



REPUBLIC OF KENYA

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

**Civil Appeal 29 of 2003**

**BOSKY INDUSTRIES LIMITED.....APPELLANT**

**VERSUS**

**MUSYOKA KAVUKUA.....1<sup>ST</sup> RESPONDENT**

**JANE KOLI MUTYAMBAI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. This is an appeal arising from a judgment delivered by a Principal Magistrate in the Chief Magistrate's court at Milimani, Nairobi. The suit was filed by Musyoka Kavukua and Jane Koli Mutyambai, (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents). They had sued their former employer Bosky Industries Limited, (hereinafter referred to as the appellant), seeking judgment for Kshs.134,976.50 in respect of the 1<sup>st</sup> respondent and Kshs.71,199.80 in respect of the 2<sup>nd</sup> respondent. The amount claimed was in respect of house allowance, annual leave, notice period and service pay.

2. The appellant filed a defence to the respondent's claim, in which it contended that the respondents' suit was incompetent. The appellant further claimed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents abandoned their job on their own volition and were therefore not entitled to claim any benefits under the Employment Act. The appellant stated that the salary paid to the respondents during their employment was inclusive of house allowance. The appellant also maintained that the respondents did not work during public holidays nor were they entitled to claim for unpaid leave or traveling allowance, as they had taken leave in excess of their years worked.

3. During the hearing of the suit, the two respondents each testified. The 1<sup>st</sup> respondent claimed that he was employed by the appellant as a machine operator on the 1<sup>st</sup> January, 1996. He worked until 15<sup>th</sup> March, 2001 when he was sacked by the appellant. This was after the 1<sup>st</sup> respondent had forwarded a letter from the Tailors and Textile Workers Union, informing the shop steward that union representative, were to visit the appellant's premises to resolve a dispute involving two employees. The 1<sup>st</sup> respondent reported the matter to the Union and the meeting was held between the appellant's director and the Union representative. The Director insisted that the 1<sup>st</sup> respondent should write a letter of apology but the 1<sup>st</sup> respondent refused. The 1<sup>st</sup> respondent maintained that he was not paid house allowance for 7 months, leave due, two months salary in lieu of notice, and severance pay all totaling to the sum of Kshs.134,976.50.

4. The 2<sup>nd</sup> respondent also stated that she was employed by the appellant on 5<sup>th</sup> October, 1997 and worked until 2<sup>nd</sup> October, 2000, when she was dismissed. She explained that her dismissal arose after she

requested for permission to go to hospital for a doctor's appointment but the appellant's director refused to grant her permission. Since she was still feeling unwell, she requested the shop steward to request for permission on her behalf, but this was also declined. Nevertheless, the 2<sup>nd</sup> respondent went for the doctor's appointment. She was treated and given 5 days off-duty. On 12<sup>th</sup> October, 2000 she went to see the director but was dismissed for having gone to see the doctor without permission. The 2<sup>nd</sup> respondent claimed 71,199.80 being service pay, leave due, house allowance and leave allowance.

5. The appellant testified through its company manager, Stephan Odundo Odera (Odera) and Patrick Ligembe, a machine operator. Odera explained that the 1<sup>st</sup> respondent who was in the appellant's employment between 1996 and 2000 deserted his employment. This was after he had received someone else's letter contrary to the agreed regulations. Odera maintained that the 1<sup>st</sup> respondent received his house allowance and leave allowance, and acknowledged receipt of the same.

6. As for the 2<sup>nd</sup> respondent, Odera claimed that she was appointed in 1998 and worked up to the year 2000. She left employment after she asked for permission to go for treatment and was told to go, get treatment and report back after she had recovered. The 2<sup>nd</sup> respondent wrongly interpreted that as dismissal and referred the matter to the labour office. After deliberation the 2<sup>nd</sup> respondent was asked to go back to work. She however declined and deserted her employment.

7. Odera maintained that the 2<sup>nd</sup> respondent also took leave and received her allowances which she signed for. The witness maintained that the salary paid to the respondents was inclusive of house allowance. He contended that the respondents were paid all their salaries and signed the payroll. He however conceded that the 2<sup>nd</sup> respondent's house allowance was indicated separately every month.

8. Patrick Ligembe who claimed to have been employed by the appellant as a machine operator for 10 years also testified on behalf of the appellant. He explained that he was the shop steward for the workers, and that the 1<sup>st</sup> respondent was in the committee for shop steward. Both the respondents were Union members. He explained that the 1<sup>st</sup> respondent received a letter on his behalf i.e. Ligembe's behalf, which was against the company's regulations. The 1<sup>st</sup> respondent was asked to apologize but he refused, leading to the termination of his services. Ligembe maintained that the 2<sup>nd</sup> respondent was unwell. She sought for permission to go for treatment. She went for treatment but did not resume duty.

9. In her judgment, the trial magistrate found that the payrolls produced by the appellant did not provide for payment of house allowance. She therefore found that the 1<sup>st</sup> respondent was not paid house allowance for the period he worked and he was therefore entitled to Kshs.76,250/= in that regard. She further found that the 1<sup>st</sup> respondent was entitled to severance pay for the 5 years worked, but was not entitled to payment in lieu of notice. As for the 2<sup>nd</sup> respondent the trial magistrate found that she was also not paid leave allowance for Kshs.40,000/=. She also found that the 2<sup>nd</sup> respondent was not entitled to salary in lieu of notice because she was given a chance to report to work but she declined. The trial magistrate found that the 2<sup>nd</sup> respondent was entitled to severance pay of Ksh.11,100 for the period worked. The trial magistrate therefore gave judgment in favour of 1<sup>st</sup> respondent for the sum of Kshs.93,350 and the 2<sup>nd</sup> respondent for the sum of Kshs.51,600/=.

10. Being aggrieved by that judgment, the appellant has filed this appeal raising 9 grounds as follows:

(i) The learned trial magistrate erred in law and in fact in awarding the 1<sup>st</sup> plaintiff judgment in terms of paragraph 5(b) of the plaint in the absence of any evidence by the 1<sup>st</sup> plaintiff or any Labour Officer's as to how much the 1<sup>st</sup> plaintiff was legally entitled to as housing allowance per month.

(ii) The learned trial magistrate erred in law and in fact in awarding judgment to the 1<sup>st</sup> plaintiff in terms of paragraph 5(b) of the plaint despite the fact that the 1<sup>st</sup> plaintiff had severally admitted in his cross-examination evidence that he used to be paid his monthly salary being inclusive of his monthly housing

allowance.

(iii) The learned trial magistrate erred in law and in fact in awarding the 1<sup>st</sup> plaintiff judgment in terms of prayer 5(f) of the plaint in the absence of evidence that the defendant illegally terminated his services/employment and even then without any legal evidence of such entitlement or rate applicable in case of entitlement.

(iv) The learned trial magistrate erred in law and in fact in awarding judgment to the 2<sup>nd</sup> plaintiff in terms of her prayer (b) in the plaint in the absence of any evidence by the said plaintiff and or any labour officer as to how much the said plaintiff was legally entitled to as housing allowance per month.

(v) The learned trial magistrate erred in law when she awarded judgment to the 2<sup>nd</sup> plaintiff in terms of her prayer (b) in the plaint despite her admission that she had signed the payroll each month indicating that her monthly salary had been paid to her inclusive of her monthly housing allowance.

(vi) The learned trial magistrate erred in law and in fact in awarding judgment to the 2<sup>nd</sup> plaintiff in terms of her prayer (f) of the plaint in the absence of any evidence that the defendant illegally terminated her services/employment and even then; without any evidence of such legal entitlement or rate applicable in case of entitlement.

(vii) The learned trial magistrate erred in law and in fact in totally ignoring the documentary and oral evidence adduced by the defendant's witnesses which if taken into account could not have allowed both the plaintiffs' cases to stand.

(viii) The learned trial magistrate having held that each of the plaintiff's is not entitled to any pay in lieu of notice of termination; meaning that there was no case of unlawful/wrongful termination of their services by the defendant she should not have gone ahead to award each of the plaintiffs severance pay as she did.

(ix) The learned trial magistrate totally erred in law and in fact in finding that each of the plaintiffs had proved his or her case to the required standard of proof so as to entitle each of them to the various or the two awards made.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I find that although it was contended by the appellant that the respondents deserted their employment, it is apparent that the respondents were in actual fact each constructively relieved of their employment by the appellant following certain incidences.

12. For the 1<sup>st</sup> respondent, it was as a result of the allegation that he had received mail addressed to the shop steward. It was alleged that this was contrary to an agreement arrived at between the appellant and the Union. However, other than oral assertions by the appellant's witnesses, no evidence was adduced to show the precise terms of such an agreement. Nor was any evidence adduced to show whether the terms of such an agreement was communicated to members of the Union. Moreover, there is no evidence of any letter having been addressed to the 1<sup>st</sup> respondent to explain his conduct. In the circumstances, the 1<sup>st</sup> respondent was entitled to payment of his salary in lieu of notice.

13. As regards the claim for "service pay", there was no evidence from the 1<sup>st</sup> respondent to show how the claim was arrived at. The agreement between the Union and the appellant regarding the terms of service were not produced before the court, so that it is not clear whether the agreement provides for any such payments, and if so, under what circumstances.

14. Under the Employment Act, there is no provision for payment of "service pay". There is however a provision under Section 16A(1)(f) of the Employment Act Cap 226 for payment of "severance pay" at the rate of not less than 15 days pay for each completed year of service, where employment has been terminated on account of redundancy. That is not the case herein, and the 1<sup>st</sup> respondent would therefore

not be entitled to any severance pay.

15. As regards the claim for house allowance, the 1<sup>st</sup> respondent had worked for the appellant for a period of 5 years. There is no evidence that the 1<sup>st</sup> respondent raised the issue of the non-payment of this allowance either with the Union or with the appellant prior to the termination of his services. The only reason why the 1<sup>st</sup> respondent did not raise the issue is because the salary he was being paid was consolidated with the house allowance. I therefore find this claim was also not proved.

16. There was evidence that the employees of the appellant were not working during the public holidays. This was conceded by the 1<sup>st</sup> respondent. Therefore the 1<sup>st</sup> respondent's claim for public holiday's allowance was not proved. Finally, as concerns the leave allowance, the record shows that the 1<sup>st</sup> respondent was paid for the leave days, and the claim was therefore not established.

17. With regard to the 2<sup>nd</sup> respondent, it was clear from the evidence that her dismissal arose out of a dispute regarding her request to go to the doctor for treatment. The appellant's director apparently refused to give her permission, forcing her to go without permission. It was this that led to her dismissal. There was clear evidence that the 2<sup>nd</sup> respondent was unwell and the appellant's director had no reason to refuse her permission to see the doctor. I find that the 2<sup>nd</sup> respondent was unlawfully dismissed and therefore is entitled to payment of salary in lieu of notice. She is also entitled to salary for the days she was on sick off. In regard to payment of house allowance, evidence was adduced by the appellant showing that the 2<sup>nd</sup> respondent received her house allowance monthly in addition to her salary. The fact that the 2<sup>nd</sup> respondent raised no issue regarding the house allowance until after her dismissal is a clear indication that she had no complaint as she was being paid. The 2<sup>nd</sup> respondent's claim for house allowance was therefore not proved.

18. With regard to the 2<sup>nd</sup> respondent's claim for service pay and public holiday, the same fails for similar reasons as already given in respect of the 1<sup>st</sup> respondent. With regard to payment in respect of leave and traveling allowance, there was sufficient evidence adduced that the 2<sup>nd</sup> respondent received payment in this regard, which he signed for. The claim in this regard was therefore not proved.

19. The upshot of the above is that I find that the trial magistrate was wrong in giving judgment for the respondents in respect of the severance/service pay and house allowance. Accordingly, I set aside the judgment of the lower court and substitute thereof a judgment in favour of the 1<sup>st</sup> respondent in the sum of Kshs.12,900/= being two months salary in lieu of notice, and the judgment in favour of the 2<sup>nd</sup> respondent for Kshs.9,248/= being payment in respect of one month's salary in lieu of notice and 11 days sick off. Each party shall bear its own costs in this appeal.

Those shall be the orders of this court.

**Dated and delivered this 29<sup>th</sup> day of May, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Gicharu H/B for Mbindyo for the appellant

Wanjohi H/B for Kimeria for the respondent