



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ.A)

CIVIL APPEAL NO 228 OF 2017

BETWEEN

GRAIN PRO KENYA INC. LTD.....APPELLANT

AND

ANDREW WAIHAKA KIRAGU.....RESPONDENT

(Being an appeal from the judgment and decree of the Employment

and Labour Relations court, at Nairobi (Mbaru J.,)

dated 9th February, 2017

in

E & LRC CAUSE No 2404 of 2012)

JUDGMENT OF THE COURT

[1] At the heart of this appeal is the question of whether **Andrew Waithaka Kiragu** (respondent) was entitled to house allowance which was not specifically stated in his letter of appointment. A brief glimpse of the facts before the trial court was that; **Grain Pro Kenya Inc. Ltd** (appellant) offered employment to the respondent vide a letter dated the 13th May, 2010 as a customer services manager with effect from 1st June, 2010 at a monthly salary of USD 600. However, the employment was terminated on 14th September, 2012 for reasons that the appellant was undergoing restructuring and/or reorganization such that the services of the respondent were no longer required. As terminal dues the respondent was paid a sum of Ksh. 238,448.45 which comprised of two months' salary in lieu of notice, severance pay for 2 years of service (30 days) and payment in respect of 27 leave days not taken, this was less other statutory dues that were deducted.

[2] The respondent was aggrieved by the said termination which he claimed was untimely, unjustified, unprocedural, wrong in law and unlawful. He therefore filed suit before the Employment and Labour Relations court at Nairobi seeking inter alia;-

- a) Salary for 14 days for September, 2012;
- b) House allowance
- c) Loss of benefits;
- d) Loss of stock option plans
- e) Damages for unlawful termination;
- f) Costs and interests

[3] The claim was resisted by the appellant by way of a statement of response in which it was admitted that indeed the respondent was

employed by the appellant but the allegations of unfair or unlawful termination were denied. In contrast they posited that the respondent's services were lawfully terminated on the ground of redundancy as the position he occupied was abolished; he was duly informed vide a letter dated 14th September, 2012 and he was duly paid his dues; he was not entitled to house allowance as the same was part of his gross salary package.

[4] The matter fell for hearing before Mbaru, J., and the trial took place with the respondent giving evidence in support of his claim. He reiterated that his termination was unfair because he was merely approached one morning and was informed his services were no longer required; he was not paid house allowance and other benefits as per his claim. On the other hand, **Mr Bondi Maulid Omar** testified on behalf of the respondent. He maintained that the respondent's services were abolished as a matter of policy to avoid losses and to switch to digital marketing and that the respondent was paid all his benefits and dues according to the law.

[5] Upon evaluating the evidence the learned trial Judge found for the respondent, in doing so she made some key statement in some pertinent paragraphs which we restate here below:-

“I have gone through the work policy submitted by the Respondent and the question of house allowance or gross pay is not addressed. Save for what is stated in the letter of offer that an initial salary will be paid, nothing is mentioned as to whether this is gross pay inclusive of housing allowance. The other benefits due to the Claimant are well set out including a medical cover, life insurance; leave but not house allowance. The all-round rider of other benefits required in law open up the benefits due to the Claimant based on applicable law. On the claim for house allowance, section 31 of the Employment Act makes provision for house allowance where no housing is given to the employee. On the open-ended contract such as the one issued to the claimant, where no allowance or housing was given and based on the claim for the same, such is due. The Claimant is awarded Kshs.571,531.00 in house allowances.

... On the finding that the Claimant was unfairly terminated (sic) from his employment as the Respondent did not follow the statutory procedures under section 40 of the Employment Act, section 49 of the Act gives the Court power to award compensation and not damages in a case such as this one. The Claimant is awarded 3 months' salary in compensation the same computed based on the last salary paid at \$600 on the current applicable exchange rate of Kshs.103.00 as at close of business 2nd March, 2017. The Claimant is awarded Kshs. 185,400.00 in compensation.

The Claimant was paid for notice adequately and for his severance.

In conclusion therefore, judgement is hereby entered for the Claimant in the following terms

a) Compensation Kshs.185,400.00;

b) House allowance Kshs.571,531.00;

c) Unpaid salary for 14 days worked in September, 2012 Kshs.23,800.00; and

d) Costs of the suit.”

[6] With the above award, it seems the shoe was on the other side as it was the appellant this time round who was aggrieved by the above award and in turn filed the instant appeal which is predicated on some three grounds of appeal. They revolve around the issue of the house allowance as the learned Judge is faulted for awarding house allowance, notwithstanding a letter of employment showing the respondent was paid a monthly consolidated gross salary which included house allowance; awarding house allowance yet it was not strictly proven as a special damage. There is no appeal in regard to the award of 3 months as compensation for unfair termination and unpaid salary for fourteen (14) days worked in September, 2012.

[7] When this appeal came up for the plenary hearing, **Mr. Aboge** learned counsel appeared for the appellant, he relied on his written submissions, a list of authorities and made some brief highlights. Counsel emphasized that the appellant was challenging the award on house allowance which was not payable as the respondent terms of service were contained in a letter of appointment by which he was paid a consolidated salary which was part of the basic wage. This was in accordance with the provisions of **Section 31 (2) of the Employment Act** which gives an employer three options, that is, to provide housing, pay house allowance or pay a consolidated salary. The respondent was paid a consolidated salary as was evidenced by payslips that were adduced in evidence and they reflected a gross salary was all inclusive of all the allowances including house allowances.

[8] Further, it was submitted that the claim on house allowance was not arithmetically correct especially how the figure awarded of Ksh. 571,531 was arrived at. The percentage rate applied by the respondent was 25% instead of 15% as provided in the General Wages Order which requires that housing component should comprise at least 15% of the basic wage. Counsel made reference to many decisions principally from the Employment and Labour Relations Court which are quite instructive that 15% is the percentage of house allowance that is ordinarily awarded by that court. See **Milkah Khakayi Kulati vs Sandstorm (Africa) Ltd [2014] eKLR**. Counsel therefore urged us to allow the appeal based on the aforementioned arguments.

[9] **Mr. Paul Ndungu** learned counsel for the respondent opposed the appeal. He entirely relied on his written submissions and did not make oral highlights. Counsel for the respondent maintained that his client was entitled to the house allowance and the same was properly calculated. The appointment letter stated that the respondent was being paid a gross salary, in his view house allowance is a mandatory right. The letter of appointment stipulated other benefits that the respondent was entitled to and said nothing about house allowance; this was construed to mean that the gross salary did not include house allowance and the Judge was justified to award. Moreover, it was not indicated

in the contract that the salary the respondent was earning was a consolidated one including house allowance and nothing would have been difficult for the appellant to say so in the letter of appointment. The payslips also did not mention house allowance. Counsel therefore urged us to dismiss the appeal.

[10] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. In the case of; **Mwangi vs Wambugu [1984] KLR 453**, this Court stated thus:

"An appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

[11] Bearing in mind the aforesaid parameters, we have deliberated on the grounds of appeal, the evidence before the trial court and the submissions filed by both counsel in support of their respective prepositions. As pointed out in the opening paragraph the sole issue for determination in this appeal is whether the appellant was entitled to house allowance; was the salary of USD 600 a gross salary incorporating a house allowance. This is how the contract letter was written;

"a) An initial salary of USD 600 monthly payable every end of the month through a payroll account

b) Full medical insurance for yourself from day 1 and for your children up to 18 years old (10% own participation) as on final appointment and part of our group insurance. Spouses can be insured voluntarily at a reduced rate of 50% of the insurance premium at your final appointment as well.

c) We will provide a life insurance at twice your yearly salary upon regularization.

d) We provide 2 weeks of paid vacation per year accrued at the rate of 1 day per month and available at the rate of 1 day per month. Vacation days can be accrued to a max of 24 days and will not be converted into money.

e) Other benefits as required by law.

f) Profit sharing based on yearly performance of the company."

[12] From the above terms was the Judge right to interpret this contract as having a component of house allowance under the provisions of **Section 31** of the **Employment Act**? No doubt the answer to the above lies in the interpretation of the contract of employment especially because the employment contract is silent on whether the sum of USD 600 salary per month was a gross one or consolidated. What is more persuasive on our part is the need to re-evaluate the material that was before the trial court especially the term of contract that referred to "other benefits as required by law" in clause (e) of the letter of appointment.

Section 31 of the **Employment Act** provides as follows:

"31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)."

[13] Looking at the letter of appointment which is subject contract against the above provision of the law and while conscious that it is not within the scope of courts to re-write a contract but merely to interpret, we find the contract of employment did not indicate whether the sum of USD 600 included house allowance and specifically provided that the respondent was to be paid "other benefits as required by law". The Judge interpreted that contract although she did not specifically mention this particular clause to mean that the appellant was liable to pay the respondent house allowance. We cannot fault the Judge for that interpretation because house allowance is a benefit that is required under the Employment Act and the contract did not provide that house allowance was consolidated in the basic wage. Counsel for the appellant invited us to look at the payslip that indicated the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign for it. For avoidance of doubt, we clarify that had the contract expressly stated that the salary of USD 600 was inclusive of house allowance, we would not have used the clause "other benefits as required by law" in the contract to award house allowance. We would have applied **Section 31 (2) (a)** of the **Employment Act** to exclude it.

[14] The above being our finding, the only issue is the computation of the said house allowance. It would seem the learned Judge did not explain the formula used to arrive at the sum of Ksh 571,531 awarded as house allowance. This was the sum claimed by the respondent in the statement of claim which the Judge adopted as it was, hook line and sinker. Counsel cited many authorities where house allowance was

calculated at the rate of 15% of the monthly salary and in accordance with the General Wages Guild. The case of Ananna Yonemura v Liwa Kenya Trust [2014] eKLR and Kedhihia Workers v B.O.G Maseno School for the deaf [2013] eKLR were cited. To us 15% is reasonable percentage that an employee spends from part of a salary to pay house rent. In this regard the respondent was employed on 1st June, 2010 and he was terminated on 14th September, 2012 giving a period of about 25 months. Thus $600 \times 25 \times 103 = 1,545,000$ out of which 15% should be the house allowance and that is Ksh. 231,750.

[15] In the upshot of the above analysis this appeal partly succeeds as we interfere with the award of Ksh. 571,531 and substitute it with a sum of Ksh. 231,750 to be paid to the respondent with interest from the date of the award at the court rate. For reasons that the appellant partially succeeded in this appeal and also that we do not wish to set these parties against each other any further we order each party to shall bear their own costs in this appeal but the appellant shall bear the costs as ordered for the ELRC proceedings.

Dated and delivered at Nairobi this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR