IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 57 OF 2014

BETWEEN

CHEMILIL OUTGROWERS CO. LTD……APPELLANT

VERSUS

LENS CHARLES NDAGO ……..…...1ST RESPONDENT

EDWARD ONYANGO ODHIAMBO…….2ND RESPONDENT

GEORGE OTIENO OKECH ……..…. 3RD RESPONDENT

JULIUS OUMA OWINO…….…….....4TH RESPONDENT

(An appeal from the judgment and decree of the Industrial Court of Kenya at Kisumu delivered by the Honourable Justice H. Wasilwa)

dated 30th September 2013

in

Industrial Cause No.67 of 2013)

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JUDGMENT OF THE COURT

The Appeal before us arises from a judgment of the Industrial Court, in a cause where the respondents, ***Lens Charles Ndago, Edward Onyango Odhiambo, George Otieno Okech*** and ***Julius Ouma Owino*** had claimed that the appellant had unlawfully terminated their employment contracts, and refused to pay their terminal dues. Their claim was that at all material times they were field clerks in the appellants employment, and earned a salary of Kshs 1000/= per month; and that on or about 8th September 2009 the appellant unilaterally and without any notice terminated their employment. They further claimed that the appellant underpaid them during the term of the employment contract, and that at the time of terminating their contracts, it did not provide them with an opportunity to show cause why their services should be terminated. The particulars of the claim were as follows;

i) three months' pay in lieu of notice;

ii) underpayment of their salary;

iii) underpaid leave allowance for the period worked;

iv)unpaid overtime for holidays worked;

v) unpaid overtime for weekends worked; and

vi) gratuity 15% times 15.

The appellant denied ever employing the respondents as field clerks earning a salary of Kshs. 1000/= per month, and further denied unilaterally terminating their services and failing to pay their terminal dues. Instead, the appellant contended that if the respondents were employed, then it was on a temporary basis in terms of the contract, which was subject to renewals depending on the respondents' performance, and further that the respondents contract was terminated after they were appraised and their performance found to be below average. It was their contention that based on the contract, the respondents were not entitled to a salary but a standing allowance of Kshs.1000/=, together with an additional commission for sugarcane harvested and delivered to the company, which services were only required during the harvesting period. The appellant concluded by stating that the respondents were paid all amounts due to them by the time the contract was terminated.

In her judgment, the learned judge found that the respondents were employees of the appellant, whose employment contracts were terminated unlawfully. As a consequence, the trial court awarded the respondents,

i) Amounts being under payment of their wages as follows,

Lens Charles Ndago – from March 2002 to September 2009 Kshs 605,772/-

Edward Onyango Odhiambo from January 2004 to September 2009 Kshs 469,926/-

George Otieno Okech– from September 2005 to September 2009 Kshs 352,630/-

Julius Ouma Owino – from November 2006 to September 2009 Kshs 258,150/-

ii) One month's salary in lieu of notice of Kshs 9,442 for each respondent;

iii) Twelve months' salary for wrongful termination of a sum of Kshs 113,304/-;

iv) Service pay of 15% for each year worked as follows;

Lens Charles Ndago –Kshs 37,768/-

Edward Onyango Odhiambo - Kshs 23,605/-

George Otieno Okech –Kshs 18,884/-

Julius Ouma Owino- Kshs 14,163/-.

The appellant was aggrieved by the decision of the trial court, and appealed to this court, where in the memorandum of appeal they specified 19 grounds of appeal.

When the appeal came up for hearing, ***Mr. Nyanga***, learned counsel for the appellant informed us that he would collapse the grounds into one ground namely, that the trial court failed to evaluate the evidence

that was on the record, and in particular the nature of engagement that was between the parties having regard to the trade practices in the sugar industry.

Counsel submitted that the payments made by the appellant to the respondents was based on incentives and allowances. In counsel's view, the classification of the respondents was wrong, and the trial court arrived at the wrong conclusion that the respondents were employees of the appellant; that as a consequence, they were not entitled to the amounts claimed as underpayment, twelve months' salary for wrongful termination, service pay and the payment in lieu of notice which was not due to them; that on the basis of a letter of appointment, the respondents were appointed to work as field agents, on a commission basis. Counsel further submitted that it was admitted that the commissions paid were in addition to the monthly retainer of Kshs. 1000/=.

Counsel urged us not to rely on the literal meaning of the contract, but on the intention of the parties, in order to reach a finding that the respondents were commission agents and not employees, particularly having regard to the fact that the appellant was a non-profit making farmers association.

Mr. Odeny learned counsel for the respondents opposed the appeal and submitted that the respondents were employees of the appellant, based on the letters of appointment issued to the respondents by the appellant, and there was no evidence to show that the respondents were commission agents. Counsel submitted that the appellant had admitted that the respondents were employed as field clerks on a temporary basis and earned a monthly salary; that their employment was terminated without notice following a performance appraisal. Counsel concluded that the learned judge was correct in finding that the respondents were employees of the appellant, whose contracts had been wrongly terminated.

Before we address the issues before us, it will be necessary to restate our duty on a first appeal as set out in ***Makube vs Nyamiro [1983] KLR 403;***

> ***"… a Court of Appeal will not normally interfere with a finding of fact by a trial court, unless it is based on no evidence, or on a misapprehension of evidence, or the judge is shown demonstrably to have acted on wrong principles.""***

Besides this principle, section 17 of the Industrial Court Act limits our jurisdiction on appeals from the Employment and Labour Relations Court to only points of law. Both of these are points of law. To determine the first one, an examination of the evidence on record is imperative.

From the record of appeal and the submissions made by counsel, the main issues for determination before this Court are:

> ***i) Were the respondents' employees or commission agents?***
>
> ***ii) Was the appellant's termination of the respondents' services lawful or did it amount to wrongful termination?***

In re-evaluating the evidence, it is not disputed that, by way of letters of appointment, Lens Charles Ndago was appointed on 26th March 2001, Edward Onyango Odhiambo was appointed on 15th January 2004, George Otieno Okech was appointed on 1st October 2005 while Julius Ouma Owino was appointed on 6th November 2006 by the appellant as field clerks. The terms of their engagement were on a temporary basis, and they were each to be paid Kshs 1000/= per month. It is also not in dispute that the respondents' engagement was terminated on 8th September 2009.

What is in dispute is whether the respondents were to be considered employees within the meaning of the Employment Act 2007 ***(the Act)*** or were commission agents, having regard to trade practices in the sugar industry.

The definition of an employee under the Act is a person employed for wages or a salary and includes an

apprentice and indentured learner.

Section 9 of the Act provides the prerequisites for an employment relationship, and ***Section 9 (1)*** stipulates,

A contract of service—

> ***(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
>
> ***(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing.***

At ***Section 9 (3)*** of the Act it is stipulated that for the purpose of signifying his consent to a written contract of service, an employee may sign his name thereon.

Section 10 of the Act sets out the contents of an employment contract, and provides that it should include *inter alia* the name, age, permanent address and sex of the employee; the name of the employer, the job description of the employment; the date of commencement of the employment; the form and duration of the contract; place of work; and the hours of work.

With respect to remuneration, ***section 10 (h) and (i)*** of the Act provide for remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits and the intervals at which remuneration is paid.

In this case, it was by way of their respective letters of appointment, that the respondents' were engaged as field clerks. The letters of appointmentprovided for the date of appointment, as well as the designated area of service, and stated:- Noteworthy, is the manner in which the respondents were to be paid.

> ***"Wages: Kshs. 1000/- per month for start but may be considered upwards with increase in work load and your performance."***

At the foot of the letter, the respondent signed their names in acceptance of the terms and conditions as follows:

> ***"I accept the terms and conditions as above and confirm that I will be able to commence employment on…." (emphasis ours).***

When the appellant terminated the respondent's employment, the termination letter referenced ***"TERMINATION OF SERVICES"*** reads:

> ***"Your attention is drawn to the above subject. You were offered a job in this Company through your letter dated 26th March 2001 to serve as a field clerk in lower Tams of settlement schemes.***
>
> ***We regret to inform you that we have completed conducting your appraisal and your performance was below average.***
>
> ***We thank you for the time you worked with us and wish you well in your future endeavors"***

Having regard to the contents of the letter of appointment, and specifically, the reference to the payment of monthly wages as opposed to commissions, and the term "*employment*", there can be no doubt that at all times the appellant intended to establish an employer/employee relationship with the respondents.

This is further buttressed by the nature of the work they undertook as field clerks, and the manner in which it was carried out.

It was the respondents' contention that their responsibilities as field clerks entailed the preparation of receipts for sugarcane transportation to the factory, undertaking field census and weekly progress reporting. They also stated that they had been employed for varying periods of between 3 and 9 years until the date of termination.

The appellant also confirmed that the respondents were engaged as field clerks, and in particular, ***Francis Onditi RW1***, the appellant's acting General Manager testified that the respondents' work involved the recording of deliveries of cane and checking on loan repayments, and that they would report to the office occasionally. They were paid a monthly amount of Kshs. 1000, which payments were evidenced by the monthly schedule of payments produced by the appellant.

When we consider the nature of the work in which the respondents were involved, it is clear to us that this was clerical work, whereby they were required to provide administrative support in the appellant's operations, which was purely for the benefit of the appellant's business. The nature of the services makes it difficult to see how the respondents could have been anything other than employees.

Furthermore, the appraisals carried out by the appellant should not be disregarded. It was, following the appraisals, that the respondents' performance was supposedly found to be below average, which led to the termination of their employment.

An ***"appraisal"*** as defined by the ***Concise Oxford English Dictionary 12th Edition*** is a formal assessment of the performance of an employee. Appraisals are an employment methodology for evaluating and documenting employee job performance and employee productivity. If indeed the respondents were not employees, what would have been the purpose of seeking to evaluate and rate their performance?

Yet despite these glaring factors that point to the creation of an employment relationship, the appellant has argued that the respondents were appointed as commission agents, and not employees, in terms of the trade practice in the sugar industry.

The ***Concise Oxford English Dictionary 12th Edition,*** defines a commission agent as one who sells goods and services for a fee.

The Concise Dictionary of Law, 2nd Edition, page 17 defines an **"agent"** as,

> ***"A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."***

When we consider this defination in the light of the facts of this case, we can find no evidence to support a principal/agent relationship between the parties. There was no agreement, commission based or otherwise, specifying any agency terms, or an agreed rate of commission payable. Neither was there any evidence to show that the respondents acted as intermediaries or established legal relations between the appellant and other third parties. What was before the court was a letter of appointment, that appointed the respondents to the position of field clerks, and the agreement to pay monthly wages of Kshs. 1000/=. Though the appellant alluded to the payment of a commission at a rate of 85 cents per ton for every 5 tons of sugarcane delivered, the purpose of such a payment was not documented, and in our view, there was every possibility that it was an employee incentive that formed part of the respondents' remuneration package.

Consequently, when the fundamentals of a principal and agent relationship are taken into account, we can find no basis to support the contention that the respondents were the appellant's commission agents. Instead, from the express terms of engagement, within the letter of appointment, including the payment of wages, and the manner in which the employment services were carried out, we find that for all intents and purposes, an employer/employee relationship existed within the meaning of the Act.

Having found that the respondents were employees, were their contracts of employment lawfully

terminated by the appellant?

Pursuant to ***section 41*** of the Act, prior to terminating the services of an employee for reasons of *misconduct, poor performance or physical incapacity*, an employer is under a statutory obligation to inform the employee of the reasons and to give the employee an opportunity to make representations before the decision is made.

Turning to the manner in which their employment was terminated, it was the respondents' contention that their contract of employment was terminated summarily following a performance appraisal where their performance was found to be wanting, which was unlawful.

Section 35 of the Act provides for notice in specific instances. In particular, ***section 35 (1)*** states,

> ***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) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;***
>
> ***(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or***
>
> ***(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.***

Besides the acknowledgment that the respondents were employees, given the reference to the "*job*" offer, as was the case here, the requirement was that for the contract to be terminated either party was required to give twenty-eight days' notice in writing. In this case, the respondents were issued with a letter of termination, as seen earlier, specifying that their services were terminated. No notice period was provided by the appellant, such that there can be no doubt that the respondents' services were terminated summarily.

In addition, the letter did not specify that the respondents would be afforded an opportunity to present their case before the decision was made to terminate their services contrary to the requirements of ***section 41*** of the Act. Upon delivery of the letter to the respondents, their employment was considered effectively terminated, thereby denying them the opportunity to rebut or disprove the appraisal findings on their performance.

Given these circumstances, we find as did the learned judge, that the respondents' were the appellant's employees, whose contracts were wrongly terminated. There is therefore no basis for the complaint that the learned judge failed to properly evaluate the evidence.

Accordingly, the appeal lacks merit and is dismissed, with costs to the respondents.

Dated and delivered at Kisumu this 25TH day of SEPTEMBER, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL