IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MAKHANDIA & MURGOR, JJA)

CIVIL APPEAL NO. 52 OF 2017

BETWEEN

PARBAT SIYANI CONSTRUCTION LTD.....APPELLANT

AND

DANIEL KIPROB AYABEI.....RESPONDENT

(Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi of Wasilwa, J,) dated 25th April 2015 **in Employment & Labour Relations Cause No. 276 of 2013)**

JUDGMENT OF THE COURT

By a Memorandum of Claim dated 26th March 2013 and filed by ***Daniel Kiprob Ayabei, (the respondent),*** against ***Parbat Siyani Construction Ltd,*** (***the appellant),*** the respondent stated that he was employed by the appellant between 1st February 2009 and 7th August 2012 as an engineer. However, he was not issued with a letter of appointment though on 14th July 2012, the respondent issued a notice to the appellant expressing his intention to terminate his employment for personal reasons. The notice was acknowledged by the respondent who was also notified of his last working day. It was the respondent's contention that at the end of the employment period, the appellant failed to pay him his salary and outstanding dues. He therefore claimed:

i) 7 months leave from 2012 of Kshs 73, 146.65

ii) 5 days' salary for days worked in August 2012 at Kshs 120,750 x5/26 = Kshs 23,221.15

iii) 3 years' gratuity at 14 days a year at Kshs 105,000 x 42/26 = Kshs 196,615.40
iv) Wages for June and July 2012 at Kshs 120,750 = Kshs 241,500

Total Kshs. 1,168,982.50

The appellant denied owing the respondent such amounts, but nevertheless admitted that the respondent was entitled to payment of his salary for the months of June and July 2012 at Kshs 106,108 per month totaling Kshs. 212,216 but contended that house allowance was not payable to him. The appellant denied breaching the contractual terms, and claimed that the respondent had left employment at his own behest and was not entitled to further payment.

After hearing the parties, the learned judge determined that since no contract of employment existed between the parties, the burden of proving the allegations in the Claim rested with the appellant, as employer to disprove the claim which burden it did not discharge. In the end, the court found in favour of the respondent and awarded the respondent the following;

1. 7 months leave in 2012 of Kshs 73,146.65

2. 3 years' gratuity of Kshs 169,050

3. Wages for June and July 2012 at Kshs 120,750 = Kshs 241,500

4. House Allowance for the period worked at 15% of monthly salary x42 months= Kshs 661,500

Total Kshs 1,146,196.65

The court also ordered that he be issued with a Certificate of Service.

The appellant was dissatisfied with the judgment of the Employment and Labour Relations Court and filed this appeal on the grounds that the learned judge was wrong in finding that the respondent was entitled to house allowance of Kshs. 661,500; in awarding the respondent 3 years' gratuity despite the appellant having demonstrated that it had been paying the respondent's National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues; in awarding the respondent leave dues for 7 months worked amounting to Kshs. 73,146,65 without evidence or justification; in failing to properly evaluate the evidence; in failing to consider the appellant's submissions; for wrongly awarding Kshs. 1,146,196.65 to the respondent and in failing to find that the respondent was under an obligation to clear with the employer before receiving his dues.

Both the appellant and the respondent filed written submissions. Highlighting the appellant's submissions, ***Ms. P. Makori*** stated that the 3 years' gratuity payment of Kshs 169,050 awarded by the learned judge was unwarranted and was contrary to the evidence and the law, particularly as the appellant had demonstrated that it paid monthly NSSF and NHIF contributions. It was further submitted that, the respondent's salary of Kshs 106,000 which was exclusive of house allowance, and therefore the amount awarded by the court had no basis; that furthermore, the computation of his salary for the months of June and July 2012 was erroneous, as, the respondent's monthly salary was Kshs. 106,000, the total salary outstanding would not therefore add up to the award of Kshs 241, 500, and that the same situation pertained to the computation of House allowance.

On her part ***Ms. Kirui*** learned counsel for the respondent submitted that the respondent was a site engineer and that the parties had entered into an oral contract; that under the arrangement, house allowance was payable. Counsel conceded that there were some arithmetical errors in the judgment which the Court was eligible to correct. On the gratuity amount awarded, counsel asserted that though the evidence adduced showed that contributions in the respondent's name were made, there was no documentation produced that was supportive of the contributions; that additionally, no membership number of either NSSF or NHIF was given to indicate that he was indeed a member of these institution, and no statements were produced showing monthly remittances. On this account counsel stated, the court rightly awarded gratuity.

We have considered the pleadings, the judgment of the Employment and Labour Relations Court, the parties' submissions and the law. As this is a first appeal, it is our duty to analyze and evaluate the evidence and reach our own conclusions whilst bearing in mind that we did not have the benefit of seeing or hearing the witnesses. (See ***Selle vs Associated Motor Boat Co. [1968] EA 123; Jabane vs Olenja [1986] KLR 661, 664.*** This Court stated in ***Jabane vs Olenja [1986] KLR 661*****, 664** that it will not lightly differ from the findings of fact of a trial judge and will only interfere with them if they are based on no evidence. (See ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278*** and ***Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870).***

We find the issues for consideration in this appeal are whether the trial court properly evaluated the evidence; whether the learned Judge awarded sums that were not pleaded, and whether in so doing the learned judge rightly awarded the respondent;

i) house allowance of Kshs 661,500;

ii) 3 years' gratuity of Kshs 169,050; and

iii) 7 months leave of Kshs 73,146.65.

We begin by observing that, it is not in dispute that the respondent was employed by the appellant on 15th December 2009, as a site engineer, and that there was no contract that governed his employment with the appellant. It is also not in dispute that the respondent worked for the appellant for 3 years 7 months and on 14th July 2012 he issued a one-month notice of termination of employment to the appellant, which notice expired on 14th August 2012. What is disputed are the various sums claimed by the respondent arising from termination of his employment.

The record shows that the appellant has conceded that it owes the respondent leave for 2012 of Kshs 73,146.65, and wages for June and July 2012 save for that, regarding his monthly salary, the appellant contends that it was Kshs. 120,750 inclusive of house allowance, while the appellant asserted that he received an amount of Kshs. 106,000, exclusive of house allowance.

This would leave two issues for our determination which are whether the respondent was entitled to house allowance of Kshs. 661,500 and 3 years' gratuity of Kshs 169,050.

So as to ascertain whether these sums were correctly awarded, it is of necessity that we begin by determining what the respondent was paid as his monthly salary. A review of the judgment does not disclose that the learned Judge determined the monthly salary that the respondent received. And since no formal contract existed between the parties, we are required to reevaluate the evidence to arrive at the respondent's monthly salary.

Be that as it may, the respondent contended that he *"…was employed at a salary of 80,000/= and then it rose to 106,000/= exclusive of house allowance."* In his evidence ***Daniel Mutua Musau RW1***, the appellant's Security and Safety Manager stated that he was earning Kshs. 106,208 by the time of leaving employment. Based on this evidence it can be concluded that the respondent earned a salary of Kshs. 106,208. We also wondered, why the respondent did not raise the issue of house allowance during the employment which lasted for close to 3 years if indeed it was not a consolidated salary.

Having so discerned, was the respondent entitled to house allowance of Kshs. 661,500 awarded by the learned judge. In finding that the respondent was entitled to house allowance, the judge went on to compute the house allowance due in the following terms;

> ***"House allowance for the period worked = 15% of monthly salary x 42 months =0.15 x 105,000 x42 = 661,500/=."***

However, a consideration of the pleadings does not disclose that the respondent claimed house allowance. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See ***National Social Security Fund Board of Trustees vs Sifa International Limited (2016).*** And in the case of ***Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)*** the latter case this Court emphasised that;

> ***"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead…".***

Without any claim for house allowance having been specifically pleaded the trial court should not have awarded it. It can therefore be inferred that the salary of Kshs. 106,500 was a consolidated salary. As such we find we must interfere with this award.

Turning to the claim for 3 months' gratuity, the trial court awarded the respondent Kshs. 169,050 as gratuity, at the rate of 14 days a year for every year worked. Though it was not cited, it would seem that the trial court based the payment of gratuity on ***rule 19 (1) (c)*** of the ***Regulation of Wages Building and Construction Industry Order 2004*** which provides for service gratuity at the rate of 14 days' salary for each year of service.

The appellant on the other hand argued that the respondent was not entitled to a gratuity payment by reason of the monthly NSSF and NHIF contributions made on his behalf by the appellant.

In answer to this, ***Section 36 (6)*** of the ***Employment Act*** clearly stipulates that where NSSF and NHIF deductions are made, no service or gratuity is payable where the employee is a member. However, an analysis of the evidence does not disclose that the respondent was a member of NSSF or of NHIF. There is nothing to show that the appellant made contributions on his behalf. The appellant merely produced its own payment schedules in support of this assertion, but did not produce any payslips showing the deductions, or statements from either NSSF or NHIF as confirmation of receipt of payment. Additionally, no membership number was ascribed to the respondent, so that it could not be definitively proved that the respondent was a member of those two institutions. Without evidence that the contributions were indeed made, we would agree with the learned judge that the respondent was entitled to payment of gratuity.

The foregoing notwithstanding, we are not in agreement with the computation of gratuity arrived at. This is because, having found as we have that the respondent earned Kshs. 106,500, it would follow that the computation of gratuity would be based on Kshs. 106,500 and not Kshs. 120,750 as computed by the learned judge. Therefore, Kshs. 106,208 applied at the rate of 14 days a year for the 3 years worked means that the respondent would be entitled to Kshs. 148,691. And we so find.

Finally, we turn to the question of whether the respondent was under an obligation to clear with the employer before receiving his dues. On 14th July 2012 the respondent wrote to the appellant giving one (1) months' notice of his intention to terminate his employment. The evidence does not show that the appellant responded to his letter, or much less, issued him with clearance instructions. Much later, after the notice period expired, the appellant alleged that the respondent had refused to account for a negative stock variance of approximately Kshs 5.9 million which was why he had refused to collect his dues. We have gone through the evidence, and nothing is supportive of the appellant's allegations. No demands were made on the respondent. No evidence was tendered of investigations into the allegations or reports made to the police. All this is apparent from the testimony of DW1 where he stated in cross examination;

> ***"…The materials got lost between November 2011 and April 2012. I don't have the audit report. He was not alone at the site. We didn't do an audit after he left… The loss of 5 million was reported at Parklands police Station. I don't have the records in Court."***

Since there were no clearance instructions, or any evidence showing that the respondent had refused to clear with the appellant, we find that the respondent was entitled to his final employment dues, and the Certificate of Service as stipulated by ***section 51*** of the Employment Act.

In summary, the appeal partially succeeds. The amounts of leave for 7 months worked in 2012 of Kshs. 73, 146.65; 3 years' gratuity at 14 days a year at Kshs. 148,691; wages for June and July 2012 at Kshs 106,500 per month = Kshs 213,000 is allowed. The house allowance award is disallowed.

For the avoidance of doubt we make the following orders:

1.The appellant to pay the respondent;

i) 7 months leave days for 2012 Kshs. 73, 146.65;

ii) 3 years' gratuity at 14 days a year at Kshs. 148,691;

2. The appellant to issue the respondent with a Certificate of Service.

3. Each party to bear their own costs in the Employment and Labour Relations Court and in this Court.

It is so ordered.

Dated and delivered at Nairobi this 10th day of July, 2020.

M. KOOME

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR