IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 31 OF 2019

BETWEEN

JOSEPH MDUDU KENGA.....APPELLANT

AND

1. NAS AIRPORT SERVICES

LIMITED MOMBASA.....1ST RESPONDENT

2. MANPOWER NETWORKS LIMITED....2NDRESPONDENT

(*Being an appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Ndolo, J.) delivered on 31st January 2019*

in

ELRC No. 681 OF 2017)

****

JUDGMENT OF THE COURT

Joseph Mdudu Kenga, who is the appellant in this appeal is aggrieved by the decision of the Employment and Labour Relations Court, for reasons that, despite the court having found that his employment was unjustifiably terminated, it failed to award him, a monetary amount of Kshs. 1,579,275.14, made up of compensation of 12 months' salary, 1 months' salary in lieu of notice, unpaid salary arrears, leave travel allowances, unpaid public holidays for 2 years, unpaid house allowance, overtime allowance and service charge.

The appellant's claim is that at all material times, he was employed by ***NAS Airport Services Mombasa Limited*** (*NAS)* and ***Manpower Networks Limited*** *(Manpower)* as a bar supervisor, a head waiter, and a Maitre D'hotel from 22nd July 2015 and was paid as a casual labourer; that his salary was Kshs. 28,000, but was only paid Kshs. 18,000. It was his case that he worked for two years without a formal contract of employment, and that his terms of employment were set out in the Collective Bargaining Agreement between the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers and the Kenya Association of Hotel Keepers and Caterers, as well as in the Control Policies and Procedures for Managers/Supervisors for NAS issued to him on 10th February 2016. He also claimed that he was not paid whilst away on leave, and that his employer did not remit his NHIF and NSSF dues.

He further claimed that on 30th July 2017, the Security Manager informed him of his suspension from employment and that he should surrender his port identity card. He claimed that he was not issued with a formal letter of suspension or termination.

He therefore claimed a sum of Kshs. 1,579,275.14, made up as follows;

a) 12 month's salary in compensation …….…… Kshs. 339,622.44

b) 1 month's salary in lieu of notice ……..…….Kshs.36,386.89

c) Unpaid salary arrears ……..Kshs. 97,641.14

d) Unpaid leave days for 2 years …….…..…Kshs. 49,056.58

e) Leave travelling allowance ……..….Kshs. 14, 400.00

f) Compensation for footwear for 24 months …….....Kshs. 14,400.00

g) Service charge @ 10,000 per month ……..……..Kshs. 240,000.00

h) Unpaid public holidays for 2 years ……..…Kshs. 15,239.47

i) Unpaid house allowance ……..…Kshs. 194,040.48

j) Overtime……...……...….Kshs. 480,451.46

k) Unremitted NHIF dues ……...Kshs. 20,400.00

l) Unremitted NSSF dues……..…..…Kshs. 2,800.00

m) Night shift (275) days……...…….. Kshs. 74,836.68

n) Certificate of service

o) Costs plus Interest

The respondents' rejoinder was that whereas the appellant was their employee, he was specifically employed by Manpower, as a sales associate; that he was not unjustifiably dismissed, but had absconded from duty. When questioned, he was rude and unremorseful. He would neglect to conduct regular reconciliations, and would absent himself from his duties without explanation. On 5th July 2017, he had misconducted himself by irregularly voiding a bill.

Upon considering the pleadings, the evidence and the submissions of the parties, the learned judge found that the appellant was unjustifiably terminated from employment, and awarded him 6 months' salary as compensation and 1 months' salary in lieu of notice, together with interest at court rates from the date of judgment. The court also found that the appellant was entitled to a certificate of service as well as costs.

The appellant was aggrieved and brought this appeal on grounds that the trial court failed to award him the various amounts claimed including, 12 months' compensation, 1 months' salary in lieu of notice of Kshs. 36,386.89, unpaid salary arrears, leave travel allowances, unpaid public holidays for 2 years, unpaid house allowance, overtime allowance and service charge.

The appellant who appeared in person filed written submissions where it was contended that he was not an employee of Manpower, but was employed by NAS; that he was employed as a supervisor and not a sales associate, and that the employment contract the respondents produced as evidence was fake; that they also produced fake NHIF data claiming to have remitted the statutory amounts to NHIF.

Though served with the hearing notice, the respondents did not appear, but they nevertheless had filed written submissions, where it was asserted that the appellant was employed by Manpower as his qualifications, approval, supervision, payment and termination of employment all emanated from that company. As to whether he was wrongfully terminated, it was submitted that the appellant had absconded from duty after failing to attend a disciplinary hearing, opting instead to serve the respondents with court pleadings on the day of the hearing; that despite all efforts to comply with the provisions of the Employment Act to address the appellant's misconduct, the appellant had failed to cooperate.

As concerns the claim for his pending dues, it was contended that, during the pendency of his employment, the appellant had not disclosed, that he was a member of a union, or that he was subject to the terms of a collective bargaining agreement, as a consequence of which, his employment contract with Manpower remained the basis upon which his contractual terms were derived.

On the claim for one month's salary in lieu of notice, the respondents contended that since the appellant absconded from employment, he was not entitled to this claim, and neither was he entitled to any alleged arrears over and above the salary of Kshs. 25,000.

Concerning house allowance, the respondents asserted that this was included in his salary, and therefore such amount could not be claimed in

retrospect. Regarding NHIF and NSSF payments, it was submitted that the deductions were made by Manpower, as the appellant's employer and remitted to the appellant's NHIF and NSSF accounts.

We have considered the appeal and the parties' submissions. This is a first appeal, and as such, our duty is to re-appraise the record and arrive at our independent conclusions in respect of the issues for determination. In the case of ***Cecilia Gathoni & another vs George Kariuki Kabugu [2013] eKLR*** this Court stated thus;

> ***" This being a first appeal, we are reminded of our primary role as the first appellate court namely to re-evaluate, reassess and reanalyze the facts as they were before the learned trial judge and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of* Sumaria & Another vs Allied Industries Ltd [2007] KLR 1 *where this Court held inter alia that being a first appealthe court was obligated to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge has shown to have acted on wrong principles reaching the finding he did."***

Cognisant of the above, the following issues are for consideration by this Court;

i. whether the appellant was employed by NAS or by Manpower;

ii. whether he was employed as a supervisor or as a sales associate;

iii. whether he earned Kshs. 25,000 or Kshs. 28,000;

iv. whether he was unjustifiably dismissed or absconded from duty; and

v. whether he was entitled to the sums claimed.

Beginning with the question of whether the appellant was an employee of NAS or Manpower, a consideration of the memorandum of claim does not disclose that this was an issue for the learned judge to determine. Needless to say, it is an appropriate starting point for the determination of the issues in this appeal. The appellant's contention is that he was employed by NAS and that NAS failed to provide him with a contract and also failed to pay him his full salary of Kshs. 28,000 per month whilst he was employed; that it also failed to provide him with a certificate of service after his employment was terminated. He further argued that though Manpower purported to be his employer, he had not applied for a position in their employment; that he was employed with NAS, and the terms of his employment were as set out in a Collective Bargaining Agreement between the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers and the Kenya Association of Hotel Keepers and Caterers, as well as in the Control Policies and Procedures for Managers and Supervisors issued to him on 10th February, 2016. He also produced a copy of his port identity card as proof that he worked for NAS.

Manpower on the other hand sought to demonstrate that the appellant was its employee. It produced the appellant's letter of application for employment as a supervisor with Manpower. Also produced was an employment contract between the appellant and Manpower, several leave application forms in the appellant's name and addressed to Manpower, and various statements showing NHIF and NSSF remittances made on the appellant's behalf.

Having analysed the documents produced by Manpower above, we are satisfied that they are sufficient proof that the appellant was an employee of Manpower.

As concerns the nature of his employment, though his application for employment shows that he applied for the position of supervisor, the contract clearly stipulated that he was subsequently employed as a sales associate. Without any other documentation from the appellant demonstrating a contrary position of employment, once again it can be concluded that the appellant was employed as a sales associate.

Turning to the salary earned, the learned judge had this to say;

> ***"The Respondents produced a contract of service dated 27th September 2015 indicating that the Claimant was entitled to a gross monthly salary of Kshs. 25,000."***

A review of the contract reinforces this position. The appellant's complaint was that he was to be paid Kshs. 28,000 but was paid a lesser amount of Kshs. 18,000, for the first two months and Kshs. 25,000 for the duration of his employment. The contract is clear; the appellant was to receive a salary of Kshs. 25,000 per month. Conversely, the appellant has not denied receiving a monthly payment of Kshs. 25,000 per month. Accordingly, as was the learned judge, we too are satisfied that the appellant's monthly salary was Kshs. 25,000.

Having ascertained the foundation of the appellant's employment, we now turn to consider whether the appellant was unjustifiably terminated, or whether he deserted his employment. Upon considering the evidence, the learned judge took the view that, where an employer alleges desertion it must demonstrate that efforts were made to notify the deserting employee that the employment had been terminated. According to the learned judge nothing showed that the employer took any steps to establish the employee's whereabouts or to caution or

notify him that his employment was terminated on grounds of desertion. The judge concluded that, *"…In the absence of evidence of any such efforts by the Respondent, the allegation of desertion of duty remains unproved."*

Sections 107 (1) and ***108*** of the ***Evidence Act*** provides that whosoever asserts the existence of certain facts must prove that those facts exist. In this case though Manpower claimed that the appellant had deserted his employment, when he failed to attend a disciplinary hearing arising from misconduct for voiding sales without authority, though the voided sales were produced, there was no letter inviting him to attend disciplinary hearings, or any minutes of the proceedings in question. In addition, ***Edwin Shamalla Muga, DW2,*** a supervisor with Manpower, admitted that no formal or systematic process was adopted to terminate his employment contract and with nothing evincing the allegation that he had absconded from employment, the learned judge cannot be faulted for having arrived at the conclusion that the appellant's employment was unjustifiably terminated.

Concerning the amounts claimed under the different heads, the learned judge awarded the appellant 6 months' salary as compensation for the unlawful termination of his employment, and 1 month's salary in lieu of notice, but declined to make awards under the other heads. In respect of the 1 months' salary in lieu of notice, the appellant was aggrieved with the award of Kshs. 28,000. He claimed that he ought to have been paid Kshs. 36,386.00 which was inclusive of house allowance of Kshs. 8,085.02.

With regard to the award of 1 month's salary, this has not been disputed. What is in contention is the appellant's claim for house allowance arising out of the terms of a collective bargaining agreement. Much as this may be a sufficient basis upon which to support such a claim, he has also admitted that whilst in employment he did not at any time inform the respondents that he was a member of a union, or bring the terms of the concerned collective bargaining agreement to their attention. He testified that, *"…My employer didn't know I was a member of the union."* Clearly, the moment for enlisting the employer's compliance with the terms of the collective bargaining agreement had since passed, and we consider that it is now too late in the day for the appellant to turn around and demand that the terms of a collective Bargaining Agreement be applied retrospectively, particularly after his employment had ended. In the circumstances, there being only the employment contract upon which the learned judge could rely, it can be concluded that his monthly salary was inclusive of house allowance.

The appellant's other complaint was that the learned judge ought to have awarded him 12 months' salary of Kshs. 339,622.44 as compensation for unlawful termination, instead of the award of 6 months' compensation. In such award, the learned judge is exercising a discretion, and in the case of

United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985]

***E.A,* Madan J.A** (as he then was), explained the principles applicable by a court when exercising its discretion as follows;

> ***"The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

Besides indicating that the court ought to have awarded him compensation for 12 months, the appellant has not faulted the court's award of 6 months, or pointed to any considerations that the court ought to have taken into account, or failed to take into account or demonstrated that, the discretion was exercised injudiciously. In the circumstances, we find that we cannot interfere with that decision.

On the claims that he was not paid for leave days not taken, the learned judge stated thus;

> ***"The Claimant himself produced leave forms indicating that he had utilized his leave days. The claim for leave pay is therefore without basis…"***

In the judgment, the learned judge took into account the leave forms provided by Manpower, and the appellant's admission that he took leave during the period of employment, and found as a fact that the appellant had applied for and taken his leave.

In the case of ***S. M. vs E. N. B. [2015] eKLR*** it was stated that;

> ***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."***

See also ***Cecilia Gathoni & another vs George Kariuki Kabugu*** ***(supra)*****.**

The appellant in this case has not pointed to any misapprehension, or misdirection on the part of the learned judge on whether he took his leave days or not. As such, we are not at liberty to interfere with those findings. In the circumstances, we are satisfied that this claim is not merited.

Regarding the other claims for unpaid salary arrears, leave travel allowances, unpaid public holidays for 2 years, overtime allowance and service charge, as observed by the learned judge, these were not proved, and there being nothing to support these claims, we too are satisfied that the learned judge was right in dismissing them.

All in all, the appeal is without merit, and is for dismissal. To avert any further acrimony between the parties we order each party to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 24th day of April, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR