



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU Civil Appeal 40 of 2009

JOSEPH OPONDO ANDEDO.....APPELLANT

VERSUS

JALARAM NUSRING & MATERNITY HOME RESPONDENT

DR. T. K. PAUL.....RESPONDENT

JUDGMENT

By a plaint dated and filed in court on the 11th February 2003, the appellant, Joseph Opondi Andedo, claimed a sum of Kshs. 233, 945/40 cts from the respondents Jalaram Nursing & Maternity Home (first respondent) and Dr. T. K. Paul (second respondent) being the amount allegedly due and owing to the appellant on account of unpaid overtime, nineteen (19) days pay for June 2002, unpaid accrued leave and payment in lieu of notice arising from the dismissal of the appellant by the respondents from his employment as a laboratory technologist with effect from the month of June 2002.

The respondents denied the claim and contended that if at all the appellant was dismissed then it was due to his gross misconduct and involvement in illegal activities.

The respondents further contended that the appellant was not entitled to any payment due to the said misconduct and illegality.

Therefore, the respondents prayed for the dismissal of the appellant's case. There was an intention to raise a preliminary objection to the suit but it would appear that this was not pursued.

The suit proceeded to full hearing before the learned Resident Magistrate at Kisumu. It was started off by the learned Resident Magistrate Mr. J. G. Gathuku and concluded by the learned Resident Magistrate M/s C. M. Oluoch (as she then was).

After the trial, judgment was entered in favour of the appellant against the first respondent for the sum of Kshs. 11,350/40 together with costs and interest.

The suit against the second respondent was dismissed with no orders to costs.

Being dissatisfied with the decision the appellant preferred eight (8) grounds of appeal as follows:-

- (1) The Learned trial Magistrate erred both in law and fact in misapprehending the evidence as set out by the appellant and hence arriving at the wrong decision.
- (2) The learned trial magistrate raised the standard of proof in a civil suit beyond that of a balance of probabilities.
- (3) The trial court found as a fact that the appellant was entitled to payment for overtime worked but failed to compute the amount although there was evidence on record on the basis of which such computation could have been made.
- (4) The learned trial court erred in both law and fact in dismissing the appellant's claim against the 2nd defendant and yet the issue of overtime related to him.
- (5) The defence never tendered evidence to rebut the plaintiff's claim and yet the trial court relied on general denial to make the findings which she (sic) did.
- (6) The trial court erred in failing to assess the evidence before it as is required by law in order to determine the exact amount the appellant had proved as due to him notwithstanding the evidence on record.
- (7) The decision, findings and judgment of the trial court is against the weight of the evidence on record.
- (8) The decision was reached using the wrong principles.

The grounds were argued on behalf of the appellant by learned counsel, Mr. Onsongo and were opposed on behalf of the respondents by learned counsel, Mr. R. Otieno.

At this juncture, the role of this court is to reconsider the evidence and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses (See, SELLE & ANOTHER =vs= ASSOCIATED MOTOR BOAT CO LTD & OTHERS [1968] EA 123 and WILLIAMS DIAMONDS LTD =vs= BROWN [1970] EA 1).

The case for the appellant arose from the facts that follow:-

On or about the 16th April 1999, the appellant Joseph Opondo Andendo (PW1) was employed by the first respondent after answering an advertisement for a vacancy for the post of a laboratory technologist. He made an application for the job and was accordingly interviewed. The interview was conducted by the second respondent and he emerged successful. He commenced work in February 1999 under a one month contract. In the process, a disagreement arose over the payment of overtime dues. His understanding was that overtime was payable at the rate of 30% of the amount chargeable for each lab test. He was offered some cash payments which he declined and insisted that he had to be paid the full amount.

He was then given the option to continue working prior to the renewal of the one month contract or to leave the job. He opted to leave the job and was paid his dues by a director of the first respondent one Dr. Ashok. He vacated the hospital quarters and resumed work at medical diagnostic laboratories where he had been previously employed.

The appellant said that thereafter in the month of March he received a call from the second respondent informing him that his terms had been adapted and that he was required for negotiations. He obtained a written contract which he went through and signed. The contract was produced in court and marked PEX4 dated 1st April 1999.

After the signing of the contract the appellant started working afresh for the first respondent. He said that there was a verbal agreement that he would be entitled overtime dues at the rate of 30% as he was the only technologist in the twenty four (24) hours hospital. He put in several hours of overtime and recorded the same in two books which were tendered in evidence as P.EX 5 a-b after an initial objection to their production by the respondents.

The appellant said that from his own calculation he was owed a sum of Kshs. 215,645/= as overtime dues. He produced a breakdown of the amount (i.e. P. EX 6) which was never paid to him despite instructing his lawyers to demand for it. He denied that he neglected his duties and disclosed confidential information. He contended that he did not fail to comply with the terms of his employment and that he was not dismissed for misconduct but merely left the employment after disagreeing with the employer over a microscope.

After his testimony, the appellant did not call any witness and closed his case.

Through its administrator Charles Osoro Kotung (DW1), the first respondent confirmed that the appellant had been employed as a laboratory technician earning a monthly salary of Kshs. 6,950/=. He worked eight (8) hours a day before he was dismissed sometime in June 2002 after being found selling drugs illegally and contrary to the rules and regulations. He was arrested by the police for engaging in that illegal activity. This led to his summary dismissal.

The first respondent contended that the appellant was not entitled to overtime as he never worked more than eight hours a day and worked in shifts with others. The first respondent further contended that the appellant was summarily dismissed and hence entitled to only the days worked. The second respondent did not testify.

The learned trial magistrate considered all the foregoing evidence and concluded by stating that:-

“In sum, the plaintiff is entitled to Kshs. 4,400/40 cts as 19 days worked for June 2002 and Kshs. 6,950 as accrued back (sic). This should be paid by the 1st defendant, who was the plaintiff’s employer. The 2nd defendant is said to be a resident medical officer at the hospital. He was not the plaintiff’s employer. I think he was improperly joined in the suit. I therefore enter judgment for the plaintiff against the 1st defendant in the sum of Kshs. 11,350/40 together with costs of the suit and interest thereon. I however dismiss the plaintiff’s suit against the 2nd defendant with no orders as to costs”.

Having carefully considered the evidence adduced at the trial in the light of the submission and arguments made for and against the appeal by the learned counsels, this court is prevailed upon to more or less agree in part with the conclusions reached by the learned trial magistrate. It was not disputed that the appellant and the first respondent enjoyed an employer / employee relationship and therefore the dispute at hand centered on a contract of employment

The second respondent was also an employee of the first respondent. The most that was required of him (if at all) was to testify against or for the first respondent or for or against the appellant. It was improper for him to be joined as a party to this suit. The case against him was rightly dismissed by the learned trial magistrate.

It is trite law that where termination of employment is wrongful what flows from the breach of conclusions of service is damages according to the terms of the contract. (See, Kenya Ports Authority vs= Silas Obengele Criminal Appeal No. 38 of 2005 (C/A at Msa).

It was argued by Mr. Onsongo Learned Counsel, that the only complaint by the appellant is the overtime payment which was not awarded by the trial court even though a finding was made that the appellant was entitled to such overtime dues.

Mr. Onsongo found it illogic that the trial court went ahead to make a finding that the claimed overtime was not proved yet the relevant documents were tendered by the appellant. On his part, Mr. Otieno, learned counsel argued on behalf of the respondents that overtime dues were not reflected in the written contract which superseded any verbal agreement and in any event, the claimed overtime was not proved as

the documents relied upon by the appellant were disputed by the first respondent.

It was apparent that the contract which existed between the appellant and the first respondent was the one dated 1st April 1999 (P. EX 4). It was valid for a period of twelve months but it would appear that even after its expiry the appellant continued working under the same terms and conditions upto the time of his dismissal. This explains why the contract was tendered in evidence by the appellant.

The contract under paragraph 10 provided for notice or payment in lieu of notice upon termination of employment by either party. It also provided for summary dismissal from employment (See paragraph 11). Paragraph 11 (2) (b) of the contract provided that:-

“The nursing home shall pay to the employee his basic salary earned to the date of such dismissal”.

The fact that the appellant was dismissed from employment was not substantially disputed. According to the first respondent, the reason for the dismissal was that the appellant had engaged in illegal activities while under employment such that the matter was reported to the police.

There was a dismissal letter to show that the reason was communicated to the appellant in writing. The said letter was contained in the appellant’s reply to the request for particulars made by the respondent’s but was never produced by the appellant as part of his exhibits.

A copy of the letter dated 17th June 2002 is at page fifteen (15) of the record of appeal and reads as follows:-

“This refers to the contract signed between you and the management. Refer to clause three section of 3 of the above contract which you have violated resulting into adverse portrayal of the name of the hospital, thus we have no alternative than not to renew your contract. You are requested to hand over all the hospital property in your possession by virtue of your employment with immediate effect then liase with our accounts department for your final dues if any”.

The first respondent’s administrator (DW1) indicated that the appellant was summarily dismissed after his arrest by the police for engagement in illegal activities while in employment of the first respondent.

Indeed, the termination of the contract prior to the actual expiry of the same was a strong indication that the appellant was summarily dismissed from employment but not pursuant to the terms and conditions of the agreement and more specifically paragraph 11 of the contract.

Consequently, the effect of paragraph 11 (2) (b) of the contract could not come into operation so that the appellant became entitled to only basic salary earned to the date of such dismissal and was not entitled to accrued leave or payment in lieu of notice or even overtime.

It is instructive to note that the agreement didnot provide for any overtime payment and if any was forthcoming then it was treatable as an allowance or benefit derived from the existence of employment and had to go along with the employment. In the circumstances, there was no basis for making payment of the claimed overtime dues whether or not the same was proved by available documentary evidence.

This court therefore holds that the summary dismissal of the appellant was wrongful and in terms of the employment contract he was entitled to not only the nineteen (19) days worked for the month June 2002 but also to accrued leave and payment in lieu of notice. He was not entitled to overtime for reasons indicated hereinabove.

Consequently, this appeal partly succeeds to the extent that in addition to the amount awarded by the learned trial magistrate i.e. Kshs. 11,350/40cts the appellant is further awarded a sum of Kshs. 6,950/= being payment in lieu of notice.

Judgment is therefore entered for the appellant against the first respondent for the total sum of Kshs. 18,300/40cts together with costs and

interest.

Each party to bear own costs of the appeal.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 12th day of February 2010.

J. R. KARANJA

JUDGE

JRK/aao