



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 286 OF 2010

NAMPAK KENYA LIMITEDAPPELLANT

- V E R S U S -

PAUL MURUGA WACHIRA..... RESPONDENT

(Being an Appeal from the entire judgement and decree of the Principal Magistrate's Court at Thika delivered on 20th July 2010 by Hon. Mrs. Gicheha in PMCC no. 121 of 2009)

JUDGEMENT

1) Paul Muruga Wachira, the respondent herein, filed an action by way of the plaint dated 24th February 2009 before the Chief Magistrate's Court, Thika, in which he sought for judgment against Nampak (K) Ltd, the appellant herein, as follows:

- a) *An order of declaration that the respondent's dismissal was unlawful.*
- b) *An order directing the appellant to pay the respondent his dues.*
- c) *Payment of ksh.419,304.*
- d) *Costs of the suit and interest.*

2) The appellant filed a defence to deny the respondent's claim for various reasons. The appellant specifically stated in paragraph 9 of its defence that the court had no jurisdiction to entertain the suit. The suit was heard and determined in favour of the respondent by Hon. Gicheha, learned Principal Magistrate. Basically, the trial magistrate held that the respondent was unlawfully terminated and proceeded to award him ksh.409,784/75 with costs and interest. The appellant was aggrieved by the decision hence this appeal.

3) On appeal, the appellant put forward the following grounds:

- 1. THAT the learned magistrate erred in law and in fact in failing to find that the honourable court lacked jurisdiction to hear and determine the matter.***
- 2. THAT the learned magistrate erred in law and in fact in failing to find that the mere fact that the defendant participated at the hearing did not confer jurisdiction to the court.***
- 3. THAT the learned magistrate erred in law and in fact in failing to find that the appellant was entitled to raise the issue of jurisdiction by way of submissions after the hearing of the suit being***

a matter of law.

4. THAT the learned magistrate erred in law and in fact in finding that the respondent was unlawfully dismissed from employment.

5. THAT the learned magistrate erred in law and in fact in failing to take into account the evidence by the appellant's Human Resource Manager and Plant Manager's that respondent was given a hearing prior to dismissal.

6. THAT the learned magistrate erred in law and in fact in failing to take into account the evidence by the appellant's Human Resource Manager and Plant Managers that the appellant strictly followed the statutory procedure in dismissing the respondent from its employment.

7. THAT the learned magistrate erred in law and in fact in failing to take note of the evidence tendered by the appellants witnesses which showed that the respondent's dismissal from employment of the appellant was necessitated by the respondent's gross misconduct.

8. THAT the learned magistrate erred in law and in fact in finding the appellant liable to the respondent.

9. THAT the learned magistrate erred in law and in fact in awarding the respondent two month's salary in lieu of notice.

10. THAT the learned magistrate erred in law and in fact in awarding the respondent severance pay.

11. THAT the learned magistrate erred in law and in fact in awarding damages to the respondent.

4) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

5) I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of 11 grounds of appeal, the main ground in my view, which commends itself for determination is the question of jurisdiction.

6) It is the submission of the appellant that the trial court fell into error when it handled a labour dispute in which it did not have jurisdiction to hear and determine under Section 87 of the Employment act, 2007 and Section 12 of the Labour Institutions Act. It is argued that the above legislations vested exclusive jurisdiction to hear and determine disputes between employers and employees to the Industrial Court now referred to as the Employment and Labour Relations Court. The respondent was of the contrary view that at the time of instituting the suit the operational law, that is the Labour Institutions Act, 2007 granted the magistrate's court jurisdiction to entertain employment disputes. According to Section 16(2) of the Labour Institutions Act, the Hon. Chief Justice was authorised to designate any magistrate's court to hear and determine matters relating to labour laws. The respondent pointed out that pursuant to the aforesaid provision the Hon. Chief Justice caused to be published, Legal notice no. 9243 designating all courts presided over by magistrates of the rank of Senior Resident Magistrates and above as special courts to hear and determine employment and labour relation cases.

7) In her judgment, the learned principal magistrate noted that the appellant had raised the issue of jurisdiction during submissions instead of raising it as a preliminary objection so that the respondent can answer. With respect, the learned principal fell into error here. It is apparent from the defence filed by the appellant that the issue touching on jurisdiction was raised in paragraph 8 and was responded to by the respondent in paragraph 4 of the reply to defence. It cannot therefore be said that it was raised at the stage of submissions. Despite expressing her misgivings, the learned Principal Magistrate nevertheless proceeded to determine the question of jurisdiction. She formed the opinion that the magistrate's court

had jurisdiction to hear and determine the dispute under the Employment Act. She went further to state that the Act gave the appellant a chance to either commence his complaint with the labour officer or in the alternative to file an action in court under Section 47(1) of the Employment Act.

8) I have carefully considered the competing arguments over the question touching on jurisdiction. There is no dispute that the respondent's action is in respect of his summary dismissal by the appellant. In such a case the provisions of Section 47(1) and (3) of the Employment Act, 2007 provides:

“where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under Section 87.”

The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial court on the same issue and to the right to complain of any other infringement of his statutory rights.

9) The provision of Section 87(1) and (2) of the Employment Act, 2007, provides:

“Subject to the provisions of this Act whenever:

Any question, difference or dispute arises as to the rights or liabilities of either party; or

Touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service the aggrieved party may complain to the labour officer or lodge a complaint or suit in the industrial court,

No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).”

10) The provision of Section 12(1) of the Labour Institutions Act expressly provides as follows:

“the Industrial court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect any matter which may arise at common law between an employer and employee in employer's organization and a trade union or between trade union, an employer's organization, a federation and member thereof.”

11) It should be noted that the Employment Act, 2007, came into force on 2nd June 2008 vide legal notice no. 61 dated 23rd May 2008 thus repealing the previous Employment Act (Cap. 226 of the Laws of Kenya).

12) The respondent's contract of employment was taken care of under Section 93 of the Employment Act, 2007 which stated as follows:

“A valid contract of service..... entered into in accordance with the repealed Employment Act shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and constructed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.”

13) It is now abundantly clear in my mind that the trial court lacked jurisdiction hear and to determine the dispute since the contract of employment dated 14th April 1997 between the respondent and the defendant is to be deemed as a contract governed by the Employment Act 2007 as provided for under Section 93 of the aforesaid Act and consequently any dispute or complaint arising from the said contract can only be

determined by the Industrial Court as under Sections 47(1) and (3), 50 and 87(2) of the Employment Act, 2007 as read together with Section 12 of the Labour Institutions Act.

14) The respondent has relied on a gazette notice showing that the Chief Justice caused to be published a gazette notice giving magistrates courts to handle employment and labour relations matters. The respondent failed to provide a copy of the aforesaid gazette notice to the trial court nor to this court. This court is therefore unable to determine whether the gazette notice covered the trial court at that time.

15) The second ground which was ably argued relates to the merits of the appeal. According to the respondent, he had established his claim before the principal magistrate's court on a balance of probabilities. The appellant was of the view that the respondent's dismissal was procedural fair and justified therefore there was no basis of awarding notice pay. The appellant further argued that the service pay was not payable or due since the respondent was a member of NSSF and pension scheme. The learned Principal Magistrate found that the plaintiff being a member of the middle level management staff, the appellant was bound by the terms of service that were produced before the court. The trial magistrate further stated that the respondent was entitled to severance pay amongst other claims. I am convinced that the decision of the learned principal in this respect cannot be faulted. I find no merit in this appeal challenging the merits of the decision.

16) In the end, this appeal solely succeeds on the ground touching on jurisdiction. Consequently the appeal is allowed. The order dismissing the objection on jurisdiction is set aside and is substituted with an order striking out the suit with costs of the appeal and suit being given to the appellant.

Dated, Signed and Delivered in open court this 25th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent