IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 299 OF 2015

BETWEEN

MISS NDUTA MBILE……..…..….. APPELLANT

VERSUS

JOHN GACHAU GITONGA……..... RESPONDENT

(Being an appeal against the Judgment/Award of the Employment and Labour Relations Court at Nairobi (Byram Ongaya J.) dated 28th August 2012

in

Industrial Cause No. 19 of 2011)

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JUDGMENT OF THE COURT

[1] This appeal was filed on 15th December, 2015 pursuant to leave granted to the appellant on 20th November, 2015. The dispute revolves around a claim for unfair termination of employment that was filed before the then Industrial Court (now Employment and Labour Relations Court). The claim was instituted by **Gachau Gitonga** (respondent) against **Miss Nduta Mbile** (appellant). The respondent, who was the claimant, contended that he was employed by the appellant as a night watchman to guard her residential properties with effect from 1st November, 2005 to 5th November, 2009 when his services were terminated. The respondent claimed compensation for one month's salary in lieu of notice, 5 days worked in the month of November, 2009, annual leave for 4 years, severance pay for 4 years, underpayment of salaries and overtime all amounting to Ksh 498,228.35/= .

[2] The respondent denied the appellant's claim, in particular, that there was any contract of employment or any monthly salaries paid to the appellant; she contended that the appellant was a daily casual worker who was paid Ksh 300 per night and that he barely worked for one and half months after the 2007-2008 post-election violence during the month of January and February 2008. The respondent's casual contract was brought to an end for failing to report to work and he was paid all his dues. The appellant maintained that the appellant was not a permanent employee and therefore was not entitled to any compensation.

[3] The dispute was heard by **Ongaya J.**, and the respondent briefly stated his case that he was employed by the appellant at a monthly salary of of Ksh 5,175/ per month and Ksh 1,000 for house allowance but

the appellant ended up paying him only Ksh 4,000/= per month which fell short of the statutory minimum pay. The appellant was accused of failing to increase the respondent's salary in 2006, despite the fact that the Minister for Labour had increased the minimum wages to Ksh 6,796/=. The appellant claimed that he was sacked on 5th November, 2009 without notice, he was also never given leave for four years and was not paid overtime. He therefore told the court that his total claim was Kshs. 498,228.35/= as well as medical allowance. The appellant also testified and maintained that she had employed the respondent on a daily basis at the rate of Kshs. 300/= per day and that he only worked for her for a period of less than two months. His contract came to an end in February, 2008 due to his absence from work as a result of prolonged illness.

[4] The learned trial Judge allowed the entire claim by the respondent in an extempore judgment dated 28th August, 2012. The said judgment did not give any reasons or demonstrate any evaluation of the evidence before court before allowing the various claims sought by the respondent. We reproduce the entire judgment hereunder:-

> **JUDGEMENT**
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> **"This is a claim for unfair termination as set out in the memorandum of claim dated 6th January, 2011. The claimant bases his claim on the oral contract of employment and the various service orders set out in the statement of claims on minimum wages.**
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> **The claimant has shown in his evidence that there existed a contract of employment between the parties from November 2005 to November 2009. The duty to maintain records of employment relationship is vested upon the employer and which was not discharged in the instant case.**
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> **The respondent's evidence has been inconsistent and fails to support the claim by the respondent that there was no employment relationship at all material times. In particular, the claimant has shown that he invited the respondent to a conciliatory process which the respondent failed to take advantage of. The letter Ref. No. AOJ/JGG/2010 dated 29.06.2010 is clear evidence of an ongoing dispute between the parties and concluding in failed conciliatory process.**
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> **This court will encourage employers and employees to amicably resolve their disputes through the conciliatory process through statutory and other mechanisms. The statutory process involving the Labour Officers is not the only path to pursue conciliation and amicable settlement.**
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> **In the instant case, the respondent did not take advantage of the conciliation process and the claimant has proved his case on a balance of probabilities.**
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> **Accordingly, the court enters judgment for the claimant as prayed for in the statement of claim dated 6th January 2011.**
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> **A decree shall issue accordingly."**

[5] Indeed, a decree was issued according to the respondent's claim and prayers. It was followed by spirited efforts by the respondent to execute the same and various unsuccessful efforts by the appellant to review and set aside the decree; she filed an application dated 3rd October, 2012 which was dismissed on 9th October, 2012 and on 25th October, 2012 she filed an application for stay of execution pending appeal which was allowed by consent on the 9th November, 2012 on condition that the appellant was to pay Kshs 16,350/= as costs and to deposit her land title for **No. L.R Ngong/Ngong 38852** as security which conditions the appellant complied with.

[6] After obtaining leave of this court the appellant filed the instant appeal where she has raised some 12

grounds of appeal. In line with the provisions of **Rule 86(1)** of the **Court of Appeal Rules** we intend to summarize or recast the said grounds to avoid repetition. The Rule stipulates in mandatory terms thus;-

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."** (Emphasis added)

The said grounds broadly relate to lack of proof of existence of the terms of the oral contract of employment; failure to consider that a casual employee is not entitled to one months' salary in lieu of notice; that prolonged illness can be a ground of termination of a casual labourers services and failure to evaluate the evidence and to give reasons for the award.

[7] The respondent did not participate in this appeal despite having been served with the appeal; he was also invited to attend a case management session on 22nd November, 2016 which he did not attend. During case management, directions were given that parties do file written submissions. Thereafter, the appeal came up for hearing on 28th March, 2017 but could not proceed due to the respondent's absence. When the appeal came up for hearing again on 6th June, 2017 the respondent was absent though duly served with a hearing notice by registered mail vide his last known address as indicated in the court records. Mr Kigata, learned counsel for the appellant filed written submission and made some oral highlights during the plenary hearing.

[8] Counsel for the appellant submitted that the trial Judge failed to evaluate the evidence before making the award for each of the claims; that the learned Judge failed to consider the respondent was a casual employee who was being paid on a daily basis yet he was awarded 12 months' severance pay and one month's salary in lieu of notice. Further, the learned Judge was faulted for failing to identify the terms and conditions of a casual worker who is engaged only on daily basis. According to counsel, a person employed on a daily basis is not entitled to one months' salary in lieu of notice and severance pay. Counsel took issue with the judgement that failed to give reasons for the award and for dwelling on the issue of conciliatory meetings which was not an issue before the Judge as parties had attended such meetings but it turned out the appellant was being taken round by unqualified and unauthorised labour consultants. Counsel urged us to allow the appeal.

[9] 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. See **Mary Njoki v John Kinyanjui Mutheru** [1985] eKLR:-

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484." Also the case of;- S. M. v E. N. B. [2015] eKLR:-**
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> > **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we, however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions**."

[10] In the premises and having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, the issues that fall for determination which are germane and cut across the twelve grounds of appeal are two fold; whether the claim by the respondent was proved and whether the learned trial Judge erred by failing to give reasons for awarding the respondent's claim as prayed. We

reproduced the impugned judgement and we need not belabour the point that the trial Judge did not give reasons, nor did he evaluate the evidence, and with tremendous respect, this is a fundamental error as parties are entitled to be given reasons.

[11] It is trite that every judgement in a defended suit should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such of the decisions. Even though this was a labour dispute, it is imperative while exercising judicial authority reasons for a judgement must be given as parties need to know why the Judge or judicial officer arrived at a particular decision. Of course giving reasons demonstrates the court's articulation of the factual and legal basis for the decision as well as the interpretation of the relevant law or rules being applied by the Judge. This point was succinctly put by **RT Hon. Sir Harry Gribbs GCMG, AC KBE,** the former Chief Justice of the High Court of Australia as quoted in the **Australian Law Journal** 1993 (67 A) 494 when he said;-

> **"…The citizens of modern democracy–at any rate in Australia-are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial or otherwise. In such a society, it is of particular importance that parties to litigation –and the public-should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view.."**

[12] The respondent's claim was that the appellant failed to follow the requirements of the law by paying him a monthly salary that was below the minimum wage, one month salary in lieu of notice, 5 days worked in the month of November, 2009, annual leave for 4 years, severance pay for 4 years, underpayment of salaries and 12 months' salary for unlawful termination. The trial court had a duty to evaluate and consider the basis or the evidence upon which each claim was made and give a justification for each of the awards. The respondent claimed that he was underpaid against the provisions of the Employment Act and the legal Notice No. 42 of 1st May, 2005 but he did not produce evidence to show how the alleged underpayment was arrived at. Both parties gave evidence and although we may not fault the trial Judge in his conclusion that he disbelieved the appellant's testimony because she was inconsistent, still the Judge did not identify the areas of the appellant's evidence that he found inconsistent.

[13] Be that as it may, we must recognize that it was the trial Judge who had the opportunity to see the witnesses as they testified and to assess their respective demeanors See the case of;- **S. M. v E. N. B.** [2015] eKLR:-

> **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."**
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> See also;- **MBOGO –V- SHAH** [1968] E.A. 93:
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> **"…..A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge, in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."**

1[4] The learned trial Judge did not, however, indicate how the appellant's evidence was inconsistent. As matters stood, the respondent claimed he was employed through an oral agreement and he had worked for 4 years being paid a salary of Kshs 4,000/= per month instead of the mandatory minimum wage

prevailing at the time. On the other hand, the appellant stated that the respondent was a daily casual employee earning a sum of Kshs 300/= per day, and that he had not worked for more than two months within which he absconded work on account of illness and the contract was terminated. In this regard, the Judge found there existed a contract of employment as it was the appellant who was the employer who had a legal duty to keep the records of employment and produce them in court. Since the appellant did not produce any record to show that she was paying the respondent on a daily basis, the above finding by the Judge cannot be faulted. That being the case, the trial Judge ought to have examined each of the claims by the respondent and given reasons for the award. For instance, how the salary of underpayment was arrived at; how this evidence was extrapolated from the legal notices; those legal notices were not produced in court and the figures were not at all verified; so were the hours awarded for overtime, no evidence was adduced whatsoever, for the days when the respondent worked overtime. There were no reasons given for the award of 12 months for unlawful termination considering that the respondent was also awarded one months' salary in lieu of notice. Moreover, the respondent admitted that he was absent from work for a long time due to prolonged illness. In our respectful view, the claim for damages for unlawful termination was not proved and the factors set out under **Section 49 (1)** of the Employment Act were not taken into account. The trial Judge having failed to give any reasons, we can only echo the sentiment expressed by this Court differently constituted in the case of;- **United States International University vs. Eric Rading Outa** [2016] eKLR where the following observations were made;-

> **"In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.**
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> **Although we have found, like the learned judge, that the appellants' termination of the respondents employment was wrongful, we find, on our own consideration of the matter, that the learned judge erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that should have guided him to make an award of compensation for wrongful termination of employment."**

[15] As stated here before, a first appeal, gives us room to re-evaluate the evidence and arrive at our independent conclusion based on the available evidence. See the case of;- **Selle and Another V Associated Motor Boat Company Ltd and Others,** [1968] 1 EA 123 (CAZ):

> "**An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.** (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270)."

[16] What was established from the evidence was the fact that the respondent was employed by the appellant not as a casual labourer but on a monthly basis as the appellant did not produce records to show she was paying the respondent daily wages. As posited earlier we found the Judge was right in his conclusion that it was the duty of the appellant as the employer to keep and produce records of employment. There was no evidence to support the allegation of wrongful termination, underpayment of salaries, overtime and annual leave for 4 years, the law requires every employee to go on leave every year and the respondent did not adduce evidence on why he did not take leave for four years. What we find could have been allowable in the circumstances of this case is one year's leave. That being the case, this

appeal partially succeeds, we set aside the judgement dated 28th August, 2012 and decree issued on 18th September, 2012 and substitute it thereto with the following orders;-

a) One months' salary in lieu of notice Kshs 7,865/=

b) 5 days worked in November 2009 Kshs 1,512/=

c) Annual leave for one year Kshs 7,865/=

d) Severance pay for 4 years Kshs 15,730/=

TOTAL Kshs 32,972/=

This being a dispute over employment, we make no orders as to costs.

Dated and delivered at Nairobi this 29th Day of September 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR