IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 49 OF 2016

CHENGO KITSAO CHENGO ……APPELLANT

AND

UMOJA RUBBER PRODUCTS LTD……..……RESPONDENT

(Being an appeal from part of the judgment of the Employment and Labour

*Relations Court at Mombasa (**Makau, J.**) delivered on 19th February, 2016*

in

Civil Cause No. 270 of 2015.)

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JUDGMENT OF THE COURT

By a contract of employment entered into in 1996, whether oral or in writing, it is not clear, the appellant was engaged by the respondent as a machine operator on casual basis. According to the appellant, this engagement was subsequently converted to permanent employment in 2009, at a monthly salary of Kshs.7,500/=. All is said to have been well until 13th March, 2013, when the respondent allegedly unlawfully terminated the appellant's employment, prompting the appellant to lodge a claim in the Employment and Labour Relations Court at Mombasa seeking compensation as follows:

(a) One month's salary in lieu of notice Kshs. 7, 500/=

(b) Leave for the 17 years worked Kshs. 63, 750/=

(c) Gratuity for the 17 years worked Kshs. 63, 750/=

(d) 12 months compensation for unfair termination Kshs. 90, 000/=

(e) Overtime payment for every 52 Saturdays of

the year for 17 years @ Kshs.260/= Kshs.229, 840/=

(f) Pay for 13 days worked in March, 2013

@Kshs.260/= Kshs. 3, 380/=

Total Kshs.458,220/=

The case as presented before the trial court was that the appellant, a diligent and hardworking employee was dismissed for no reason at all, without notice payment in respect of leave applied but not taken and gratuity. That for this reason, the termination was wrongful and unfair, thus entitling the appellant to compensation among other prayers in the memorandum of claim. On its part, save for the admission that the appellant was indeed engaged as a casual employee, the respondent contested the rest of the appellant's averments. It denied having terminated the appellant's employment. To the contrary, it pleaded that the appellant was a contract employee, prone to bouts of chronic absenteeism from work, had only worked intermittently in March, 2013, until 13th March, 2016 when he completely deserted employment. As such, the prayers sought in the claim were undeserved as the respondent had nothing to do with the appellant's desertion of duty. In addition, it claimed that the appellant was disentitled to gratuity because while in employment, he was a member of the National Social Security Fund "NSSF", to which the respondent was a contributor.

At the hearing of the claim, parties agreed to canvass it by way of pleadings, documentary evidence and written submissions. Upon consideration of the parties' respective cases, **Makau, J**., rendered his award on 19th February, 2016. While finding that the appellant had failed to prove its claim for unfair dismissal, the learned judge nonetheless found that the appellant was entitled to the salary for the 9 days he had worked in March, 2013. Accordingly, he dismissed all of the appellant's claim for compensation and instead awarded him a sum of Kshs.2,708.40/= plus interest being salary for the 9 days worked in March, 2014.

It is that judgment that has spurred this appeal, in which the appellant faults the findings of the learned judge on the grounds that he erred when he held that the appellant did not substantiate his claim of unfair and wrongful dismissal; had deserted work; had consented to the production of documents by the respondent and that the same was tantamount to his admission of their authenticity; and lastly, that the appellant was disentitled to overtime payments and gratuity.

Submitting before this Court in support of the appeal, **Mr. Oluga**, learned counsel for the appellant, reiterated that the appellant's termination of employment was in utter disregard of **sections 35** and **43** of the Employment Act "*the Act*". Further, that the respondent misled the court when it stated that the appellant had deserted duty, particularly in light of the fact that the respondent had initially made no mention of the desertion in its letter dated 10th April, 2015 in response to the appellant's demand letter. The respondent, he said, had instead claimed that the appellant was a contractual employee whose employment had come to an end by effluxion of time. That there was no proof of the alleged desertion and the attendance records produced in this regard were a fabrication given that the same bore no signature or validation by the workers whose attendance history they purported to attest to. In conclusion, counsel submitted that the judge erred in holding that just because the appellant did not contest the admission of the work attendance records, the same stood uncontroverted. To the contrary, he asserted, the judge should have appreciated that the said records though admitted, were of no evidentiary value, and ought to have allowed the claim.

Opposing the appeal, **Ms. Opulu,** learned counsel for the respondent, submitted that under **section 36(c)** of the **NSSF Act**, an employer who contributes to the NSSF scheme is exempt from paying his worker any service pay and or gratuity. Further, that as rightly held by the trial court, **section 47(5)** of the **Employment Act** places the onus of proving unfairness of the termination of employment on the claimant; a burden the appellant failed to discharge. In addition, that given the appellant's willful desertion from employment, the issue of his unfair termination did not arise.

As a first appellate court, this Court has the primary role of re-evaluating, re-assessing and re-analyzing the facts and evidence that were placed before the trial judge and determining whether the conclusions reached by the trial judge should stand or not. (See **Sumaria and Another v Allied Industries Limited [2007] 2 KLR page 1** and also **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR**).

The primary issue in this appeal is whether the appellant was fairly terminated as held by the trial judge on account of desertion of duty.

For any claim anchored on unfair termination or wrongful dismissal from employment the burden of proving that unfairness or wrongful dismissal from employment has occurred is always on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer. See **section 47(5)** of the Act. The incidence of the burden in this regard rested with the appellant for he was the one who alleged that the termination of his employment by the respondent was both unfair and wrongful.

Did the appellant discharge this burden? According to paragraph 4 of the memorandum of claim, the appellant contended that the respondent '*wrongfully and unfairly terminated the claimant's employment and summarily dismissed the claimant from employment*.' Save for that statement, nothing else was said or produced in evidence to substantiate the manner in which that termination was effected. On the other hand, in rebuttal, the respondent alleged desertion of employment and produced attendance records to back up its allegation. In the face of this rebuttal, it was for the appellant to refute the allegations of desertion by way of evidence. He did not. However in this appeal, he has asserted that even though the work attendance records of the appellant were admitted in evidence, the judge erred in relying on them as they lacked any probative value. In essence, that in so doing, the learned judge mistook admission of evidence as being synonymous with proof of such evidence.

Indeed, the mere admission of documents into evidence does not render them credible, reliable or of probative value. This was aptly captured by this Court in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR**; where it was stated that:

> **"First, when the document is filed, the document though on file, does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.**" (emphasis added)

Though the appellant did not respond to or rebut the respondent's documents, he still contends that the same should not have been relied on. In applying its judicial mind to the evidence, any court would have noted that the attendance records in question relate to the appellant and indicate that the appellant indeed intermittently worked in the months of February, 2016 and in March, 2016 as claimed by the respondent. Indeed, they prove that the appellant worked for only 18 days in February and 9 days in March, 2016 respectively. If the attendance records are as untrue as the appellant claims, then under **section 107** of the **Evidence Act**, he should have adduced evidence to the contrary or at the very least, sought to cross examine the maker of the attendance register. As it were, the proceedings before the trial court were purely by way of documentary evidence produced before court as annextures to the pleadings. No witnesses were summoned. Coupled with the want of evidence on the appellant's part, the court cannot be faulted for giving greater credence to the respondent's version of events. On a balance of probability, the respondent discharged its burden under **section 47** of the **Act** and the claim for unfair termination should thus fail as the learned judge correctly found.

On gratuity, **Ms. Opulu** called in aid **section 36** of the **NSSF Act** to support her contention that the appellant, being a member of NSSF, was disentitled to any kind of service pay and gratuity. The said section basically stipulates that where an employee is entitled to termination notice of one month or more, he shall also be entitled to service pay for every year worked as long as he is not a member of registered

pension or provident fund scheme under the **Retirement Benefits Act**, or a gratuity or service pay scheme established under a collective agreement, or the NSSF or any other scheme established and operated by an employer whose terms are more favourable than those under the NSSF Act. In the present case, the appellant was found to be a permanent employee earning monthly salary. That finding was not contested. As such, his contract was terminable by a month's notice being given by either party. However, from the payslips presented before court by the respondent, it is evident that the appellant was an NSSF member, with a monthly contribution of Kshs.200/=. The respondent too had met its part of the bargain by equally contributing its portion to the NSSF. In the absence of an agreement to the contrary, between the parties, his NSSF membership disentitles him to any service pay and/or gratuity.

Lastly, with regard to overtime the trial judge found and correctly so in our view, that Saturday did not constitute the statutory off day as the appellant got Sundays off, meaning that he worked and was paid for the statutory maximum of 6 days a week. In the absence of a contract stating that the parties had a contrary arrangement, warranting the claim that he was to work for five days to the exclusion of Saturday and Sunday the court disallowed that claim as well and rightly so. Under **section 27(2)** of the **Act**, an employee is entitled to at least one rest day for every seven days worked. The off day may be any day of the week as long as the mandatory work days do not exceed 6 days. That is the default period of work set by law. Where parties agree on more off days, as has been alleged by the appellant herein, then proof of such arrangement should be tendered, in the absence of which the court is bound to go by the statutory imperative. In this case therefore, the appellant admitted that he was given Sundays as his off days. The learned judge was thus right in holding that the appellant was accorded his statutory rest day. In addition, that in the absence of an agreement to the contrary, the appellant could not claim compensation for accrued Saturdays as claimed, given that Saturday fell within his statutory working days. In view of the foregoing, this appeal must fail and it is dismissed with no orders as to costs.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a copy of the original.

DEPUTY REGISTRAR