

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 5 OF 2009

BAKER N. ALUKONYAAPPELLANT

VERSUS

WESTMONT POWER (K) LTDRESPONDENT

J U D G M E N T

This is an appeal against the judgment of the Honourable Senior Resident Magistrate Teresia Mwangi delivered in Civil Suit No. CMCC 983 of 2004, Chief Magistrate's Court at Mombasa on 19th December 2008.

The grounds of appeal were as follows:

1. That the trial Magistrate erred in law and in fact in reaching the conclusion that the dismissal was lawful in that:-
 - (a) The conclusion reached is inconsistent with the evidence given by the plaintiff and the P.W.2.
 - (b) Plaintiff's evidence which is corroborated by P.W.2's evidence was that he was not charged with the duty of keeping the petty cash rather his was a supervisory role.
 - (c) There was evident misfeasance, malice and arbitrariness in his dismissal.
2. That the trial magistrate erred in law and in fact that the Magistrate failed to appreciate that the money given out as petty cash was for official use.
3. That the trial Magistrate erred in law and in fact in reaching the conclusion that there was a shortfall of Kshs.51,000/- whereas the same was accounted for.
4. That the trial Magistrate erred in law and in fact in dismissing the Plaintiff's prayers for damages for breach of contract considering the plaintiff's evidence on this was uncontroverted.
5. That the trial Magistrate erred in law and in fact in failing to recognize and consider the un-constitutionality of the Plaintiff being denied a fair hearing as enshrined in the Constitution before dismissal.
6. That the trial Magistrate erred in law and in fact in concluding that the entire amount of Kshs.210,813/- was not proved.
7. That the trial Magistrate erred in law and in fact by failing to consider the authorities relied on by the plaintiff.
8. That the trial Magistrate erred in law and in fact by awarding interest from the date of judgment rather than from the date of dismissal or of filing of the suit.
9. That the trial Magistrate erred in law and in fact by failing to appreciate that an accountant is a specialized professional guided by code of ethics, requiring high integrity and trust.

10. That the trial Magistrate erred in law and in fact in failing to consider the illegality of a foreigner engaging or being engaged in employment without a valid work permit.

In an Amended plaint dated 13th September 2004, the plaintiff sought the following remedies from the Defendant which was his employer:-

- (a) Special damages in the sum of Kshs.210,813/-
- (b) Damages for unlawful and wrongful dismissal and defamation
- (c) Costs of this suit
- (d) Interest on (a) (b) and (c) above at court rates.
- (e) Declaration that the Plaintiff's dismissal from employment with the Defendant Company was unlawful, illegal, improper and unwarranted.
- (f) Any other relief that this Honourable court deems fit to grant.

At all material times, prior to the suit and since 1997, the plaintiff had been an employee of the Defendant as an accountant. He pleaded that by a letter dated 6th October 1998 from the Defendant he was suspended from his employment with immediate effect pending investigations to establish alleged discrepancies in the petty cash account and that the plaintiff would be notified of the outcome of the Defendant's finding.

The plaintiff averred that by a letter dated 14th October 1998 from the Defendant his services were terminated. That this was done even before the defendant had done enough and thorough investigations to establish the allegations leveled against the plaintiff neither was the plaintiff informed of the outcome of the investigations.

The Plaintiff averred that he was wrongly and unlawfully dismissed from his employment with the Defendant company without just cause, notice or a hearing and that as a result of the unlawful and wrongful dismissal he has suffered loss of income, mental anguish, "denture", and his character and loss of esteem in society.

The Defendant filed an Amended written statement of Defence and a counterclaim. The Defendant claimed that the services of the plaintiff was terminated for gross misconduct. It set out the grounds of misconduct. It insisted that the dismissal was proper and lawful. The Defendant admitted certain lawful terminal dues to the plaintiff which it said that it has always been ready and willing to pay to the plaintiff.

These are:-

- (a) One month's salary in lieu of notice – Kshs.70,000/-
- (b) Accrued leave of 37 days.
- (c) 6 days wages for days worked in October 1998.

The total sum admitted was Shs.189, 148.40. However the Defendant Counter-claimed for Shs.368,924/= or being money lost or misappropriated amounts which belonged to the company, interest and costs.

The Parties through counsel filed written submissions.

I have considered the Memorandum of Appeal, the pleadings, proceedings and written submissions.

The record shows that the plaintiff testified on oath. He called one witness, PW2 who was an Accounts Assistant in the Defendant company at all material times. The Defendant did not call any witnesses. I will now proceed to deal with the issues/grounds raised in the Appeal.

- Whether the termination of the services of the Appellant was wrongful or not

The Defendant did not call any witnesses to rebut the evidence of the plaintiff. The honourable trial Magistrate did find this as a fact and stated that no witness was called to controvert the plaintiff's case. However, the court stated that it would be wrong to disregard the defence pleadings.

The trial court proceeded to dismiss the counterclaim filed by the defendant in the absence of any evidence by the defence.

In view of the foregoing I find it quite irregular that the trial court used the cross-examination of the plaintiff to make findings of fact against the Plaintiff when the defendant did not call a single witness to rebut the plaintiff's case and to attempt to prove the counterclaim. How could the trial court find that the plaintiff was not diligent enough in his work and how he handled the cash. I am unable also to fathom how the court could make a positive finding of fact in the circumstances that the plaintiff failed to keep proper records and that the Defendant's concern was legitimate.

I find that there is no basis or rationale for the finding that the plaintiff did not adhere to company restrictions on the records he was to maintain and that there was misconduct on his part. The trial court in effect found that the dismissal was not unlawful and that he was not entitled to general damages.

With respect, this is a misconception of the law. The onus was on the Defendant to prove its case of a lawful termination as it is the one which alleged the defence of gross misconduct. The Defendant once it raised the issue of gross misconduct was required to prove the same.

The defendant did not call any witness to rebut the evidence of the plaintiff as a result I find that the plaintiff's evidence was uncontroverted. I do find that on a balance of probability that he was dismissed without being given any lawful notice and without being given a fair opportunity to be heard. The defendant did not prove the allegations of gross-misconduct as alleged in the defence and counterclaim.

The employment of the plaintiff with the Defendant was based on the letter of appointment dated 28th February 1997 (Ex. No. 1). It did not have a termination clause. Under the law, where the contract is unwritten or has no provision for termination, the employee shall be entitled to a notice period equivalent to the period upon which salary is paid. However there are exceptions depending on the nature of the employment whether it is specialized or not etc. In this case the plaintiff was entitled to a monthly salary of Shs.70,000/= payable at the end of each calendar month.

Ordinarily if the employment of services being rendered is not specialized, unique or exceptional, the law would deem that the employee would be entitled to one month's notice or one month's salary in lieu of notice. If this is adhered to, the termination would be a normal or lawful termination.

In the present case the Defendant did not give any notice of termination of the services of the plaintiff. The allegations of misconduct was not proven. The alleged investigations had not taken place as the plaintiff was not informed if the outcome of or called to defend himself. As a result, there was no basis for summary dismissal and he was entitled to a notice in this case for a period equivalent to the interval of payment of salary i.e. one month. In lieu of one month's notice he was entitled to one month's salary which was Kshs.70,000/=.

The plaintiff did not lead any evidence or prove that his job was of such a specialized nature that he was entitled to a longer period as he would not be able to secure an alternative employment in such a period.

In the Court of Appeal, Civil Appeal No. 66 of 1995 CLEMENT J. MACHARIA V K.G.G.C.U. LTD, it was held:-

"In relation to a contract of Employment the employee is only entitled to receive what the contract stipulates. The Appellant was paid his full entitlement. No general damages are payable for dismissal of a servant".

Where the contract is silent on the termination then the court would fall on the Employment Act. Accordingly, I reiterate that the plaintiff is entitled to one month's notice before termination of his services and in lieu, one month's salary.

It should be noted that the Defendant in its pleadings, defence conceded to pay one month's salary in lieu

of notice i.e. Shs.70,000/=. If this sum is paid, then the plaintiff is not entitled to general damages for wrongful dismissal. I am bound by the decision of the Court of Appeal, if for any reason, I had held any other views of my own that general damages ought to attach to cases of wrongful dismissal in Kenya considering the absence of job security and the inequality in the bargaining powers of the Employer and employee (Master and servant).

With regard to the claim for accrued leave and wages for days worked in October 1998, I am not inclined to disturb the findings of the Honourable Magistrate who took the evidence and carried out the calculations. It lead to the amount of Kshs.119,000/=.

With regard to the claim for damages for defamation, the trial court disallowed damages for this head on the ground that the newspaper advertisements or notices of the Plaintiff's dismissal from employment published in the "Daily Nation" and "Standard" were not produced. I agree with the trial court. In the absence of the said Notices, publication of the Notices was not proved. There can be no libel without publication.

I do agree with the counsel for the Respondents that the Appellant has attempted to introduce additional evidence and exhibits in the appeal through the written submissions. This is improper and inadmissible. I hereby strike out all the annexures to the written submissions. As a result, the finding of the Honourable Magistrate on the claim of defamation stands.

In view of the nature of the claim and the circumstances, I think that the court was entitled to award interest from the date of judgment.

The result is that the Appellant is successful in this appeal with regard to the question of wrongful termination of his employment. He was wrongfully terminated. He is awarded the following:-

One month's salary in lieu of notice - Shs.70,000/=
Accrued leave - Shs.86,333/=
14 days salary for October 1998 - Shs.32,667/=
TOTAL - Shs.189,000/=

The Appellant is awarded costs of the suit plus interest at court rates from the date of judgment in the trial court and also costs of this Appeal with interest thereon at court rates.

Dated and delivered at Mombasa this 27th day of October 2010.

M.K. IBRAHIM
J U D G E

CORAM:
Ibrahim, J
Court clerk – Kazungu
Mr. Simiyu for the Respondent
Mr. Alukonya - the appellant in person

Judgment read in their presence.

IBRAHIM, J