



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 203 OF 2011

AKSHAR TEAM SECURITY LIMITED ALSO T/A A-TEAM.....APPELLANT

VERSUS

DIDA GALGALO BILALA.....RESPONDENT

(Appeal against the judgment and decree of Hon. P. Nditika in Milimani Commercial CMCC No. 10559 of 2007 delivered on 29th April, 2011)

JUDGMENT

1. The origin of the dispute between the parties herein is an alleged failure by the Appellant to pay the Respondent his salary in lieu of his annual leave and public holidays for eight (8) years. The Respondent sought special damages of KShs. 53,120/=, general damages and costs and interest of the suit. The Appellant filed a statement of defence where it denied the Respondent's claim.

2. It was the Respondent's testimony that he had worked with the Appellant as a security guard for eight years since the year 1999 to 2007 and produced an employment card (P. Exhibit 1) to so prove. He stated that the Appellant was meant to pay him KShs. 4,000/- per month. That he was not allowed leave or off-duty. He stated that before leaving employment, he issued the Appellant with a notice dated 30th June, 2004 (P. Exhibit 2). He lamented that for the eight years that his leave and off days were forgone, he was not paid occasioning him to file the suit. On cross-examination, the Respondent admitted that he had nothing to demonstrate that he worked even on public holidays. The Appellant closed its case without calling any witness.

3. The trial court heard the matter and entered judgment in favour of the Respondent and awarded him KShs. 384,000/- as damages. KShs. 21,120/- for the 11 public holidays and KShs. 32,000/- as leave allowance and KShs. 53,120/- as special damages.

4. Aggrieved by the aforesaid decision, the Appellant filed this appeal on the following grounds:-

i. The learned magistrate erred in law and misdirected himself by awarding special damages when the same had not been proved.

ii. The learned magistrate erred in awarding the special damages in the absence of documentary or any other proof thereof during the trial.

iii. The learned magistrate erred in law and fact and seriously misdirected himself in granting the Respondent general damages which were not proved.

iv. The learned magistrate erred in law and fact by awarding general damages based on purely wrong legal principles.

v. The learned magistrate erred in law and fact by awarding judgment in favour of the Respondent when there was no evidence whatsoever to justify the award.

5. This appeal was canvassed by way of written submissions. It was submitted on behalf of the Appellant that rather than producing an employment card, the Respondent tendered no other evidence in proof of his claim. That going by the submissions filed in the trial court for the Respondent, his claim was solely based on the Employment Act No. 11 of 2007 and that no submissions were made by his advocate in regard to general damages. It was contended that the award of special and general damages does not exist under the Employment Act No. 11 of 2007(***the Act***) which is the applicable statute in this case. That a party invoking the Act would only be entitled to terminal benefits and that the only other relief one may seek is compensation for wrongful dismissal and unfair termination. That since it is the Respondent who issued a notice of termination, he would only claim for untaken leave days or payment for public holiday which would be classified as terminal dues and not special damages and that the same must be strictly proved before awarding. It was contended that the Respondent having worked for 8 years without leave without any complaint is an indication that he had slept over his right and only confirms the Appellant's defence that the Appellant took leave at his own pleasure. It was further stated that it was an indication that the Respondent's claim is an afterthought. It was contended that the trial magistrate erred in awarding the Respondent a sum equivalent to salary of 8 years yet there was no claim or evidence as to salary arrears for the said period.

6. The Respondent on the other hand submitted that the appeal as filed is incompetent and should be struck out. It was contended that this court proceeded to admit the appeal when the record did not fulfil the provisions of Order 42 rule 13 (4)(e)(f) of the Civil Procedure Rules, 2010 i.e. that the Respondent did not include in the record all the vital documents that would aid this court in arriving at an informed decision. It was argued that lack thereof renders the appeal defective and incompetent. It was further submitted that the appeal as filed was improperly before court since it was filed out of time and without leave of court. It was argued that in the event there was such leave, then it should have formed part of the record and that there should also have been at the very least an order to that effect at the direction stage. It was submitted that once a certificate of delay was issued before the filing of the record of appeal, the Appellant would have made a formal application for the record of appeal to be admitted out of time and such order made part of the record. It was submitted that thirty (30) days having lapsed from when the certificate of delay was issued and the appeal filed without leave to file out of time, the appeal is irregularly and incompetently before court and ought to be dismissed for being in contravention of the law. It was submitted that Article 159 of the Constitution provides that justice ought to be done without undue regard to technicalities, that the omission and glaring irregularities complained of go to the root of the appeal. On the evidence and pleadings, it was submitted that the Appellant did not controvert the Respondent's case. That for lack of evidence, the special damages were rightfully pleaded and proved as the Appellant never showed that the Respondent was not entitled to the same. That as much as the plaint referred to the Respondent's claim as special damages, it is clear from the wording that the same were employment claims which court found that on a balance of probability were rightfully due to the Respondent.

7. In consideration of the Respondent's submissions, it is proper for this court to first determine whether the record of appeal herein is valid or not. I have taken the liberty to peruse the court record, the certificate of delay was issued on 13th May, 2014 and the record of appeal filed on 31st August, 2014. That is close to three months after the prescribed period of thirty (30) days allowed. Further, the Appellant did not apply for the appeal to be admitted out of time as required under Section 79G of the Civil Procedure Act which stipulates as follows:-

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

8. While I appreciate that such a record of appeal filed out of time without the leave of court is incompetent, I frown at the Respondent's failure to raise and/or disclose the issue at an earlier hour despite the Respondent's counsel presence at the time directions were taken. This is a show of bad faith and to say the least sharp practice which goes against an advocate's duty to the court. Advocates ought to aid the court with expeditious and just administration of justice.

9. The question that arises is whether such lapse goes to the root or substance of the case. The statute is in mandatory terms that an appeal shall be filed within a period of 30 days from the date of delivery of judgment. Failure to seek leave to an appeal out of time is fatal. It would go to the root of the case. The consequence is that the appeal will be rendered incompetent. The defect cannot be regarded as a procedural technicality since it is a statutory provision. Though the provision is worded in mandatory terms, the courts in discretion to grant leave can overlook the defect for broad interest of justice. The circumstances of this appeal persuades this court to acknowledge that the appeal was filed out of time but that court will overlook that because the Appellant had obtained and filed a certificate of delay and in any case, the Respondent did not raise the issue in advance but waited until the closing stage of its submissions. For the above reason a fair order is to save the appeal and proceed to consider its merits.

10. In **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others**, the Court of Appeal had this to say where a notice of appeal was served on the respondent out of time and without leave of the court:-

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

11. In **Civil Appeal (Application) No. 130/2008., Joseph Kiangoi v. Waruru Wachira & 2 others**, held as follows:-

"The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair... the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record..."In the result

12. I decline to strike out the appeal herein and proceed to determine the appeal. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess it and make my own independent conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A. 123**. I have given due consideration to the appeal herein. While the Respondent gave evidence, the Appellant did not controvert the

Respondent's evidence. It was incumbent upon the Appellant to not only deny that the Respondent's dues were paid but to keep records and produce in court documents to that effect to prove its case. Under Section 74 of the Employment Act (the Act), The Appellant is under duty to keep and maintain the employment records and failure to do so and produce the same to the court show that the Appellant's denials were unfounded. The failure to controvert/or rebut a case was discussed in Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 by Makhandia J as follows:-

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

13. I adopt the disposition in the **Karuru Munyoro** case (supra) and in the circumstances take the Respondent's facts to this case to be true. On the reliefs payable to the Respondent, I note that the trial court awarded the Respondent damages equal to eight years salary yet what was prayed for was salary in lieu of annual leave and public holidays. Further, the trial magistrate did not give a basis of how he arrived at that figure. I am in the circumstances inclined to interfere with the trial court's finding.

14. The Respondent was not given leave or rest during public holidays. This was against the provisions of Section 41 of the Act and Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Under Section 28 (1) (a) of the Act, for every year worked an employee is entitled to 21 days leave. The Appellant having not rebutted the Respondent's evidence, the Court would find in favour of the Respondent that he did not go on leave from the year 1999 to 2007 and find that he is entitled to payment in cash, in lieu of the leave days for those eight (8) years. Leave is normally granted with full pay. Working with the Respondent's earning of KShs. 4,000/=, I find that he is entitled to KShs. 32,000/= being salary in lieu of annual leave. As for public holidays, as correctly stated by the Respondent, he was in employment with the Appellant at a double normal rate as statutorily envisaged in Section 40 of the Act. His relief for the public holiday works as $11 \times 8 \times (4,000 \div 30) =$ KShs. 21,120/= . No basis was laid for the award of general damages. The appeal herein therefore partially succeeds. The trial court's decision on damages is set aside and substituted by the following order:-

The Respondent is awarded

- i. KShs. 32,000/= being salary in lieu of leave days and
- ii. KShs. 21,120/= being salary in lieu of public holidays

totalling to KShs. 53,120/=

- iii. Costs of the appeal and the suit based on the above figure.

Dated, Signed and Delivered in open court this 29th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for the Appellant

Mrs. Njuguna h/b Kuloba for the Respondent