Case Number:	Civil Appeal 23 of 2015
Date Delivered:	04 Mar 2016
Case Class:	Civil
Court:	Employment and Labour Relations Court at Mombasa
Case Action:	Judgment
Judge:	James Rika
Citation:	Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR
Advocates:	Mutua Munyao & Company Advocates for the Appellant Mogaka, Omwenga & Mabeya Advocates for the Respondent
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	Makungu
County:	Mombasa
Docket Number:	-
History Docket Number:	R.M.C.C Number 3717 of 2006
Case Outcome:	-
History County:	Mombasa
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CIVIL APPEAL NUMBER 23 OF 2015

BETWEEN

ROGOLI OLE MANADIEGI.....CLAIMANT

VERSUS

GENERAL CARGO SERVICES LIMITED.....RESPONDENT

[Being an Appeal from the Judgment and Order of the Hon. Makungu made on

the 30th day of January 2008, in Mombasa R.M.C.C Number 3717 of 2006]

BETWEEN

ROGOLI OLE MANADIEGI.....PLAINTIFF

VERSUS

GENERAL CARGO SERVICES LIMITED.....DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Mutua Munyao & Company Advocates for the Appellant

Mogaka, Omwenga & Mabeya Advocates for the Respondent

JUDGMENT

1. The Appellant was the Plaintiff in Mombasa R.M.C.C. Number 3717 of 2006, in which he sought against his former Employer, 3 months' salary in lieu of notice at Kshs. 14, 400; 8 years' annual leave pay of Kshs. 38,400; gratuity at Kshs. 19,200; and overtime worked both on normal days and public holidays, at Kshs. 222,350. The Trial Court dismissed the Claim with costs to the Respondent, finding the Appellant was only entitled to notice pay. The Appellant lodged the Appeal at the High Court in Mombasa, registered as Civil Appeal Number 29 of 2008. The Appeal was transferred to the Employment and Labour Relations Court by the High Court on jurisdictional grounds on 20th July 2015, and registered as Civil Appeal Number 23 of 2015.

2. Parties agreed to have the Appeal considered and determined on the strength of the record. They

agreed to file written submissions underlining their respective positions on the Appeal.

3. The Appellant raises 8 Grounds of Appeal. Encapsulated these grounds are that the Trial Court erred in law in raising the standard of proof required to establish the Claim; the Trial Court erred in law and fact in holding the Appellant had not proved he worked for 8 years without taking annual leave despite the Respondent not adducing any evidence to the contrary; and erred in denying the Appellant overtime pay and gratuity, despite the Respondent failing to produced any counterevidence to that adduced by the Appellant.

4. The Respondent gave no evidence at the Trial, and did not file Submissions on Appeal

5. The Appellant submits his evidence in the Trial Court was uncontroverted. He worked in the private security industry, and his terms and conditions of service regulated by the Regulation of Wages [Protective Security Services] Order 1998. Regulation Number 6 of this Order provides normal working hours are 52 in a 6-day working week. In a day normal hours are 8. The Appellant testified he worked 12 hours every day, for the entire 8 years worked. He merited compensation for excess hours, under Order 7.

6. The Trial Court rejected the Claim for overtime on the ground that the Appellant did not attempt to give dates when he worked overtime. The Appellant contends this was misdirection and that he should have been awarded overtime pay of Kshs. 222,350 as pleaded, in view of the Respondent having offered nothing by way of evidence to contradict the Appellant. He relies on Industrial Court case between ***Meshack Kiio Ikulume v. Prime Fuels Kenya Limited [2013] e-KLR,*** where the Court held it is the duty of the Employer to keep employment records, including on hours of work.

7. The Court is not able to agree with the Appellant on this ground. It is true the Employer is the custodian of employment records. The Employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the Employer bringing to Court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the Employee. The Claimant did not show in the Trial Court when he put in excess hours, when he served on public holidays or even rest days. The evidence on record does not even separate normal overtime from overtime on rest days and public holidays. The rates of compensation are different. He did not justify the global figure claimed in overtime, showing specifically how it was arrived at, based on the Regulation of Wages [Protective Security Services] Order 1998. He correctly argues on the application of the Order, but gave no consistent evidence showing the hours worked, and how these hours gave rise to the figure of Kshs. 222,350 claimed as the overall overtime.

8. Furthermore from the recorded evidence, the Appellant testified there were times he went home for a week, or two weeks. He stated, *''in the course of employment, there is a time I was not working.''* How then would he justify overtime pay based on the full period in employment, if he did not work in full" His claim for overtime was not established on the balance of probability, and his correct submission on the law relating to computation of overtime pay, is made in a factual vacuum.

9. His claim for annual leave pay fails on the same ground. He testified he was away for even a week or two weeks. All the time his salary was paid. He did not in the Plaint, deduct the days he was away, from his annual leave claim. He seeks a full 8 years of unpaid annual leave. It is, the Court restates, the duty of the Respondent to keep employment records which would include annual leave records. But as stated above the Employee must endeavour to prove his case on the balance of probability, even where such records are not made available. The Appellant did not do this, instead claiming annual leave days for the entire period in employment, while at the same time, conceding he was away for weeks. He did not give

the frequency of these weeks when he was away. It was not a requirement of the Wage Order or the Employment Act that the annual leave days are taken at once, so that the one week, or two weeks, the Appellant states he was away, could be part of his annual leave entitlement. He needed to give forthright evidence explaining the time he was away from duty, on account of both the claim for overtime pay and annual leave pay. It is not proper for the Appellant to submit, which was not the case during trial, that the days he was off-work were days of ''sick leave or emergency.''

10. Notice of 3 months, or 3 months' salary in lieu of such notice, was not an item supported by any evidence. It was not justifiable under the contract of employment, or the law governing the employment relationship. The Trial Court correctly found the Appellant was entitled to 1 month salary in lieu of notice under the law, and having received Kshs. 11,280 from the Respondent through the Labour Office, was not entitled to additional notice pay.

11. The prayer for gratuity was well-founded under the Wage 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. ***He is allowed gratuity at 18 days' salary for every year completed in service computed at Kshs. 33,230.***

12. The Appellant finally prays the Court to consider granting him underpayments with regard to the period 2003 to 2005. He did not plead this in his initial claim, but testified he was paid Kshs. 200 per day in 2003 at the beginning, which was reduced later, to Kshs. 4,800 per month.

13. The Court is entitled to evaluate evidence on appeal, and grant the Parties their full employment rights. This aspect of the evidence was consistent and unchallenged. There is a principle of employment law, that the salary of an Employee should not be adjusted in his disfavour, without consultation and his concurrence. The Respondent lowered the rate payable to the Appellant from Kshs. 6,000 to Kshs. 4,800 a month. No reason for this is given anywhere in the proceedings. ***The Court shall therefore allow the prayer for arrears of salary at Kshs. 38,400, as submitted by the Appellant***.

14. ***The Appeal is therefore allowed to this extent: the Respondent shall pay to the Appellant gratuity and arrears of salary added up at Kshs. 71,630. Interest at 14% p.a. on the principal sum granted to the Appellant, from the date of Judgment till payment is made in full. Parties shall meet their costs in the Appeal and the Trial Court.***

Dated and delivered at Mombasa this 4th day of March, 2016

James Rika

Judge