



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJ.A.)

CIVIL APPEAL NO. 277 OF 2009

BETWEEN

RONALD KIMATU NGATIAPPELLANT

AND

UKULIMA SACCO SOCIETY LTDRESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Khamoni, J.) dated 17th July, 2008

in

H.C.C.C. No. 453 of 2007)

JUDGMENT OF THE COURT

In a suit dated 28th May, 2007 and filed in the superior court the appellant/plaintiff who was an employee of the respondent/defendant claimed from the latter the principal amount of Kshs.7,430,406/= as general damages for breach of contract, costs of the suit and interest and any other relief the court may deem fit to grant. The basis of this claim was that the appellant who was employed by the respondent and who had worked his way up to the status of a permanent and pensionable employee was forced to retire prematurely, which made him to suffer loss and damages.

The respondent filed its defence denying the appellants claim. The case was heard by the superior court on 2nd July, 2008 and a reserved judgment delivered on 17th July, 2008. In his said judgment the learned Judge (*Khamoni, J.*) dismissed the appellant's claim on the ground that the burden placed upon him in civil matter to prove his case on a balance of probabilities was not accomplished.

The appellant, dissatisfied with this decision has now appealed to this Court through a memorandum of appeal lodged herein on 27th November, 2009. It has 9 grounds of appeal as follows:-

“1. The learned trial judge erred and misdirected him (sic) right from the outset in the opening two paragraphs of the judgment when he introduced his personal knowledge of the hearsay of Defendant without reference to the evidence adduced by the plaintiff.

2. The learned trial Judge erred and misdirected him (sic) by not finding out from the defence the contract terms and conditions with the defendant.

3. The learned trial Judge erred and misdirected himself by failing to appreciate that the plaintiff supplied all the legal basis for contract employment wanted then he had to search and find out what law and chapter defines contracts.

4. The learned trial Judge erred and misdirected himself in failing to find out from the letter from Principal Registrar of Persons dated 4th October, 2002, quoted at page 5 of the judgment related to plaintiff, year of birth and also the correct names of the plaintiff.

5. The learned Judge erred and misdirected himself by overlooking the evidence of the plaintiff the fact that the change of date of birth was from an assessment done by a doctor based at Kenyatta National Hospital was part of the plaintiff legal date of birth and age which was not challenged in court and the defendant ought to have summoned the Doctor to court to close (sic) examine him over the same.

6. The learned trial Judge erred and misdirected himself in deciding the case on the basis of an extraneous issue of retirement in the contract law or agreement.

7. The learned trial Judge erred and misdirected himself by deciding the case on the basis of an erroneous assumption and not a careful analysis of the evidence adduced) that the circumstances obtaining 15% when the defendant cause of 3% were the same as in when the alleged increment calculated annual increment of salary based mean figure since employment in 1989.

8. The learned trial Judge erred and misdirected himself by assuming without evidence that the unproven allegation by the defendants that the plaintiff had attained the retirement age but the plaintiff ID show he had six more years before attaining the conventional age of 55 years which was produced in court.

9. The learned trial Judge erred and misdirected himself on why the defendant had withheld plaintiffs. Benefits without justification amounting to Kshs.110,722/=.

When the appeal was heard before us on 16th February, 2011 the appellant submitted in person and stated that the only issue in the appeal was that of the age of retirement which was not provided for either in the general terms of employment or in his letter of appointment. He stated further that his original identification card showed he was born in 1953; thus he was not due for retirement when the respondent prematurely retired him. In that regard the claim he made against the respondent for Kshs.7,430,406/= was based on lost income for the six (6) years he would have worked before retiring plus interest. He also included annual increments.

Mrs. Mbabu, learned counsel for the respondent on the other hand opposed the appeal and stated that the superior court gave reasons for dismissing the suit. She stated further that the appellant did not inform the respondent about the change of the date of his birth and that the issue of the second identification card was only raised long after the appellant had been issued with the letter of retirement. Mrs. Mbabu also stated further that in any case the appellant did not justify or prove the claim of over Kshs.7 million he made against the respondent and that he offered no evidence of breach of contract. In reply the appellant stated that the issue of the date he was born arose when his wife died and it was his parents who suggested the year 1953 as the year he was born.

This is a first appeal and in the circumstances this Court has a duty to analyze and re-evaluate the evidence adduced in the superior court and to reconsider it to find out if it warranted the decision reached. As was stated in ***Selle & Another v. Associated Motor Boat Co. Ltd. [1968] 123 at p 126:***

“An appeal to this Court from the 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 Judges 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamid Saif v. Ali Mohamed Sholan [1955] 22 EACA 270).”

Subject to the caution in Selle’s case, an appellate court will be slow to interfere with the findings of fact made by the trial court unless those findings are based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings. In line with those principles, we have considered the matter fully and have formed the following view of it.

When the appellant was employed by the respondent by letter dated 21st March, 1989 the records he submitted to the said respondent indicated that he was born in 1947. On 18th March, 2002 he was issued with a retirement letter by the respondent on the ground that he had reached the mandatory retirement age. But by letter dated 25th July, 2002 the appellant wrote to the respondent and stated:-

“RETIRMENT ON AGE GROUND

I acknowledge your letter dated 18th March, 2002. After serious thought I wish to state that my birth date is 1953 not 1947 as stated in your letter.

UPDATE

Sometimes in July last year, I advised you verbally, when you went round the offices validating staff ages. The same information was later included in the revised staff-data, now in the computer. Please peruse through

- 1. Application No. 24222 from the Principal Registrar of Persons, whereupon the original ID was surrendered.***
- 2. Medical assessment report***
- 3. Court Affidavit.***
- 4. Copy of current ID card.***

Kindly reconsider your decision.

***Yours faithfully
Signed
R. K. Ngati.”***

We do not find any reply to this letter on this record. But there is a letter on the same record dated 25th October, 2002 which indicates that the appellant had written to the National Chairman of the respondent on 21st August, 2002 requesting for extension of his employment but that request was turned down by its management and the appellant advised to proceed for his retirement as earlier communicated to him. This particular letter of 21st August, 2002 is not on record to show the reason given by the appellant for extension of his employment or revocation of retirement. But his appeal before us is based on the issue of age of retirement which was not provided for in the general terms of employment or in his letter of appointment.

The learned trial Judge dealt with this issue in his judgment at length and found that there was no evidence that the appellant formally wrote to the respondent informing them of his official changed date of birth from 1947 to 1953. If the appellant had officially changed his date of birth before leaving employment how would he have written to the respondent on 25th July, 2002 to say in his judgment:

“After serious thought, I wish to state that my birth date is 1953 and not 1947 as stated in your letter.”

He then went on to say in the same letter:

“Sometimes in July last year I advised verbally, when you went round the offices validating staff ages. The same information was later included in the revised staff data, now in the computer.”

Did he even follow this up to ensure the data was extracted from the computer to confirm what he was saying about his date of birth? This letter was written by the appellant to the respondent four (4) months after the retirement letter had been served on him. A reply to his letter, if at all, is not on this record. The learned trial Judge had this to say:

“On the whole therefore, I find that is a case where parts of some vital evidence have been kept away from the Court while some which ought not to be brought has been brought as the plaintiff fails to pass the most vital test of discharging the burden squarely upon him that indeed he formally and properly or satisfactorily in writing informed the defendant of the official and lawful change of his date of birth from 21st March, 1947 to 21st March, 1953. At the same time, the court has been given contradicting evidence from the Principal Registrar of Persons in Plaintiff’s exhibit 5 and defendant’s exhibit 3. Yet the parties did not care to bring the said Registrar in court to testify in person. It follows I am not satisfied the plaintiff has succeeded in proving this suit against the defendant even on the balance of probabilities.”

The learned trial Judge then dismissed the appellant’s suit with an order that each party do bear his/its own costs thereof. As can be seen from the judgment, the learned trial Judge considered in detail the issue of the appellant’s age and disbelieved the evidence of the appellant on it. The appellant did not produce the letter he wrote to the respondent pleading that they reconsider their decision to retire him to show the reason why he was pleading for revocation of retirement notice; neither did he avail the Principal Registrar to explain the basis on which he found that the appellant was born in 1953 and not in 1947. The learned trial Judge heard the witnesses testify and he was in a better position to gauge their demeanour and truthfulness. We cannot interfere.

In the circumstances of the learned Judge’s decision he did not go into the merits of the damages claimed. Even if he did, he would not have gone far as they were all in the nature of special damages which should be specifically pleaded and strictly proved. Issues relating to employment are contractual in nature and the appellant had a duty, once he pleaded the claims arising therefrom to strictly prove them – see ***Ouma v. Nairobi City Council [1976] KLR 297***. In addition even if for the sake of argument the contract was wrongfully terminated there is a wealth of authorities by this Court that the measure of damages would be the salary in lieu of notice and not the millions claimed by the appellant.

This appeal fails and is dismissed, but as the appellant obtained leave of this Court to file the appeal as a pauper, each party will bear his/its own costs thereof.

Dated and delivered at Nairobi this 25th of March, 2011

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR