



REPUBLIC OF KENYA



KENYA LAW
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**JRS Group Ltd v Bwana (Appeal E044 of 2022)
[2023] KEELRC 2489 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2489 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E044 OF 2022
S RADIDO, J
OCTOBER 18, 2023**

BETWEEN

JRS GROUP LTD APPELLANT

AND

FRANCIS MUGA BWANA RESPONDENT

(Being an Appeal from the judgment of the Magistrates Court at Kisumu before Hon Odera T. (CM) in CMELRC No. E228 of 2021 delivered on 18th November 2022)

JUDGMENT

1. Through a Memorandum of Appeal lodged with the Court on 15 December 2022, JRS Group Ltd (the Appellant) challenges the judgment of the Honourable Chief Magistrate on the grounds:
 - i. That the learned Magistrate erred in law and in fact in finding that the Appellant had not proved its case on a balance of probability contrary to the evidence on record.
 - ii. That the learned Magistrate erred in law and in fact and misdirected herself by failing to exercise judicial authority on known legal principles and rendering an unjust judgment.
 - iii. That the learned Magistrate erred in law and in fact by awarding Kshs 535,800/- as overtime for 3 and a half years while disregarding that the employment was based on distinct contracts.
 - iv. The learned Magistrate erred in law and in fact in believing and relying on the Respondent's submissions without any evidential value attached to them.
 - v. The learned Magistrate erred in law and fact by ignoring and or failing to consider in totality the Appellant's pleadings and submissions.
 - vi. The learned Magistrate applied the wrong principles in law in making her findings and granting house allowance to the Respondent.



- vii. That the learned trial Magistrate erred in fact by awarding the Respondent damages amounting to Kshs 798,426/15.
2. The Court gave directions on 23 May 2023, 22 June 2023, and 18 September 2023 as a consequence of which the Appellant filed its submissions on (should have been filed and served on or before 30 September 2023) and the Respondent on....

Role of First Appellate Court

3. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

4. This Court will keep the interdict in mind.

Award of overtime

5. The number of working hours in certain industries is governed by the *Regulation of Wages (Amendment) Order(s)*.
6. In the case of security guards, the applicable Order is the *Regulation of Wages (Protective Security) Services Order* and it provides for 52 hours spread over 6 days in a week (8.6 hours per day).
7. It is a notorious fact that the Court can take judicial notice that security guards in this country work 12-hour shifts.
8. Security guards, therefore, ordinarily work 3 hours overtime every day.
9. The employer is under an obligation to keep attendance records. The Appellant did not produce any attendance records to show that the Respondent was compensated for overtime, or to rebut the bank statements he produced to indicate that he was being underpaid.
10. The Court, therefore, finds no error of law or fact in the award of this head of the claim by the Honourable Chief Magistrate (some aspects of this head of the claim appear to have been caught by the limitation prescribed by section 90 of the *Employment Act*).

House allowance

11. Where the employer provides housing, Regulation 5 of the *Regulation of Wages (Protective Security) Services Order* still expects the employer to pay some housing allowance.
12. The Appellant's witness admitted that the Respondent was underpaid and cannot turn around and escape from the admission.

Leave allowance

13. The Honourable Chief Magistrate allowed the claim for leave allowance in the sum of Kshs 45,426/- on account of leave from 2017 to 2021.
14. An employee is entitled to at least 21 days' annual leave on full pay.



15. Section 28(4) of the *Employment Act*, 2007 circumscribes how many leave days can be carried forward. The Respondent did not indicate whether he accumulated leave from 2017 with the approval of the Appellant.
16. He would therefore be only eligible for accrued commuted leave for the 18 months before separation which should be equivalent to one and a half months' basic pay.

Underpayments

17. During the course of the hearing, the Appellant's witness conceded that the Respondent was being paid below the prescribed minimum wage.
18. Based on the admission and in consideration of the various *Regulation of Wages (Amendment) Orders*, the Chief Magistrate awarded the Respondent Kshs 155,153/95 as underpayments.
19. The underpayments accrued from 2017 to 2021.
20. The Court finds no error of law or fact in the award and the Appellant has not demonstrated any error either of principle, law, or fact.

Conclusion and Orders

21. The Court has re-evaluated the evidence and law relied on by the Chief Magistrate and finds no error of law or fact.
22. The Appeal is found without merit and is dismissed with costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 18TH DAY OF OCTOBER 2023.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances:-

For Appellant Hussein B. Indumuli, Advocate

For Respondent O.J. Okoth & Co. Advocates

Court Assistant Chrispo Aura/Everlyne

