



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO 15 OF 2009**

**THE PRINCIPAL AND BOG**

**MACHAKOS TEACHERS COLLEGE ..... APPELLANT**

**VERSUS**

**WAMBUA MUANGE..... RESPONDENT**

**((An Appeal arising out of the judgment of J. M. Munguti SRM delivered on 20<sup>th</sup> January 2009 in Machakos Chief Magistrate's Court Civil Case No. 157 of 2007)**

**JUDGMENT**

The Appellant was the Defendant in Civil Cases No. 157 of 2007 at Machakos Chief Magistrate's Court. The Respondent was the original Plaintiff in the said suit, and he sought general damages for unlawful dismissal. The learned trial magistrate found for the Respondent, and awarded him 12 months' pay of Kshs 103,620/= as the remedy for unfair dismissal. The Appellant subsequently appealed to this Court through an Amended Memorandum of Appeal dated 9<sup>th</sup> February 2007, wherein its grounds of appeal are as follows:

- 1. The learned magistrate erred both in law and fact when he shifted the burden of proof to the defendant.**
- 2. The learned magistrate erred both in law and fact when he granted reliefs which were not sought by the plaintiff.**
- 3. The learned magistrate erred in law and fact when he decided the whole case against the weight of evidence.**
- 4. The learned magistrate erred in law when he acted on provisions of the law which were not applicable to the case at hand.**
- 5. The learned magistrate erred both in law and fact when he relied on extraneous matters.**
- 6. The learned magistrate erred both in law and fact when he ordered that interest be paid from 30/11/2006.**

The Appellant is praying for orders that the trial Court's judgment be quashed, and that judgment be

entered for the Appellant as against the Respondent.

### **The Facts and Evidence**

I will proceed with a summary of the facts and evidence that was given in the trial Court. The brief facts of the case are that the Respondent instituted a suit in the trial court by filing a plaint dated 22<sup>nd</sup> February 2007, wherein he claimed that he was employed by the Appellant on 5<sup>th</sup> December 2005 as a plumber at a monthly gross salary of Kshs 8,635/=, and that on or about 30<sup>th</sup> November 2006 the principal of the Appellant unlawfully cancelled his employment, and further on 28<sup>th</sup> December 2006 orally dismissed him without notice. The Respondent claimed general damages for unlawful dismissal.

The Respondent gave evidence at the trial and stated that he was employed as from 5<sup>th</sup> January 2005 as a plumber, and he produced the letter of appointment as exhibit 1. However, that on 30<sup>th</sup> November 2006 he received a letter which he also produced as an exhibit, stating that he had been employed by mistake without approval of the BOG and cancelling his employment. He testified that the Appellant did not let him serve for the two months stated therein after he filed this suit.

The Appellant filed a defence dated 19<sup>th</sup> March 2008, wherein it admitted that the Respondent was its employee who was dismissed, but denied that the said dismissal was unlawful, or that the Respondent was entitled to general damages for unlawful dismissal. The Appellant did not call any evidence at the trial.

### **The Submissions**

The Appeal herein was canvassed by way of written submissions. The Appellant's Advocate, Elizabeth Isika Advocate, filed submissions dated 26<sup>th</sup> October 2015. It was argued therein that the trial court's decision was based on the failure of the Appellant to give evidence, yet it was the Respondent who needed to prove unlawful termination. Further, that the Respondent was awarded 12 months' pay as his remedy without an indication as to whether the same was general damages.

It was contended in this regard that the Respondent was only entitled to severance pay under the employment laws at the time, and courts have held that the damages awardable for unlawful dismissal is the salary in lieu of notice. However, that a construction of the employment cancellation letter shows that the Respondent was given two months' notice. Further, that the trial magistrate in her award relied on section 49(1) of the Employment Act which came into force on 2<sup>nd</sup> June 2008, while the Respondent's termination letter was dated 30<sup>th</sup> November 2006, before the passing of the said Act.

Lastly, it was submitted that the trial magistrate erred by ordering that interest be paid from 30<sup>th</sup> November 2006, when the law provides for interest to be paid from the date of judgment or assessment when the claim is for money. Section 26 of the Civil Procedure Act and the decision in **Shariff Salim & Another vs Malundu Kikava (1989) e KLR** were cited in this regard.

P.N Musila & Co. Advocates for the Respondent filed written submissions dated 5<sup>th</sup> November 2015. The Respondent distinguished the decision in **Shariff Salim & Another vs Malundu Kikava (1989) e KLR** relied on by the Appellant and submitted that the present appeal involves damages in respect of tortious claim and not monies. He urged the Court to be guided by the Industrial Court's decision in **Absalom Ajusa Magomere vs Kenya Nut Co Ltd , (2014) e KLR**.

### **The Issues and Determination**

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, the facts that the Respondent was an employee of the Appellant and that he was dismissed by the Appellant are not disputed. What is disputed and in issue is whether the said dismissal was unlawful, and if so, whether the Respondent is entitled to damages and the quantum.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424.**

The law on the first issue before this Court is that a dismissal of employment can be unlawful for reasons of being a wrongful dismissal or an unfair dismissal. The law provides that a dismissal will be wrongful if it is in breach of the terms of the employment contract as held in **Imenje vs Kenya National Co. Ltd (1986) KLR 350.** The circumstances which can give rise to a claim of wrongful dismissal are explained in more detail in **Tolley's Employment Handbook, 20th Edition** paragraph 58.1 at page 1093 as follows:

**“A wrongful dismissal occurs when an employer dismisses an employee in a way that is in breach of an employee’s contract of employment. Most commonly this arises when the employer dismisses the employee summarily (ie without any notice at all) or with short notice, and has no sufficient justification for doing so. However there may also be a wrongful dismissal in other situations: for example if the employer terminates the employment without following some procedure prescribed by contract. Further, if the employee resigns in response to some repudiatory breach of contract by the employer, that will give rise to a claim which is in effect for wrongful dismissal.”**

An unfair dismissal is one on the other hand one where there is no substantive justification provided or procedural fairness observed. The elements of a claim for unfair dismissal are explained in **Tolley's Employment Handbook, 20th Edition** at paragraph 53.1 at page 984 as follows:

**“An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal...if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate or to pay compensation to the ex –employees”**

A dismissal can therefore be both unfair and wrongful at the same time.

In the present appeal, the letter of cancellation of the Respondent’s employment dated 30/11/2006 produced by the Respondent as his exhibit 2

stated as follows:

**“30/11/2006**

**Mr. Wambua Muange,**

**P. O. Box 124 – 90100**

**MACHAKOS**

**DEAR SIR,**

**RE: CANCELLATION OF YOUR EMPLOYMENT AS A PLUMBER – JOB GROUP ‘D’**

**I am writing on behalf of the Board of Governors concerning the above offer made to you in December 2005.**

**This offer was given by mistake as it was done without the knowledge and approval of the Board of Governors.**

**The college will recover from you the difference in salary paid to you on the higher grade**

**totalling to Kshs. 17,950/= through 7 monthly instalments. W.e.f. December 2006.**

**I sincerely apologise for this mistake and all the inconveniences you are going to suffer both financially and psychologically.**

**Your contract is consequently extended for a further two months. You are further advised to apply for consideration when this post is advertised.**

**Ursula N. Wafula (Mrs)**

**PRINCIPAL/SECRETARY”**

This cancellation of employment was wrongful, for the reason that my construction of the said letter, and that of a reasonable person who reads it, is that the same is as a summary dismissal of the Respondent from his position as Plumber Job Group “D”, and an offer of employment of a fixed term for two months in an unspecified position and terms. This construction is also supported by the statement therein that the Appellant would continue recovering an overpayment made to the Respondent for the following seven months.

In addition I find the said dismissal to have been unfair by reason of the summary nature of the termination, and for the reason that the Appellant failed to bring any evidence to establish the allegations that the offer of employment was given by mistake without the knowledge and approval of the Board of Governors. The Appellant was in this regard required by law to show that he dismissed the employee for a substantial justificatory reason, and it would then be for the Court to decide whether it acted reasonably in treating the reason as a sufficient reason for dismissing the employee. The trial magistrate therefore did not err in his finding that the Respondent’s dismissal was unlawful.

As regards the award by the trial Court of Kshs 103,620/=, it is an established principle of law that that the appellate court will only interfere where the trial court either took into account an irrelevant factor or left out a relevant factor, or that the award was too high or too low as to amount to an erroneous estimate, or that the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

As regards the issue of damages, it is not disputed by the parties that the Respondent’s monthly gross salary was Kshs 8,635/=, made up of a basic salary of Kshs 6,060/=, a house allowance of Kshs 2,200/=and a medical allowance of Kshs 375/=, as shown in the letter of employment dated 5/12/2005 produced by the Respondent as his exhibit 1.

Let me also state at the outset that I do agree with the Appellant that the trial magistrate did err in applying section 49(1) of the Employment Act of 2007, and that the applicable statute at the time of the Respondent’s employment and dismissal was the Employment Act of 1984 which was repealed by the Employment Act of 2007.

This finding notwithstanding, the relevant remedies to take into account for unfair dismissal is re-engagement, reinstatement and compensation. Given the lapse of time since the Respondent’s employment was cancelled, it would not be in the circumstances reasonable or practicable to order for his re-engagement or reinstatement. I am also mindful in this regard that under Section 15 of the repealed Trade Disputes Act which was applicable at the time of cancellation of the Respondent’s employment, compensatory awards in redressing unfair termination were awarded and capped at the equivalent of the employee’s 12 months’ gross salary.

This position was noted in **Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR** . In that decision it was found that the Employment Act 2007 was not in force at the time of the Respondent’s dismissal, but the Industrial Court awarded *the Respondent compensation the equivalent of 12 months’*

salary at Kshs. 155,520 for unlawful and unfair termination pursuant to the cited section of the Trade Disputes Act. The Court also found that the Respondent in addition merited 3 months' salary in lieu of notice in accordance with the terms of his employment contract.

In addition, in *Major Wilfred Kyallo Kangullyu v. Tetra Pak Limited, Industrial Court of Kenya Cause Number 715 of 2011 [2014] e-KLR*, it was held that an employee whose contracts of employment were terminated before the year 2007 when the new employment Law came into force, and who filed their claims in the Civil Courts, should not be treated differently from employees who at the time filed their Claims at the Industrial Court under the repealed Trade Disputes Act, and who could be awarded compensation or reinstatement for unfair and unlawful dismissal. To this extent therefore, the award by the trial magistrate of Kshs 103,620/- being 12 months' pay for unfair dismissal was legal.

As regards the remedy for wrongful dismissal, it is settled law that the basic principle in assessing damages is that the employee must be put in the same position as if the employer had properly performed the contract. Therefore, Where an employee is dismissed summarily in breach of contract, the *prima facie* measure of damages is the sum which the employer would have had to pay in order to bring the contract to an end lawfully – that is to say, the sum payable in respect of the notice period or remainder of the term of the contract if it is a fixed term contract.

The letter of employment dated 5/12/2005 produced by the Respondent as his exhibit 1 in the trial Court did not provide for any notice period for termination of employment. In such cases, the law is that an implied term that the employment contract may be terminated upon reasonable notice, which reasonable notice is determined by the Court taking into account factors such as the seniority and remuneration of the employee, his or her age and length of service. It was in this regard held by the Court of Appeal in the case of *Kenya Oil Field Services Ltd vs Peter Njoroge (Nbi) Civil Appeal No. 124 of 1985* as follows:

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**“The law is well settled that when the service Contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination Clause the measure of compensation or indemnity for unlawful dismissal is for the REASONABLE PERIOD OF NOTICE depending on the nature of the employment.”**

In addition there may be applicable periods of notice of termination of employment that are set by statute. The repealed Employment Act of 1984 in this regard provided in section 14(iii) that where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract, it shall be deemed to be terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. However, this provision was not applicable in the case of a contract of service whose terms provide for the giving of a greater period of notice of termination in writing.

It is thus the finding of this Court that under the then applicable law the Respondent would have been entitled to the payment of salary for one month as damages in lieu of notice. To this extent therefore, the trial magistrate did err in not awarding the one month's salary as damages for wrongful dismissal.

Lastly, as regard the finding by the trial magistrate that interest at court rates be paid on the award and costs as from 30/11/2006, section 26 of the Civil Procedure Act provides as follows with regard to the imposition of interest:

**“ (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.**

**(2) Where such a decree is silent with respect to the payment of further interest on such**

**aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum. “**

Section 27(2) of the Act further provides as follows:

**“(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”**

In addition, in the decision by the Court of Appeal in **Dalmas Ogoye vs KNTC Ltd, Nairobi Civil Appeal No 125 of 1996**, that was relied upon by the Appellant in the trial Court, it was held that since the amount due to the employee therein ought to have been paid at the time his employment was unlawfully terminated, it would be payable with interest of 14% from that date of termination. The two options presented by law are therefore payment of interest on any sum adjudged by the Court either from the date of institution of the suit, or from the date of termination of employment until payment in full. Furthermore, since a Court has discretion to order that interest is payable before institution of the suit, the trial magistrate did not err in his finding interest at court rates be paid on the award as from 30/11/2006 and at court rates.

I accordingly dismiss this appeal for the above reasons, and set aside the award of the trial Court of Kshs 103,620/= and substitute it with an award of damages of Kshs 112,255/= made up of the following items:-

- a) Compensatory award for unfair dismissal.....Kshs. 103,620/=
- b) Damages in lieu of notice.....Kshs. 8,635/=
- Total damages.....Kshs 112,255/=

The Respondent is also awarded interest at court rates on the award of Kshs 112,255/= from the date of dismissal on 30/11/2006 until the date of payment, and the costs in the trial Court and of this appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF JANUARY 2016.**

**P. NYAMWEYA**

**JUDGE**