



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU Civil Appeal 22 of 2009**

**Civil Appeal 22 of 2009**

**SAMUEL OGODO WEGA ..... APPELLANT**

**-VERSUS-**

**FISH PROCESSORS (2000) ..... RESPONDENT**

**Coram:**

**Ali-Aroni, Judge.**

**Appellant present in person**

**Ms. Nishi Pandit Advocate for the respondent**

**Mr. George Diang'a Court Clerk.**

**JUDGMENT**

**A. Pleadings**

This is an appeal from the judgment of the Senior Resident Magistrate at Winan, Hon. Learned Magistrate – Mr. Biwot delivered on the 27<sup>th</sup> of January, 2009.

The grounds of appeal are as follows:

1. The Learned Trial Magistrate erred in law in dismissing the plaintiff/appellant's claim with costs when the appellant had proved his suit above a balance of probabilities as required in Civil Suits.
2. The Learned Hon. Magistrate erred in law in not evaluating the appellant's evidence properly and believing the defence witnesses evidence as gospel truth when infact the defence evidence tendered in the trial Court was weak, inconsistent and full of admission basing his findings on unfounded-hearsay evidence. The Learned Magistrate failed to disclose or cite any authority in law relied on in arriving on his decision.
3. The Learned Trial Magistrate had evaluated the whole evidence and in the body of his judgment convinced that the plaintiff's termination or dismissal was unlawful but later misdirected himself in using wrong principles to dismiss the plaintiff's claim.
4. The Learned Trial Magistrate erred in law by considering and believing document any exhibits listed by defence which are fully of discrepancies the defendant's submissions which admits the appellant's claim in part but embarrassed on wrong principles in computing appellant's dues incorporating them with the defendant's dues, notwithstanding that there was no counter-claim filed by the defendant's hence arriving at a wrong decision of dismissing the appellant's claim with costs.
5. The Learned Trial Magistrate having critically analyzed, established in his judgment that the termination or dismissal of the appellant was unlawful, illegal null and void will have entered judgment in favour of the plaintiff/appellant as prayed, in the plaint and not turning around and dismissing the plaintiff/appellant's claim with costs. (SIC)

The appeal was opposed.

The appellant appeared in person whereas the respondents were represented by Miss Nishi Pandit Advocate.

**B. Appellant's submissions**

The appellant urged the court to set aside the judgment of the lower court on the grounds set out in his Memorandum of Appeal and because the lower Court did not put down all his evidence.

### C. Respondent's Submissions

The respondent's counsel disputed the allegation that some of the appellant's evidence was left out. She further submitted that the appellant was represented by a counsel at that stage and the issue should therefore arise. Counsel further submitted that the dismissal was lawful as a notice had been issued. That even if the termination was unlawful; the appellant was only entitled to one month's pay in lieu of notice. On the issue of leave counsel stated that the appellant did not proceed on leave for 1 year only, therefore only 1 year's leave was pending. However the respondent's counsel conceded that there was no counter-claim by the respondents but submitted the court rightly considered the defence's claim in the interest of justice.

### C. Court's analysis, findings and conclusion.

The brief facts of the case are as follows. The appellant was employed by the respondent on the 17<sup>th</sup> of November, 2001 as a driver. He was issued with a letter whose reference read "Probation/Appointment Letter" offering him a job at a monthly salary of Ksh 5,000/=. The said letter had 6 express terms and conditions. Two conditions are relevant to this case. They are:

" And on compliance with Section 17 Cap 226 of the Laws of Kenya (V) 13, the company management shall have full right of terminating your services instantly and without notice if you are found guilty of misconduct, insubordination, drunkardness, criminal offence or any other action that is deemed just by the company." (Sic)

"The company also deserves the right to dismiss or employ the services permanently after satisfactory of three months (90 days) probation without any notice."

The plaintiff was confirmed on the job in February, 2002. He worked until the 13<sup>th</sup> of February, 2006 when he was terminated for an alleged misconduct. There was an attempted to settle the matter at the labour offices without success culminating in this suit.

The plaintiff filed suit on the 24<sup>th</sup> of April, 2006 claiming for:-

1. Salary for February 2006 Ksh 7,963
2. 3 months salary in lieu of notice.
3. 2 years leave at Ksh 7,963 per annum Ksh 15,926.
4. Statutory deductions.
5. Costs of application.

The defendant filed a defence on the 23<sup>rd</sup> day of May, 2006 denying the sums claimed. The defendant stated that it did not terminate the plaintiff unlawfully. The defendant further stated that the plaintiff owned it Ksh 22,503.35 and it would consider filing a counter-claim.

I have considered submissions made before me by the parties. I am minded that an appellate court will not interfere with a finding of fact unless the finding is based on no evidence, or on a misapprehension of the evidence or the trial court acted on wrong principles in reaching the finding. This court may consider, examine and evaluate the evidence if necessary. See Mwanasokoni VS Kenya Bus Services Ltd (1985) KLR 932.

It is not in dispute that the plaintiff worked for the defendant as a driver between November 2001 and 13<sup>th</sup> of February 2006. The plaintiff was issued with a probation/employment letter dated 17<sup>th</sup> November, 2001. Apart from the initial letter of employment stipulating terms, while the appellant was on probation. No other letter was given to the applicant stipulating his terms and conditions of service. On the 14<sup>th</sup> of February, 2006, the defendant through its general manager one Rajesh Kumar issued the appellant with a termination letter. The body of the letter gives an account of a vehicle whose engine allegedly ceased, because the appellant drove the same without checking the water. The letter did not address the subject referenced. The parties and the court treated the said as the termination letter.

The defence witnesses produced two vouchers both dated 23<sup>rd</sup> December 2005 for payment of Ksh 5,000/= and Ksh 25,000/= respectively. The said vouchers were said to be for a loan advanced to the appellant by the respondent. No counter-claim was filed.

In his judgment, the learned Trial Magistrate found that the plaintiff was entitled to two month's leave and for the days worked in February, and that the appellant was dismissed without notice. He considered 3 months in lieu of notice as reasonable. Although the issue of the damaged motor vehicle did not arise in the suit, nonetheless the learned trial Magistrate considered the evidence of the defence witnesses and penalized the appellant for the alleged damage. Despite finding that 3 months notice was reasonable, the learned trial Magistrate went ahead to award the appellant only 1 month notice. He also found that the appellant owed the defendant Ksh 30,000/= although this issue was not before the court. Parties are bound by their pleadings. The respondent did not file a counter-claim and the court therefore ought not to have considered the claims made during the trial. I find that the learned Trial Magistrate misdirected himself by giving weight to evidence of issues not before the court thus awarding monies to the defendant.

The parties did not have terms and conditions of service past the probation letter. The defendant therefore ought to have given a reasonable notice or payment of a reasonable period in lieu. From the evidence before court, it is clear that the appellant was terminated without notice or payment in lieu of notice. It therefore follows that the termination was unlawful. I agree with the Learned Trial Magistrate only to the extent that a 3 months notice would have been adequate and the finding that the appellant was entitled to two months salary in lieu of his leave. The Learned Trial Magistrate also misdirected himself in considering issues not before him and reducing the period of leave the appellant was entitled to.

For the above reasons, I set aside the judgment of the Learned Trial Magistrate and allow the appeal. Having found as stated above, the arithmetic is simple and I proceed to award to the appellant as follows:-

i)	Salary for days worked in February 2006	= 4,246.00
ii)	3 months salary in lieu of notice	= 23,889.00
iii)	2 months leave:	= 15,926.00
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		= 44,061.00
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	iii) Costs.	
	iv) Interest.	

Dated and delivered in Kisumu on 26.02.2010.

**ALI-ARONI**  
**JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent

AAA/hao