**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**CIVIL APPEAL 28 OF 2001**

**MUTHAIGA COUNTRY CLUB……...…….....…….APPELLANT**

**VERSUS**

**SIMON WACHIRA MUHURO……....…..RESPONDENT**

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

1. This appeal arises from a suit which was filed in the magistrate's court at Nairobi by Simon Wachira Mahuro, (hereinafter referred to as the respondent). He had sued H.A. Valentine and P.G. Nicholl (hereinafter referred to as 1st and 2nd defendants), and Muthaiga Country Club, (hereinafter referred to as the appellant), seeking judgment for Kshs.155,212.50 being terminal dues which he claimed was rightfully due to him on account of termination of his employment by the appellant.

2. The 1st and 2nd defendants, who were the Chairman and Secretary of the appellant, filed a joint defence with the appellant in which they denied the respondent's claim. They maintained that contrary to the respondent's assertion that his employment was terminated, the respondent voluntarily resigned from his employment. The defendants and the appellant further maintained that upon his resignation, the respondent was paid his terminal dues less statutory deductions, club expenses and tax leaving a net of Kshs.77,038.51.

3. During the hearing of the suit the respondent testified that he was employed by the appellant as a cook on 17th February, 1980. He worked until 15th February, 1999 when on his seniors' direction, he wrote a letter of resignation, which was duly accepted. The respondent explained that following his resignation he was entitled to a sum of Kshs.155,212.50. The amount was in respect of severance pay, salary for 15 days worked in February 1999, three months pay in lieu of notice, pay in lieu of leave, leave/travelling allowance and 12 days holiday pay. However, the appellant only paid him a sum of Kshs.77,038.51.

4. The respondent maintained that the appellant wrongly calculated his dues using the salary he was earning in 1996, and not his salary at the time of termination which was Kshs.14,000/=. The respondent also maintained that the appellant failed to take into account his house allowance of Kshs.1,500/=. The respondent further complained that the appellant calculated his severance pay for 16 years instead of the 19 years that he had worked. The respondent explained that when he was offered the sum of Kshs.77,038.51, he had to take the money because the appellant threatened to evict him from the house. Under cross-examination, the respondent maintained that he did not know why he was told to resign.

5. The appellant testified through its personnel manager, James Festus Wahome, who conceded that the respondent was employed in 1980. The witness explained that in 1996 the respondent was promoted and

was to be paid a salary of Kshs.10,000/=. The witness stated that upon promotion, the respondent was not covered by the Union as he was in the management position.

6. The witness further explained that he received a report from the resident manager and chef, that there was a physical confrontation between the respondent and one George Kungu. He explained that following the respondent's resignation his dues were calculated and he was paid his dues including salary in lieu of notice. He conceded that at the time of resignation the respondent was earning a salary of Kshs.14,000/=. He maintained that the respondent's total dues (gross) was Kshs.127,051/= from which, statutory deductions, club expenses, etc, were deducted, leaving a net of Kshs.77,038.51.

7. Counsel for the appellant and the respondent each filed written submissions urging the court to find in favour of their client. In her judgment delivered on 7th December, 2000, the trial magistrate found that as at the time of his resignation, the respondent's salary was Kshs.14,000/=. She further found that the respondent's letter of promotion did not state that the respondent ceased to be a member of the Union, and therefore, the Collective Bargaining Agreement was applicable to the respondent and he was entitled to 4 months notice.

8. The trial magistrate found that the respondent's resignation was a result of undue duress on the part of the appellant. She found further that the respondent had proved his case against the appellant and therefore entered judgment in the respondent's favour. The trial magistrate added a postscript to the judgment to the effect that the appellant had not filed his submissions.

9. On the 18th December, 2000, the appellant brought an application under certificate of urgency under order XX1 Rule 22 and Order XLIV Rule 1 of the Civil Procedure Rules, seeking *inter alia*, an order that the submissions filed on 27th November, by the appellant be taken into consideration and that the judgment delivered on 7th December, 2000 be reviewed. The application was grounded on the fact that the defendant's submissions filed on 27th November, 2000 were not considered before the judgment was delivered on 7th December, 2000.

10. The application was also supported by an affidavit sworn by Esther Mukenyi Ndosi, an advocate, who deponed that the trial magistrate had erroneously noted that the appellant had failed to file his submissions when the correct position was that the appellant's submissions were filed on 27th November, 2000 before delivery of the judgment. Counsel therefore contended that the appellant's submissions were not considered in the judgment.

11. That application was objected to through a replying affidavit sworn by the respondent's counsel Lucy Wanjiru Wangombe. She maintained that the application was an afterthought, and that there was no new and important matter, or evidence, which was not within the knowledge of the appellant's advocate, at the time of the judgment to warrant the review of the judgment. It was further contended that the appellant's application was an abuse of the court process and ought to be dismissed.

12. The appellant's application was heard by the trial magistrate, who delivered a ruling on 4th January, 2001. In her ruling, the trial magistrate found that the appellant's application was brought without undue delay. She also found that although the appellant's submissions were filed on 27th October, 2000, the same were apparently not placed in the court file. She therefore found that there was sufficient cause to warrant review of the judgment.

13. The trial magistrate then proceeded to consider the submissions and found that the evidence of the appellant's witnesses contained admissions that the respondent was an employee of the appellant and that he did resign. The trial magistrate further found that the respondent's evidence that he resigned under duress was not controverted. The trial magistrate also found that contrary to the appellant's submissions, there was no clause in the Collective Bargaining Agreement which excluded an employee in the respondent's position from being covered in the agreement. The trial magistrate found that in calculating the respondent's dues, his salary at the material time, is what ought to have been used. The trial magistrate further found that there was no cause of action revealed against the 1st and 2nd defendants.

14. With regard to the notice period, the trial magistrate found that the respondent was entitled to 4 months notice. The trial magistrate reviewed her judgment delivered on 7th December, 2000 to the extent of dismissing the respondent's suit against the 1st and 2nd defendants. She however confirmed her judgment against the appellant.

15. Being dissatisfied with that ruling, the appellant has filed this appeal raising 7 grounds as follows:

(i) The learned magistrate having accepted that there were grounds for reviewing her judgment failed to appreciate the scope of court's powers on review and did not therefore evaluate the entire evidence in the light of the applicant's submissions. In effect, therefore, she misdirected herself or reached erroneous decisions as more particularly set forth in grounds 2 to 7 herebelow.

(ii) The learned magistrate erred in not reviewing the entire judgment on the grounds that the letter of promotion did not exclude the respondent from being covered under the collective Bargaining Agreement.

(iii) The learned magistrate erred in finding that the basis of calculating the plaintiff's dues should have been his last monthly salary.

(iv) The learned magistrate erred in finding that the respondent was unionisable employee at the time of the respondent's resignation from the appellant.

(v) The learned magistrate erred in finding that the respondent resigned due to undue influence by the appellant when the evidence indicated that the respondent resigned due to personal reasons. The issue not having been pleaded in the plaint was not one before the court for adjudication upon.

(vi) The learned magistrate erred in finding that the plaintiff was entitled to four months notice. The evidence showed *inter alia*;

a) The notice period to be three months which the appellant duly paid.

b) The respondent resigned from the appellant's employment.

c) The appellant did not require the respondent to work during his notice period and the appellant paid the respondent his dues for that period which the respondent accepted.

(vii) The learned magistrate erred in failing to take into account the statutory deductions to be made from any dues paid to the plaintiff. She, therefore, arrived at the incorrect figure.

16. Mr. Mbaabu who appeared for the appellant submitted that the respondent was not a member of the Union at the time of his resignation. He maintained that this was confirmed by the fact that his letter of resignation was not copied to the Union nor did his payslips reflect any Union deductions. Mr. Mbaabu contended that if the respondent was a Union member, the dispute would have been dealt with by the Union in accordance with its dispute resolution mechanism as set out under Clause 12A of the Collective Bargaining Agreement. Counsel referred ***HCC Appeal No.104 of 2000 (Eldoret) Joseph Kipkoech Kogo vs Kenya Flouspar Co. Ltd***, wherein, Hon. Gacheche J. held that membership of the Union has to be proved through evidence.

17. Mr. Mbaabu submitted that no evidence was tendered to prove the respondent's alleged membership of the Union. He maintained that since the respondent was not a member of the Union, his gratuity ought to have been calculated on the basis of his salary as at September, 1996 when he ceased to be unionisable. Mr. Mbaabu contended that the respondent was not entitled to gratuity after his appointment to the management position. Mr. Mbaabu further submitted that the respondent's submission that he was forced to resign was contradicted by letter of resignation wherein he indicated that he resigned due to factors beyond his control. Mr. Mbaabu submitted that the appellant's witness testified that the respondent resigned to avoid disciplinary action being taken against him. He further submitted that the

respondent having accepted the sum of Kshs.77,038.51 in full and final settlement, there was no basis upon which he could claim money again from the appellant. In this regard, counsel relied on the case of ***Trinity Prime Investment Ltd vs Lion of Kenya Insurance Co. Ltd HCCC No.867 of 2001***.

18. With regard to claim for 4 months salary in lieu of notice, Mr. Mbaabu submitted that there was no basis for this claim as the respondent's plaint prayed for 3 months salary in lieu of notice. It was further submitted that 4 months' salary in lieu of notice was only applicable to unionisable staff, of which the respondent was not. It was contended that the respondent's calculation in his plaint did not take into account mandatory statutory deductions. The court was referred to the case of ***Ombanya vs Gailey [1974] EA 522***.

19. Ms. Ngotho who appeared for the respondent at the hearing of the appeal submitted that the trial magistrate properly evaluated the entire evidence and arrived at a just conclusion. It was submitted that the trial magistrate properly reconsidered the evidence and the submissions of the appellant in arriving at her findings. Ms. Ngotho maintained that the appellant wrongly calculated the respondent's dues using the previous salary. She maintained that the respondent having worked for the appellant for a period of 19 years, he was entitled to gratuity for the 19 years and not 16 years as calculated by the appellant. She further submitted that neither the respondent's letter of promotion nor the Collective Bargaining Agreement excluded him from the Union. She maintained that the respondent was entitled to 4 months salary in lieu of notice and contended that statutory deductions were taken into account. She therefore urged the court to dismiss the appeal.

20. I have given due consideration to this appeal. Although the appeal is against the ruling of 4th January, 2001, counsels have argued as if the appeal is against the judgment of 7th December, 2000. That is a misconception. The mandate of this court in hearing this appeal is to consider whether the trial magistrate erred in her ruling of 4th January, 2001 in respect of the appellant's application seeking review of the judgment.

21. The application for review of the judgment was brought under Order XLIV Rule 1 of the Civil Procedure Rules, on the ground that the trial magistrate had failed to consider the submissions filed by the appellant. In effect therefore, the application was anchored on the allegation that there was an error apparent on the face of the record. The trial magistrate properly addressed her mind in this regard and noted that although the appellant's submissions were filed on 27th November, 2000, the same were not in the court file at the time she was writing her judgment and therefore there was good reason to review the judgment. The trial magistrate thereafter proceeded to reconsider the evidence in the light of the appellant's submissions. Thus, the appellant's application for review of the judgment was in actual fact successful to the extent that the judgment was reconsidered and reviewed.

22. The question is whether the trial magistrate properly considered the appellant's submissions and reviewed the entire judgment in the light of those submissions. From the submissions which were filed by the appellant the following issues stood out:

(i) Whether there was any cause of action against the 1st and 2nd defendants.

(ii) Whether the respondent resigned on his own volition or his employment was constructively terminated through the respondent being forced to resign under duress.

(iii) Whether the respondent's position was covered by the Collective Bargaining Agreement.

(iv) What was the amount of terminal dues payable to the respondent after termination/resignation of his employment.

(v) Whether the respondent had any claim against the appellant in view of his having signed the certificate of terminal dues disclaiming any further claims against the appellant.

23. With regard to the 1st issue the trial magistrate considered and accepted the appellant's submissions that the respondent's plaint did not disclose any cause of action against the 1st and 2nd defendants. The appellant has obviously no complains against that finding.

24. With regard to the 2nd issue, it was submitted that contrary to his evidence in chief that his employment was terminated, the respondent did concede under cross-examination that he wrote a letter of resignation giving the appellant three months notice. In his ruling, the trial magistrate found that the respondent's evidence proved that he resigned under duress and that this evidence was not controverted. That finding was not supported by the evidence which was on record as the appellant's witness clearly maintained that the respondent personally gave him his letter of resignation and that there was no mention of any influence to resign. The witness categorically denied having pressured the respondent to resign. There was therefore nothing to contradict the clear evidence of voluntary resignation which was before the court by virtue of the respondent's letter.

25. The question as to whether the respondent's employment was covered by the Collective Bargaining Agreement was a pertinent issue, as it determined whether the respondent was to be paid in accordance with the Collective Bargaining Agreement. The respondent's letter of appointment dated 18th April, 1980 which was produced as defence exhibit No.1, showed that upon employment, he was eligible for membership of the Kenya Association of Hotel Keepers and Caterers, and the Domestic and Hotel Workers Union, (hereinafter referred to as the Union).

26. The letter dated 11th September, 1996 promoting the respondent, to the position of an assistant head cook, indicated that he was promoted to a management position. There was however no mention of his eligibility to Union membership. It was the appellant's submissions that the Collective Bargaining Agreement did not cover employees in the respondent's position. However, as pointed out by the trial magistrate in his ruling, no specific provision of the Collective Bargaining Agreement was identified to the court for this proposition.

27. Since the evidence before the court showed that the respondent had been a member of the Union, it was for the appellant who was claiming that the respondent was no longer a member of the Union to demonstrate that fact. The trial magistrate was therefore right in concluding that the appellant was covered by the Collective Bargaining Agreement. That being the position the respondent was entitled to severance pay for the full period that he had worked for the appellant and not 16 years only as was submitted by the appellant.

28. With regard to the payment in respect of salary in lieu of notice, although the Collective Bargaining Agreement provided for 4 months notice, the respondent is the one who gave notice and ought to have given 4 months notice. Instead the respondent gave 3 months only. Notwithstanding the fact that this was prejudicial to the appellant, the appellant not only accepted the inadequate notice but offered to pay the respondent in lieu of the notice given. Indeed, the respondent only claimed for 3 months salary in lieu of notice as was offered to him by the appellant. He cannot now turn round and claim 4 months salary. The trial magistrate appreciated this and did not therefore allow the respondent's claim for 4 months.

29. It was in evidence that as at the time of his resignation the respondent was housed by the appellant. Thus even the payslip that the respondent exhibited did not show any payment in respect of house allowance. Since the appellant opted to release the respondent immediately and requested the respondent to vacate the house allocated to him, it was only fair and just, that the respondent's three months salary in lieu of notice, include the house allowance.

30. I find that the amount payable to the respondent were properly calculated at a gross sum of Kshs.155,212/=. This payment was subject to the statutory deduction. Although the appellant gave a figure of Kshs.27,930/= in respect of payroll deductions, Kshs.11,617/= in respect of Club expenses, and Kshs.10,469/= in respect of lumpsum tax, no evidence was adduced before this court to show how those figures were arrived at or any evidence of tax paid or payment to NHIF or NSSF. Although in the submissions counsel for the appellant referred to loan deductions of Kshs.27,930/= , there was no

evidence on record to support this submission. I would therefore hold that the respondent was entitled to the sum of Kshs.155,212.50 less statutory deductions only i.e NHIF, NSSF and PAYE if applicable.

31. Finally, there was the submissions that the respondent had signed a certificate of terminal dues, in which he received the amount of Kshs.77,038.51, and confirmed that the calculations were correct, and that upon that payment, he had no further claim against the appellant. The trial magistrate apparently did not consider this submission. Counsel for the appellant relied on ***Trinity Prime Investment Ltd vs Lion of Kenya Insurance Co. Ltd*** (supra). I have considered that authority. While I accept the principle that a discharge is a contract which can only be vitiated in accordance with the usual rules of contract, I find that in this case, there was an element of undue influence. It is evident that the respondent has resigned from his employment of 19 years due to circumstances which suggested that the appellant was otherwise likely to impose disciplinary action against him. The respondent's explanation that he had to take the money as he sorts himself out was reasonable.

32. It is obvious that as between the appellant and the respondent, the appellant had an upper hand and the respondent was in a weaker position. The independence of the respondent therefore was substantially undermined. Obviously, the respondent needed time to look at and consider the calculations of what was due to him. However, he also needed the money. In the circumstances, I find that the discharge signed by the respondent was not binding as there was an element of undue influence.

33. For the above reasons, I come to the conclusion that the appellant's application for review was properly allowed to the limited extent of setting aside the judgment against the 1st and 2nd defendants only. I therefore find no merit in this appeal and do therefore dismiss it with costs. Those shall be the orders of the court.

**Dated and delivered this 23rd day of June, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

……..…for the appellant

…….…….for the respondent