



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 249 OF 2017

BETWEEN

WELLS FARGO LIMITED.....APPELLANT

AND

JULIUS IHOMBA GATETE..... RESPONDENT

(Appeal from the award and decree of the Employment and Labour Relations Court (Nduma, J.) dated 6th September 2013 in Cause No. 356 of 2010)

JUDGMENT OF THE COURT

After serving *the appellant, Wells Fargo Limited*, for a period of sixteen years, *the respondent, Julius Gatete Ihomba* voluntarily retired on 14th January 2010. On 7th April 2010, he lodged a memorandum of claim in the *Employment & Labour Relations Court, Nairobi*, and prayed for judgment against the appellant for **Kshs 650,948.00** made up of 64 days accrued annual leave amounting to **Kshs 74, 624.00**; 14 days unpaid earned salary of **Kshs. 16,634.00** and 16 years retirement or service gratuity of **Kshs 560,000.00**.

By its memorandum of defence dated 3rd June 2010, the appellant admitted the claim as regards annual leave and unpaid salary, so that the two issues are no longer in dispute before us. However as regards the service gratuity, the appellant opposed the claim contending that service gratuity was not provided for in the respondent's contract of employment and that he was not covered by the *Regulation of Wages (Protective Security Services) Order, 1998 (the Order)* as amended by the *Regulation of Wages (Protective Security Services) (Amendment) Order, 2003*, because he was employed at management level rather than in the minimum wages categories of employment covered by the Order.

Nduma, J. heard the claim and in a judgment dated 6th September 2013, the subject of this appeal, held that the Order applied to the respondent and that under *section 26(2)* of the *Employment Act* he was entitled to the more favourable terms. Accordingly he awarded him service gratuity of Kshs. 560,000.00 with interest at court rates from 14th January 2010 until payment in full, and costs of the claim. That is the aspect of the award that the appellant challenges in this appeal.

Urging the appeal, *Mrs. Woodward*, learned counsel for the appellant, submitted that by dint of regulation 2 of the Order, the respondent was not covered by the Order because it applied only to persons employed or involved in private investigations, security consultancies, guarding, and escort of money, which the respondent was not. Counsel further contended that the Order did not apply to the respondent because he was employed in a senior managerial position in the appellant, dealing with personnel vetting and inquiries work. He was also a decision maker and was specifically designated as a senior member of staff, earning much more than the guards. The appellant further maintained that the Order applied only to uniformed guards, which the respondent was not; that although his salary had changed over time, his terms of service remained the same, and that because of his former employment as Chief Inspector of Police, Kenya Police, the respondent was not a junior employee.

It was the appellant's further submission that the learned judge erred in equating the respondent with two of its former retired employees, yet they were far junior and earned far much less than he. Those employees, it was submitted, were not in management like the respondent and as such the Order was applicable to them so that they were entitled to gratuity while the respondent was not. On that basis it was submitted that the learned judge's conclusion that the appellant had discriminated against the respondent was not justified and was based on a consideration of extraneous matters.

The award of gratuity was also challenged on the ground that it was not provided for in the respondent's letter of appointment and in any case, it was in violation of *section 35(6)(d)* of the *Employment Act*, which does not allow gratuity to an employee who is a member of the

National Social Security Fund (NSSF). The appellant contended that it had adduced sufficient evidence, which proved that the respondent was a member of the NSSF and so was not entitled to gratuity. In support of that proposition the appellant relied on the decision of this Court in ***Chengo Kitsao Chengo v. Umoja Rubber Products Ltd [2017] eKLR*** and that of the High Court in ***Jonah Racha Abdi v. Kenya Forestry Research Institute [2014] eKLR*** and urged us to allow the appeal.

The respondent opposed the appeal on the basis of written submissions prepared by his advocates, ***Gathii Irungu & Company***. He submitted that he was not a manager as claimed by the appellant, but only a guard employed in the guards department where he was responsible for vetting and investigating the background of other guards before employment; that the manager he was reporting to was ***Joseph Kagema***; that his Department was designated “Guarding” and his Sub-Department “Guards Office Staff”; and that the Order therefore applied to him as well as to the guards he worked with.

As regards registration with NSSF, the respondent submitted that just like other employees of the appellant, he was registered after employment, and notwithstanding registration with NSSF, the appellant had continued to pay gratuity to retiring employees. He relied on the cases of ***Peter Kilionzo*** and ***Julius Odera***, two of his retired colleagues whom the appellant paid gratuity notwithstanding registration with NSSF. In his view, there was no basis for the appellant to treat him differently, which amounted to discrimination. Accordingly he urged us to dismiss the appeal for lack of merit.

We have carefully considered the record, the memorandum of appeal, the judgment of the trial court and the respective submissions by the parties. By dint of **section 17** of the ***Employment & Labour Relations Court Act*** as amended by the ***Statute Law (Miscellaneous Amendments) Act, No. 18 of 2014***, appeals to this Court from the Employment and Labour Relations Court are on both points of fact and law. Being a first appeal, we are enjoined to revisit the evidence before the trial court afresh, analyze it, evaluate it and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit, which we do not have, of seeing, hearing and observing the demeanor of the witnesses as they testified. Accordingly we shall not readily differ with its conclusions on facts unless we are satisfied such conclusions are based on no evidence or on a misapprehension of the evidence or the court is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See ***Seascapes Ltd v. Development Finance Co. of Kenya Ltd (2009) KLR, 384***).

In the court below both parties called one witness each. The respondent testified on his own behalf and stated that he was employed by the appellant on 17th October 1994 until 14th January 201 when he retired voluntarily. He was employed in the guarding department and was responsible for vetting and conducting background checks on guards before the respondent employed them, and performed other general duties as assigned to him by the management. He produced his letter of appointment and denied ever being part of the respondent’s management. He also produced one of his pay slips, which indicated that he was employed in the guarding department. While admitting that he was a member of the NSSF and making monthly contributions of Kshs 200.00, he testified that in the respondent’s employment such contribution was not a bar to payment of gratuity and referred to cases of two of his former retired colleagues, ***Peter Kilionzo*** and ***Julius Odera*** who the respondent paid gratuity although they were contributing to the NSSF.

The respondent’s witness was ***Stephen Kang’ethe***, its Human Resource Manager. He confirmed that the respondent was responsible for vetting guards, which in his view made him “a senior member of staff” earning more than the other guards. He confirmed that the respondent’s payslip indicated that he was employed in the guards department as a guards’ office staff, which designation was never changed during the time of his employment. He further testified that ***Peter Kilionzo*** and ***Julius Odera*** were junior to the respondent and were paid less than he was. As regards NSSF, he confirmed that the respondent remitted Kshs 200.00 per month.

The witness conceded that other than the letter of appointment, there was no other letter appointing the appellant to a management position in the appellant. He however maintained that only uniformed guards, drivers, in-charges and supervisors were entitled to gratuity.

As we have already pointed out, the only issue in dispute in this appeal is whether the respondent was entitled to payment of gratuity as held by the trial court. The appellant submits that he was not, firstly because the Order applies only to the lower cadre of employment whilst the respondent was part of the management. Secondly the appellant contends that the respondent was a contributor to the NSSF and therefore by dint of section 35(6)(d) of the Employment Act, he is precluded from payment of gratuity.

It was the appellant who averred that the respondent was a member of the management and it follows therefore that by virtue of **section 109** of the ***Evidence Act***, the burden of proving on a balance of probability that the respondent was so employed lay on the appellant.

(See ***Diamond Trust Bank Kenya Ltd v. Said Hamad Shamisi & 2 Others [2015] eKLR***). Having carefully considered the totality of the evidence on record, we do not find any basis for disagreeing with the finding by the learned judge that there was no evidence that the respondent was part of the respondent’s management. His pay slips, which it is common ground reflected his employment status, indicated that he was in the guards office staff in the department of guarding. That was his status for the 16 years he was employed by the respondent. We do not find it conceivable that the respondent’s status would continue to be reflected in the pay slip as a guards office staff if indeed his status had changed to management. The appellant’s own witness conceded that save for the respondent’s appointment letter, there was no other letter appointing or promoting him to a higher position. For the 16 years he continued to be employed in interviewing, investigating and vetting potential guards. If indeed the respondent were in management, we would have expected the witness to testify to the department that he headed or the manner in which he was appointed or designated a member of the management.

Regulation 2 of the Order identifies the employees to whom the Order applies in the following terms:

“This Order shall apply to all persons employed directly or indirectly by an undertaking or part of an undertaking which is involved in the carrying on of any of the following activities-

a. private investigations or security consultancy,

b. guarding of industrial plants, banks, warehouses, shops, private homes or any other property or establishment

against theft, illegal entry or fire; and

c. escort of money or other valuable property. (Emphasis added).

There's a proviso to the provision, which is not relevant to this appeal.

Whilst the respondent may not have been a guard in uniform, in the absence of credible evidence that he was in the management of the respondent, we have no hesitation in concluding that on the basis of the evidence on record and a purposive interpretation of the Order, it applied to him as a person who was *indirectly* involved in the guarding industry by virtue of his employment to investigate the background of potential guards and vetting them for employment. His salary of Kshs10,000.00 per month with an annual increment of Kshs1,000.00 over a period of 16 years plus an allowance of Kshs 2,000.00 per month to facilitate his investigations, transport, and collection of evidence, does not convince us that he was in the management as claimed by the appellant.

One of the benefits conferred on a person covered by the Order is payment of gratuity, which is provided for by *regulation 17* of the Order as follows in the pertinent part:

“17 (1) After five years' service with an employer, the employee shall be entitled to eighteen days pay for every completed year of service by way of gratuity based on the employee's wage at the time of termination of service.

2. An employee who is summarily dismissed for lawful cause or terminates his services for any reason other than certified ill-health or retirement age shall not be entitled to a gratuity:

...”

As regards the respondent's membership in NSSF, section 35 of the Employment Act makes provision on the termination notice required for various types of contracts of employment. Section 35(5) provides that an employee whose contract of service is terminated by giving 28 days' notice is entitled to service pay for every year worked, the terms of which shall be fixed. However section 35(6) excludes the application of section 35 in among others, cases where the employee is a member of the NSSF.

After considering the provisions of section 35(6) of the Employment Act and regulation 17 of the Order, the learned judge, properly in our view, fell back on section 26 (2) of the Employment Act and upheld the gratuity payable to the respondent under regulation 17, notwithstanding his contributions to NSSF. Section 26 of the Employment Act is in the following terms:

2. Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

The effect of the above provision is simply that if the terms of the respondent under regulation 17 of the Order are more favourable than those under section 35(6) of the Employment Act, which falls under Part VI of the Act, the more favourable terms will apply. We do not see any error on the part of the learned judge in that regard. In addition, we must add that the decision of this Court in *Chengo Kitsao Chengo v. Umoja Rubber Products Ltd* (supra) is easily distinguishable as there was no evidence of the employee in that case being entitled to any better terms than those set out in section 35 of the Employment Act.

Ultimately we do not find any merit in this appeal and the same is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 2nd day of March, 2018

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR