REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL NO. 39 AND 40 OF 2010 (CONSOLIDATED)

(From the original Civil suit No. 328 of 2006 of the Chief Magistrate's Court at Malindi)

NELSON MAESHO ……..…APPELLANT

VERSUS

M. MUNYAYA T/A MUNYAYA SECURITY GUARDS ……...RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of J. Kituku learned Resident Magistrate, delivered on 6th April, 2009, dismissing civil suit no. 328 of 2006 (also test suit in respect of Civil Suit No. 329 of 2006).

2. Both plaintiffs in the Lower Court had sued their employer A. M. Munyaya t/a Munyaya Security Guards for payment of terminal benefits following termination of their employment. Their two plaints were similar and the material paragraphs averred, inter alia that:

> **"3. At all material times to this case, the plaintiff was an employee of the defendant who is engaged in business of proving security services whereby the plaintiff was a guard from 1996 – 2000.**
>
> **4. During the period of his employment the plaintiff was underpaid to the tune of Kshs. 66,633/- between 1998 and 2000 in wages, overtime, leave and public holidays.**
>
> **5. The plaintiff's claim against the defendant is for Kshs. 66,633/- being the principal that is due and owing.**
>
> **6. There is no case pending in court based on the facts herein involving the parties save for a criminal prosecution in Malindi Principal Magistrate's Criminal Case No. 838 of 2001."**
>
> **"REASONS WHEREOF**
>
> **Prayers for judgment against the defendant for;**

i. **Kshs. 66,633/-**
ii. **Interest since 2000."**

3. The defences filed were also similar and stated inter alia; as follows:

> **"2. The defendant denies the contents or paragraph 4 of the plaint and wish to state that the plaintiff left employment after criminal charges were preferred against him in 2001.**
>
> **3. That soon after termination of the criminal proceedings the plaintiff sought assistance of his trade union to seek a refund of all arrears of salaries but were found to have been paid and the defendant is not owed any money by the plaintiff.**
>
> **4. Without prejudice herein the defendant avers that the plaintiff's claim has no basis in law as the same is statute barred."**

4. The plaintiffs adduced evidence during the hearing and their case was closed before cross-examination could be completed due to non-attendance by the defendant. The learned magistrate in his judgment dismissed the suit on grounds that the plaintiffs had failed to plead special damages sought. He relied on several authorities in that regard.

5. The appellants' memorandum of appeal takes issue with the finding of the learned magistrate. Grounds 1, 2, and 3 attack the finding in the following manner.

> **"1. The leaned trial magistrate erred in fact and law in dismissing the appellant's claim on the ground that special damage had not been pleaded, which was a grave misdirection.**
>
> **2. The learned trial magistrate erred in fact and law in failing to see that the amount claimed was in fact specifically pleaded in the plaint.**
>
> **3. The learned trial magistrate erred in law and face when he failed to apply his mind to address and resolve the issues that were before him for determination."**

6. The appeal was opposed by the defendant. Parties filed written submission in canvassing the appeal.In substance, the appellant's submission was that from the pleadings on record the appellants had specifically pleaded the sum claimed and the defence proferred was that payment had been made. That the appellant having given uncontroverted evidence, the court was not entitled to raise a 'surprise' defence on behalf of the defendants on the grounds that the claim was in the nature of a special damages claim requiring specific pleading and proof, which according to the appellant it was not. The appellants asserted that the claim being one for a liquidated sum due as terminal benefits did not qualify as special damages. The appellants asserted that the claims had been proved on a balance of probabilities and should have been allowed.

7. For their part, the respondent began by raising, quite correctly in my view, the defects in the purported decree accompanying the memorandum of appeal. On the face of it, the decree is full of errors and is a misrepresentation of the outcome of the suit in the Lower Court. However, I do not accept that a defective decree is no decree at all. It can be corrected if necessary. Besides in the appeal the court not only looks to the decree but also the judgment of the court and proceedings (see proviso to definition of decree under Section 2 of the Civil Procedure Act). In observing its duty under Article 259(2) (d) of the Constitution, the court while acknowledging the correctness of the respondent's submissions cannot allow the substance of the appeal to be defeated by the errors in the decree.

8. The respondents opposed the appellant's assertion that the claims before the court were not in the nature of special damage claims. The respondents contend that the claims having arisen from

alleged wrongful dismissal from employment were special damage claims which ought to have been pleaded specifically and proved. They submit that the learned magistrate was therefore entitled to dismiss the claims for want of particularization and proof.

9. This being a first appeal, the court is under a duty to re-evaluate the evidence, assess it and draw its own conclusions while making due allowance for the fact that it did not have the opportunity to hear or see the witnesses give evidence (see **Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1 and Peters v Sunday Post Ltd [1958] EA**.) Before embarking on such evaluation however, I find it necessary to examine the nature of the claims before the Lower Court because that was the decisive point upon which the same were dismissed.

10. The relevant portions of the respective pleadings have been restated earlier in this judgment. The appellant's argument was as follows: *"…the claim had nothing to do with special damages. The claim was what in law is known as a claim for money, a liquidated demand – which is a claim that is specific …special damages cannot be said to arise in a case where a party is suing for terminal benefits…"*

There is no doubt however, looking at the plaint, that the claims arose from a contract of service between the parties even though it is true that as drafted, the claim did not allege wrongful termination of services. The claim was for alleged underpayments in respect of wages, overtime, leave and public holidays during the period of the contract. It is the respondent who appeared to have assumed that the suit as essentially one for wrongful termination as paragraph 2 and 3 of the defence clearly disclose. This pleading cannot alter the basic nature of the plaintiff's claim. I therefore reject the respondent's arguments that this suit was based on wrongful termination.

11. But I have difficulty comprehending the appellant's unsupported views that their claim is merely one "for a liquidated" sum. By virtue of the admitted fact that it is a claim for terminal benefits, it is a claim arising from an employment contract. The Lower Court was therefore entitled to find that the claims before it were for special damages hence required to be pleaded specifically and proved.

12. The learned magistrate correctly relied on several relevant authorities, including **Bagajo v Christian's Children Fund Inc. [2004]2 KLR 73.** In that matter Ringera JA (as he then was) having reviewed the claims pleaded by the applicant for payment for overtime and extra hours worked, in lieu of off days, accumulated leave, house allowance, severance pay etc, agreed with the superior court that the claims were untenable because they were not specifically pleaded. He went on to state:

> **"All the payments the appellants sought were in the nature of special damages whose quantum was or could have been known before trial."**

13. On the authority of the **Bagajo Case** the trial court was convinced that the claims before him were special damage claims. That was a correct application of the authority. However, by going further to find that the claims in this case were not specifically pleaded, the learned magistrate erred. It is true that the plaints herein did not itemize the respective heads making up the total claim. That was done at the trial. Nonetheless the plaints specifically pleaded the total sums claimed, and this fact distinguishes this case from **Bagajo's Case** where no figures at all were pleaded under the different claim heads. With respect, that was a serious misdirection.

14. In the defence the plaintiff's claim for payments pleaded in paragraph 4 of the plaint were denied and it was further pleaded that the appellants had been paid in full. At no time did the defendant seek further and better particulars from the appellants. In these circumstances it was not open to the learned magistrate to dismiss the claims on the basis that the same were not specifically pleaded. The plaints were not elegantly drafted but it is a misdirection to say that they did not disclose the amounts and nature of the claim.

15. Were the claims proven? I have re-evaluated the evidence on record. Nelson Maesho the plaintiff in the test suit testified that he worked for the defendant as a guard between 1996 – 2000. He stated that at the time of the termination of the contract he was owed the sum of Shs. 66,633 made up as follows;

i. Notice Shs. 3,164/-
ii. Leave Shs 6,238.40
iii. Public holidays 2,677.40
iv. Underpayments (salary) Kshs. 41,726.40
v. November, 2000 Salary Kshs. 3,267/-
vi. Overtime Shs. 94,491.80 (sic)

16. He produced the computation sheet prepared by the labour officer as an exhibit. His brief cross-examination centred on the identity of the employer, reasons for termination of employment and payment vouchers which he denied signing. He denied in this connection that his name was Nelson Katana Maesho and was stood down at the request of the defence counsel, to produce identification. Thereafter the defendants did not participate in the trial and the matter was eventually set down for judgment.

17. The trial magistrate found that the defendant as named and Malindi Van Guards (the firm to which the labour officer D. O. Omwoyo directed their correspondence P.exh. 1a and b) were the same entity. It would seem that the computation P.exh.2 is the schedule referred to in the latter letter. According to the plaintiff the schedule was prepared by the labour officer who received his compliant and did a computation of dues. This evidence was not shaken during the cross-examination or controverted. The schedule sets out the dues owing in respect of the individual claimants, the plaintiffs included. The defence appeared to suggest that all sums due and owing to the plaintiffs had been paid. No such evidence was tendered and the plaintiff already disputed payment vouchers shown him during cross-examination.

18. On a balance or probabilities the plaintiff's evidence was adequate proof of the claim before the court. The schedule sets out the itemized sums payable to each claimant and clarifies what seems to be a recording error in respect of overtime at Shs. 9449.80 and not Shs. 944180/- as recorded in the notes of the trial. Claimants No. 2 and 8 who are the plaintiffs herein were entitled to a total sum of Shs. 66,633.00 and Shs. 42,482.80 respectively as per the schedule. That the plaintiffs were subjected to criminal prosecutions apparently arising from their employment with the defendant is evident from the defence filed. The outcome is not unknown.

19. In paragraphs 4 and 5 of the plaint the plaintiffs did not include a claim for payment in lieu of notice nor make any averment of wrongful termination at all. In the circumstances there is therefore no basis for payment of Shs. 3164/- to either plaintiff as notice. That sum ought to be deducted from the totals due. Hence, while allowing this appeal and setting aside the dismissal order in the Lower Court, I would substitute therefore an order that judgment be entered for the sum claimed less the notice sum of Shs. 3164/- in favor of the appellants with costs and interest.

Delivered and signed at Malindi this 18th day of July, 2014 in the presence of: Mr. Obaga holding brief for Kimani for the respondent.

Court clerk - Samwel

C. W. Meoli

JUDGE