REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 19 OF 2001

NARCOL ALUMINIUM ROLLING MILLS……..APPELLANT

VERSUS

STEPHEN APONDI OCHIENG……..……..RESPONDENT

JUDGMENT

The defendant (hereinafter *"the appellant"*) was sued by the plaintiff (hereinafter *"the respondent"*) for wrongfully having dismissed the respondent from its employment with effect from 10th February 1992. The main complaint made in the plaint was that the appellant wrongfully and in breach of the employment contract, and without giving the respondent six months notice in writing or any notice to determine the contract, dismissed the respondent and refused to allow him to remain in the said employment. By reason of that complaint the respondent claimed to have been deprived of his salary and other dues which he would have otherwise earned. The respondent particularized the damages as follows:-

a) Loss of salary for the period of six (6) months at Kshs. 1,710/= per month.

b) Loss of annual paid leave allowance from 1998 – 1992 – Kshs. 5,130/=.

c) Loss of service allowance, unproper (sic) paid overtime and holidays and house allowance to be assessed later.

d) Statutory deductions to be made.

e) Damages.

The appellant filed a defence in which it denied the claim made in the plaint that it had employed the respondent on the said terms. It pleaded that the plaintiff was a casual worker who was paid on a daily basis and was therefore not entitled to six (6) months notice of termination or any allowance.

At the trial, the respondent testified and called no witness. His case was that he had been employed by the appellant as a casual worker in January 1998 at a daily wage of Kshs. 7/= and continued in the said employment until about 14th or 15th February of an unspecified year when he was dismissed without any notice. He contended that he should have been treated as a permanent employee for the 4 years he had

worked. On that basis he claimed to be entitled to 6 months or 3 months notice or the payment of Kshs. 10,260/=. The respondent further testified that he worked every Saturday which should have been treated as overtime and yet he was not paid for the same. He was therefore deprived of Kshs. 8,923/20 for 52 days. The respondent further claimed for hours he worked on Sundays which he said worked to Kshs. 11,856/=. For other public holidays, the respondent claimed Kshs. 2,280/= and for leave not taken, he claimed Kshs. 10,800/= whereas for unpaid house allowance he claimed Kshs. 20,800/=. Lastly, he testified that he was entitle to traveling allowance at the rate of 1,000/= per month which amounted to Kshs. 10,800/=.

The appellant's case at the trial was presented by its personnel Manager, Bernard Juma. He testified that the respondent had worked for the appellant in 1991 as a casual worker and was paid on a daily basis at the rate of 57/= per day. The witness denied that the respondent worked continuously. In the premises, he said the respondent was not entitled to the six (6) months notice which notice would have been more than the one month's notice their permanent workers were entitled to on termination. All the respondent's claims were denied.

In the judgment delivered after the trial, the Learned Resident Magistrate summarized the respondent's testimony and that of the appellant's witness and concluded his judgment as follows:-

"The issue at hand is whether the plaintiff is entitled to damages for breach of agreement of employment as well as interests thereon. I have considered submissions rendered by both counsels. I am convinced with counsel for the plaintiff Mr. Gathuku that the plaintiff in this matter ought to be regarded as a full time employee and as such he is entitled to full benefits. His evidence that he worked for about 4 years has not been controverted. This is evidence that he worked for more than six (6) months but he was not issued with a notice of termination after the six month. As such I proceed to award damages for the plaintiff as hereunder:-

Shs. 10,260/= notice

Shs. 8,923/20 for overtime

Shs. 11,856/= for unproper (sic) paid overtime.

Shs. 2,280/= for working on holidays

Shs. 20,800/= house allowance

Shs. 10,840/= leave and traveling allowance

Total Shs. 64,959.20, I refuse to award Shs. 14,400/= for uniform and footwear as it was not pleaded in the plaint."

The Learned Magistrate's decision triggered this appeal by the defendant. He has put forward a total of 8 grounds of appeal which, in the main, challenge the Learned Magistrate's finding that the respondent was a permanent employee of the appellant who was entitled to six (6) months salary in lieu of notice and was entitled to the various sums awarded which were claims in the nature of special damages which were neither specifically pleaded nor strictly proved.

When the appeal came up before me for hearing on 5th March 2009, counsel agreed to file written submissions which were in place by 24th July 2009. I have considered the record, the grounds of appeal, and the submissions of counsel. Having done so, I take the following view of the matter. This is a first appeal. The court should therefore subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at its own conclusions bearing in mind that it did not see or hear the witnesses testify. The court should also be slow to disturb findings of facts of the trial court (see Peters – v – Sunday Post Ltd [1958] E.A. 424. The court is duty bound to examine with care whether the findings on facts were not based on evidence adduced before the trial court or whether there was a misapprehension

of the evidence or that the trial magistrate acted on wrong principles in arriving at those findings of fact.

The respondent's counsel in his submissions challenged the competence of this appeal on the ground that the record of appeal does not include an approved certified decree. For that proposition reliance was placed upon the cases of Municipal Council of Kitale – v – Fedha [1983] KLR 307 and Shah – v – Aperit Investment SA [2000] 2 EA 514. I concur with counsel for the appellant that failure to include an approved and certified decree in the record is not fatal to the appeal under Order XLI Rule 8B (4) of the Civil Procedure Rules, there is no requirement that a formal record of appeal be filed. All that is required is that before hearing the appeal the court be satisfied that the documents listed in the said sub-rule are on the record. Indeed the court can dispense with the production of any document listed therein except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from. In my view, even the failure to produce the said vital documents does not attract the sanction of striking out. The absence of the documents would only mean that the appeal would not be proceeded with until they are availed. With all due respect to counsel for the respondent the authorities cited are not relevant as they considered the provisions of the Court of Appeal Rules.

Turning to the merits of the appeal, I ask myself whether on the evidence adduced before the trial magistrate the respondent proved on a balance of probabilities that he was a permanent employee of the appellant or that he was entitled to be treated as such employee. In his plaint at paragraphs 3 and 4, he averred that he had been employed pursuant to an agreement made in or about January 1988 which expressly provide that his employment would only be determined by a six months notice in writing and alternatively implied that his employment would only be determined by a reasonable notice which would in this case be six months.

During his testimony at the trial, the respondent did not allude to any agreement of employment. In his own words:-

"I started working there in January 1998. I was employed as a casual worker. I used to be paid daily for four years. I used to be paid 57/= per day. Letter dated April 1990 on behalf of plant engineer. I wish to produce the letter as evidence. We used to be paid on a daily basis at times on Saturdays. I used to get a salary. I used to go to work daily without a break. They just dismissed me. They never told me the reason for dismissal. It was in February 15th or 14th. They never gave me notice. I was not paid money. I pray court pays me damages for suffering I endured……..I ought to be treated as a permanent employee for the four years I worked. I was entitled to six months or three months notice……."

That testimony clearly excluded a written agreement of employment between the respondent and the appellant. In the absence of a written contract, there can be no question of express terms. An agreement could therefore only have been implied. The latter appears to have been the finding of the Learned trial Magistrate. In his own words:-

"I have considered the submissions rendered by both counsels. I am convinced with (sic) counsel for the plaintiff Mr. Gathuku that the plaintiff in this matter ought to be regarded as a full time employee and as such he is entitled to full benefits. His evidence that he worked for about four years has not been controverted……."

So, the Learned trial Magistrate concluded that the respondent would be treated as a permanent employee on the basis that his testimony that he had continuously worked for the appellant for four years had not been controverted. That finding was one of fact. I can only interfere with that finding if the same was not based on the evidence adduced before the Learned trial Magistrate or if the Learned trial Magistrate misapprehended the evidence. I am unable to find that there was no evidence upon which the Learned trial Magistrate could make that finding. I cannot also say that the Learned trial Magistrate's finding was based on a misapprehension of the evidence. It is immaterial that I would not have come to the same conclusion on the same evidence. (See Peters – v – Sunday Post Ltd (supra).

In the premises, I cannot disturb the finding that the respondent ought to be treated as a permanent employee. How about the terms of such an employee? Such terms in my view could not be presumed.

The respondent could only prove the same by production of the employment terms of his colleagues. He did not adduce any such testimony. He did not call even one of his colleagues to demonstrate the terms applicable to a permanent employee. In the premises, there was no proof that a permanent employee with the appellant was entitled to six months notice of termination. The respondent was not even sure of the requisite notice when he testified. He was not certain whether he was entitled to six months or three months notice. He did not therefore prove that he was entitled to six (6) month salary in lieu of notice. Ground 1 of the appeal is therefore allowed. Consequently, the award of Kshs. 10,260/= said to have been in lieu of notice is set aside.

With regard to the award of Kshs. 8,923/20 for overtime, Kshs. 11,856/= for *"unproper"* paid overtime, Kshs. 2,280/= for working on holidays, Kshs. 20,800/= house allowance and Kshs. 10,840/= leave and traveling allowance, the same were special damages. Such damages it is now settled must not only be specifically pleaded but must also be strictly proved. (See Sande – v – K.C.C. Ltd [1992] LLR 314 CAK). The sum of 8,923/20 awarded for overtime was not pleaded in the plaint. It could not therefore have been awarded. The plaintiff did not also specifically plead the sum of Kshs. 11,856/= for what he was awarded as unproper paid overtimes. This award does not also sound in logic and should not have been awarded. The sums for working holidays (Kshs. 2,280/=), house allowance (Kshs. 20,800/=) and leave and traveling allowances (Kshs. 10,840/=) were also not specifically pleaded and could not therefore have been awarded.

Besides not being specifically pleaded, the respondent had to adduce evidence that those payments were indeed payable on termination. He did not. The Learned trial Magistrate did not consider those established principles of Law before making the said awards. Indeed besides stating what the respondent had stated and what the appellant's Personnel Manager had stated, the Learned trial Magistrate did not in any way analyse the evidence. On my own independent evaluation and reconsideration of the evidence, I find and hold that the respondent did not strictly prove the special damages awarded.

In the premises, I allow grounds 2, 4, 7 and 8 of the appeal and the awards: Kshs. 8,923/20 for overtime, Kshs. 11,856/= for *"unproper"* paid overtime, Kshs. 2,280/= for working on holidays, Kshs. 20,800/= for house allowance and Kshs. 10,840/= for leave and traveling allowances are hereby set aside.

The above disposes of this appeal substantially and I need not consider the grounds that the trial Magistrate erred in Law and fact, in relying on the plaintiff's evidence which was self contradictory and at variance with the plaint.

Having not disturbed the trial Magistrate's finding that the respondent ought to have been treated as a permanent employee of the appellant and given that the appellant's permanent employees are entitled to one month's salary in lieu of notice, I am of the view that in the circumstances of this case such an award would have been appropriate. In the end, this appeal is allowed. All the awards made by the trial Magistrate are hereby set aside. The respondent is awarded one month's salary in lieu of notice.

Although the appellant has substantially succeeded in this appeal, I am of the view that, taking into account the relationship of master and servant which existed between the appellant and the respondent, costs should not follow the event. Accordingly, I order that each party bears his/its own costs of this appeal and the costs of the lower court.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2009

F. AZANGALALA

JUDGE

Read in the presence of:-

Gekonde holding brief for Khaminwa for the Respondent and Ngigi holding brief for Patel for the Appellant.

F. AZANGALALA

JUDGE

9TH OCTOBERE 2009