



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 711 OF 2003**

**DAVID M. MEREKA.....APPELLANT**

**VERSUS**

**MUKAMI MUTEE.....RESPONDENT**

***(Being an appeal from the judgment of the Honourable Mrs. Nzioka Senior Resident Magistrate at Nairobi delivered on 7<sup>th</sup> October, 2003 in civil case no. 5817 of 2002)***

**JUDGEMENT**

1. Mukami Muthee, the Respondent herein, was employed by David M. Mereka t/a Mereka & Co. Advocates, the Appellant herein, on 1<sup>st</sup> January 1997. By a letter dated 16<sup>th</sup> November 1999, the Appellant summarily dismissed the Respondents. The appellant's action, prompted the Respondent to file a suit before the principal magistrate's court in which she claimed for payment of ksh.114,167 being a month's salary in lieu notice and pro-rata salary for 16 days worked in November 1999. The Appellant filed a defence denying the respondent's claim. The Appellant alleged that he summarily dismissed the Respondent on account of theft of the Appellant's updated Local Government Act. The suit was heard and on 7-10-2003, Hon. G. L Nzioka, the learned Senior Resident Magistrate gave judgment in favour of the Respondent and against the Appellant in the sum of kshs.82,442 plus costs and interest. The Appellant was unhappy with the aforesaid decision hence this appeal.
2. On appeal, the Appellant put forward the following grounds.
  1. ***THAT the learned trial magistrate erred in law and in fact in holding that the respondent's summary dismissal from employment was unlawful contrary to the evidence on record which overwhelmingly confirm the existence of sufficient and reasonable grounds to justify such action.***
  2. ***THAT the learned trial magistrate erred in law and in fact in failing to consider or have any or sufficient regard to the submissions filed on behalf of the appellant as the binding authorities cited therein as to the inapplicability of the rules of natural justice in the circumstances of the matter before her and thus erroneously holding that the appellant had breached the said rules.***
  3. ***THAT the learned trial magistrate erred in law and in fact in finding that the respondent's monthly salary was ksh.72,500/= contrary to the evidence on record confirming that the same was far much less.***
  4. ***THAT the learned magistrate erred in law and in fact in failing to consider the submissions filed on behalf of the appellant and have any or sufficient regard to the binding authority cited therein thus erroneously awarding respondent's claim for pro rata salary for sixteen (16) days worked in November, 1999 which is not legally recoverable in the circumstances of the matter before her.***

5. ***THAT the learned trial magistrate erred in law and in fact in stepping into the arena or litigation by unilaterally and erroneously introducing considerations as to PAYE at a figure of ksh.28,658/= in the absence of any evidence by either party to support the same.***
6. ***THAT the learned trial magistrate erred in law and in fact in finding the respondent's claim had been proved notwithstanding the insufficiency of her evidence.***
3. Learned counsels appearing in the appeal recorded a consent order to have the appeal disposed of by written submissions.
4. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions. In the first two grounds of appeal, the Appellant has argued that he was entitled to summarily dismiss the Respondent without the need of giving her a right of hearing under Section 17 of the Employment Act. The Appellant argued that it was reasonable for him to raise the suspicion of theft by the respondent.
5. The Respondent urged this court not to disturb the trial court's decision arguing that the trial magistrate correctly found that the Respondent was unlawfully dismissed without being given a right of hearing as require by law.
6. The Appellant does not deny that he summarily dismissed the Respondent from his employment. He has argued that he was right to suspect that the Respondent intended to steal his updated Local Government Act which he discovered had been sealed in a parcel to be given to another advocate. The Appellant further stated that in the circumstances he was not obliged to hear the respondent. The learned Senior Resident magistrate found that although the Appellant cited suspicion of theft of the Local Government Act by the Respondent as the reason for summary dismissal the rules of natural justice should have been adhered to. The learned magistrate further took into account the fact that there was bad blood between the Appellant and the Respondent prior to the date when the Respondent was summarily dismissed.
7. After a careful re-evaluation of the case that was before the trial court, I have come to the conclusion that the learned Senior resident magistrate came to the correct conclusion. The Appellant summarily dismissed the Respondent on suspicion that the Respondent did not intend to return the Local Government Act belonging to the Appellant. That was a very serious allegation that required the Appellant to hear the respondent. It was a mere suspicion which could not sustain the action taken by the Appellant.
8. In grounds 3, 4 and 5, the Appellant attacked the manner in which the learned Senior Resident Magistrate determined the award. It is the Appellant's submission that the trial magistrate wrongly calculated what was due to the Respondent without anybody's submission thus wrongly entering judgement for kshs.111,100/= less payee of kshs.28,658/= making a net sum of kshs.82,442/=. The Respondent on the other hand is of the view that the learned magistrate was properly guided in fact and law to make the aforesaid award.
9. I have perused the evidence tendered before the trail court and it is clear that the Respondent presented evidence showing the she earned a monthly salary of ksh.72,500.//= with effect from 1<sup>st</sup> August 1998. She was able to also show that she worked for 16 days. The amount awarded was pleaded and properly proved by the evidence tendered. The decision of the trial magistrate cannot therefore be faulted. The appeal therefore lacks merit. It is dismissed with costs to the respondent.

Dated and delivered in open court this 13<sup>th</sup> day of November, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent