



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO.13 OF 2015

BETWEEN

**COASTAL BOTTLERS LIMITED
APPELLANT**

AND

**GEORGE KARANJA
RESPONDENT**

(Being an appeal from the judgment and decree of the Industrial Court of Kenya at Mombasa (Makau, J.) dated the 28th February, 2014

in

ICC No. 373 of 2013 formerly Mombasa HCCA. No. 44 of 2010)

JUDGMENT OF THE COURT

By a letter of appointment dated 9th July, 1998, the appellant employed the respondent as its systems administrator at a monthly salary of Kshs.18, 000/-. He worked until December, 2007 when he voluntarily resigned from the said employment. By then, he had risen to the level of a Supervisor, earning a monthly salary of Kshs.125, 219/-. Upon resignation, he was paid his dues save for what he termed as gratuity amounting to Kshs.1, 126,971/-

Demands to the appellant for the payment of the aforesaid sum proved futile, prompting the respondent to mount **Mombasa SRMCC No, 2652 of 2008** to force such payment. In its defence, the appellant contended that there existed no provision for payment of gratuity in the respondent's letter of employment and that the terms and conditions of service relied on by the respondent created no contractual obligation for payment of such gratuity. To the contrary, it pleaded, the Management Terms and Conditions of Service were a mere policy document and no obligation to pay gratuity could be inferred therefrom.

In a judgment delivered on 1st March, 2010, the court allowed the respondent's claim on the basis that from the conduct of the appellant in the past of paying gratuity to employees in the same bracket as the respondent when they left its employment, payment of gratuity was thereby implied.

Dissatisfied with this decision, the appellant lodged an appeal before the High Court, being **Mombasa HCCA No 44 of 2010**. However, with the advent of the Industrial Court (now renamed the Employment and Labour Relations Court), that appeal was transferred to the Industrial Court as **Mombasa Industrial Court Cause No. 44 of 2010**. Upon hearing the appeal, **Makau J.** found no merit in the same and dismissed it with costs holding that gratuity was provided for under the Management Terms and Conditions of Service that were supplemental to the contract of employment. It is this decision that has generated this second and perhaps last appeal, on the grounds that the Judge was in error in dismissing the appeal, finding that gratuity was payable, deciding on the question of discrimination which was not pleaded, holding that express terms of employment could be overridden by terms of a policy document, considering extraneous grounds of appeal without giving parties an opportunity to be heard, denying the appellant a fair hearing and lastly, reopening and deciding on a matter that had already been decided upon by the trial court.

With leave of this Court, parties were allowed to ventilate their respective arguments by way of written submissions and were subsequently given opportunity to orally highlight the same. Though the appeal was mounted on the aforesaid 7 grounds, the appellant at the hearing, through its learned counsel **Mr. Noorani**, abandoned grounds 2, 3 and 4 and only urged the remaining ones being grounds, 1, 5, 6 and 7. In our view, the grounds abandoned as aforesaid were the fulcrum around which this appeal rotated. Those urged were to say the least peripheral. We say no more.

Highlighting the appellant's written submissions, Mr. Noorani faulted the Industrial Court for basing its decision on issues that were neither grounds of appeal before it nor submitted on by the parties. Counsel added that in the appeal before the Industrial Court, the only ground that stood for determination was whether the trial magistrate erred in awarding gratuity despite having found that the same was not an express term in the employment contract. Counsel contended that instead of addressing this issue, Industrial Court went on to make an inquiry into the entire case as laid before the trial court. This, according to the appellant, meant that the Court acted in excess of its jurisdiction and in the process deprived the appellant of its right to be heard since the appellant had no opportunity to submit on the additional issues introduced by the Industrial Court and which nonetheless informed his ultimate decision. In view of the foregoing, counsel said, the matter ought to be remitted back to the Industrial Court to be heard afresh by a different Judge.

Opposing the appeal, **Mr. Adala**, learned counsel for the respondent, submitted that the Industrial Court acted well within its bounds. That as a first appellate court, it had a legal duty to interrogate the evidence tendered in the trial court and come to its own independent findings and conclusions. The respondent took issue with the fact that the appellant had not pointed out what exactly the new issues introduced by the Industrial Court were. He submitted that in any event, the respondent had in its plaint pleaded and at trial proved that gratuity was payable and that the concurrent findings of the two courts on the issue can thus not be questioned.

From the grounds of appeal and submissions by learned counsel, the primary issue for resolution here appears to be whether or not the Industrial Court acted within his jurisdiction in not concentrating or restricting itself to the limited ground (s) that were specified in the grounds of appeal and were canvassed before it. In order to determine the issue, it is pertinent to trace how jurisdiction of our courts in labour and employment disputes flows.

It is not in doubt that the cause of action arose in December, 2007 and was thus governed by the provisions of the Trade Disputes Act then in force, but now repealed. Whereas the said Act provided for resolution of labour disputes by the Industrial Court, it has to be noted and appreciated that the jurisdiction of the Industrial Court was by no means exclusive, thus enabling parties to sometimes lodge their disputes as civil claims in the Magistrate's Courts or the High Court depending on what the dispute turned on and the pecuniary jurisdiction. Such appears to have been the case here. In light of this, the

parties' right of appeal at first instance lay with the High Court on issues of both law and fact, pursuant to **Section 65(1)(b)** of the Civil Procedure Act. With the setting up of the Industrial Court however, such appeals now lay with the Industrial Court having regard to the provisions of **Section 12(1)** of the Industrial Court Act. However, given that under **Article 162(2)** of the Constitution, the Industrial Court enjoys the same status as the High Court, any party dissatisfied with the outcome of a first appeal in the Industrial Court finds further recourse by way of a second appeal before this Court; save to say that such an appeal is limited to issues of law only in terms of **Sections 72 and 79D** of the Civil Procedure Act.

From the above, two issues pertinent to this appeal emerge; one, the Industrial Court had the jurisdiction in both fact and law to sit on appeal of the magistrate's decision. Under this duty and as a first appellate court, it was bound to re-evaluate and re-analyze the evidence put before the trial court in a bid to come up with its own independent findings even on the limited issue (s) framed before it. Two, the duty of this Court is limited to determining whether the first appellate court in its interpretation of the law, delivered on its mandate. We shall address these two issues in some detail in turn.

In its first appeal, the appellant faulted the judgment of the trial court on the basis that the same was not supported by the pleadings and the evidence adduced before court. That having found that gratuity had not been expressly provided for under the contract and the Management Terms and Conditions of Service, the magistrate ought not to have implied it in her judgment. In the judgment of the trial court, this is how the learned trial magistrate rendered herself;

“.....The letter of employment the Plaintiff was issued with was silent on the issue of payment of gratuity. Similarly, the Management Terms and Conditions of Service were also silent on the issue of gratuity. In the case of Central Bank of Kenya v. Kivieko Muteti cited by the defendant's counsel, no claim for gratuity was pleaded. In this case however, it was pleaded. Although gratuity wasn't a term of the contract of service between the defendant and their employees, we have evidence in the testimony of plaintiff witness 2. EUNICE WAKINI KAHU who resigned the same year as the Plaintiff herein. She was paid gratuity. Exhibit 7 is evidence of such payment. The defendant acknowledged having paid the same. It is hence clear that there was an implied contract that they had to pay gratuity.....”

In determining that appeal, the first appellate court was of the view that even though the letter of appointment made no mention of gratuity, the same was supplemental to the Management Terms and Conditions of Service in place between the parties and that since gratuity was provided for under the terms and conditions of service, the same was thus payable.

In this appeal, the appellant faults that finding by the Industrial Court on the basis that in so holding, the Court departed from the grounds and issues raised in the memorandum of appeal and instead formulated new issues on which the parties were never given an opportunity to submit. In particular, the appellant's contention was that there existed narrow issue isolated for determination; and wondered whether Industrial Court could go outside a framed issue in respect of which arguments had been advanced before it by the parties and address issues extraneous thereto. The appellant's answer to this was in the negative and to this end, sought refuge in the decision of this court in **Bake 'N' Bite Limited v. Rachel Nungare & 16 others [2015] Eklr**. The respondent naturally took an opposite view as already demonstrated elsewhere in this judgment

It is trite law that pleadings are not only binding on the court but on the parties as well (see. **Galaxy Paints Company Ltd v Falcon Guards Ltd, Civil Appeal No. 219 of 1998**, where this Court held that:-

“The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising from such issues as the parties framed for the court's determination.”

This decision was also adopted with approval by this Court in **William Muthee Muthami v Bank of Baroda [2014] eKLR**), when it restated the principle thus:-

“It is a firmly established rule of evidence that the evidence produced in court to prove a claim must flow from the pleadings.”

This applies not only to pleadings and proceedings before the trial court, but to appeals as well. An appellate court is bound by the issues pleaded in the memorandum of appeal and ought not address any issues extraneous to the grounds pleaded (see. **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**).

Did the Industrial Court address itself to issues not pleaded? Through its memorandum of appeal in that court, the appellant’s sole complaint was that the trial court erred by awarding gratuity to the respondent; despite having found that the contract had made no express provision for the same. It was the appellant’s argument that the magistrate should not have implied gratuity as a term to the contract as the respondent had not even pleaded it in his claim.

This is an erroneous supposition because in his plaint in the trial court, the respondent stated as follows:-

“5. The plaintiff avers that it was a term and condition of service that on termination of employment other than termination on disciplinary grounds, the plaintiff would be entitled to terminal dues and or gratuity at the rate of 30 days pay for each completed year of service at the current salary.

6. The plaintiff states that at the time of termination of his service he was on a monthly salary of Kshs.125,219. The plaintiff thus claims the sum of Kshs.1,126,971 against the defendant ‘on account of gratuity and or terminal dues payable to him for his 9 years of service’ (emphasis added)”

It is thus manifestly apparent that gratuity had been pleaded by the respondent. Equally apparent is that the respondent had pegged his claim primarily on the Management Terms and Conditions of Service. In our view, the appellant’s contention that gratuity as an express or implied term was never pleaded before the trial court is without basis. Consequently, having been pleaded, the trial court as well as the Industrial Court were bound to decide on the same.

Looking at the judgments delivered by the two courts below, both courts concurred albeit for different reasons that gratuity was payable to the respondent. To the trial court, gratuity was an implied term of the contract based on the fact that the appellant had paid the same to other employees of equal rank to the respondent. To the Industrial Court, the question placed before it was whether the trial court erred in holding that there was an implied term on gratuity. In response thereto, the Industrial Court held that gratuity was payable on account of the express term in the Management Terms and Conditions of Service between the appellant and its management level staff, which it saw as applicable to the respondent. In our view, this did not constitute a departure from the grounds raised in the memorandum of appeal, bearing in mind that the sole issue for determination in the trial court was whether or not gratuity was payable expressly or by implication. Further, this case is distinguishable from the **Bake ‘N’ Bite** (supra) because in that case, unlike in the present appeal, the issues addressed by the Judge had not been pleaded. As indicated earlier, such is not the case here.

In addition and as already stated, it is the duty of the first appellate court to reevaluate the evidence presented before the trial court and reach its own independent findings. The Management Terms and Conditions of Service as well as all other factors considered by the Industrial Court had been presented at the trial as evidence. The learned Judge could not determine the issue of whether gratuity was payable or not without having regard to the evidence placed before the trial court. Even on the limited issue framed by the parties for his determination; i.e. whether the trial court having found that the payment of gratuity was not an express term in the contract of employment between the parties, was right to conclude nonetheless that it was payable by implication? The learned Judge still had a duty to look at the evidence laid in the trial court before answering the issue. It was not an issue capable of an abstract determination nor was it amenable to a simple yes or no answer. The Industrial Court had to re-examine the evidence afresh and reach its own findings. As a result, we see no extraneous issues addressed by the Industrial

Court as claimed by the appellant. His consideration of the Management Terms and Conditions of Service was essential in order to establish whether or not gratuity was payable and whether the trial court was right in drawing an inference despite having found as a fact that there was no such express provision in the contract of employment.

In doing so therefore, the Industrial Court cannot be accused of failing to limit itself to the grounds of appeal nor can it be accused of re-opening the case and overstepping its mandate. Further and as correctly observed by counsel for the respondent, the appellant has not even pointed out a single issue that the Industrial Court introduced in its judgment. Finally in discharging this legal duty, we do not see how the appellant was denied a fair trial as envisaged by **Article 50** of our Constitution.

The inevitable conclusion we have come to therefore is that this appeal lacks merit and is accordingly dismissed.

Dated and delivered at Malindi this 30th day of October, 2015.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W.OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR
