IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MARAGA & SICHALE, JJ.A)

CIVIL APPEAL NO. 48 OF 2013

BETWEEN

SOUTHERN ENGINEERING COMPANY (SECO)…….APPELLANT

AND

DAVID ANZANI OMBEBA……..……..……RESPONDENT

(An appeal from the judgment of the of the High Court of Kenya at Mombasa (Makau, J.) dated 26th August, 2013

In

Industrial Court No. 4 of 2013.)

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JUDGMENT OF THE COURT

[1] The appellant before us, **Southern Engineering Company** (SECO), was the respondent in a claim filed against it in the Industrial Court by its former employee, ***David Anzani Ombeba,*** who is now the respondent in this appeal. In the initial claim filed on 24th January 2013, the respondent sought declarations that it had a contract of employment with the appellant having worked for the appellant for seventeen years; that the appellant was in breach of the contract of employment; and that the respondent was entitled to payment of acting allowance and service pay.

[2] In response to the claim, the appellant admitted having employed the respondent, but denied that the respondent was entitled to the reliefs sought. The appellant contended that the respondent's employment was lawfully terminated on account of redundancy; that the appellant went out of its way and obtained the respondent employment with a sister company; that the respondent left the employment with the sister company following a disagreement over the transfer of his service benefits from the appellant to the sister company; that following negotiations the appellant paid the respondent a total of Kshs.217,770/- being his full and final dues in respect of gratuity and wages due to him; and that the respondent was not entitled to any acting allowance, service pay or any further payment on account of the redundancy.

[3] In reply to the appellant's statement of response, the respondent maintained that he was entitled to the

acting allowance, gratuity payment, and payment on account of redundancy in accordance with the collective bargaining agreement signed between his union and the appellant. The respondent therefore prayed for orders that the termination of his employment on account of redundancy was unlawful and that he was entitled to the acting allowance and service pay.

[4] Hearing of the suit proceeded before ***Makau, J.*** who upon considering the evidence for the respondent and the appellant, and the written submissions filed by each party, delivered judgment in favour of the respondent for payment of a total sum of Kshs.1,195,080.80/- being severance pay, accrued acting allowance and pay in lieu of fourteen days leave. Having taken into account the amount of Kshs.272,272/- already paid to the respondent, final judgment was given in favour of the respondent for the sum of Kshs.922,808.80/-

[5] Being dissatisfied with the judgment, the appellant has moved to this court raising fourteen grounds of appeal. In a nutshell, the appellant is aggrieved that the learned judge exercised his judicial authority unjustly, as the finding in favour of the respondent was contrary to the evidence adduced by the parties; and that the awards made were outside the certificate of agreement reached by the parties before the conciliator on 29th November 2012. The appellant has further faulted the learned judge for: relying on only one piece of evidence in concluding that the respondent was working in an acting capacity; computing severance pay based on total monthly remuneration (*gross pay*) instead of monthly basic pay contrary to ***Sections 2, 10 (2),(h)*** and ***(i), 35(5), 36, and 40(1)(g)*** of the **Employment Act 2007**; and finding that the amount already paid out to the respondent was Kshs.272,272/-when the respondent had actually been paid Kshs.384,540/-inclusive of statutory taxes and deductions.

[6] Following directions given by the court in consultation with the parties, written submissions were duly filed and exchanged for the purpose of disposal of the appeal. In its submissions, the appellant urged us to allow the appeal maintaining that the learned judge misdirected himself and exercised his judicial authority unjustly without reference to the evidence before him; that in terms of ***Section 2*** as read with section 40 of the Employment Act 2007, the respondent was never declared redundant because he was given alternative employment in the appellant's sister company following an agreement between the appellant and the respondent's union; that the respondent terminated his employment with the sister company after one year following a disagreement regarding the transfer of his service benefits from the appellant's company, and therefore the issue of redundancy did not arise.

[7] Further, the appellant submitted that the awards made by the learned judge were contrary to the conciliatory agreement reached between it and the respondent's union on 29th November 2012 resulting in the respondent accepting payment from the appellant in full and final settlement of his claim. Relying on ***Thomas De- La Rue (K) Limited v David Opondo Omutelema [2013] eKLR***, the appellant observed that no evidence was adduced by the respondent to prove that the agreement made before the conciliator was irregular or unlawful or that the discharge voucher executed by the respondent was executed under duress. In particular the appellant attacked the award made by the learned judge in regard to acting allowance maintaining that the court ignored the paucity of evidence in regard to the claim, and the fact that only a single letter referred to the respondent's acting capacity.

[8] As regards the calculation of the respondent's severance pay, it was argued that the calculation was not done in accordance with the provisions of the Employment Act 2007 or the General Wages Order on pay and remuneration, and that the calculations also failed to take into account the statutory deductions. The court was therefore urged to allow the appeal and set aside the judgment of the Industrial Court in its entirety.

[9] On its part, the respondent in its written submissions questioned the extent of our jurisdiction to entertain the appellant's appeal arguing that ***Section 27(2***) of the Labour Institutions Act No. 12 of 2007, ***Section 17(2)*** of the Industrial Court Act 2011 and ***Rule 27(4)*** of the Industrial Court (Procedure) Rules confine appeals from the Industrial Court to the Court of Appeal to matters of law only; that as an appellate court we have no mandate to examine and analyze the facts and evidence adduced before the Industrial Court, and come to a different conclusion as suggested by the appellant; that the appellant's grounds of appeal challenging the exercise of the learned judge's judicial authority was anchored on

matters of fact and evidence and should therefore be dismissed; and that there was evidence that the respondent's employment was terminated on account of redundancy before the attempt to transfer the respondent to the sister company.

[10]As regards the awards made by the Industrial Court, the respondent argued that the Industrial Court is a specialized court with a mandate to hear and determine employment and labour related matters; that ***Section 18*** of the Industrial Court Act 2011 gives this Court appellate jurisdiction to hear and determine appeals from the Industrial Court; that the appellant not being satisfied with the dues paid to him following the conciliation, had the right to move to the Industrial Court to have the agreement reviewed to correct the imbalance of the bargaining power; that the respondent did not have the benefit of union representation at the time of computation of the payment made to him by the appellant; and that the payment made was a violation of his right to fair remuneration contrary to ***Article 41(2)(a)*** of the Constitution of Kenya 2010.

[11] On the claim for acting allowance, the respondent submitted that the letter dated 9th September 2005, appointing him as acting head of maintenance department was from the appellant and was confirmed by the appellant's human resource manager; and that in addition, the pay-slip for August 2007 which was produced in evidence also made reference to the acting capacity. The respondent denied having been paid Kshs.384,540/- contending that neither the appellant's human resource manager nor the clearance voucher or payments voucher indicated the computation of the settlement at Kshs.384,530/- before tax, nor was evidence adduced to show that any tax was paid. The respondent maintained that the learned judge was correct in his computation of severance pay.

[12] Although parties were given an opportunity to highlight their written submissions, the appellant opted to rely entirely on the written submissions without highlighting. The respondent made oral submissions reiterating that under ***Section 27(2)*** of the Labour Institutions Act 2007 and ***Section 17(2)*** of the Industrial Court Act 2011 appeals from the Industrial Court to the Court of Appeal are restricted to matters of law only; and that this was rightly so in view of the fact that the Industrial Court has appellate jurisdiction; that failure by the learned judge to appreciate facts and evidence laid before him as alleged by the appellant were questions of fact which could not be entertained in this appeal; that the appellant's grounds of appeal were mainly hinged on matters of facts and evidence, which this Court has no jurisdiction to reassess and come to a different conclusion from that of the Industrial Court; that the evidence was in any case clear that the appellant terminated the respondent's employment on account of redundancy and that the respondent did not, of his own volition, leave the employment with the sister company.

[13] We have given careful consideration to this appeal, the written submissions, the submissions made orally and the authorities cited. As was stated by *Nyarangi J.A* in ***The Owners of the Motor Vessels ("Lillian S") v Caltex Oil Kenya Limited [1989] KLR 1***:

> ***"Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction".***

Thus the first issue that needs consideration in this appeal is to settle the issue of jurisdiction. ***Article 164 (3)*** of the Constitution provides the jurisdiction of this court as follows:

> ***"164.***
>
> ***(3) The court of appeal has jurisdiction to hear appeals from-***
>
> ***(a) the High Court; and***
>
> ***(b) any other court or tribunal as prescribed by an Act of Parliament."***

[14] The industrial Court is a superior Court established under ***Article 162(2)*** of the Constitution as a Court with the status of the High Court. Under ***Article 164(3)(a)***, this Court has a general power to hear appeals from the Industrial Court. Further, in accordance with ***Article 164(3)(b)*** Parliament has circumscribed the extent of this Court's appellate jurisdiction through ***Section 27(2)*** of the Labour Institutions Act 2007 and ***Section 17(2)*** of the Industrial Court Act 2011, by giving a specific right of appeal limited to matters of law only in appeals emanating from Industrial Court. In our view the limitation is appropriate in light of the fact that the Industrial Court is a specialized Court guided by special rules and procedures, and therefore best suited to deal with matters of fact. It is also in the spirit of ***Article 159(2)(b)*** of the Constitution that litigation in this area be expedited by avoiding unnecessary protraction on factual issues. Therefore, the restriction of the right of appeal on matters from the Industrial Court to matters of law only, is not inconsistent with the Constitution.

[15] The challenge is to draw the line between what would amount to a matter of law as opposed to a matter of fact. In ***Attorney General v David Marakaru*** ***[1960] EA 484***, the predecessor of this Court followed ***Bracegirdle v Oxley*** ***[1947] 1 All ER 126*** in which this distinction arose and *Lord Denning* stated as follows:

> ***"On such a question, there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony, conclusions from those facts are inference deduced by a process of reasoning from them. The determination of primary fact is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them...the conclusions from those facts are sometimes conclusions of facts and sometimes conclusions of law."***

Peters v Sunday Post ***[1958] EA 424*** offers further guidance as follows:

> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact, of a judge who tried the case, and who has the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But it is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion."***

[16] In this case, the appellant attacked the conclusions which were arrived at by the learned judge on the facts before him. The conclusions were basically conclusions of facts based on the primary evidence that was before the trial court. For instance, the fact that the respondent was served with a notice of redundancy; that a dispute was declared and subjected to conciliation; that the respondent was paid some money and duly signed a discharge voucher for the actual salary relating to the time in issue; and the appellant's entitlement to payment of acting allowance, were all factual conclusions based on primary facts which were before the court.

[17] Contrary to the submissions now made by the appellant, redundancy was not in dispute. The issues before the learned judge were whether the redundancy was unfair and in breach of contract; and whether the claimant was paid all his employment dues upon the said redundancy. It is evident that during the conciliation process, the appellant conceded that the respondent was entitled to payment of severance pay for seventeen years. The dispute before the learned judge was the calculation of the severance pay, that is, the salary upon which the computation of severance pay was to be made; and also the question whether the respondent was entitled to payment of acting allowance and if so the rate thereof.

[18] In dealing with the respondent's claim, the learned judge stated as follows:

> ***"…the court has carefully considered the evidence adduced and more so the defence exhibits in support of payment of the terminal dues of Kshs.272,272/- to the claimant. According to RW1, the figure was calculated using the monthly basic pay of Kshs.33934x20 days per year of service for 17 years less taxes. The claimant accepted the payment and discharged the respondent fully.***

The foregoing notwithstanding, the court has the jurisdiction to review settlement if the employee appeals in order to correct the imbalance of the bargaining power" (emphasis added)

[19] It is on that basis that the learned judge reviewed the calculation of the appellant's dues and used his gross monthly earning established at Kshs.52,876 to calculate his severance pay. The defence exhibits referred to by the learned judge which were annexed to the appellant's response to the respondent's statement of claim included three discharge vouchers. In the first discharge voucher dated 18th January 2012, the respondent acknowledged a sum of Kshs.50,205/- which he accepted:

"…in full and final settlement of all arrears and associated dues and any other claims of whatsoever nature that I have or may in future have being inclusive of all costs and interests payable to me and arising out of the contract of employment between myself and the company."

Similarly, in the second voucher dated 3rd December 2012, the respondent accepted a sum of Kshs.38,534/-

"…as full and final settlement of all my terminal and or final dues and other claims in whatsoever nature that I have or may in future have, being inclusive of all costs and interests payable to me and arising out of the contract of employment agreed between myself and the company, this amount is inclusive of all dues owing to me as regards to include public holiday and off days worked during this period, leave days earned and not taken during the period of my contract. I also confirm that I have no further claim whatsoever against the company…"

Finally in the last discharge voucher dated 27th December 2012 the respondent acknowledged a cheque of Kshs.217,770/- and a cash sum of Kshs.54 502/-

"…being all my final gratuity wages due as sum payable to me and arising out of my employment contract which elapsed on 31st July 2011, between myself and Southern Engineering Company Limited… I also do confirm that the aforesaid sum is accepted to me as full and final settlement of all my terminal and or final dues and other claims in whatsoever nature that I have or may in future have being inclusive of all costs and interests payable to me and arising out of the contract of employment agreed between myself and the company… this amount is inclusive of all dues owing to me as regards to include public holidays and off days worked during this period leave days earned and not taken during the period of my contract. I also confirm that I have no further claims whatsoever against the company…"

[20] All these discharge vouchers were signed by the respondent and one ***Mathew O. Bilo*** who is identified in the collective bargaining agreement annexed to the respondent's reply to the appellant's response, as the Chief Shop-steward. It cannot therefore be correct as opined by the learned Judge that there was imbalance of the bargaining power. Indeed, the respondent never questioned the discharge vouchers in his reply to the appellant's response. It is evident that the respondent and his union kept on pushing the appellant and notwithstanding the first two discharge vouchers, further payment was made as per the third voucher. Thus there was no justification for the intervention of the court in a matter where the parties had freely agreed. That was the essence of the conciliation process, and a precedent allowing the court to ignore such an agreement would put a damper on the conciliation process promoted in resolution of labour disputes.

[20] The crux of the respondent's complaint before the Industrial Court was whether the amount due should have been calculated on the respondent's basic salary or gross salary. The collective bargaining agreement only mention "pay" without specifying whether gross or basic. It is evident from the submissions, that were made before the learned judge that the discharge voucher was based on the computation of the severance pay as calculated on the respondent's basic salary, and that the computation was done on the higher rate of twenty days' pay for each completed year as opposed to the minimum provided in the collective bargaining agreement of fifteen days' pay. The conclusion that there was imbalance of bargaining power, was thus a conclusion which was not borne by evidence. Therefore the trial judge ought to have enforced the agreement of the parties as reflected in the discharge voucher and

not reopened the issue of calculation of the severance pay. Equally, the respondent having acknowledged payments that included leave days, the claim for outstanding leave days also ought not to have been entertained.

[21] As regards the issue of accrued acting allowance, it is evident that, this was not addressed in the discharge voucher. In his judgment the learned judge addressed this issue and came to the conclusion that the respondent was entitled to the payment of acting allowance. Although the discharge voucher purported to release the appellant from any present or future claims, the learned judge was right in addressing that particular issue, as it was a benefit due to the respondent under the collective bargaining agreement.

[22]Given the circumstances, the findings of facts relating to the acting allowance arrived at by the trial judge were not unreasonable. The upshot of the above is that we allow this appeal to the extent of setting aside the amount of Kshs.599,261.33/- and Kshs.24,675.46/- awarded by the trial judge as severance pay and accrued leave respectively. We confirm the judgment of the Industrial Court in regard to the accrued acting allowance of Kshs.571,144/- which amount will be subjected to the usual taxation. We order that each party shall pay their own costs in this appeal.

Dated and delivered at Malindi this 18th day of September, 2014

H.M. OKWENGU

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JUDGE OF APPEAL

D. MARAGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR