Kaguora v Gilly Security and Investigation Limited (Appeal E226 of 2022) [2024] KEELRC 2588 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2588 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E226 OF 2022

NJ ABUODHA, J

OCTOBER 25, 2024

BETWEEN

JOSEPH MWANGI KAGUORA ..... APPELLANT

AND

GILLY SECURITY AND INVESTIGATION LIMITED ..... RESPONDENT

(Being an appeal arising from the entire Judgment of Honourable MR. S.A Opande (PM) in Milimani CMELRC 68 of 2022 Joseph Mwangi Kaguora vs Gilly Security and Investigation Limited delivered on 05/12/2022)

JUDGMENT

1. Through the Memorandum of Appeal dated 21st December, 2022, the Appellant appeals against the Judgement Honourable MR. S.A OPANDE delivered on 5th December 2022.
2. The Appeal was based on the grounds that:
    i. The Learned Magistrate erred in law and in fact in dismissing the Claimant's suit yet it is manifestly clear that indeed the Claimant was not paid his terminal dues as pleaded and proved by the evidence on record.
    ii. The Learned Magistrate erred in fact and in law in applying a standard of proof higher in civil cases that is on a balance of probability.
    iii. The Learned Magistrate erred in law and in fact in failing to hold that the Claimant's case was unchallenged and uncontroverted.
    iv. The trial Magistrate erred in law and in fact in considering and determining the issue of unlawful termination from employment an issue that was not raised in the pleadings and proceeded to dismiss the Appellant's Case based on that issue alone.

v. The Learned Magistrate erred in considering extraneous matters which were not raised by parties during trial.

vi. The Learned Magistrate erred in law and fact in failing to pronounce itself accordingly on all the Prayers raised by the Appellant in his Memorandum of Claim.

vii. The Learned Magistrate erred in fact and in law in failing to pronounce itself accordingly on all the prayers raised by the Appellant in his Memorandum of claim.

viii. The Learned Magistrate erred in law and fact in failing to award costs and interests of the suit to the Appellant.

ix. The Learned Magistrate erred in law and fact in failing to balance the weight of evidence by the Appellant as against that of the Respondents' case and thus arriving at an erroneous decision.

x. The Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities filed in court.

xi. The Learned Magistrate erred in law and fact in totally misapprehending and misconceiving the Claimant's suit and eventually dismissing the same contrary to the weight of the documents and evidence on record.

3. The Appellant prayed that the appeal be allowed and the judgment delivered on 5th December, 2022 by the trial Court be set aside in its entirety with costs of the lower court and this Appeal.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Fred Mwihia & Company Advocates filed written submissions dated 9th September, 2024.On the issue of whether the Appellant is entitled to the reliefs sought by him in the trial Court, it was Counsel's submission that the Appellant did not dispute that he did resign from the Defendant company. What was in dispute was whether the Respondent did pay him his terminal dues as required by law having worked for the Respondent from 2009 to 2019. The Respondent had also undertaken to pay the Applicant his final dues as per its letter dated 28th December, 2018.

6. Counsel submitted that regarding the claims for unpaid earned leave days and unpaid overtime, shown to have accrued during the entire period of employment, the same were not in the nature of a continuing injury as contemplated in Section 90 of the *Employment Act* but damages as a result of an Employment which ought to have been brought within a time limit of 3 years and not 12 Months as held by the trial court as contemplated by Section 90 of the *Employment Act*.

7. Counsel relied on the case of George Hiram Ndirangu v Equity Bank Limited [2015] eKLR while submitting that the failure by the Respondent to settle the claim by the Appellant was a continuing injury within the purview of Section 90 of the *Employment Act* and which injury had so far not ceased as he has never been paid despite sending a Demand Notice to the Respondent. No evidence was before the Honourable Court to show that the continuing injury had ceased by the payment of the said monies to the Claimant by the Respondent.

8. Counsel further relied on the case of David Ngugi Waweru v Attorney General & another [2017] eKLR in submitting that the cause of action under Section 90 of the Act accrues from the date of termination.

9. It was the Counsel's submission that the Appellant testified in the trial court that he resigned from the Respondent Company due to his health conditions which resignation was duly accepted by the

Respondent. The Respondent, however, failed and or refused to pay him his terminal dues as required by the law.

10. Counsel submitted that the Appellant's employment was terminated with effect from 01/01/2019 and he subsequently filed his case on 24/01/2020. He is therefore duly entitled to the accrued unpaid leave of Kshs 113,400/= and overtime pay of Kshs 120,960/-, overtime on holiday and Sundays of Kshs 97,200/=.

Respondent's Submissions

11. The Respondent did not participate in this appeal just like in the lower court proceedings.

Determination

12. The principles which guide this court in an appeal from a trial court are now well settled. In Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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"

13. It is not in dispute that on or about 26/10/2009 the Appellant was employed by the Respondent as a site manager and in October 2018 he fell ill and resigned on 30/11/2018.

14. The Judgment of the trial court was on the dismissal of the Appellant's for the claim for notice pay, service pay, accrued leave, overtime payment, Overtime on holidays and Sundays, unremitted NSSF and 12 months compensation.

15. The court finds that the only issue in this appeal concerns payment of terminal benefits upon resignation from employment. Having considered the evidence as presented, it is clear that this was not a case for unlawful termination or wrongful dismissal. The Appellant resigned from duty due to health reasons. Consequently, sections 41, 43 and 45 of the *Employment Act* have no application to this dispute. The Claimant having voluntarily resigned from duty, the matter fell under the provisions of sections 35, 36 and 38 of the *Employment Act*.

16. The Appellant gave the Respondent a one-month notice according to the letter dated 30/11/2018 intending to resign on 1/1/2019, this court agrees with the trial court that as a result the prayer for notice pay fails.

17. On Service Pay, Section 35[5] of the *Employment Act* provides for service pay. However, Section 35[6] of the Act, exempts particular classes of employees from the benefit of service pay more so those who are members of NSSF. The Appellant was registered with NSSF hence falls under the categories of those employees contemplated under subsection [6][d] of section35.

18. On NSSF not remitted, the court is of the view where there are allegations that an employer didn't fully make due contributions as contemplated under the NSSF Act, the remedy for an offended employee lies under Section 14 of the same Act, which provides;

> " If any contribution for which a contributing employer is liable under this Act is not paid within one month after the end of the month in which the contribution period or the last day of the contribution to which it relates falls, a sum equal to five per cent of the amount

of that contribution shall be added to the contribution for each month or part of a month thereafter that the amount due remains unpaid, and any such additional amount shall be recoverable in the same manner as the contribution to which is added".

19. The Appellant had the duty to prove non-remittal of his contributions by evidence of NSSF statements. He provided a few and not all hence this court agrees with the lower court that he was not entitled to the same claim.

20. On the claim for unpaid earned leave days and unpaid overtime claimed by the Appellant on their Memorandum of Claim, this court notes that this being an employment dispute, the applicable law on limitation of actions is section 90 of the *Employment Act* which provides as follows:-

> " Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), 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".

21. This court further notes that a reading of section 90 of the *Employment Act* leads to the conclusion that the cause of action starts running after cessation of the contract. In this case the employer-employee relationship ended on 1/1/2019 when the contract ended and any claim arising out of that relationship ought have been filed in Court within 3 years thereafter.

22. The court notes that the second part of section 90 of the Act provides that in the case of continuing injury or damage, the claim must be brought within twelve months next after the cessation thereof. Section 90 of the Act is framed in mandatory terms and no extension of time is permissible.

23. Concerning continuing injury, the Court of Appeal in the case of G4S Security Services (K) Limited v Joseph Kamau & 468 Ors (2018) eKLR contextualised what constitutes continuing injury when it stated that a contractual benefit which accrues at the end of each month amounts to continuing injury for purposes of the law of limitation.

24. Consequently, the Court finds that the dues sought by the Appellant under the heads of accrued leave and overtime accrued at the end of each month and therefore he should have moved the Court within 12 months from 1st January 2019.

25. The court therefore agrees with the findings of the trial court that the Appellant by filing a claim on 24/1/2020 was outside the limitation period for claims under continuing injury.

26. On 12 months compensation as claimed, the Appellant has not justified under what head the same was claimed being that the Appellant stated that the issue of unlawful termination from employment was not pleaded. In any event the appellant resigned and never alleged he was compelled or coerced into doing so.

27. In the upshot the Court finds and holds that the Judgment of the lower court was sound both in fact and law and the Court finds no reason to disturb the same. The appeal is therefore dismissed with costs.

28. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 25TH DAY OF OCTOBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division