



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Appeal 170 of 2007**

**DELAMERE ESTATES LTD.....APPELLANT**

**VERSUS**

**MOSES GICHAGA KIMANI.....RESPONDENT**

**JUDGMENT**

This is an appeal against the judgment of the Senior Resident Magistrate at Naivasha, Hon. Njagi, in CMCC 727/03. The respondent had sued the appellant for special and general damages for unlawful dismissal from employment. The trial court found in favour of the respondent and made an award of Kshs.80,000/- as general damages for unlawful dismissal and special damages of Kshs.1,820/-. The appellant is dissatisfied with the said judgment and filed this appeal seeking to have the judgment set aside or reviewed.

Although the memorandum of appeal contained 6 grounds, in his submissions, Mr. Wamaasa, counsel for the appellant, condensed them into two grounds, namely:-

- 1. That the learned trial magistrate erred in law and in fact by awarding the respondent Kshs.80,000/- general damages without regard to the evidence on record;**
- 2. That the trial magistrate failed to consider the appellant's evidence and written submissions on record.**

The respondent's counsel also filed written submissions on 18/1/2012 but did not attend court for highlighting of submissions although he was duly served. The court will consider the said submissions in which the respondent opposed the appeal.

A brief background of this case is that the respondent was an employee of the appellant whom he served faithfully for one year 9 months, till 4/4/2002 when the appellant dismissed him. The respondent's claim was that he should have been issued with an employee's certificate of service, be paid one month's salary in lieu of notice at Kshs.1,820/- and damages for wrongful dismissal and costs of the suit. In his testimony in the trial court, the respondent produced a letter of employment dated 23/8/00 issued after completing probation. He was employed on permanent terms (PEx.1). By the time of his dismissal, his salary was Kshs.1,820/- as evidenced by the payslip (PEx.2). He said that he was dismissed because two young bulls died because of having been trampled upon by the bigger ones. He said it is Senior Stephen Lejuyai who mixed the bulls. He reported the death of the bulls and his services were terminated under a letter dated 4/4/02 (PWx.3). On 5/4/02 he was paid his benefits Kshs.1,470/-. The respondent denied having mixed the bulls but that Senior was to blame. He denied having been paid salary in lieu of notice nor was he given a certificate of service as required.

The appellant called one witness, Simon Mbogo who was the Accounts Assistant at Delamere Estates. He produced a letter dated 4/4/2007 that was authored by Dr. Ojango, the Assistant Farm Manager (DEx.1) and the letter in which the respondent was paid his dues (DEx.2). DW1 was not present when the letter was issued nor was he at Delamere to know how the bulls died. In the defence filed by the appellant, the appellant generally denied that the dismissal was misguided or contrary to labour laws.

The trial magistrate found as a fact and which I agree with, that the contract of employment between the respondent and appellant was not denied.

The respondent contends that he was dismissed for no apparent reason. The question is whether the respondent was guilty of gross misconduct. In his testimony, the respondent maintained that his senior (supervisor) is the one who mixed the older bulls with the younger ones as a result of which some died. In cross examination, the respondent said that he could not have defied the supervisor's authority and he mixed the bulls as directed. The appellant did not find it necessary to call the said "Stephen" as a witness. The respondent's evidence that it was Stephen who mixed the bulls is therefore not controverted and I will find that the appellant failed to prove that the bulls died due to the respondent's negligence. The trial court correctly found that there was no proof by way of evidence that the respondent was negligent or that he caused the death of the bulls. The trial court also correctly pointed out that there was no evidence that the respondent was given an opportunity to explain his side of the events before termination of his services thus contravening rules of natural justice. I find that the respondent's termination was unlawful.

The respondent was employed on permanent terms as evidenced by the letter of employment dated 23/8/2000 (PEx.1). The said letter does not allude to what the notice period would be in the event of termination of the contract. In the instant case, the contract was silent on termination. The law then applicable to contracts was the **Employment Act Cap 226** (now repealed). **Section 14(5)** provided that:-

**"14(5)(1). Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey, shall, if made to be performed in Kenya, be decreed to be-**

- (i)....**
- (ii)...**

**(iii) where the contract is to pay wages periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing;**

**Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provisions of this sub-section which would otherwise be applicable thereto."**

In the case of **Peter Whitton and Katherine S.R. Whitton v Kenya Educational Trust Ltd HCCA 56 and 57 of 2005**, J. Maraga as he then was, had occasion to consider a situation such as this. He considered the case of **Payzu vs Hannafore (1918) 2 K.B. 345**, where the court said that if a contract is silent on termination notice or its length, the court will not construe that as to mean that no notice was required. In **Hamilton Vs Bryant 30 T.K.R. 408**, the court said notice is always required and its length will be determined by usage. If there is no usage, then the court will determine the reasonable notice required to be given in the circumstances of each case – see **Credition Gas Company v Credition U.D.C. (1928) Cho. 174** and **Ombaya v Gailey & Roberts Ltd (1974) EA 522**.

In the instant case, there is no evidence of usage and so it is left to the discretion of this court to decide on the period of notice. In the plaint, the respondent prayed for one month's salary in lieu of notice and the trial court granted the prayer. In that regard, the plaintiff will be entitled to Kshs.1,820/-. The respondent also prayed for general damages. In the **Dalmas B. Ogoye v KNTC Ltd. CA 125/1996**, the Court of Appeal said:-

**“Since the appellant was unlawfully terminated, the only damages he is entitled to in law is that amount he would have been paid if his employment had been brought to an end in the manner stipulated in his contract of service and no more.”**

I agree with the appellant’s counsel that all that the respondent was entitled to is the notice period which is duly provided for and no more. The sum of Kshs.80,000/- awarded to the respondent cannot be justified. In the end, I quash the award of Kshs.80,000/- and set it aside. The appeal succeeds in part and the respondent will have judgment for a sum of Kshs.5,460/- being three months salary in lieu of notice. I also direct that the appellant do issue the respondent with a certificate of service. Each party to bear its own costs. It is so ordered.

**DATED and DELIVERED this 15<sup>th</sup> day of November, 2012.**

**R.P.V. WENDOH  
JUDGE**

**PRESENT:**

Mr. Maragia holding brief for Mw. Wamaasa for the appellant

N/A for the respondent

Kennedy – Court Clerk