



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, SICHALE, & ODEK, JJA)

CIVIL APPEAL NO 190 OF 2013

BETWEEN

PATHFINDER INTERNATIONAL KENYA LIMITED.....APPELLANT

AND

STEPHEN NDEGWA MWANGIRESPONDENT

(Appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi (Mukunya, J.) dated 20th April, 2012

in

Industrial Cause No 1023 of 2010

JUDGMENT OF THE COURT

Pathfinder International Kenya Limited (hereinafter the ‘appellant’) has come calling to this Court following the delivery of an award dated 20th April, 2012 by Industrial Court of Kenya (now defunct). The pertinent facts which relate to the dispute before the said court can be discerned from a Memorandum of Claim dated 2nd September, 2010 and lodged thereat on 7th September, 2010. We summarize them thus:-

Stephen Ndegwa Mwangi (hereinafter the ‘respondent’) was employed by the appellant herein as a communication officer vide a contract of employment dated 16th October, 2008 for a period of 2 years with effect from 1st July, 2008. His salary was set at the sum of Ksh 140, 000/= per month, which was subsequently increased to Ksh 155, 400/= per month. The respondent was attached to a programme run by the appellant, namely **Aids, Population and Health Integrated Assistance Program (APHIA II Nairobi / Central)**.

An appraisal of the subsequent employer / employee relationship between the appellant and the respondent herein as brought out by the pleadings, portrays a cordial association by and large with matters only taking a turn for the worst upon the effluxion of the respondent’s 2 year contract term. By this time the respondent had worked with the appellant’s **APHIA II NEP (North Eastern Province)** and **Prevention of Mother to Child Transmission (PMTCT)** projects, the former allegedly supported by **USAID**, and the latter allegedly supported by the **Center for Disease Control (CDC)**. Discord between the parties herein can be traced to the respondent’s claim before the trial court that there was an implied term in his employment contract or that there was an established practice that all individuals seconded to **USAID** sponsored projects were entitled to payment of gratuity at the rate of one month’s salary for every year worked upon lapse of their contracts.

In addition, the respondent claimed, citing the appellant’s guidelines in relation to severance pay, that all employees were entitled to severance pay of one month salary for every year worked in the event of project reduction or the end of a project. The respondents sought judgment for:-

(a) Gratuity payment equivalent to 2 months’ salary.....310,800/00

(b) Severance pay equivalent to 2 months’ salary.....310,800/00

TOTAL 621,600/00

On its part, the appellant discounted the respondent's claims for gratuity and severance pay vide its Statement of Response dated 2nd September, 2010 and filed on 22nd September, 2010 maintaining a similar stance in the face of a Supplementary Memorandum of Claim dated 12th November, 2010 and filed with the leave of the trial court granted on 2nd November, 2010. The appellant's 'Supplementary Reply to Claim' dated 24th November, 2010 and filed on the same date attests as much. After a trial spread over the months of February and March of 2012, the trial court entered judgment for the respondent in the following terms:

"The respondent is ordered to pay to claimant the sum of shs.621,000/- as claimed within 30 days as claimed. Judgment is hereby entered in favour of Claimant against the Respondent for shs.621,000/- and costs in default of payment the Claimant to execute the judgment/award as a decree of the Court".

The appellant was dissatisfied with the said outcome hence this appeal. On 19th December, 2018 Mr. Wilson Mwiwuri, learned counsel and Mr. Murimi Waweru, learned counsel who held brief for Mr. Thuita appeared for the appellant and the respondent respectively during the plenary hearing before us. The duo elected to rely on their respective written submissions filed on 18th April, 2017 and 6th November, 2018 which we have considered. We have also considered the record, the authorities cited and the rival written submissions and the law. Our mandate herein is donated by **Rule 29 (1) (a)** of the **Court of Appeal Rules, 2010** which requires us to appraise the evidence as a whole, re-evaluate the same and arrive at our own conclusions. Generally, however, the first appellate court will not lightly differ from the findings of fact of a trial court which had the benefit of seeing and hearing all the witnesses and assessing their credibility through their demeanour. It will only interfere if the findings are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did. See ***Ephantus Mwangi Vs Duncan Mwangi Wambugu (1982 -88) 1 KAR 278.***

In the memorandum of appeal dated 11th August, 2013, although the appellant listed three grounds of appeal, the crux of this appeal is as stated in ground 2 in which the learned Judge was faulted ***"... in failing to uphold the legal position that severance is only payable on a redundancy and that gratuity is only payable if contractually provided for."***

It is common ground that the respondent was employed by the appellant in a two year contract. In the offer letter dated 26th June 2008, the respondent's entitlements included 21 days of leave, sick leave, medical and other insurance. There was no provision for gratuity. In a letter dated 23rd July 2010 by **Guandaru Thuita & Co. Advocates** on behalf of the respondent, the appellant was addressed as follows:

"While it is true that the handbook does not refer to the element of gratuity, we wish to remind you that our client had been contracted by your organization purely to perform USAID projects and as well-known to you all persons contracted to offer services to USAID are entitled to gratuity as matter of practice which is necessarily implied in the contract of employment.

In a further letter dated 10th August 2010 by the said firm of Advocates and addressed to **Hamilton Harrison & Mathews**, the appellant's counsel stated:

"We wish to reiterate that our client's claim for gratuity/severance pay is not based on an express provision but on an implied one which has arisen out of Custom, Practice and Usage.

The aforesaid practice has been more prominent in USAID funded projects and consequently, whether or not USAID was privy to the employment contract, the entitlement to gratuity still remains."

In his evidence during the trial, the respondent told the trial court that ***"I was not terminated but my contract came to an end"*** and that the ***"claim on gratuity is based on best practices of International Programmes."*** He also made reference to what he referred to as a ***"draft document"*** as the basis for his claim of severance pay. On severance pay he further stated:

"Eligibility of payment of severance pay is due to reduction or end of project."

During cross examination **Benedictus** stated:

"Staff Handbook has provision on gratuity which came into operation in November 2011. In June 2010 when Claimant left there was not provision for gratuity."

It therefore, follows that the respondent's right to claims of gratuity and severance pay were not based on a contract but what the respondent referred to as ***"an implied term of the contract"*** and also what he referred to as ***"best practices"***.

In **H. Young & Company EA Limited vs. Javan Were Mbango 2016 eKLR** this Court stated:

"This Court in Central Bank of Kenya vs. Davies Kivieko Muteti [2009] eKLR emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in Bamburi Cement Ltd vs Farid About Mohammed [2016] eKLR denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the

Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement. Severance pay on the other hand, is only payable under Section 40(g) of the Employment Act where an employee is terminated on account of redundancy. See Hema Hospital vs Wilson Makongo Marwa [2015] eKLR. In the current appeal before us the respondent was entitled to severance pay at the rate of not less than fifteen days' pay for each completed year of service."

Similarly, in *Bamburi Cement Limited V William Kilonzi [2016] eKLR*, this Court observed thus:-

"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". [Emphasis added]

We are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the Employment Act of 2007 does not make it mandatory for employers to pay gratuity to employees.

As stated above the respondent's claim for gratuity was hinged on '**an implied term**' of the employment contract and '**established practice**' as the respondent chose to call it in his memorandum of claim dated 2nd September, 2010. The employment contract between the appellant and the respondent made no mention of gratuity. On the other hand, we discern '**established practice**' to mean the alleged payment of gratuity to all individuals performing **USAID** sponsored projects. The basis of the said payment was allegedly a document (**Exhibit 4** annexed to the respondent's memorandum of claim) titled '**PATHFINDER INTERNATIONAL, Kenya-Severance Pay Accounting Policies and Guidelines**' -**DRAFT DOCUMENT-JUNE 25, 2010**'. To counter the appellant contention that the document was a draft and hence inapplicable, the trial court rendered itself as follows with regard to the said exhibit:-

"It is observed that the Employer / Respondent should not have produced documents providing for payments of severance or gratuity to employees and to make them available to employees if the employer did not want or intend the provisions to apply".

The trial court also rendered itself thus:-

" It is also observed that Article 41 of the Constitution of Kenya guarantees to workers the right to fair labour practices including the right to fair labour practices including the right to fair remuneration. Some employees were paid severance pay but for some reason the claimant was not paid. There is no evidence that those paid had been declared redundant. The Respondent / Employer admitted that some employees were paid. Fair labour practice would require the Employer to justify the discriminatory payment. In this dispute the Employer / Respondent did not discharge this burden to justify this discrimination".

In our considered view, it was incumbent upon the respondent to prove or establish that there were employees who had been paid gratuity and or severance pay from time to time to the exclusion of the respondent.

From the pleadings and the record as a whole, the respondent's claim in this regard was couched in generalities as opposed to being specific. We were unable to ascertain the identities of the persons who were paid gratuity and severance pay as claimed by the respondent. Furthermore, documents such as pay slips which would have vindicated the respondent's claim were conspicuously absent.

It was also incumbent upon the respondent to prove that he was accorded differential treatment to warrant the finding by the trial court that severance pay was being paid selectively. Whereas the respondent had pleaded that some of his former colleagues had been paid severance pay to his exclusion, implicitly bringing his claim within the confines of Article 41 of the Constitution, he did not tender or lead any evidence supporting his allegation as we have observed hereinabove.

With respect, and in relation to the foregoing, we are unable to agree with the trial court's decision to rely on a draft document in the face of testimony by the appellant's, **Benedictus Kibaara Mwenda** ('**Benedictus**') who testified that.

"The document relied on for claim of severance pay is a draft document. The document has not come into force"

Further that:

"The Pathfinder Handbook was applicable during the claimant's employment. It has guidelines on gratuity and severance pay. Gratuity was not a provision during employment during the time of applicant" [Emphasis added]

"Draft document is not yet operational". In re-examination, **Benedictus** stated:

"Staff Handbook has provision on gratuity which came into operation in November 2011. In June 2010 when claimant left there was no provision for gratuity".

Had the learned trial judge applied his mind to the foregoing excerpts, he would have noted that the respondents relied on a document that was for all intents and purposes a draft. Accordingly, it could not form the basis for making a claim for gratuity or severance pay. In the

premises we interfere with the findings of the learned trial judge in this respect and reverse his findings on the respondent's eligibility for gratuity and severance pay.

Accordingly, we have come to the conclusion that the appeal herein has merit and we hereby allow the same. Consequently, the judgment and decree of the Industrial Court is hereby set aside and the respondent's case thereat is dismissed.

Costs of this appeal and the court below is awarded to the appellant.

Those shall be our orders.

Dated and delivered at Nairobi this 10th day of May, 2019.

E.M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

(PROF) J. ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR