



**Omwenga v Collindale Security Limited (Cause 760 of 2018)
[2023] KEELRC 441 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 760 OF 2018
JK GAKERI, J
FEBRUARY 21, 2023**

BETWEEN

DOMINIC ATURA OMWENGA CLAIMANT

AND

COLLINDALE SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on 21st May, 2018, amended on 18th November, 2018.
2. The Claimant avered that he was employed by the Respondent as a security guard on 6th March, 2012 when he entered into a contract and served as a night watchman from 6 pm to 6 am and was underpaid contrary to the Regulation of Wages (General) Amendment Orders, 2011, 2012, 2013, 2015 and 2017.
3. It is the Claimant's case that his lawful salary;
 - (i) From 1st May, 2011 the salary was Kshs.8,463/=.
 - (ii) From 1st May, 2012 the salary was Kshs.9,571.65
 - (iii) From 1st May, 2013 the salary was Kshs.10,911.70
 - (iv) From 1st May, 2015 the salary was Kshs.12,221.10
 - v() From 1st May, 2017 the salary was Kshs.14,420.90
4. The Claimant's case is based on the allegations that on 28th September, 2017, he tendered his resignation letter allegedly because of unfavourable working conditions and requested payment of his dues. The resignation was accepted via letter of even date. That on 31st October, 2017, he went to the Respondent's office, cleared and was compelled to sign the certificate of clearance without reading it and was given a cheque of Kshs.12,622.00 as final dues.



5. That he raised the issue of outstanding underpayments of Kshs.288,185.91 as well as service pay of Kshs.51,896.25 which concerns were ignored.
6. The Claimant prays for;
 - (a) Underpayment of Kshs.288,185.91
 - (b) Outstanding overtime Kshs.552,102.89.
 - (c) Service pay of Kshs.51,896.25.
 - (d) Certificate of service.
 - (e) Costs of this suit.
 - (f) Interest at court rates on (a), (b), (c) and (e) above from the day of filing of the suit until payment in full.

Respondent's case

7. The Respondent's Memorandum of Reply filed on 30th July, 2018 denied all the averments by the Claimant and prayed for dismissal of the suit with costs. The amended response filed on 4th February, 2019 adopted a similar approach.

Claimant's evidence

8. The Claimant's statement, which he adopted as evidence-in-chief rehashes the contents of the statement of claim.
9. On cross-examination, the Claimant confirmed that he had not filed the letter of appointment and had no evidence that he requested for a copy. He testified that he was engaged as a night guard but had no evidence to show.
10. He admitted that he gave a resignation notice, cleared and was partially paid.
11. On re-examination, the witness testified that his contract of employment was in his file held by the Respondent and used to sign the OB on reporting to work. That he signed the Clearance Certificate to get the cheque of Kshs.12,622/=.

Respondent's evidence

12. RWI, Caroline Odhiambo testified that she was the Human Resource Manager of the Respondent and confirmed that the Claimant was their employee from 6th March, 2012 until he resigned on 28th September, 2017 and the Respondent accepted the resignation and was paid final dues after signing the Clearance Certificate.
13. It was her testimony that the Claimant refused to collect the certificate of service.
14. She testified that all NSSF contributions were remitted as required by law as evidenced by the documents on record and the Claimant had no pending leave days.
15. On cross-examination, the witness confirmed that the Claimant was employed as a day security guard working from 8.00 am to 5.00 pm and his salary was compliant with the Regulation of Wages Orders though in 2012 he was underpaid by Kshs.86 per month.



16. That as at the date of resignation, his salary was Kshs.10,200/= while the minimum wage for a day guard was Kshs.12,926.55.
17. It was her testimony that the Claimant did not work for extra hours and if he worked on public holidays, he was compensated.
18. It was her further testimony that the Claimant was given a copy of the employment contract.

Claimant's submissions

19. According to the Claimant, the issues for determination were underpayment of the Claimant, overtime hours worked and reliefs.
20. On underpayment, it was submitted that the Claimant was entitled to earn at least the minimum wage as per the Regulation of Wages (General) Orders in force.
21. Reliance was made on the provisions of Section 48(2) of the *Labour Relations Act* and the decision in *Kathra Hussein Noor & another v Kaderdina Hajee Essak Ltd* [2016] eKLR to underline the essence of minimum wage and urge that the Respondent contravened the operative Regulation of Wages Orders.
22. It was additionally submitted that housing allowance was pegged at 15% of the basic salary.
23. On working hours, it was submitted that the Claimant worked overtime without pay.
24. That according to the Claimant's terms of employment, he was required to work for 12 hours per day at 72 hours per week and was thus entitled to payment for overtime.
25. That the Claimant was neither paid for overtime nor public holidays and was claiming Kshs.552,102.89 as prayed.
26. The decision in *Evans Katiezo Aligiulab v Eldomatt Wholesale & Supermarket Ltd* [2016] eKLR was relied upon in support of the submission.
27. As regards the reliefs claimed, the Claimant's counsel submitted that the Claimant was entitled to the amount claimed for underpayment, overtime and service pay and certificate of service.

Respondent's submissions

28. The Respondent identified a singular issue for determination, namely; whether the Claimant was entitled to the reliefs sought.
29. The claim for service pay was discounted on the ground that the Claimant was a member of the NSSF and contributions were being remitted and was thus disqualified by the provisions of Section 35(6)(d) of the *Employment Act*, 2007.
30. The Court of Appeal decision in *Next Generation Communication Ltd v George M. Kirangaru* [2019] eKLR was relied upon to reinforce the submission.
31. On overtime, it was submitted that since the Claimant worked as a day guard from 8.00 am to 5.00 pm, he was not entitled to overtime allowance and he adduced no evidence to show that he worked for extra hours.
32. The court was urged to find the claim baseless.
33. Reliance was made on the provisions of Section 107 and 108 of the *Evidence Act* to urge that he who alleges must prove the allegations and the Claimant had not proved that he worked for extra hours.



The decision in *Protus Wanjala Mukite V Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR was relied upon to buttress the submission on proof.

34. As regards certificate of service, the Respondent submitted that after the Claimant cleared, he was paid terminal dues and was given a certificate of service as evidenced by the clearance certificate which the Claimant signed.
35. As regards underpayment, it was urged that the Claimant was on a fishing expedition to unjustly enrich himself from a judicial process on the ground that he was employed as a day guard but had without adducing evidence opted to claim for underpayment as a night guard.
36. Reliance was made to the decisions in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR and *National Bank of Kenya Ltd v Pipelastic (K) Ltd and another* [2001] eKLR to urge that the court cannot rewrite contracts between the parties which binds them unless coercion, fraud or undue influence was pleaded.
37. It was further submitted that the Claimant admitted on cross-examination that he had no evidence that he was a night guard and had not filed the letter of appointment or other evidence to validate his employment as a night guard and the Respondent had provided the contract of service he had signed in 2012.
38. Counsel submitted that the Claimant was relying on the salary for a night guard under the Regulation of Wages Orders annexed.
39. That the Claimant had not pleaded underpayment as a day guard.
40. The decisions in *World Explorers Safaris Ltd v Cosmopolitan Travel Ltd & another* [2021] eKLR and *MNM v DNMK & 13 others* were relied upon to urge that issues should be raised on the pleadings.
41. The court was urged to dismiss the suit.

Determination

42. The singular issue for determination is whether the Claimant is entitled to the reliefs sought.
43. It is not in dispute that the Claimant was employed by the Respondent as a security guard on 6th March, 2012 and although the Claimant testified that he was engaged as a night guard, he tendered no scintilla evince to prove the allegation. But more significantly, he admitted that although he had no copy of the contract of service, the same was in his file maintained by the Respondent. In other words, the Claimant was telling the court that he was aware that indeed there was a document and the Respondent furnished the document which the Claimant signed on 6th March, 2012, the day he was employed as a day shift reliever security guard working from 8.00 am – 5.00 pm.
44. The Claimant did not disown the Letter of Employment which he authenticated on every page by his signature. In addition, RWI confirmed on cross-examination that the Claimant was given a copy of the letter of appointment.
45. Relatedly, the Claimant adduced no evidence of when his employment changed from day to night guard including where he was stationed.
46. As correctly submitted by the Respondent's counsel, he who alleges must prove the allegation. It was the obligation of the Claimant to establish that he was employed and served the Respondent as a night guard. The provisions of Section 107, 108 and 109 of the *Evidence Act* are explicit on the burden of proof as is the decision in *Protus Wanjala Mukite v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (*Supra*).



47. From the evidence on record, it is the finding of the court that the Claimant has on a balance of probability failed to prove that he was employed by the Respondent as a night security guard from 6th March, 2012.
48. Having found that the Claimant was a day security guard, I will now proceed to determine how the Claimant left employment and his entitlement to the reliefs.
49. Again, it is not in contest that the Claimant left employment by voluntary resignation via letter dated 29th September, 2017. The letter made reference to unfavourable working conditions which were neither pleaded nor testified about other than underpayment which featured prominently in the pleadings.
50. The Claimant did not allege that he was constructively dismissed or the Respondent's conduct itself precipitated the resignation.
51. In sum, the Claimant did not allege unlawful termination of employment and the reliefs attendant to unlawfully termination of employment are therefore not available to the Claimant other than accrued rights. (See *Edwin Beiti Kipchumba v National Bank of Kenya Ltd* [2018] eKLR and *Herbert Wafula Waswa v Kenya Wildlife Services Ltd* [2020] eKLR.
52. The parties had a mutual separation as evidenced by the contents of the Claimant's letter whose only request was payment of final dues and he admitted payment on cross-examination as evidenced by the clearance certificate which he signed on 31st October, 2017.
53. The allegation that he signed the certificate without reading so as to get the cheque remained an allegation as it was not substantiated. The Claimant neither alleged coercion or undue influence or misrepresentation of its contents. At common law, signature *prima facie* means acceptance (*Lestrangle v Graucob* [1934] 2 K.B. 394).
54. However, the Clearance certificate as structured did not waive the Claimant's right to sue the Respondent for other entitlements, if any. (See *Coastal Bottlers Ltd v Kimathi Mitbika* [2016] eKLR.
55. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

(i) Underpayment of Kshs.288,185.91

56. Surprisingly, neither the original statement of claim nor the amended version sets out or discloses the Claimant's salary when he was employed or at any other point thereafter.
57. The payslips provided by the Claimant in support of the claim reveal that in November 2013, the gross salary was Kshs.8,652/= per month, as well as in February, 2014. In March 2017, the salary was Kshs.10,000/= and by August, 2017 it had risen to Kshs.11,200/=.
58. Significantly, the payslips also reveal that the component of housing allowance was included in the gross salary and none was pleaded or proved as outstanding.
59. As regards the prayer for underpayment, the Respondent argued that he Claimant had not pleaded underpayment as a day but as a night guard and the alleged underpayment was thus irrecoverable. That the Regulation of Wages (General) Orders relied upon prescribe the minimum wage for night guards not day guards. I disagree.
60. The Regulation of Wages (General) Orders promulgated by the Minister pursuant to the provisions of the *Labour Relations Act*, 2007 evidently provide minimum wage for both day and night guards. For



instance, under the Regulations of Wages (General) Order, 2012 effective 1st May, 2012, the minimum wage for a day guard in Nairobi was Kshs.8,599.80 and night guard at Kshs.9,571.65.

61. Having admitted that the Claimant was its employee, it was immaterial whether he was a day or night guard for purposes of the minimum wage and underpayment violated the Claimant's right to fair labour practice under Article 41 of the *Constitution* of Kenya, 2010.
62. Moreover, RWI admitted on cross-examination that under the Regulation of Wages (General) Order, 2011, the minimum salary for a day guard was Kshs.7,586/= and the Claimant's salary was Kshs.7,500/=, an underpayment of Kshs.86/= per month upto 30th April, 2012 and by August, 2017, the salary had risen to Kshs.10,200/= while the prescribed minimum wage was Kshs.12,926.55 per month an underpayment of Kshs.2,726.55 per month effective 1st May, 2017.
63. In addition, effective 1st May, 2013 to 30th April, 2015, the prescribed minimum wage was Kshs.9,780.95 per month while the Claimant's salary was Kshs.7,652.00, an underpayment of Kshs.2,128.95 per month.
64. Effective 1st May, 2015, the minimum wage was Kshs.10,954.70 per month and the Claimant's salary was Kshs.7,652/=, an underpayment of Kshs.3,302.70 and from 1st May, 2017 while the prescribed wage was Kshs.12,926.55, the Claimant's salary stood at either Kshs.9,000/= or 10,200/= which signified an underpayment.
65. The foregoing summary demonstrates beyond peradventure that the Respondent underpaid the Claimant throughout the period he was its employee and is thus entitled to the outstanding salary as it accrued per month.
66. However, the amount outstanding is not the sum prayed for by the Claimant's counsel as the computation was based on the salary of a night guard yet the Claimant was a day guard as found elsewhere in this judgement.

(ii) Outstanding overtime pay, Kshs.552,102.89

67. Having found that the Claimant was employed by the Respondent as a day guard and worked from 8.00 am to 5.00 pm as evidenced by the contract of service he executed which did not disown or allege that it was vitiated by duress, undue influence, mistake or misrepresentation, the claim for overtime pay was unsupported by evidence, the same is unsustainable and is accordingly dismissed.

(iii) Service pay, Kshs.51,896.25

68. The court is in agreement with the Respondent Counsel's submission that the Claimant is not entitled to service pay by virtue of the provisions of Section 35(6)(d) of the *Employment Act*, 2007 which disqualifies employees who are members of the NSSF from service pay.
69. This finding is justified on the premise that documentary evidence on record show that the Respondent deducted and remitted NSSF contributions of its employees including the Claimant and the Respondent's witness testified as much.
70. Similarly, copies of the payslips availed by the Claimant show that NSSF deductions were made from the Claimant's salary.

The prayer is disallowed.



(iv) Certificate of service

71. Although the Claimant testified in court that he had not collected the certificate of service, RWI testified that he was given the certificate of service as evidenced by the Clearance Certificate he signed.

72. The court is persuaded that the Respondent discharged its obligation under Section 51 of the Employment Act, 2007.

The prayer is declined.

73. In the upshot, judgement is entered for the Claimant in the following terms;

- (a) Outstanding underpayment from date of employment till the date of resignation on 28th September, 2017.

The underpayments shall be computed by the counsels for the parties based on the basic pay and the operative Regulation of Wages (General) Orders, 2011, 2012, 2013, 2015 and 2017.

The agreed computation shall be filed for adoption by the court within 30 days from the date hereof.

- (b) In light of the partial success, the Claimant is awarded 50% of the costs.

- (c) Interest at court rates from date of adoption of the computation till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

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 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.

DR. JACOB GAKERI

JUDGE

