REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 299 of 2006

KENYA TEA DEVELOPMENT AGENCY LIMITED …….....…….. 1ST APPELLANT

TOMBE TEA FACTORY ……..…… 2ND APPELLANT

AND

ONGAGA ANGWENYI ……....……...…….. RESPONDENT

(Being an appeal from the decree of Hon. S.R. Wewa, SRM, dated and

delivered on the 1st November 2006 in Kisii CMCC No. 1238 of 2004)

JUDGMENT

1. The appeal herein emanates from the decision, judgment and decree of the Senior Resident Magistrate Kisii Law Courts in Civil Suit No. 1238 of 2004 delivered on 1st November 2006. The respondent who was the plaintiff in the lower court filed a suit against the appellants jointly and severally on 24th September 2004 seeking *inter alia,* the following orders:-

(a) *Specific terminal benefits.*

(b) *Interest thereon from the date of employment to date.*

(c) *Interest and costs of the suit.*

1. The Respondent averred that the 1st appellant herein was the umbrella company of the 2nd appellant and that both appellants had been sued because of the tortuous acts committed by their respective managers, servants and/or agents against the respondent. The respondent also averred that he was hired as Driver Grade II on or about 1st March 1995 by the 1st appellant herein. He stated further that on or about 22nd January 2002, his services were prematurely terminated by the 1st appellant and that at the time of termination the respondent's salary was Kshs.8930/= per month. It was the respondent's contention that the said termination was irregular, arbitrary and without reasonable cause whatsoever. The respondent therefore contended that he was entitled to the following benefits:-

(i) *Three months' salary in lieu of notice.*

(ii) *Gratuity.*

(iii) *Annual leave earned.*

(iv) *House allowance and*

(v) *Medical allowance.*

which benefits he said had not been paid to him thereby prompting him to file suit.

1. The appellants entered appearance and also filed defence through the firm of Migiro & Co. Advocates. In their joint defence dated 17th January 2005 and filed in court on the same day, the appellants denied the respondent's averments and claims as set out in the plaint. The appellants also averred that, contrary to what the respondent stated in paragraph 8 of the plaint, to the effect that the termination of employment was irregular and arbitrary, they were justified to terminate the respondent's services. Further, the appellants averred that upon the said termination, they paid to the respondent all the dues that he was entitled to and that if there were any benefits that were not paid to the respondent, then the respondent was not entitled to the same. The appellants prayed for the dismissal of the respondent's suit with costs.

2. The respondent does not appear to have filed a reply to the defence as none appears to be on the file. There is also none on the Record of Appeal.

3. The suit was heard in the subordinate court and after the conclusion of the same, the learned trial court made the following findings:-

- *That the issue of having been paid in lieu of notice has not been proved, and that the respondent was entitled to 2 months' pay in lieu of notice of Kshs.17960/=.*
- *That the respondent was entitled to annual leave totaling Kshs.26,790.00.*
- *That the respondent was entitled to medical allowance at the rate of Kshs.6000/= per year for 7 years – Kshs.42,000/=.*
- *That the respondent was entitled to house allowance at the rate of Kshs.9240/= per year for 7 years totaling Kshs.64680/=.*
- *That the respondent was entitled to gratuity for 3 years at the rate of Kshs.8930/= per year totaling Kshs.30827/=.*

1. The trial court also said that the above stated sums would be paid to the respondent less Kshs.16173/= which had been paid to and acknowledged by the respondent. Though noting that the respondent indeed received a loan from Chai Co-operative Society, the trial court said that it was not for the appellants as employer, to receive the same from the respondent for Chai Co-operative Society which had its own machinery for recovering loans.

The respondent was also awarded costs and interest of the suit.

2. The appellants were aggrieved by the said decision and they have come to this court challenging the same. In the Memorandum of Appeal dated 22nd November 2006, the appellants have raised the following 10 grounds:-

1. *The learned trial magistrate's finding that there was no evidence of payment of the respondent's benefits by the appellants cannot be supported on the face of overwhelming documentary evidence (DEX 2; DEX 3 and DEX 4) adduced by the appellants showing that a bulk of his terminal benefits were applied to settle the respondent's loan then due and owing by him to Chai Co-operative Savings and Credit Society.*

2. *The learned trial magistrate failed to properly or at all to address her mind to the relationship between the appellants and the respondent on one hand and that of Chai Co-operative Savings and Credit Society*

on the other, and as a consequence came to an erroneous finding that the appellants were not under a duty to receive payment on behalf of the Sacco from the respondent.

3. *The learned trial magistrate erred in law and fact in failing to appreciate that the appellants being the collecting agents were under an obligation to collect payment from the respondent amongst others and pass the same to the Chai Co-operative and Savings Society – it being a Society for the Employees of K.T.D.A., the 1st appellant.*

4. *The learned trial magistrate misconstrued the clear provisions of the Letter of Appointment signed by both the 1st appellant and the respondent and as a result she treated the respondent as having his services with the 2nd appellant wrongfully terminated.*

5. *The learned trial magistrate misdirected herself in law and fact by failing to appreciate that the respondent had neither pleaded nor specifically proved special damages as a result of which she came to erroneous conclusions on the issue.*

6. *The learned trial magistrate misdirected herself in law and fact by failing to decide the case on matters or issues placed before her and instead digressed into addressing her mind and considering issues of facts and opinions expressed in the respondent's counsel's submissions. In digressing thus, the learned trial magistrate acted not only contrary to established principles of the Law of Evidence but her conduct occasioned a miscarriage of justice as the findings on special damages were based on unsolicited evidence.*

7. *The learned trial magistrate failed to properly and reasonably analyze and appreciate that the authorities cited by the respondent's counsel were not relevant and therefore not applicable to the matters in controversy.*

8. *The learned trial magistrate erred in law and fact in shifting the burden of proof to the appellants.*

9. *The learned trial magistrate failed to hold, in the light of factual and evidential basis, as she should have done, that the respondent case ought to have been dismissed.*

10. *The learned trial magistrate gave no consideration to the appellants' submission with its relevant and applicable authorities.*

1. The appellants pray that the judgment of the SRM be quashed and there be an order of dismissal of the respondent's suit in the lower court with costs. The appellants also pray for the costs of this appeal.

2. By consent of the parties, this appeal proceeded by way of written submissions. Parties filed their written submissions together with supporting authorities. I have considered the respective and opposing submissions. I have also carefully read the pleadings filed by the parties herein and the proceedings and judgment of the trial court. This is a first appeal and on this appeal, I am under a duty to reconsider and evaluate the evidence afresh, only remembering that I do not have the privilege of seeing and hearing the witnesses who appeared before the trial court. The duty of a first appellate court has been stated in a number of authorities among them the case of **Selle & another –vs- Associated Motor Boat Co. Ltd.& others [1968] EA 123** where Sir Clement De Lestang, V-P, delivering the judgment of the court stated the following at p. 126:-

"I shall deal with the cross-appeal first as in my view it can be disposed of quite shortly. I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to

take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Shalon [1955], 22 EACA 270)."

3. In the present appeal, the issue for determination is whether the respondent proved his case against the appellants on a balance of probabilities. Whereas the respondent contended that he was not paid his terminal dues, the appellants contended that the respondent was paid all his dues as per **D.Exh.2, D.Exh.3** and**D.Exh.5**. Secondly, whereas the respondent contended that his dismissal was irregular and arbitrary and unjustified, the appellants contended that they were justified to relieve the respondent of his duties. During his testimony, the respondent stated that after he received the letter of dismissal dated 22nd January 2002, he signed the same accepting that he had been dismissed for the reasons stated therein. He did so on 1st February 2002 in the presence of witnesses as can be seen from **P. Exhibit 2**. He also said that he was entitled to be paid two months' salary in lieu of notice and that he was also entitled to annual leave allowance, and other benefits. It is to be noted that in the plaint, the respondent was asking to be paid 3 months' salary in lieu of notice.

4. During cross examination, the respondent stated that prior to being issued with the termination letter dated 22nd January 2002, he had been served with an earlier disciplinary letter regarding the performance of his duties as a driver and that by his undated letter produced as **D. Exhibit 1**, he admitted the faults pointed out in the letter of warning from his employer that due to his negligence, a car under his charge was damaged. He undertook not to repeat the error. In his further evidence, on cross examination the respondent admitted that he had taken a loan with Chai Co-operative Society to the tune of Kshs.96,000/= and that the balance due at time of termination was Kshs.60935/=. He also admitted to having been paid the sum of Kshs.16173/= on 8th January 2005. He also confirmed that he still owed Chai Co-operative Society some money even after the appellants deducted all the amounts that were due to him to offset the said loan. He also confirmed during re-examination that there was an arrangement between the appellants and Chai Co-operative for recovery of the loan balances from the respondent.

5. The appellants called Peter Mainga as DW1. His testimony was to the effect that the appellants had given the reasons for dismissing the respondent in their letter of termination. The letter of termination referred to by DW1 reads as follows:-

"KENYA TEA DEVELOPMENT AGENCY

HEAD OFFICE

MOI AVENUE
P.O. BOX 30213
NAIROBI
KENYA

DATE: 22.01.2002

Ongaga Angwenyi

Thro; the Leaf Base Manager

Tombe Leaf Base

P.O. Box 1958
KISII
RE: TERMINATION OF SERVICES

We refer to the Leaf Base Managers letter Ref. STF/CON/4/9977/TEdated 3.10.2001 wherein you were charged with frequent vehicle breakages, and the subsequent letter of even reference dated

17.10.2001 which suspended your services.

Your defence/explanation letter dated 7.10.2001 have been considered but found not convincing and hence is unacceptable.

We note that your performance has been very poor and riddled with cases of negligence and carelessness. This has resulted in breakages in the vehicle under your care hence high costs of maintenance and repair. You have not been able to explain the frequent breakages and therefore you have been held accountable for the offences.

Due to the prevailing circumstances the company is unable to retain your services any longer. We therefore regret to inform you that your services have been terminated with effect from the date of this letter.

Note that you will not be paid for the period you served under suspension but you will be paid two months' salary in lieu of notice alongside your other terminal benefits. You are required to hand over any company property under your care by virtue of employment before your dues are effected.

S.M. Agala

FOR/MANAGING DIRECTOR

CC F.C C.M.O.
ZM – ZONE X

6. DW1 explained that for the reasons given in the above stated letter, the appellants were justified in terminating the respondent's services. He also testified that all the benefits due to the respondent were computed as at 18th February 2002 and paid out to him less the sum of Kshs.96393/96 owed to Chai Co-operative Society.

7. The above are the relevant facts as they relate to the circumstances under which the respondent's services with the appellants' were terminated. I have carefully reconsidered and evaluated these facts afresh. I have also carefully read the written submissions filed by counsel on both sides. During the highlighting of the submissions, Mr. Migiro for the appellants pointed out that since the respondent's claim was in the nature of special damages, the same had to be specifically pleaded and specially pleaded. That in the instant case, the special damages awarded to the respondent came from nowhere and that the same should be disallowed by this court. Reliance was placed on the Court of Appeal decision in **Galaxy Paints Company Ltd. –vs- Falcon Grounds Ltd. [2000] 2 EA 385** in which the Court of Appeal expressed itself in the following words:-

"It is trite law, and the provisions of Order XIV of the CPR are clear,

that the issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the CPR, the trial court by dint of the provisions of Order XX rule 4 of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues the parties have framed for court's determination."

8. Counsel submitted that in the present case the respondent neither pleaded nor proved special damages in his testimony. That the sum of kshs.182127/= awarded by the trial court, was solicited from the respondent's counsel's submissions and not from the evidence and therefore ought not to be allowed, as infact all monies due to the respondent were paid to him by the appellants.

9. I have looked at the respondent's pleadings and testimony very carefully. I have also looked at the respondent's counsel's submissions before the trial court where counsel computed the terminal benefits due to the respondent. From a consideration of all the above, I am persuaded that the said computations were not supported by the plaint or by oral testimony by the respondent. Infact, what I see is a very casual approach by the respondent in his evidence as to why he thought he was entitled to any payment from the appellants.

10. In response to submission by counsel for the appellants, Mr. Bigogo, appearing for the respondent conceded that no special damages were specifically pleaded. He however submitted that in its wisdom, the trial court relied on the formula provided by counsel for the appellant in making the award. The formula referred to is what appears in **D. Exhibit 4**. The court has looked at and examined **D. Exhibit 4**. Though the same may offer a formula, the respondent was under a duty as claimant, to bring himself within the ambit of that formula first by pleading specifically the special damages he was entitled to and secondly by offering evidence to prove his claims. He did neither and in the circumstances, he did not prove his case against the appellants on a balance of probabilities.

11. Secondly, it is clear from the respondent's own testimony and from **P. Exhibit 2** - Letter of Termination of Services – that the respondent's work record was **"very poor and riddled with cases of negligence and carelessness"** which had resulted **"in breakages in the vehicle under your care hence high costs of maintenance and repair."** The letter also pointed out that the respondent had not been able to explain the frequent breakages and as a result he was being held accountable for the offences. In my considered view therefore, and contrary to the findings of the trial court, the appellants' action of terminating the respondent's services was justified.

12. The upshot of what I have stated above is that the respondent's appeal is justified. Accordingly, the appeal filed by the appellants has merit. It is hereby allowed. The judgment and the decree of the trial magistrate are hereby set aside and substituted by the judgment of this court dismissing the respondent's suit with costs. The appellants shall also have the costs of this appeal.

13. It is so ordered.

Dated and delivered at Kisii this 18th day of October, 2012.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. N. Migiro (absent) for Appellants

Mr. Bigogo (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.