



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 840 of 2004

SPRINGFIELD PROPERTIES LIMITED. APPELLANT

VERSUS

JAMES MUNGERE MUCHINA..... RESPONDENT

(From the judgment and decree of A. E. L Kindy, Principal Magistrate in Milimani CMCC No. 8281 of 2003)

J U D G M E N T

The Respondent who was an employee of the Appellant for a period of 15 years was, on a report made to the police, arrested. He was later charged with a criminal offence of making a document without authority contrary to section 357 (a) of the Penal Code in Criminal Case No. 53 of 2001. He was served with a letter terminating his employment for gross misconduct. Four months down the line, he was acquitted of the charge with no case to answer. He then demanded from the employer, herein the Appellant, the following: -

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|---|--------------|--------------------------|
| a) One month's salary in lieu of Notice – | Kshs. | 19,000.00 |
| b) Severing or Service Allowance for 15 years - | Kshs. | 219,230.75 |
| c) Overtime – 12 days | Kshs. | 7,615.40 |
| d) Unpaid salary during the trial – 4 months | <u>Kshs.</u> | <u>76,000.00</u> |
| | Kshs. | <u>321,846.15</u> |

When the employer failed to settle the claim, the Respondent filed this suit by a plaint dated 14th August, 2003.

The employer/Defendant filed its defence. It averred that notwithstanding the acquittal of the Plaintiff, it was entitled to summarily terminate the employment services of the Plaintiff after facts showed, on reasonable and/or sufficient grounds, that the Plaintiff had committed a criminal offence of printing cinema theatre admission receipts without the Defendant's knowledge and/or authority. That the summary dismissal was in accordance with Section 17(g) of the then existing Employment Act (Cap 226) now repealed.

It was the Defendant's further defence that in the circumstances above, the dismissed plaintiff was entitled only to moneys, allowances and benefits due to them up to the date of his dismissal and nothing more. That he was not accordingly entitled to terminal notice or payment in lieu thereof nor was he

entitled to severance/service allowance nor payment of salary during the trial period of the criminal case.

During the hearing of this claim before the lower trial court, the Plaintiff/Respondent adduced evidence as to how he was arrested, charged and acquitted. That he was not reinstated to his job on request. He testified that his monthly salary was Ksh.19,000/- and that he had worked for 15 years. He also said that at the time of his dismissal, he had worked an overtime period of 12 days for which he was not paid.

On the other hand, the Defendant called its operations manager who testified for it. He had investigated the operations of the cinema theatre in January, 2001. That he noticed that the cash collection turned in were less than the number of customers indicated to have attended the show and this meant that foreign illegal tickets were being sold to customers. That internal investigation showed that Kevin Printer had been requested to print theatre receipts by one employee called Ogutu who in turn actually claimed he had done so by the orders of the plaintiff. That the Police were involved and that that is how the plaintiff had been arrested and charged.

In his very short, disorganized and unreasoned-out judgment, the trial magistrate simply concluded that the plaintiff was wrongly dismissed because he had not been found guilty of the criminal charge with which he had been charged. Accordingly, the Honourable Magistrate concluded, he was entitled to payment of salary in lieu of notice, payment of service/severance allowance due for service for 15 years and full salary for the whole period the plaintiff was under trial of the criminal charge. That is what provoked this appeal.

I have carefully perused the pleadings, the evidence adduced and the manner the honourable trial magistrate used or failed to use it to come to the conclusions he arrived at. The main issue before me, as I see it, is whether or not the Appellant was entitled to summarily dismiss the Respondent and what payment, in either case, the Respondent was entitled to.

There is no dispute that the law applicable at the time was the now repealed Employment Act, cap 226, subject to any provisions of any employment contract signed by the parties altering any such provision in accordance with the common wishes of the parties.

The first issue to resolve however, is whether the Appellant was entitled to summarily dismiss the Respondent.

Section 17(9) of the Employment Act, aforesaid provided thus: -

“If an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employers property the employer is entitled to summarily dismiss such as employee.”

It is clear to my mind that what is required of the employer, is commission of a criminal offence or reasonable and sufficient grounds that the employee may have committed a criminal offence against or to the detriment of the employer or employer's property. Later acquittal, especially acquittal under Section 210 of the Criminal Procedure Code, may be evidence, but not conclusive evidence, of whether or not the grounds for summary dismissal were reasonable and sufficient.

I have considered the facts that were before the Appellant/Employer when it dismissed the Respondent. The Appellant suspected that the revenue being accounted to it was not equal to the official receipts or tickets. It suspected fraud using unauthorized or illegal tickets. It got information that Kevin Printer had been requested to print extra receipt books by one Ogutu who was one of its employees. Ogutu said that he had been requested to order the receipt books by the Respondent James Mungera Muchina. In my view, the Appellant who was losing revenue was entitled to believe these facts and act upon them to summarily dismiss the Appellant upon the circumstances as they were at that time. It is unfortunate that the Respondent did not, even before the lower court, produce copy of the criminal proceedings upon which he was acquitted under section 210 of the Criminal Procedure Code. Had he

done so, the trial court and this court would assess further whether the grounds upon which the Respondent was summarily dismissed were reasonable and sufficient. There is no explanation by the Respondent why he decided to only produce the charge sheet and not the proceedings. Probably he had a good reason on his part not to produce the proceedings.

I now turn to the issue of what payment the Respondent was entitled to in the circumstances of a lawful summary dismissal as the one stated above. The relevant provision which in the view of this court applied is Section 5(3) of the Employment Act hereinabove cited. It provides: -

“Where an employee is summarily dismissed for lawful cause, he shall be paid on dismissal all moneys, allowances and benefits due to him up to the date of his dismissal.”

In the case of **Konig Vs Kanjee Naranjee [1968] EA 233** it was held that: -

“... Although a servant is entitled to arrears of salary on dismissal this entitlement only applies to completed periods of service-in this case a month ...”

As earlier stated, the Respondent had worked for 15 days on the day of dismissal. He had not completed the month for which he would be entitled to be paid his full salary. In my view and finding, therefore, he would be entitled to be paid the proportionate sum of his salary of the monthly salary of Ksh.19,000/-. That would be $15/30 \times 19,000/1 = \text{Ksh.9,500/-}$

In accordance, with section 5(3) of the Act, the Respondent would not be entitled to Notice of termination of his employment or payment in lieu thereof. He was entitled to payment for the overtime of 12 days already worked and which was not denied or defended by the employer. That sum was Ksh.7,615.40. As to the issue of service or severance payment, the Respondent was not entitled to it since it was not independently of the law provided in the contract of employment signed between the parties and since none was payable under the Employment Act because the Respondent was summarily dismissed. This was not a case where the Respondent was declared redundant.

And finally, the trial court awarded salary during the period of 4 months of the criminal charge trial. It is not clear on what legal basis he did so. Section 5(5) of the referred to Act clearly states as follows:-

“No wages shall be payable to an employee in respect of a period during which he is detained in custody or serving a sentence of imprisonment imposed under any law.”

The facts show that the period between 8th January, 2001 when he was charged with the criminal offence and April 2001 when he was acquitted, was a period when the Respondent was not at work as he was undergoing trial. He was not entitled to be awarded salary when he was not giving his services. Payment of Ksh.76,000/- awarded for that period was not in accordance with the law.

The finding of this court therefore is that the only awards to which Respondent was entitled were: -

- 1) Kshs.9,500/- for 15 days worked.
- 2) Kshs.7,615.40 being overtime earned for 12 days, totaling Ksh.17,115.40.

Interest is allowed from the January, 2001 until full entitlement. As the appeal has succeeded partly, each party shall bear the costs of the appeal and the suit below in the ratio of the figures earned or lost by a party. Orders accordingly.

Dated and delivered at Nairobi this 26th day of February, 2013.

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