Omar v Nyatangi (Appeal E102 of 2024)
[2024] KEELRC 13408 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13408 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E102 OF 2024

NJ ABUODHA, J

NOVEMBER 29, 2024

BETWEEN

RAKIYA OMAR ..... APPELLANT

AND

JACKLINE MORAA NYATANGI ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable S.A Opande (PM) delivered on 4th October, 2023 in Milimani CMELRC No. E353 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal 27th March, 2024 the Appellant appeals against the judgment of Honourable S.A Opande (PM) delivered on on 4th October, 2023 The Appeal was on the grounds inter alia:

    i. That the trial Magistrate erred in law and in fact and misdirected himself by failing to acknowledge and or take cognisance of the fact that the issue of house allowance was statute barred.

    ii. That the trial magistrate erred in law and fact and misdirected himself when he found and held the appellant herein liable to pay the respondent an excessive sum of Kshs. 396,000/- being house allowance.

    iii. That the trial magistrate erred in law and fact and misdirected himself by failing to acknowledge and or take cognisance of the provisions of section 90 of the *Employment Act*.

    iv. That the trial magistrate erred in law and fact and misdirected himself when he found and held that the house allowance due to the respondent was for the entire period of employment

v. That the trial magistrate erred in law and fact and misdirected himself by failing to acknowledge and or take cognisance of the fact that failure to claim house allowance by the respondent resulted into a continuing injury which action could only be brought within 12 months.

2. The Appellant prayed that:

i. The appeal be allowed and that the judgment and decree of the Milimani MCELRC Cause No. 353 of 2021 be set aside and or vacated.

ii. That the award of Kshs. 396,000/- being house allowance awarded in Milimani MCELRC Cause No. 353 of 2021 be set aside.

iii. That the award of six months' compensation for unlawful dismissal at Kshs. 132,000/- in Milimani MCELRC Cause No. 353 of 2021 be varied from six month's to three months' compensation.

iv. That costs of the appeal be borne by the respondent.

3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's advocates Messrs. Midikira & Company Advocates submitted in the main that the trial court failed to take into account the fact that failure to claim house allowance by the respondent resulted in continuing injury whose action can only be brought within 12 months. Counsel place reliance on section 90 of the *Employment Act* and the case of Trevar Marambe -vs- For You Chinese Restaurant [2021] eKLR where the Court states that house allowance accrues at the end of every month and non-payment thereof amounts to a continuing injury and falls squarely into the purview of section 90 of the *Employment Act*.

5. On the issue of the six months' salary as compensation, counsel submitted that the award did not correspond with the injuries suffered and was excessive. According to Counsel, the appellant acted in good faith and was only concerned with the respondent's health given the Covid-19 pandemic. The respondent had not demonstrated any evidence of long term harm resulting from the dismissal such as challenges in finding new employment or experiencing severe financial hardship. Counsel therefore proposed the reduction of the award from six to three months.

Respondent's Submission

6. Mr. Musungu for the respondent submitted that the issue of limitation was never pleaded before the trial court hence never gave the trial court a chance to consider the issue. Counsel relied on the case of Pacific Frontier Seas v Kyengo & Another [2022] eKLR. Counsel further submitted that Trevor's case relied on by the appellant was bad in law and submitted that the proper holding on the issue of continuing injury was as was held by Mbaru J in the case of Radar Security Ltd vs- Amos Ogachi Nyaata [2023]KEELRC1203 in which the learned Judge stated that "a continuing injury or damage would entail a continuum of facts within employment and where the employer persists in failing to pay untaken leave days, house allowance or such other dues and benefits derived from an employment contract for a period of 12 months are not paid or allocated hence causing injury and damage to the employee. At the end of employment by termination or summary dismissal or resignation, such does not abate and may form part of a claim which can lawfully be lodged within the meaning of section 35(4) read together with section 90 of the Act". Counsel further relied on the decision of Manani J in the case of Vipingo Ridge Limited v Swaleh Ngonge Mpita [2022]eKLR and Court of Appeal decision

in G4S Security Services (K) Limited v Joseph Kamau and 468 Others [2018]eKLR where the Court stated that claims for terminal dues which had accrued more than three years before termination and institution of the suit could be claimed subject to provisions of section 90 of the *Employment Act*. Counsel thus submitted that the claimant's employment was terminated on 2nd July, 2020 and filed the suit in the lower court on 1st March, 2021. The claim for house allowance was therefore not statute barred.

7. On the issue of quantum of damages Counsel submitted that the award of six months' salary as compensation was justified and the appellant had not demonstrated that the trial court did not properly exercise its discretion to warrant interference by the Court. On this point Counsel relied on the case of Naima Khamis vs Oxford University Press (EA) Ltd [2017] eKLR

Determination

8. The court has considered the pleadings and submissions filed by the parties herein and observes that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. Where the Court stated that:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

9. This appeal is around two issues namely whether the trail court erred in awarding housing allowance despite provisions of section 90 of the Act and whether the award of six months' salary as compensation was inordinately high to warrant interference by the Court.

10. The Concept of continuing injury has been considered by this Court and the Court of Appeal. As was held by Mbaru J in the case of Radar Security Ltd vs- Amos Ogachi Nyaata [2023]KEELRC1203 "a continuing injury or damage would entail a continuum of facts within employment and where the employer persists in failing to pay untaken leave days, house allowance or such other dues and benefits derived from an employment contract for a period of 12 months are not paid or allocated hence causing injury and damage to the employee. At the end of employment by termination or summary dismissal or resignation, such does not abate and may form part of a claim which can lawfully be lodged within the meaning of section 35(4) read together with section 90 of the Act".

11. That is to say an employee upon termination of employment may claim unpaid house allowance, leave or any other benefit or allowance payable under the employment contract during the currency of such contract provided the claim is lodged within three years of the termination of the contract and in case of continuing injury, within 12 months from the cessation thereof.

12. The Court of Appeal in the case of Mary Kitsao Ngowa & 36 Others v Krystalline Limited (Civil Appeal 21 of 2015) [2015] KECA 286 (KLR) observed as follows:

According to the Black's Law Dictionary, continuing injury is defined as:-

> " An injury that is still in the process of being committed. An example is the constant smoke or noise of a factory." (emphasis added). This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. What comes to mind is where for example, the dispute pertains to an industrial strike and one of the parties has moved court on account of an injury that continues to be suffered during the subsistence of the employment and /or strike. However, in this case, it is not in dispute that at the time the claim was lodged, the employment relationship had already been severed. Indeed, it is the termination that gave rise to the cause of action. Any claims arising therefrom could therefore no longer be termed as continuing injury.

13. From the foregoing it therefore means that non-payment of house allowance is a continuing injury for as long as it remains unpaid contrary to the *Employment Act*, however such a claim ought to be lodged within 12 months after the termination of the employment contract when it ceases because the relationship has been terminated. It was not in dispute that the claimant's employment was terminated on 2nd July, 2020 and filed the suit in the lower court on 1st March, 2021. This was within the twelve months contemplated by section 90. The claim was therefore not statute barred hence the trail court did not err in making the award. This ground of appeal therefore fails.

14. On the issue of the award of six months, the Court notes that this is discretionary and the Court making the award must have assessed its merit and came to the conclusion that it was the most appropriate in the circumstances. The appellant has not tabled any evidence to show that the trial court exercised its discretion improperly. In the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR the court sated as follows:

> The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

15. The trial court came to the conclusion after hearing evidence that the appellant failed to prove that the respondent absconded duty and that the respondent was never issued with a notice to show cause prior to dismissal. These were justifiable reasons for the trial court to assess the award to the extent it did. This Court would therefore only disturb the award by the trial Court if it was adequately demonstrated that the trial court misdirected itself in some matter hence arriving at a wrong decision. This has not be shown in this appeal.

16. In the upshot the Appeal fails for lack of merit and is hereby dismissed with costs to the Respondent.

17. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION