REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 465 OF 2008

HON. PHOEBE ASIYO. ..... 1ST APPELLANT

DR. AKINYI NZIOKI. ..... 2ND APPELLANT

DR. JACQUILINE ODUOL. ..... 3RD APPELLANT

MRS HANE OGOT (As the National Officials of the

Kenya Women's Political Caucus). ..... 4TH APPELLANT

VERSUS

MARTIN NJALALE. ..... RESPONDENT

(From the Judgment and decree of K. L. Kandet Resident Magistrate in Milimani CMCC No. 13530 of 2005)

J U D G M E N T

This appeal arises from the Judgment of the Nairobi Resident Magistrate's court to the effect that the Appellants were liable to pay the Respondent leave allowances for a period of six years during which the Respondent worked for the Appellants in several intermittent renewable service contracts.

The facts of the case are as follows: The Respondent who was an accountant was employed by the Appellants from the 1st February, 1999 in severable renewable contracts which were ended by the Respondent by his letter of resignation dated 3rd January, 2005. Consequently, he was paid his work benefits except his leave days unpaid allowance. He accordingly filed a claim for the same in a plaint dated 14th December, 2005, seeking a judgment for Ksh.350,000/-.

The Appellants filed their defence on 27th January, 2006, denying that the Respondent was entitled to any leave days by the time he resigned. The suit proceeded to a trial which resulted to the trial court entering judgment in favour of the Respondent for Ksh.143,333.30 together with interest and costs. That aggrieved the Appellants who accordingly filed this appeal.

The major issue before the lower court and here is whether by the nature of the employment contracts between the parties herein, the Respondent by the time he resigned, could have been entitled to any leave days and if so, how many?

In the appeal the Appellants raised 10 grounds of appeal but which were squeezed and grouped into

about 5 grounds when making submissions on them. They are as follows: -

1. **That the honorable trial magistrate erred in law and fact by failing to appreciate the fact that although the Respondent's employment contract lasted six years it nevertheless was made up of three to four intermittent, separate contracts.**
2. **That the learned magistrate failed to appreciate sufficiently or at all that the Respondent's contract consisted of the actual signed contracts as read together with the Appellant's managements procedure manual of 1997.**

3. **That the Respondent who had pleaded that he was entitled to 104 leave days spreading through the six years of performed contract, failed to prove the same by relevant credible evidence, on the balance of probability.**

4. **That the honourable trial magistrate erred in law and fact in failing to appreciate and find that if there were any unpaid leave days due to the Respondent, the same had been forfeited.**

5. **That the Respondent was in any case estopped from claiming 104 unpaid leave days since he had represented to the Appellants on 24th September, 2004, that he had only 14 leave days still unpaid for.**

I have carefully perused the material relied upon by both sides which included the lower court record, consisting of the judgment appealed from, the grounds of Appeal, the written submissions and the legal authorities cited from both sides. I am conscience of this court's duty as an appellate court and take into account the restatement of the relevant principle in **Selle Vs Associated Motor Boat Co. [1968] EA 123 at page 126**, which states thus: -

"An appeal to this court from a trial High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities to estimate the evidence in the case generally."

I take the principle stated above to mean that where it is apparent that evidence has not been properly evaluated by the trial court, or that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to freshly evaluate the evidence itself and be at liberty to draw its own conclusions.

I now turn to consider the grounds of appeal. The first ground raises the issue whether the trial court was entitled to regard the six worked years as continuous service which would entitle the Respondent to yearly leave for each year worked.

The Appellants stated that the six years were of several (about 4) intermittent employment contracts. They argued that some of those contracts were less than one year each and could not therefore attract an annual leave under the Employment Act as well as under the Management Manual which was allegedly part of the Respondents signed contract.

The Respondent indeed conceded that the contract of service he signed were intermittent and several of them were of less than one year each. His case nevertheless, was that each contract linked with next one so that from 1999 when he got employed, he never for a day ceased to work for the Appellants. That each following contract was linked to the expiring one until January, 2005 when he resigned.

I have considered the issue raised in this ground of appeal. I have come to the conclusion that although the six years of service were consisted of several intermittent contracts, nevertheless, they all amounted to one continuous service employment which would attract a yearly leave of not less than 21 days per year under the law. In this case before the court, the Respondent's contract entitled him to 30 days of leave

per year. In my view, although the intermittent contracts may have had some variations in their terms, such variations did not affect the basic substance of the contracts. His duties under the contracts remained substantially the same. In these circumstances, the trial magistrate's conclusion on this issue was right.

The second ground of appeal is that the Respondent's contract of employment consisted of the signed contracts as read with the Management Procedure Manual introduced in 1997 two years before the Respondent was employed. The Appellants argument was, therefore, that the Manual being part of the contract provided certain terms which included the term that any annual leave accruing to an employee must be taken before the end of the year in which it accrued except where, with the permission of the management, the leave is allowed to overlap to the following year in which case only 5 days would be allowed to so overlap.

That in the case of the Respondent, the days of leave accrued and said to be 104, were forfeited since there was no request from the Respondent during the relevant periods, to extend them to the following years so as to be available to him in January, 2005 when he resigned. The Appellant further argued that the Respondent did not prove on the balance of probabilities that he indeed was entitled to unspent leave of 104 days as claimed.

There is no serious dispute as to the existence of the Management Procedure Manual which the Appellant asserted was introduced into staff contracts in 1997. However, whether it became part of any employee's contract or not, was in my view, an issue of fact to be proved by the Appellants who asserted the fact. I have carefully perused the evidence in the record. The Management Procedure Manual itself provides thus: -

> ***"All employees of KPWC shall be issued with a letter of appointment upon recruitment. The letter of appointment will set out the terms and conditions of employment. The letter of appointment together with the manual will constitute the formal contract between the employee and KPWC. Each employee will accept their appointment in writing by signing a letter of acceptance to the employment and contract, which will be kept in their personal files. By accepting their appointment; the staff member acknowledges that he or she has read and accepted the conditions laid down in the letter of appointment and the Manual."***

It was the view of the learned trial magistrate that the said Manual had no date of commencement or when it was operationalised. He was not sure that the Manual was brought to the attention of the Respondent at any relevant time. Indeed, in my view, if the Appellants wished to credibly assert that the Manual was brought to the attention of the Respondent, they would have led evidence on the point. They did not at any time assert that the Respondent was given a copy of the Manual when he signed the first contract in 1999. They did not either assert that each time the contract was renewed, a copy of the Manual was annexed to the contract, or in the minimum, that his attention was drawn to the existence of the manual as part of the contract.

The Appellant urged that there are several occasions when the manual was, in particular, brought to the attention of a meeting of staff members where Respondent was present. The meeting which was addressed by the Chairlady was given as an example. In my view however, the issue of terms of the contract was not a casual matter but clearly a serious issue. Whether the terms and conditions spelt out in the Management Procedure Manual were incorporated into the employment contracts of the workers was not an issue to be left to casual staff meeting such as the one abovementioned. Indeed whether or not the Respondent probably became aware of the existence of the Manual in such meetings, that alone did not and could not automatically import the Manual terms and conditions into staff contracts.

This court accordingly completely agrees with the trial court's conclusions when he stated that it was doubtful whether or not the Manual under discussion and the specific terms now in dispute, including leave terms, were legally brought to the Respondents' attention. I agree with the trial magistrate also that the issue of leave was so vaguely handled by the Appellants that it would be unfair to conclude that the terms touching on it were without complications. It is no wonder therefore, that it caused confusion on both sides. Such confusion should not be allowed to adversely affect staff who had no obligation to

incorporate the terms of the Manual into their contracts.

In conclusion on this point, the confusion created by the Appellants in handling the leave issue, appears to have led the Chairlady to admit during her speech in her rear attendance of such meetings, that the Board would discuss and clarify the same. The Chairlady also conceded that the leave arrangement for all staff depended on whether or not a worker's services were required during a given year; in which case, he/she would not be granted the leave.

The record of evidence does not show that the Board ever decided the said matter of pending leave either way. If the Board did so, evidence of communication of such decision would have been adduced in evidence. However, none was so adduced. That the Respondent in his evidence did not contend that he was not aware of the **"leave"** issue, is not the issue herein. The issue is whether or not the Appellants proved on the balance of probabilities that the Respondents leave days were contractually forfeited by virtue of the Management Manual being part of his written contract. In this court's view, the Appellants contention that the Management Manual was with full knowledge of the Respondent made part of his service contract, was vague and doubtful, and in particular, was not proved on the balance of probabilities.

In my view, ground two of the appeal which was summarized and recorded above on page three of this Ruling, has been dealt with. That is to say, that the honourable trial magistrate did not fail to appreciate the full content of the contract signed by the Respondent as asserted by the Appellants. On the contrary, he specifically considered the issue and came to the conclusion that the Management Procedure Manual was introduced vaguely into the workers contract. In particular, it was not at the relevant time(s) introduced to the Respondent's contract. For example no copy was served on the Respondent each time he signed his contract or renewal of contract and this situation did not improve merely because the issue of the Manual was once raised during the Chairlady's attendance of a specific staff meeting. In any case she promised to have the matter later discussed by the Board of Directors thus confirming that the issue of leave was not a settled matter.

The third ground of appeal raised the issue as to whether or not the Respondent/Plaintiff had sufficiently proved that he was entitled to 104 unpaid leave days across the working period of six years. In my understanding of the evidence on record, the Appellants were not asserting that the Respondent did not earn the days across the six years. What the Appellant asserted, was that even if the days were earned, the Respondent either used them or forfeited them every end of each year when he did not utilise the earned days. The Appellants further stated that it was the Respondent's legal burden to prove on the balance of probabilities that he had not spent or forfeited the outstanding leave days, a burden they asserted, he failed to unload.

The Respondent, in answer, stated that it was the Appellants who kept the record of leave days of each staff member. That a staff member would fill the leave form showing the days of leave sought by a worker but in turn the Appellants relevant officer in charge of leave days, probably the accountant or co-ordinator, would grant the days allowed to the applying officer to take for that particular time. The co-ordinator would as well fill on the leave form the days of leave still outstanding after the granting of the leave then applied for. That in the case of the Respondent, the co-ordinator, in respect to the Respondent's leave application dated 19th January, 2004, filled the relevant part of the application showing that at the time, the Respondent was still having 104 leave days unspent after the 5 days granted at the time – See Exhibit No. 3 on page 61 of Appeal Record.

I have on my part studied and considered the relevant evidence. I note that the Appellants in their evidence at the lower court, did not deny or successfully controvert the facts as to how a member of staff would at any time ascertain his/her unspent leave days. Indeed the explanation that it was co-ordinator or personnel officer to whom leave applications were directed, who had the leave records and who wrote the remaining leave days on the application forms, makes good sense. It was, therefore, not a contradiction that the co-ordinator or such personnel officer showed a balance of 104 days in the application form of the Respondent dated 19thJanuary, 2004 while, on another application form by the Respondent (exhibit D12) dated 24th September, 2004, the Personnel Officer indicated that only 14 days of leave days

remained unspent.

First, there is evidence that the Management decided to forfeit all leave days of the workers not spent after the Chairlady's meeting said to have taken place on the basis that a provision of the Management Procedure Manual provided so. Secondly, it was the Appellant Personnel who kept the leave records of all workers and had the power, duty and opportunity to fill the workers application form in respect to that information, which explanation this court, as did the trial court, has accepted. In that case, the Appellant's assertion that the Respondent made a representation to the Appellants that he had only 14 days leave as depicted in the forestated application form, exhibit D12, is not acceptable by this court. This court, from the evidence on record, does not believe that the Respondent made any such representation.

In the above circumstances, it is the view of this court that it was in the burden of the Appellant, to explain in evidence what happened with the 104 leave days shown as still unspent by the Respondent in exhibit 3 in the appeal record after the Respondent asserted that both application forms, were in relation to unspent leave days, filled by the Appellants. By explaining that the two leave forms were actually filled by the Appellants, the Respondent shifted the burden to explain the fate of the leave days to the Appellants.

The Appellants tended to suggest that the Respondent's leave days were forfeited after its Board of Directors meeting decided to implement the relevant leave provisions in the Management Procedure Manual. No evidence was however, adduced when the Board of Directors took the decision and whether and how such a decision was, if at all, notified upon the workers. For example, were the workers notified by individual letters written to them or by a notice pinned on the Notice Board? For lack of evidence to that end, this court, as was the trial court, is entitled to and does assume, that no notification was served or given to the Respondent who should not, accordingly be negatively affected by the said decision of the Board of Directors.

On the other hand, if the notification about forfeiture was communicated to the workers, including the Respondent, this court's position would be that such notification could and did not have capacity to impose the leave forfeiture clause on the Respondent's service contract at that late hour. That is so because the term would then be unilaterally imposed upon the Respondent's original contract.

The fourth ground questioned the trial magistrate's decision not to accept the forfeiture of leave days not taken by the Respondent by the end of six years. This ground has effectively been dealt with above. Once the court made the finding that the leave terms in the Manual were not at any relevant time of signing the contract, made part thereof, then the burden of proof lay with the Appellants to show that the Manual term were incorporated into the contract later. The Appellants evidence claimed that the Board of Directors made a decision that the provision in the manual was part of the worker's contract. The Appellants however failed to show that the Manual was voluntarily adopted by the Respondent as part of his contract. They also failed to show that a copy of the Manual was shown or given to the Respondent at the time he signed his contract or contract renewals. They further failed to show that even after the Board of Directors made the decision the same was properly and effectively notified on the workers including the Respondent. And finally, this raised the issue whether at that stage, the notification if any, did not amount to a unilateral and legally non-binding imposition on the Respondent, a situation this court has refused to approve.

Ground five of appeal was whether, on the face of Respondent's leave form exhibit 12, he did not make a legal representation to the Appellants in respect of which the principle of estoppel prevents him from claiming the right in the 104 days leave contained in the leave application form, exhibit 3? I have already discussed the Respondent's reply to the effect that the entry of leave days in both forms above was made, not by him but by the Appellant's personnel in charge of the worker's leave records. This court has already made a finding that the Respondent's explanation is accepted in view of the fact that it is reasonable and was not controverted by evidence.

Section 120 of our Evidence Act, Cap 80 explains the principle of estoppels. It provides thus: -

> "**When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such other person or his representative to deny the truth of that thing."**

And **Halsbury's Laws of England**, 4th Ed. Vol 16 in Paragraph 1593 at page 1069, explains the working of the same principle thus: -

> ***"... it is true that the state of a man's mind is a fact, and in that sense a man who makes a statement as to his present intention makes a statement of existing fact; but estoppels is a rule of evidence, available, where there is a cause of action, to prevent a person from denying what he has once said, and is not a cause of action. The person who made the statement of intention is to be put in the same position as if it were true."***

The precise limits of the principle of estoppels have never and may not easily be defined. It is however, said that the principle will arise when one person makes to another an unequivocal clear representation relating to the enforcement of legal rights with intention that such representation should be acted upon and the other party, in the belief of the truth of the representation, acts upon it. The legal consequences arising will haunt the person who made the representation or his legal representatives. It will not matter whether the representation was made due to a mistake, or failure to properly understand the factual or legal implication of the representation. Once the representation is relied and acted upon by the person it was made to, the maker will not be allowed to go back on it since it would be unfair or unjust to allow him to do so.

In this case the court has found that the alleged representation that the Respondent had 14 days of leave instead of 104 days, was made or entered in the Respondent's leave application, not by the Respondent but by the Appellant's personnel. Furthermore, there is no evidence that the Appellants acted upon it and in what way they altered their position to their detriment. In these circumstances, this court finds no evidence upon which the principle of estoppels would be brought into play and would dismiss the Appellants fifth and final ground of Appeal.

The final result is that for the reasons discussed and the findings made hereinabove, this court finds no sufficient reason for interfering with the findings in the Judgment of the honourable trial magistrate, which otherwise was carefully and properly drawn. This appeal is accordingly without merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 4th day of July 2013.

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JUDGE