REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 115 OF 2010

(Being an appeal arising from the judgment and decree of the Hon. Kagendo, in Nakuru CMCC No. 1207 of 2005 dated and delivered on 30th March, 2010)

EMILY CHESANG SAMOEI.....APPELLANT

VERSUS

COUNTY COUNCIL OF NAKURU.....RESPONDENT

JUDGMENT

In a Plaint dated 15th July 2005 and filed on 19th July 2005, the Appellant sued the Defendant for -

(a) an order that the Defendant do reinstate the Plaintiff to her employment with full benefits from the date of termination till reinstatement,

(b) alternatively, the Defendant be ordered to pay the Plaintiff her unpaid salary, three months in lieu of notice together with severance pay for each completed year worked,

(c) costs of the suit plus interest at court rates,

(d) any other relief.

The case went to full trial at which the Appellant as well as a representative of the Respondent testified. In a judgment delivered on 16th April, 2010 the learned trial magistrate though the finding that the termination of the Appellant's service was irregular went ahead and dismissed the Appellant's suit on the grounds inter alia that the Appellant had not pleaded special damages in her Plaint and directed that each party bears its own costs.

2. Aggrieved with the dismissal of her suit, the Appellant came to this court on appeal and in a Memorandum of Appeal dated and filed on 14th May, 2010 the Appellant set out nine grounds of appeal namely -

1. *that the learned magistrate erred in law and in fact in dismissing the appellants suit,*
2. *that the learned magistrate erred in law and in fact in failing to consider the appellant's evidence vis a vis the pleadings,*
3. *that the learned magistrate erred in law and in fact in failing to set out the points for determination and determine them as per the law,*

4. *that the learned magistrate erred in law and in fact in holding that the appellant's had failed to prove her case on a balance of probability contrary to the evidence on record,*

5. *that the learned magistrate erred in law and in fact and displayed outward bias towards the Appellant,*

6. *that the learned trial magistrate erred in law and in fact in failing to calculate the damages awardable to the Appellant had she succeeded,*

7. *that the learned trial magistrate erred in law and in fact failing to set out concise points for determination and to determine them as per the law,*

8. *that the learned trial magistrate erred in law and in fact in failing to consider the appellant's claim without considering the pleadings and evidence on record,*

9. *that the learned magistrate applied the wrong principles in making her findings,*

And by reason thereof prayed that -

(a) that the appeal be allowed and judgment and decree delivered on 10.04.2010 be set aside,

(b) that judgment be entered in favour of the Appellant against the Respondent as per the Plaint,

c. *that the sum payable to the Appellant be assessed (by this court),*

d. *that costs of the appeal and costs of the suit be met by the Respondent,*

(e) that the court do grant to the Respondent any other relief the court may deem fit to award.

3. This being a first appeal, and this court being the first appellate court, is mandated -

> ***"to re-evaluate the evidence adduced by the witnesses before the trial magistrate and reach its own independent decision on the facts of the case, always keeping in mind that it did not have an opportunity of seeing and hearing the witnesses as they testified. The Appellate court will interfere with the decision of the trial court if it establishes that the finding was based on no evidence or was based on misapprehension of the evidence or the trial court is shown to have demonstrably acted on the wrong principles of law in reaching its findings." - MWANA SOKONI VS. KENYA BUS SERVICE LTD [1985] KLR and PETERS VS. SUNDAY POST [1958] E.A. 424, 429 where Sir O'Connor P. said -***
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> ***"It is a strong thing for an appellate court to differ from the findings, on a question of fact, of the judge who tried the case, and who had had the advantage of seeing and hearing the witnesses. An Appellate Court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the Appellate Court might itself have come to a different conclusion."***

4. In this regard therefore, I have perused and re-evaluated the evidence in light of the grounds of appeal, the submissions of Counsel for the Appellant and the Respondent respectively. Despite there being nine grounds of appeal, the appeal herein may be determined upon one ground – whether the learned trial magistrate erred in fact and in law in dismissing the Appellant's suit in its entirety. To determine this question, it is necessary to consider the evidence of both the Appellant and the Respondent.

5. **Firstly,** there is no doubt that the Appellant was an employee of the Respondent. She had a Letter of Appointment dated 9.10.1990, at a salary scale M5£ 609 X 24-801 X 30 – 891. About ten years later precisely 27.07.2000, her employment as a Nursery School Teacher, was translated to the position of Community Development Assistant in terms of the Finance Staffing and General Purposes Committee Meeting Resolution under Minute No. FSGP 46199 and minutes adopted under Minute No. NCC 27/99. By a copy of the said letter the County Treasurer was instructed to reinstate the Appellant to the payroll and pay her arrears effective from 1st January, 1999.

6. This letter is consistent with the evidence of DW1 in cross-examination, that the Appellant was employed in 1990, and on re-examination that the Appellant worked upto 1998, and was reinstated with full pay from 1.01.1999.

7. DW1 lied to court when she stated that the Appellant was a casual worker. DW1 also told untruth when she testified that the Appellant was paid as a casual worker. The Appellant produced her original payslip for the month of March 2003. Even under the repealed Employment Act *(Cap. 226 Laws of Kenya)*, a casual worker is one who is paid on daily or weekly basis, and could only work as such for a maximum period of three months. The Appellant had been in the Respondent's employment for a continuous period from 9.10.1990 to 31.04.2003. Her temporary lay-off for a month in 1998 was obviously erroneous as the letter of 27.07.2000 reinstating and translating her position to Community Development Assistant clearly shows.

8. The Respondent's Minutes of the meeting of 14.03.2003, including the Appellant in the list of new employees is not only suspect, but is clearly strange for an employee, like the Appellant, who had been practically in employment of the Respondent from 1.10.1990 to 31.03.2003, a period of twelve years and 6 months. The learned magistrate's finding that the termination of Appellant's employment in the manner it was done, was irregular, was correct.

9. Having come to that conclusion, the learned trial magistrate erred in dismissing the Appellant's suit on the ground that the Appellant's pleading was shoddy in failing to plead for special damages.

10. The trial court erred because, in a suit for unlawful termination of employment, the Plaintiff, or the Appellant's claim in this case was for -

1. *an order of reinstatement with full benefits from the time of termination till reinstatement,*

2. *alternatively, payment of salary which was unpaid, three months in lieu of notice together with severance pay for each completed year of service.*

11. Having found that the termination of the Appellant's service was irregular and decided not to grant the prayer for reinstatement, the learned trial magistrate had no reason for denying the Appellant the alternative prayer for three months pay in lieu of notice, and severance pay. Neither payment of three months pay in lieu of notice nor severance are special damages to be quantified and pleaded. Those are contractual damages.

12. In this case the Appellant's monthly salary was known, from the last payslip, shs 9,730/= less the statutory deduction of shs 1,175.70 leaving a nett salary of Kshs 8,554.30. Three months salary in lieu of notice would therefore be nett sum multiplied by three months, that is, shs 8,554.30 x 3 = Shs 25,662.90.

13. The question is whether the Appellant is entitled to severance pay. The termination of the Appellant's employment appears from the extract of the Minutes of 14.03.2003 quite capricious. Though the grounds of her termination are not explained, except that *"she was a new employee"*, this ground cannot however be correct. She had been in employment from January 1990 to 31.03.2003. The probable ground for her own termination would most probably be redundancy, and in which event she would be entitled to severance pay under the Employment Act, at the rate of at least one full month for each year of completed service. Having worked for the Respondent for $13^1/_2$ years, she would be entitled nett

severance pay of Ksh 8,554.30 multiplied by the number of years worked, that is to say Ksh 8,554.30 x 13 ½ years which would amount to Ksh 115,443.05.

14. I would therefore allow the appeal herein and set aside the judgment and decree of the lower court delivered on 14.03.2013 and in lieu thereof I enter judgment for the Appellant in the sum of Ksh 141,105.95 comprising -

(1) Salary in lieu of notice - Shs 25,662.90

(2) Severance pay for 13 ½ years - Shs 115,443.05

Nett Kshs 141,105.95

15. I also allow interest thereon at court rates from the date of filing suit till date of this judgment, and from the date hereof till payment in full. The Appellant shall also have the costs of the suit in this and the lower court.

16. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 16th day of May 2014

M. J. ANYARA EMUKULE

JUDGE