IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, MURGOR & KANTAI, JJ.A)

CIVIL APPEAL NO. 14 OF 2017

BETWEEN

HARRISON M. KARIUKI

JOSEPH K. NGUGI

ROSEMARY N. KARANJA

JOHN MUGO MWANGI

EUNICE N. NYAMBATI

RAPHAEL G. GATIMU

BEN N. MURUNGA

LAWRENCE K. NJIHIA

JOSEPH K. MWANGI

MAINA WACHIRA

SEBASTIAN O. MADIANG

JOSIAH EYAMETI

JAMES L. KANYINGIRI

KIRERA MOSOBA

JANET KHAVELE...APPELLANTS

AND

KENYA FARMERS ASSOCIATION...................................RESPONDENT

(An appeal from the judgment of the High Court of Kenya

***at Nakuru (Koome, J.) dated 2nd October, 2009* in H.C.C.C. No. 128 of 2001)**

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JUDGMENT OF THE COURT

This is a first appeal from the Judgment of the High Court of Kenya at Nakuru (Koome, J – as she then was) delivered on 2nd October, 2009.

Rule 29 of the **rules of this Court** mandates us in such an appeal to re-appraise the evidence and to draw inferences of fact and make our own conclusions based on the facts on record. This Court stated on that mandate in the case of **Kenya Ports Authority v Kuston (Kenya) Limited (CA No. 142 of 1995)**:

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

The fifteen appellants were among the twenty-two plaintiffs who sued the respondent (**Kenya Farmers Association**) claiming various reliefs. It was claimed that the appellants were employees of the respondent either at its head office in Nakuru or its branches in the Republic of Kenya and that in 1999 the respondent, in breach of terms and conditions of service had retired the appellants on grounds of age before they reached retirement age of 55 years. It was further claimed at paragraphs 6 and 7 of the amended plaint:

> ***"6. That it is the plaintiffs case that they were retired prematurely before the Compulsory retirement age in contravention of the terms and conditions of service and that they are entitled to damages amounting to the difference in their actual age and the compulsory age of retirement.***
>
> ***7. That it is also the plaintiffs case that prior to the unlawful retirement, the defendant has refused and/or neglected to pay them salaries for various periods ranging from 15 months to two years, failed to pay leave allowance, failed to remit National Social Security dues, failed to remit Provident Fund deductions, failed to pay Retirement Benefits and also SACCO deductions the particulars of which are given below:-"***

Those particulars headed "KFA EMPLOYEES SENT ON EARLY RETIREMENT AGAINST THEIR WILL" give the name of the plaintiffs, sets out each plaintiff's claim on named items set out as follows:

> ***"a) Months remaining before attaining mandatory retirement age of 55 years.***
>
> ***b) Gross pay per month.***
>
> ***c) Unpaid salaries as at 30th November 1999***
>
> ***d) Entitlement salary pay through attainment of retirement period.***
>
> ***e) Leave and leave allowance pay for the remaining period.***
>
> ***f) NSSF deductions not remitted as at 30th April 1998***
>
> ***g) Provident Fund deductions not remitted to Fund Managers***
>
> ***h) RBS deductions not sent to Fund Managers***
>
> ***i) Recoveries to SACCO not remitted as at 30th April 1998***
>
> ***j) Unpaid salary increment for unionisable staff***
>
> ***k) Total claim entitlement adding C through J."***

The total claim was Kshs.17,109,103.00 "with interest at court rates since August 1999 as more specifically shown in paragraph 7 of the plaint" and costs of the suit.

The respondent resisted the claim through a statement of defence where the plaint was said to be bad in law for not disclosing proper particulars of the claim and misjoinder of causes of action; that the respondent was wrongly sued as there was no entity called "Kenya Farmers Association"; that the court lacked jurisdiction as the matter in issue fell within the jurisdiction of the then Industrial Court (today – Employment and Labour Relations Court), that the employment of the appellants was lawfully terminated and their dues paid in full; that the appellants had in any event reached retirement age and the whole claim was denied.

Some of the appellants testified on their own behalf while one testified on behalf of others in accordance with the provisions of **Order 1 rule 12 Civil Procedure Rules.** In the impugned judgment the judge dismissed the suit by some of the plaintiffs who neither testified nor gave authority as per the said **Order 1 rule 12.** The Judge found in favour of the appellants on some of the claims giving judgment for **Kshs.1,745,137.00** in respect of the items – i) 3 months' salary in lieu of notice; ii) 1 month salary in lieu of leave;

> iii) NSSF; iv) unremitted PF (Provident Fund); v) unremitted RBS (funds to a retirement scheme).

The appellants are dissatisfied with those findings hence this appeal premised on the Memorandum of Appeal drawn by the appellants' lawyer's **M/S Mirugi Kariuki & Company Advocates** where 9 grounds of appeal are set out. It is said that the Judge erred in law and fact

by dismissing the appellants' claim for accrued unpaid leave; in holding that the appellants were paid their contributions through a cooperative society; in not holding that the appellants were entitled to 3 months special terminal leave to run concurrently with their retirement notice, leave pay, KFA terminal benefits; the unremitted provident fund and retirement benefit; that the Judge should have allowed the whole claim as the respondent did not call any evidence; erred in not allowing the claim on accrued salaries; in not awarding a "higher award as they were unlawfully retired from their employment before the mandatory retirement age and were therefore entitled to compensation for the remaining term of service". In the penultimate ground the learned Judge is faulted for failing to appreciate that the appellants were entitled to gratuity pay for the period of years worked and, finally, that the Judge erred in failing to award the appellants general damages for unlawful termination of employment.

The appeal came up for hearing before us on 20th February, 2020 when learned counsel **Mr. Kibet E. Chepkwony** appeared for the appellants while learned counsel **Miss I.M. Sambu** appeared for the respondent. Both parties had filed written submissions and lists and digest of authorities and what was left was a highlight of the same. Mr. Kibet submitted that since the respondent had not called any evidence in support of the statement of defence filed the appellants' case was unchallenged and all the claims set out in the amended plaint should have been allowed by the trial Judge. According to counsel, we should overturn any finding by the trial Judge which was not in accord with the unchallenged evidence given by the witnesses who testified for the appellant.

In respect of deductions or payments made to a cooperative society it, was Mr. Kibet's submission that the Judge erred in not finding that deductions had been made and there should have been an award on the same to 9 appellants. On ground 5 of the Memorandum of Appeal relating to alleged accrued salaries, Mr. Kibet submitted that the Judge should have found that there were payslips issued by the respondent to the successful appellants and the Judge should have found that there was no corresponding payment to the appellants' bank accounts. Learned counsel concluded his submissions thus:

> ***"It was the responsibility of the defendant to show that payment had been made as per payslips. There were payslips without money. It was for defendant to rebut that evidence ….."***

Then it was **Miss Sambu's** turn to go. Her starting point was a submission in answer to the fact that the respondent had not called any evidence in rebuttal. According to counsel, a court relies on the evidence presented by the parties to make a determination in a case before court. She cited **Sections 107-109 Evidence Act** in support of her proposition that the appellants retained the duty to prove their case to the required standard. According to counsel, some of the appellants did not testify and particulars of the claim were not given. Counsel gave as an instance the claim on leave not taken – there were no particulars on when leave was not taken or for which period salary was not paid. Counsel cited the English case of **Ractiliffe v Evans [1892] QB 524** in support of the proposition that, being a monetary claim, the appellants had a duty not only to plead the claims but specifically prove the same.

On deductions made and remitted to a cooperative society it was Miss Sambu's submission that the appellants should have pursued that claim through the cooperative society. Counsel cited **Section 76** of the **Cooperatives Act** which creates a dispute resolution mechanism between a cooperative society and a member submitting that the trial Judge had no jurisdiction to entertain that part of the claim which should have gone to the appropriate tribunal under the said Act.

According to counsel for the respondent, the payslips produced into evidence by the appellants were sufficient evidence in proof that payments stated in the payslips had been made. On the issue of early retirement Miss Sambu submitted that the Scheme of Service that governed the relationship between the respondent (as employer) and the appellants (as employees) allowed for early retirement and, in any event, submitted counsel, the **Employment Act (Chapter 226 Laws of Kenya** - since repealed) allowed for termination of employment by either side giving one month notice to the other or payment of salary in lieu of notice.

Miss Sambu concluded her submissions by challenging the claim on gratuity which, according to her, was not pleaded in the plaint and was being raised on appeal. Counsel cited case law to support her proposition that gratuity is awarded to an employee at the discretion of the employer. For all these, counsel supported the award by the High Court and urged us to dismiss the appeal.

In a brief rejoinder, Mr. Kibet submitted that the appellants had discharged the evidential burden submitting further that the particulars given in the plaint were sufficient.

We have considered the whole record and the submissions made before us and this is the view we take of this appeal.

As we have seen the trial Judge awarded each of the appellants 3 months' salary in lieu of notice; 1 month salary in lieu of leave; contributions to National Social Security Fund (NSSF); unremitted RBS (this is in respect of contributions to a Fund Manager). Going by the document attached to the plaint giving particulars of the appellants' claim, what was not awarded were the claims on accrued salaries, alleged entitlement for the remainder period to retirement at 55 years; leave pay allowance contributions to a cooperative society (SACCO) and salary arrears.

Some of the appellants testified before Apondi, J. before the trial was taken over and concluded by Koome, J. **Harrison M. Kariuki** (the 1st appellant) testified before the trial Judge. In the particulars attached to the plaint he was claiming Ksh.507,272 in respect of accrued salary and Ksh.170,225 in respect of leave pay allowance making in all Ksh.741,433. In respect of those claims he testified that:

> ***"…. I have not supplied the Defendant with any particulars on the above. On my pay slip, the deductions show what has been allocated for NSSF and Provident Fund. I do not have any documents to prove membership to NSSF, Provident Fund and RBS…."***

He testified that he had not claimed those sums from the respondent at all. **Raphael Gatimu Githura (the 6th appellant)** testified amongst other things that his claim on SACCO dues should be ignored by the trial court since he had been refunded those contributions. He further stated that he had not claimed any salary arrears in the schedule attached to the plaint.

Erireriko Masoba (14th appellant) admitted in cross-examination that he was claiming sums different from what was claimed in the schedule attached to the plaint and:

> ***"I do not belong to RBS (item H) on the plaint but to Provident Fund….."***

This witness was recalled to testify on behalf of other plaintiffs in terms of **Order 1 rule 12 Civil Procedure Rules**. Considering the nature of the claim where each plaintiff was claiming different sums of money in respect of different heads, it is surprising that this course was adopted as it is difficult to follow how this witness would have been able to specifically prove each of the claims made by each plaintiff. For instance, he says in evidence speaking about one of the plaintiffs:

> ***"…. Janet Kaberere (Kharele – this is the 15th appellant) was 48 years when she was retired. We are asking KFA to pay up to the age of 55 years. I do not know whether Janet had another job after retirement. It is not true Janet was paid all her dues from the documents. I can tell she is not paid…."***

We observe in passing that it would have been proper for Janet to testify and give specifics on whether she had been paid or not, particularly in the face of documents that seemed to show that she had received payment.

We do not find it necessary to go into the testimony given to the trial court any further.

As properly submitted by counsel of the respondent, the claims made by the appellants were special damage claims and the appellants were duty bound to particularize the claims and prove the same specifically. For, indeed, **Section 107** of the **Evidence Act** provides:

> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

Although the respondent did not call evidence to support the statement of defence this did not in any way remove or reduce the burden on the appellants to specifically prove the special damage claim that they had made. It has been held in many judicial pronouncements of this Court that proper particulars of a special damage claim must be given and the claimant must thereafter specifically prove those claims. This was the holding in **Charles Sande v Kenya Cooperative Creameries Limited CA No. 154 of 1992** *(unreported)* where it said:

> ***"As we have pointed out at the beginning of this judgment Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law."***

The claims set out in the schedule attached to the plaint, which were not awarded by the trial Judge, were not specifically proved and, worse still, they were not supported by the evidence which we have reviewed in this Judgment.

The appellants complain in the Memorandum of Appeal and in submissions before us that the trial Judge erred in failing to award the appellants accrued unpaid leave. The learned Judge was not satisfied that the appellants had accrued leave for so many years without any issue being raised, and, also no credible evidence being led in that respect. The Judge awarded each appellant 1 month salary in lieu of leave. In the circumstances we think that the Judge was generous to make that award and the complaint by the appellants has no merit and is dismissed.

Then there is the complaint that the appellants should have been awarded contributions to a SACCO. As correctly submitted by counsel for the respondent, issues between a SACCO and its members are governed by provisions of the Cooperative Societies Act and the Judge was right not to delve into that issue, since a distinct dispute resolution mechanism was available to the appellants under the said Act.

On ground 3 of Memorandum of Appeal in relation to 3 months special terminal leave, retirement notice, leave pay, KFA terminal benefits, unremitted provident fund and retirement benefits – some of these were awarded by the trial Judge. There was no evidence to support or prove the other claims and the Judge was right to reject them.

Although the respondent did not call any evidence (ground 4 and 5 of the Memorandum of Appeal) we have shown that the appellants had a duty to specifically prove the special damages claim they had filed.

The appellants claim that they were entitled to a "higher award" for being retired before the age of 55 years. The Judge analysed the evidence before her and found that an employer could terminate employment as provided in the then Employment Act. The Judge further found that the appellants were entitled to three months' salary in lieu of notice and proceeded to award the same to the appellants. The complaint in this respect (ground of appeal) has no merit at all.

On the claim for gratuity on ground 8 of the Memorandum of Appeal,

– this claim is not in the amended plaint filed by the appellants at all and was not addressed by the Judge or the parties at the High Court. It cannot be raised on appeal, it not having been raised at the trial court. Gratuity, in any event, as was stated by this Court in the case of

Bamburi Cement Limited v Wlliam Kilonzi [2016] eKLR:

> ***"Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer."***

Gratuity is paid to an employee at the discretion of the employer. So, nothing turns on that in this appeal.

The last complaint against the findings by the trial Judge is that she should have awarded general damages for unlawful termination of employment. It will be recalled that the relationship between the appellants and the respondent was that of employees/employer governed by contract. The answer on whether the appellants were entitled to general damages for breach of contract is to be found in a case of this Court quoted by the trial Judge – **Alfred J. Githinji v Mumias Sugar Company Limited** where it was held:

> ***"We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. The contract of employment between the Appellant and the Respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period. In our view, even though the Respondent's dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the Appellant."***

General damages were not awarded in the circumstances that obtained in the matter before the trial Judge and could not be awarded at all.

We have reviewed the whole record as we were required to do and having done so, we did not find any merit in any of the grounds of appeal. The appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 5th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true Copy of the original. Signed

DEPUTY REGISTRAR