



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 38 OF 2010

(Being an appeal from the Judgment/Decree of Hon. Kagendo, Resident Magistrate, dated and delivered at Nakuru on 5th day of February, 2010)

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|------------------------------|-----------------|
| ERICK KARANJA GAKONYO..... | 1 ST |
| | APPELLANT |
| TERESIA WANJIKU GAKONYO..... | 2 ND |
| | APPELLANT |

VERSUS

SAMSON GATHIMBA.....
RESPONDENT

JUDGMENT

By a plaint dated 19th July 2006 the Respondent sued the Appellants jointly and severally for the following orders -

- (a) *a declaration that the dismissal of the Respondent (plaintiff) was unjustified and unlawful;*
- (b) *that the Plaintiff do receive from the Defendant all his terminal and unpaid allowances.*

In his evidence the plaintiff claimed -

- (i) *salary for the years 2004 and 2005 amount to Ksh 475,000/=*
- (ii) *leave allowance for 13 years @ the rate of Ksh 20,000/= per year amounting to Ksh 260,000/=*
- (iii) *allowances - Shs 1.1. million*
- (iv) *notice period Ksh 60,000/=*

In cross-examination the Respondent stated his monthly salary was Ksh 20,000/=, and Shs 39,600/= being January 2006, pay and leave allowance for 2005. He denied any allegations of theft leveled against him. The Respondent called two witnesses who both confirmed that he was the Appellants' farm manager and that during his watch, the farm prospered.

The 1st Appellant gave evidence and admitted that he was the owner of Giteru Farm in Molo, and

that the Respondent was his Farm Manager, for a period of 13 years, starting with a salary of Ksh 2,500/= and rising to Sh 20,000/= at the time of his summary dismissal. The Appellants denied owing or being liable to the Respondent for any of the sums claimed in the evidence of the Respondent.

In their defence dated 29th August 2006, the Appellants while admitting that the Respondent was indeed employed as a Farm Manager, the Appellants denied that he was employed on permanent and pensionable basis, stated that the Respondent was lawfully and summarily dismissed from his employment at Giteru Farm, Molo on or about 13.02.2006, and that the said summary dismissal was for justifiable and lawful grounds, and which were duly brought to the attention and notice of the Respondent. The appellants also denied having dealt with the Respondent as a casual labourer, and averred that the Respondent's employment was summarily terminated for lawful cause as a result of acts by the Respondent amounting to gross misconduct justifying summary dismissal.

The particulars of the alleged misconduct are in paragraph 5(a) - (c) inclusive and charge the Respondent with the actual theft or being an accessory to the theft of produce, namely, dry maize from the Appellants main store at Giteru Farm. It is noteworthy that the Respondent did not file any reply to these particulars and left them unchallenged.

In his evidence the respondent denied the allegations leveled against him and contended that they were made by staff who wanted his position. In her judgment, the learned trial magistrate found that claim for sh 2,025,200/= was not pleaded but found that the Respondent's services were unlawfully terminated and entered judgment for the Respondent as prayed in the plaint. The Appellants, aggrieved with the said judgment and orders appealed to this court on twelve (12) grounds, namely -

(1) *the Learned Magistrate erred in law in entering judgment in favour of the Respondent and against the Appellants without having due regard to the pleadings and the evidence before the court.*

(2) *the Learned Magistrate erred in law and particularly Section 17 of the Employment Act, Cap. 226 (repealed) by declaring that the Respondent had been unlawfully terminated.*

(3) *the Learned Magistrate erred in law by entering judgment on a claim for special damages that was not specifically pleaded in the plaint.*

(4) *the Learned Magistrate erred in law by entering judgment on a claim for special damages that was not strictly proved.*

(5) *the Learned Magistrate erred in law by failing to appreciate that the Respondent had been terminated on account of gross misconduct.*

(6) *the Learned Magistrate erred in law by failing to appreciate that general damages cannot be awarded for breach of contract.*

(7) *the Learned Magistrate erred in law and facts by finding that the Respondent had proved the claim for special damages save for the particulars, which finding was contrary to the evidence before the court.*

(8) *that the Learned Magistrate erred in law by relying on privileged documents that were on a without prejudice basis in order to render her judgment.*

(9) *the Learned Magistrate was wrong to totally disregard the Appellants' written submissions and authorities is so far as concerned the issue of special damages and the requirement that they be specifically pleaded and strictly proved.*

(10) *the judgment of the Learned Magistrate is ultra vires the Magistrate's Court Act on account of jurisdiction.*

(11) *the Learned Magistrate erred in law in awarding costs to the Respondent in total disregard of the legal principle that the costs follow the event.*

(12) *consequently the Learned Magistrate's decision occasioned a miscarriage of justice.*

And by reason thereof prayed for orders that -

(a) *this appeal be and is hereby allowed.*

(b) *the judgment of the Honorable Kagendo delivered in Nakuru RMCC No. 1246 of 2006 and all consequential orders be and is hereby set aside.*

(c) *the suit Nakuru RMCC No. 1246 of 2006 be and is hereby dismissed with costs to the Appellants.*

(d) *the costs of this appeal be and are hereby awarded to the Appellant.*

The Appellants were represented by the firm of Ochieng, Onyango, Kibet and Ohaga, while the Respondent was represented by the firm of Nyagaka S. M. & Company Advocates. The said counsel both filed written submissions together with authorities upon which they respectively relied.

I will commence with the Respondent's Counsel's submissions. Mr. Nyagaka supported the judgment and orders of the trial magistrate, and relied upon the decision of the Court of Appeal in the case of **CHEGE MWANGI VS UNIVERSITY OF NAIROBI** [Civil Appeal No. 144 of 1995] where that court granted an order for payment of benefits in terms of his conditions of employment with the Respondent, and asked this court to do likewise.

On their part counsel for the Appellants in their submissions relied upon the provisions of Section 17 of the Employment Act (*Cap 226, Laws of Kenya*) (now repealed) but the law applicable during the course of employment of the Respondent and at the time of filing suit, the subject of the appeal. The Appellant's counsel also relied upon the cases cited in the submissions. The appellant's counsel posed three issues -

(i) *what is the statutory jurisdiction in this matter*

(ii) *was the dismissal of the Respondent unlawful and/or unreasonable in any way,*

(iii) *is the Respondent entitled to damages?*

Having considered both Respondent's Counsel's submissions, and those of the Appellant's counsel, the three issues raised by counsel for the Appellant's will be satisfied or answered by determination of the first question - the law applicable to the dispute herein.

I have no doubt in my mind that the law applicable to the dispute between the applicant and respondent is the Employment Act (*Cap. 226, Laws of Kenya*) now repealed by the Employment Act 2007 (*No. 11 of 2007*). The applicable provision of the Employment Act was Section 17 which gave seven (7) grounds for summary dismissal of an employer. The seven grounds were not exhaustive, but the most relevant ones, in this case are Section 17 (e) and (g) which read -

"S. 17 -

(a) - (b)

(c) if any employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was her duty, under his contract, to have performed carefully and properly.

(d) - (f) -

(f) **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 employer's property.**

Section 17 provides that any of the above grounds constitute justifiable or lawful grounds for the dismissal.

In this case, the Respondent was suspected of theft or being an accessory of the theft of the Appellant's dry maize. He was given a suspension, to which he did not give any response, and was subsequently summarily dismissed on the grounds inter alia of willful neglect to perform work which was his duty to have performed, or to have carefully and properly performed, and of committing or being reasonably suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

The Respondent was not caught or found to have actually stolen the Appellant's dry maize from its store in the Giteru Farm. There was however a whiff of suspicion that dry maize had been or was being stolen from the Appellant's stores in the farm. Even DW2, admitted having heard of the theft, and thus the Respondent's four witnesses unwittingly confirmed the appellants' reasonable suspicions, that their dry maize was being stolen or had been stolen. A suspension later, did not evoke any explanation from the Respondent hence the Appellants drastic action by invoking the provisions of Section 17 of her applicable law, the Employment Act, which expressly permitted an employer to summarily dismiss an employee with loss of all privileges.

The Respondent admits in his evidence that he was granted 2 cows which were equivalent to 2 months salary (*at the rate of Ksh 20,000/= per month*). The Respondent was therefore lucky in that respect.

Summary dismissal usually connotes dismissal of an employee without giving the notice to which the employee is entitled by virtue of the contract of employment. It is justified if the employee's conduct is such that it prevents "**further satisfactory continuance of the relationship**" **SINCLAUR VS. NEIGHBOUR [1967] 2Q.B. 275.**

Suspicion is an opinion or belief derived from circumstances or facts that do not constitute proof. In the case of **HUSSEIN VS. CHONG FOOD KAM [1970] AC 942**, Lord Devlin said -

"Suspicion in its ordinary meaning is a state of conjecture or surmise when proof is lacking."

In the case of the relationship of employee and employer, suspicion lead to erosion of confidence and trust by the employer in the employee, and in the cause of suspicion of loss or theft of property of the employer, it may lead to summary dismissal without even notice. As I have already observed, the Respondent was given Notice by the suspension letter, and gave no or no satisfactory explanation to the allegation of dereliction of duty and theft of the Appellants dry maize. In the circumstances it cannot be said that his dismissal was unlawful. The Appellants succeed on the first issue, the dismissal was lawful.

The second issue is whether the Respondent was entitled for the special damages of Sh 2,025,200/= (*inclusive of salary for 2004-2005, Ksh 475,000/=*), (*pay in lieu of leave days Shs 260,000/=*). (*Pay in lieu of notice sh 60,000/= and service charge sh 150,000/=*).

The Appellant contended and I agree with their contention that these claims are in the nature of special damages and must be specifically pleaded and proved. Of Special damages Order VII, rule 2(1) of the Civil Procedure Rules (*now revoked*) (*now Order 6, rule 1 of the Civil Procedure Rules 2010*), provides -

"where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed,

except where the plaintiff sues for mesne profits or for an amount which would be found due to him on taking unsettled accounts between him and the defendant. "

There was no such situation of taking of accounts between the Appellant and the Respondent. For the Respondent to be awarded any of the sums claimed in his evidence, he had first to plead them, and then prove each of them. He neither pleaded nor proved any of the claims for special damages. They do not therefore lie. See the case of **COAST BUS SERVICES LTD vs. DANYI & OTHERS [1992] LLR 318 (K)**.

More fundamentally, the sum of Ksh 2,025,200/= was not awarded by the trial magistrate it was merely a sum claimed by the Respondent in his evidence. In the words of the learned magistrate's judgment - "In the submissions by his Advocate, the said special damages have been tabled and total Ksh 2,025,200/=. However that was not pleaded. The court therefore find that the plaintiff was wrongly and unlawfully dismissed and accordingly enters judgment as prayed in the plaint.

Our Superior Courts have time and again held that general damages cannot be awarded for breach of contract because damages arising from breach of contract are usually quantifiable and are not at large. See the cases of **HABIB ZURICH FINANCE (K) LTD VS. MUTHOGA & ANOTHER [2002] E.A. 81 (CAK)** and in **SONYE VS. SIAYA TEACHERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY & ANOTHER [1999] E.A. 2 E.A. 310 (CAK)** - the court stated that general damages cannot be awarded for wrongful termination of employment and even where there is distress, mental anguish and injured feelings general damages cannot be awarded.

The prayers in the plaint were as noted at the beginning of this judgment were for (a) a *declaration that the dismissal was unjustified and unlawful*, (b) *an order that plaintiff do receive from the Defendants all his terminal and unpaid allowances and* (c) *costs of this and interest thereon at court rates*.

I have already held that the dismissal was lawful and justified. I have also held that special and general damages must be pleaded and proved.

In the circumstances therefore the award of both special and general damages cannot be justified as it has no basis in law.

Similarly, there was also no basis for the claim for service charge as the termination was lawful.

Being of the above mind, I find the Appellants appeal of 23rd February 2010 has merit, and the same is allowed in terms of prayers (a) - (c) thereof.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 20th day of May 2011

**M. J. ANYARA EMUKULE
JUDGE**