



Yaa v SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022) [2022] KEELRC 1553 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1553 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2022**

BOM MANANI, J

JULY 29, 2022

BETWEEN

ELIZABETH KAHONZI YAA 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 2021 in the matter of Mariakani ELRC No. 206 of 2019)

JUDGMENT

Introduction

1. This is an appeal arising from the decision of the Magistrate's court at Mariakani in ELRC No. 206 of 2019. The trial court's decision was in exercise of its jurisdiction over employment and labour relations matters pursuant to the powers donated to it under Gazette Notice No. 6024 of 2018.
2. After hearing the parties, the learned trial magistrate rendered his judgment on 8th December 2021 disallowing a substantial part of the Appellant's claim. It is that decision that has triggered this appeal.

Facts of the case

3. The brief facts of the case before the trial court are that on 25th August 2012, the Appellant was employed by the Respondent as a security guard. She was posted to the Respondent's assignment at Imarika Sacco Ltd within Mariakani. Around 21st April 2019, the Appellant voluntarily resigned from employment thereby bringing the contract of service between her and the Respondent to a close.
4. On resigning, the Appellant expected that the Respondent would work out the Appellant's terminal dues and pay them out to her. According to the Appellant, she was expecting to be paid accrued house



allowance, accrued leave days, overtime, leave travelling allowance, allowance for public holidays she worked and gratuity.

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

The Trial Court's decision

6. The trial court was not satisfied with the evidence presented by the Appellant in support of her claim. As a result, with the exception of the award for Ksh. 2,439/= towards overtime pay, the rest of her claim was dismissed.
7. In dismissing the claim, the trial court alluded to the reasons advanced in a related but distinct dispute in Mariakani CMELRC 205 of 2019 as the basis for his decision. The court indicated that for reasons similar to those advanced in CMELRC 205 of 2019 which had also been heard before him, he had reached the conclusion that the Appellant had failed to prove her case to the required standard.

The Grounds of Appeal and Questions for Determination

8. 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 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 pay for the duration of her service notwithstanding that there was no evidence to controvert the claim that the Appellant had been working for an average of twelve (12) hours per day.
 - 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 of employment challenging the Appellant's claim in this respect.
 - f. That the trial court erred in law and fact in failing to award the Appellant payment for public holidays worked despite the Respondent having not provided records to rebut the Appellant's claim in this respect.
 - g. That the trial 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.
9. 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 as particularized in the Memorandum of Claim notwithstanding that the Respondent had failed to provide records demonstrating that the claims were not due to the Appellant?

Analysis and Findings

10. I will address these questions not in any particular way. However, in the final analysis I will have answered all the issues raised.
11. At the point of taking directions on appeal on 7th June 2022, the parties agreed to prosecute the matter by way of written submissions. Subsequently, both parties filed their submissions. Therefore, the court’s decision is guided by the submissions on record, the documents constituting the Record of Appeal and the law that is applicable to the dispute.
12. As is the practice in first appeals, it is perhaps necessary to restate my role in processing this appeal. My mandate in this respect involves re-evaluation of the evidence on record with the intent that I reach my own conclusion on the matters raised. However, even as I undertake this exercise, I must remain alive to the fact that I neither saw nor heard the witnesses before the trial court testify and must make due allowance for this (see *Moses Odhiambo Muruka & another v Stephen Wambembe Kwatenge & another* [2018] eKLR).
13. 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 her case beyond reasonable doubt. I have studied the court’s decision against the evidence tendered. With respect, I do not see any suggestion that the trial court imposed on the Appellant the burden of establishing the facts of her case beyond reasonable doubt.
14. What I think is the problem in the matter in relation to the concept of burden of proof is the way the trial 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 notwithstanding that it is the employee who may be asserting breach or otherwise of the term.
15. 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 applied the conventional burden of proof as envisaged under sections 107 and 108 of the *Evidence Act*. This approach places the duty to establish a disputed fact in a cause on the party asserting the fact.
16. That the trial court adopted this conventional approach in allocating the duty to establish disputed terms of the contract of employment between the parties to the cause is clear from the observations of the court at page 2 of its judgment (see page 50 of the Record of Appeal). At this page, the trial magistrate observes that for the same reasons as those expressed in CMELRC No. 205 of 2019, it was his view that the Appellant had failed to establish her case.
17. I have looked at the reasoning of the court in CMELRC No. 205 of 2019. At page 7 of the decision in CMELRC No. 205 of 2019, 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.”



18. However, the fact that the trial court adopted the conventional approach in allocating the burden of proof in terms of sections 107 and 108 of the *Evidence Act* 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.
19. Consequently, I find no merit in the ground of appeal asserting that the trial court imposed on the Appellant the burden of establishing her case beyond reasonable doubt. I decline to allow this ground.
20. I will now consider the question of the burden of proof adopted by 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.
21. 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).”
22. 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).
23. 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 25th August 2012 to 21st April 2019 when she resigned, a period of more than six (6) years. Therefore, and in terms of section 9 (1) of the *Employment Act*, the contract of service between the parties to this action 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.
24. Before the trial magistrate, the parties had a dispute relating to: whether the Appellant was entitled to house allowance as a standalone item or whether it was included in her gross salary; and whether she was entitled to leave travelling allowance, overtime accrued leave pay and gratuity. For all purposes and intents therefore, 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.
25. Under section 10 (7) of the *Employment Act*, where a dispute arises on the terms 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 gross salary of the Appellant



included house allowance; the Appellant was not entitled to leave travelling allowance and overtime pay rested with the Respondent employer.

26. 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 provided 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 or other written memorandum to demonstrate that house allowance was included in the Appellant's gross salary.
27. In the Court of Appeal decision of *Grain Pro Kenya Inc. Ltd v Andrew Waitbaka 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 instrument generated by the employer without the input of the employee. The pay slip produced by the Appellant and appearing at page 48 of the Record of Appeal ought to be understood in this context.
28. 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.
29. 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 or gross salary such as house and medical allowance. In such case, it will be clear that whilst consolidated or gross salary usually includes house and medical allowance, these items do not form part of the gross or consolidated salary in such case as they have specifically not been included in the list of items comprising the gross or consolidated 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 by the evidence presented in each particular case.
30. 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.
31. In this appeal, I would have disagreed with the decision of the trial magistrate that merely because the Appellant's salary was indicated as "gross" in the pay slip, it necessarily incorporated the element of house allowance. This is because despite the Appellant producing a pay slip demonstrating that her 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 re-examination of the Appellant on the subject, she expressed herself as follows at page 41 of the Record of Appeal: -

"I was earning an all inclusive salary. I didn't understand what all inclusive salary means."



32. By this, 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 salary paid to the Appellant was all encompassing.
33. To my mind, it does not matter that the Appellant may have misconstrued the import of the term “all inclusive” as long as she admits that she had information that the salary she was receiving was of this nature. This is sufficient proof of the fact that the salary covered house allowance. With this admission, it became unnecessary for the Respondent to go further and furnish the court with additional evidence on the subject.
34. With regard to leave travelling allowance, the same principle applies. As the contract between the parties was for a period running over six (6) years, it was by law required to be reduced into writing to give clear particulars on how it addressed leave travelling allowance if at all.
35. On her part, the Appellant asserts that she was entitled to leave travelling allowance, a fact that the Respondent disputes, at least in its pleadings. In terms of section 10(7) of the Employment Act, the burden lay with the Respondent to produce the written contract of service or other written memorandum to disprove the Appellant’s case as to the existence of the term on leave travelling allowance given the fact that the Appellant had provided prima facie evidence in the pay slip demonstrating that she was entitled to leave and therefore in all probability to leave travelling allowance.
36. Besides mere denials in the statement of defense relating to this allowance, the Respondent did not lead evidence to satisfy the requirements of section 10 (7) of the Employment Act. In the absence of evidence to the contrary from a written contract of employment 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.
37. Importantly, leave travelling allowance is indeed a statutory right contrary to the finding by the trial court and submissions by Counsel for the Respondent that it was not. As a statutory right, this entitlement is implied in every contract of service for security guard employees and constitutes one of the irreducible minimum terms of the contract as long as there is evidence that the employee has 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.”
38. 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 by providing 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.”

39. It does not matter therefore that the Respondent’s position is that the contract between them did not provide for leave traveling allowance. In my view and having regard to the allocation of burden of proof under section 10(7) of the *Employment Act*, it was for the Respondent to furnish records to demonstrate that the Appellant was paid this allowance when she took her last annual leave.
40. I take this position because, in my view, the Appellant laid prima facie evidence that she was entitled to annual leave when she produced evidence showing that she had been in service of the Respondent for over a year in terms of Section 28 of the *Employment Act*. Under regulation 13 aforesaid, all employees in the security service sector who are eligible for leave are by law entitled to leave travelling allowance.
41. In any event, information on payment of allowances such as leave travelling allowance is ordinarily expected to be in the custody of the employer who maintains the employment records. In terms of section 112 of the *Evidence Act*, when in civil proceedings any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him (see *Associated Motors Co. Ltd v Blue Sea Services Ltd* [2019] eKLR).
42. In this case and in terms of section 112 of the *Evidence Act* as read with section 10(7) of the *Employment Act*, the burden lay with the Respondent to disprove the Appellant’s assertion that she was entitled to leave travelling allowance and that the same had not been paid. I would therefore set aside the decision of the trial court on this item and award the Appellant leave travelling allowance of Ksh.950/=.
43. Lastly, I should state 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 traveling allowance. The decision is not applicable to this case. It related to travel allowance for the Claimant while on official travel. That is not the same thing as leave travelling allowance claimed by an employee that is proceeding on leave.
44. The trial magistrate found as a matter of fact that the Appellant had been subjected to work for an extra two (2) hours every day in the month of March 2019. This was based on the entries in the pay slip for the month under consideration as read with a Wage Order whose specifics the court did not set out. The court went ahead to award the Appellant overtime pay of Ksh. 2,439/=.
45. 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 are not confined to the month of March 2019. 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.



46. 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.”
47. 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 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.
48. 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 she 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.
49. 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 on 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.
50. 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 her 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.
51. Although the Respondent filed a clearance/discharge form dated 16th September 2020 via its list of documents dated 30th August 2021 which suggests that the Respondent in fact acknowledges the Appellant’s entitlement to overtime pay to the tune of Ksh. 478,137.03, I note that the said form was not formally tendered in evidence as exhibit. This is because the Respondent ended up not calling any witness in the cause. 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.
52. That notwithstanding and in my view, it was incumbent on the trial court to consider the implication of section 10(7) of the *Employment Act* on the fate of the Appellant’s claim on overtime pay particularly in view of the Respondent’s election not to provide any evidence on oath to challenge the Appellant’s



preliminary evidence that she had been subjected to overtime for which she had not been remunerated. The entries in the pay slip showing twelve (12) work hours per day for the Appellant instead of the standard eight (8) hours as provided in the applicable Wage Order were sufficient prima facie evidence that the Appellant had a plausible claim for overtime on a balance of probabilities. It was therefore erroneous for the trial court to ignore considering the matter from this perspective.

53. The Appellant had pleaded overtime of four (4) hours every day. However, the trial court found, based on a Wage Order that was not cited, that the overtime committed was only two (2) hours per day. 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 (6) 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 as demonstrated by the pay slip, it follows that the Appellant's contention that she was working an extra four (4) hours per day prima facie has merit.
54. In the absence of evidence by the Respondent to the contrary in terms of section 10(7) of the Employment Act and based on the above finding, I will set aside the trial court's finding on this item and replace it with a finding that there is evidence establishing a prima facie case that the Appellant was subjected to regular four (4) hours overtime for the duration of the contract. In the absence of rebuttal evidence as required under section 10(7) of the Employment Act, I award the Appellant overtime pay of Ksh. 551,480/= being the amount claimed based on four (4) hour overtime rate.
55. As for unpaid leave, the pay slip appearing at page 48 of the Record of Appeal shows that the Appellant had a balance of zero (0) days unpaid leave. From the slip, there is a section dedicated to information on the annual leave brought forward where an employee has not utilized his or her accrued leave days in full. The entry against this item reads zero (0). This is clear evidence that there was no accrued annual leave brought forward for the Appellant from the previous years.
56. 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 memorandum of the particulars of a term in the contract be produced by the employer to establish a disputed fact in the contract. I say so recognizing the fact that by virtue of section 20 of the Employment Act, a pay slip is a document that is generated 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.
57. Therefore, 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 and or duplicitous documents on this aspect. The pay slip sufficiently demonstrates that leave was an entitlement of the Appellant but that it had been fully utilized by her. I will therefore uphold the trial court's finding declining to enter judgment for the Appellant for unpaid leave dues.
58. For public holidays, the pay slip again demonstrates that the Appellant worked for an average of twenty-three (23) days per month. In terms of regulation six (6) of the Regulation of Wages (Protective Security Services) Order, 1998, the Appellant's average monthly work days were required to be twenty-four (24). This is if the foregoing six (6) day work week regulation is anything to go by. This means that as the Appellant was working for twenty-three (23) instead of twenty-four (24) days per month as contemplated under the Regulation of Wages (Protective Security Services) Order, 1998, she had



an extra one (1) off day per month in addition to the six (6) days guaranteed under regulation six (6) aforesaid in any given thirty (30) day calendar month.

59. With the extra one (1) rest day every calendar month, it appears incomprehensible that the Appellant was working on designated public holidays without getting compensation from the one (1) extra rest day in any given month. I would therefore uphold the decision of the trial court declining the prayer for unpaid holidays. In my view, the entries in the pay slip suggesting that the Appellant was enjoying the full rest days guaranteed under Regulation of Wages (Protective Security Services) Order, 1998 and in addition had one (1) extra day over and above that contemplated under regulation six (6) above is sufficient evidence, by way of some other written memoranda that the Appellant is not entitled to claim pay for public holidays as they must have been compensated by the one (1) extra rest day she was off duty every month.
60. 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

61. 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. Accordingly, I set aside the trial court's 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. 551,480/=.
 - c. The Appellant's claim for house allowance and leave pay is declined.
 - d. The Appellant's claim for pay for work performed on public holidays is declined.
 - e. The awards above attract interest at court rates from the date of institution of the claim before the trial 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

Kerubo 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

