IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, WARSAME & KIAGE, JJ.A)

CIVIL APPEAL NO. 93 OF 2016

BETWEEN

JACKSON MUIRURI WATHIGO

T/A MURTOWN SUPERMARKET.....APPELLANT

AND

LILIAN MUTUNE.....RESPONDENT

***(*An appeal from the judgment of the Employment and Labour**

Relations Court of Kenya at Nyeri (Ongaya, J.) delivered on 15th October, 2015

in

ELRC No. 96 of 2014)

****

JUDGMENT OF THE COURT

1. At one-point ***Lilian Mutune*** (the respondent) worked in Murtown Supermarket which was owned and ran by ***Jackson Muiruri Wathingo T/A Murtown Supermarket*** (the appellant) together with his wife, Marie Wathigo. The manner in which the respondent was engaged as an employee was a point in contention between the parties and so was the duration of her employment was also in dispute.

2. On one hand, the appellant contended that the respondent was introduced to both himself and his wife on 14th September, 2011 by her sister who used to supply cakes to the supermarket. According to the appellant, the respondent tendered a letter dated 14th September, 2011 by which she sought employment in the supermarket but she lacked the requisite academic qualifications thus her application was rejected. Be that as it may, on humanitarian grounds, both he and his wife agreed to engage the respondent on a need be basis for purposes of cleaning the supermarket. As per the appellant, the respondent worked at most twice or thrice a week and would be paid around Kshs.500 at the end of the

day.

3. The respondent on the other hand, maintained that she had been employed by the appellant as a shop assistant sometime in August, 2010 way before she made the formal application on 14th September, 2011. The only reason she did not make the formal application earlier was that she had not attained the age of majority and therefore did not hold a national identification card. She worked every day of the week including public holidays from 8:00a.m. to 9:00p.m. for a monthly salary of Kshs.4000.

4. On 10th November, 2013 the appellant's wife asked her to go home and wait until she had been paid her salary for the months of July, August, September and October, 2013, which were in arrears, before resuming work so as to avoid the arrears accumulating further. Nonetheless, she was never called back or paid her outstanding salary. As a result, she reported the matter to the Labour office in March, 2014. Thereafter, the labour officer, Bernard Mutisya Mbuvi, upon inviting the appellant on several occasions for a conciliation meeting without any success, computed the terminal dues owing to the respondent at Kshs.273,373.

5. Despite being served with a demand notice of the aforementioned computed amount, the appellant failed to settle the same causing the respondent to file a suit, **ELRC Cause No. 96 of 2014**, in the **Employment and Labour Relations Court** (ELRC) seeking the said amount. By a judgment dated 15th October, 2015 **Byram Ongaya, J.** found in favour of the respondent and upheld the labour officer's computation. In the end, the following orders were issued:-

a) The respondent (the appellant herein) ***to pay the claimant Kshs.273,373 by 1.12.2015 in default, interest at court rates to be payable therefrom*** *(sic)* ***from the date of the suit 22.08.2014 till*** *(sic)* ***full payment.***

b) The respondent to pay the claimant's costs of the suit.

6. Aggrieved with the decision, the appellant's lodged this appeal which is predicated on the grounds that the learned Judge erred in; finding that the respondent was in his employment between August, 2010 and September, 2011; upholding the labour officer's computation of the respondent's terminal dues which were otherwise not supported by evidence; and totally disregarding the appellant's evidence.

7. By a consent dated 21st January, 2021 the parties agreed to dispose of the appeal through their respective written submissions on record without making any oral highlights.

8. According to the appellant, there was no evidence to justify the learned Judge's finding that the respondent employment commenced from August, 2010. For starters, the respondent's letter of application for employment dated 14th September, 2011 did not substantiate that fact. What is more, the labour officer in his own computation did not factor in the period between August, 2010 and September, 2011. The appellant thus urged us to find that the respondent's period of employment was from 14th September, 2011 to 10th November, 2013.

9. On the nature of the respondent's engagement, the appellant contended that it was on a casual basis. Further, the same was corroborated by the respondent's own evidence to the effect that there were three other shop assistants in the supermarket who were employed on short term basis.

10. The appellant disputed the labour officer's computation which he submitted was not only based on falsehoods but also contained glaring errors. In particular, the appellant argued that the respondent was neither employed for 3 calendar years nor was she owed any salary arrears. He went on to contend that in assessing the alleged salary arrears, which supposedly ran from July, 2013 to 10th November, 2013, the labour officer erroneously applied a basic minimum wage of Kshs. 14,011.80 as opposed to Kshs. 12,184.25 prescribed for shop assistants under **Regulation of Wages (General)(Amendment) Order 2013**. Be that as it may, the existence of the alleged arrears was in question because the labour officer went further to compute alleged underpayment for the period between 1st May, 2013 and 30th October, 2013, suggesting that there were no salary arrears so to speak.

11. In the appellant's opinion, the respondent's allegation that she was paid a monthly salary of Kshs. 4000 was contradicted by the labour officer's computation of alleged underpayment. In that, the labour officer did not attribute or calculate any underpayment for the period between 14th September, 2011 and 1st November, 2012 which was indicative that the applicant had been paid in accordance with the **Regulation of Wages (General)(Amendment) Order 2011 & 2012.**

12. Moreover, the appellant submitted that some of the computed terminal benefits for instance, pay for working without leave days or rest days and during public holidays for the years 2011 and 2012 were time barred under ***Section 90*** of the Employment Act. According to the appellant, those claims were in the nature of continuing injuries whose limitation period was twelve (12) months.

13. In conclusion, the appellant stated that the respondent had not established her case to warrant the impugned judgment being entered in her favour.

14. Opposing the appeal, the respondent submitted that the trial court having found that her evidence was credible there was nothing to justify interference with that finding of fact by this Court. Likewise, the award issued by the trial court was a finding of fact which this Court could not substitute with its own finding.

15. In any event, as per the respondent, the burden lay with the appellant by virtue of ***Section 10(7)*** of the **Employment Act** to establish the terms of her employment. His failure to render any employment record meant that the appellant had not established his allegations that she was a casual employee. Besides, the respondent submitted that having worked for the appellant from August, 2010 until November, 2013, the appellant was estopped by ***Section 37*** of the **Employment Act** from claiming that she was a casual employee.

16. We have considered the record, submissions by the parties and the law. This being a first appeal, we are cognizant that our primary role is namely, to re-evaluate the evidence before the ELRC and draw our own conclusions. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses as they gave their evidence. See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212**.

17. Based on the foregoing, we find that the appeal turns on the determination of the nature and duration of the respondent's engagement. The other concomitant issue is whether the respondent was entitled to any terminal benefits upon the determination of her engagement and, if so, the extent of those dues.

18. From the totality of the evidence adduced it is not in dispute that the respondent worked for the appellant. However, whilst the respondent contends that she began working in August, 2010 we agree with the appellant that the evidence on record is to the

contrary. In our minds, it makes no sense for the respondent who alleged to have been employed in August, 2010 to subsequently apply for such employment by the letter dated 14th September, 2011. The letter in question read in part as follows:-

"…

To Dear Madam,

My name is Lillian Wanjiku Mutune… I would like to request you to accept me as your employee. I promise to respect and honour you and also to obey and to respect the work. *(sic)*

I would be hardworking and obedient to U*(sic)****, your customers and also those whom I would be working together with as my workmates*** *(sic)****… I am ready to work well and to respect the time of work.*** *(sic)* ***and to be faithful I will be if U****(sic)* ***accept me as your employee.*** *(sic)****"***

19. Our own reading of this application letter does not support the allegation by the respondent that she was seeking to renew her employment upon obtaining an identity card. The words used therein, in our view, did not portray any existing employer/employee relationship between the parties as at the date of the application letter. As such, we, unlike the ELRC, are inclined to find, as the appellant invited us to do so, that the respondent was employed on 14th September, 2011. Perhaps that explains why the labour officer omitted the alleged period between August, 2010 and 14th September, 2011 in computing the terminal dues.

20. Moving onto the nature of the respondent's engagement there was no documentary evidence adduced to that effect. The appellant as well as his wife in their evidence stated that they did not keep any employment records. Their position was that the respondent was a casual employee while the respondent argued that she was not. In this regard, the learned Judge correctly appreciated that by virtue of ***Section 10(7)*** of the Employment Act the appellant was under a duty as the employer to produce written particulars of the respondent's employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent's allegation. See **Nanyuki Water & Sewage Company Limited vs. Benson Mwiti Ntiritu & 4 others [2018] eKLR**.

21. In our view, the appellant did not discharge the above burden. It was not enough for him to just state that the respondent was a casual employee. More was needed to support his position. Besides, the appellant in his own submissions asked this Court to find that the respondent had been engaged from 14th September, 2011 to 10th November, 2013. Clearly, even if we were to accept that the respondent was initially engaged on a casual basis, the duration of her employment, that is, from 14th September, 2011 to 10th November, 2013 meant that her terms were automatically converted by dint of **Section 37** of the Employment Act to a monthly salaried employee.

22. On the terminal dues awarded by the ELRC, we remind ourselves that as an appellate court we can only interfere with the same under specified circumstances as set out in the often quoted case of **Kemro Africa Ltd. vs. Lubia & Another (No.2)** 1987 KLR 30. Kneller J.A in his own words set out the circumstances as follows:-

"***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quatum of damages awarded by the trial judge were held by the former Court Of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."*** *[Emphasis added]*

23. It is instructive to note that the appellant never raised any issue concerning some of the claims being statute barred at the ELRC. Rather, he has raised the same for the first time in this appeal. We reiterate that our jurisdiction as an appellate court is to look into issues that were presented before the trial court. As this Court aptly stated in **Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR**;

"The appellant cannot be allowed to hang on a defence that it never raised and prosecuted in the High Court in this present appeal. Not only does this Court lack the benefit of the reasoning of the High Court but the new defense should be taken as an afterthought on the appellant's part and allowing it would be prejudicial to the respondent."

24. On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of ***Section 10(7)*** of the **Employment Act** the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under ***Section 74*** of the **Employment Act**.

25. Beginning with salary arrears, it is common ground that the respondent's employment came to an end on 10th November, 2013. As per the respondent, she had not been paid for the months of July, August, September and October, 2013 prior to the determination of her employment. In contrast, the appellant denied the existence of such arrears. On our part, taking into account that the appellant did not produce any evidence of payment of the respondent's salary during this period we are inclined to give the respondent the benefit of doubt. Therefore, we concur with the ELRC that the appellant owed the respondent salary arrears for the months of July, August, September, October and 10 days in November, 2013.

26. As to the quantum of those arrears, we agree with the appellant that the applicable basic minimum monthly wage for a shop assistant was Kshs. 12,184.25 as per the **Regulation of Wages (General) (Amendment) Order, 2013** which came into force on 1st May, 2013. Nonetheless, the aforementioned minimum wage was exclusive of housing allowance which under ***Section 31***of the **Employment Act** was required to be provided by the appellant. Consequently, we find that the basic minimum monthly wage of Kshs.14, 011.80 applied by the labour officer was reasonable. In the circumstances, we decline to interfere with computation of the total salary arrears at Kshs.60, 717.80.

27. On the issue of underpayment, the first consideration would be the determination of the salary that was paid to the respondent. In light of the fact that the appellant failed to produce evidence on the terms of the respondent's engagement as envisioned under ***Section 10(7)*** of the **Employment Act**, we, like the ELRC, are inclined to accept the respondent's version, that is, that she was paid a monthly salary of Kshs. 4000.

28. As such, we cannot fault the assessment of the said underpayment for the period between 1st November, 2012 to 30th April, 2013 which was tabulated at Kshs. 49,746.60. However, we disagree with the computation of underpayment for the period between 1st May, 2013 and 30th October, 2013. This is because once the salary arrears had been calculated and awarded from July, 2013 to 10th November, 2013, as per the then prevailing basic minimum monthly wage, the issue of underpayment during the period in question could not arise. It follows therefore that the learned Judge erred in upholding the assessment of the underpayment for the period between July, 2013 and 30th October, 2013. Consequently, the only period within which the

underpayment could apply in the year 2013 was from 1st May, 2013 to June, 2013. We find that the amount payable for underpayment for the months of May and June, 2013 was Kshs. 20,022.80.

29. Last but not least, with regard to the payable amount in lieu of annual leave days, rest days and public holidays, the only grievance that was raised by the respondent related to limitation period which we have addressed herein above. Therefore, there is no reason to upset the computation by the labour officer under these heads.

30. Based on the foregoing, the appeal herein succeeds in part. For avoidance of doubt, we hereby find that the respondent was engaged by the appellant from 14th September, 2011 up to 10th November, 2013. In addition, we set aside the computation of the underpayment of wages with respect to the period between 1st May, 2013 and 30th May, 2013 which was assessed at Kshs. 60,070.80 and substitute the same with an amount of Kshs. 20,022.80 which relates to the months of May and June, 2013.

31. Accordingly, we find that the respondent was entitled to terminal dues totalling to Kshs. 233,325 which we hereby direct the appellant to meet excluding any amount that may have been paid prior to the determination of this appeal. The appeal having succeeded in part, we direct that each party bears his/her own costs. Costs at the ELRC are awarded to the respondent.

Dated and delivered at Nairobi this 23rd day of July, 2021.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR