



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KARANJA, KOOME & OTIENO-ODEK, J.J.A

CIVIL APPEAL NO. 18 OF 2018

BETWEEN

**PATRICK LUMUMBA KIMUYU.....APPELLANT**

VERSUS

**PRIME FUELS (K) LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Makau J.) delivered on 28<sup>th</sup> July, 2018*

*in*

*ELRC Cause No. 181 of 2016)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal revolves around the issue of whether the burden of proof was discharged. In a claim lodged at the Employment and Labour Relations Court (ELRC) at Mombasa, **Patrick Lumumba Kimuyu** (the appellant) sought judgment against **Prime Fuels (K) Limited** (the respondent) for the sum of Kshs. 1,030,308 together with costs and interest thereon. The principal sum was said to be in respect of terminal dues owed to the appellant following his resignation from the respondent company.

2. It was common ground that the appellant was employed by the respondent way back on 27<sup>th</sup> December, 2006 as an articulated truck driver and that the parties executed an agreement to this effect. It was also common ground that the employment went on without a hitch until the appellant voluntarily resigned from employment vide a letter dated 10<sup>th</sup> April, 2015, at which point he was earning a monthly gross salary of Kshs. 35,000. However, according to the appellant, at the time of his resignation, the respondent owed him accrued compensation in respect of public holidays and Sundays worked as well as service pay for the eight years he had worked. To this end, he tabulated his claim as follows:

- |  |                         |
|--|-------------------------|
| a) ½ Salary @ 8yrs                       | Kshs. 118,020.00        |
| b) Sundays= 365 days= 2920hrs x 258      | Kshs. 753,360.00        |
| c) Public Holidays 77 days x 8 hrs x 258 | <u>Kshs. 158,928.00</u> |

**TOTAL** **Kshs. 1,030,308.00**

3. The claim was opposed vide the respondent's response filed on 12<sup>th</sup> May, 2016. While admitting that the appellant was her erstwhile employee and that the respondent was entitled to paid annual leave while in employment; which included public holidays and Sundays, the respondent stated that all such dues had been paid at the time of his resignation. The respondent also asserted that in any event, the only time that the appellant was required to work for 7 consecutive days was when he was travelling and delivering the respondent's products outside the country. In addition, that during such trips, the appellant was always compensated by way of a travelling allowance for the extra days worked. Further, that at the time of resignation, the appellant had by his own admission, already exhausted his leave days. In this regard, the respondent also stated that the appellant's resignation was abrupt as he never gave the requisite one month notice; but in lieu thereof, invited the respondent to recover any dues it may have against him from his terminal pay. On account of that want of notice, the respondent mounted a counterclaim, seeking judgment for one month pay in lieu of notice plus costs.

4. Upon hearing the submissions of respective counsel, the learned trial Judge (Makau J.) in a reserved judgment delivered on 28<sup>th</sup> July, 2018 found the appellant's claim devoid of proof and dismissed it. With regard to the respondent's counterclaim, the same was allowed. He however decreed that since the appellant had admitted owing the respondent one month's salary in lieu of notice, then the sums claimed by the respondent would be recovered from the appellant's undisclosed terminal dues.

5. Irked by that decision, the appellant lodged the present appeal, in which he contends that the learned Judge erred by; dismissing his claim; failing to consider the provisions of **section 35(5)** of the employment Act No. 11 of 2007 ( the Act ) ; finding in favour of the respondent and holding that the appellant had been duly paid his travel allowances yet his claim was not for travel allowance but for the compensation for public holidays and Sundays worked; finding that the respondent had paid the appellant all his travel allowances yet there was no claim for travel allowance and; considering the respondent's evidence and submissions whilst ignoring those of the appellant.

6. The appeal was ventilated through written submissions, with no oral highlights. G.A Okumu & Co Advocates filed submissions on behalf of the appellant on 27<sup>th</sup> August, 2018 while O&M Law LLP Advocates filed the submissions on behalf of the respondent on 17<sup>th</sup> September, 2018. According to **Mr. Okumu**, learned counsel for the appellant, the appellant was entitled to service pay under section 35(5) of the Employment Act No. 11 of 2007 and further, that under section 10 (3) (a) (i) of the Act, the employer is obligated to keep records of the employees' entitlement to payments with regard to annual leave, public holiday and terminal benefits. In view of the foregoing, and in view of the fact that the employee is also entitled to one rest day under the Act, the appellant maintained that the respondent had failed to pay him his dues as claimed. Counsel cited a plethora of cases in support of the contention that an employee is entitled to compensation for public holidays and Sundays worked.

7. In addition, he submitted that the respondent had failed to tender proof of such payments. It was the appellant's contention that under section 10 (3) (a) of the Act, the employer is required to pay the employee for work done on public holidays and Sundays and that the respondent failed to do so in this case and that the burden was upon the respondent to prove the payments if any. Further to this, he said, the respondent had also failed to prove her claim as per the counterclaim and the learned Judge thus erred in allowing the counterclaim. According to the appellant, the petty cash vouchers furnished by the respondent in evidence only proved compensation for long distance travel allowances and were not in respect of public Holidays and Sundays worked.

8. On behalf of the respondent it was submitted that due to the nature of the appellant's work, the instances on which he would be required to work on holidays and Sundays were rare and tended to be during long trips. As such, he was always compensated for the overtime worked, hence the petty cash vouchers detailing his compensation in this regard. As such, the claim for public holiday and Sunday pay could not arise. Learned counsel added that when the appellant happened to work on Sundays and public holidays whilst travelling, he was always allowed extra leave days and also paid for the extraneous days worked. Furthermore, that fact was admitted by the appellant in his resignation letter.

9. It was also reiterated that the appellant failed to give the requisite notice prior to his resignation, but actually ceased work the very day he resigned. Consequently, the respondent was entitled to recover one month pay in lieu of notice as per the counterclaim. In addition, it was submitted that the appellant's claim for gratuity was unfounded and the respondent could not be liable for the same, as it was never envisioned in the employment contract. With regard to the claim for Sundays and public holiday pay, counsel submitted that the learned trial Judge rightly directed his mind to the matter by dismissing the appellant's claim. He added that the appellant had failed to prove that he indeed worked on public holidays and Sundays as claimed and in fact admitted having utilized all his leave days. Counsel dismissed the applicability of **Section 10 (3) (a) (i)** and **Section 35** of the Act as pleaded by the appellant and stated that the documentation produced by the respondent in this case proved that the appellant was duly compensated for the few public holidays and Sundays he had worked whilst travelling. Coupled with this he said, the appellant had not pointed out one specific instance when he had worked on a Sunday or public holiday and had not been paid. On that basis, the Court was urged not to interfere with the findings of the trial court and to dismiss this appeal with costs.

11. This being a first appeal, the duty of this Court is as re- stated in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was held in part that:-

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”***

What arises for determination in this appeal is whether the appellant was entitled to the sums he claimed and whether the learned Judge erred in awarding judgment as per the counterclaim. According to the contract dated 27<sup>th</sup> December, 2006, the appellant was to work from Monday to Saturday and to have Sundays and public holidays off. In his memorandum of claim, he claimed to have accrued some 365 Sundays worked equaling 2920 hrs x258 (753,360/-) and 77 public holidays x8 hours x258(ksh.158928). It was never specified which days these were. His was therefore an omnibus claim with no specificity.

12. In contrast, the respondent not only denied owing the sums claimed, but also denied that the appellant ever accrued those dues in the first place. In other words, the respondent's assertion was that the appellant's claim was in respect of fictitious labour, as he never put in the work on those days as claimed. Except where expressly provided under statute, the burden of proof in civil cases is always cast on the party who alleges (see. Sections 107-109 of the Evidence Act Cap 80 Laws of Kenya). It is for the party that alleges a fact to be true to prove the existence and veracity of that fact. This is under the basic principle of Evidence that 'he who asserts must prove' (see. **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR**)

That is also the purport of **section 107(1)** of the **Evidence Act**, which provides:

*107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

There is also an evidential burden that is cast upon any party who desires the court to believe the existence of a fact. That is captured in **Sections 109** of the **Act** as follows:

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

13. In this case, the appellant has been adamant that he not only worked on some public holidays and Sundays, but that he was never paid in respect thereof. The respondent has refuted both assertions; at which point the appellant contends that the respondent ought to have produced records to prove any payment effected with regard to the public holidays and Sundays worked. As stated above, the appellant never specified which Sundays he was on duty or which public holidays he worked for which he was not paid. It was not clear how he had arrived at the number of days he claimed he was owed. How then would the respondent be expected to defend such a claim? The learned Judge made a finding to the effect that the appellant had actually admitted having utilized all his leave days and paternity days and those must have included Sundays and probably public holidays. How then would the appellant have expected the learned Judge to award him pay for days which had not been proved at all?

14. Whereas we appreciate that the employment Act enjoins an employer to keep employment records in respect of an employee, that does not absolve an employee from discharging the burden of proving his/her claim. If anything, that burden weighed more heavily upon the appellant in view of the respondent's categorical denial that the appellant had worked on the days claimed. It behooved the appellant to first discharge the burden by showing that he had indeed worked on the public holidays and Sundays as contended. Only upon such proof, would the evidential burden then shift to the respondent to show that she paid for the overtime worked. On the other hand, we note that the respondent produced before court several receipts for allowances paid to the appellant, which given the paucity of evidence in support of the appellant's claim could as well have been payments for public holidays and/or Sundays worked.

Addressing a similar issue this Court in its decision in **Rogoli Ole Manadiegi vs. General Cargo Services Limited** (2016) eKLR expressed as follows;

*“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”*

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.

15. Still on the appellant's claim, was the limb of prayers seeking to be awarded service pay. According to the appellant, under his contract of employment and section 35 (5) of the Act, he was entitled to service pay or gratuity for his eight years of service with the respondent; which he tabulated at the rate of half his monthly salary. Section 35 of the Act addresses the issue of termination notice with sub section (5) thereof providing that;

*‘An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed’*

For clarity purposes, the subsection (1) (c) referred to above is on these terms:

*(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be —*

*(a).....*

*(b) .....*

*(c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. (emphasis added)*

The import of the foregoing provisions is twofold; firstly, an employee whose salary is payable monthly and whose contract is terminable by notice is deemed to be under a contract of service and; secondly, such employee is entitled to service pay on such terms as ‘shall be fixed’. The presumption here is that the terms of the service pay shall be fixed by the contracting parties themselves. However, looking at the employment contract herein, no mention has been made of such terms by the parties herein. On what basis then could the appellant come up with the rate of severance pay he was now proposing? Moreover, it is not in doubt that the appellant was a member of the National Social Security Fund (**N.S.S.F**) as is evident from the payslips exhibited in the trial court. He is therefore expressly excluded from claiming any severance pay by dint of section **35(6) (d)** of the Act. He was clearly not entitled to any service pay.

16. Lastly, is the issue of whether the trial court erred in allowing the prayer sought in the counterclaim. As stated earlier, it is common ground that at the time of his resignation, the appellant was earning a monthly salary of Kshs. 35,000.00. The counterclaim by the respondent was pegged on the contention that the appellant never gave one month notice and for that reason, was liable to compensate the respondent in lieu of that notice. In his resignation letter, the appellant seems to have acknowledged this fact when he invited the respondent to recover the same from his terminal dues. He stated in part:

*'...since my leave days are over, I am requesting the management to deduct from my final dues...'*

It is also notable that the respondent's claim that the appellant never gave notice was never contested by the appellant. With this in mind and also considering that clause 13 of the employment contract required either party to give a month's notice of termination of contract or pay salary in lieu thereof, the finding of the trial court on the counterclaim was proper.

17. On the whole therefore, we are persuaded that this appeal is devoid of merit and the same is hereby dismissed. Given the financial disparities between the two parties in this appeal, the order that commends itself to us on costs is that each party should bear its own costs of the appeal.

**Dated and delivered at Mombasa this 8<sup>th</sup> day of November, 2018.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**