



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.93 OF 2010

BETWEEN

GIANCHORE TEA FACTORY CO. LIMITED APPELLANT

AND

OYAGI ONTOMWA RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Mr. Macharia, RM,

delivered on 29th April 2010 in the RM's court at Nyamira Civil Suit No.106 of 2004)

JUDGMENT

Introduction

1. The appellant herein being aggrieved and dissatisfied with the judgment and decree of Hon. Mr. Macharia, Resident Magistrate, delivered on 29th April 2010 at Nyamira in Civil Suit No.106 of 2004 filed this appeal setting out the following grounds:-

- a. That the learned magistrate erred in law and in fact in entering judgment in favour of the plaintiff as prayed in the plaint.*
- b. That learned magistrate erred both in law in fact by considering irrelevant or immaterial facts which have not been pleaded or proved by evidence as required by law.*
- c. That the learned magistrate erred both in law and fact in not taking into consideration the evidence and submissions tendered in court on behalf of the appellant.*
- d. That the learned magistrate erred in both law and fact in holding that the respondent was entitled to the amount sought in the plaint when he had not proved the same.*
- e. The learned magistrate erred in both law and fact by failing to state in his judgment the statement of the case, points of determination the decision thereon and reasons for such a decision.*
- f. The learned magistrate erred in both law and fact by failing to find that the evidence tendered on behalf of the appellant was unshakable, unchallenged and not rebutted by the*

respondent.

g. The learned magistrate erred both in law and fact in awarding costs and interest of the suit to the respondent.

h. The judgment of the learned magistrate is in the circumstances unfair and unjust.

2. The appellant therefore prays that the judgment and decree of the lower court be set aside and be substituted with a proper finding by this honourable court and costs be awarded to them.

The Pleadings

3. Briefly, by a plaint dated 15th September 2008, the respondent herein sought for judgment against the appellant for Kshs.41,666.40/= being the accrued salary unlawfully withheld, together with costs and interest.

4. The respondent's claim is as follows:- He claimed that he was a tea grower who delivered tea leaf to the appellant company and a member of the company vide grower No.GN009 0157 1344. In or about October 2006, the appellant without any reasonable cause withheld the respondent's tea salary and bonus in the sum of Kshs.11,997/= and has continued withholding the same to date which accrued and stood at **Kshs.41,666.40** by the time of filing plaint. That as a result, the respondent has suffered damages which he now claims, namely payment of Kshs.41,666.40 as unpaid tea salary and bonus as at June 2008.

5. The appellant filed a defence in the lower court denying each and every allegation in the respondent's plaint. The appellant was categorical that they had not withheld the respondent's salary and bonus without any reasonable cause or justification and invited the plaintiff to strict proof. Particulars of damages were also denied.

The Evidence

6. The suit was heard by the trial court during which the respondent was the only one to testify in support of his claim. He testified that he was a tea farmer and used to deliver his tea to the appellants herein. He produced the June 2008 pay slip "**P. Exhibit No.1**". He further testified that he was last paid in the month of August 2006 and had never received any payments since then, thus prompting him to demand for the same vide the letter marked as "**P. Exhibit 2**". He testified that he later learnt that the reason why the appellant withheld his salary was that he (respondent) appeared to have delivered more tea than was expected of him. The respondent denied the allegation, hence the proceedings before the trial court

7. The appellants on their part called Jackline Moraa their employee who testified that according to the appellant's bylaws, if a farmer is suspected of delivering false weights for his tea, the matter is investigated and if found guilty the farmer forfeits the tea to the company or pays Kshs.50,000/=. A copy of the by-laws is marked "**D. Exhibit 1**". She told the court that every tea bush is supposed to produce 2kg in a year and that anything in excess of such weight is suspicious. That according to a report by the factory management the respondent had 3.73 kg per bush in the year 2005 and 2006. She told the court that the respondent appeared in the report as one of the farmers who had produced excess tea by 1.73 kg.

8. She further testified that in the appellant's meeting held on 26th September 2006, it was resolved that people with excess tea would be suspended pending further investigations and that the respondent had been paid all his monies.

Judgment of the Trial Court

9. Having considered the evidence on record and the submissions filed, the trial court found that it was not in dispute that the plaintiff is a member of the appellant company and used to sell his tea to them.

He also found that there is no dispute that the amount in question that is Kshs.41,666.40 appearing in the respondent's pay slip being cleared by the respondent is false weight. The trial court noted that there was no evidence to the effect that the respondent was found guilty of delivering excess tea by 1.73 kg per tea bush.

10. After scrutinizing the evidence on record, the trial court found that the respondent had proved his case on a balance of probability and that the appellants owed the respondent Kshs.41,666.40 and went ahead and granted the prayers sought which are now appealed against.

The Submissions

11. Parties filed and exchanged written submissions herein which this court has had an opportunity to go through. The issues for determination in this appeal are:-

- a. *Whether the respondent proved his case on a balance of probability.*
- b. *Whether the respondent was entitled to special damages and if the same was awarded.*
- c. *Whether the amount claimed by the respondent was for false weight and in view of the by-laws was an offence.*

Analysis and Findings

12. On the first issue herein, the respondent showed that he was a member of the appellant factory and he used to supply tea to them. This was not disputed in any way or at all by the appellants. The court was shown his pay advice slip for June 2008. What stands out on the pay slip is the F/Weight Recovery of 817.40. In cross examination, the respondent claimed that he was to be paid Kshs.817. From the defence by the appellants, DW1 told the court that as per their by-laws, Article 22 para (a) provides that in case of false weight the matter should be investigated and if found guilty the grower forfeits his tea to the tea factory and may be fined Kshs.50,000/=. It means therefore that the false weight amounting to Kshs.817 was to be investigated. The trial court did not see the investigation report nor did it find the witness (DW1) competent enough to actually give a correct position of the company and its policies.

13. Given that the trial court in its wisdom noted that the amount in dispute of Kshs.41,666.40 appearing in the pay slip and being claimed by the plaintiff was false weight, and again by **P. Exhibit 1** find that the amount shown is Kshs.817. The respondent has not shown by way of calculation how he arrived at the amount of Kshs.41,666.40. Again I find that this amount was for false weight, which means that the respondent must have supplied more tea than he was expected to do. The trial court therefore erred in allowing/awarding the respondent Kshs.41,666.40. Though the said amount was pleaded, there is no indication either from the pleadings or the evidence on how the amount was arrived at. This court finds therefore that the respondent on account on not specifically pleading what was claimed should not have been awarded such a claim. He did not thus prove his case to the required standard.

14. The respondent did not claim any special damages as alleged by the appellant. The lower court did not award any special damages because the same was not pleaded.

Conclusion

15. In the final analysis, this court finds that the amount claimed by the respondent was for false weight. The pay slip is clear. Even though there was no investigation report as to the weight of tea supplied by the respondent, I find that the pay slip speaks for itself as it shows false weight. The appellant's by-laws are clear on this issue and therefore the appellants are at liberty to charge the respondent herein for falsifying the weight of the tea he supplied.

16. The appeal herein is therefore allowed on the grounds set out above. Judgment and decree of the lower court is set aside and the suit in the lower court is dismissed. Each party shall bear their own costs

both in the court below and for this appeal.

17. Orders accordingly.

Judgment written and signed by

R.N. SITATI

JUDGE.

Judgment delivered, dated and countersigned in open court at Kisii this 9th day of January 2015

C. NAGILLAH

J U D G E

In the presence of:-

Mainga h/b Nyachiro for Appellants

N/A for Respondent

Edwin Mong'are Court Assistant