



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC APPEAL NO.009 OF 2020

FRANCIS NGIRONGU.....APPELLANT

VERSUS

FLAMINGO HILL CAMP LIMITED.....RESPONDENT

JUDGEMENT

1. This matter is originated by way of Memorandum of Appeal dated 17<sup>th</sup> June, 2020 filed through the firm of Benson Njuguna & Company Advocates. The Appeal is premised upon the following grounds:-

1. **THAT the Honourable Magistrate erred in law and in fact by dismissing the Appellant's claim against the weight of the evidence presented and applicable law.**
2. **THAT the Honourable Magistrate erred in law and in fact by dismissing the Appellant's case without framing issues for determination and without providing: adequate reasons.**
3. **THAT the Honourable Magistrate erred in Jaw and in fact in disregarding the Appellant's evidence, submissions and judicial authorities cited.**
4. **THAT the Honourable Magistrate erred in law and fact by dismissing the Appellant's claims by considering extraneous issues of redundancy and time limitations on a claims for overtime and unpaid annual leave, which issues were nether pleaded nor canvassed by parties during trial.**
5. **THAT the Honourable Magistrate erred in law and misdirected herself by dismissing the Appellant's claim for annual leave for the years 2015, 2016 and 2017 and overtime on the basis that the claims were not continuing injuries and thus statute barred.**
6. **THAT the Honourable Magistrate erred in law and in fact by establishing that the — 20 Appellant worked only overtime for two (2) hours a day but refused to award him compensation on the basis that the claim was statute barred, the Appellant went on annual leave, off days and compulsory leave.**
7. **THAT the Honourable Magistrate erred in law and misdirected herself by failing to make a finding that the decision by the Respondent to send the Appellant on compulsory un-paid leave for nine (9) months was illegal and unlawful, which amounted to a continuing injury and thus payable as salary arrears.**
8. **THAT the Honourable Magistrate erred in law and misdirected herself by failing to exercise judicial authority on known legal principles and by rendering a biased, unjust and an inconsistent decision.**
9. **THAT the Honourable Magistrate erred in law by considering issues of law and fact not raised by the Respondent and thus seeking to prosecute the Respondent's case.**
10. **THAT the Honourable magistrate erred in law and misdirected herself by shifting the burden of proof to the Appellant on matters alleged by the Respondent on rotation of guards against well-established rules of evidence that require the person alleging existence of facts to prove them.**
11. **THAT the Magistrate erred by failing to establish that the Respondent had not tabulated the terminal dues payable to**

**the Appellant and failing to compute the same.**

He prays for Orders That;

- a. This Appeal be allowed and the orders issued on 28<sup>th</sup> May, 2020 dismissing the Appellants Statement of Claim with costs be set aside.**
- b. The Appellant's be awarded terminal dues payable as prayed in his statement of claim dated 9 August 2019.**
- c. The Respondent do pay the costs of this Appeal and costs at the subordinate court in CME&LRC CASE NO. 290 OF 2019.**
- d. Any other order and relief that this Honourable Court may deem fit and just to grant.**

**Brief facts**

2. The Appellant, claimant in the trial court, vide a statement of claim dated 9<sup>th</sup> August, 2019 brought a suit against the Respondent in the chief magistrate's courts at Nakuru being ELMCC NO.290 of 2019, seeking for his terminal dues being gratuity pay, salary arrears, overtime pay, accrued and outstanding leave days all amounting to **Kshs, 2,202,131/-** together with interest and cost of suit and to be issued with a certificate of service and any other prayer the court may deem fit to grant.

3. The claimant in his claim allege that he was employed by the respondent as a security guard commencing December, 2005 to 31<sup>st</sup> January, 2019 when he resigned due to unavoidable circumstance, after serving for 13 years.

4. He contended that he served the respondent diligently, loyally and professionally without any disciplinary issues for the 13 years.

5. He alleged that the Respondent send him on compulsory leave without pay on various dated being; 31<sup>st</sup> March, 2015 to July 2015, 31<sup>st</sup> March, 2016 to July, 2016 and 15<sup>th</sup> April, 2017 to July, 2017 all adding up to Nine (9) months all which were unpaid. Further that, the decision to send him on compulsory leave was unilateral, unlawful and contrary to the rules of Justice.

6. It is alleged that the claimant worked from 6:00pm to 6:00 am every day therefore worked for four hours' overtime which overtime was never paid for the 13 years at the Respondent's employ.

7. The claimant resigned and tendered his resignation letter dated 16<sup>th</sup> November, 2018 which was accepted by the respondent on 28<sup>th</sup> December, 2018. The respondent while accepting the resignation letter offered the claimant; Gratuity at half monthly salary for every year served, 3 accrued off days, 12 accrued leave days, half leave travelling allowance and service charge from January 2019.

8. The claimant averred that he was paid a sum of Kshs 76,000/- upon his resignation but the said sum of money was without any explanation as to the tabulations as such alleged that the terminal due was too low forcing him to file the said claim.

9. The respondent on the other hand averred that the claimant was employed on 1<sup>st</sup> July, 2006 and has worked for the respondent for 12 years 6 months. Further that the claimant was served with several warning letter of 22<sup>nd</sup> January, 2009, 16<sup>th</sup> May, 2011 and 13<sup>th</sup> October, 2018.

10. The respondent averred that there was an incident that occurred on the night of 12<sup>th</sup> October, 2018, while the claimant was on duty, that a gas cylinder got lost and the claimant could not explain the same and he admitted liability on 13<sup>th</sup> October, 2018 and agreed for the cost of the gas cylinder to be deducted from his pay.

11. On the issue of overtime, the respondent stated that the claimant did not work overtime as alleged but that, they have 8 guards who worked on rotational shifts.

12. The respondent further stated that the certificate of service was issued to the respondent upon resignation and payment of his terminal dues which was calculated at Kshs. 76,000/-.

14. The suit was heard and judgment delivered on 28<sup>th</sup> May, 2020 dismissing the claimant claim for lacking merit culminating to this appeal.

14. This appeal proceeded by way of written submissions with the appellant filing his submission on 2<sup>nd</sup> March 2021 and the respondent filing theirs on 15<sup>th</sup> March, 2021.

**Appellant's submissions.**

15. The Appellant submitted on all the Eleven grounds of appeal together. He submitted that the Honorable Trial Magistrate ignored critical evidence adduced by the parties during hearing therefore arriving at a wrong conclusion whereby she dismissed the appellants claim.

16. He submitted that the trial court ignored that on 28<sup>th</sup> December, 2018, the respondent undertook to compute and pay the Appellant his gratuity pay to be computed at half salary for each completed year of 12 years, which during hearing was established that the appellant had

worked for 12 years 6 months.

17. He submitted that the trial court ignored the evidence adduced that the respondent had failed to compute the terminal dues and give a breakdown of the total sum payable and only paid the claimant a blanket sum of Kshs. 76,000/-.

18. It was submitted that the trial court should have considered and made a finding that the appellant herein worked for the private security industry and thus his terms and conditions of service are regulated by Regulations of wages (Protective security services) order 1998.

19. It was further submitted that the trial court failed to appreciate the holding in the case of **Rogoli ole Manadiegi –versus- General Cargo Services Limited [2016] eklr** where Justice James Rika while allowing a claim for gratuity for a security guard stated that;

**“The prayer for gratuity was well-founded under the Wages Order. The years of service were not in doubt. Unlike the claims for overtime and annual leave, gratuity was pursued on clear facts based on a clear wage regulation. The Appellant did not leave employment on redundancy; he never testified he did so. The Trial Court erred in equating gratuity under the Wage Order, to severance pay on redundancy. The Appellant merited 18 days’ salary for every year completed in service as gratuity, under regulation number 17.”**

20. Accordingly, he submitted that the appellant herein ought to have been awarded gratuity pay computed as follows;

$(25,000/26) \times 18\text{days salary} \times 12 \frac{1}{2} \text{ years of service} = 216,346.15/-$ .

21. On the issue of salary arrears, it was submitted that the trial court misdirected itself in arriving at its decision. He argues that, the appellant was forced to proceed on unpaid leave for nine (9) Months despite being employed on a permanent and pensionable terms.

22. It was further submitted that the respondent contradicted their letters sending the appellant on compulsory leave as exhibit at pages 19-21 of the record of appeal and alleged that they paid the appellant for the said leave given but failed to produce any evidence to support their allegation contrary to the law under section 107(1) of the evidence Act that provides that; whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. He buttressed this by citing the case of **Meshack Kiio Ikulume –versus- Prime fuels Kenya Limited [ 2013] eklr**, where Justice Radido held that;

**“The practice of mere denials and putting Claimants to strict proof is not the practice or procedure of or applicable in the Industrial Court.”**

24. The Appellant further submitted that the Respondent’s evidence was contradictory and that the respondent failed to produced important document save for pays lips which the appellant allege were fabricated.

25. The appellant submitted that the employer who is the respondent herein is mandated under Section 10(6) of the Employment Act to keep employees records therefore if there were any records of payment for the 9 months on compulsory leave or evidence of recalling the appellant to work, the same ought to have been produced by the respondent during trial and relied on the case of **Francis Kamau Kinuthia – versus- Flamingo hill camp limited [2019] eklr** where the court held that;

**“The salaries unpaid when the claimant was sent on compulsory/forced leave is due as such time was within his employment. The wages owing from April to June, 2016 and from February to may, 2017 are payable all at ksh.141, 477.00.”**

26. Accordingly, the appellant submitted that, he has established a case for salary arrears for nine months on compulsory/ forced leave on a balance of probability which was ignored by the trial court and thus urged this court to allow the prayer for unpaid leave between 31<sup>st</sup> March 2015 to 31<sup>st</sup> July 2015, 31<sup>st</sup> March, 2016 to 31<sup>st</sup> July, 2016 and 15<sup>th</sup> April, 2017 to 31<sup>st</sup> July, 2017 all amounting to **Kshs. 221,836/=**.

27. It was submitted that the trial court while rejecting prayer for payment of the compulsory/ forced unpaid leave days departed from the facts, evidence and applicable principles and based its decision on redundancy, which issue was neither pleaded by the parties nor canvassed during hearing.

28. On the prayer of annual leave sought, the appellant submitted that the respondent during hearing produced leave request form indicating that the appellant had sought for 77 days for leave in December 2018 and January, 2019 but never produce any evidence for any leave taken in the year 2015, 2016 and 2017 when the onus lies with them. He thus submitted that the appellant is entitled to leave days’ pay for the years 2015, 2016 and 2017 at the rate of Kshs, 25,000/- each year all summing up to **Kshs. 86,538/=**.

29. It was submitted that the trial court while dismissing the prayer for leave days stated that;

**“... on the claim for annual leave, annual leave are classified as continuing injury under provisions of section 90(2) of the employment Act... this court makes a finding that these are not continuing injuries and therefore that the claim is dismissed.**

30. Accordingly, the Appellant submitted that, the trial court misapprehended and misinterpreted the provisions of section 28(2) and 90(2) of the Employment Act leading to a wrong decision and urged this court to allow the prayer for annual leave for the year 2015, 2016 and 2017.

31. On the allegation of working overtime, the appellant submitted that he has proved that he worked from 6pm to 6am. The respondent in rebutting the same claim that the appellant worked with other guard on rotational shift but failed to adduce any evidence to affirm the same. To affirm his position, he relied on the case of **Meshack Kii Ikulume –versus Prime Fuels Kenya Limited [2013] eklr** where the court held that;

**“The Respondent relied on mere and bare denials and put the Claimant to strict proof but gave no indication it had evidence to dispute the truth of the Claimant’s allegations. Bare denials can never suffice to give rise to a dispute of fact where the facts averred fall within the knowledge of the denying party I just need to note that in the employment relationship the employer is obliged to keep and produce records in legal proceedings pursuant to sections 10(2)(3),(7) and 74 of the Employment Act. The practice of mere denials and putting Claimants to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination. This was not such a claim but it is true that it is employer who keeps attendance logs, muster rolls and such other documents.”**

32. Accordingly, it was submitted that the respondent ought to have produced evidence to show that the appellant did not work in excess of 4 hours each day as alleged. Further that under regulation number 6 of the wage Order, the appellant was expected to work for a maximum of 8 hours a day. He cited the case of **Philemon Oseni Kidavi –versus Brinks Security Guards ltd [2018] eklr** where the court held that;

**“The respondent as the employer opted to submit any work records with regards to the claimant employment contrary to section 10(7) of the Employment Act... on the claim of overtime pay, I find no material challenge to the claims that the claimant had 3 hours overtime work each day... without any records filed by the respondent in this regard a reasonable computation of the same would be to remove a month pay in each year based on the last gross salary wage earned by the claimant.”**

33. He also relied on the case of **Evans Katiezo Aligulah Versus- Eldomat Wholesalers and supermarket ltd [2016] eklr**. And submitted that having established that the appellant worked for 4 hours overtime each day for the 13 years, the Appellant ought to be paid the pleaded sum of Kshs. 1,819,328/- as compensation.

34. The appellant submitted that there was no formula used by the respondent in calculating the appellant’s terminal benefit which was paid at Kshs. 76,000/-. they thus submitted that, the trial court arrived at a wrong decisions and urged this Court to set aside the judgement of 28<sup>th</sup> May, 2020 and allow this Appeal.

#### **Respondent’s submission**

35. The respondents in opposition of the appeal herein submitted that the evidence on record is clear and the testimony by the appellant herein during trial culminated to the decision of the learned magistrate which according to the respondent was sound and that the same ought not to be interfered with.

36. It was submitted that the appellant resigned from his employment and was offered more than what the law mandates any employer to offer an employee upon resignation and therefore argued that, the Appeal herein has no basis and urged this court to dismiss the same with costs.

37. I have examined the submissions and averments of the parties herein. The main gist of the appeal is that the learned trial magistrate misdirected herself by failing to appreciate the crucial evidence submitted by the parties. This being a 1<sup>st</sup> appeal from the lower court, this court has a duty to re-evaluate the evidence of the parties herein.

38. From the evidence herein the claimant indeed resigned from employment. This is evidenced from the resignation letter dated 16/10/2018 (FHCH 6). This resignation was accepted by the respondents vide their letter dated 28/12/2018 (FHCH 7).

39. In the acceptance letter the respondent accepted to pay the appellant his dues as follows:-

- Gratuity at ½ month’s salary for each year worked (12 years)
- 12 day accrued leave
- Half leave travelling allowance
- Service charge for salary 2019

40. The amounts were to be paid less statutory deduction such as payee, NHIF, NSSF and any advances if any.

41. At the time of resignation, the claimants gross salary was kshs.23,354 as per his December 2018 payslip.

42. In declining to grant the appellant gratuity pay the Hon. Magistrate indicated that this is not payable as the appellant was a member of NSSF and therefore Section 35 (5) of the Employment Act 2007 came into play.

43. Indeed Section 35 (5) of the Employment Act 2007 does not envisage payment of gratuity where an employee is a member of NSSF or a Pension Scheme.

44. The appellant was a member of NSSF. However the respondent herein whilst accepting his resignation promised to pay him his gratuity when they knew he was a member of NSSF.

45. In the circumstances the promise crystallized at that point and the respondents could not renege on the same.

46. Their refusal to pay gratuity to the appellant was in bad taste and the Hon. Learned Magistrate should have enforced the promise by the respondent to pay the same.

47. In the circumstances I find that failure to award the appellant gratuity was an error and he is indeed entitled to the same.

48. As for the payment of leave this was also promised by the respondent as they accepted the resignation this being 12 days leave.

49. On overtime pay, the appellant indicated that he worked from 6am to 6pm. The respondents on their other hand submitted that they had 8 hour shift/rotation.

50. They therefore submit that the Appellant was not entitled to overtime. The respondents have not however demonstrated the 8 hour rotational shift through their master roll to indicate that the appellant worked for only 8 hours instead of the 12 hours thus working 4 hours overtime daily.

51. The appellant also indicated that he was sent on unpaid leave for 9 months which fact the respondent accepted.

52. In their evidence before the lower court, the respondents indicated that the reason was due to low business at the time.

53. On this, I will let the explanation of the respondent suffice given that the claimant was later recalled to work and there had been no promise to pay him the unpaid salary.

54. Given the circumstances of the appeal, it is my finding that the appeal has merit and I allow the same and instead find for the appellant as follows:-

**1. Gratuity payment of 15 days for each year worked being-**

$$15/30 \times 23,354 \times 12 \text{ years} = 140,124$$

**2. 12 day leave day =  $12/30 \times 23,354 = -9,341.6$**

**3.  $\frac{1}{2}$  leave travelling allowance which I put at kshs.  $\frac{1}{2} \times 23,354 = 17,677$**

**Total = 161,142.6**

**Less already paid**

**Balance = 85,142.6**

**4. The respondent will pay costs of this appeal plus interest at court rate with effect the date of this Judgment.**

**DATED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for parties