



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WARSAME, KIAGE & MURGOR, J.J.A.)

CIVIL APPEAL NO. 104 OF 2018

BETWEEN

ONDIEKI DOUGLAS NYAGOKA.....APPELLANT

AND

MTWAPA BEVERAGES LIMITED.....RESPONDENT

(An appeal against the judgment and decree of the Employment and Labour Court

at Mombasa (O.N. Makau, J.) dated 16th December 2016

in

ELRC Cause No. 761 of 2015

JUDGMENT OF THE COURT

In this appeal, the appellant **Ondieki Douglas Nyagoko** (*Douglas*) is dissatisfied with the judgment of the Employment and Labour Relations Court which despite finding in his favour that he had been unfairly dismissed from employment, wrongly found that his salary was Kshs. 12,000 per month instead of Kshs. 30,000, and that he was paid all other dues including overtime, commissions, leave and off days.

Douglas was employed by the respondent in 2003 as a sales manager. His starting salary was Kshs. 8,000 and by the time that he left the respondent's service in July 2015 it was increased to Kshs. 30,000 per month which amount was inclusive of overtime, commissions, leave and off days. On 4th June 2015 Douglas was demoted to a casual worker, and that thereafter his services were terminated unlawfully and discriminatorily. He alleges that he was not afforded an opportunity to be heard, and that there was no evidence of wrong doing on his part.

Following termination of his employment, he claimed his terminal dues, his salary for the days worked in June, 12 years' unpaid leave, service pay, off days overtime (12 hours per week), and compensation for unfair termination of his employment all of which totaled to Kshs. 1,372,500.

The respondent admitted that Douglas had been an employee of the company from February 2010 until he left employment in July 2015 without notice; that his salary in 2010 was 8,000 per month, in 2011 it was Kshs. 10,000 per month and in 2012 it was Kshs. 10,000 per month and from 2013 to July 2015 it was Kshs. 12,000 per month, and that any payments over and above his salary were in respect of commissions, overtime and days off; that at no time did he earn a salary of Kshs. 30,000 per month. The respondent also denied that it had unlawfully terminated his employment, or that he was entitled to the sums demanded.

It was the respondent's case that, the demand for July salary of Kshs. 12,000 was not due to him as he deserted duty without notice; that he was not entitled to service pay as there was no contract in respect of such payment; that Kshs. 360,000 compensation was not payable as his salary was Kshs. 12,000 per month; that he was not entitled to Kshs. 102,000 as he received payment in lieu of off days, and in most cases he took time off; and that Kshs. 360,000 was not due to him as he was at all times paid for overtime.

Upon considering the pleadings, the evidence and the submissions of the parties, the learned judge concluded that Douglas was unfairly dismissed from employment, and that the reason for termination was not explained to him, and as such he was not afforded a fair hearing. The court also found that the employer failed to prove that his termination was based on a valid and fair reason or that in so doing, a fair procedure had been adopted.

As a result, the learned judge granted the following reliefs;

1. One month's salary in lieu of notice;
2. Six (6) month's compensation for unfair termination at Kshs. 12,000 per month; and
3. Service pay from 19th September 2006 to 4th July 2015 at the rate of 15 days for each completed year of service.

Douglas was dissatisfied with the reliefs granted by the trial court and appealed against the decision on the grounds that the learned judge was wrong in finding that his salary was Kshs. 12,000 per month instead of Kshs. 30,000, and that he had been paid all other sums due including overtime commissions, leave and off days. He therefore appealed against the trial court's award in the following terms;-

- i) that the payment in lieu of notice be reviewed from Kshs 12,000 to Kshs. 30,000;
- ii) that compensation for unlawful termination be reviewed from Kshs.72,000 to Kshs. 180,000;
- iii) that Service pay be reviewed from Kshs 54,000 to Kshs. 135,000;
- iv) Together with costs and interest.

Mr. Nyabena, learned counsel for Douglas filed written submissions, and in highlighting the submissions, stated that Douglas' salary was Kshs. 30,000 per month exclusive of commissions, overtime, days off, and leave. It was counsel's case that the emoluments payment schedule the respondent provided was not authentic, and did not comprise proper employment records; that the learned judge wrongly concluded that Douglas' salary was Kshs. 12,000, while the other payments were additional emoluments. It was submitted that there was no proof that overtime, days off or any other payments were made, and therefore the amount of Kshs. 30,000 referred to was Douglas' take home salary.

For its part, the respondent represented by **Ms. Kerubo** and **Mr. Mogaka** holding brief for Mr. Omwenga stated that they would rely on the respondent's submissions in the High Court, which showed that in so far as Douglas' salary was concerned he earned Kshs. 12,000 per month, and that in addition to his salary he earned commissions, overtime and payment for off days which brought his average monthly pay to Kshs. 30,000 by the time he left employment. In other words, his monthly salary was Kshs. 12,000 and any payment over and above this were in respect of overtime, and off days, earned in the course of the month.

This being a first appeal it is our duty to reconsider the evidence, undertake an evaluation of such evidence and after so doing reach our own decision, but in discharging this duty, we must bear in mind that we neither saw nor heard the witnesses- See **Peters vs Sunday Post Limited [1958] EA 424.**

From the pleadings, evidence and submissions, it is apparent that the principal issue for our consideration is whether Douglas' monthly salary was Kshs. 30,000 as he claimed or whether it was Kshs. 12,000 as contended by the respondent. A determination of this issue will enable us to compute the awards under the other heads claimed. Associated with this was whether he was paid commissions, overtime and other emoluments in the course of his employment.

When the oral and documentary evidence produced is analysed, despite the learned judge's conclusion that "...the Respondent proved by records that the fixed salary was Kshs. 12,000 per month..." no document was produced that specified with certainty that Douglas' monthly salary was Kshs. 12,000. There was also nothing that shows that it was Kshs. 30,000 per month either. It is our duty therefore to reassess the evidence, so as to arrive at an independent determination of what Douglas' salary was by the time his employment terminated.

It was Douglas' case that his monthly salary was Kshs. 30,000. He alleges that he was not paid his June salary of Kshs 10,500, and on cross-examination he stated that "My salary was shown as ksh. 12,900...The pay I was receiving was varied to ksh. 30000, 36000 or even 37000."

Dorcas Agweli testified for the respondent. She stated that Douglas' monthly salary was Kshs. 12,000, but commission, overtime and his days off pay were added to his salary. In support of this evidence, she produced documents showing monthly payments for commissions, and off days' pay, and though it was conceded that the documents did not state to whom the payments were made, Douglas did not controvert them.

In point of fact, Douglas admitted that the salary he received varied. He stated that; "The pay I received varied to ksh. 30000, 36000 or even 37000..." And when this is considered against Dorcas Agweli's evidence, which was that he was paid a salary of Kshs. 12,000 together with additional emoluments, it meant that what he received each month was not fixed at Kshs. 30,000, but would vary when commissions, overtime, leave and off days were taken into account. In some cases he would be paid upto Kshs. 30,000 and in other cases upto Kshs. 37,000. If this was indeed the case, his fixed salary could not have been Kshs. 30,000. It would have been much less, in view of the other additional payments.

Since, the evidence shows that other payments were made in addition to his salary, which Douglas did not deny, it can be concluded that he received these additional payments alongside his salary during the period of employment.

But more fundamentally, it is observed that he did not at any time claim that, because his fixed salary was Kshs. 30,000, and he received the additional payments, that he was underpaid. This is because, if his fixed salary was Kshs. 30,000 and he received the additional payments of commissions, overtime, and unutilized off days together with his salary, it goes without saying that the total amount earned would have been well over Kshs. 30,000. Yet, at all times his salary together with additional emoluments was in the region of Kshs. 30,000, with no claim

having been made for underpayment of salary. In our view, to assert that he was entitled to a fixed salary of Kshs. 30,000 when both his pleadings and the evidence on record pointed to receipt of a fixed salary of Kshs. 12,000, together with commissions and overtime, amongst other emoluments, was clearly an attempt on his part to unjustly enrich himself to the detriment of the employer. In the case of **D. K Njagi Marete vs Teachers Service Commission – Industrial Cause No 379 of 2009** Rika

J appropriately observed;

“What remedies are available to the Claimant? “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

We are therefore satisfied that the learned judge rightly concluded that Douglas’ fixed salary was Kshs. 12,000, and as such we have no reason to interfere with that finding, or the computation of compensation for unlawful termination or service pay.

In sum the appeal is unmerited, and is for dismissal. To avert the possibility of any further acrimony developing between the parties, we order each to bear their own costs.

It is so ordered.

Dated and delivered at Mombasa this 26th day of September, 2019.

M. WARSAME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR