



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 601 of 2004

SOCFINAF COMPANY LIMITED T/A TATU ESTATE...APPELLANT

VERSUS

JULIUS OUMA OKOTH.....RESPONDENT

*(An appeal from the judgment of the Honourable
Resident Magistrate D. Morara, in Gatundu Law Courts
in RMCC No.583 of 2003 delivered on 22nd July, 2004.)*

J U D G M E N T

1. This appeal arises from a suit which was filed by Julius Ouma Okoth, hereinafter referred to as the respondent. He had filed the suit in the Chief Magistrate's Court at Gatundu against Socfinaf Company Limited T/A Tatu Estate, hereinafter referred to as the appellant. The respondent who claimed to have been unlawfully dismissed from employment by the appellant sought judgment from the appellant for
 - (a) One month's salary in lieu of notice
 - (b) Severance pay
 - (c) Unpaid leave days
 - (d) General damages.
2. The appellant filed a defence in which it admitted having employed the respondent as a tractor driver from 11th April, 1991 to 11th November, 2002. The appellant denied having unlawfully dismissed the respondent and contended that the respondent's contract was lawfully terminated as a result of gross misconduct.
3. During the hearing of the suit, the respondent testified explaining that he was initially employed as a general worker in 1991, but was promoted to a driver on 20th July, 2000, at a gross salary of Kshs.6,013/=. The respondent testified that his dismissal by the appellant was unlawful. He urged the court to give him one month salary in lieu of notice, severance pay, unpaid leave and general damages. He denied having stolen any diesel. Under cross-examination, the respondent conceded that he did not know the total of his claim.
4. Daniel Munene, the appellant's Assistant Manager testified in support of the defence. He testified that the respondent was a tractor driver and that each driver was assigned a tractor for which he was responsible. On the 5th November, 2002, the appellant was in the process of spraying coffee using a tractor pump. While the witness was supervising the exercise using a motorbike, he came across one of the appellant's tractor Registration No.KAK 4YD. The tractor had the cap of its diesel tank open, a pipe inside the tank and two boys standing next to it. There was also a 20 litre jerry can near the tractor. The respondent who was the driver of the tractor was seated inside the tractor.
5. The witness observed the scene from a distance of about 10 meters away, but when he approached the tractor the 2 boys ran away taking with them the jerry can and the pipe. The witness maintained that the respondent was stealing the diesel from the tractor which was gross misconduct. It was for that reason that the respondent was summarily dismissed. The witness explained that the respondent was only entitled to salary in lieu of notice if his dismissal was not as a result of gross misconduct. The witness maintained that the respondent was not entitled to any gratuity for the same reason. As regards unpaid leave days, the witness testified that the respondent had none.
6. In his judgment, the trial magistrate found that the respondent had proved his case on a balance of probabilities and entered

judgment in his favour. Being aggrieved by that judgment, the appellant has lodged this appeal raising 7 grounds as follows:

- (i) That the learned magistrate erred in law in delivering judgment on 22nd July, 2004 in the absence of counsel for the appellant in place of 3rd August, 2004, which is the date that the Court had given as a judgment date as evidenced by the court records.
- (ii) That the learned magistrate erred in law in failing to note the points for determination and in failing to give reasons for his decision in the judgment.
- (iii) That the learned magistrate erred in law in ruling in favour of the respondent despite overwhelming points of law and fact tilting heavily against the respondent.
- (iv) That the learned magistrate erred in law and in fact by totally ignoring and not taking into consideration the submissions of the appellant and fully upholding the respondent's submissions which contained new evidence not adduced at the trial.
- (v) That the learned magistrate erred in law in failing to take into account the court of appeal decision cited by the appellant which authority is binding on the court.
- (vi) That the learned magistrate erred in law and in fact in failing to take into account the evidence of DW1 being evidence of an eye witness.
- (vii) That the learned magistrate erred in law and in fact as the judgment was against the weight of the evidence adduced by the appellant.

7. I have carefully considered the pleadings and evaluated the evidence which was adduced before the trial magistrate. Firstly, it is evident that the respondent's claim was a special damages claim arising from his contract of employment. His claim for one month's salary in lieu of notice, severance pay and unpaid leave days were specific claims the amount of which ought to have been specifically pleaded. In this case, the respondent not only did not specifically plead his loss but also did not adduce any specific evidence to confirm the amount of severance pay to which he was entitled or the unpaid leave days in respect of which he was claiming. In fact, the respondent admitted under cross-examination that he did not know the total of his claim. The respondent having failed to specifically plead his special damage claim, his suit was doomed from its very inception.
8. Looking at the evidence before the trial magistrate, there was absolutely no basis for the amount of Kshs.60,030/= which was awarded as severance pay. With regard to the claim for general damages, this claim was obviously misconceived. The respondent's claim was based on his contract of employment. The breach of contract by unlawful dismissal could only attract damages as provided in the contract. In this case, the terms of the respondent's employment, which were contained in the memorandum of agreement signed with the Union, provided for termination of employment subject to notice or payment in lieu of notice, except for cases of gross misconduct.
9. In this case, the appellant called evidence to show that the respondent was found siphoning diesel from the appellant's tractor which he was allocated to drive. The trial magistrate did not address his mind to this evidence. Had he done so, he would have found that the evidence for the appellant in this regard was quite convincing as against the respondent's bare denial. The appellant demonstrated that it had a good reason for summarily dismissing the respondent. The respondent was therefore not entitled to any notice or salary in lieu of notice.
10. I come to the conclusion that the respondent not only failed to properly plead his claim, but also failed to discharge the burden of proof. The judgment of the trial magistrate cannot be supported as it was against the weight of the evidence. For the above reasons, I allow the appeal, set aside the judgment of the lower court and substitute it thereof with an order of dismissal.

Dated and delivered this 10th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Wachira H/B for Karanja for the appellant

Advocate for the respondent absent

Eric - Court clerk