Radar Limited v Nyaata (Appeal E091 of 2022)
[2023] KEELRC 1203 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1203 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E091 OF 2022

M MBARŨ, J

MAY 11, 2023

BETWEEN

RADAR LIMITED ..... APPELLANT

AND

AMOS OGACHI NYAATA ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. D.O. Mbeja in CM ELRC No. E208 of 2020 delivered on 21st November, 2022)

JUDGMENT

1. The appeal herein follows the judgment and decree of the Hon DO Mbeja in CM ELRC No E208 of 2020 delivered on November 21, 2022. The matter before the Hon Magistrate was that the respondent was the employee of the appellant employed on June 17, 2012 as a day guard earning Kshs 15,760 per month but on February 12, 2019 his employment was unfairly terminated through summary dismissal on the grounds that he had neglected his duties. He claimed the following terminal dues;

    a. Notice pay Kshs 15,760;

    b. Pay for 9 days worked Kshs 5,454;

    c. Unpaid leave for 6 years Kshs 76,356;

    d. Prorata leave Kshs 7,423.50;

    e. House allowance for 79 months Kshs 186,756;

    f. Unpaid public holidays for 6 years Kshs 36,360;

    g. Gratuity pay for 6 years Kshs 65,448; and

    h. Compensation Kshs 189,120.

2. In response, the appellant's case was that the respondent's wages were regulated under the *Regulation of Wages (General) (Amendment) Orders* for the years worked and included house allowance. The respondent was terminated in his employment upon notice as part of the terms of employment. The respondent was allowed annual leave and at the end of employment he was paid all his dues and the claims made are not justified.

3. The appellant also challenged the claim with regard to the provisions of Section 90 of the *Employment Act, 2007* (the Act) on the grounds that the claims made were time barred.

4. The Hon Magistrate heard the parties and delivered judgment with findings that the provisions of Section 90 of the Act were not applicable to the claim since the claims made were continuing tort and there was an employer and employee relationship. There was no evidence that the appellant had paid the respondent house allowance or allowed annual leave, employment was terminated without any reasons being given or a hearing and made an award as claimed and compensation at 6 months all at Kshs 488,117 and costs.

5. Aggrieved, the appellant filed this appeal and faulted the trial court that the findings that Section 90 of the Act did not apply to the claim was erroneous. The claim for unpaid leave for February, 2016 to February, 2018 and pay for public holidays, unpaid house allowances were all time barred but the court allowed the same. The payment of gratuity was not a benefit under the employment contract and the award was contrary to the provisions of Section 35(5) of the Act and the compensation given at 6 months was excessive hence the appeal which should be allowed with costs.

6. Both parties attended court and agreed to address the appeal by way of written submissions.

   The appellant's written submissions were not on record as directed.

7. The respondent submitted that Section 90 of the Act was properly addressed by the Trial court with a finding that the claims made with regard to leave pay, public holidays and unpaid house allowances related to continuing injuries and were properly assessed and awarded. The respondent was employed by the appellant on June 17, 2012 and employment terminated on February 12, 2019 upon which he filed his suit on December 2, 2020 within the provisions of Section 90 of the *Act*.

8. The respondent also submitted that there was no evidence submitted by the appellant that there was payment of annual leave, house allowance for work during public holidays and these awards were justified. The trial court was satisfied that there was no notice giving reasons for termination of employment or a disciplinary hearing and compensation awarded is lawful as held in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR. the law requires that before termination of employment an employee must be given a hearing which was not done as held in the case of *Kenfreight (E.A.) Limited v Benson K. Nguti* [2019] eKLR and the appeal should be dismissed with costs.

8. This being a first appeal, the court is required to re-evaluate the evidence and make own analysis, findings and conclusions but with consideration that the trial court heard the parties in evidence and had the opportunity to hear oral submissions.

10. As a general rule, a preliminary objection on a pure point of law can be raised at any stage of the proceedings under the principles settled in the case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696. Where there is an objection, such should be addressed instantly and not at the tail end of proceedings.

11. The appellant raised objections with regard to the provisions of Section 90(2) of the Act [should be Section 90] within the written submissions after hearing had closed. The objections were that

employment commenced on 1st November, 2018 and claims relating to unpaid leave, public holidays and annual leave for the periods of February, 2016 to February, 2018 were time barred since the suit was filed on 17th June, 2021.

12. The trial court addressed the objections and made a finding that such claims were continuing torts and were justified.

13. In these proceedings, the appellant did not file any submissions. The court is denied the justification of the grounds of appeal.

On the law, Section 90 of the Act provides that;

> 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. [underline added].

There is no dispute that employment of the respondent by the appellant ceased on February 12, 2019 and the claim before the trial court was filed on December 2, 2020 and amended on April 22, 2021. This is a period of 22 months after employment ceased.

Within the provisions of Section 90 of the *Act*, the respondent had the right to file his claim within 3 years (36 months) after the act, neglect or default complained of and where there was a case of a continuing injury or damage, to file suit within 12 months after the cessation thereof as held in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR.

14. A continuing injury or damage would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical memorandum of claim would normally contain a claim for compensation and payment of accrued dues. In my view, 'continuing injury or damage' would connote such accrued dues.

15. 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 but for 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 dues to 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. In arriving at these findings, I am persuaded by the findings of Manani, J in *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR that;

> A continuing injury or damage would, in my view, for instance arise in a case of discriminatory treatment at work which remains persistent over an extended period of time. In such case, one may not compartmentalize the discrimination unless it relates to distinct factual situations. See Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] in which the court said that the term ''continuing injury'' denotes an injury that is still in the process of being committed.

16. The Court of Appeal in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR held that;

> ... termination of employment does not extinguish payment of work emoluments and terminal benefits due and owing to the employees by fact of service rendered and so long

as the emoluments and benefits remain unpaid, the same constitute continuing injury or damage within the meaning of Section 90 of the *Employment Act, 2007*.

17. In this case, the respondent having moved court to secure his rights within the meaning of Section 90 of the *Act*, the Hon Magistrate properly applied the law and made a correct finding.

18. With regard to findings that there was unfair and wrongful termination of employment and award of 6 months' compensation, the appeal is that the appellant had a right to terminate employment upon serving notice. Under paragraph 6 of the Memorandum of Response the appellant's case was that the respondent was issued with termination notice pursuant to Section 35 of the *Act* which allowed termination of employment upon such notice. However, in employment and labour relations, even where an employer has the right to issue notice, reasons leading to such decision and due process must be addressed pursuant to Section 43 and 41 of the *Act*. It is no longer sufficient to have a termination clause in the employment contract. Due process before employment is terminated is mandatory under the provisions of Section 41 of the *Act*.

19. The Hon Magistrate addressed the matter comprehensively within the provisions of Section 41(1) of the *Act* and under Section 49 he had the discretion to assess compensation and no matter is raised that such discretion was wrongly exercised.

20. Notice was issued accordingly and the claim to be paid in lieu of notice is not justified.

21. There is no evidence that the respondent was paid for 9 days worked in February, 2019 and the claim for Kshs 5,454 is justified.

22. On the awards for leave pay for 6 years, the respondent's evidence was that he was not allowed to take his annual leave or paid in lieu thereof. Taking of annual leave is lawful pursuant to Section 28 of the Act. However, section 28(2) requires that all annual leave be taken within 18 months when due or unless the employer has approved a change or by a policy of the employer, such leave is suspended for good cause. The employer as the custodian of work records is then required to file such work records once suit is filed in terms of Section 10(6) and (7) of the Act. Without any work records as to how the respondent was allocated annual leave, on the last wage of 15,760 he was entitled to leave for 18 months all at 21 + 11 days prorated total at 32 days quantified to Kshs 16,811 in annual leave pay.

23. On the claim for unpaid house allowance, as a day guard, the respondent's wage was regulated under the *Regulation of Wages (General) (Amendment) Orders*.

24. Employment commenced on June 17, 2012 at a wage of Kshs 15,760 per month. The minimum wage in 2012 was Kshs 8,579.80 which is over and above without underpayments.

25. In the year 2013 and 2014 the minimum wage was Kshs 9,780.85 and there was no underpayment.

26. In the year 2015 and 2016 the minimum wage was Kshs 10,954.70 and there is no underpayment.

27. In the year 2017 the minimum wage was Kshs 12,926 and the respondent was paid above such wage.

28. In the year 2018 the minimum wage was Kshs 13,572.90 and the respondent was paid above such wage.

29. Cumulatively, at the wage of Kshs 15,760 the respondent was well compensated for his labours. There was no underpayment and the claim for payment of a house allowance over and above the generous wage paid each month over the years is not justified.

30. On the claim for work during public holidays, the respondent outlined all the gazetted Public Holidays due as part of his claim. The appellant was then required to submit work records to demonstrate that

while at work, the respondent was compensated for working during these gazetted public holidays. The analysis and award of Kshs 36,360 is well addressed by the Hon Magistrate.

31. With regard to gratuity pay, such benefit only accrues where it is a term in the contract or there is an agreement such as a Collective Bargaining Agreement (CBA) or private treaty allocating such benefit. Where the employer has applied the provisions of Section 35(5) and (6) of the *Act* and remitted statutory dues for the employee, to award gratuity in the absence of a written agreement in erroneous.

32. The analysis above, the appeal partially succeeds and the judgment of the Hon Magistrate in Mombasa CM ELRC No E208 of 2020 is hereby reviewed with the following awards;

    a. Compensation for 6 months at Kshs 94,020;

    b. Pay for 9 days worked in February, 2019 at Kshs 5,454;

    c. Leave pay Kshs 16,811;

    d. Pay for public holidays Kshs 36,360;

    e. Each party shall bear own costs of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF MAY, 2023.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....