



**Mars Security Guards Limited v Kerauma (Civil Appeal E039 of 2022)
[2023] KEELRC 2726 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E039 OF 2022**

**L NDOLO, J
NOVEMBER 2, 2023**

BETWEEN

MARS SECURITY GUARDS LIMITED APPELLANT

AND

POLYCARP TINEGA KERAUMA RESPONDENT

*(Appeal from the Judgment of Hon M.W Murage (Ms.), SRM delivered
on 28th February 2022 in Nairobi CMEL Cause No 652 of 2019)*

JUDGMENT

Introduction

1. On 26th August 2019, the Respondent (Claimant in the lower court) filed a claim at the Chief Magistrate’s Court at Milimani, seeking the following remedies from the Appellant (Respondent in the lower court):
 - a. 1 month’s salary in lieu of notice.....Kshs. 15,000.00
 - b. Annual leave not taken.....29,753.30
 - c. Leave travelling allowance.....850.00
 - d. October 2017 salary arrears.....15,500.00
 - e. 12 months’ in damages for wrongful dismissal.....180,000.00
 - f. Overtime at 20 hours a week.....337,932.00
 - g. Pay for 88 rest days.....270,345.60
 - h. Unpaid public holidays (5 days).....13,860.00



- i. Unpaid public holidays (12 days).....37,584.00
 - j. Unremitted NSSF deductions.....3,200.00
 - k. Service gratuity.....10,384.10
 - l. Certificate of service
 - m. Costs plus interest
2. In its Reply dated 23rd August 2019, the Appellant denied the entire claim, stating that the Respondent himself absconded duty, following a robbery at his assigned place of work.
3. By a judgment dated 24th February 2022, the trial court made an award in favour of the Respondent in the following terms:
- a. Annual leave days not taken.....Kshs. 7,000.00
 - b. Paternity leave.....7,000.00
 - c. October 2017 salary arrears.....8,500.00
 - d. Overtime.....51,559.20
 - e. Rest days.....28,748.16
 - f. Unremitted NSSF contributions.....2,000.00
 - g. Costs plus interest
4. Both parties were partially dissatisfied with the judgment of the learned trial Magistrate. The Appellant therefore filed an appeal and the Respondent filed a cross appeal, which form the subject of this judgment.
5. These being first appeals, I am guided by the Court of Appeal decision in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 where the duty of a first appellate court was established in the following terms:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The Appellant’s Appeal

6. The Appellant challenges the judgment of the trial court by way of an appeal. In its Memorandum of Appeal dated 22nd March 2022, the Appellant raises the following grounds of appeal:
- a. The learned Magistrate erred in law and in fact by failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis;



- b. The learned Magistrate failed to consider and take into account the extensive material placed before her, touching on the pertinent and substantial points of fact and law, so as to arrive at a just and fair decision;
 - c. The learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant in arriving at her judgment;
 - d. The learned Magistrate erred in law in failing to properly evaluate and assess the reliefs prayed for by the Respondent;
 - e. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to annual and paternity leave;
 - f. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to overtime;
 - g. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to rest days, despite the clear evidence that the Respondent had every month, taken off days and the same was not deducted from his consolidated monthly salary;
 - h. The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to NSSF payment of Kshs. 2,000 when the deductions were clearly remitted up to the month the Claimant absconded from work.
7. The Appellant lists eight (8) grounds of appeal, which I will compress into the following limbs:
- a. Annual and Paternity Leave;
 - b. Overtime;
 - c. Rest Days;
 - d. National Social Security Fund (NSSF) Dues.

Annual and Paternity Leave

8. The Appellant challenges the award on annual leave and paternity leave. Regarding annual leave, the Appellant submits that because the Respondent had served for less than 12 months, he was not entitled to leave pay.
9. The Appellant further submits that there was no evidence on the Respondent having applied for either annual leave or paternity leave.
10. In her judgment dated 24th February 2022, the learned trial Magistrate awarded the Respondent prorata leave based on the period of service being, 8 months and 6 days. The award by the learned Magistrate is well grounded on Section 28(1)(b) of the [Employment Act](#) and there is no reason to disturb it.
11. Regarding the award on paternity leave however, there was no documentary evidence presented before the trial court to confirm that the Respondent had indeed earned paternity leave.
12. There is firm jurisprudence from this Court (variously constituted) that an employee claiming paternity leave must make an application supported by documentary evidence such as notification of birth (see [Hamisi Madzungu v Pride Inn Hotels & Investment Limited \[2017\]](#) eKLR and [Harun Musee Paul v Biashara Selection Limited \[2021\]](#) eKLR).



13. In the absence of an application for paternity leave supported by the necessary documentary evidence, the trial court had no basis for making an award in this regard. The award for paternity leave was therefore made in error and is hereby reversed.

Overtime

14. In challenging the award on overtime, the Appellant submits that the Respondent's employment contracts provided for consolidation of overtime compensation with the monthly salary. The relevant clause in the subject employment contracts provides:
 3. For any overtime pay compensated will be consolidated with the understanding between the management & the person to sign the contract. Reason is you are aware the assignment/order payments are not affordable to compensate with the overtime hours especially during this present economy.
15. A reading of this clause demonstrates the Appellant's attempt to contract with its employees outside the law. Such a provision cannot be used to defeat the Respondent's legitimate claim for overtime compensation. The award by the learned trial Magistrate is therefore confirmed.

Rest Days

16. In making the award on rest days, the learned trial Magistrate stated as follows:

“Section 27(2) of the *Employment Act* provides that an employee is entitled to at least one (1) rest day in every period of 7 days. From the Claimant's pleadings he states that he was given 2 off days in a month instead of four. This claim is supported by the muster roll produced by the Respondent. Having found that the Claimant only worked for 8 months and 6 days plus probation for 3 months, he is entitled [to] a total of 45 rest days. He says he was given 2 rest days per month instead of 4 rest days.

This means he is only entitled to 23 rest days. The rate of compensation for rest day is twice the normal rate. This will come to 52.08x12 hoursx23=28,748.16”
17. In arriving at the award under this head, the learned trial Magistrate relied on documents availed by the Appellant, which confirmed the Respondent's averments. I therefore find no reason to fault the trial court in this regard.

National Social Security Fund (NSSF) Dues

18. The learned trial Magistrate found that the Appellant had not remitted all the NSSF dues on the Respondent's account and therefore made an award of Kshs. 2,000 in favour of the Respondent.
19. In challenging this award, the Appellant maintains that it remitted NSSF dues for the entire period of the Respondent's employment.
20. The only finding I will make on this is that even if the trial court was right in reaching the conclusion that not all NSSF dues had been remitted, any outstanding dues would be payable to the statutory body and not to the Respondent. For this reason, the award under this head is reversed.

The Respondent's Cross Appeal

21. The Respondent filed a cross appeal dated 4th April 2022, raising the following grounds:



- a. That the learned Magistrate failed to consider the evidence and the Respondent’s submissions as to the circumstances and the law on termination as advanced by the Respondent, thereby reaching a wrong conclusion that the Respondent was not terminated, a reversible error both in law and fact;
 - b. That the learned Magistrate failed to appreciate the law on wages being Section 48 of the *Labour Institutions Act* and the Regulation of Wages Order;
 - c. That the learned Magistrate failed to appreciate the law on employment records and effectively held that the Respondent was to discharge the burden of proof on issues touching on employment records contrary to the provisions of Sections 10 and 74 of the *Employment Act*, resulting in a reversible error in law and fact;
 - d. That the learned Magistrate failed to appreciate that payment of wages contrary to the minimum wage regulations is an offence hence upheld an illegality perpetuated by the Appellant as against the Respondent, resulting in a reversible error in law;
 - e. That the court failed to appreciate the mandatory terms in law with regard to minimum wage and the calculation of special damages;
 - f. That the learned Magistrate generally failed to consult express provisions of the labour statutes in determining the matter, resulting in a reversible error in both law and fact.
22. The major issue in the Respondent’s cross appeal is the finding that the Appellant himself deserted duty and could not therefore lay a claim of unlawful termination of employment.
23. In her judgment dated 24th February 2022, the learned trial Magistrate returned the following verdict:
- “This court therefore finds that the Claimant was not wrongfully terminated from his employment but deserted from duty. This court determination(sic) of this fact should not be interpreted to mean that it is a finding that the claimant was involved in the alleged robbery incident. No. The police should be able to investigate that and reach a conclusion. This Court merely finds it is not a coincidence that the moment there was a robbery at the premises the claimant was guarding, it is when he did not report to duty.”
24. An employer alleging desertion of duty against an employee is required to demonstrate efforts made to reach out to the deserting employee with a view to putting them on notice that termination of their employment on account of desertion is under consideration.
25. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited [2019]* eKLR this Court held as follows:
- “Desertion of duty is a grave administrative offence which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
26. The Appellant’s witness, Jackson Ochieng Olando testified before the trial court that he had no evidence of efforts made to reach out to the Respondent after he deserted duty.



27. In arriving at the conclusion that the Respondent had deserted duty, the trial court relied on unproved allegations of robbery as the reason for the Respondent's desertion. In the impugned judgment, the learned trial Magistrate states thus:

“This court does not find it a coincidence that the moment that there was a robbery incident at the premises where the claim was guarding, it is when he allegedly took his wife and child upcountry, and extended his stay for 2 days.”

28. By adopting this line, the trial court erroneously shifted the burden of disproving desertion to the Respondent. The effect is that the Respondent's assertion that his employment was unlawfully and unfairly terminated was unshaken and the trial court ought to have found in favour of the Respondent in this regard.

29. In the circumstances, I will set aside the order disallowing the claim for unlawful and unfair termination and substitute it with an award of three (3) months' salary in compensation. In making this award, I have taken into account the Respondent's short employment stint and the Appellant's unlawful conduct in the termination transaction. In addition, I award the Respondent one (1) month's salary in lieu of notice.

30. The other grounds listed in the cross appeal fault the trial court for alleged failure to take into account applicable minimum wage as set out in the relevant Regulation of Wages Order. However, in his Memorandum of Claim filed at the lower court, the Respondent did not plead underpayment. This was therefore not an issue at the trial and cannot be part of this appeal. That is all I will say on this issue.

Final Orders

31. Finally, both the appeal and cross appeal succeed partially as follows:

- a. The award on leave pay is confirmed;
- b. The award on paternity leave is set aside;
- c. The award on overtime is confirmed;
- d. The award on rest days is confirmed;
- e. The award on NSSF dues is set aside;
- f. An award of Kshs. 45,000 being 3 months' salary in compensation is made in favour of the Respondent;
- g. An award of Kshs. 15,000 being 1 month's salary in lieu of notice is made in favour of the Respondent.

32. As the appeal and cross appeal succeed only in part, I direct that each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023

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JUDGE

Appearance:

Mr. Muriithi for the Appellant

Mr. Wetaba the Respondent

