REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 368 OF 2011

THE STANDARD LIMITED ....APPELLANT

VERSUS

STEPHEN AGGREY ODHIAMBO .... RESPONDENT

JUDGEMENT

1. Stephen Aggrey Odhiambo, the respondent filed an action before the Chief Magistrate's Court, Milimani Nairobi against the Standard Ltd, the appellant herein where of he sought for judgement in the sum of kshs.527,000/= as special damages plus cost and interest. The suit was heard by Hon. L. M. Njora who in the end gave judgment in favour of the respondent as prayed. The appellant being dissatisfied filed this appeal.

2. On appellant put forward the following grounds in its memorandum of appeal:

1. ***THAT the learned magistrate erred in her judgment in holding that the appellant was liable to pay the respondent gratuity for 22 years giving a total sum of kshs.416,900 plus 12% interest per annum until payment in full yet there was no such written or implied term in existence in the respondent's written or oral employment contract.***
2. ***THAT the learned magistrate erred in law and fact in her finding and misapprehended the evidence before her hence arrived at a wrong finding in awarding the respondent gratuity.***
3. ***THAT the learned magistrate erred in law and fact in disregarding and failing to appreciate the whole evidence tabled by the appellant.***
4. ***THAT the learned magistrate misdirected herself by, awarding the respondent while disregarding appellant's documentary and oral evidence before court together with its submissions.***
5. ***THAT the learned magistrate consequently erred in not exercising her discretion judicially and fairly.***

3. When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case which was before the trial court. The brief facts of the case are that the respondent was employed by the appellant with effect from 29th June 1979 and was eligible to join the Company's non-contributory provident fund scheme upon the completion of three months. The respondent was eventually confirmed in employment on 18th October 1979. There is also evidence that as a unionisable employee the respondent's employment was governed by the collective Bargaining Agreement then in force before being promoted to management level. The respondent's employment was terminated on 23rd July 2001 prompting the respondent to file a

suit for terminal benefits.

5. Though the appellant put forward a total of five grounds, the main ground which commends itself for consideration is whether or not the respondent was entitled to judgement in the sum of kshs.416,900 being gratuity pay for 22 years.

6. It is the submission of the respondent that the trial court made the correct decision when it entered judgement in favour of the respondent on account of the gratuity as prayed and proved at the trial. The respondent cited clause 13 (a) of the Collective Bargaining Agreement and the letter of appointment dated 9th January 1981.

7. The appellant is of the view that the learned trial principal magistrate erred when she gave judgment in favour of the respondent yet the letter of employment for the respondent did not entitle him any gratuity at the end of service or at all.

8. After carefully re-evaluating the case that was before the trial court and after considering the submissions, I am satisfied that the learned principal magistrate decision cannot be faulted.

9. I have perused the Collective Bargaining Agreement which was tendered in evidence before the trial court and it is clear that the respondent was entitled to gratuity. Paragraph 13(a) of the aforesaid Collective Bargaining Agreement provides that.

***"An employee on completion of two years continuous service with an employer shall be entitled to a minimum of 15 days pay for every completed year of service by way of gratuity on termination of his service**."*

10. The respondent's letter of appointment dated 9th January 1981 which was also produced as an exhibit in evidence states inter alia:

".. Your terms and conditions of service will be governed by the existing Collective Bargaining Agreement."

11. The above mentioned documents i.e the letter of appointment dated 9th January 1981 and the Collective Bargaining Agreement demonstrate that the respondent was entitled to gratuity pay on termination.

12. There is an argument put forward by the appellant that gratuity should not be paid to management staff. It would appear that argument cannot stand in the absence of an express clause in the Collective Bargaining Agreement to that effect. It is also apparent from the letter of promotion of the respondent to management grade did not expressly state that the respondent would lose his accrued contractual benefits upon promotion. On the contrary, the only benefit that the respondent was expressly denied was to claim for overtime.

13. In the end and on the basis of the above reasons, this appeal is without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 3rd day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent