



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 161 OF 2010

REV. FRANCIS MUCHEE NTHIGA.....APPELLANT

VERSUS

BISHOP DAVID N. WAWERU.....RESPONDENT

(Being an appeal against the decision of the Murang'a Senior Resident Magistrates Court Civil Case No. 123 of 2009 (Hon. I.K. Orange)

BETWEEN

REV. FRANCIS MUCHEE NTHIGA.....PLAINTIFF

VERSUS

BISHOP DAVID N. WAWERU.....DEFENDANT

JUDGMENT

The appellant in this appeal instituted a civil suit against the respondent in the subordinate court seeking what he described as “*outstanding salary, two months’ salary in lieu of notice, terminal and employment benefits together with interest thereon.*” He also sought for costs of the suit and interest thereon.

The basis of the appellant’s claim was that he had previously been an employee of the respondent; in breach of the terms of the contract of employment executed between the appellant and the respondent, the latter is said to have terminated the appellant’s services without any notice.

The defendant denied the plaintiff’s claim and in a defence filed in court on 20th May 2009, he put the plaintiff to strict proof of all the allegations made in his plaint.

At the hearing only the plaintiff testified; the defence did not call any evidence. Based on the evidence that was presented before him, the learned magistrate dismissed the plaintiff’s claim mainly on the ground that the plaintiff did not plead or particularise the damages which he was seeking against the defendant.

Being dissatisfied with the subordinate court’s decision, the appellant appealed to this court and in the memorandum of appeal filed on 16th September, 2010 the appellant faulted the learned magistrate for finding that he did not prove his case on a balance of probability; that the learned magistrate erred in law and in fact in making a finding that the appellant did not specifically plead his claim; that his findings were neither supported by evidence on record or law; and that it was wrong for the learned magistrate to have dismissed the plaintiff’s case when it was not controverted. The appellant asked this court to allow

his appeal and award the sum of Kshs. 140,000/= together with interest until the payment has been made in full.

On 1st March, 2012, parties took directions to the effect that the appeal be disposed of by way of written submissions and following this direction, they indeed filed and exchanged written submissions on their respective positions.

After considering the plaintiff's pleadings in the subordinate court, the judgment by the learned magistrate and the arguments by the parties in this appeal, the only issue on which the appellant's appeal turns is whether he ought to have specifically pleaded his claim. In this regard paragraphs 5 and 6 of the plaintiff's pleadings are of interest; it is stated in those paragraphs that:

“5. Upon termination the plaintiff was entitled to terminal and employment benefits and was also entitled to payment of 2 months (sic) salary in lieu of notice particulars of which are within the knowledge of the defendant.

6. The defendant did not pay the plaintiff his employment benefits and other payments that the plaintiff was entitled to under his contract of employment and has not done so to date and the plaintiff claims the same from the defendant.”

The plaintiff did not provide plead figures either in the body of the pleadings or in his prayers, including the figure of Kshs 140,000/= that he now wants this court to award; the plaintiff's claim was, therefore neither specifically pleaded nor particularised.

Considering that the plaintiff's claim was based on a contract of employment, it follows that a claim for damages arising out of a breach of such a contract are in the nature of special damages which must not only be specifically pleaded but must also be proved as well. Without having been specifically pleaded or proved, the appellant's claim could not have succeeded and the learned magistrate was correct in dismissing it.

Talking of the need to plead and prove special damages the court of appeal sitting at **Nairobi in Civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another versus Benson Omwenga** cited with approval its earlier decision in **Charles Sande versus Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992** (unreported) where it said:

“As we have pointed out at the beginning of this judgment Mr Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law.”(Underlining mine).

The court also quoted its decision in **Coast Bus Service Ltd versus Murunga Danyi & 2 Others Civil Appeal No. 192 of 1992 (unreported)** where it stated:-

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the pleadings as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the pleadings to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the pleadings that a claimant will be allowed to proceed to strict proof of those particulars...”

In the suit that was filed in the magistrates' court, there is no doubt the particulars of what would have been special damages were known to the appellant at the time of filing suit; and if, peradventure they were not available at the material time, the appellant had the chance to apply to amend his pleadings and

include them when they became known to him. As things stand there were no particulars of special damages and therefore there was nothing to prove. Without anything to prove the appellant's suit was stillborn. I would, in the circumstances uphold the learned magistrate's decision and dismiss the appellant's appeal with costs.

Signed, dated and delivered in open court this 23rd day of May, 2014

Ngaah Jairus

JUDGE