



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 373 OF 2013

COASTAL BOTTLERS LTDCLAIMANT

VERSUS

GEORGE KARANJARESPONDENT

(Appeal arising from the judgment and decree of Senior Principal Magistrate Lilian Mutende dated March 2010 in SRMCC No. 2652 of 2008)

J U D G M E N T

INTRODUCTION

The appellant has brought this appeal challenging the award of ksh.1,126,971.00 as gratuity to the respondent by the subordinate court. According to the appellant the letter appointing the respondent as her employee did not provide for payment of gratuities on termination of his services. The respondent on his part contends that his employment contract was governed by the appellant' terms and conditions of service for management of 2002 in addition to the initial letter of appointment dated 6/7/1998. Consequently according to him, he was entitled to gratuities as provided under the said 2002 management terms and conditions of service.

BACKGROUND

The respondent was employed by the appellant as a System Administrator in the Finance Department by a letter dated 6/7/1998. He worked until December 2007 when he voluntarily served a resignation letter to the appellant. The appellant accepted the notice and cleared the respondent and even paid all his dues under the employment letter.

Subsequently the respondent demanded for payment of gratuity for the years served at the rate of 30 days per year of service which worked to ksh.1,126,971 applying his last salary of Ksh.125,219 per month. When the appellant denied liability the respondent sued successfully before the subordinate court. The appellant was aggrieved and brought this appeal.

GROUND OFS OF APPEAL

The appellant raised 9 rounds of appeal but in his submission, the learned counsel for the appellant consolidated th grounds of appeal into only one that is “the trial magistrate fell into error when after finding that payment of gratuity was not an express term of contract of employment, she proceeded to find that the appellant was never the less obliged to pay gratuities to the respondent”. The appeal was

disposed by way of written submission followed by brief highlighting.

THE APPELLANT'S CASE

The appellant submitted that the letter of appointment produced as exhibit did not entitle the respondent to any gratuity at the end of his service or at all. That even if the issue of discrimination was raised in evidence during the hearing, the same was not pleaded in the plaint. In the appellant's view what was being claimed as gratuity was possibly severance pay and which could not be awarded because the respondent had not been declared redundant. The appellant contended that gratuity by its very nature is discretionary and cannot be implied.

The appellant cited the court of Appeal decision in **MOMBASA CIVIL APPEAL NO. 82 OF 2005, CENTRAL BANK OF KENYA VS DAVIES KIVIEKO MUTETI [2009] e KLR** where the court held:

“in conclusion, we do not appreciate the basis on which the learned judge of superior court awarded his claim for gratuity seeing that it was not pleaded, was not in the contract of service between the appellant and the respondent and was not alluded to as such in the evidence before the court.”

With reference to the foregoing precedent, the appellant maintained that gratuity could only be enforceable if it was part of the employment contract.

With respect to the management terms and conditions of service 2002 (P.E.2) the appellant submitted that the same were not signed by the respondent as required under Section 14(2) of the Employment Act Cap 226 and as such the same could not have had the effect of varying the letter of appointment. Consequently, according to the appellant, the said terms and conditions 2002 amounted only to a merely policy document and not evidence of a contract.

In addition, the appellant submitted that Section 4 of the said management Terms and Conditions 2002 provided that where they were in conflict with the letter of appointment, the latter was to prevail. Accordingly, the appellant submitted that because the letter did not provide for gratuity or terminal dues, the court should let the letter of appointment to prevail. She therefore prayed that the appeal be allowed and order the suit to be dismissed because the claim was not proved.

RESPONDENT'S REPLY

The respondent submitted that he adduced lucid and uncontroverted evidence including letter of appointment (Exh P.1.) and management Terms and Conditions of Service 2002 (P.Exh 2) to prove that he was entitled to payment of gratuity. Clause VIII (b) of the Management Terms and Conditions of service 2002 entitled him to terminal dues at the rate of 30 days pay for each completed year of service based on his last salary because he has served for over 5 years and the termination was not on disciplinary grounds.

In addition he contended that the appellant's witness had confirmed in evidence that the other employees of the appellant were paid gratuity after resigning from work just like the respondent. On the impugned judgment, the respondent submitted that the trial court held that although gratuity was not an express term of the contract, the evidence adduced before the court pointed that the respondent was entitled to payment of gratuity and summed it up as an implied term of the contract because other employees in similar circumstances were paid gratuities by the appellant. The respondent cited Section 119 of the Evidence Act Cap 80, laws of Kenya in submitting that the court is entitled to presume the existence of any fact, which it thinks likely to have happened with regard to the common course of natural events, human conduct and public and private business in their relations to the facts of the particular case.

He concluded by urging the court to disallow the appeal because he had proved his case on a balance of probability before the trial court.

ANALYSIS AND DETERMINATION

The issues for determination arising from the appeal and the submissions are:

- a. **whether the Management Terms and Conditions of Service 2002 applied to the contract of employment between the parties herein.**
- b. **Whether the said Management Terms and Conditions of Service 2002 were in conflict with the letter of Appointment.**
- c. **Whether the award of gratuity to the respondent in the circumstances of this case was proper in law and fact.**

Application of the Management Terms and Conditions of Service 2002 to the respondent's

It has not been denied by the appellant either here or the court below that the said management terms and conditions of service were authentic and applied to the respondents contract of employment. All what was submitted by the appellant is that the respondent did not append his signature on the said management terms and conditions of service 2002 as was required under Section 14(2) of the employment Act Cap 226 *supra* and consequently the document never became a contract capable of varying the letter of appointment. This court is of the different view as it does not agree with the appellant that the 2002 terms and conditions of service was a mere policy document creating no rights and obligations between the appellant and her management staff to whom it was addressed to including the respondent. The said document did not require the respondent to sign acceptance. It was to bind him automatically.

This court while appreciating the provisions of Section 14(2) of the employment Act Cap 226 *supra*, is alive to the fact that a contract of employment can consists of terms contained in a series of separate documents and memoranda published by employer to their staff. It is therefore not valid for an employer to submit that express terms which she published and applied on her staff were only mere policy guidelines. It is also this courts finding that not every correspondence by the employer creating rights and obligations in employment relationship need to be countersigned by the employee in order to become binding. For example a letter of promotion, salary review and transfers need not be signed by the employee once the employer has exercised that right or discretion.

Consequently the lack of signature by respondent on the Management Terms and Conditions of service 2002 did not render them inapplicable to the respondent. This court firmly holds that the said terms and conditions of service, 2002 applied to the respondents employment contract.

Conflict between the letter of appointment and the management terms and conditions of service 2002

As correctly submitted for the appellant, clause 4 of the management terms and conditions of service 2002 provided that in case of any conflict between the said management terms and conditions of service 2002 and the letter of appointment, the letter shall prevail. Consequently the appellant urged that because the letter of appointment did not provide for payment of gratuity as provided under clause VIII of the management terms and conditions of service 2002, the two documents are in conflict and the court should follow the letter of appointment and disregard the 2002 Management Terms and Conditions of service.

This court is of a different view that is to say, the two documents were not in conflict. The two documents were only supplementing each other in the employment relationship between the parties herein.

Was the award of gratuity proper in the circumstances of this case

For the reasons stated above the award of gratuity in favour of the respondent by the subordinate court was proper. Unlike the circumstances prevailing in the **CENTRAL BANK OF KENYA CASE**

SUPRA, the respondent in the present case had gratuity expressly provided for under the management terms and conditions of service 2002, had pleaded the claim for gratuity and had also conversed the issue in evidence during trial. Consequently the facts of the present case are distinct from the **CENTRAL BANK OF KENYA CASE** *supra*.

DISPOSITION

By now it should be obvious that the court has disallowed the appeal for want of merits. Costs to the respondent.

Signed, dated and delivered this 28th day of February 2014

O.N. Makau

Judge