REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA
CORAM: GICHERU, OMOLO & TUNOI, JJ.A.
CIVIL APPEAL NO. 119 OF 1996

BETWEEN

BAMBURI PORTLAND CEMENT COMPANY LIMITED ..... APPELLANT

AND

MRS. PHILEMON OYIGO ..... RESPONDENT

(Appeal from a judgment and decree of the High Court of
Kenya at Mombasa (Justice I.C.C. Wambiliyangah)
dated 21st November, 1995
in
H.C.C.C. NO. 331 OF 1989)
****

JUDGMENT OF OMOLO, J.A.

I think that on the material which was placed before the learned judge of the superior court (Wambiliyangah, J.), he did arrive at a reasonable decision and I see no occasion for us to interfere with him. One thing was established by the evidence which was before the judge and that was that since 1985, the respondent had been running the appellant's staff canteen and was supplying the appellant with various types of cooked meals. Whether that agreement was in writing or verbal does not seem to matter very much. At first the agreement was that the food was to be supplied at a charge of Shs.15/= per plate but it is clear to me from the recorded evidence that that price was always a sore point between the respondent and the appellant. The canteen was originally run by one Ben Holland and the respondent started by running the canteen on behalf of Holland. The respondent's evidence on this was, and I quote her:-

"I had started negotiation for price increase even when I was standing in for Mr. Holland. They raised the prices we kept on negotiating the price increases. In April, 1987 we discussed the matter. We postponed the matter. In November, 1987 I told them I could charge a minimum amount of Shs.25/= per plate. They told me to go back and document how I had arrived at that figure. ....."

It is obvious to me that it was at the stage when the respondent was asked to document the proposal to charge a minimum of Shs.25/= that she commissioned an accountant (P.W. 2) who produced a full report supporting the respondent's claim to Shs.25/=. I note that at this stage when the respondent insisted on a minimum of Shs.25/=, the appellant did not tell her that it (appellant) would not be able to pay that much and that she ought to pack up and go away. Instead they told her that they were going for tenders but that in the interim she should continue to run the canteen. The tendering process was finalised in March, 1988. The lowest bid accepted by the appellant was Shs.19.50. The respondent's tender of Shs.25/= was rejected. The appellant then gave the respondent notice to vacate by 31st July, 1988 but in the meantime, they would compensate her by paying to her Shs.19.50 instead of Shs.15/= which they had been paying her previously. This was clear evidence that even the appellant must have realised that the respondent was making a loss. They chose Shs.19.50 because that was the lowest tender they had received but as the learned judge points out in his judgment, correctly in my view,:-

"It must be remembered that she sold food. One had to analyse her inputs before one can fairly determine the profitable price at which it could be sold. The tenderer who had quoted Shs.19.50/= upon whose

figure the compensation was based was not called as a witness. So no-one can say by what factors or circumstance his quotation was influenced. It was, therefore, erroneous on the part of the defendant to base its so called "compensation" figure on the quotation of an outsider - who had not yet started operating. ....."

The truth of the matter is that both the appellant and the respondent had come to recognise that the Shs.15/= in the agreement was too low. In November, 1987 the respondent told the appellant she would now charge a minimum of Shs.25/=; the appellant, as I have said, did not tell her it could not pay that amount and ask her to go away. They instead asked her to establish a basis for that claim. She did so but the appellant chose to "compensate" her using the lowest tender of Shs.19.50. As the learned judge correctly says, no one knew how that figure had been arrived at. The simple position appears to me to be this. Both the appellant and the respondent agreed or realised the need that over and above the Shs.15/= in the agreement the respondent should be compensated. The appellant thought Shs.19.50 would be adequate "compensation"; the respondent thought only Shs.25/= would do. The judge had before him these two figures. He chose to use the respondent's figure and rejected that of the appellant. The judge gave his reasons for doing this. I think the learned judge was perfectly entitled to do this and it would not be right for us to interfere with his judgment.

That being my view of the matter my judgment shall be that this appeal must be dismissed with costs thereof to the respondent.

Dated and delivered at Nairobi this 11th day of October, 1996.

R. S. C. OMOLO ----------

JUDGE OF APPEAL