



Cotec Security Group Ltd (Formerly Known as Bedrock Holdings Ltd) v Kenya National Private Security Workers Union (Appeal E023 of 2023) [2024] KEELRC 610 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 610 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E023 OF 2023
CN BAARI, J
MARCH 19, 2024**

BETWEEN

COTEC SECURITY GROUP LTD (FORMERLY KNOWN AS BEDROCK HOLDINGS LTD) APPELLANT

AND

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION RESPONDENT

(Being an appeal from the Judgment of Hon M. Agutu (PM) Kisumu delivered on 6th April 2023 in Kisumu CMELRC CAUSE NO. 57 OF 2019)

JUDGMENT

1. In an amended statement of claim dated 29th October, 2020, the Respondent impleaded the Appellant at the Chief Magistrates' Court seeking awards on account of underpayment, overtime, leave allowance, off days/rest days, holidays, gratuity and house allowance, all totalling to Kshs 1,613,759.11/-. It equally sought award of costs of the suit and interests thereon.
2. The Trial Court rendered a Judgment on 6th April, 2023, allowing the Respondent's claim in the following terms;
 - i. Underpayment Kshs 325,080/-
 - ii. House allowance Kshs 131,826/-
 - iii. Off duty Kshs 115,440/-
 - iv. Leave days Kshs 100,940/-
 - v. Overtime Kshs 75,005/-



- vi. Less Kshs 78,657/- (previously paid by the Appellant)
TOTAL Kshs 669,634/-
3. The Appellant being dissatisfied with the decision of the Trial Court, lodged a memorandum of appeal on 25th April, 2023, premised on the following grounds: -
- i. The Trial Magistrate erred in law and in fact by failing to appreciate the canon principle of law that parties are bound by their pleadings.
 - ii. The Trial Magistrate erred in law and in fact by not appreciating that the Appellant sufficiently discharged on a balance of probabilities the burden requiring him to prove that the grievant took at least a day off each week during the subsistence of his employment.
 - iii. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that during his employment, the grievant earned a consolidated salary, hence he was not entitled to house allowance.
 - iv. The Learned Magistrate erred in law and in fact by failing to appreciate the evidence presented before her, particularly that the grievant went for leave, and whenever he did not go he was compensated accordingly.
 - v. The Learned Magistrate erred in law and in fact by attempting to rewrite the employment contract between parties as to the hours of work and the agreed consolidated pay, which contract was negotiated by parties in light of the prevailing economic conditions. As a result, the Learned Trial Magistrate then proceeded to award the grievant overtime dues totally contravening the employment contract that parties had signed.
 - vi. The Learned Magistrate erred in law and in fact by failing to properly and sufficiently appraise, interpret and apply the provisions of Section 90 of the [Employment Act](#), thereby arriving at an inconsiderate finding.
 - vii. The Learned Magistrate erred in law and in fact by failing to accord the requisite consideration to the Appellant's evidence and submissions filed on record, thereby arriving at a wrong finding.
4. The Appellant prays that this appeal be allowed and the judgment of the Magistrates Court be set aside and the Respondent's case dismissed.
5. On 12th July, 2023, the Respondent informed Court of its desire to file a cross appeal and which it duly filed on 25th July, 2023. Under the cross- appeal, the Respondent contends that: -
- i. The Learned Trial Magistrate erred in law and in fact in failing to award gratuity despite the Respondent admitting the same as payable.
 - ii. The Learned Magistrate erred in law and in fact in finding that overtime was barred to one year.
 - iii. The Learned Magistrate erred in law and fact in under-assessing the overtime payable by the Appellant herein by using the wrong multiplier on the amount due per hour.
6. Both the appeal and the cross appeal were canvassed by way of written submissions.
7. Both parties filed their submissions.



The Appellant's Submissions

8. The Appellant submits that it was wrong for the Magistrate to award the Respondent what was not prayed for. It is its further submission the Respondent was awarded underpayments of Kshs.325,080/= as against Kshs 143,840.40/= pleaded and unpaid leave of KShs.100,940/= as against Kshs 75,107.40/= pleaded.
9. It submits that parties are bound by their pleadings, and buttresses this assertion through reliance in Daniel Otieno Migore versus South Nyanza Sugar Co. Ltd [2018] eKLR, where the court, while citing the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR, stated that:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.
10. It is the Appellant's submission that most of the prayers sought were continuing injuries and were thus caught up with time limitation. It therefore urges this Court to disregard any claim that accrued earlier than 29th May, 2018, based on Section 90 of the [Employment Act](#).
11. The Appellant submits that at the point of engagement the salary was negotiated in consideration of the prevailing economic situation. It asserts that the agreement was for the Appellant's client Maseno University to pay Kshs 14,000/- out of which the grievant was to be paid Kshs 10,500/-, with the balance being left for administrative purposes and uniform acquisition.
12. The Appellant avers that underpayments should be subject to Section 90 of the [Employment Act](#), given that it was a continuing injury. On this point, the Appellant urges this court to be guided by the cases of Daniel Otieno Migore vs South Nyanza Sugar Co.Ltd [2018]eKLR and Kenya Union of Commercial Food and Allied Workers vs Generation Electric Allied Limited [2019] eKLR.
13. With respect to house allowance, the Appellant submits that the salary of Kshs 10,500/- was consolidated, hence the Respondent is not entitled to an award on account of house allowance. It sought to rely in Stephen O Edewa vs Lavington Security Limited [2019] eKLR where the Court disallowed house allowance stating that the salary was consolidated.
14. In respect of off duty payments, this Court is urged to disregard the same on the strength of the muster roll which shows that the Grievant was off duty for four days every month and was paid. It is its submission that the muster rolls for 2018 and 2019 were only a sample that prove on a balance of probabilities that the grievant proceeded on leave and was paid.
15. On the issue of leave, the Appellant submits that the grievant was compensated in full through the payment of Kshs 63,857/- for prorated leave.
16. In respect of overtime it submits that the grievant was not entitled to any on the basis that the Grievant was well aware of the working hours, which explained why he never complained for seven years. The Appellant further urges the Court to treat overtime as a continuing injury in case it finds to the contrary. Reliance is placed in Hezron Kihumba Kamotho v Teachers Service Commission [2019] eKLR.



17. The Appellant contends that the grievant was not entitled to gratuity on account of being 64 years of age at the time of retirement. It relies on paragraph 17 of the Legal Notice No. 24, of the Regulation of wages and conditions of *Employment Act*. According to the Appellant the grievant's retirement at 64 disqualified him from entitlement to gratuity.
18. On the award of costs, the Appellant implores upon the Court to levy the same on the Respondent premised on its failure to issue a demand letter before filing suit at the magistrate's court.

The Respondent's Submissions

19. The Respondent submitted on both the appeal and the cross-appeal.
20. It is the Respondent submission that the Appellant acknowledged owing the grievant gratuity during cross-examination of its witness at the lower court. It placed reliance in the Court of Appeal decision in *Wells Fargo ltd v Julius Ihomba Gatete [2018] eKLR*.
21. The Respondent submits that the Appellant admitted owing the grievant on account of gratuity, and that the only remaining issue was calculation of the same. It contends that the magistrate was wrong in not pronouncing herself on gratuity yet the same was comprehensively canvassed. It urges this Court to award gratuity for 18 days for each year worked in the sum of Kshs 73,380.22/=
22. On the award of overtime pay, the Respondent submits that it is not in dispute that the grievant worked for 12 hours every day which translates to 4 extra hours every day. It further submits that the hourly rate as provided under Rule 6 of the Regulation of Wages (General) Order was Kshs75.72/-. It called into question the Kshs 60 arrived at by the Magistrate alleging that there was no basis for the same.
23. Additionally, the Respondent contends that this suit was filed 1 month after cessation of the employment relationship, hence the issue of limitation of time does not apply. It placed reliance in *The German School Society & another v Ohany & another* for the holding that: -

“Normally, a belated service-related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service-related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.”

24. The Respondent submits that the Magistrate erred in holding that a continuing wrong can only be sustained for one year.
25. The Respondent avers that the contention that claims before 29th May, 2018 ,were caught up by limitation of time should be disregarded. It asserts that claims for a continuous wrong only need to be filed within a year of termination. On this the Court is urged to consider the *Ogany case (supra)* and *Kengo Bakari Mwandogo v Kaluworks ltd [2020]eKLR*.
26. On the issue of the Respondent earning a consolidated salary, the Respondent avers that the payslip only refers to the Kshs 10,500/- as the basic pay. It relies on the case of *Vipingo Ridge vs Swalehe*



Ngonge Mpitta [2022]eKLR, where it was held that it is not automatic for house allowance to be included in the consolidated pay.

27. In respect of the award of underpayments, the Respondent submits that it was way below what was stipulated in the wage order. It relies on Section 48(1) of the *Labour Institutions Act* to the effect that in the event of underpayment the correct stipulation as per the wages order should replace the underpayment in the contract. It had reliance in *Irungu Githae vs Mutheka farmers co-operative society ltd* to buttress this position and prays for Kshs 143,840.40 under this head.
28. It is the Respondent's submission that the grievant worked 7 days a week and further submits that the Appellant failed to produce a checklist showing that the Grievant signed on off days.
29. It finally urges this Court to allow the cross-appeal, and dismiss the appeal with costs.

Analysis and Determination

30. Upon careful consideration of the Memorandum of Appeal, the cross-appeal and the Record of Appeal, the issues that crystallize for determination are: -
 - i. Whether the Trial Court awarded damages that were not pleaded;
 - ii. Whether the Grievant's dues qualify as continuing injuries, and if so;
 - iii. Whether the Grievant is entitled to the dues sought, and to those awarded.
31. The role of a first appellate Court was succinctly elucidated in the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where it was stated: -

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

Whether the Trial Court awarded damages that were not pleaded

32. It was the Appellant's contention that the Magistrate awarded higher amounts for underpayments and unpaid leave than what was pleaded. It states that Kshs 325,080/= was awarded for underpayments as opposed to Kshs 143,840.40/= pleaded. Additionally, KShs.100,940/= was awarded for unpaid leave as opposed to Kshs 75,107.40/= pleaded.
33. The amended memorandum of claim indeed shows that the Respondent pleaded for Kshs 143,840.40/= for underpayment, and Kshs 75,107.40/= for unpaid leave.
34. As correctly submitted by the Appellant, pleadings are the bedrock upon which all proceedings derive. In *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* [2014] eKLR the court cited with approval the Nigerian Supreme Court decision of *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where it was stated that: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded..... ..In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the



issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

35. It therefore follows that the Trial Court did award amounts higher than those pleaded as evidenced by the judgment. This indeed, was a misdirection on the part of the Trial Court.
36. Further, no reason was given to justify departure from the pleadings before the Court. In the premise, I find and hold that the Trial Court erred in making higher awards than those pleaded.

Whether the Grievant’s dues qualify as continuing injuries.

37. The Appellant urges this Court to disregard any claim that accrued earlier than 29th May, 2018, on the basis that they are time barred for being continuing injuries.
38. The Respondent on its part avers that the issue of time limitation does not arise because the suit was filed one month after cessation of the employment relationship.
39. Section 90 of the *Employment Act* provides thus on time limitation:

“Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof. “

40. The import of this section is that any claim based on a continuing injury must be brought within 12 months of cessation of the violation.
41. The Supreme Court of India in Balakrishna S.P. Waghmare v Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the Indian Limitation Act) as follows:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

42. The record shows that the grievant was retired on 30th April, 2019, and this suit filed on 24th June, 2019. The claims are therefore well within the 12 months stipulated by Section 90 of the *Employment Act*.
43. The next question that flows from the foregoing, is whether claims that were more than the three years stipulated under Section 90 were awardable. A look at the Respondent’s Memorandum of Claim shows claims go as far back as the year 2013 to 2015.
44. The cause of action herein arose on 30th April, 2019 when the Grievant was retired. It therefore means that as per the provisions of Section 90 of the *Employment Act*, any claim before 30th April, 2016 is statute barred, and so I hold.



Whether the Grievant is entitled to the dues sought and to those awarded by the trial court

Underpayments

45. Having found that claims before 30th April, 2016 were time barred, this Court shall restrict itself to the period between 30th April, 2016 and 30th April, 2019.
46. It is not in dispute that the grievant earned Kshs 10,500/- per month. The Appellant contended that the Grievant was paid Kshs 14,000/= with Kshs 3,500/= being deducted for uniforms and administrative purposes. This it stated was a provision in the agreement which was not supposed to be disturbed by the court.
47. On its part the Respondent urges this Court to consider the provisions of Section 48(1) of the *Labour Institutions Act*. It produced a payslip showing that the Grievant earned Kshs 10,500/-. The contract alluded to by the Appellant does not cover the relevant period hence it is of no use.
48. The Respondent produced the Minimum Wages Orders for the relevant period. The Wage order applicable to the period 2016 to 2017 provided a minimum wage of Kshs. 12,926.55, meaning that the Respondent was underpaid by Kshs. 2,426.55, while 2017 to 2018, the minimum wage was Kshs. 13,572.90, translating to an underpayment of Kshs. 3,072.90 and 2018 to 2019 was Kshs. 15,141.95 with the underpayment being 4,641.95.
49. In total, the underpayment amounts to Ksh. 71,623.25, and the award by the Trial Court is hereby set aside, and substituted therewith an award in the sum of Ksh. 71,623.25 on account of salary underpayment.

House allowance

50. The record confirms that the minimum wages for the period January, 2019 to April, 2019 was inclusive of house allowance. The Grievant is therefore not entitled to house allowance during this period.
51. The minimum wages for the period May, 2016 to December, 2018 were not inclusive of house allowance. The Grievant is thus entitled to house allowance for this period in the sum of Kshs. 65,258.82, being 15% of the basic salary payable in the respective years, in terms of the applicable Minimum Wage Orders.

Off duty

52. According to the Appellant the Grievant had 4 off days per month, and was duly paid. In support of this contention it produced a muster roll for 2018 and 2019 stating that this was sufficient to prove on a balance of probabilities that the Grievant is not entitled to off days. The Respondent on his part urges that in the absence of muster rolls the grievant is entitled to off days.
53. The muster roll produced in evidence only indicates the days when the Respondent was present at work, and does not show that he worked extra hours.
54. The Respondent did not lead any evidence to prove that he worked for extra hours and that he was entitled to payment for the extra hours served.

PARA 55.

For this reason, the award in this respect is set aside.



Overtime

56. Similar to off-duty claim, the Respondent led no prove that he worked more hours than he was employed to do. Furthermore, the contract was not specific on working hours.
57. The award in this regard is equally set aside.

Leave days

58. On the claim for payment in lieu of leave, the Appellant being the custodian of the records did not produce anything to show that the Grievant proceeded on leave.
59. This prayer is thus upheld for the period of 30th April, 2016 to 30th April, 2019, being the time falling within the limitation period.
60. The Appellant established that it paid the Respondent Kshs. 68,107 on account of 147 leave days not utilized.
61. In the premise, the claim is not merited and the award on account of leave is set aside.

Gratuity

62. There is no contractual basis for an award under this head and the Respondent's pay slip shows that he together with the employer contributed to NSSF.
63. The claim is therefore accordingly declined, and the finding of the Trial Court upheld.
64. In the final analysis, the appeal partly succeeds and orders issued in the following terms: -
- i. The award of Kshs. 325,000 is set aside, and substituted therewith an award in the sum of Ksh. 71,623.25 on account of salary underpayment.
 - ii. The award of Kshs. 131,826 in house allowance is set aside and substituted with Kshs. 65,258.82.
 - iii. The award of Kshs. 115,140 off -duty allowance is set aside entirely.
 - iv. The award of Kshs. 100,940 on account of leave is set aside.
 - v. The Appellant will bear the costs of both the suit before the lower court and those of this appeal.
65. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF MARCH, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Mr. Bagada present for the Respondent

Arwin Ongor- C/A

