relevant period, including the 18 months preceding his exit from employment, his claim to that extent collapses.

### **Overtime, Rest Days and Public Holidays**

80. The claimant prays for the sum of Kshs 2,392,000.00, Kshs 106,153.00 and Kshs 243,269.00 being compensation for overtime, rest days and public holidays worked respectively. At the outset, it is worth pointing out that these claims have not been particularized and proved. These being specific claims, the claimant ought to have specially pleaded and proved the same. In this respect, the claimant ought to have particularized the period he claims to have worked overtime and during his rest days as well as public holidays and justified the same.

81. My finding is fortified by the determination in the case of *Rogoli Ole Manadiegi v General Cargo Services Limited* [2016] eKLR, where the Court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

82. Applying the above determination to the instant case, I will similarly hold that the claimant has failed to prove his claim with regards to overtime, rest days and public holidays hence the claim flops to that extent.

### **Severance pay**

83. The claimant has prayed for severance pay in the sum of Kshs 331,730.00. It is imperative to note that severance pay relate to termination from employment following a redundancy, which was not the case herein. On this score, I find it imperative to clarify at this point that severance pay is payable under section 40(1) (g) of the *Employment Act* upon an employee’s exit on grounds of redundancy. On this account, this relief cannot be sustained.

### **Orders**

84. In the final analysis, I dismiss the claim substantially and only award salary for 13 days worked in respect of January 2018, being Kshs 10,833.33. This figure shall be subject to interest at court rates from the date of judgement until payment in full.

85. As the claim has substantially failed, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**



For Claimant Mr. Babu

For the Respondent Ms. Babu

Court assistant Abdimalik Hussein

## **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 March 15, 2020 and subsequent directions of April 21, 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**

