



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal of

NYALI CONSTRUCTION AND ELECTRICAL SERVICES LTD.....APPELLANT

VS.

GITENE.PETER AKUMA.....RESPONDENT.

JUDGMENT

1. This is an appeal from the Judgment of Hon. Muneeni Resident Magistrate in CMCC 1680 of 2001. In his Memorandum of Appeal dated 29th November 2001 the appellant has raised three grounds of appeal. The gist of these grounds is that the Respondent was not entitled to gratuity and that the Respondent had been duly compensated; and therefore the appellant did not owe him further dues as held by the trial court.

2. In its judgment the trial court held as follows; ***“The plaintiff quoting from) the Act (Cap 229) proved to the court how he arrived at the figures of Ksh. 98,787.05 of the total dues, Kshs. 115,031.50, the defendant paid Kshs. 16,244.45, Ksh 98,787.05 is due and owing. The plaintiff has proved its case in a balance of probabilities. I enter judgment for Ksh. 98,787.05 for the plaintiff against defendant, costs of the suit and interest. Orders accordingly.” (See Judgment at pg 74 of the Record of Appeal.)***

As a result of this Judgment the Defendant/Appellant has preferred this appeal.

3. It has long been held that the appellate court will only interfere with a lower court's judgment if the same is founded on wrong principles of fact and or law. The Kenya Court of Appeal has held that ***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion,. (See Law JA, Kneller & Hannon Ag JJA in Mkube vs Nyamuro [1983] LLR, 403-415, at 403)***

4. The appellate court's responsibility under Section 78 of the CPA is to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction.

ISSUES FOR DETERMINATION

5. From the memorandum of appeal the issues for determination are:

a) Whether the Respondent was entitled to gratuity and

b) Whether the Respondent was entitled to Shs,115,031.50 as terminal dues for redundancy

6. The plaintiff in his plaint claimed the sum of Ksh 115,031.50 as his terminal dues as a result of being rendered redundancy. He enumerated them as follows;

Unpaid leave for 2 months	4,634.80
3 months wages not paid.....	6,951.75
Traveling allowances.....	4, 250.00
House allowances.....	2,200.00
1 month in lieu of notice.....	2, 317.25
Gratuity -5 years.....	63,865.00
Public Holidays.....	<u>11,586.25</u>
Total.....	115,586.25
Less monies received.....	<u>16,2444.45</u>
Grant Total.....	<u>98, 787.05</u>

(See paragraph 6 of the plaint at pg 5 of the Record of Appeal)

The Plaintiff/Respondent's counsel in his written submissions has argued that the trial court was right in relying on the above computation of terminal dues.

7. On the other hand the Defendant/Appellants counsel has submitted that the court erred in upholding the plaintiff's said computation as terminal dues, and urged the honourable court to consider the following computation. (Summarized)

Gross Total Dues.....	Ksh 25,933.25
Less Deductions.....	<u>Ksh 9,688.80</u>
Net Dues.....	<u>Ksh.16,244,45</u>

(See paragraph 3 of Defence at pg 92 Of the Record of Appeal)

8. In his judgment Hon. Muneeni, Magistrate, stated that the plaintiff proved his computation of dues in accordance with the provisions of the Regulation of Wages and Conditions of Employment Act , Cap 229 of the Laws of Kenya which has since then been repealed. The court did not cite a specific/particular provision. However, in his testimony the plaintiff (PW 1), referred the lower court to sections 13, 5 and 17 of Cap 229.

9. The Plaintiff/Respondent evidence (pg 48 Record of Appeal) was as follows:

“Recently they paid Kshs. 16,000/- to my advocate, traveling allowance was Kshs. 850 according to Cap 229, Section (3) house allowance S 5, Gratuity S 17. My dues came to Kshs. 98,787,05.

10. I have perused the said provisions of Cap 229 (The Regulation of Wages and Conditions of Employment Act). I do not see in those provisions any reference to the allowances. That notwithstanding, I have seen Exhibit is the Respondent's payslips, which show that the Respondent's gross taxable earnings for August 1998 were follows;

Basic Pay.....	2015.00
House Allowance	302.25
Fixed Overtime.....	806.00
Off Duty/Holiday.....	991.70
TOTAL.....	<u>4,114.95</u>

11. There is no explanation in the record of appeal as to how the figures claimed by the plaintiff/respondent were calculated, and how the Magistrate arrived at a similar computation as the Plaintiff. In this regard the Hon. Magistrate's reasoning is ambiguous and lacking in clarity. For example, the Plaintiff claimed and was awarded 5 years gratuity of Shs. 63,865.00. this amounts to Shs. 12,773 per year, or three times his monthly gross taxable earnings. This is not explained.

12. The applicable legal provisions relating to the Respondent are the Regulation of Wages (Protective Security Services) Order, 1988. Using those provisions and the claims in the Plaint, I make the following computations.

a) **Traveling Allowance** Paragraph 13 of the Order provides: After each period of twelve months an employee shall be entitled to Shs. 850 traveling allowance when proceeding on leave. Thus 850×5 equals 4,250 Amount claimed is 4,250/- which is confirmed.

b) **House Allowance.** Paragraph 5 of the Order provides for 15% of basic pay to be paid on house allowance. Thus, $4115 \times 15 / 100 \times 5 = 617.25 \times 5 = 3,086.25$. Amount claimed is Shs. 2,200/- which is confirmed.

c) **Gratuity** Paragraph 17 of the Order provides for eighteen (18) days pay for every completed year of service. Thus $18 / 24$ (working days per month) $\times 4,115 = 3,086.25 \times 5$ years = 15,431.25.

13. In the result, I find that the Hon. Magistrate did not properly consider the applicable legal provisions of the Regulation of Wages and Terms and Conditions of Employment (Protective Security Services) Order 1998. Accordingly, the amounts awardable to the plaintiff/Respondent are as follows:

Unpaid Leave (2 months).....	4,634.80
3 Months unpaid Wages.....(as claimed).....	6,951.75
Travelling Allowance.....	4,250.00
House Allowance.....	2,200.00
I Month Notice.....	2,317.25
Gratuity.....	15,431.25
Public Holidays.....(as claimed).....	<u>11,586.25</u>
Total.....	47,371.25
Less Monies paid.....	<u>16,244.45</u>
Payable.....	31,126.80

14. I therefore set aside the award by the Hon. Magistrate Muneeni, and substitute with an award for the amount of Shs. 31,126.80. To this extent the Appellant's appeal partially succeeds. Each party will bear its own costs.

Order Accordingly

25th March, 2013

R.M. MWONGO
JUDGE

Read in open court by:

Date ; **10th April, 2013**

Coram:

Judge: Hon. M. Odero...

Court clerk:

In Presence of Parties/Representative as follows;

- a).....
- b).....
- c).....
- d).....