REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 159 of 2009

SATE RIDE LIMITED…………………………….APPELLANT

-VERSUS-

JAMES ANYEGA………………………………RESPONDENT

JUGEMENT

(Appeal being form the Judgment and Decree of Hon. S. Wewa (Resident magistrate) dated and delivered on the 27th day of July, 2009 in the original Kisii CMCC.No. 505 of 2006)

This appeal arises from the judgment and decree of the Chief Magistrate's Court (**Hon. S. Wewa** -Resident Magistrate presiding) in Kisii Civil case number 565 of 2006. In that suit the appellant was the defendant whereas the Respondent was the plaintiff. The respondent had sued the appellant claiming a total sum of Kshs. 188,000/= being salary arrears and annual leave allowances for the entire period that he had worked for the appellant as a bus conductor. Apparently between January, 2000 and October, 2005 the respondent had been engaged by the appellant as a bus conductor in the appellant's buses that used to ply Migori- Nairobi route.

In its defence to the claim the appellant denied having employed the respondent. It also denied the existence of any salary arrears and or annual leave allowances or otherwise due to the respondent. Finally, the appellant took the position that the respondents' suit was bad in law, improperly before the court, fatally defective and would at the earliest opportunity apply to have the same struck out with costs for being an abuse of the courts process. However this threat never came to pass as the suit was eventually set down and heard on merits.

During the hearing of the suit, the respondent testified that the appellant had employed him as a bus conductor on or about 20th November, 2000. He was to work in its buses that plied Nairobi-Sirare route. He was given a badge to that

effect, staff identification card, PSV licence and certificate of Good Conduct. He used to be paid Kshs. 3,500/= per month having started off with Kshs. 1500/= in November, 2000. He worked untill October, 2005 when he decided to leave the employment for want of payment of his salary regularly by the appellant. He then reported the dispute to the Kisii Labour office. Despite several correspondences between the appellant and the labour office aforesaid, the dispute was never resolved. The labour office worked out the respondent's entitlement in the sum of Kshs. 188,026/80. However the appellant refused to pay the same and hence the suit.

Cross-examined by **Mr. Nyambati;** the learned counsel for the appellant, he stated that he was employed in Kisii town. The appellant however never issued him with a letter of appointment nor a pay slip. From the year 2002 he had not been paid his salary. The appellant's General Manager called **Mogaka,** signed the badge and conductors card. He denied that he was a tout at a bus stage.

The appellant testified through **Andrew Mochache** who used to be the General manager of the appellant between January, 2000 and October, 2005: He denied that the respondent was ever an employee of the appellant and he never knew him. He conceded that though later Certificate of appointment was being issued as well as pay slips, however by then they were not being issued. He denied too his alleged signatures on those exhibits. As far as he was concerned the respondent was a stranger.

Cross –examined by **Mr. Masese,** learned counsel for the respondent, he stated that he left the appellant's employment after it went burst. He did not have anything to show that he had ever worked for the appellant . He did not even have a sample of the pay slips, and identity cards he referred to in his evidence. He was aware of the respondent's claim for Kshs. 188,028/=. They were to pay but couldn't as they did not know him and in any event the appellant went bankrupt.

The learned magistrate having carefully evaluated the evidence tendered by both the appellant and respondent as well as their written submission was persuaded that the respondent had proved his case on a balance of probabilities. She held thus :-

> ***"…….The evidence adduced by the plaintiff I do consider. The issues are whether the plaintiff was an employee and if he is entitled to the praye(sic)or sought. The plaintiff had a badge which he alleges was issued to him immediate he started working. This is proof that he worked for the defendant. I do find that he was an employee. There is also evidence adduced on non-payment vide the complaint letters written to the labour offices. This is exhibits 5 and exhibit 6 respectively. The defence did adduce evidence to rebut the plaintiff's case. The defence witness denies the fact that the plaintiff was an employee. The gist of the denial is that the exhibit documents were not signed by***

him as the then manager. There was no expertise (sic) evidence relating to comparision of signatures to cause the court doubt what has been exhibited. The defence has also not laid out a basis as to how the plaintiff would have gotten the said documents and why he should have complained to the labour offices. The defence witness didn't proof to court that he was an employee of the said company. I do find the plaintiff's claim to have been proved on a balance of probabilities. I do enter judgment in his favour. I find that the plaintiff's salary had not been paid. I award Kshs. 188,000/= as salary arrears and annual leave allowance for the plaintiff's entire period of service. I also award costs and interest thereof……..”

The appellant was aggrieved by the judgment and decree aforesaid. Accordingly he lodged the instant appeal. It sought to impugn the learned magistrate's judgment on six grounds to wit:

- ***That the learned resident magistrate erred in law and in fact in finding that the plaintiff had proved his case on a balance of probabilities or at all.***

- ***That the learned Resident Magistrate erred in law in finding that he (sic) had jurisdiction to entertain the case.***

- ***That the learned Resident Magistrate erred in law and in fact in failing to find that the plaintiff's case was riddled with contradiction inconsistencies.***

- ***That the learned Resident Magistrate erred in law and in fact (sic) failing to find that the plaintiff's case and evidence in court was inconsistent with the pleadings***

- ***That the learned Resident magistrate erred in law and in fact (sic) in finding that the plaintiff had established that he was an employee of the Defendant at any time.***

- ***That the leaned resident magistrate erred in law and in fact in finding that the plaintiff had proved his claim for the sum of Kshs. 188,000/= without a basis as to how the figure was arrived at and in the absence of proof.***

When the appeal came up for hearing **Mr. Otachi** for the appellant and **Mr. Masese** for the respondent agreed to canvass it by way of written submissions. Those submissions were subsequently filed and exchanged. I have

carefully read and considered them.

As a first appellate court, it is my duty to subject the evidence tendered in the trial court to afresh and exhaustive evaluation and examination so as to reach my own decision on the case but always bearing in mind that the trial court had the added advantage of seeing the witnesses testify and could therefore assess their demeanour.

The issues for determination in the lower court as well as in this appeal are whether or not the respondent was an employee of the appellant and if so whether he was owed the monies tabulated in the plaint.

In a Civil case, it is the duty of the plaintiff to prove his case on propondence of probabilities. In this case the respondent had sued the appellant seeking his salary arrears as well as annual leave allowances. So it was incumbent upon him to prove first, that he was an employee of the appellant at the material time and secondly, as a result of that employee/employer relationship, he was owed by the appellant the amount claimed in the plaint. The standard of proof in civil cases is not however as high as in the Criminal cases which require that such prove be beyond reasonable doubts. The standard of proof in civil cases is merely on a balance of probabilities. The respondent tendered in evidence various documents showing some relationship of sorts between him and appellant. On the documents submitted by the respondent, I am satisfied just like, the learned magistrate was that, the respondent had been able to discharge the burden placed on his shoulders . He proved that he was indeed an employee of the appellant. I am unable to believe that the respondent knowing very well that he was not an employee of the appellant would simply wake up one day and lodge a claim against an entity he had or has no relationship with either present or in the past. If that was the case, why, did he have to settle on the appellant. Further where did he get the documents he tendered in evidence linking him to the appellant. Much as the appellant questioned their authenticity no credible evidence in that regard was tendered. It was not enough for the appellant's witness to merely proclaim that the signature thereon was not his. He needed to do a little more. There must in my view therefore, have been a relationship of that of an employer and employee between the two. The respondent even knew by name some of the employees of the appellant. That evidence was neither challenged nor controverted. It must therefore be taken to be true. In any event it is not that in every employment, there must be an agreement or letter of employment or appointment. Contrary to the appellant's submission, it is not a requirement that for an employee to prove his employment he must provide information as to how he was hired, under what conditions, which agent of the company made him the offer e.t.c. It is also not correct to assert that if indeed the respondent was an employee of the appellant, there would have been an agreement stating the nature of employment, pay, place or work e.t.c. In some cases employment can be implied. That would appear the case here. What the respondent was engaged in is not a job that

required extra skill. He was engaged as a bus conductor, which is a manual job that does not require any extra skill. With that kind of work, I doubt very much that there would be any need for a formal letter of employment or appointment. The documents that the respondent produced in court as prove that he was an employee of the appellant were in my view sufficient to prove that he had been employed by the appellant previously.

Further, this dispute was reported to the labour office, Kisii. The appellant failed to attend the meetings called by the labour office to resolve the dispute for reasons which are not clear or apparent on record. In my view, the labour office was best placed to adjudicate on the matter since employment or lack of it is their forte. That the appellant failed to turn up and contest the claim thereat could only mean one thing. That the respondent's claim was genuine, irresistible and that the appellant was merely running away from the truth.

Of course there are contradictions and inconsistencies here and there in the testimony of the respondent. Such contradictions are not wholly unexpected. However, for as long as those contradictions and inconsistencies do not go to the root of the respondent's case or credibility, they are tolerable. I do not think therefore that the contradictions in the evidence of the respondent made him an unreliable witness.

The amount claimed and which was eventually awarded was in the nature of special damages. They had been specifically pleaded as required by law. The amount claimed in the plaint was Kshs. 188,000/=. However it is clear that this amount is not the amount that the labour office arrived after their calculation. To them the respondent was entitled to Kshs. 188,028/80. The letter dated 22nd December, 2005 addressed to the General Manager of the appellant by the District labour officer, sets at the details as to how that figure was arrived. That letter was tendered in evidence and was not seriously challenged. The trial court was satisfied just as I am that the claim as laid out and which had the documentary backing from the Ministry of labour had been proved. Ordinarily a party is bound by his pleadings. The respondent had specifically pleaded that he was owed Kshs. 188,000/=. Although the labour office came up a figure slightly above the foregoing, the discrepancy is minimal. In any event the respondent did not insist to be paid as per the labour office's tabulation but according to his pleadings.

With regard to the question of jurisdiction, it is the contention of the appellant that the trial court did not have jurisdiction to entertain the case. That the appellant is a limited liability Company, whose registered offices were in Nairobi. In view of sections 11 and 15 of the **Civil Procedure Act,** Geographically the suit should have been filed in Nairobi. The simple answer to this submission is that the appellant was bound by its pleadings. In its defence, the appellant expressly and categorically admitted the jurisdiction of the trial court to hear and determine the matter. As correctly observed by the learned magistrate if the appellant had learned

belatedly that it had admitted jurisdiction inadvertently, it should at least have applied to amend its defence. That was not done.

In the upshot, I find and hold just as **Mr. Masese** correctly submitted that, lower court was faced with a factual situation of two opponents and given that it exercised its discretion to believe or disbelieve evidence judiciously and there was no impropriety, on the face of the record, the entire appeal lacks merit and is accordingly dismissed with costs to the respondent.

Judgment dated, **signed** and **delivered** at Kisii this 17th June, 2010.

ASIKE-MAKHANDIA

JUDGE