Bollore Transport and Logistics Kenya Limited v Masha & another (Appeal E035 of 2023) [2023] KEELRC 3460 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3460 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E035 OF 2023

M MBARŨ, J

DECEMBER 7, 2023

BETWEEN

BOLLORE TRANSPORT AND LOGISTICS KENYA LIMITED ..... APPELLANT

AND

KARISA KALAMA MASHA ..... 1ST RESPONDENT

SHEER LOGIC MANAGMENET CONSULTANTS LIMITED .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. Nabibya in Mombasa CMELRC No.463 of 2018 delivered on 23 March 2023)

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMELRC no463 of 2018 delivered on 23 March 2023.

2. The background to the appeal is a claim filed by the 1st respondent against the appellant and the 2nd respondent. He claimed that he was employed by the 2nd respondent upon being subcontracted by the appellant as a loader from the year 1994 at a daily wage of ksh 800. On 20 February 2018, the 1st respondent reported to work but was told there was no work. That prior to termination of employment he had not been appraised on a set criteria adopted in selecting him for redundancy and this resulted in unfair termination of employment. He claimed the following dues;

    a. Notice pay ksh 20,800;

    b. Severance pay for 24 yearsksh 288,000;

    c. Service pay for 24 yearsksh 345,200;

    d. Leave days for 24 yearsksh 384,000;

e. 12 months' compensationksh 249,600; and

f. Costs of the suit.

3. In response, the appellant's case was that the 1st respondent was not its employee as alleged which is admitted in the Memorandum of Claim. The employer was the 2nd respondent and hence the appellant cannot be held liable in redundancy or held accountable to pay terminal dues.

4. In response, the 2nd respondent's case was that it had occasional piece rate employment with the 1st respondent as a casual loader within the appellant's premises. Between June 2016 and January 2018 the appellant contracted the 2nd respondent to manage the contracted employees, causals and piece rate employees from 1st June 2016 to 31st July 2020. The 2nd respondent's business is to outsource labour for various companies and institutions. For this purpose, the 1st respondent was issued with a gate pass as a causal employee to allow him access to the appellant's premises. He was not on a daily wage as alleged but on piece rate employment. The respondent was lastly a casual employee of the appellant in February 2018 and then absconded duty. Casuals would be picked at the gate whenever labour was needed.

5. In the judgment of the learned magistrate delivered on 23 March 2023 there was a finding that the 2nd respondent was the employer who unfairly terminated employment. The court awarded of the following;

a. Notice pay ksh 20,800;

b. Leave for 3 yearsksh 43,659;

c. 6 months' compensationksh 124,800; and

d. The appellant [1st respondent] to pay service amount.

6. Aggrieved by the judgment and findings, the appellant filed this appeal on six grounds. It challenged the order to pay service whereas there was no evidence of employment. The 1st respondent admitted employment was between him and the 2nd respondent hence the order to pay service should be set aside and the appeal allowed.

7. Parties attended court and agreed to address the appeal by way of written submissions.

8. The appellant submitted that, in his pleadings, the 1st respondent admitted that he was employed by the 2nd respondent who issued him with a gate pass to access the appellant's premises to undertake his duties. There was no employment relationship between the appellant and the 1st respondent to justify the award of service pay and the appeal should be allowed.

9. The 1st respondent submitted that he was employed by the appellant as a loader in the year 1994 but later outsourced labour to the 2nd respondent who would pay him ksh 800 per day. On 10 February 2018 his employment was terminated by the 2nd respondent. Under Section 10(7) of the *Employment Act*, the appellant should have kept work records for the period the 1st respondent was in its employment. The 2nd respondent was condemned to pay notice, unpaid leave days and compensation for unfair termination of employment while the appellant was directed to pay service and the appeal is without merit and should be dismissed with costs.

10. The 2nd respondent did not file any written submissions.

11. This being a first appeal, the court has the duty to review the entire record and make own conclusions but take into account the fact that the lower court had the opportunity to hear the parties and take evidence.

12. In his Memorandum of Claim filed on 8 December 2018 the 1st respondent at paragraph (4) pleaded that he was an employee of the 2nd respondent as a loader upon being subcontracted by the appellant who had employed him in the year 1994. He was transferred to the 2nd respondent and retained on a daily wage of ksh 800.

13. The appellant produced the outsourcing agreement with the 2nd respondent. The agreement was for provision of labour taking effect from 1st June 2016.

14. Under the agreement, the appellant and the 2nd respondent agreed that the 2nd respondent would provide labour and have employment contracts with its employees. These employees would remain under the 2nd respondent, the contractor.

15. The labour outsourcing agreement is not challenged. The 1st respondent admitted that his wages would be paid by the 2nd respondent while offering labour to the appellant. For that purpose, he was issued with a gate pass to access the appellant's premises.

    This agreement was to be for one year.

16. The 1st respondent filed his claim before the lower court on 8 December 2018.

17. Any claims arising from his employment with the appellant going back to the year 1994 should have been addressed within the meaning of Section 90 of the *Employment Act*, 2007. This is the period of up to 9 December 2015.

18. The claim for service is pleaded to cover 24 years. This was not assessed by the trial court to ascertain the exact period covered by the general award for service pay. There are no reasons given as to why service pay was awarded.

19. The 1st respondent's claim was that there was unfair termination of employment and claimed service pay for years worked ... service pay (18 days' x ksh 800 x 24 years).

20. Service pay is ordinarily due in terms of Section 35(5) and (6) of the *Employment Act*, 2007. The employee must plead as regards non-payment of statutory dues or failure by the employer to allocate a pension scheme or medical cover. Service pay can also accrue where parties apply such benefit in the written contact of employment or under the collective agreement or other private treaty.

21. The claim by the 1st respondent is in the nature of a service pay for years worked. The total is based on 24 years of service.

22. However, where the 1st respondent was in the service of the appellant from the year 1994 until 1st July 2016, he left such employment and was contracted under the 2nd respondent to provide the appellant with labour. This much he admitted in evidence and in his pleadings. At the point where employment terminated, the 1st respondent had transitioned his employment to the 2nd respondent.

23. A claim for service pay for 24 years from the appellant is hence not a correct tabulation. The claim for a service pay for years worked without giving it the necessary foundation is to deny the appellant proper pleadings for a proper response.

24. Where employment of the 1st respondent transitioned to the 2nd respondent from the appellant's employment, where there was any claim for service pay, such ought to have been addressed as a

continuing injury within 12 months from the date of employment transition or within 3 years from the date thereof pursuant to Section 90 of the *Employment Act*, 2007. To wait until the end of his employment with the 2nd respondent to make any claim within the employment of the appellant was time barred.

25. The finding by the lower court that service pay is payable by the appellant is without any reasons. The foundation of such claim lost, the appeal is with merit.

26. Accordingly, the appeal is hereby allowed. The judgment in Mombasa CMELRC no 463 of 2018 directing the appellant to pay service pay to the 1st respondent is hereby set aside in its entirety. For this appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 7TH DAY OF DECEMBER 2023.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....