REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APEAL NO 753 OF 2006

(Appeal from the original decree in Thika CMCC No 1291 of 2003 - Kidula, CM - passed on 16th October 2006)

SACDEP KENYA…….……..…….....APPELLANT

VERSUS

EVERLYN IJAI .....RESPONDENT

J U D G E M E N T

1. This is an appeal from the decree of the lower court by which judgment was entered for the Respondent (plaintiff) for the sum of KShs 295,074/37 plus costs and interest as claimed in the plaint. The Respondent's claim against the Appellant (defendant) was for the balance of her terminal dues upon termination of her employment with the Appellant. It was the Respondent's case that her terminal dues should have been calculated at 25% of her gross annual salary multiplied by the number of years served in accordance with an internal memo dated 11th July 1996 addressed by the Defendant through its chairman to all staff. Instead, the Appellant calculated her terminal dues at 15% of her gross annual salary multiplied by the number of years served in accordance with a document that was not then in force and did not bind her. She therefore sought the difference between the two calculations. It was common ground that the Plaintiff's employment was terminated by resignation and not by dismissal as she had pleaded in her plaint. It appears however, that the manner of termination of her employment did not affect her terminal dues.

2. The only issue that was before the trial court for determination was, which of the two documents, the **Internal Memo dated 11th July 1996** (produced in evidence by the Respondent as Exhibit P2), and the **Personnel Policies and Procedures dated March 1998** (produced in evidence by the Appellant as Exhibit D1 (b)) was the document applicable in calculating the Respondent's terminal dues? The trial court found that it was the internal memo produced by the Respondent that was applicable. The court also found that the document produced by the Appellant did not apply to the Respondent's employment and could not have altered the terms of her employment.

3. I note from the record of this appeal that both sides had filed written submissions pursuant to an order made on 18th May 2010 (Sitati, J). The advocates for the parties had subsequently highlighted their submissions before Sitati, J on 28th July 2010. Upon reserving judgment the Judge subsequently noted that the original lower court record was missing, and on 23rd December 2010 she directed as follows -

"**COURT:**

Court unable to write judgment until lower court file is traced. DR to assist in the search for the same and to advice court once same is found. Mention before the Judge dealing with Civil Appeals on 2nd March 2011 to confirm availability of lower court file".

4. On 18th February 2014 the learned counsels for the parties agreed before me that the original lower court record was irretrievably lost after it was forwarded to this court by the lower court. To enable the appeal to be heard to its logical conclusion, both learned counsels for the parties further agreed that there were before the court all necessary documents to enable the matter to proceed. I then directed that there be fresh highlighting so that a judgment could be written. Such highlighting was done before me on 26th June 2014. There was no appearance for the Appellant though the date had been given in the presence of its counsel.

5. The sum total of the grounds of appeal in the Appellant's memorandum of appeal is that the trial court erred in fact and in law for finding as it did. I have read the testimonies of the witnesses who testified before the lower court. I have also read the judgment of the lower court. I have also considered the written submissions filed by the parties and the oral submissions of the learned counsel for the Respondent. No authorities were cited.

6. I have not had a chance to look at the two documents in contention because there are no copies of those documents in the two volumes of the record of appeal before the court. As already pointed out there was only one issue for determination before the trial court. That issue was, which document was to be used in calculating the Respondent's terminal dues?

7. Two documents were laid before the trial court. The Plaintiff's document (Exhibit P2) was an internal memo addressed by the chairman of the Appellant to all its members of staff. It referred to what amounted to a negotiated agreement between the Appellant and its employees for calculation of employees' terminal dues at 25% of the annual gross salary multiplied by the number of years served. The contents of this document were verified by the Appellant's own witnesses, particularly DW2 who was the finance manager of the Appellant. There cannot be any doubt at all that after issue of Exhibit P2, that internal memo constituted part of the terms and conditions of service of the Appellant's employees, including the Respondent. The only issue for consideration is whether the subsequent document called the Personnel Policies and Procedures (Exhibit 1 (b)) could have altered the terms and conditions of service of the Respondent.

8. There is no evidence that Exhibit D1 (b), either the entire document or part thereof, was negotiated as between the Appellant and its employees. The clause thereof pertaining to calculation of terminal dues purported to alter drastically the contract of service between the Respondent and the Appellant. No evidence was placed before the trial court to the effect that the Appellant's employees (including the Respondent), were asked to acquiesce to the new document or alteration of their contracts of service; at any rate there was no evidence of such acquiescence. How could the Appellant then expect to unilaterally alter existing contracts of service between it and its employees?

9. The trial court found that Exhibit D1 (b) came into force (if that) after the Respondent left the Appellant's employment and that therefore she could not be bound by it. It also found that Exhibit P2 was a binding document that had the full authority of the board of the Appellant which communicated the document to its employees through its chairman.

10. Upon my own evaluation of the evidence placed before the trial court I find that the Respondent's contract of service with the Appellant included the contents of the internal memo (Exhibit P2). That internal memo provided for the Respondent's terminal dues at 25% of her annual gross salary multiplied by the number of years served. The internal memo was, by its contents, a negotiated term of service between the Appellant and its employees. The subsequent document variously called the Constitution of the Appellant or the Personnel Policies and Procedures was an imposition from the Appellant which could not in law have altered the Respondent's terms and conditions of employment to so radically reduce her terminal dues by 10 percentage points. The learned trial magistrate did not err in law or fact at all by finding as she did.

11. In the event I find no merit in this appeal. The same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF OCTOBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014