Wanjohi v SGA Security Solutions Limited (Employment and Labour Relations Appeal E001 of 2022) [2022] KEELRC 3852 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 3852 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2022

BOM MANANI, J

JULY 29, 2022

BETWEEN

ALEX KARIERI WANJOHI ..... APPELLANT

AND

SGA SECURITY SOLUTIONS LIMITED ..... RESPONDENT

(Being an appeal from the judgment and order of the Principal Magistrate at Mariakani in Kenya delivered by Honourable Stephen K. Ngii- PM on the 8th of December 2021in the matter of Mariakani ELRC No. 205 of 2019)

JUDGMENT

Introduction

1. This appeal arises from the decision of the Magistrate's court at Mariakani exercising jurisdiction over employment and labour relations matters pursuant to the powers donated to it by virtue of Gazette Notice No. 6024 of 2018. After hearing the parties, the learned trial magistrate rendered his judgment on December 8, 2021 disallowing a substantial portion of the claim. It is this decision that the Appellant is dissatisfied with. And hence the appeal.

Facts of the Case before the Trial Court

2. The brief facts of the case are that on December 29, 2011, the Appellant was employed by the Respondent as a security guard. The Appellant served in this position until January 24, 2017when he voluntarily resigned.

3. It would appear that on resigning, the Appellant expected that the Respondent would work out the Appellant's terminal dues and pay them out to him. According to the Appellant, he was expecting to be paid accrued house allowance, leave days, overtime, leave travelling allowance, allowance for public holidays he worked and gratuity.

4. Contrary to the aforesaid expectation, the Respondent appears to have failed to make the payments. And hence the decision by the Appellant to sue.

Trial Magistrate's Decision

5. It does appear that the trial court was not satisfied with the evidence presented by the Appellant is support of his claim. As a result, with the exception of very few paltry awards, most of the claim was dismissed.

Grounds of appeal and questions for determination

6. Dissatisfied with the trial court's decision, the Appellant filed this appeal. This was through a Memorandum of Appeal filed on January 7, 2022. The appeal raises seven (7) grounds of appeal. These are: -

    a) That the trial magistrate erred in law and fact by rendering a decision that went against the weight of the evidence tendered.

    b) That the learned trial magistrate erred in law and fact by raising the standard of proof in the cause from that of a balance of probabilities to beyond reasonable doubt.

    c) That the learned trial court erred in law and fact in failing to award the Appellant house allowance despite evidence that the Appellant was neither provided with housing nor paid house allowance.

    d) That the learned trial court erred in law and fact in failing to award the Appellant overtime notwithstanding evidence supporting the claim.

    e) That the learned trial magistrate erred in law and fact in declining to enter judgment for leave travelling allowance despite the failure by the Respondent to produce a written contract challenging the Appellant's claim in this respect.

    f) That the court erred in law and fact in awarding the Appellant payment for two (2) holidays worked in January 2017 and not the rest of the period despite the Respondent having not provided records to rebut the Appellant's claim in this respect.

    g) That the court erred in declining the Appellant's claim for accrued leave days despite the failure by the Respondent to challenge the Appellant's claim by way of production of records on leave taken by the Appellant.

7. A close analysis of the several grounds discloses that they revolve around the following three questions: -

    a) Did the decision of the trial court go against the weight of the evidence that was tendered?

    b) Did the trial court impose on the Appellant a higher standard of proof than that usually applied in cases of a civil nature?

    c) Did the trial court err in dismissing several of the Appellant's claims set out in the Memorandum of Claim notwithstanding that the Respondent had failed

to provide records demonstrating that the said claims were not due to the Appellant?

Analysis and Determination

8. I will address these questions not in any particular way. However, in the final analysis I will have answered all the issues raised.

9. At the point of taking directions on appeal, the parties agreed to prosecute the matter by way of written submissions. I note that at the time of writing this decision, both parties had filed their written submissions. I will therefore be guided by the submissions on record, the documents comprising the Record of Appeal and the applicable law in reaching my decision.

10. As I begin my analysis of the matter, it is perhaps necessary to restate my role in processing the appeal. In terms of the law and as submitted by the Respondent's counsel, I am required to re-evaluate the evidence on record and reach my own conclusion on the matters raised. However, even as I do this, I must remain alive to the fact that I neither saw nor heard the witnesses testify and must make due allowance for this (see *Moses Odhiambo Muruka & another v Stephen Wambembe Kwatenge & another* [2018] eKLR).

11. I will begin by evaluating whether the trial court imposed on the Appellant a burden of proof that was so high as to be equal to that of establishing his case beyond reasonable doubt. I have studied the trial court's decision against the evidence tendered. With respect, I do not see anything to suggest that the trial court imposed on the Appellant the requirement of establishing the facts of his case beyond reasonable doubt.

12. What I think is the problem in the matter in relation to the concept of burden of proof is the way the court handled the allocation of this burden in view of the provisions of section 10(7) of the *Employment Act*. The section shifts the burden of proving or disproving a term of a contract of employment which by law is required to be in writing to the employer.

13. As I will argue later on in this decision, it appears to me that the trial court, in its analysis, disregarded this requirement of reverse burden of proof. Instead, the court went full throttle in applying the conventional burden of proof as envisaged under sections 107 and 108 of the *Evidence Act*. This is clear from the observations of the court at page 54 and 55 of the Record of Appeal. The court observed as follows: -

> " Before I pen off I must point out that even though the Respondent did not adduce evidence to rebut the Respondent's (sic) case the burden of proof still remained on the shoulders of the Claimant to substantiate his case on a balance of probabilities. This principle was echoed in the case of Karungi and Another v Kibiya and 3 others (1987) eKLR 347."

14. However, this problem has nothing to do with raising the standard of proof in the matter to beyond reasonable doubt. In fact as is clear from the above quotation, the trial court was alive to the fact that the standard of proof in civil matters as a general rule remains on a balance of probabilities. Consequently, I find no merit in this ground of appeal.

15. I will now consider the question of the burden of proof provided for under section 10 (7) of the *Employment Act*. The intention is to consider the impact of the said provision of law on the ultimate results in the cause.

16. Section 9(1) and (2) of the *Employment Act* provides as follows: -

> (1) A contract of service: -
>
> a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
>
> b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.
>
> (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)."

17. Section 10 (7) of the Act stipulates as follows: -

> "If in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer." (Emphasis added through underlining).

18. According to the Certificate of Service issued to the Appellant by the Respondent and appearing at page 13 of the Record of Appeal, the Appellant served the Respondent from December 29, 2011 to January 24, 2017 when he quit employment, a period of more than five (5) years. Therefore, and in terms of section 9 (1) of the *Employment Act*, the contract of service between the parties was required to have been reduced into writing. And in terms of section 9 (2) of the Act, the obligation lay with the Respondent as the employer to have the contract reduced into writing.

19. Before the trial magistrate, the parties had a dispute relating to: whether house allowance was included in the Appellant's gross salary; and whether the Appellant was entitled to leave travelling allowance, overtime pay and gratuity. For all purposes and intents, the dispute between the parties related to the terms of the contract of service between them which contract, as is clear from section 9 of the *Employment Act*, ought to have been reduced into writing.

20. Under section 10(7) of the *Employment Act*, where a dispute arises on a term of a contract of service that is required to have been reduced into writing in terms of section 9 of the Act, the burden is on the employer to prove or disprove the disputed term by either producing the written contract or written particulars of the disputed term. Thus, the burden of proving that: the Appellant's gross salary included house allowance; the Appellant was not entitled to leave travelling allowance, and overtime pay rested with the Respondent employer.

21. It would appear from the record that contrary to the statutory demand under section 10(7) of the *Employment Act*, the Respondent failed to furnish the trial court with the written employment contract between the parties. It does appear from the record that the Respondent did not furnish the trial court with the contract to prove that the Appellant was not entitled to leave travelling allowance and overtime pay. It is also evident that apart from the pay slip produced by the Appellant indicating that house allowance was not specifically provided for, the Respondent provided no evidence by way of a written contract of employment to demonstrate that house allowance was included in the gross salary.

22. In the Court of Appeal decision of *Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu* [2019] eKLR, the court emphasized that the primary contracting document in an employment contract is the contract itself. A pay slip is not evidence of the terms of engagement between an employer and an employee as it is usually a one sided document generated by the employer without the input of the employee. The pay slip produced by the Appellant and appearing at page 14 of the Record of Appeal ought to be understood in this context.

23. In the case of *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR, the court underscored the fact that the use of the phrase ''consolidated'' or ''gross'' in a pay slip does not of itself necessarily denote that all the benefits due to an employee are included in the gross or consolidated pay. These phrases only raise a rebuttable presumption of fact in favour of the fact that the salary covers all the benefits.

24. In some cases there may be evidence to rebut this presumption. This may for instance arise where a pay slip itemizing components of ''consolidated'' or ''gross'' salary in fact excludes some heads of allowances that would ordinarily form part of consolidated salary such as house and medical allowance. In such case, it will be clear that whilst consolidated salary usually includes house and medical allowance, these items do not form part of the consolidated or gross salary in such case as they have specifically not been included in the list of items comprising the consolidated or gross salary. Consequently, whether salary that is described as "consolidated" or "gross" covers all the benefits due to an employee is a matter of fact to be determined through evidence on a case by case basis.

25. This position in fact finds support in the decisions relied on by the Respondents to attempt to advance a contrary position. For instance, in *Stephen O Edewa v Lavington Security Limited* (2019) eKLR, there was evidence that the Respondent's Human Resource Manual made specific reference to house and medical allowances as being included in the "consolidated salary". In *Charity Wambui Muriuki v Total Security Surveillance Ltd* (2017) eKLR, the court observed that house allowance is ''usually'' one of the allowances included in consolidated salary meaning that there may be evidence that it is not.

26. In this case, I would have disagreed with the trial court's pronouncement that merely because the Appellant's salary was indicated as ''gross'' in the pay slip, it necessarily included the house allowance benefit. This is because despite the Appellant producing a pay slip demonstrating that his salary did not include house allowance, the Respondent failed to produce the written contract, the primary evidence on the subject, to confirm that house allowance was covered in the ''gross'' or "consolidated" salary. However, during cross examination of the Appellant on the subject, he expressed himself as follows: -

> " I was earning an all inclusive salary."

27. By this statement, the Appellant made an admission that the salary described as ''gross'' or ''consolidated'' was ''all inclusive''. This can only be understood to mean that the parties understood the salary paid to the Appellant as all encompassing. With this admission, it became unnecessary for the Respondent to go further and furnish the court with additional evidence on the subject.

28. With regard to leave travelling allowance, the same principle applies. As the contract between the parties was for a period running over three months, it was by law required to have been reduced into writing to give clear particulars on how it addressed leave travelling allowance if at all.

29. On his part, the Appellant asserts that he was entitled to leave travelling allowance, a fact that the Respondent disputes in its statement of defense. In terms of section 10(7) of the *Employment Act*, the burden lay with the Respondent to produce the written contract of service to disprove the Appellant's case as to the existence of the term on leave travelling allowance given the fact that the Appellant by

showing that he had been in the Respondent's service for more than a year, had provided prima facie evidence demonstrating that he was entitled to leave and therefore in all probability to leave travelling allowance.

30. Besides mere denials in the statement of defense relating to this allowance, the Respondent did not satisfy the requirements of section 10 (7) of the *Employment Act*. In the absence of evidence to the contrary from a written contract or other written memorandum, the trial court ought to have found in favour of this allowance. In my view, the court's decision was rendered without considering the effect of section 10 (7) of the *Employment Act* on the proceedings.

31. Importantly, leave travelling allowance is indeed a statutory right contrary to the finding by the trial court and submissions by the Respondent's counsel that it was not. As a statutory right, this entitlement is implied in every contract of security service providers as long as they have been in service for the duration contemplated in law. Regulation 13 of the Regulation of Wages (Protective Security Services) Order, 1998 provides as follows on the issue: -

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

32. These Regulations provide the minimum terms and conditions of service below which parties to an employment contract in the security services sector may not contract. Section 48 of the *Labour Institutions Act*, 2007 underscores this reality. It provides as follows: -

> " Notwithstanding anything contained in this Act or any other written law: -
>
> a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
>
> b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms."
>
> "An employer who fails to: -
>
> a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
>
> c) provide an employee with the conditions of employment prescribed in the order, commits an offence."

33. It does not matter therefore that the Respondent's position is that the contract between them did not provide for leave traveling allowance. And as the Appellant had accrued leave days as per the pay slip produced in evidence (it shows three (3) leave days), he was entitled to leave traveling allowance as facilitation for his travel to utilize the said leave. I would therefore set aside the decision of the trial court on this item and award the Appellant leave travelling allowance of Ksh.950/=.

34. I should perhaps mention that I have considered the decision of *Fred J Owuor alias Fred OJ Owuor v Tech Institute of Management Ltd* (2017) eKLR relied on by the defense to advance the argument that the Appellant was not entitled to leave travelling allowance. The decision is not applicable to this case.

It related to travelling allowance for the Claimant while on official travel. This is not the same thing as leave travelling allowance claimed by an employee that is proceeding on leave.

35. The trial magistrate found as a matter of fact that the Appellant had been subjected to work overtime for two (2) hours every day in the month of January 2017. This was based on the entries in the pay slip for the month under consideration as read with a Wage Order whose specific details the court did not set out.

36. I have looked at the pay slip in issue. Contrary to the trial court's finding and submissions by counsel for the Respondent, the entries on the number of hours and days of engagement in my view were not confined to the month of January 2017. Rather, the details on these items are of a general nature meant to provide information on: the number of days the employee was expected to work per every month; the number of hours to be clocked by the employee every month; and the number of hours to be clocked by the employee for every day worked. That is why the words "per month" and "per day" are used.

37. The *Labour Institutions Act*, 2007 incorporates several sector specific Wage Orders. For the security sector, it incorporates the Regulation of Wages (Protective Security Services) Order, 1998. Regulation 6 of the Order provides as follows regarding work hours for persons employed as security guards: -

> " The normal working week of all employees including day and night guards shall be fifty-two hours of work spread over six days of the week."

38. The pay slip which is the only document generated by the Respondent but which was produced by the Appellant shows the working hours for the Appellant were twelve (12) per day. Thus, in six days of a week, the cumulative working hours of the Appellant were seventy- two (72) against the fifty two (52) prescribed by the above Wage Order. This means that instead of clocking an average of eight (8) hours a day the Appellant was required to clock twelve (12) hours per day. Clearly if we have to consider the only evidence furnished from the employer's record (the pay slip) and the Appellant's own testimony, there is prima facie evidence that the Appellant was working approximately four (4) extra hours a day.

39. I have considered the claim for overtime pay in the light of the requirements of section 10 (7) of the *Employment Act*. The Appellant's case was that he had been subjected to overtime work over the period set out in the Memorandum of Claim without being remunerated for it a fact that the Respondent disputed. Contrary to the Respondent's position, the pay slip produced by the Appellant shows that the Appellant was required to put in twelve (12) hours of work per day instead of the approximately eight (8) hours contemplated under the applicable Wage Order aforesaid. In terms of section 10 (7) of the *Employment Act*, the disagreement between the parties on the number of hours to work per day constituted a dispute in respect of the term on work hours and overtime in the contract of service.

40. As section 9 of the Act requires the contract between the parties to have been reduced into writing, it was the duty of the Respondent under section 10 (7) of the Act to produce either the written contract of employment or written particulars of the term relating to work hours and overtime to disprove the Appellant's claim for overtime. As demonstrated above, the pay slip produced in evidence by the Appellant laid out prima facie evidence in support of the Appellant's claim for overtime. In the face of this evidence, it was not sufficient for the Respondent to merely deny the claim in the statement of defense without more.

41. There is nothing on the record to show that Respondent provided the court with a copy of the written contract of service or other particulars to controvert the Appellant's evidence and demonstrate: that it did not provide for overtime; and that the entries in the pay slip produced relating to the extra hours worked by the Appellant were not a reflection of the overtime earned by him per month in terms of

the clause on overtime in the contract as asserted by the Appellant. In the absence of evidence to the contrary, the trial court ought to have found in favour of the Appellant in respect of the overtime claim.

42. The Appellant had pleaded overtime of four (4) hours every day. This contention was based on the Appellant's assertion that the law requires him to work up to eight (8) hours per day and not twelve (12) hours as captured in the pay slip. However, the trial court found, based on a Wage Order that was not cited, that the law required the Appellant to work for ten (10) hours. Thus as he had been working for twelve (12) hours, the overtime committed was only two (2) hours per day.

43. However, as I have demonstrated above, the Regulation of Wages (Protective Security Services) Order, 1998 actually provides for fifty -two (52) hours per every six days of a week. This means that a security guard is required to work approximately eight (8) hours a day and not the ten (10) hours the trial court alluded to. If the Appellant was working twelve (12) hours per day as demonstrated by the pay slip, it follows that the Appellant's contention that he was working an extra four (4) hours per day prima facie has merit.

44. In the absence of evidence by the Respondent to rebut the prima facie case by the Appellant in terms of section 10(7) of the *Employment Act*, I will set aside the trial court's finding on this item and replace it with a finding that there is prima facie evidence that the Appellant was subjected to regular four (4) hours overtime for the duration of the contract. I therefore award him overtime pay of Ksh. 366,274/= being the amount claimed based on four (4) hour overtime rate.

45. Perhaps just to comment on the foregoing further, I have noted from the record that the Respondent indeed filed a list of documents on September 7, 2021. On the list is attached a clearance/discharge form dated September 16, 2020 which suggests that the Respondent in fact acknowledges the Appellant's entitlement to overtime pay totaling approximately Ksh. 275,293/=. It is not in dispute that the said form was not formally tendered in evidence as exhibit as the Respondent did not call any witness. Nevertheless, under rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the trial court in my view still had the discretion to consider the import of the document on the Appellant's claim for overtime. It is baffling that a party who has filed documents in court evidencing that he acknowledges a particular fact would attempt to backtrack on it.

46. As for unpaid leave, the pay slip appearing at page 14 of the Record of Appeal shows that the Claimant had a balance of three (3) days unpaid leave. From the slip, there was no annual leave brought forward from the previous years.

47. The entries in the pay slip on the status of the Appellant's accrued leave satisfy the requirement of section 10(7) of the *Employment Act* that either a written contract of employment or other memoranda on the particulars of a written employment contract be produced by the employer to establish a disputed fact in the contract. I say so recognizing the fact that a pay slip is a document which, under section 20 of the *Employment Act*, is prepared by the employer. In law, it is memoranda by the employer on the term relating to remuneration in a contract of service. But for the fact that it has been furnished to the court by the Appellant, the very same document would have been sufficient to discharge the burden on the Respondent if it had been produced by the Respondent. Therefore, to insist on production of similar evidence by the Respondent would merely be an endeavour in duplicity.

48. With the clear and comprehensive details in the pay slip on the Appellant's accrued leave status, I find that there was no need for the Respondent to provide additional documents on this aspect of the case as such evidence would only be superfluous. The pay slip produced sufficiently demonstrates that leave was an entitlement of the Appellant but that it had been fully utilized by him except for the three (3) days of unpaid leave that are captured in the instrument. I will therefore enter judgment for the Appellant for accrued leave dues for the three (3) days captured in the pay slip.

49. Daily unpaid leave dues are usually equivalent to an employee's normal daily wage rate. As the monthly wage rate for the Appellant was Ksh. 12,009/=, his daily wage rate would be approximately Ksh. 400/=. Therefore, for the three outstanding leave days, the Appellant was entitled to claim Ksh 1,200/= in accrued leave dues.

50. For public holidays worked the pay slip again provides for two (2) days. The Appellant did not provide details of the specific public holidays he worked to enable the court consider an award beyond the two (2) days captured in the pay slip.

51. It is correct to observe that section 10 of the *Employment Act* places the burden on an employer to prove or disprove a term of a contract that is required to have been reduced into writing. However as I have suggested above, this concept of reverse burden is triggered by the employee providing prima facie evidence in support of his claim. Only then is the employer called upon to prove or disprove the preliminary evidence by the employee (see *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR).

52. In the case of a claim for public holidays worked, my view is that the employee must lay out preliminary details of the specific days under consideration in order to establish a prima facie case for pay for those days. Only then will the employer be under duty to provide evidence to prove that the claim is unwarranted. I do not understand the Appellant as having acted this way.

53. In terms of regulation nine (9) of Regulation of Wages (Protective Security Services) Order, 1998, an employee is entitled to be paid double the hourly pay for every hour worked during public holidays. Thus for the two (2) unpaid holidays worked as per pay slip the Appellant is entitled to claim Ksh. 1,600/=.

54. Although the trial court disallowed the Appellant's claim for gratuity, I note from the Memorandum of Appeal that there is no ground challenging this part of the decision. I will therefore not disturb the trial court's order in this respect.

Final Award

55. In the final analysis, I find as follows: -

I. The trial court misdirected itself on the application of the requisite burden of proof by disregarding the directions on this subject as set out under section 10(7) of the *Employment Act* thereby reaching the wrong decision in the cause.

II. I accordingly set aside the trial courts judgment and enter judgment for the Appellant as follows: -

a) The Appellant is awarded leave travelling allowance of Ksh. 950/= as pleaded.

b) The Appellant is awarded overtime pay of Ksh. 366,274/=.

c) The Appellant is awarded unpaid leave dues for three days totaling Ksh. 1,200/=.

d) The Appellant is awarded pay for work performed on two public holidays totaling Ksh. 1,600/=.

e) The awards above attract interest at court rates from the date of institution of the claim before the trial magistrate's court till payment in full.

f) Costs of the Appeal to the Appellant.

g) The award is subject to the statutory deductions under section 49 of the *Employment Act* where applicable.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF JULY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Jumbale for the Appellant

Kerobo for the Respondent

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.

B. O M. MANANI

JUDGE