IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 63 OF 2016

BETWEEN

PRINCESS CAB & CAR HIRE LIMITED.....APPELLANT

AND

FRANCIS WAWERU GIKONYO.....RESPONDENT

(An appeal from the Judgment and Decree of the Employment & Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) delivered on 23rd April, 2015

in

E & LRC CAUSE NO. 1179 OF 2012)

****

JUDGMENT OF THE COURT

1. **Princess Cab & Car Hire Limited** (the appellant) hired **Francis Waweru Gikonyo** (the respondent) as a Public Service Vehicle (PSV) driver on 19th March, 2008 for a term of three months ending on 18th June, 2008, which term was supposed to serve as a probation period. He was supposed to be paid Ksh. 400 all-inclusive for everyday worked. The terms of engagement were spelt out in the agreement signed on 30th April, 2008.

2. Upon expiry of the three months he was offered temporary employment as a driver vide an agreement signed on 27th August, 2008. This time, employment was for a term of six months with a monthly salary of Ksh. 12,000 all inclusive. These contracts were renewed upon expiry every three or six months with a slight salary increment, until 29th June, 2011 when the appellant wrote a letter to the respondent as hereunder:-

> **"29th June 2011**
>
> **Francis Waweru Gikonyo**
>
> **C/O Ourselves**
>
> **Dear Mr. Gikonyo,**

REF: <u>YOUR EMPLOYMENT CONTRACT</u>

Reference is made to your Employment Contract dated 24th June, 2010, which is due to expire on 30th June, 2011. The company hereby advises you that it is not intending to renew your Employment Contract after the said expiry.

You are hereby requested to clear with the company within seven days after the date of the contract expiry.

We further thank you for the time you have served with us.

Please acknowledge receipt of this letter by signing the attached copy and returning it to the undersigned.

Yours sincerely,

BERNADETTE N. KIHANYA

<u>MANAGING DIRECTOR.</u>''

3. The respondent declined to sign the letter to acknowledge receipt as requested. The contract was not renewed and the respondent found himself jobless on 1st July, 2011. It is opportune to note that the contract of employment, at clause 7 thereof provided that either partly had a right to terminate the contract subject to one month's notice. This would nonetheless apply if either party intended to terminate the contract before its expiry. The respondent moved to the then Industrial Court vide a memorandum of claim filed on 12th July, 2012 which was later amended on 26th September, 2012.

By his amended plaint, the respondent sought relief as follows:-

"(1) … Holidays Rest Days Overtimes (sic). Risk allowances day worked salary for June 2011. Rest days – on duty 1 x 4 x 39 months = 156 days. One month notice = 13,000. Days worked June 2011 – 13,000 and following days in suit (sic)"

(2) … That the respondents to pay 10% from the basic salary for 3 years and 6 months.

(3) That the respondents to pay costs of the suit. *(sic)**"***

The amount claimed after tabulation amounted to Ksh 480,250.80/=.

5. In response to the amended claim; the appellant filed an amended response in which it denied the respondent's claim and asserted that the respondent had taken all his leave days; he had been paid all his wages and net salary for June 2011; and that his contract had expired on 30th June, 2011, and he had therefore no sustainable claim against the appellant.

6. The matter was heard before the Employment and Labour Relations Court (ELRC) at Nairobi (Wasilwa, J.), and in a judgment rendered on 23rd April, 2015, the learned Judge found that the respondent had not been terminated from employment, but rather, his one year contract had expired. This therefore, meant that there were no damages payable to the respondent and none were awarded. The learned Judge however, made a finding to the effect that the respondent used to work for 12 hours a day instead of 8 hours, and therefore concluded that he used to put in 4 hours of overtime every day and he was owed that money. The learned Judge therefore went on to compute the amount owed as follows:-

"4 hours x 30 = 120 per month x 42 months (3½ years). This translates to 5040 hours x the hourly rate of 37.5 x 2 = 5040 x 37.5 x 2 = 378,000/=."

7. Aggrieved by that judgment, the appellant moved this Court vide the Notice of Appeal dated 24th April, 2015. This was followed by the memorandum of appeal dated 5th April, 2016 which contains five grounds. In the memorandum of appeal, the learned Judge is faulted for awarding Ksh. 378,000 contrary to the respondent's prayers; awarding overtime for 3½ years while disregarding the fact that the employment was based on distinct contracts ranging between six months and one year; calculating overtime including periods when the respondent was away from work for four months; awarding overtime for more than 5000 hours while the appellant had claimed only 1170 hours of overtime. The appellant urged the court to allow the appeal.

8. When the appeal came before us for plenary hearing, learned counsel Mr. Owang, represented the appellant while the respondent appeared in person. Mr. Owang reiterated and expounded his grounds of appeal. He informed the Court that the entire respondent's prayers, save for the one on payment of overtime were rejected by the court. He faulted the learned Judge for recalculating the hours of overtime and granting what the respondent had not asked for. According to Mr. Owang, the respondent claimed 1170 hours of overtime as tabulated in his statement of claim and this claim amounted to Ksh. 86,463 which they had no problem paying to the respondent. Mr. Owang drew the Court's attention to the fact that the learned Judge had calculated overtime for the period the respondent had gone on leave, as evidenced in the leave application/approval forms on record, overtime on sick off days; overtime on three months when respondent was away, a fact he had admitted. He also faulted the learned Judge for treating the separate contracts as one contract of employment. He urged us to dismiss the appeal, or in the alternative allow the claim for overtime as pleaded by the respondent.

9. On his part, Mr. Gikonyo, the respondent urged us to uphold the impugned judgment and allow the award given by the learned Judge and award him costs of the appeal.

10. We have re-considered the pleadings before the ELRC, the proceedings, which included the evidence of the two witnesses who testified before the court, and the exhibits as is expected of us as a first appellate court. In doing so**,** we must always bear in mind the words of *Sir Clement de Lestang VP* in **Selle v. Associated Motor Boat Company** ***[1968] E.A. 123 at p. 126;*** where he stated:-

> ***"… 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 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 witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the 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."***

The above was cited with approval in **Jivanji V. Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431**, and many other decisions of this Court.

11. We have also considered the memorandum of appeal and the oral address by learned counsel and the appellant. From the onset, we are in agreement with the learned Judge that the appellant was not terminated from the employment. It is true he had many disciplinary issues and there are on record not less than nine letters from the respondent to the appellant explaining, or showing cause why he had failed to conduct himself in the manner expected of him by his employer. Those letters were nonetheless not relevant because he was not terminated. The appellant seemed to have tolerated him until his contract expired, then failed to renew it. The learned Judge pronounced herself as follows on that issue:-

> ***"… the claimant served on contract and his last contract was the one dated 24th June, 2010 which was with effect from 1 st July, 2010. The contract was for one year ending June, 2011. It was renewable subject to performance. Time of work is indicated as 6.00 am to 6.00 pm for the day shift and 6. 00 pm to 6.00 am for the night shift. Overtime was payable. The salary of Ksh 13,500 consolidated per month. The reading of this contract was to end on 30th June, 2011 and***

this is the period when the claimant avers that he was terminated. This in my view is not a termination but that the contract came to term by afflixion (sic) of time."

The learned Judge was spot on that issue. Having said so, then we find that the issue of notice or severance pay and any kind of compensatory damages could not arise.

12. In his claim, the respondent by his own computation arrived at 1170 hours of overtime. This amounted to Ksh. 86,463.00. Indeed in his testimony, he told the court that the total hours he had worked overtime was 89, not 1170. How then did the learned Judge arrive at 5,040 hours? It was neither pleaded, nor canvassed during the hearing. It is trite that parties ae bound by their pleadings. See **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR**, wherein this Court expressed:-

"***As authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which the trial court may pronounce. The learned Judge, no matter how well intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."***

We have no doubt that the learned Judge meant well and was probably driven by sympathy for the respondent in view of the fact that he was not entitled to compensatory damages. That notwithstanding, the learned Judge could not ignore well established and settled principles of law as reiterated in the above case. The only other way the learned Judge would have recomputed the overtime hours was if the issue had arisen in the course of the proceedings and the same had been fully canvassed and proven. See decision in **Odd Jobs vs Mubea** 1970 E.A 476.

13. We are in agreement with learned counsel that the learned Judge awarded a claim that had neither been pleaded, nor proven by way of evidence. The respondent admitted in evidence that at one point, he had left employment for a period of 3 months, and was returned to work following intervention by a union official. The learned Judge nonetheless computed overtime for those three months. Clearly, in so doing, she fell into error. The appellant was clear in his mind that he had worked for 1170 hours and assuming he proved his claim to the required standard, that is the amount he was supposed to be paid. We do not find it necessary to delve deeper into the evidence with a view to establishing whether the said claim for overtime was proved or not, as learned counsel for the appellant intimated that they have no issues paying the amount the respondent had claimed for 1170 hours.

14. In the result, this appeal succeeds in part. We set aside the amount of Ksh. 378,000/= awarded by the learned Judge and substitute thereof Ksh. 86,463.00/=. In view of this outcome, we order that each party bears its own costs of this appeal.

Dated and delivered at Nairobi this 19th day of October, 2017.

ALNASHIR VISRAM

……..

JUDGE OF APPEAL

W. KARANJA

……...

JUDGE OF APPEAL

M. K. KOOME

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR