Mombasa & 2 others v Nyanumba (Appeal E013, E023, E022, E024, E028, E027, E026 & E025 of 2024 (Consolidated)) [2024] KEELRC 2084 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2084 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E013, E023, E022, E024, E028, E027, E026 & E025 OF 2024 (CONSOLIDATED)

M MBARŨ, J

JULY 4, 2024

BETWEEN

SGA SECURITY SOLUTIONS LIMITED ..... 1ST APPELLANT

SGA CASH IN TRANSIT LIMITED ..... 2ND APPELLANT

SGA MOMBASA ..... 3RD APPELLANT

AND

JOSECK NYANUMBA ..... RESPONDENT

(Being Appeal and Cross-appeal from the judgment of Hon. D.O. Mbeja in Mombasa MCELRC No.134 of 2020 delivered on 29 January 2024. The appeal relates to several judgments including MCELRC No.81, 86, 135, 192, 193, 194, 195, and 196 of 2020)

JUDGMENT

1. The appeal herein ELRCA E013 of 2024 consolidates several similar appeals in

   ELRCA No.E013 of 2024;

   ELRCA No.E023 of 2024;

   ELRCA No.E022 of 2024;

   ELRCA No.E021 of 2024;

   ELRCA No.E024 of 2024;

   ELRCA No.E028 of 2024;

   ELRCA No.E027 of 2024;

   ELRCA No.E026 of 2024;

ELRCA No.E025 of 2024.

2. The Appeals and Cross-appeals arise from judgments delivered on 29 January 2024 in Mombasa CMELRC No.134 of 2020 as the lead file consolidating CMELRC No.81, 86, 135, 192, 193, 194, 195, and 196 of 2020. The appellants in all the appeals are SGA Security Solutions Limited, SGA Cash In Transit Limited, and SGA Mombasa Limited. The appellant is seeking that the judgments delivered by the trial court be set aside and substituted with an order dismissing the claimant and or the hearings start de novo and costs be paid.

3. The facts leading to the claims before the trial court in the lead file for the appeal, ELRCA No.E013 of 2024 SGA v Joseck Nyanumba are that the respondent is an adult and the appellants are registered limited liability companies that are separate and distinct.

4. On 1st April 2009, he was employed as a guard at a monthly wage of Ksh.9, 000 and rose through the ranks to Crew in 2013. He was later promoted to a CIT Crew member and then transferred to SGA Cash In Transit Limited and his wage increased to Ksh.25, 512 per month. His employment was regarded as being under the SGA Group of Companies which operated as one entity. A transfer from one respondent to another was a departmental transfer.

5. The respondent claimed his employment was terminated through summary dismissal without due process while attached to the Kenya Ferry Services on 10 February 2020. The appellants alleged that he was involved in a conspiracy to defraud their customer. He appealed against the decision of summary dismissal and was reinstated back on the condition that he should take a wage cut and a demotion which he refused to accept. The appellants decided to terminate his employment upon refusing to accept the new unfavourable conditions on the grounds of redundancy. This was unfair redundancy and or constructive dismissal without due process or justification. This was an indication that the appellants were no longer interested in the contract of employment and resulted in frustrating the respondent in his employment.

6. The respondent's case before the trial court was that he was not allowed to take his annual leave and was required to remain at work for 10 years hence entitled to Ksh.164, 494 in unpaid leave days. Before November 2017 he was not paid a house allowance and for 5 years is entitled to Ksh.159, 275.40. Work hours were 12 in a day and no overtime was compensated all at Ksh.796, 377. The due gratuity pay for 10 years is claimed at Ksh.147, 184.61 and for unfair termination of employment, he claimed Ksh.306, 144. The respondent attached his work records to support his claim and particularized them as follows;

    a. Accrued leave pay Ksh.164,494;

    b. Overtime allowance Ksh.796,377;

    c. House allowance Ksh.159,275.40;

    d. Notice pay Ksh.25,512;

    e. Gratuity pay Ksh.147,184.61;

    f. Severance pay Ksh.184,61;

    g. 12 months compensation Ksh.306,144;

    h. Costs of the suit.

7. In response, the appellants admitted that the respondent was employed as a guard. He rose to the position of CIT Crew but his wage was not Ksh.25, 512 as alleged. The appellants denied the claim

that they were regarded as departments under the SGA Security Group of Companies and operated as one entity and transferred staff from one appellant to the other. Employment was not continuous.

8. The appellants responded that the respondent was suspended from duty on 3 January 2020 to pave the way for investigations after there was the presentation of evidence that showed that he had been stealing from a client. He was invited to a disciplinary hearing on 4 February 2020 when he failed to give satisfactory responses and summary dismissal was issued on 10 February 2020. He appealed against the summary dismissal which was reduced to a termination and his dues were paid in full. The claim that there was reinstatement is not correct and is without evidence and the alleged conditions for pay cut and demotion are without evidence.

9. The appellants also responded that the respondent was not declared redundant or constructively dismissed as alleged. He took his annual leave or paid in lieu thereof. The claims made for house allowances, overtime or unfair termination of employment did not arise hence not due. Notice pay is not due as this was a case of summary dismissal. There was no overtime work and gratuity and severance pay are not due since the respondent was a member of NSSF and NHIF and there was no redundancy respectively.

10. The trial court heard the parties and in the judgment held that there was an unfair termination of employment due to alleged redundancy that was unfair, and unreasonable. The respondent was entitled to notice pay, accrued leave days for one year, house allowance for the years not paid, overtime allowed as prayed, severance pay for years worked and 6 months compensation for unfair termination of employment.

11. Claims for gratuity were declined.

12. Aggrieved, the appellants filed the appeal on 23 grounds;

    1. The magistrate erred in law and in fact in locking out the appellants from testifying in court.

    2. By refusing the appellants to testify and adduce their documents in response to the claimants/ respondents' case, the appellants' case was unheard of.

    3. The magistrate erred in law and fact in holding that the option of return to work offered by the appellants to the claimants/respondents upon appeal of their summary dismissal was tantamount to constructive dismissal.

    4. The magistrate erred in law and fact in finding that three was constructive dismissal of the respondents' contracts.

    5. The magistrate wrongly found that the appellants herein unilaterally changed the employment contracts.

    6. The magistrate erred in law and fact in assuming that the appellants were claiming/pleading redundancy for their actions when there was no evidence pleaded by the appellant who on the contrary had at all times stated that they had summarily dismissed the respondents/claimants.

    7. The magistrate erred in law and fact in finding that the termination was indeed substantively unfair by assuming that the appellant had pleaded or fronted the defense of redundancy.

    8. The magistrate erred in law and fact in holding an assumption of redundancy and proceeding to find fault in the process and decision of the appellant in the conduct of its employee relations process. By relying on the wrong matrix, the court arrived at the wrong decision.

9. The magistrate erred in law and fact in finding in favour of the respondents for the reliefs sought.

10. The magistrate erred in law and fact in awarding salary in lieu of notice when the same was expressly paid and formed part of the terminal dues paid by the respondents.

11. By awarding salary in lieu of notice, the court has unjustly enriched the respondents and simultaneously prejudiced the appellants.

12. The magistrate erred in law by awarding the 2nd and 4th respondents pro-rata leave whereas the same was expressly paid and formed part of the terminal benefits upon termination.

13. The magistrate erred in law and fact in awarding the respondents severance pay on account of assumed redundancy when the same was not only pleaded but was never advanced and or proved.

14. The magistrate erred in law and fact in awarding overtime to the respondents while the same was an agreed term of contract expressly providing for payment of Ksh.3, 000.

15. The magistrate erred in awarding the respondents a cumulative sum of Ksh.7, 152,838.95 as overtime whilst the claimant did not compute, specify or calculate how the sum was arrived at.

16. In so doing, the court has ignored the trite law that specific damages must not only be pleaded but specifically proved.

17. The magistrate erred in law and fact in awarding the respondents 6 months of unfair compensation yet the respondents voluntarily resigned when they opted for termination as opposed to summary dismissal.

18. The magistrate erred in law and fact in failing to take into account the appellants' role in orchestrating the terminating proceedings in that they were accused of stealing by the contracting client which led to the disciplinary proceedings that eventually culminated in their summary dismissal and subsequent on appeal termination.

19. The magistrate erred in law and fact in failing to consider all the appellants' positions leading to the termination.

20. The magistrate in failing to call and allow the appellant's witnesses to testify and produce documents in support of its case, handicapped the appellant and condemned it unheard.

21. The appellant did not testify or offer any rebuttal evidence to the respondents' case and was therefore condemned unheard.

22. The cumulative awarded sum of Ksh.9, 474,463.73 is extremely high and would cause the appellants to close its shop yet it was never heard nor was it allowed to defend itself.

23. The magistrate erred in law and fact by writing down the instant judgment yet the court had not heard nor seen any witnesses testifying.

13. The respondents raised Cross-Appeal seeking for a review and or enhancement of the awards of the trial court and in the alternative, the total award in the judgment delivered on 29 January 2024 be enhanced to Ksh.12, 968,621.34 as claimed. The respondents are also seeking costs for the appeal and cross-appeal.

14. The grounds for the Cross-appeal are that;

1. The trial court erred in law and in fact in under-assessing the house allowance;

2. The trial court erred in law and in fact in holding that the appellants were not entitled to gratuity because they did not produce contracts, thus failing to appreciate the fact that the burden of proving that the Cross-Appellants were not entitled to gratuity fell on the appellants.

3. The court erred in law and fact in failing to award underpayments to Fridah Bigogo, Violent Moraa Mayaka and Moses Wesonga.

4. The court erred in law and fact in failing to award maximum compensation for unfair termination to all the cross-appellants considering that each had worked for over 5 years before being unlawfully dismissed from work.

5. The court erred in law and fact and made an error in making a total award of Ksh.9, 474,463.37 when the total sum as per the judgment is ksh.12, 968,621.34.

18. Parties attended and agreed to address the appeal and cross-appeal by way of written submissions.

19. The appellants submitted that the trial court locked out the appellants from testifying and producing evidence before judgment was delivered. The appellant filed appeals against such a decision through ELRCA No.E069 of 2023 and ELRCA No.E067 of 2021.

20. In the impugned judgment, the trial court assumed there was redundancy and proceeded to address the same in the absence of evidence in this regard. The appellants had evidence that the respondent committed acts of gross misconduct and were subjected to due process leading to summary dismissal. They lodged appeals which were allowed to the extent of reducing it to termination and hence were paid their terminal dues including notice pay. The disciplinary hearing and verdict thereof are not challenged. The respondents were found culpable of stealing from the appellants' client, Kenya Ferry and as such, there were justified reasons for summary dismissal under the provisions of Section 44 of the *Employment Act*, 2007 (the Act). There was a valid and genuine reason leading to termination of employment as required under Section 43 of the Act.

21. There was due process where the respondents were suspended from duty, invited to attend disciplinary hearings, and notices of summary dismissal were issued for good cause. These dismissals were reduced to termination of employment. The claim that there was an unfair termination of employment placed the burden upon the respondent to prove under Section 47(5) of the Act which they failed to do.

22. The appellants submitted that the finding that employment was terminated on account of redundancy was without evidence and was assumed by the trial court. There is no material record of application of Section 40 of the Act in this case. The assessment of severance pay had no justification in law or fact. The respondents admitted in evidence that employment was terminated on account of gross misconduct and not redundancy.

23. The appellants submitted that in assessing the claims, the trial court erred in allocating notice pay as this was paid in full to the respondents at the end of employment.

24. On leave pay, the respondents testified that they would each get annual leave. Leave request forms were submitted in this regard.

25. The pro-rata leave claimed for Benjamin Nyang'a at Ksh.5, 320.76 the 2nd respondent and Fridah Bigogo the 4th respondent failed to take into account that they were suspended for 3 and 9 months respectively and were not entitled to leave pay while on suspension.

27. The claim for house allowance, upon termination of employment, the appellants had no obligation to pay this claim. From the date employment terminated and when the suit was filed, such period should have been removed.

28. The respondents did not prove that their wages were not consolidated. The pay slips confirm that a house allowance was being paid. The claim from 2017 backwards was a period outside the provisions of Section 90 of the Act as held in The German School Society & another v Ohany and Another [2020] eKLR.

29. The claim for severance pay is not due as this was not a case of redundancy. The findings in this regard were a complete departure from the evidence and response filed.

30. On overtime, the appellants submitted that there was evidence presented that each respondent would be paid ksh.3, 000 for any overtime worked. Any claim for 2017 and before was time-barred.

31. The compensation allocated for alleged unfair termination of employment at 6 months was too high and failed to take into account that the due process was applied leading to termination of employment for justified grounds.

32. On the cross-appeal, the appellants submitted that the alleged underassessment of house allowance based on the main appeal is not justified as this was not due in the first instance. Gratuity is not a term of the contract and was correctly addressed and dismissed as held in Bamburi Cement Limited v William Kilonzi [2016] eKLR.

33. The Severance pay not awarded to Fridah Bigogo and Moses Wesonga was not due as there was no redundancy. When these witnesses gave evidence, they admitted that the appellants' client Kenya Ferry lost money where they were deployed and this was gross misconduct. They were not underpaid and no compensation is due.

34. The cross-appeal that the total award should be Ksh.12, 968,621.36 and not Ksh.9, 474,463 should be addressed in the context of the appeal that has challenged the entire award and judgement.

35. In response, the respondents submitted that the respondents and cross-appellants were terminated from their employment by the appellants unfairly. The reasons given leading to termination of employment were unsubstantiated and unfair.

36. The respondents filed suits before the trial court seeking compensation for unfair termination of employment, payment of dues for redundancy and payment of work-related unpaid dues.

37. The matter came up for hearing before the trial court on 31st March 2021 and the 1st respondent testified and a further hearing was scheduled for 19 May 2021. The appellants applied to consolidate the various suits filed differently but arising from the same cause of action and against the appellants. By consent, parties agreed to consolidate the 9 suits and to rely on the same documentary evidence. The appellants applied to produce CCTV footage which was declined by the court but leave to appeal was granted. The appellants filed an application seeking a review Order through an application dated 19 May 2021 which was dismissed. The appellant filed an appeal ELRCA No.E067 of 2021 which was struck out in a ruling delivered on 21st September 2023.

38. The matter went back to the trial court for a hearing on 10 October 2022 when the appellants applied that two of its witnesses had left employment and sought to substitute them. The application was allowed. On 15 December 2022, the matter came up for hearing of the appellant's case and the case was closed. Parties were directed to file written submissions.

39. Instead, the appellants filed an application dated 17 January 2023 seeking to review the orders to file submissions and the same was dismissed in a ruling delivered on 30 June 2023. Aggrieved, the appellants filed an appeal ELRCA No. E067 of 2021 was found invalid. No submissions were filed before the trial court. Judgment was entered in favour of the respondents on 29 January 2024. The appellants sought leave to appeal and were allowed where ELRCA No.E013 of 2024 was filed. Parties attended and on 12 April 2024 parties agreed to consolidate the appeals herein.

40. The respondents submitted that the appellants failed to file their written submissions and cannot blame the trial court over its findings. The right to be heard was addressed based on the court directions which the appellants failed to address. The appeal challenging the proceedings of the trial court in this regard was dismissed in ELRCA No.69 of 2021 on 20 November 2023 for being an abuse of the court process.

41. The appellants chose not to defend the suit before the trial court. They also chose not to file any written submissions. The judgment is proper and should be allowed in terms of the cross-appeal as held in Supreme Court Civil Application No. 20 of 2014 (Mombasa) Bwana Mohamed Mwana v Silvano Buko Bonaya; Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others Civil Application No.25 of 2022.

42. The respondents submitted that the appellants appeal herein and the grounds of appeal amount to res judicata given ELRCA No.69 of 2021 – SGA Security Solutions Limited & 2 others v Joseck Nyanumba & 8 others and ELRC No.67 of 2021 SGA Security Solutions Limited & 2 others v Joseck Nyanumba & 8 others. The issues addressed are the same and relate to the same cause of action seeking to be heard over matters already addressed. This is an abuse of court process.

43. When the matter came up for hearing before the trial court on 15 December 2022, an application by the respondents to have the appellants' case closed and documents expunged was granted.

44. The respondents submitted that termination of employment was unfair and there were no valid reasons leading to summary dismissal or termination of employment. Sections 43, 45 and 57(5) of the Act require the employer to have valid reasons which are lacking in this case and to take the employee through due process which the appellants failed to address. The findings that there was unfair termination should have been redressed with maximum compensation of 12 months. The cross-appeal should be allowed to this extent as held in *Kenya Ports Authority & another v Joseph Munyao & 4 others CACA No.134 of 2018*. In this case, the respondents were dismissed from employment and they appealed. In response, the appellant offered reinstatement on condition that you are willing to take any opportunity but guarding. The summary dismissal was reduced to termination with immediate effect since there were no openings in any department except in the guarding department.

45. This in effect was a unilateral termination of employment despite reinstatement. The respondents would only continue in employment except in lesser roles. This was contrary to Articles 41 and 47 of *the Constitution* where the appellants engaged in unfair Labour practices and made adverse decisions without hearing the respondents. In the case of John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR the court held that the motions of Section 45 of the Act require that the termination of employment must be for a valid reason and the employer must undertake due process. These elements are lacking in this case.

46. The actions by the appellants were in effect a change of the terms and conditions of employment contrary to Sections 10(5) and 13 of the Act. Section 19(2) and (4) of the Act directs that no employee should suffer a wage deduction unfairly. In the case of Kenya County Government Workers Union v Wajir County Government and Another [2020] eKLR and Ronald Kamps Lugaba v Kenol Kobil

Limited [2016] eKLR courts have held that an employer cannot suo motto change the employment contract to the detriment of the employee.

47. The appellants are entitled to the reliefs sought in the Memorandum of Claim. Notice pay is a right under Section 35 of the Act. Accrued leave is due under Section 28 of the Act and no record was filed in this regard to demonstrate leave days taken. House allowance is due to an employee under Section 31 of the Act. There was no evidence of provision of housing or the due allowance.

48. On the claim for severance pay, following a successful appeal, the respondents were reinstated but offered lower positions. This was followed by termination of employment due to redundancy. Termination of employment was involuntary. No terminal dues were paid in this regard. The respondents who were underpaid were correctly addressed. Overtime pay is a right for work done. The respondents pleaded to this extent and the award is justified. Gratuity pay is regulated under Clause 17(1) of the Regulation of Wages (Protective Security Services) Order. The respondents were guards entitled to such pay as held in *Maro Abdallahi Jilloh v Nine One Kenya Limited ELRC No.834 of 2017*.

49. The trial court analyzed the evidence but by error tabulated the awards at Ksh. 9, 474,463.73 instead of Ksh.12, and 968,621.34 which should be reviewed and allocated accordingly. The appeal herein should be dismissed with costs and the cross-appeal allowed and the respondents awarded costs of the cross-appeal. The conduct of the appellants should be taken into account and the motions taken to frustrate the hearings from the trial court to this extent and under the provisions of Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 costs should be awarded to the respondents.

Determination

50. The appeal and cross-appeal were heard together. Being the first appeal, this court must examine the entire record of the lower court and make its independent findings. I have read the record and noted that the issues for determination are whether the appeal is res judicata; whether the grounds of appeal raised are with merit; and whether the cross-appeal is with merit. Further, all documents in support of the appeal and cross-appeal were admitted in evidence by consent of both parties. These documents included work records relating to the respondents/cross-appellants.

51. On whether the appeal is res judicata given the facts in ELRCA No.E067 of 2021 - SGA Security Solutions Limited & 2 others v Joseck Nyanumba & 8 others and ELRCA E069 of 2021 SGA Security Solutions Limited & 2 others v Joseck Nyanumba & 8 others. The appellants filed these appeals, seeking to address the right to a hearing before the trial court on the basis that they were not allowed to call evidence or file written submissions. Both appeals were dismissed.

52. A matter is res judicata if a suit is filed contrary to the provisions of Section 7 of the *Civil Procedure Act*, 2010 which provides;

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

53. The doctrine applies to both suits and applications and in this case appeals as was held in Abok James Odera v John Patrick Machira Civil Application No. Nai. 49 of 2001. To rely on the defence of res judicata there must be:

(i). a previous suit in which the matter was in issue;

(ii). the parties were the same or litigating under the same title;

(iii). a competent court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

54. In this appeal, the appellants' substantive orders are that the suit be returned for hearing de novo by the trial court.

55. Grounds (1), (2), (20), (21) and (23) relate to matters addressed in ELRCA No.E067 and E069 of 2021. These matters relate to the parties herein. The court has expressed itself on these matters. The issues therefrom cannot be addressed by this court as it stands functus officio. To this order, the suit to revert to the trial court for hearing de novo would be to give the appellants another bite at the cherry. This is not permissible in our legal system under the principles outlined under Section 7 of the *Civil Procedure Act* for being res judicata.

56. On whether the offer made by the appellants to the respondents to return to work upon appeal amounted to constructive dismissal, the facts of the case should be considered.

57. Through notice dated 10 February 2020, the appellants terminated the employment of the respondents by summary dismissal. This was after the respondents had been suspended from duty through a notice dated 3 January 2020 to allow for investigation. This was necessary following an impromptu year audit at Kenya Ferry Services Ltd at the cash tolls on 31st December 2019 and from the audit report it was discovered that the respondents were responsible for the money laundering that was taking place behind cameras.

58. The respondents were invited to a disciplinary hearing on 4 February 2020. Upon the hearing, the appellants established that the company has lost trust in you hence you are summarily dismissed from the services of the company with effect from 10th February 2020. The respondent applied the provisions of Section 44(4) (g) of the Act.

59. The summary dismissal was complete.

60. The proceedings thus far have not been challenged.

61. The appellants allowed the respondents the right of appeal. This is in accordance with Section 45(5) (a) of the Act;

> (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for this section, a Labour officer, or the Industrial Court shall consider—
>
> (a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

62. The appellants heard the appeals on 28 February 2020 and through notice dated 2 March 2020 indicated that they had reviewed the summary dismissal decision and offered to reinstate you back, however you gave conditions that you are willing to take any opportunity in the CIT department only and not any other opportunity within the organization.

63. The appellants agreed to review the summary dismissal with a reinstatement.

64. However, the respondents had given conditions.

65. On 8 February 2021, Joseph Nyambu testified before the trial court and reiterated this position as follows;

> ... my appeal was allowed and I was reinstated on condition that I be demoted to a guard. I was told to take up the guard position or other that I would be terminated. ... I insisted that that I be reinstated to my position as cashier, it was my condition. ...

66. On the given conditions by the respondents, the appellants responded that;

> ... we wish to inform you that we currently do not have any openings in the CIT department. The management has however considered your appeal and reduced the summary dismissal decision to termination of service. This is therefore to inform you that your services have been terminated with effect from 2nd March 2020.

67. This last part of the letter has led to this appeal.

68. On the one hand, the respondents in cross-appeal assert that they were dismissed on 2 March 2020 without a hearing, this was constructive dismissal for being offered inferior wages and being demoted, they were declared redundant and were not paid their terminal dues of severance.

69. As outlined above, the process leading to summary dismissal was completed on 10 February 2020. The appeal was reviewed but the respondents declined the conditions issued.

70. The appeal conditions were declined, the position upon appeal was the termination of employment. The background is a summary dismissal that was complete.

71. The appellants offered to pay for notice. On 21 July 2020, the respondents were paid terminal dues through a bank deposit. This is not challenged. In this appeal, Joseck Nyanumba was paid Ksh.108, 961.40 in terminal dues.

72. The agitation that there was a demotion and cut in wages is without evidence. The concept of constructive dismissal did not take effect since the respondents rejected the appeal terms and did not resign from their employment as addressed by the court in Maria Kagai Ligaga Vs Coca-Cola East and Central Africa Limited, that;

> Constructive dismissal occurs when an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed

73. This position is reiterated in Max Masoud Roshankar & another v Sky Aero Limited [2015] eKLR. Constructive dismissal must start with an action by the employee. A resignation is necessitated by the conduct of the employer. Such conduct must have placed the employee under intolerable conditions that the employee is forced to abandon employment through resignation.

74. To this extent, there was no constructive dismissal.

75. The employee, offered the opportunity to work upon a successful appeal from a summary dismissal cannot demand to be taken back on his position. An employer retains the prerogative to reorganize its operations. The conditional reinstatement of the respondents by the appellants is not stated to be a demotion or a pay cut. The respondents did not take up the employment to enjoy any wages to make such a determination.

76. The matter that there was a redundancy in the given circumstances cannot be inferred by the court. To this extent, the trial court made a presumption that the reinstatement and the conditions thereof resulted in a redundancy. Looking at the entire record, and the evidence of the respondents before the trial court, there was no redundancy in the matter.

77. Building on the summary dismissal and appeal converting the same to a termination of employment, employment terminated for a justified reason. Indeed, the respondents have relied on the provisions of Sections 41, 43 and 45 of the Act. Such provisions allow an employer to effect the termination of employment where the employee is found to have engaged in misconduct and the due process is addressed. Section 45(5) of the Act provisions was gone into length in the case of Alphonse Machanga Mwachanua v Operation 680 Limited (2013) eKLR where the court summarized legal fairness procedures. Further in the case of Nicholas Muasya Kyula v Farmchem Ltd [2012] eKLR the court held that;

> In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. ...
>
> The appellants conducted the disciplinary hearing to completion. There were findings that the respondents were of gross misconduct.

78. The appeal conditions were thus rejected by the respondents, the option was termination of employment and they have since been paid their notice pay and work dues.

79. Grounds (3), (4), (5), (6), (7), (8), (10), (11), and (13) of the appeal are with merit. The findings concerning redundancy and awards thereof were not justified. The award of severance pay, compensation for alleged unfair termination of employment or notice pay are removed from the respondents.

80. On the award for overtime, the appellants' case is that the respondents were paid Ksh.3, 000 per month to take care of overtime. Indeed, where the employee has worked overtime, such Labour should be compensated.

81. In this case, the respondents filed their payment statements. On pages 28 and 29 of the Record of Appeal, part of the records filed by the respondents before the trial court and part of the Memorandum of Claim demonstrate the following facts;

> In January 2019 there was the payment of overtime at 1.5 normal amount of Ksh.8, 394.07;
>
> Overtime 2.0-day amount Ksh.5, 244.97;
>
> In January 2017 overtime is paid at Ksh. 2,500;
>
> January 2018 overtime 1.5 normal amount Ksh.8, 341.92;
>
> Overtime 2.0 P/H day Ksh.3.330.11.

82. These payments are replicated for Pascal Marenga Katuma, the appellant in ELCRA No.E024 of 2024.

83. Overtime is earned per employee. It cannot be a general claim. Despite the appellants not filing the work records, based on the records filed by the respondents who made such a claim, the above analysis demonstrates that overtime was paid when due.

84. Indeed, overtime claimed by the respondents related to;

> April 2009 to March 2013;
>
> March 2013 to April 2024;
>
> May 2014 to January 2017.

85. The claim before the trial court was filed on 11 November 2020. Indeed, the provisions of Section 90 of the Act require that all continuing injuries should be addressed within 12 months from the date the right accrues. Even when employment subsists, the employee is allowed to secure his rights and is protected in doing so under the provisions of Section 46 of the Act.

86. In the case of The German School Society & another v Ohany & another, the Court of Appeal held that;

> Normally, a belated service-related claim will be rejected on the grounds of delay and laches or limitations. 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, regarding 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 continuing, 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 wrong contemplated under section 90.

87. Section 90 of the 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.

88. The cumulative award of overtime at Ksh.7, 152,838.95 failed to factor in the time limitations and hence, the trial court erred in making the general award.

89. To this extent, the appeal is with merit.

90. On the cross-appeal, gratuity is regulated under the contract of employment and policy documents published by the Minister in sector-wide areas. The appellants operate in the security services sector. The respondents were employed in such industry. The Minister has published the Regulation of Wages (Protective Security Services) Order. These Orders apply in the security sector just like the Minimum Wage Orders for general employees of agricultural workers. For the claim for payment of gratuity to the respondents upon termination of employment. This claim was justified and should have been assessed on the merits.

91. The respondents claimed gratuity pay for each year worked. The respondent herein is entitled to Ksh.147, 184.61 in gratuity pay.

92. In the cross-appeal concerning severance pay for Fridah Bigogo, Violet Moraa and Moses Wesonga, as analysed above, there was no redundancy. Payment of severance pay for all respondents is not due.

93. On the cross-appeal for a maximum compensation of 12 months instead of 6 months, there was no unfair termination of employment to justify the award of compensation. The appeal was allowed, and the respondents rejected the conditions thereof resulting in termination of employment. The cross-appeal that there was an error in making a total award of Ksh.9,474,463.37 when the total sum as per the judgment is ksh.12,968,621.34 is addressed above. The only terminal dues the respondents are entitled to under the appeal and cross-appeal is payment of gratuity. For the respondent in the lead file, the sum of Ksh.147, 184.61 and shall be paid to all respondents as claimed. The appellants made mere denials about this claim under the mistaken belief that the respondents were registered with NSSF and NHIF and hence gratuity pay was not due.

94. As outlined above, the policy direction by the Minister should be interfaced with an employment contract. Where such is not done, the employees do not lose the right unless the Wage Orders and policy by the Minister are revoked. The respondents are entitled to gratuity.

95. On costs, the respondents have taken the court through a painful journey over the years at the hands of the appellants' in seeking justice. Upon filing suit before the trial court, the hearing had to stop severally to accommodate the appellants. Several intervening appeals have been filed and all have since been dismissed. To secure their rights, the respondents have filed the cross-appeal and although partially successful, the court finds the respondents herein are entitled to their full costs of the cross-appeal. No costs are due to the appellants for the appeal.

96. Accordingly, the appeal is with merit and is allowed as analyzed above. Judgment of the lower court in Mombasa CMELRC E134 of 2020 is set aside save for the orders in the cross-appeal.

97. The Cross-appeal is partially successful to the extent that the judgement in CMELRC No.E134 of 2020 is hereby reviewed and the respondents awarded gratuity pay Ksh.147, 184.61.

98. On costs, only the cross-appellants are awarded costs.

99. Orders above are to apply in the consolidated appeals outlined above.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....