



No. 442/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 172 OF 2008

RAKESH SHAH T/A MASAKU LUCKY WHOLESALERS.....APPELLANT

VERSUS

PAUL MUSEMBI MUINDI.....RESPONDENT

(Being an appeal from the original ruling in Machakos Chief Magistrate's Court Civil Suit No. 478 of 2004 by Hon. D.G. Karani -RM on 12/11/2008)

J U D G M E N T

1. The background of this appeal is that the appellant a male adult trading as **Masaku Lucky Wholesalers** employed the respondent as a shop attendant at a salary of **Ksh.5,300/=** per month. On or about the **1st** day of **June 2003**, the appellant without any cause dismissed the respondent from employment.
2. Consequently the respondent sued him claiming damages for wrongful dismissal, a sum of **Ksh.50,530/=** interest and costs.
3. The appellant filed a defence and counter-claim denying the allegations. He admitted having employed the respondent but refuted the date of his employment and the monthly salary of **Ksh.5,300/=**. He averred that he advanced **Kshs.103,467/=** to the respondent who declined to refund; a claim that the respondent denied in his defence to the counter-claim.
4. The learned trial magistrate evaluated evidence adduced and made a finding that the appellant failed to give the respondent adequate notice of termination of his employment. He opined that the dismissal was unlawful. He awarded the respondent terminal benefits in the sum of **Ksh.48,215/=** as calculated by the **District Labour Officer** and general damages in the sum of **Ksh.85,000/=**. He dismissed the counterclaim and entered judgment for the respondent against the appellant in the sum of **Ksh.133,215/=**.
5. Being dissatisfied with the judgment the appellant appealed on grounds that:
 - The learned magistrate erred in law and fact in finding that the dismissal was unlawful; in failing to find that the appellant advanced some money to the respondent; in finding that the appellant had failed to prove the counterclaim on a balance of probabilities; he took into account extraneous matters and failed to find that the respondent was bound by his admissions.
6. This being a first Appellate Court, it is my duty to subject the evidence tendered in the Lower Court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that

I did not see or hear witnesses.(See *Peter Versus Sunday Post (1958) EA 424 at page 429*).

7. This is a matter where it is not in contention that the respondent was employed by the appellant. Although in his pleadings the appellant denied the averment that he employed the appellant in **January 1990**, in their evidence as adduced in court both the appellant and respondent concur that the respondent was in the appellant's employment from **1990 – 2003**. His duties included writing receipts and packaging. The respondent's evidence that he was earning **Ksh.5,300/=** per month as salary was not challenged.
8. It is further not in dispute that the respondent's services were terminated. The issue to be addressed would be if the termination was in accordance with the law? The reason given by the appellant why the termination of the respondent's services was necessary is that he used to take salary advances that would exceed his monthly salary and his business was also not doing well. The respondent admitted taking salary advances while the appellant admitted having not paid the respondent terminal dues.
9. The respondent adduced evidence of a letter addressed to him by the appellant (**Vide Exhibit 1**). It was a notice to the effect that his services were being terminated with effect from the **1st of June, 2003**.

The learned trial magistrate considered the termination letter. In his judgment he stated that the document was undated hence it was not clear to the court whether the requisite notice was given. Stating that the appellant ought to have given the respondent sufficient notice of his intention to terminate his services he dismissed the document as not amounting to a notice.

10. Pursuant to my duty of re-looking at evidence adduced I have scrutinized the document. What is interesting is the fact that a date "**5-5-2003**" was introduced on it. It cannot be deduced when this was done but it must be presumed that it was after judgment of the lower court was delivered. In the submission the appellant's counsel does not dispute the fact of the document being undated. It is also imperative to note that the document was not included in the record of appeal prepared by the appellant.

As correctly submitted, in his evidence the appellant did not state when he received the letter. What is not in dispute is the fact that the notice was given.

11. The letter of termination was to be effective from **1st June, 2003**. This being the case the law applicable was the **Employment Act of 1984** as revised. **Section 14(5) (3)** of the Act states:

"Where the contract is to pay wages or salary periodically or intervals or exceeding one month, a contract terminable by either part at the end of the period of 28 days next following the giving of the notice in writing."

12. Although the notice was given there is no verification at what point in time it was issued. The respondent was entitled to a notice equivalent to the period upon which salary is normally paid. Inadequate notice having been given, the respondent was entitled to one month salary in lieu of notice. This was not paid. This was well stated in the case of **Stephen Ndirangu Ndungo versus Wanjuki Muchemi (2014) eKLR** where the court held that:

"Under the repealed and the current Act an employee is entitled upon termination, to notice equivalent to the period in respect of which salary or wages are paid or payment in lieu thereof. Further, as a minimum, an employee is entitled to housing or housing allowance, leave with pay and rest days."

13. It was important for the respondent to get requisite notice. What the appellant as an employer was not obligated to give was reasons for termination of services. This was well put in the case of **Haroun R. Lwongu versus Kenya Society for the Blind (2014) eKLR** where the court stated thus:

“The dominant principle in the law of termination of employment was that an Employer was not bound to give reasons for termination, or observe rules of fairness and natural justice in terminating an Employee’s contract. The Judicial Authorities from the Civil Courts endorsed the principle that an Employer could terminate the contract for any reason, or no reason, upon issue of the requisite notice. The Civil Courts relied on the provisions of the repealed Employment Act Cap 226 the Laws of Kenya.”

14. It was admitted by the respondent that he used to receive salary advance. In his decision the learned trial magistrate declined to award a sum claimed by the appellant of **Ksh.103,467/=** as salary advance on the ground that the handwritten document exhibited had many entries but no signature was appended thereon. That the same did not bear the name of the respondent. It is however argued by the appellant that when the exhibit was presented to the respondent on cross examination he did not deny having appended signatures that appeared on the document.

15. In his evidence in chief the respondent stated thus:

“I used to take salary advance but not a loan. I do not owe the defendant any money.”

16. On cross examination he stated thus:

“...I used to receive salary advances. Salary payment sheet “DMFI 1”. I had not been overpaid. I owe the defendant no money.”

17. In his defence the appellant stated that he did not engage services of an accountant to tell whether there was underpayment or overpayment to the plaintiff.

18. **DMFI 1 (DExhibit 1)** was an excerpt from a diary dated the **7th day of April 1989**. The document contained the recording of some figures. There is a title ‘**Jacket**’ on the **7th April 1989**. From the **6th September 1989** there is an indication of “**Cash Advance**”. Indeed as intimated by the learned trial magistrate, the evidence adduced by the appellant in form of a diary does not contain the respondent’s name. The issue of signatures did not arise but verification of the same was important. That notwithstanding, though the respondent did not comment on the signature thereon, it is important to note that the entries were made prior to the respondent being employed by the appellant. The duty was upon the appellant to clarify the same. This was not done. The records as provided could therefore not be of any use. The same could not be relied upon. The counter-claim could not be proved and therefore stood dismissed as ordered.

19. The respondent prayed for general damages for wrongful dismissal. The learned trial magistrate awarded a sum of **Ksh.85,000/=** on the grounds that failure to give adequate notice by the appellant contravened rules of natural justice.

20. In the case of **Alex Muriuki Bundi versus Kakuzi Limited (2012) eKLR** while referring to other decisions the court held thus:

“On the authorities of Central Bank of Kenya vs. Nkabu (2000) LLR (Supra), Barclays Bank of Kenya Ltd vs. Njau (2006) 2 EA 15 and Githinji vs. Mumias Sugar Co. Ltd (1994) LLR 1373, it is contended that the plaintiff is not entitled to payment in lieu of the notice beyond the period set out in his contract of employment, that damages cannot be computed beyond the notice period in the contract and that in cases of termination, the damages suffered are the wages for the period during which normal notice would have been correct. Since the plaintiff has been paid 3 months’ salary in lieu of notice that is all he is entitled to.” (Also see Ronald Kimani Ngasi versus Ukulima Sacco Society Ltd Nbi Civil Appeal No.277 of 2009 pg 6.)

21. It was important for the learned magistrate to give the basis upon which the award was made.

22. There was a claim of **Ksh.50,350/=** in pleadings. According to paragraph 4(b) of the plaint the claim was for terminal dues totaling **Ksh.34,450/=** and **three (3) months’** salary in lieu of notice amounting to **Ksh.15,900/=**.

23. In his testimony he sought to be paid the sum of **Ksh.50,350/=** being leave allowance as per Labour Laws. He produced in evidence a letter from the Labour Officer.

24. The letter dated **1st July 2003** is addressed to the Managing Director of Lucky Wholesalers. The subject matter is the respondent. It alludes to the recipient having agreed to pay dues as follows:

Severance pay for 13 years

13 x 15 x 5300 - Ksh.24,450/=

One month in lieu of notice - Ksh. 5,300/=

Salary - Ksh. 5,500/=

Leave - Ksh. 3,165/=

Total - **Ksh.48,215/=**

25. The author of the letter was not called as a witness. No evidence was adduced of receipt of the same. Whether or not such an agreement was entered into was something not established.

26. This is a case where there was misdirection on the part of the magistrate since the respondent did not specifically prove that the appellant owed him any pay being leave allowance or severance pay. He failed to produce any form of employment contract that would assist the court to form an opinion as to any benefits he was entitled on leaving employment. In the premises he was only entitled to a month's salary and salary in lieu of notice. The total sum is **Ksh.10,600/=**. This is what he would have been entitled to.

27. In the result I do allow the appeal partially and set aside the judgment entered by the lower court. Consequently, I do enter judgment for the respondent in the sum of **Ksh.10,600/=** with interest and costs in the lower court.

28. Each party shall however bear its own costs of the appeal.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE