IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL NUMBER 33 OF 2019

APEX STEEL LIMITED……..APPELLANT

VERSUS

DOMINIC MUTUAMUENDO…….RESPONDENT

(*Appeal from the judgment and decree of HonourableJ.A. Agonda (SRM) of the Principal Magistrate's Court at Mavoko delivered on the 30th day of August 2019 in ELRC Case No. 24 of 2018*)

JUDGMENT

Background

1. The respondent was employed by the appellant as a General Workeron or about 8th June, 2015 for a monthly salary of Kshs. 12,616.50. The engagement was on fixed term basis and the last contract signed by them was starting on 4th January 2017 and ending on 30th November 2017.On 3rd December 2018, the respondent filed a suit vide the Memorandum of Claim dated 3rd December 2019 alleging that the appellant summarily dismissed him from employment and seeking a declaration that his dismissal was unlawful and unfair and that he was entitled to payment of terminal dues and compensatory damages amounting to Kshs. 464,244.42 as set out in the memorandum of claim.

2. The appellant filed a statement of response on 1st March 2019 denying all the claims made by the respondent contending that the contract of employment lapsed after effluxion of time on 30.11.2017.It further averred that from 24th August 2017, the respondent absconded duty and briefly showed up on 29th August 2017 before disappearing again without permission. Finally, the appellant averred that it served the respondent with a show cause letter dated 6th September 2017 but he never responded until 30th November 2017, when he wasnotified that his contract would not be renewed.

3. The matter was heard on 8th July 2019 when the respondent testified as Cw1and Mr. Abraham Ondara, the appellant's human resource manager, testified for the defence as RW1.Cw1 told the court that he reported to work on 27th October 2017 and after finishing the target he was given, an officer of the appellant ordered him to continue working or else he would be sacked, and the threat was executed the following day. he denied being served with any show cause letter by the appellant before the dismissal. He admitted that his salary under the contract dated 4th January 2017 was kshs.12,616.50 per month but stated that he was not being issued with any payslips.

4. On cross examination, he admitted that in 2015, he worked from October to December and thereafter he signed a contract in January 2016 and another in January 2017. He admitted that there was clocking in when reporting to work and that would reflect on the payroll. He contended that he clocked in on 27th August 2017 but his name was removed from the system. He further contended that he was paid in September and November 2017 but not in October 2017. He stated that he was working 7 days a week, Monday to Sunday without any rest day. However, he admitted that he was paid for the Sundays he worked.

5. In a rebuttal of the respondent's testimony, Rw1 reiterated the averments in the defence that:

a. The respondent was absent from work for the period between 24th August 2017 and 29th August 2017 and from 29th August 2017 to the date his contract expired, 30th November 2017.

b. On 6th September 2017, following the respondent's unauthorized absence from work, the appellant sent the respondent a letter asking him to show cause why disciplinary action should not be taken against him for his unauthorized absence from work.

c. As the respondent neither responded to the letter nor resumed duty before his contract expired on 30th November 2017, the appellant did not pursue any attempt to take disciplinary action against the respondent.

d. The respondent's employment with the appellant therefore came to an end by effluxion of time rather than summary dismissal as alleged by the respondent.

e. The respondent was paid all amounts due to him as at the date his contract expired including his last salary on 29th August 2017, and as such the reliefs sought in the claim were without basis as a result.

6. After the hearing, both parties filed written submissions and upon considering the case, the trial Magistrate made the following finding:

> ***"It therefore follows automatically that all the evidence tendered by the claimant on the termination of his employment remained uncontroverted, unchallenged and unrebutted. In the circumstances therefore and as the law stipulates I really have no options but to believe all the above uncontroverted and unchallenged evidence as the whole truth."***

7. On the basis of the said finding the learned trial Magistrate entered the impugned judgment in favour of the respondent in the following terms:

a. The respondent was earning Kshs. 14,898 and not Kshs. 12,626.50 as stipulated in the respondent's contract of employment.

b. An award of Kshs 178,776 being 12 months' salary as compensation for unlawful termination.

c. An award of Kshs. 144,212.64 on account of rest days and Kshs. 17,287.03 for public holidays on ground that no attendance register was produced to prove that the respondent was given his rest days and public holidays.

d. An award of Kshs. 19,482 being one month's salary in lieu of notice.

e. An award of Kshs. 5,013.75 for accrued leave on ground that no leave register was produced in court.

f. An award of kshs 17,190 being service pay.

8. The appellant was aggrieved and is now before this court on a first appeal raising the following grounds, that the learned magistrate erred in law and fact by;

a. Holding that the respondent had proved his claim for unfair and unlawful dismissal and compensatory damages on a balance of probabilities.

b. Awarding the respondent 12 months' salary as compensation for unlawful termination when there was evidence that the respondent deserted duty, did not respond to a show cause letter and was on a fixed term contract for 11 months from 4th January 2017 to 30th November 2017.

c. Disregarding the appellant's evidence and witness testimony.

d. Ignoring the wage sheets and evidence produced by the appellant demonstrating that the respondent did not work on public holidays, rest days and utilized his leave days.

e. Failing to consider the wage sheets because the maker of the wage sheets was not called as a witness while the wage sheets were not contested by the respondent and their custodian, the appellant's human resource manager, testified and produced them in court.

f. Awarding the respondent Kshs. 19,482 as pay in lieu of notice contrary to the pleadings and evidence that the respondent's monthly salary was Kshs. 12,616.50.

g. Awarding the respondent pay in lieu of rest days, public holidays and service pay for 2 years and 5 months in the sum of Kshs. 144,212.64 despite evidence on record showing that he only worked for 8 months under the 2017 fixed term contract.

h. Awarding the respondent service pay for 2 years and 5 months contrary to the law and decisions of this court while the evidence on record showed that the respondent was a member of the National Social Security Fund and the appellant remitted contributions for the 8 months in which the respondent was in employment.

i. Making a manifestly excessive award of damages that is not supported by the law and evidence on record.

j. Entering a judgment that was unsupported by the evidence tendered.

9. The appeal was canvassed by way of written submissions and the counsel for both parties adopted the same fully without any highlighting.

Appellant's case

10. The appellant filed its submissions on 18th June 2020 whereby it condensed the said grounds into the following points:

a. The learned magistrate erred in holding that the respondent's evidence on unfair termination was uncontroverted.

b. The learned magistrate erred in holding that the respondent had proved his claim for unlawful termination and compensatory damages.

c. The evidence on record did not support the finding that the appellant did not produce an attendance register to prove that the respondent did not work on public holidays, rest days and utilized his leave days.

d. The learned judge [sic]erred in awarding the respondent service pay for 2 years and 5 months contrary to the law and evidence on record.

e. The learned judge[sic] erred in making a manifestly excessive award of damages.

11. In sum, the appellant's case is that the learned magistrate's finding was based on wrong principles, contrary to and not supported by the evidence on record and the award of damages was manifestly excessive. Consequently, it urged for the appeal tobe allowed with costs.

12. In support of ground 1, the appellant submitted that the trial magistrate failed to take into account the evidence tendered demonstrating that the respondent was an employee, engaged under a fixed term contract that was not renewed due to his unauthorised absence from work. It urged this court to consider the following:

a. The respondent was employed by her under a fixed term contract for the term of 11 months and thathe signed 3 contracts for each year he was engaged with the appellant in 2015, 2016 and 2017.

b. The fixed term contract signed by the respondent for the year 2017 was admitted by the respondent during cross examination.

c. The term of engagement under the fixed term contract for the period relevant to the suit, was from 4th January 2017 to 30th November 2017.

d. The casual employee pay sheets produced demonstrate that the respondent was not present at work from 23rd to 29th August 2017.

e. The respondent did not return to work before his contract expired on 30th November 2017, and that due to his continued absence, the appellant did not take disciplinary action against him but simply chose not renew his contract for the year 2018.

f. During the hearing, the respondent admitted that he had not signed a contract for the year 2018 and did not have employment with the appellant after the 2017 fixed term contract lapsed.

13. The appellant urged that **Section 10 (3) (c) of the Employment Act, 2007** recognises an employer's right to engage an employee on a fixed term contract. It further urged that the moment the respondent's fixed term contract expired,it ceased to have any rights or obligations as against the respondent. It contended that the failure to take disciplinary action for his unauthorized absence from work is not an admission that the appellant unlawfully terminated the respondent.

14. It fortified the foregoing view by relying on**Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR**where this court held that the general principle is that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry.It further relied on**JohnstoneLuvisia v Allpack Industries Limited [2019] eKLR**where this court declined to give a declaration of unfair termination where a fixed term contract had come to an end. Therefore, it submitted that, in this case also, the respondent was not unlawfully dismissed but it is his fixed term contract that lapsed.

15. The appellant further submitted that the foregoing precedents make it clear that:

a. Lapsing of a fixed term contract is not the same as a dismissal and;

b. allowing such a contract to expire where an employee is not fulfilling their duties under that contract cannot amount to an unlawful termination.

16. According to the appellant, the learned trial magistrate neglected to appreciate this distinction and for this reason alone, the appeal should be allowed.

17. In addition, the appellant urged that it established through oral and documentary evidence that the respondent was not dismissed from employment unlawfully or otherwise but his contract simply came to an end and no evidence was produced by the respondent to refute this allegation. It therefore maintained that the learned magistrate erred in fact and law in finding that the evidence of the respondent's unlawful termination was uncontroverted.

18. As regards ground 2, the appellant submitted that Section 2 of the Evidence Act, Cap 80 states that the Evidence Act applies to all judicial proceedings in or before any court other than the Kadhi's court or arbitration proceedings. Section 107 and 109 of the Evidence Act that codify the principle 'he who alleges must prove' therefore apply to proceedings in the Employment and Labour Relations Court. It further submitted that while section 47(5) of the Employment Act places the burden to justify unlawful termination on the appellant as the employer, it does not absolve the respondent's obligation to prove his claim for unlawful termination.

19. It submitted that during examination in chief and cross examination, the respondent alleged that he was sacked together with another

employee on 27th October 2017 but the said employee was not called as a witness to prove this claim. It therefore maintained that the respondent did not produce any evidence to prove his claim on a balance of probabilities and argued that the learned magistrate ought to have drawn an inference that the evidence withheld by the respondent would have been adverse tohis claim, and erred by failing to do so.

20. The appellant further submitted that the learned magistrate also erred in ignoring the following contradiction between the respondent's pleadings and his evidence:

a. At paragraph 10 and 11 of the respondent's memorandum of claim, he alleges that he was not issued with a contract of employment but duringcross examination, he admitted that he signed three fixed term contracts.

b. At paragraph 14 of the memorandum of claim, the respondent allegedthat he suffered inter alia an abrupt loss of income as a result of the alleged summary dismissal on 27th October 2017 but during cross-examination, the respondent states that he received payment in November.

21. The appellantmaintained that the learned magistrate ought to have held that the respondent did not prove his claim for unlawful termination and erred in failing to do so. It further contended that the learned trial magistrate erred in awarding the respondent compensatory damages when the claim was not proved.

22. On the other hand, it urged that the compensatory damagesequaling to 12 months' gross salary awarded were manifestly excessive. It contended that it produced the respondent's contract of employment which indicated that his gross salary of Kshs. 12,616.50. and no evidence was produced by the respondent to support the finding that his monthly salary was Kshs. 14,898. For the same reason, it further contended that the amount awarded as payment in lieu of notice exceeded the amount the respondent would have earned had the appellant given one's month notice as prescribed by the contract. Therefore, according to the appellant, the learned trial magistrate erred by awarding damages in excess of the limits provided in section 49 of the Employment Act.

23. Without prejudice to the above, the appellant submitted that the award of damages for unfair termination would still be manifestly excessive even if it were based on an accurate representation of the respondent's gross salary and relied on **OlPejeta Ranching Limited v David WanjauMuhoro [2017]eKLR**,where the Court of appeal held that in exercising the discretion to award maximum compensation for unfair termination, the court did not justify the award and in the absence of such justification, it held that the trial Judge in considering the award took into account irrelevant considerations and/or failed to take into account relevant considerations, and reduced the award to 6 months gross pay.

24. Likewise, in this matter, the appellant submitted that the learned magistrate did not justify her decision to award the respondent 12 months' maximum compensation nor did she base her discretion to make the award on the above parameters. Therefore, it urged this court to find that the award took into account irrelevant considerations or failed to take into account relevant consideration and set aside the award.

25. As regards Ground 3 the appellant submitted that the respondent did not prove his case for rest days, leave days and public holidays allegedly not utilized and the learned magistrate erred in failing to dismiss his claim but instead shifted the burden of proof to it. Itfurther submitted that the learned magistrate acknowledged that the appellant produced pay sheets as evidence in her judgment, which pay sheets indicate the days worked by the respondent between 2015 and 2017 under his various fixed term contracts but the learned magistrate went on to find that the respondent was not given his rest days, public holidays and leave days.

26. The appellant further submitted that, having acknowledged the pay sheets in the preceding paragraph, the finding that no register was produced is contradictory. It contended that the above finding disregarded the unrebutted evidence of the respondent on cross examination whereby he referred to the various pay sheets and admitted he was not working every Sunday and that whenever he worked on Sundays he was compensated.

27. Without prejudice to the above, the appellant submitted that the amount awarded by the magistrate for rest days, public holidays and leave was manifestly excessive and not supported by the evidence tendered. It submitted that the respondent admitted to signing a contract every year including the one he signed for the year 2017 and contended that the learned trial magistrate erred by awarding the respondent the amount pleaded, for rest days, public holidays and leave for for a period of 2 and a half years.

28. It relied on **Charles KariukiMwangi v Intersecurity Services Limited [2018] eKLR**where the Claimant sought leave and public holidays for cumulative period of 6 years, but this court held that the claim was not proven as the Claimant had the onus of proving on a balance of probabilities that there was no leave taken.

29. According to the appellant, the learned magistrate in this case, improperly shifted the burden of proof to it by holding that it ought to have producedleave register to prove that the Claimant had exhausted all his leave days.It relied on **Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR**where this court held that the duty of an employee to prove that he worked on public holidays and did not take leave is not extinguished by the employer's duty to keep records, and that an employee must prove his claim or else the claim must fail.

30. As regards Ground 4, the appellant submitted that Section 35(6) of the Employment Act provides that service pay will not be payable where an employee is a member of the National Social Security Fund (NSSF). It contended that in this casethe respondent is a member of the NSSF and as such the learned magistrate erred in awarding service pay. It further contended that it did not employ the respondent continuously and especially from 1st December 2015 to 3rd January, 2016, 1st December 2016 to January 3rd 2017, and the period in 2017 in which the respondent was absent from work without authorization. It therefore maintained that the trial magistrate erred in finding that the respondent was entitled to service pay on the basis that the appellant intermittently remitted his statutory deductions.

Respondent's case

31. The respondent opposed the appeal and prayed that it be dismissed with costs. He argued ground 1,2 and 9 of the appeal together. He submitted that the trial Court was right in holding that the appellant terminated his employment unfairly and unlawfully. He contended that appellant terminated his employment without any valid reason and without following a fair procedure. He further contended that the trial court was right in holding that the appellant did not serve him with any show cause letter over the alleged absence from work since the defence witness failed to produce a certificate of postage. He also contended that the trial court was right in dismissing the allegation by the appellant that it made effort to trace him after he absented himself from work since there was no evidence to support the allegation. He relied on **Elizabeth NjeriKinyua v Joel Mugo&Another [2019] e KLR**where this court found that service of the letter was not proved due to lack of certificate of posting.

32. The respondent further submitted that the trial court was right in awarding him compensatory damages plus terminal dues for 2 years and 6 monthsbecause there was proof of continuous employment for that period. He contended that the court has judicial discretion, and it exercised the said discretion when it awarded 12 months' gross salary compensation on the basis of the evidence tendered and the provisions of section 49(1) (c) of the Employment Act. He urged that the award be upheld and relied on **Leena Apparels (EPZ) Limited v NyevuJumaNdokolani[2018] e KLR**where the Court of Appeal upheld the award by the trial court and returned that the decision of how many months' salary compensation to award should be left to the trial court. Therefore, the respondent prayed that the award of compensation and salary in lieu of notice be upheld.

33. The respondent further argued ground 3,4,5,6, and 10 together. He submitted that the trial court considered and analysed both written and oral evidence presented by the witnesses by both sides. He contended that the trial court summarised the evidence tendered by both sides including wage sheets and correctly awarded him salary in lieu of notice, pay for rest days, public holidays worked and accrued leave. For emphasis he relied on **Victor Omwenga v General Timothy Orwenyo t/a GMT Services[2019] e KLR**where this court awarded cash for accrued leave after the employer failed to produce leave records to disprove the employee's claim for leave. He further relied on **Charles MainaMunyua v Victory ConstructionLimited [2013] e KLR**where this court awarded cash to the employee for rest days after the employer failed to produce employment records to disprove the claim.

34. Finally, the respondent argued ground 7 and 8 together and submitted that the trial court was right in basing the award for public holidays, rest days leave and service pay on a period of 2 years and 6 months notwithstanding that the appellant employed him under separate fixed term contracts. He relied on **EverlineManuni v Mudete Tea Factory [2018] e KLR**where this court held that though the claimant was employed on separate fixed term contracts, her service was continuous.

35. He further urged that the award of service pay be upheld because as evidenced by the NSSF certificate he produced as exhibit, the appellant remitted NSSF contributions intermittently. He relied on **Elijah KipkorosTonui v NgaraOpticians T/A Bright Eyes Limited [2014] e KLR**where this court held that basic membership to the NSSF or any other scheme is not a bar to claim for service pay under section 35(5) of the Employment Act

Issues for determination and analysis

36. This being a first appeal, the role of this court is as it was explained in **Mary Njoki v John KinyanjuiMatheru [1985] e KLR** where the Court of Appeal held that: -

> ***"whilst an appellate court has the jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide."***

37. Again the Court of Appeal restated the role of the court in a firat appeal in **Kenya Ports Authority v Kusthon (Kenya) Limited [2009] 2 EA 212** as follows: -

> ***"on a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

38. More recently, the Court of Appeal in **J. S. M. v E. N. B. [2015] e KLR, thus**:

> ***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."*** (Emphasis added)

39. Having regard to the grounds of appeal, evidence before the trial court, the entire record of appeal and the rival submission filed herein, the issues upon which this appeal turns on are:

(a) Whether the respondent was dismissed by the appellant or his contract lapsed after effluxion of time.

(b) If, the respondent was dismissed, whether the dismissal was unfair and unlawful.

(c) Whether reliefs awarded are erroneous and should be interfered with.

Dismissal or expiry of the contract

40. There is no dispute that the respondent was employed by the appellant on fixed term contracts signed yearly from 2015 to 2017. The respondent admitted in evidence that he signed the last contract in January 2017 and it was to lapse on 30th November 2017. The respondent alleged that he was summarily dismissed by the respondent on 27th October 2017 after he protested doing more work after completing the target allocated to him. He contended that he was dismissed with another colleague who he did not call as a witness.

41. On the other hand, the appellant denied the alleged dismissal and contended that the respondent absconded duty from 24thto 29th August 2017 and failed to report back to work until his contract expired on 30th November 2017. It further contended that following the misconduct, it served him with a show cause letter on 6th September 2017 but he never responded and it decided not to pursue disciplinary action against him and instead chose to let the contract lapse automatically on 30th November 2017. It produced wage sheets to prove that the respondent absconded duty from 24th August 2017 and his last pay was upto 29th August 2017.

42. After considering the evidence tendered, the learned trial magistrate made the following observation and finding: -

> ***"The Respondent alleged it did not after all, summarily dismiss the Claimant but RW1 during his testimony never delved into the issue of terminating the Claimant from employment and there was no termination letter that was served upon the Claimant as required by the Employment Act. The respondent was anxious to see the claimant off and in particular his immediate boss fired him on the material date, indicates a certain level of discomfort in the respondent. It therefore follows automatically that all the evidence tendered by the Claimant on the termination of his employment remained wholly uncontroverted, unchallenged and unrebutted."***

43. I have carefully considered the evidence on record. The respondent testified as Pw1 and told the court that on 27th August 2017, he was dismissed by an Asian and the following day he was reinstated by the management. However, he was again chased away and told there was no job. During cross examination he admitted that there was clocking in to indicate attendance and the payroll would show the clocking. He contended that he was paid salary for September and November 2017 but not October 2017. On being referred to wage sheets, he contended that on 24th and 27th August 2017 he attended work but his name was removed from the clocking system.

44. Rw1 producedthe Payroll attendance generated from computer and denied existence of any manual register. He further stated that the respondent was paid salary through the bank. He denied that the respondent was dismissed and contended that he left work on 29th August 2017. He further contended that the respondent's last salary was for August and it was paid in September 2017. During cross examination, he admitted that the payroll was not signed by employees but explained that there was no need for their signature because salaries were paid through the bank.

45. From the foregoing summary of evidence, it is clear that the learned trial magistrate was right in finding that the appellant did not serve the respondent with any termination letter. It is also clear that the learned trial magistrate erred by holding that Rw1 did not delve into the issue of termination and that the evidence by the respondent was uncontroverted, unchallenged and unrebutted. In my view, the conclusion of the learned trial magistrate on the alleged dismissal of the respondent was not based on the evidence adduced by the parties or it was based on misapprehension of the evidence on record and he acted on wrong principle of law of evidence with respect to the burden of proof.

46. The question that begs for answer is which party had the burden of proof.Section 107 and 109 of the Evidence Act codify the principle that "he who alleges must prove". The burden of proof was therefore on the respondent to prove that he was dismissed on a balance of probability and not on the appellant to disprove the alleged dismissal. The respondent did not tender any written evidence, or call any witness to prove that he worked until 27th October 2017 and received his pay. He did not deny that his salary was being paid through the bank but he withheld his bank statements from the court. Instead, he produced NSSF statement that shows that the last remittance was done in August 2017, and corroborated the defence case that the respondent deserted employment in August 2017 when he was paid the last salary. Consequently, I return that the respondent did not prove on a balance of probability that he was dismissed by the appellant on 27th October 2017 as alleged.

47. On the other hand, I am satisfied that the appellant proved on a balance of probability that the respondent deserted employment from 24th August 2017 until the contract lapsed by effluxion of time on 30th November 2017. The payroll produced by RW1 and the NSSF statement produced by the respondent as exhibits corroborates that appellants case that the respondent was never dismissed but he deserted employment from August 2017. In addition, the copy of the contract of employment produced by Rw1 as an exhibit and admitted by the respondent supports the appellant's case that the contract lapsed automatically by effluxion of time on 30th November 2017.

Unfair and unlawful termination

48. Under section 47(5) of the Employment Act, the burden of proof of unfair termination is on the employee who alleges that he was so discharged. As already held herein above that the respondent did not prove that he was dismissed by the respondent, it follows that the he did not also prove that he was unfairly dismissed. Without proof that the respondent was dismissed from employment, the burden of proof did not shift to the appellant to justify the reason for the dismissal, and prove that fair procedure was followed. Consequently, I find that the learned trial magistrate fell into error when he held that the respondent was unfairly dismissed by the appellant without being given a fair hearing.The said finding of unfair termination was founded on no evidence or misapprehension of the evidence tendered and on erroneous shifting of the burden of proof from the respondent to the appellant contrary to express provision of section 47(5) of the Employment Act.

<u>Whether the reliefs granted should stand.</u>

49. The award of compensation of 12 months gross' salary for unfair termination plus salary in lieu of notice was founded on the erroneous

finding that the respondent was unfairly dismissed from employment by the appellant. Having reversed the said finding and replaced it with a finding that the contract of service lapsed automatically after the lapse of the agreed contract term on 30th November 2017, the said award is set aside.

50. As regards the award of Kshs. 144,212.64 for rest days, the appellant alleged that the award was not supported by evidence tendered and it was manifestly excessive. In awarding the said claim the learned trial magistrate stated that:

> ***"The contract of employment indicated that the Claimant was working for four days and no attendance register to prove that the Claimant was given his rest days as alleged by the Respondent. In the circumstances, I will award the Claimant rest days taking into account that he had worked for the Respondent for a period which translated to Kshs. 144,212.64."***

51. The above conclusion was based on no evidence and indeed sharply contradicted the evidence by the claimant during cross examination when he admitted that he never worked every Sunday and that any Sunday he worked he was compensated. The said conclusion also contradicted the court's finding on page 8 of the impugned judgment that the appellant had produced as exhibits Wage Sheets. The record is also clear that the respondent had admitted that the said payrollsemanated from the clocking system of attendance.

52. The respondent having admitted that he was compensated whenever he worked on a Sunday, the burden of proof was upon him to demonstrate that there are some Sunday he worked but he was not paid. Such claim required precise particulars and proof of the Sundays worked at the exclusion of the oneshe was paid. However, the respondent pleaded in his Memorandum of claim that he worked every Sunday for 2years and 5 months without pay and assessed his compensation as Kshs. 144, 212.64 which was awarded as prayed. That pleading was contradicted by the respondent'ssaid evidence that he was paid whenever he worked on a Sunday.

53. In view of the said admission and the failure by the respondent to plead the particulars of Sundays allegedly worked and not paid, it is clear that the award of the Kshs 144,212.64 for rest days worked was not based on the evidence on record and in so awarding, the learned trial magistrate fell into error. Consequently, it is set aside.

54. Again the learned trial magistrate awarded the respondent kshs. 17,287.03 for public holidays worked on the basis that his evidence was uncontroverted since no attendance register was produced by the appellant. The appellant contended that the award was not supported by evidence and it was manifestly excessive. I have perused the Memorandum of Claim and noted that the respondent claimed 11 public holidays per year for 2 years and five months. No particulars of the alleged public holidays were pleaded and the respondent did not state the alleged holidays in his evidence.Likewise, the learned trial magistrate did not state which holidays he awarded.

55. It is trite that a party making any claim for special damages is under the duty to specifically plead the particulars of his/her claim and adduce evidence to specifically prove the same. Such duty is so central in civil litigation that it cannot be waived by the failure by the opposing party to tender any evidence in defence. The said award for holidays worked is set aside.

56. As regard the award of kshs 5,013.75, the trial court awarded it because the appellant did not produce leave records. However, the appellant contended that it was also not supported by evidence and it was manifestly excessive.The respondent pleaded for leave for 2 years and 5 months' period but the court awarded leave for only 5 months' period based on a monthly salary of kshs. 19,432. The salary provided in the contract of service signed by the parties on 4.1.2017 was kshs 12616.50. It follows that the said award was not based on

the evidence on record and it was manifestly excessive. It is clear that the trial court erred by considering the wrong salary in assessing the award for leave and thereby arrived at a quantum which was excessive and thereby opened the door for this court to interfere with the same. Consequently, I set aside the award of kshs. 5013.75 and replace it with kshs 12,616.50 x 5x 1.75 /26 =kshs 4,245.95.

57. In awarding the said sum I have agreed with the trial court that once the respondent contended that he never took his leave, the appellant was under a duty to produce leave records to disprove thatclaim.

58. Finally, the trial court awarded kshs 17,190 for service pay on ground that the appellant failed to remit NSSF contributions for respondent. However, the appellant contended that the respondent did not qualify for the service pay because his service was not terminated but rather the contract lapsed, and secondly because he was a member of NSSF and contributions were made by her. It was further contended that the months when NSSF was not remitted, the respondent was not in employment.

59. The 3 contracts of employment produced were for October to November 2015, January to November 2016 and January to November 2017 equaling 24 months. The total contribution of the 24 months at the rate of kshs. 400 per month is kshs 9600. The total contributions remitted during the period of the said contracts was kshs 8400 representing 21 months. The months without remittances

were therefore September, October and November 2017, when the respondent deserted his job before the lapse of the last contract. I therefore agree with the appellant that it remitted all the NSSF contributions for the respondent except when he was out of employment.

60. Having found that the respondent was a member of the NSSFand the employer regularly remitted contributions, he was disqualified from claiming service pay by dint of section 35(6) of the Employment Act which provides that a member of the NSSF or any pension or gratuity scheme cannot claim service pay. Consequently, I hold that the learned trial Magistrate erred in law and fact by awarding service pay to the respondent contrary to the evidence on record and proceed to set aside the award.

61. In the end I allow the appeal save for the award of leave which I have reduced to kshs. 4,245.95 plus interest from the date of filing suit. Each party shall bear his/its own costs of the appeal. I will not interfere with any costs by the trial court.

Dated, signed and delivered at Nairobi this 30th day of July 2020

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE