Walwanda v Radar Security Limited (Cause 263 of 2018)
[2022] KEELRC 1217 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1217 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 263 OF 2018

B ONGAYA, J

MAY 13, 2022

BETWEEN

MAZOOR SUDI WALWANDA ..... CLAIMANT

AND

RADAR SECURITY LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 24.04.2018 through Marende Necheza and Company Advocates. The claimant pleaded as follows. He was employed by the respondent as a security guard from 21.04.2012 to 30.03.2017 when he was dismissed from employment on account of redundancy without notice and without payment of final dues. He claimed as follows:

    a) One-month notice payment Kshs. 13, 095.00.

    b) Severance pay for 5 years at Kshs. 6, 547.50 Kshs. 32, 737.50.

    c) Unremitted Sacco dues from July 2012 to March 2017 at Kshs. 500 per month Kshs. 28, 000.00.

    d) Unremitted welfare dues from April 2012 to March 2017 at Kshs. 200 per month Kshs. 11, 800.00.

    e) Compensation for unfair termination Kshs. 13, 095.00 x 12 months Kshs. 154, 140.00.

    f) Total claim Kshs. 242, 772.50.

2. The claimant prayed for judgment as claimed plus costs and interest.

3. The respondent filed the memorandum of response on 27.06.2019 in person. The respondent admitted that it employed the claimant by way of a contract dated 21.04.2012. The certificate of service

exhibited by the claimant shows he was employed from 21.04.2012 to 30.03.2017. The Court finds that there is no dispute that parties were in a contract of service.

4. The respondent pleaded that the claimant was notified about the termination by the letter dated 31.03.2017 and the respondent complied with the termination procedure in clause 8.3 of the contract. The respondent prayed that the claimant was not entitled to remedies as prayed for and the suit be dismissed with costs.

5. The claimant testified to support his case. Despite service the respondent failed to attend at the hearing. Both parties failed to file final submissions. The Court has considered all the material on record and returns as follows:

    1. As already found there is no dispute that parties were in a contract of service.

    2. There is no dispute that the contract of service was terminated by the letter dated 31.03.2017 effective the same date but received by the claimant on 20.04.2017. The termination was due to the fact that the respondent's client Safaricom Ltd who had contracted the respondent to provide guarding services no longer required the respondent's services in which establishment the claimant had been employed as a guard - and the respondent had no alternative vacancies to redeploy the claimant. The respondent promised to reemploy the claimant in future if need arose.

    3. In the circumstances the claimant appears to have lost employment at the instance of the respondent and at no fault of the claimant. The situation would appear to amount to redundancy as defined in section 2 of the *Employment Act*, 2007. However, the respondent alleged termination under clause 8.3 of the contract and which stated thus, "The employee's contract with the company is tied to the company's contracts with third parties; the employee's contract may thereof terminate automatically without notice on termination of the company's contract with third parties unless otherwise re-activated by a new and separate agreement." The claimant does not dispute that the respondent's client, Safaricom Ltd which had concluded an outsourcing contract with the respondent terminated the contract. His lamentation is that procedure for redundancy was not followed. However, the Court finds that the parties were entitled to contract as per clause 8.3 of the temporary employment contract as it was within the statutory minimum terms and conditions of service. In particular, the Court finds that section 35(1) of the *Employment Act*, 2007 prescribing giving of a notice prior to termination of a contract of service specifically exempts certain contracts of service from requirement to serve a termination notice when the section starts off thus, "A contract of service not being a contract to perform specific work..." The Court finds that indeed the parties entered a contract to perform specific work, namely, guarding services as may be available when the respondent was contracted by the third parties. While the situation looked like and was in fact manifestly a redundancy, the specific clause 8.3 was a legitimate overriding term and condition of service contemplated under section 35(1) of the Act. The Court therefore finds that the termination was within that contractual term rather than a termination on account of redundancy. While making that finding the claimant received the termination letter on 20.04.2017 which had taken effect on 31.03.2017 but he appears not to allege and claim that he had continued to work until 20.04.2017 – suggesting that he knew the effect of that contractual clause which had already been invoked on 31.03.2017 when he appears to have actually stopped working; so that the termination letter was merely formalising the automatic termination which had otherwise automatically taken effect on 31.03.2017. The Court therefore returns that the termination was not unfair, it was protected under section 35(1) of the Act and as expressly agreed upon per clause 8.3 of the temporary contract of service. The Court further holds that section 35(1)

is carefully designed to protect flexibility in contracts of service where the employer engages the employee to perform specific work and whose continued availability is unascertainable or unforeseeable. It would not be in the best interests of prospective employees or employers in such situations to be denied the taking of full advantage of the exemption in section 35(1) of the Act as the parties herein appear to have expressly done. The claimant's claims for redundancy will therefore collapse.

4. It is trite law that the claims for special damages are specifically pleaded with full particulars and then strictly proved. That has not been done with the claimant's claims and prayers for unremitted Sacco dues and unremitted welfare dues. It remains unclear how the claims accrued and were part of the contract of service. In any event the alleged failure to remit was a continuing injury which ceased on 31.03.2017 when the termination took effect but the suit was filed on 24.04.2018 after lapsing of the 12 months of limitation in section 90 of the Act, for such continuing injuries. The Court finds that the two claims were as well time barred. They will collapse as unjustified and time barred.

5. The parties will bear own costs of the suit.

6. In conclusion judgment is hereby entered for the respondent against the claimant for:

a) dismissal of the suit; and

b) each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY 2022.

BYRAM ONGAYA

JUDGE