



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

Civil Appeal 956 of 2005

C. MEHTA & CO. LIMITED.....APPELLANT
VERSUS
MARGARET W. KARANJA.....RESPONDENT

(Appeal from the judgment of the Honourable Senior Principal Magistrate Mr. El Kiddy in Civil Case No.1805 of 2003 on 16th November, 2005)

J U D G M E N T

1. This appeal arises from a suit which was filed at the Magistrate's Court at Nairobi by C. Mehta & Company Limited, (hereinafter referred to as the appellant). The appellant had sued its former employee, Margaret W. Karanja (hereinafter referred to as the respondent), seeking to recover Kshs.224,230.75 together with interest. The appellant's claim arose from the employer/employee relationship, pursuant to which the appellant entered into a hire purchase agreement with the respondent for purchase of a motor vehicle registration No. KAG 471Z at a price of Kshs.625,500/= which was to be repaid in 36 monthly installments, to be deducted from the respondent's salary.
2. The respondent resigned from the appellant's employment leaving a balance of Kshs.253,642.65, due and owing in respect of the hire purchase agreement. The appellant also claimed Kshs.23,570.10 from the respondent, being liabilities incurred by the respondent on her sales. The appellant conceded there was a sum of Kshs.52,982.20 due and owing to the respondent at the time of her resignation. The appellant therefore claimed the balance of Kshs.224,230.75 from the respondent.
3. The respondent filed a defence and counterclaim in which she denied the appellant's claim and counterclaimed a sum of Kshs.152,148/=. The respondent maintained that any liabilities which she incurred in the course of her employment were as a result of delayed payments by customers for goods sold on credit, and therefore the liabilities ought to be recovered by the appellant from the individual debtors. The respondent contended that the amount due on account of the alleged liabilities by 3rd parties was only Kshs.10,865/20. The respondent maintained that the amount due to her in respect of final dues was much more than the amount admitted by the appellant. The respondent further contended that the amount due to the appellant in respect of the car, after set off of what was due to the respondent, was Kshs.38,119/65.
4. In her counterclaim, the respondent claimed for unpaid salary, for the months of July, August, and September, 2002, and service pay for one completed year of service, and unpaid leave of 16 days all amounting to a sum of Kshs.152,148/=.
5. Following the hearing of the suit, the trial magistrate found that the appellant had proved that the respondent owed it a sum of Kshs.190,263/65 in respect of the hire purchase agreement, and that there was a sum of Kshs.152,148/= due to the respondent in respect of her unpaid salary, leave and service pay. The trial magistrate set off this amount against what was due to the appellant, and gave judgment for the appellant for the difference of Kshs.38,115/65.
6. Being aggrieved by that judgment, the appellant has lodged this appeal raising 9 grounds as follows:
 - (i) The learned Senior Principal Magistrate erred in law and in fact in finding that the plaintiff in that case did not

prove its case against the defendant therein whereas the plaintiff proved its case not only on a balance of probability but beyond any reasonable doubt.

(ii) The learned Senior Principal Magistrate erred in law and in fact in finding that an oral agreement existed between the defendant and Pw3 that the defendant would be paid cash under the table of Kshs.25,000/= which agreement was denied by Pw3 and negated by documentary evidence produced before the magistrate.

(iii) The learned Senior Principal Magistrate erred in law and in fact in failing to find that the defendant's salary was reduced from kshs.45,000/= to Kshs.28,526/= in writing and the defendant accepted the reduction.

(iv) The learned Senior principal magistrate misdirected himself in arriving at the conclusion that since the defendant was repaying a car loan of Kshs.20,858 per month she could not have survived on the reduced salary of Kshs.28,526/= which conclusion was in total disregard of the evidence by Pw1, Pw2 and even the defendant herself, that the car loan repayments were deducted from the defendant's travelling allowance which was not part of the salary.

(v) The learned Senior Principal Magistrate erred in law and in fact in finding that the car loan agreement between the plaintiff and the defendant did not have any element of interest whereas it was clearly provided for in the schedule to the agreement.

(vi) The learned Senior Principal Magistrate erred in law and in fact in totally disregarding all the evidence tendered by the plaintiff's witnesses and failed to make any findings or reference on the same and on the other hand accepting in total the evidence of the defendant without any scrutiny thereof.

(vii) The learned Senior Principal Magistrate erred in fact and in law in wholly accepting the defendant's counter-claim which was not backed by any material or tangible evidence and therefore unsustainable.

(viii) The learned Senior Principal Magistrate erred in law and in fact in finding that the defendant's salary as at the time of her resignation was Kshs.45,000/= thereby making erroneous findings that the defendant was entitled to: -

(a)	Salary for July 2002	-	Kshs.20,250.00
(b)	Salary for August 2002	-	Kshs.45,000.00
(c)	Salary for 21 days in September 2002	-	Kshs.31,849.00
(d)	Unpaid 16 days leave	-	Kshs.24,000.00

(ix) The learned Senior Principal Magistrate erred in fact and in law in finding that the defendant was entitled to service pay of 21 days at Kshs.31,849/= after she had voluntarily resigned a finding which was contrary to the provisions of the Employment Act.

7. Mr. Gichachi who argued the appeal on behalf of the appellant compressed the 9 grounds into 3 issues as follows:

- (i) The issue regarding the claim for the balance in respect to the motor vehicle hire purchase agreement,
- (ii) The issue of payment of salary by cash to the respondent by the appellant,
- (iii) The issue of the respondent's counterclaim against the appellant.

8. Regarding the 1st ground, Mr. Gichachi noted that the appellant's witness testified that the balance outstanding in respect of the motor vehicle was Kshs.253,642.65, which was contrary to the evidence of the respondent that only a sum of Kshs.190,267/= was outstanding. Mr. Gichachi pointed out that the hire purchase agreement contained an element of interest at Clause 10(b) and also in the schedule. The interest element explained why in the amended plaint a sum of Kshs.253,642.65 was claimed as purchase price and interest. On the issue of the respondent's salary, Mr. Gichachi submitted that the respondent's evidence was that her salary was Kshs.45,000/= and that she was subsequently given a letter in which her salary was reduced to Kshs.28,526/=. It was noted that the respondent signed her letter reducing the salary and accepting her money. This evidence was consistent with the respondent's pay slip for the period of January, to August, 2002 which shows that her basic salary was Kshs.28,526/=. Mr. Gichachi therefore maintained that the respondent's evidence of an arrangement for payment of a separate sum of Kshs.20,508/= was not supported by any evidence.

9. It was maintained that the respondent was getting a monthly car allowance of Kshs.20,858/=. Mr. Gichachi pointed out that the respondent's salary for July and August were paid as was evidenced by the pay slips. It was submitted that the claim for service pay had no basis as the respondent had resigned and was not declared redundant. In regard to salary for 21 working days, it was argued that based on the respondent's salary of Kshs.28,546/=. salary for 21 working days was only Kshs.15,222/=. It was therefore argued that the respondent only established a sum of Kshs.52,829/= which is what ought to have been offset against what was due to the appellant of Kshs.253,642/= and judgment therefore ought to have been entered in favour of the appellant.

10. Ms Mathu who appeared for the respondent argued that the respondent's evidence of an internal arrangement and the

fact that the deductions were not reflected on the pay slip was sufficient evidence that there was a separate arrangement. It was noted that there was no evidence that the loan deductions were calculated from the respondent's travel allowance. On the issue of interest it was submitted that the parties had come to an agreement that there was no interest in the hire purchase agreement, and that at the time the respondent resigned, the amount outstanding on the vehicle was only Kshs.190,267.65. With regard to the counterclaim, it was contended that in addition to the respondent's reduced salary of Kshs.28,526/= the respondent was getting an additional sum of Kshs.25,000/= pursuant to an oral agreement. It was argued that the first agreement which was signed was thus negated. The court was therefore urged to dismiss the appeal.

11. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the submissions which were made before the lower court and the submissions made before me. I find that it is not disputed that the respondent was employed by the appellant as a sales supervisor from 1st August, 2000, at a net salary of Kshs.45,000/=. It is also not disputed that pursuant to a hire purchase agreement signed between the appellant and the respondent, the respondent obtained a motor vehicle, which was repayable on hire purchase terms. The agreement which was produced in evidence as P.Exhibit.2, shows that the hire purchase payments were Kshs.20,858/= for a period of 36 months with effect from 1st October, 2000.

12. I have carefully perused the agreement but I am unable to find any specific provision for payment of interest on the amount outstanding. The only allusion to interest is Clause 10 which deals with option to purchase. That clause states as follows: -

“Owners will only give an option to purchaser to buy out the vehicle in case of the purchaser resigning from the Company or purchaser's services are terminated, as follows:

a) No option of buying out in case the situation arises within six months from the date of this Agreement. There will be no dues to either party.

b) The vehicle will be transferred on payment remaining balance less interest on pro-rata basis after a period of one year from the date of this Agreement.”

13. In my understanding, since the respondent resigned from her employment almost two years after the hire purchase agreement, Clause 10(b) was applicable. According to that Clause, the vehicle could be transferred to the respondent upon payment of the total remaining balance less interest which was to be calculated on a pro-rata basis. Therefore, the waiver of interest is in favour of the respondent and not the appellant. Indeed, from the schedule, it is evident that the cash price of the vehicle was Kshs.450,000/= and an additional sum of Kshs.175,500/= was added in respect of the financing. This means that the element of interest was taken into account in arriving at the total balance of Kshs.625,500/=: and the monthly payments of Kshs.20,858/=. Since the repayment was to be made over a period of 36 monthly installments, it follows that payment within a shorter period would attract less financing costs. Hence, the provision for reduction of the interest.

14. Although the rate of interest to be applied is not clear, the monthly interest payable can be discerned by apportioning the finance costs of Kshs.175,500/= over the repayment period of 36 months, which works out at Kshs.4,875/= per month. I find nothing in the agreement to justify the rate of 28% or 38% which was alleged by the appellant's witness. Nonetheless, the appellant's claim that the outstanding interest went up from Kshs.190, 263/65 to Kshs.253, 642/65, was neither justified nor supported by evidence. Moreover, although in their letter dated 21st August, 2002, the appellant indicated the amount outstanding in respect of motor vehicle KAG 471Z as Kshs.303, 526.75, the appellant's letter dated 23rd August, 2002, addressed to the respondent indicates that they rectified the figures following a meeting with the respondent and brought the amount outstanding down to Kshs.190,267.65. The letter dated 12th September, 2002, addressed to the respondent's counsel by the appellant's counsel, explains how the figure of Kshs.303, 526.75 came down to Kshs.190, 267.65. The letter shows that the respondent was given credit in respect of interest at Kshs.63, 375/= calculated at the rate of Kshs.4, 875 per month.

15. Therefore, there was no justification for the appellant turning round and reclaiming the interest. The respondent appears to have accepted the sum of Kshs.190, 267.65 but the matter could not be settled because the parties could not agree on what was outstanding. I would therefore uphold the trial magistrate's finding that the amount outstanding from the respondent in respect of the hire purchase was Kshs.190, 267/65. (The figure of Kshs.190, 263.65 is a clerical mistake which is curable under Section 99 of the Civil Procedure Rules).

16. On the issue of the sum of Kshs.23, 570/10, which the appellant claimed from the respondent in respect of liabilities incurred by the respondent on her sales, it is evident that the amount was in respect of pending cash sales made by the respondent on behalf of the appellant. I would concur with the respondent that this amounts are recoverable by the appellant from the respective customers. Indeed, the appellant appears to have reduced this claim from Kshs.58, 046.20 as apparently some customers seem to have made good the payment.

17. As regards the issue of the respondent's salary, it is apparent from the evidence that although she was initially employed on a net salary of Kshs.45, 000/=: the salary was reduced to a net of Kshs.24, 795/= and a gross of Kshs.28, 526/=. The reduction was duly accepted by the respondent who signed the letter from the appellant, reviewing her salary. In

her counterclaim, the respondent claimed the salary at the previous rate of Kshs.45, 000/=. This was wrong as it was apparent that she had duly accepted the reduction of her salary from Kshs.45, 000/= to Kshs.28, 526/=. Although the respondent testified that there was an arrangement for some extra money to be paid to her, there was no evidence in support of that arrangement, nor can the court enforce such an arrangement as it would be an arrangement intended to evade tax which is against public policy.

18. Further, although the respondent claimed that she did not receive her salary for July, 2002, the appellant produced a pay slip for July, and this was duly signed by the respondent who even acknowledged that she did not have any further claim. I therefore find that the respondent was paid for the month of July, 2002 and reject her claim in this regard. I find that the respondent was entitled to salary for August, and part of September, which should be calculated on her revised salary. I therefore find that the amount due to the respondent as salaries for the month of August, 2002, and 21 days worked in September, 2002, and the pro-rata leave of 16 days, was Kshs.52,982.20 as calculated by the appellants in their letters to the respondent dated 21st August, 2002, and 23rd August, 2002.

19. As for the claim in respect of service pay, the respondent, having resigned from her employment, she was not entitled to any service pay. Thus, the total amount due to the respondent from the appellant was only Kshs.52, 982.20 and this is what should be offset against the sum of Kshs.190,267.65, leaving a sum of Kshs.137,285.45. I find that the trial magistrate ought to have given judgment in favour of the appellant for this sum. Accordingly, I allow the appeal, set aside the judgment of the trial magistrate and substitute thereof a judgment in favour of the appellant for the sum of Kshs.137, 285.45. The amount shall attract interest at court rates from the date of filing suit. I further award costs of this appeal to the appellant but order that each party shall meet their own costs in the lower court.

Those shall be the orders of this court.

Dated and delivered this 26th day of October, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the appellant absent
Ms Wambui H/b for Mathu for the respondent
B. Kosgei - Court clerk