Muchiri v Security Guards Services Limited (Employment and Labour Relations Appeal E108 of 2021) [2024] KEELRC 1807 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1807 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E108 OF 2021

BOM MANANI, J

JULY 8, 2024

BETWEEN

JOHNSTONE NYAGA MUCHIRI .... APPELLANT

AND

SECURITY GUARDS SERVICES LIMITED .... RESPONDENT

JUDGMENT

Background

1. The parties to this appeal had an employment relation until 21st December 2018 when the Respondent issued the Appellant with a letter of summary dismissal. According to the Respondent, the Appellant had been away from work from 21st February 2016 when he was arrested in connection with a theft incident at the place. The Respondent's position was that the Appellant's prolonged absence from duty coupled with the theft incident amounted to gross misconduct which entitled it (the Respondent) to terminate his services. And hence the decision to summarily dismiss him from employment.

2. Aggrieved by the turn of events, the Appellant mounted a suit before the Magistrate's Court to challenge the lawfulness of the Respondent's decision. In her judgment dated 31st August 2021, Kagoni PM (as she then was) declared the Respondent's decision as unfair and therefore unlawful. The trial court went further to award the Appellant the following: pay in lieu of notice to terminate the contract of service; compensation for unfair termination of employment equivalent to the Appellant's salary for four months; Certificate of Service; interest on the sums awarded; and costs of the case. However, the Appellant's prayers for salary arrears, gratuity and house allowance were declined.

3. Aggrieved by the trial court's decision, the Appellant filed the instant appeal. The appeal raises two grounds of appeal to wit the following:-

a. That the learned magistrate erred in law and fact in failing to award the Claimant (Appellant) the terminal dues sought in the Statement of Claim.

b. That the learned trial magistrate erred in law and fact in analyzing the facts, evidence and law applicable and hence reached a wrong conclusion.

Issues for Determination

4. From the aforesaid grounds of appeal, the only issue that arises for determination is whether the learned trial magistrate applied the wrong principles of law in determining the reliefs to grant to the Appellant.

Analysis

5. This is a first appeal. As such, the role of this court is to evaluate the evidence on record and reach its own conclusion on the matters in controversy. However, the court ought to do so with the usual caution that unlike the trial court, it did not have the benefit of taking the evidence of the witnesses in the cause. As such, it should only depart from the findings of fact by the trial court if they are not supported by the evidence on record or are inconsistent with the law.

6. As the trial court's decision shows, the court awarded the Appellant compensation for unfair termination of his contract that was equivalent to his salary for four months. The Appellant was not impressed by this development. According to him, the court ought to have awarded him compensation that was equivalent to his gross monthly salary for twelve months.

7. The basis for the Appellant's contention is that he had been in the Respondent's employment for twenty two years. In his view, this long period of service entitled him to the maximum compensation that is sanctioned by law.

8. One of the remedies that section 49 of the *Employment Act* provides for unfair termination of employment is compensation. The law sanctions compensation which does not exceed the aggrieved employee's salary for twelve months.

9. The decision regarding the quantum of compensation is left to the trial magistrate's discretion so long as he/she does not overshoot the cap that has been placed by law. However, in exercising this discretion, the court should be guided by a number of considerations. These include but are not limited to: the length of service by the employee; the extent to which the employee's conduct may have contributed to the decision to terminate his services; and the opportunity available to the employee to secure alternative employment. So long as the trial court takes these considerations into account in assessing the amount of compensation to award, the appellate court must not interfere with the exercise of the trial magistrate's discretion.

10. It is now settled law that an appellate court should exercise restraint when reviewing a decision which stems from the exercise of discretion by a trial court. The appellate court should only interfere with the decision if it is apparent that the trial court abused its discretion or that the discretion was exercised in a manner that is contrary to law.

11. This principle has been reiterated in a plethora of judicial pronouncements. In *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR, the Court of Appeal expressed itself on the matter as follows:-

> ''The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.''

12. In the instant action, the trial magistrate explained why she awarded the Appellant compensation that was equivalent to his gross salary for four months. She took into account his past conduct. She expressed the view that the Appellant was not without blemish for the eventuality that befell him because he had been issued with a number of warnings before he was relieved of his duties.

13. As indicated earlier, how an employee's conduct impacted on the employer's decision to end their relation is a critical consideration in assessing the quantum of compensation to award under section 49 of the *Employment Act*. Therefore, the trial court did not err in taking the Appellant's conduct into account in addressing this issue.

14. The Appellant has emphasized the length of his service to the Respondent as the reason why he should have been awarded maximum compensation. To support this argument, he has quoted the decision in *Gas Kenya Limited v Odhiambo* (Appeal E006 of 2022) [2022] KEELRC 3930 (KLR) (22 September 2022) (Judgment).

15. However, I do not understand that decision as establishing a legal principle to the effect that once an employee demonstrates that he has rendered long service to an employer, he is entitled to maximum compensation that is equivalent to his salary for twelve months as a matter of right. All that the court underscored is that an employee's length of service is critical in determining the amount of compensation to award.

16. In the case, the learned Judge expressed the view that given the employee's lengthy service without blemish, the trial magistrate was entitled to award him full compensation in exercise of her discretion. In contrast, the trial court in the case that gave rise to the instant appeal observed that despite the Appellant's lengthy service, his record was not without blemish. And hence her decision to award him compensation equivalent to his salary for four months.

17. Having regard to the foregoing, I am satisfied that the learned trial magistrate exercised her discretion in accordance with the law. In arriving at her decision, she considered matters that ought to be taken into account under section 49 of the *Employment Act*.

18. The next issue relates to the trial court's refusal to award the Appellant service gratuity. The Appellant argues that he was entitled to this benefit by virtue of regulation 17 of the *Regulation of Wages (Protective Security Services) Order, 1998* which provides as follows:-

> ''After five years' service with an employer, the employee shall be entitled to eighteen days' pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.''

19. The basis for the trial court's refusal to award the Appellant service gratuity was the fact that his pay slip showed that he was a contributor to the National Social Security Fund (NSSF). As such and in terms of section 35(6) of the *Employment Act*, he could not claim for additional service pay.

20. Whilst it is true that the service pay that is contemplated under regulation 17 of the *Regulation of Wages (Protective Security Services) Order, 1998* is not founded on section 35 of the *Employment Act*,

one ought to consider the rationale for the exclusion clause under section 35(6) of the *Employment Act*. The rationale was to avoid scenarios where an employee becomes a beneficiary of what appears to be double compensation.

21. The essence of contributing to the NSSF is to ensure that the employee is afforded social protection in retirement. Therefore, where the employer has opted to contribute to this Fund on behalf of the employee, it would amount to double compensation to compel him (the employer) to make additional payments towards social protection of the employee. And hence the exclusion under section 35(6) of the *Employment Act*.

22. In my view, there is sound justification for applying the same reasoning to the entitlements under regulation 17 of the *Regulation of Wages (Protective Security Services) Order, 1998*. Where an employer has registered an employee under the NSSF and has been contributing to the Fund on behalf of the employee, it appears unconscionable to compel such employer to pay the employee gratuity under the aforesaid regulations in addition to the payments under the NSSF.

23. Such payment would offend the principle against double compensation. For that reason, I agree with the trial court's finding that because the Respondent was paying NSSF dues for the benefit of the Appellant, the latter was not entitled to pursue service pay under the aforesaid regulations (see also the comments by the Court of Appeal in *Alsaidco Alarm Limited v Njeru* (Civil Appeal 256 of 2017) [2023] KECA 1127 (KLR) (22 September 2023) (Judgment)).

25. Finally, the Appellant argues that the trial court ought to have awarded him salary from March 2016 when he was kept away from the workplace to December 2018 when his services were terminated. The Appellant also claims for house allowance for this period.

26. The record shows that the trial magistrate rejected this plea on two grounds. First, she considered that the claim for salary was statute barred. Second, she was of the view that the claim for house allowance was unjustified since the Appellant's pay slips showed that his salary included house allowance.

27. The learned trial magistrate observed that past judicial pronouncements suggest that withholding employee benefits such as salary constitute a continuing injury to the employee. Under section 90 of the *Employment Act*, such claims ought to be pursued within twelve months of cessation of the injury.

28. I have considered this aspect of the claim. It is now apparent that withholding employee benefits such as salary and allowances (including house allowance) constitute a continuing wrong to the employee (see*The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment)). As such, the affected employee is entitled to claim such benefits within twelve months of cessation of the injury.

29. The Appellant's purportedly withheld salary and house allowance were for the period that ran between March 2016 and December 2018. Being a continuing injury claim, the Appellant ought to have claimed this amount within twelve months of cessation of the injury or termination of his contract of service whichever occurred earlier.

30. From the record, the Appellant's contract of service was terminated on 21st December 2018. Yet, he did not file suit until after 3rd September 2020, more than twelve months down the line.

31. Thus and in terms of section 90 of the *Employment Act*, both claims for outstanding salary and house allowance had become statute barred at the time suit to recover them was filed. As such, the trial court was right to reject them (the two claims) on this account.

Determination

32. Having regard to the foregoing, I arrive at the conclusion that the instant appeal is devoid of merit.

33. As such, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.... for the Appellant

..................for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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