



REPUBLIC OF KENYA



Batian Security Company Ltd v Gatinya (Employment and Labour Relations Appeal E001 of 2023) [2023] KEELRC 2266 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023
ON MAKAU, J
SEPTEMBER 29, 2023**

BETWEEN

BATIAN SECURITY COMPANY LTD APPELLANT

AND

LIVINGSTONE WANJOHI GATINYA RESPONDENT

(Being an Appeal against the Judgment of Honorable E.Kanyiri, Principal Magistrate at Karatina delivered on 13th December, 2022 in ELRC Case No.1 of 2020)

JUDGMENT

1. By a Memorandum of Appeal dated 10th January 2023, the appellant prays for setting aside of the judgment of the lower court on the following grounds:
 1. That the trial magistrate erred in law and fact in finding that the respondent was underpaid and awarded a sum of Kshs.184,572/- under the head; thereby disregarding the applicable Regulation of Wages (General)(Amendment) Order of the respective years in question.
 2. The trial court erred in law and facts in finding that the respondent was entitled to any house allowance and in awarding Kshs.6,317.10/-
 3. The trial court erred in law and facts in failing to consider that the respondent was allowed to proceed for his leave when it fell due and was actually paid for any days not taken upon retirement. The court erred in awarding Kshs.28,744.48/- as leave allowance.
 4. The trial court erred in finding that the respondent was entitled to any overtime against the law and without any evidence and therefore went into error in awarding a sum of Kshs.131,139/- under this head.



Background

2. The appellant employed the respondent as a Watchman from September 2008 until 1st December 2019 when he retired at the age of 60 years. However, upon the respondent's request, the appellant engaged him for one more year. On 18th June 2020 he demanded for his terminal dues and on 8th September 2020, he was paid Kshs.12,200.00. Thereafter he brought suit in the lower court seeking the following: -
 - a. The Respondent be ordered to pay the claimant the above dues amounting to Kshs.4,686,960.00.
 - b. Cost of this suit.
 - c. Interest in (1) and (2) above at court rates.
 - d. Any other or better relief that the court may deem fit to grant.
3. The appellant filed defence dated 19th January 2021 denying all the claims contained in the memorandum of claim and averred that only Kshs.43,180.00 was payable as service pay for ten years' service. It contended that the respondent was paid salary in accordance with the Regulation of Wages Column 4 titled "All other Areas" in the General Wage Order. Finally, it contended that it paid the respondent Kshs.24,364.00 for pending leaves and off days.
4. The matter went to full hearing and both sides tendered evidence. The respondent testified as PW1 and adopted his written statement as evidence in chief. He also produced a bundle of documents as exhibits. His evidence was that he joined the appellant in September 2008 and retired on 1st December 2019. His salary then was Kshs.8,400.00 per month. The salary was exclusive of house allowance and he was not provided with housing by the appellant. He took annual leave in some years and due to pressure of work he skipped other years.
5. After the retirement he was not paid his terminal dues and instead he was offered one-year contract. After demand, he was only paid Kshs.12,200.00 on 8th September 2020 as part payment of his terminal dues.
6. The appellant was represented by its Mt.Kenya Regional Manager Mr.Bernard Wanjohi Munguku, who testified as DW1. He adopted his written statement dated 19th January 2021 as his evidence in chief and produced a bundle of 14 documents as exhibits. In brief, his evidence was that the respondent was employed by the appellant on contract basis from 1st August, 2008 and worked until he retired on account of age. His work station was Ngandu shopping Centre, Kiangai shopping Centre and Rhino Watch in Kanyagia and his salary was paid in accordance with the Regulation of wages (General Wages) order. He, therefore denied the claim for salary underpayment.
7. He contended that the respondent was paid Kshs.24,364.00 as compensation for pending leaves and off days. He further contended that the respondent only worked for 10 years and therefore his rightful dues is Kshs.43,180.00 being service pay at the rate of 15 days pay for every year worked. He denied all other prayers sought.
8. After considering the pleadings, evidence and submissions tendered, the trial court (Hon.E.Kanyiri – PM) delivered the impugned judgment on 13th December 2022 in which she awarded the respondent Kshs.184,572.00 as unpaid salary, Kshs.6,317.10 as house allowance, Kshs.28,744.48 as leave allowance and Kshs.131,139.00 as over time compensation. She also awarded costs and interest from the date of the judgment.



The Appeal

9. The appellant was aggrieved and brought the instant appeal. The appeal was canvassed by written submissions.
10. With respect to the first ground, it was submitted that the award of Kshs.184,572.00 was granted in error after the trial court disregarded the evidence adduced and submission made by the appellant. It was argued that the respondent was stationed in Mathira which falls in the category of “All other Areas” in the General Wages Order and as such the wages paid to him was in tandem with the rate prescribed by the Wages Order for 2006-2018 (produced as Exhibit 14). Therefore, it was argued that the trial court needed only to compare the same with the muster roll which was produced as Exhibit 6.
11. It was further submitted that the trial court failed to consider the evidence before it had assessed the underpayment of salary at Kshs.184,572.00 by failing to pay Kshs.14,301.00 to the appellant per month.
12. As regards ground number 2, it was submitted that the trial court erred by awarding Kshs.6,317.10 as house allowance. According to the appellant, the General Wages Order does not contemplate a house allowance that is separate from the wage. He further faulted the trial court for relying on the case of Grain Pro Kenya Inc. Ltd v Andrew Waitthaka Kiragu (2019) eKLR which was not relevant to the case before the court. He submitted that the respondent was being paid a consolidated monthly salary.
13. He relied on the case of Charity Wambui Muriuki vs Total Security Surveillance Limited (2017) eKLR and Postal Corporation of Kenya v Andrew K.Tanui (2019) eKLR where the court held that gross salary includes housing allowance.
14. As regards ground number 3 of the appeal, it was submitted that the trial court erred in law by awarding Kshs.28,744.48 as leave allowance. It was argued that the trial court failed to consider the evidence on record including leave records that showed that the respondent took all his leave up to 2018 and that, what was due was for 2019 which he took in December 2019. Further that, the salary used to calculate the amount payable for leave was Kshs.8,636.30 as opposed to the correct salary for a watchman working in “All other Areas.” Finally, it was submitted that the trial court failed to take into account the evidence that the respondent was paid Kshs.24,364.00 which included his accrued leave.
15. Regarding the fourth ground of the appeal, it was submitted that the trial court erred by awarding Kshs.131,139.00 for overtime work. Further that, the court erred in shifting the burden of proof to appellant when the respondent failed to substantiate the claim for overtime. It was argued that he who alleges must prove and the opposite party cannot be called to rebut zero evidence. For emphasis reliance was placed on the case of Michael v Owl Alarms Limited (2015) eKLR where the court dismissed a claim for overtime by a watchman.
16. The respondent opposed the appeal and prayed for the same to be dismissed with costs. He contended that he served the appellant for 13 years being 2008 to 2019, plus one year after retirement and faulted the trial court for awarding him service pay for only 10 years. He urged this court to exercise the power under Order 42 Rule 32 and award him Kshs.93,600.00 as the proper amount of service pay due to him.

Analysis and determination

17. This being a first appeal, I am obliged to reconsider the evidence on record and re-evaluate it so as to draw my own independent conclusions, and ensure that the conclusions reached by the trial court are consistent with evidence (Sanitam (EA) Ltd v Rentokil (2006) 2 KLR 70).



18. Having considered the pleadings and evidence on the record and the submission made by both parties in this appeal, the issues for determination are:-
 - a. Whether the damages awarded by the trial court were merited.
 - b. Whether the court should enhance the service pay awarded by the trial court.

Awards

a. Salary underpayment

19. The appellant pleaded in its defence that the respondent's place of work was not in the cities or former municipalities but Mukurwe-ini which fell under "All other areas" whose salary scale under the Wages Order was the lowest. The respondent never adduced any evidence to counter the said evidence by the employer. Therefore, the conclusion by the trial court that his salary was Kshs.14,038.00 was not supported by both evidence and pleadings.
20. The said decision was also reached without considering a material factor raised by the defence, that is, the place of work where the respondent was stationed and the applicable minimum wage prescribed by the General Wages Orders. Consequently, I proceed to interfere with the said award by setting it aside entirely.

b. House allowance

21. The Appellant contended that the award of Kshs.6,317.10 as house allowance ought not to have been awarded because under the General wage Order it was a consolidated salary. The respondent did not submit on that issue in this appeal.
22. I have considered the record of appeal and noted the muster roll which indicated the salary paid to the appellant's staff including the respondent was gross pay. The respondent has not challenged that fact and the trial court never considered the same in her judgment. She only referred to section 31 of the *Employment Act*, which requires an employer to provide housing to his employee or pay an allowance to cater for house rent. Had the trial court taken into account the muster rolls produced as exhibit by the appellant she would have arrived at a different decision.
23. The muster rolls on record show that the claimant was receiving a gross salary which obviously included house allowance. For over a decade the respondent never raised any complaint about the issue of housing or house allowance. The award of house allowance is therefore set aside because it was not supported by evidence and also because the court failed to take into account relevant evidence on record.

c. Leave

24. The trial court awarded 43 days leave for two years that is, 2019 and 2020. The award was based on the evidence that there were leave forms for the period up to 2018. I have considered the said leave forms and noted that the claimant was being given 24 leave days per year. The trial court did not give reasons as to why she assessed the leave as 43 and not 48 days for the 2 years. The court ought to have awarded leave for the 48 days. Besides the court ought to have used the correct amount of salary being Kshs.8,400.00 prescribed by the General Wage Order of 2018 which was much higher than Kshs.7,240.95.
25. For the same reasons cited above, interference with the award of leave award is justified. Based on the power granted by Order 42 rule 32 of the Civil Procedure Rules, I enhance the leave days from



43 to 48 and re-assess the award using the respondent's salary of Kshs.8,400.00. Hence $Kshs.8400 \times 48/30 = Kshs.13,440.00$. Order 42 Rule 32 provides that: -

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents who may not have filed any appeal or cross appeal.”

d. Overtime pay

26. The court awarded Kshs.131,139.00 for 3 years, that is, 2018, 2019 and 2020. The basis of the award was that the claimant was working for 12 hours, 7 days a week adding up to 360 hours per month as opposed to 225 hours per month. However, the appellant contends that the respondent did not adduce any evidence to substantiate that claim. The appellant faults the trial court for shifting the burden of prove. The respondent has made no submissions to encounter the appellants' submission on that point.

27. I have considered the judgment and the submissions by the appellant. It is true that on the last paragraph of page 11 of the impugned judgment the trial court observed that;

“The respondent denied the allegation by the claimant that he was entitled to overtime pay and stated that he had paid for the same. The respondent did not prove that the claimant worked in the normal hours. The court then takes the averment by the claimant seriously. The claimant payed (sic) for overtime for 12 hours for 7 days a week. The claimant therefore worked 12 hours a day adding up to 360 hours a month instead of 225 hours a month. He is therefore entitled to 135 hours a month for 3 years at the rate of 1.5 times the hourly rate being Kshs.80.95. I award him Kshs.131,139.00 as overtime.”

28. The question that arises is whether the above conclusion was based on any evidence. The claimant's evidence was contained in his written statement filed together the suit on 24th November, 2020. All what it says about overtime is: -

“That I worked on 12 hours shift each day with no off day per week. That some year I was being paid leave but other years I never went for leave due to pressure of work, allegedly but the respondent promised to pay for the same which has never been paid.”

29. The foregoing testimony was in support of the averment in paragraph 5 of the claim. Strangely the respondent filed leave forms which indicated that he took both leave and off days which contradicts the written testimony and the pleadings. Another observation I make of the said testimony is that the respondent did not plead the particulars of the claim for overtime, like the dates, months or years when he worked overtime.

30. The said particulars are very key, because an award may end up enriching a claimant unjustly by awarding overtime pay for days when he was on leave or off duty. Further, the failure to plead the said particulars and then requiring the employer to rebut or show that the employee worked on normal hours is indeed prejudicial. It amounts to awarding a claimant relief because the employer has defaulted to adduce evidence to counter zero evidence.

31. In view of the foregoing, I find that the claim for overtime was not proved on a balance of probability since the respondent never pleaded particulars and adduced evidence to prove the same. I further find



that the conclusion that the employer had not proved that the employee worked in normal time was not based on any evidence and it amounted to shifting of the burden of proof to the wrong party. The cardinal rule in adversarial proceedings is always that he who alleges, must prove his/her allegation to the required standard. Consequently, the award of overtime pay of Kshs.131,139.00 is set aside entirely.

e. Service pay

32. The respondent urged the court to exercise its power under Order 42 rule 32 and award him service of Kshs.93,600.00 which was left out in the impugned judgment. The said provision states that: -

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents who may not have filed any appeal or cross appeal.”

33. The appellant did not submit on the above. However, in paragraph 9 and 10 of the statement of defence the appellant admitted that the respondent was entitled to Kshs.43,180.00 as service pay. It pleaded that:

“9) To further reply to paragraph 7 (a) to (e) of the claim, the respondent avers that the following is the true position concerning claimant’s dues:-

a. Service pay= $8,636 \times 10 \times 15/30=43,180.00$

11) That only a sum of Kshs.43,180.00 being service pay was pending and which the respondent was in the process of paying before the claimant rushed to court.”

34. I have perused the statement of claim and confirmed that the respondent had sought for service pay in paragraph 7(a) calculated as 15 days’ pay for each served (Kshs.7,200 x 13=Kshs.93,600.00). Conspicuously, the court said nothing about the claim for service pay even the admitted amount. There is no evidence on record to prove that the admitted amount was paid.

35. The appellant calculated the admitted amount using salary of Kshs.8,636.00 for 10 years. The respondent on the other hand alleged that he worked for 13 years. My calculation of the years worked gives 12 years. Hence $Kshs.8,636 \times 12 \times 15/30=Kshs.51,816.00$ which I award and decree that it be paid to the respondent by dint of Order 42 Rule 32 of the Civil Procedure Rules.

Conclusion

36. I have found that the trial court erred in law and fact in making conclusions and award of damages without supporting evidence and without considering relevant factors. I have also found that the trial court erred in law and fact by failing to award service pay even when it was expressly admitted in the pleadings and evidence. Accordingly, I have interfered with the award of damages granted by the trial court and allowed the appeal to the extent indicated above.

37. In the end I enter judgment for the appellant setting aside the impugned judgment and substituting therewith the following: -

a. Service pay.....Kshs.51,816.00

b. Leave.....Kshs.13,440.00



Kshs.65,256.00

Less paid.....Kshs.24,364.00

Net due..... Kshs.40,892.00

The award is subject to statutory deductions but in addition to interest at court rates from the date of filing the appeal. Since both parties have succeeded in this appeal, I direct that each party shall bear own costs both here and the court below.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court

ONESMUS N MAKAU

JUDGE

