



REPUBLIC OF KENYA



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**Musaki v Vickers Security & another (Appeal E056 of 2022)
[2023] KEELRC 982 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 982 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E056 OF 2022**

**AK NZEI, J
APRIL 20, 2023**

BETWEEN

JOSEPH SIVA MUSAKI APPELLANT

AND

VICKERS SECURITY 1ST RESPONDENT

GRAIN BULK HANDLERS 2ND RESPONDENT

*(being an appeal from the judgment of Hon. Nabibya M, Principal magistrate
delivered on 4th August 2022 in Mombasa CM – ELR case No. 185/2021)*

JUDGMENT

1. The Appellant herein was the claimant in Mombasa CM ELR Case No. 185 of 2021 whereby vide a detailed Memorandum of claim dated March 22, 2021 and filed in Court on March 24, 2021, he sued the Respondents herein and pleaded, *inter-alia*:
 - a. that vide an oral contract of employment made on April 5, 2014, the 1st and the 2nd Respondents which, are bodies corporate, employed the Appellant as a day time watchman with his work station at the 2nd Respondent’s employment premises.
 - b. that during the subsistence of the subject employment, the Appellant lived in Likoni Constituency in Mombasa County, which is 7 kilometers from the 2nd Respondent’s employment premises.
 - c. that contrary to Section 9 of the Employment Act 2007, the 1st and 2nd Respondents did not reduce the subject contract into writing and that accordingly, the same was governed by Section 3(6) and 8 of the Employment Act, Sections 48 and 53 of the Labour Relations Act, Regulation of Wages (Protective Security Services) Order 1998 and Regulation of Wages (General) order //



paragraph (2) thereof where rates and conditions set forth in the Regulation of Wages (Private Security Services are less favourable).

- d. that the Appellant worked impeccably for the 1st and 2nd Respondents until sometimes on October 31, 2020 when the Appellant retired on medical grounds.
 - e. that the Appellant tendered his resignation by issuing 3 months' notice to the Respondents vide a letter dated August 10, 2020, which the Respondents accepted and issued the Appellant with a certificate of service on October 3, 2020 after handover.
 - f. that the Respondents subjected the Appellant to pay below the statutory minimum remuneration and working hours beyond the statutory limit.
 - g. that contrary to Section 15 of the *Employment Act*, the Respondents failed to inform the Appellant of his rights under the subject employment and denied him statutory allowances including house allowance, leave travelling allowance, transport allowance and clocking allowance under paragraph 5,13,18, and 26 of the Regulation of Wages (Protective Security Services) Order 1998.
2. The Appellant specifically pleaded and demonstrated in detail that during the period of employment, he was paid monthly salary of ksh. 11,000, which amount was below the minimum statutory wage under the relevant Minimum Wage Orders and that total salary underpayment amounted to ksh 105,705.60 while unpaid house allowance stood at ksh 314,511.61.
 3. The Appellant set out his claim against the Respondents as follows:-
 - a. Kshs 105,705.60 on account of salary underpayment.
 - b. Ksh 314, 511.61 on account of unpaid house allowance
 - c. Ksh 288,120 on account of public transport allowance.
 - d. Ksh 24,1010 on account of unpaid clocking allowance.
 - e. Ksh 21,024 on account of unpaid tallying guard allowance.
 - f. Ksh 1,160,906.40 on account of unpaid overtime.
 - g. Ksh 209,606.40 on account of unpaid wages for work done during public holidays.
 - h. Ksh 115,598.70 on account of unpaid wages for work done during annual leave days.
 - i. Ksh 7,700 on account of unpaid leave travelling account.
 - j. Ksh 12,862.50 on account of unpaid monies for purchase of good quality bar soap.
 - k. Ksh 77,392.35 on account of gratuity.
 - l. service pay
 - m. costs of the suit and interest.
 4. Documents filed together with the memorandum of claim included the Appellant's written witness statement dated April 6, 2021 and an evenly dated list of document's listing Minimum Wage Regulation Orders (guidelines) for the years 1998,2013,2015,2017 and 2018 among other documents.
 5. The 1st Respondent defended the Appellant's suit vide a Response to the Memorandum of Claim dated April 26, 2021 whereby it admitted having employed the Appellant as a security guard on April



- 5, 2014, earning a gross salary of ksh 11,000, and having deployed him to work at the 2nd Respondent's premises. The 1st Respondent further admitted the Appellant's averments that the Appellant had tendered his resignation vide a letter dated August 10, 2020 and that the 1st Respondent had issued him with a certificate of service on October 3, 2020.
6. The 1st Respondent however denied the Appellant's claim and specifically pleaded that the Appellant was paid ksh 11,000 monthly as per the terms of his employment contract and that the Appellant went on annual leave during the course of his employment.
 7. Documents filed by the 1st Respondent together with its response to the memorandum of claim included a written witness statement of one Said Buyu dated April 26, 2021 and an evenly dated list of documents listing the Appellant's letter of appointment (dated April 5, 2014), the Appellant's resignation letter dated August 10, 2020 and the Appellant's leave application forms for the years 2016,2017,2018 and 2019, among other documents.
 8. On its part, the 2nd Respondent defended the Appellant's suit vide a Response to Statement of Claim dated April 8, 2021 and categorically denied the Appellant's claim and denied having employed the Appellant.
 9. the 2nd Respondent pleaded to having entered into a security guarding services contract with the 1st Respondent on 15th July 2011 whereby the 1st Respondent agreed to deploy security guards to the 2nd Respondents' commercial premises located along Beira Road at Port Shimanzi Mombasa. The 2nd Respondent further pleaded that it was a term of the said contract that whereas the 2nd Respondent was to avail the security guards the necessary infrastructure including toilets and guard shades, the 1st Respondent would pay the security guards salaries and allowances on due dates and would handle all other staff welfare matters.
 10. Other documents filed by the 2nd Respondent were a written witness statement of one Saira Alibhai dated April 7, 2021 and a list of documents dated April 8, 2021. Documents listed on the 2nd Respondent's said list of documents' included a security guarding service contract (between the 1st and 2nd Respondents) dated July 15, 2011 and a company particulars of both the 1st and the 2nd Respondents.
 11. At the trial before the trial Court, the Appellant adopted his filed witness statement (as his testimony) and produced in evidence the document's listed by him. Cross-examined, the Appellant testified that his employer was the 1st Respondent who also paid his salary and that he took his resignation letter to the 1st Respondent. That he used to take one day off, that he was given leave once and that his home was not being paid for.
 12. The 1st Respondent called one witness (RW-2) who adopted his filed witness statement as his testimony and produced in evidence the document's referred to in paragraph 7 of this judgment. Among the document's produced by the 1st Respondent was the Appellant's letter of appointment and the witness told the Court that Appellant had agreed to be paid ksh. 11,000.
 13. Cross-examined by Counsel for the Appellant, the 1st Respondent's said witness testified that the Appellant was paid ksh 11,000 despite the wage regulation orders. The witness further stated that the Appellant was not being paid house allowance and transport allowance. The witness further stated:-
 - a. that the Appellant was working 12 hours a day.
 - b. that the Appellant was paid for public holidays if he was on duty.
 - c. that NSSF was paid for the Appellant



- d. that the 1st Respondent had a contract with the Appellant and that the case in Court was not related to the 2nd Respondent.
14. The 2nd Respondent called one witness (RW-1) who adopted her filed witness statement as her testimony and produced in evidence the 2nd Respondent's documents referred to in paragraph 10 of this judgment. The witness testified that the 2nd Respondent did not know the Appellant; who had testified that he was employed by the 1st Respondent.
15. Having heard parties to the suit before it, the trial Court delivered its judgment on August 4, 2022 and dismissed the Appellant's claim against the 2nd Respondent. The Appellant's claim against the 1st Respondent was allowed only in respect of salary underpayment and unpaid house allowance as follows:-
- a. Underpaymentksh 105,706.60
 - b. House allowanceksh 123,783.60
 - c. Costs and interest.
16. Aggrieved by the trial Court's judgment, the Appellant filed the present appeal in this Court vide a memorandum of appeal dated August 25, 2022 and filed on August 31, 2022; and subsequently amended with the Court's leave. The Appellant set forth the following grounds of appeal:-
- a. that the learned magistrate erred in law and in fact by failing to consider that the provisions of the Regulations of Wages (Protective Security Services) Order 1998 provided for the minimum terms of the subject employment and may not be varied by writing as stipulated under Section 48(1) of the *Labour Institutions Act*, 2007 as read with Order 2(b) of the Regulations of Wages (Protective Security Services) Order, 1998.
 - b. the learned trial magistrate erred in law and in fact by failing to consider and/or distinguish the applicability in casu of the binding authority of *Kathra Hussein Noor & Another vs Kadardine Hajee Essak Ltd* [2016] eKLR, relied on by the claimant, where it was held that "if the contract of employment provides for payment below the minimum rates, the minimum rates under the wages order are inserted in the contract in substitution of those inferior terms"
 - c. the learned magistrate erred in law and in fact by dismissing with costs the Claimant's suit against the 2nd Respondent.
 - d. the learned magistrate erred in law and in fact by awarding a paltry ksh 123,783.00 on account of unpaid house allowance.
 - e. the learned magistrate erred in law and in fact by failing to consider the Appellant's prayer for minimum public transport allowance.
 - f. the learned magistrate erred in law and in fact in dismissing the Appellant's prayer for tallying guard allowance for being too generalized.
 - g. the learned magistrate erred in law and in fact by dismissing the Appellant's prayer for overtime for being "too generalized."
 - h. the learned magistrate erred in law and in fact by dismissing the Appellant's prayer for compensation for work done during public holidays for failure to produce any work records as well as failing to call the Respondents to produce the same.



- i. the learned magistrate erred in law and in fact by failing to allow the prayer for gratuity on ground that it was not provided for in the appointment letter.
 - j. the learned magistrate erred in law and in fact by dismissing the prayer for annual leave under the auspices of the leave forms for the years 2014 to 2018 produced as the 1st Respondent's exhibits.
 - k. the learned magistrate erred by dismissing the prayer for leave travelling allowance.
 - l. the learned magistrate erred in law and in fact by rejecting the claim for monthly purchase of half a kilogram of good quality soap for being too general.
 - m. the learned magistrate erred in law and in fact by rejecting the prayer for unpaid clocking allowance.
 - n. the learned magistrate erred in law and in fact by rejecting the prayer for service pay.
17. This is a first appeal. A first appeal is by way of a re-trial. The duty of a first appellate Court is to re-evaluate, re-analyse and reconsider evidence adduced in the trial Court and to draw its own conclusion; bearing in mind that it did not see the witnesses testify and therefore giving allowance for that. It was stated as follows in the case of *Mursal & Another vs Manese* [2022] eKLR:-
- “A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another vs Associates Motor Boat Co Ltd & Another* [1968] E a 123 And In *Peters vs Sunday Post Ltd* [1958] E A page 424.”
18. Having stated that, and having considered the pleadings filed in the trial Court and evidence adduced by all the parties, issues that fall for determination, in my view, are as follows:-
- a. whether the Appellant was an employee of the 1st and the 2nd Respondents, or whether he was an employee of the 1st Respondent.
 - b. whether the Appellants is entitled to the reliefs sought in the trial Court.
19. All the grounds of appeal raised by the Appellant, save for the third ground, fall under the second issue above stated, and I will tackle them thereunder.
20. On the first issue, the Appellant pleaded that he was, vide an oral contract of employment made on April 5, 2014, employed by the Respondents as a day time watchman. While the 2nd Respondent denied having employed the Appellant, the 1st Respondent admitted, both in its pleadings and in evidence, that it employed the Appellant as a day time watchman vide a letter of appointment dated April 5, 2014. The 1st Respondent produced in evidence both the said letter of appointment, duly signed and finger-printed by the Appellant, and other employment document's i.e leave application forms for the years 2016,2017,2018 and 2019 and the Appellant's resignation letter dated August 10, 2020. The Appellant did not, either in his evidence or in his cross-examination of the 1st Respondent's witness, challenge the authenticity or validity of the said letter of appointment and employment documents.
21. The Appellant himself testified, under cross examination, that he was employed by the 1st Respondent. I find and hold that the Appellant was an employee of the 1st Respondent, and was never an employee



- of the 2nd Respondent. On that basis, I uphold the trial Court's dismissal of the Appellant's suit against the 2nd Respondent, but set aside the award of costs to the 2nd Respondent. That settles the 3rd ground of appeal.
22. On the second issue, and regarding the 1st and 2nd grounds of appeal, I do agree with the Appellant's submission that if a contract of employment provides for payments below the minimum rates, the minimum rates under the Wages Order are inserted in the contract in substitution of those inferior terms. This is the creed of the Court's decision in the case of *Kathra Hussein Noor & Another vs Kaderdina Hajee Essak Limited* [2016] eKLR (Rika, J).
23. The trial Court, though it did not specifically state so in its impugned judgment, seems to have taken cognisance of the aforesaid principle as it allowed the Appellant's claim for ksh 105,705.60 being salary underpayment during the Appellant's employment. I uphold the trial Court's award in that regard.
24. On the Appellant's claim for house allowance, which is the subject in the 4th ground of appeal, the 1st Respondent's witness (RW2) admitted, under cross-examination, that the Appellant was not paid house allowance. Payment of house allowance was the Appellant's statutory entitlement under Section 31(1) of the *Employment Act*. It matters not that the Appellant's contract of employment dated April 5, 2014 stated, as I have noted, that the Appellant's salary of ksh 11,000 was consolidated, as that amount, which the Appellant earned throughout his entire period of employment, was below the minimum wages stipulated in the various Wage Orders in force between 2014 and 2020.
25. The Appellant claimed a sum of ksh 314,511.61 and meticulously demonstrated calculation of the same in his pleadings, based on various Minimum Wage Orders applicable at different times during the period of his employment. Although the 1st Respondent did not offer any different mode or basis of calculating the Appellant's unpaid house allowance, the trial Court awarded the Appellant ksh 123,783.60. No reason was given by the trial Court as to why the full sum of ksh 314,511.61 claimed by the Appellant as unpaid house allowance, which in my view was proved on a balance of probability, was not awarded. The award of ksh 123,783.60 is hereby set aside, and is substituted with an award of ksh 314,511.61
26. On the 5th ground of appeal, the Appellant's claim for ksh. 288,120 being minimum public transport allowance was not considered by the trial Court. This was a non direction. In his amended memorandum of appeal filed in this Court, which is presented in detail, the Appellant referred to the Regulation of Wages (Protective Security Services) Order, 1998, whereby it is stated at paragraph 18 of the Order:-
- “Employers shall endeavor to assign work to guards or watchmen near their places of residence, but where it is not possible to do so, an employer shall either provide transport to and from the employee's places of work or pay them a minimum public transport allowance.”
27. The Appellant pleaded that he lived seven (7) kilometers from his place of work, and was not provided with transport or paid minimum transport allowance. He pleaded that he spend ksh. 120 daily on matatu charges to and from his place of work. The Respondent did not dispute this position by demonstrating that the Appellant was either assigned duties near his residence, was provided with transport to and from work or was paid a minimum transport allowance. The period of the Appellant's employment by the 1st Respondent is not in dispute.



28. The 1st Respondent did not offer a different figure as being the minimum public transport allowance payable to the Appellant. I allow the claimed sum of ksh 288,120.
29. On the 6th ground of appeal, the trial Court disallowed the claim for ksh 21,024 being tallying guard allowance. I uphold this finding as the Appellant did not present any evidence to show that his duties as a guard/watchman included checking the contents of goods – carrying vehicles and comparing the contents thereof with any inventories as pleaded by him.
30. On the 7th ground of appeal, the trial Court disallowed the Appellant’s claim for ksh 1,160,906.40 being unpaid overtime. In the trial Court’s view, the claim was too generalized. The Appellant pleaded at paragraph 6 of his amended statement of claim that his work shift began at 0600H and ended at 1800H, making a total of 72 hours spread over 6 days of the week. The 1st Respondent admitted this pleading in paragraph 2 of its response to the memorandum of claim. The 1st Respondent’s witness (RW-2) admitted, under cross-examination, that the Appellant was working for 12 hours a day.
31. In paragraph 21 of the Appellant’s statement of claim, the Appellant pleaded and demonstrated that he worked for 6,430 hours on normal working days whereon ksh 581,786.40 was payable; and pleaded that he worked for 4,800 hours on rest days whereon ksh 579,120 was payable.
32. It is to be noted that the Appellant pleaded that he worked for six days in a week, and spoke of one off day in his evidence in Court. Section 27(2) of the *Employment Act* 2007 provides that an employee shall be entitled to at least one rest day in every period of seven days. Based on the Appellant’s pleadings and evidence in Court, I find and hold that the Appellant worked for six days in a period of seven days, and that the issue of him having worked extra hours on rest days does not arise. The claim for ksh. 579,120 being payment for extra hours worked on rest days is disallowed.
33. The claim for ksh 581,786.40 being payment for extra hours worked on normal working days was, in my view, proved on a balance of probability. The same is allowed.
34. On the 8th ground of appeal, the Appellant claimed ksh 209,606.40 on account of unpaid wages for work done on public holidays. This claim was denied by 1st Respondent. The claim, being a claim in the nature of special damages, and though pleaded, was not proved. The Appellant did not adduce any form of evidence to show that he worked on public holidays, on what particular public holidays he worked, the specific dates and the rates of wages payable on each of those dates, which are alleged to be spread over the entire period of the Appellant’s employment. It was held by the Court of Appeal as follows in *Rogali Manadiege vs General Cargo Limited* [2016] eKLR:-

“it is true that he employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime 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 worked on public holidays...he did not justify the global figure claimed in overtime showing specifically how it was arrived at...”
35. The claim for gratuity as stated in the 9th ground of appeal was disallowed by the trial Court on ground that the same was not provided for in the letter of appointment. I uphold this finding.
36. On the 10th ground of appeal, the Appellant claimed ksh. 115,598.70 on account of unpaid wages for work done during annual leave days. The trial Court dismissed the claim. The 1st Respondent produced in evidence duly executed leave application forms, duly signed by the Appellant for the years 2016,



2017, 2018 and 2019, whereby the Appellant is shown to have taken thirty calendar days' leave. The Appellant did not challenge the authenticity or validity of the said documents in his evidence. The leave form for the year 2019 shows that the Appellant had no remaining leave days as at May 4, 2019. I uphold the dismissal of the annual leave claim.

37. The claim for leave travelling allowance was dismissed by the trial Court, this despite the fact that the 1st Respondent did not demonstrate that the same had been paid to the Appellant. Paragraph 13 of the Regulation of Wages (Protective Security Services) Order, 1998 provides:

“After each period of twelve months continuous service with an employer, an employee shall be paid one thousand one hundred shillings travelling allowance when proceedings on leave.”

38. The applicant served for six years. I award him ksh. 6,600 being leave travelling allowance and set aside the trial Court's order dismissing that claim.

39. The claim for ksh 12,862.50 for purchase of good quality soap was dismissed by the trial Court for being too general, and the 12th ground of appeal was raised against that dismissal. The claim was based on paragraph 21(1) of the Regulation of Wages (Protective Security Services) Order, 1998 which provides that a guard shall be provided with two sets of uniform and a half kilogram of good quality bar soap per month by the employer at his own expense. The provision does not quantify or give the minimum cost and/or value of such soap, and the Appellant did not present any evidence on any money that he had expended in purchasing such soap over the period of his employment. I uphold dismissal of that claim.

40. The claim for clocking allowance was rejected by the trial Court, leading to the 13th ground of appeal. Paragraph 26 of the Regulation of Wages (Protective Security Services) Order, 1998 provides:-

“Guards who are required to clock at their working places shall be entitled to a clocking allowance of ten shillings per shift.”

41. In the present case, although the 1st Respondent admitted (in its pleadings) to there having been a clocking in system in the Appellant's place of work, the Appellant did not specifically plead the particulars of dates and shifts when he earned the clocking allowance. The claim is disallowed.

42. In sum, and having considered written submissions filed by Counsel for the parties herein, the trial Court's judgment dated August 4, 2022 is hereby varied and set aside to the extent stated in this judgment, and there is judgment for the Appellant against the 1st Respondent for:-

- a. Wage underpaymentksh 105,706.60
- b. Unpaid house allowance.....ksh 314,511.61
- c. Minimum public transport allowance.....ksh 288,120
- d. Unpaid overtimeksh 581,786.40
- e. Leave travelling allowance.....ksh 6,600

Total ksh 1,296,724.60

43. The warded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).



44. The Appellant is awarded costs of the appeal herein and of proceedings in the Court below, plus interest, to be paid by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE.

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

Appearance:

.....for Appellant

.....for Respondent

