



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 45 of 2009

GATUNGURU TEA FACTORY CO. LTD..APPELLANT

VERSUS

RAPHAEL KAMUMU KAHIU.....RESPONDENT

((Appeal against the judgment of O. Orimba, Senior Resident Magistrate, Kangema, in Senior Resident Magistrate's Civil Case No. 136 of 2007 delivered on 22nd April 2009 at Kangema)

JUDGMENT

By a Plaint dated 13th December 2007 filed before Kangema Senior Resident Magistrate's Court, **RAPHAEL KAMUMU KAHIU**, the Respondent herein, prayed for judgment in the sum of Ksh.83,109/85 being terminal benefits and underpayment, against **GATUNGURU TEA FACTORY CO. LTD.**, the appellant herein. At the end of the trial, judgment was entered as prayed in the Plaint. Being dissatisfied with the aforesaid judgment, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in its Memorandum:

1. *“The learned trial magistrate erred in law and in fact in upholding that the Respondent's gratuity ought to have been calculated based on a Collective Bargaining Agreement which was registered after his retirement.*

2. *The learned trial magistrate misdirected himself regarding the well known principle of the law of contract, privity of contract, thereby awarding the Respondent benefits of a Collective Bargaining Agreement concluded and registered when he was not a party in the bargaining, as he had already retired.*

3. The learned trial magistrate erred in law and in fact in awarding the respondent a sum of Kshs.83,109.85 when the same was not proved on a balance of probabilities.

4. The learned trial magistrate erred in law in rejecting the appellant's defence and failing to dismiss the Respondent's suit with costs to the Appellant."

When the appeal came up for hearing, learned advocates from both sides recorded a consent order to file written submissions which they did to dispose of the Appeal. It would appear the facts leading to this appeal are largely undisputed. The Respondent was an employee of the Appellant and retired on 31st December 2003 at the level of a Senior Supervisor. Upon his retirement, the Respondent was paid service gratuity under the Collective Bargaining Agreement which was registered and applicable to him. The Appellant produced a copy of the Collective Bargaining Agreement in evidence as an exhibit. On his part the Respondent produced the Collective Bargaining Agreement registered in 2006 as an exhibit in evidence to show that he was underpaid of terminal dues in the sum of Ksh.83,109/85. After hearing the suit, the learned Senior Resident Magistrate made a finding to the effect that the Respondent was underpaid in wage and service gratuity as stated in the Plaint.

It is the submission of the Appellant that the learned Senior Resident Magistrate erred because he arrived at his decision on the basis of a Collective Bargaining Agreement which was registered after the Respondent had retired from the Appellant's employment. According to the Respondent, when he retired, he was entitled to a figure of Ksh.17,175/= per month yet his terminal benefits were calculated on the basis of a monthly pay of Ksh.15,845/= for the year 2002. He also complained that he was entitled to be paid Ksh.17,540 per month yet he was paid Ksh.15,845 for the year 2003. The Respondent's calculations in the end showed that the Appellant was underpaid by a whopping sum of Ksh.83,109/85. The Respondent's calculations were not contested by the Appellant. The main issue which must be determined on appeal is which collective agreement should be applied to this dispute. According to the Respondent, the applicable Collective Bargaining Agreement is that of 2003/2004 whose effective dates was to run for two (2) years effective from 1st January 2003 to 31st December 2004. The Appellant was of the view that the Collective Bargaining Agreement for the year 1999/2000 was the applicable one. The question which will determine this appeal is which of the two Collective Bargaining Agreements should be applied. It is not in dispute that the 1999/2000 Collective Bargaining Agreement's effective date was 1st January 1999 and was to be in force for two (2) years. That Collective bargaining Agreement was approved on 1st January 2001. The 2003/2004 Collective Bargaining Agreement was effective from 1st January 2003 and was to run for a period of two (2) years ending on 31st December 2004. According to the Respondent, the Collective Bargaining Agreement of 2003/2004 was to operate retrospectively just like the one of 1999/2000. I have carefully considered the divergent arguments taken by the learned advocates appearing in this appeal. There is no doubt

that the 2003/2004 Collective Bargaining Agreement was executed on 3rd August 2006. The effective date of the aforesaid Collective Bargaining Agreement is stated in Clause 27 to be 1st January 2003. By the time of signing the aforesaid agreement, the Respondent had retired long time ago. In fact he had retired on 31st December 2003. He was no longer an employee. In my understanding, the agreement only affected those employees in active employment. He had signed discharge forms with his employer. In fact the R-respondent was at the time of signing the agreement no longer a union member of the Kenya Plantations and Agricultural Workers Union, having retired in the year 2003, prior to the registration of the agreement.

In sum the appeal is allowed. Consequently the judgment of trial court is set aside and substituted with an order dismissing the suit. The Appellant is given both costs of the Appeal and those of the suit in the trial court.

Dated and delivered at Nyeri this 23rd day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of Miss Mwai for Appellant and no appearance for Kirubi for Respondent.