



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 541 OF 2005

TELKOM KENYA LIMITED.....APPELLANT

VERSUS

DAVID MURITHI KAIGURI

ALIAS DAVID MURIITHI KAIGORI.....RESPONDENT

(From the judgment of John Onyiego SRM in Kerugoya PMCC NO. 318 OF 2003)

J U D G M E N T

The Respondent herein filed proceedings in the Principle Magistrate Court at Kerugoya seeking a declaration that he had been employed by the Appellant on permanent terms and sought termination payment of Kshs.240,587.30. He claimed that he was employed by the Appellant in April 1981 as a toilet cleaner and messenger in their Kerugoya Office on a monthly salary of Kshs.500/-. That his employment was terminated on 25th September 2002. He further claimed that the Appellant violated the provisions of the Employment Act by failing to pay him final benefits.

The Appellant on the other hand denied that the Respondent was entitled to any dues. It stated that the Respondent's contract was renewed, and that under the new terms he was required to clean the toilet for one hour in the morning, three times a week or as required.

Judgment was delivered against Appellant on 14th July 2005. In the judgment the court declared that the Respondent was employed on permanent terms by the Appellant. It awarded him Kshs.129,594/= as terminal dues. The Appellant being aggrieved by the said decision appealed to this court on the following grounds:

1. **The learned magistrate erred in not appreciating that the issue before the court were whether the plaintiff was an employee of the defendant or not , and if so on what terms and whether the plaintiff was entitled to the belief sought in the plaint.**
2. **The learned magistrate erred in not appreciating that the plaintiff was throughout the term he worked with the defendant an independent contract. Consequently, the reliefs sought in the plaint could not be granted.**
3. **The learned magistrate erred in finding that the plaintiff has proved his case to the prescribed standard yet there was no evidence to support such finding.**
4. **The learned magistrate erred in failing to find that the defendant had adequately answered the plaintiff's case and tendered evidence to rebut his case.**

During the hearing of the appeal the parties agreed to file written submissions which were exchanged. The parties also filed declarations under **Order 42 Rule 16(1) of the Civil Procedure Rules**.

The Appellant submitted that the Respondent did not tender evidence to satisfy the required prescribed standard of proof. The Appellant maintained that the Respondent was employed on a day to day basis and the contract was terminated when the Appellant contracted a firm to clean the facility. The Appellant further stated that the payment vouchers as opposed to the normal pay slips were rendered to the Respondent which did not disclose any allowances. The Appellant claimed that the Respondent did not object to being paid at the end of the month which was accepted without seeking a review.

The Appellant also submitted that the Respondent did not prove the existence of any relationship between him and the Appellant. It stated that the Respondent did not produce any letter to prove he was employed by the Appellant. The Appellant contested that the Respondent was an employee and that there was an intention of creating employer –employee relationship.

In response the Respondent submitted that the Respondent was not an independent contractor as insinuated by the Appellant. The Respondent stated that the Appellant was in control of what the Respondent was supposed to do. This is different in a case of independent contractor. The Appellant also defined how long the Respondent was supposed to work per week. The Respondent also submitted that he received a steady pay check from the Appellant and he was also supplied with his tool of trade which is a clear indication that he worked for the Appellant. The Respondent further submitted that his nature of work was continuous exercise for a period of 21 years.

The Respondent submitted that all the averments by him were adequately supported by law and facts. He stated that he was unfairly dismissed without any termination notice as required under **Section 35 of the Employment Act** which required the employer to pay a sum in lieu of notice. The Appellant further submitted that since he had proved his case on the balance of probability that he was an employee of the Appellant, then it follows that he was entitled to all benefits and allowances that were sought in the plaint. The Respondent also stated that he was entitled to at least one day to rest as provided under the Employment Act. The Respondent maintained that since he was underpaid it is just and equitable that the court allows him to recover what was rightfully his.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal.

This being a first appeal, it is the duty of this court to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. The court must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she/he has not acted on wrong principles in reaching the conclusion.

In doing so, I will try and answer the following questions which in my view from the issues before the court.

1. *Whether the Respondent was an employee of the Appellant. If the answer is yes, What were the terms of employment?*
2. *Whether the Respondent was unfairly terminated, if yes, what were his terminal dues?*

On the first issue, the Respondent claimed to have been employed by the Appellant, the Kenya Posts and Telecommunication Corporation in 1981. He testified that he was employed as a toilet cleaner without a letter of appointment. He was only required to produce his national Identity Card. He also told the court that his services were terminated in 2002 without any notice or benefits. The Respondent produced payment vouchers from the Appellants which indicated his monthly payment by the Appellant.

The Appellant's Human Resource Officer also testified in support of the Appellant case. She told the court that she knows the Respondent as the person contracted to clean the toilet in the Kerugoya office.

She also stated that the Respondent was not given any appointment letter and his payments were made every end month.

Under Kenyan law, an employee has been defined under **Section 2 of the Employment Act** as;

.....a person employed for wages or a salary and includes an apprentice and indentured learner' while 'employer' has been defined as, 'means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company'.

Therefore, an employee and an employer may enter into a contract of service. A contract of service is defined as;... ***an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;***

*From the foregoing, it is my opinion that the Respondent was an employee of the Appellant. He was employed for a salary which he drew every month. **The Black's Law Dictionary, Ninth Edition** defines salary as... an agreed compensation for service, professional or semiprofessional service paid at regular interval on a yearly basis as distinguished from hourly basis..... The Respondent presented payment vouchers as evidence of his compensation for services rendered to the Appellant. The Appellant paid Kshs.500/= at the beginning which was later increased to ksh 3060. The Respondent was therefore in my view an employee of the Appellant according to the employment laws.*

*Having established that the Respondent was an employee of the Respondent, the next issue for determination is what his terms of service were. It is not disputed that the Respondent did not have a letter of appointment or contract of service. The Respondent told the court that he was employed using his National Identity Card. The defence witness also confirmed that the Respondent did not have a letter of appointment and denied there was a written agreement. She stated that there were negotiations between the Appellant and the Respondent on amount of money he was to be paid depending on the amount of work. The defence witness told the court that at the initial stage the Respondent was paid Kshs.250/- per month for three days in a week per month which was later increased to Kshs.3,060/- for six days in a week per month. In my view those were the implied terms of the contract of service. The employment contract in this case could be implied from the conduct of the parties. The Appellant kept the Respondent in employment for duration of 21 years. I agree with the learned magistrate that the Appellant intended to keep the Respondent as a permanent employee. In **Halsbury Laws of England (4th Edition) volume 16 (1A) page 11 paragraph 15...** "In general a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was intended although never expressed, as where there has in fact been service of the kind usually performed by employees." (Emphasis mine)*

On whether the Respondent employment was unlawful terminated, the Respondent's claim was that he was unlawfully terminated from employment on 25th September 2002 without any terminal dues. During the trial he told the court that the Appellant did not issue him with any letter of termination. Although it is not clear how he got to know that his services had been terminated, he testified that the Appellant confirmed the termination with their letter dated 3rd December 2002 which denied he was an employee or that the Appellants owed him any benefits. There is no evidence before the court to show that the Appellant followed any law while terminating the Respondent's service. The termination in my view was therefore unlawful.

As to the determination what terminal dues, the Respondent was entitled to, the court of appeal in the case of Alfred J. Githinji v. Mumias Sugar Co. Ltd., Civil appeal No.194 of 1991, gives a guide as follows: -

"Our view is that where a contract of service...is for an indefinite period with an element of permanency and a degree of security of tenure, in that it does not provide for its termination by

giving of notice or payment of any salary for its termination in lieu thereof, what the employee who is wrongfully dismissed will be entitled to, is what is reasonable in the circumstances.”

The same court in the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR** also held that:

.....where dismissal or termination is wrongful, the damages payable to the employee is the salary which would have been paid in lieu of notice.

In paragraph 8 of the plaint, the Respondent pleaded the following dues from the Appellant:

1. *1 month salary in lieu of notice.....Ksh. 3,246.00*
2. *House allowance for 21 years 5 month.....Kshs. 125,133.30*
3. *Annual leave for 21 years.....Kshs. 68,166.00*
4. *Underpayment for 21 years 5 month.....Kshs. 47,288.00*

*Total.....**Kshs. 243,843.30***

The trial court held that the Respondent was entitled to benefits as a permanent employee. The court correctly held that the Respondent was entitled to one month salary in lieu of notice at Kshs.3,062/=. The court also awarded the Respondent severance pay at days for each 10 days for 21 years although the Plaintiff had not claimed for severance pay. I do not therefore find the basis upon which the trial magistrate made the finding in respect of this heading. Nor is there evidence on record in support of the same. I accordingly, decline to award the same.

The Respondent was also awarded a house allowance of Kshs.104,491.60 calculated at 15% of salary per month, according to the regulations of Wages General Order Cap 229. **Section 31 of the Employment Act** provides that an employer should provide an employee with accommodation or pay a reasonable house allowance. I will not interfere with the award under the said head. As to the leave allowance, I also decline to support the award under that heading.

The end result is that I dismiss the appeal with the awards corrected as follows: -

1. *1 month salary in lieu of notice.....Kshs.3,246.00*
2. *House allowance for 21 years 5 month.....Kshs.125,133.30*
3. *Underpayment for 21 years 5 month.....Kshs.47,288.00*
4. *Annual leave for 21 years.....Kshs.68,166.00*

*Total.....**Kshs.243,838.30***

Orders are granted accordingly.

Dated and delivered at Nairobi this 18th day of May, 2015.

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D A ONYANCHA

JUDGE