



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 17 of 2004

CONSOLATA HOSPITAL MATHARI APPELLANT

VERSUS

DR. BIANKA MATENS RESPONDENT

(Appeal from original Judgment of the Chief Magistrate's Court at Nyeri in Civil Case No. 632 of 2002 dated 16th January 2004 by Mr. C. D. Nyamweya – SRM)

J U D G M E N T

The appellant herein was the Defendant in the suit before the subordinate court whereas the Respondent was the Plaintiff. In the suit before the subordinate court, the respondent sought orders that; the Notice issued to her terminating her contract of service with the appellant was illegal and void, a declaration that the lawful date of cessation of employment ought to have been 14th January 2003 and general damages for pain and anxiety caused to her by the appellant during her employment with the appellant.

The Appellant disputed the Respondent's claim. In the defence dated 4th October, 2002, the Appellant denied the claim and averred that the Notice of termination of the respondent's services was lawfully and regularly issued in keeping with the terms of the contract of service which provided for general power or mode of termination of the contract. Further the appellant raised the issue of whether it had capacity to sue and or to be sued.

Following several adjournments, the trial of the case eventually commenced before **C. D. Nyamweya** learned Senior Resident Magistrate. Both the appellant and Respondent called one witness each in support of their case. Having carefully considered the evidence on record and submissions of learned counsel, the learned magistrate found for the respondent. He ordered the appellant to pay the Respondent **“the sum of Kshs.80,000/= per month together with the 10% increment excluding the months that she had been paid.”** In effect the learned magistrate ordered the appellant to pay the Respondent a total sum of Kshs.217,062/= with costs and interest.

The appellant was dissatisfied with the Honourable Magistrate's judgment and for that reason lodged the instant appeal through **Messrs Sichangi & Company Advocates**. In its memorandum of appeal, the appellant impugns the learned magistrate's judgment on 9 grounds to wit;

1. That the learned magistrate erred in law and fact in entering judgment for the Plaintiff “for the unpaid salary” as this amount to general damages for loss of employment which award is illegal

and unlawful.

2. That the learned magistrate erred in law in awarding the Respondent salaries which is basically a claim of a special nature when the same had not been pleaded, particularly and or proved as required in the law.
3. That the learned magistrate erred in law and fact in declaring that the Appellant notice to terminate plaintiff employment contract was null and void, when ordinarily there was nothing to prevent the termination from being effective on 30th September 2002, the due date.
4. That the learned magistrate erred in law and fact in awarding the plaintiff for unpaid salary despite plaintiff clear admission that she had been paid for her salary during the period under the notice.
5. That the learned magistrate erred in law and fact in holding that the Appellant had irregularly terminated the Respondent's contract of service and thereby extending plaintiff employment with the appellant against the wishes of the Appellant when the same had been validly terminated by the Appellant and the circumstances did not warrant for orders of specific performance.
6. That the learned magistrate erred in law and fact in misapprehending that a challenge of validity of the termination notice could only be founded in a breach of contract, which had not been pleaded nor any particulars provided for.
7. That the learned magistrate erred in failing to take cognisance of the case law put before him in the submission of the Appellant.
8. The learned magistrate erred in law and fact in declaring the plaintiff notice to terminate as valid and lawful when the same was subsequent to and effectively could not supersede the termination notice issued by the Appellant.
9. The judgment is unreasonable and unsupported by evidence adduced.

In summary, the Respondent's case was that by a contract of employment dated 8th January 2002 the appellant employed the respondent as a doctor at a monthly salary of Kshs.80,000/= . The contract of employment was deemed to last 12 months but could be automatically renewed for a further 12 months if not rescinded 3 months before the end of the year. The contract of employment further provided that the termination of the same had to be for grave reasons and by a written notice of at least 3 months' and payment thereof of at least 3 months salary in lieu of Notice. By a letter dated 28th June 2002 however, one **Father Elias Gichuhi**, the appellant's administrator gave the plaintiff a 3 months notice of termination of employment. The reasons he gave for the termination of the contract were the respondent's "*brash commands*". The respondent maintained that these were not grave reasons to terminate her employment. Following this turn of events, the respondent found it difficult to continue working at the institution. Accordingly she gave her own notice for the termination of the contract to expire on 14th January 2003. The respondent having not received any communication from the appellant then moved to court on 12th September 2002.

On the other hand, the appellant's case was that in issuing the respondent with Notice to terminate her employment, it had acted lawfully in keeping with the terms and conditions contained in the contract of employment dated 8th January 2002. It was the appellant's case that the termination of the respondent's employment was necessitated by the respondent's acts of gross misconduct.

When the appeal came up for hearing before me, the appellant was represented by **Mr. Mandi** and the respondent by **Mr. Mahan** both learned counsels. They consented to having the appeal heard and determined by way of written submissions. Subsequently both counsels filed written submission in support of their case which I have carefully read and considered.

This being the court of first instance on appeal, it has a duty to evaluate afresh the evidence tendered before the trial court and reach its independent conclusion. Indeed the principle was so stated in the case of **Peters v/s Sunday Post Ltd (1958) E.A. 424** in the following terms:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial judge failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide”

I may add that the appellate court should also keep in mind that the trial court had the advantage of hearing and seeing the witnesses and is generally a better judge of their demeanour.

As I was going through the record of the proceedings of the trial court, one think struck me and which has caused me a lot of anxiety. On the day of the hearing of the case that is, on 13th November 2003 the coram is indicated as follows:-

“13/11/03

Before C. D. Nyamweya – SRM

Court Clerk – Maina

Mahan for Plaintiff

Mahinda for Defendant

PW1 – Dr. Blanca Martens”

Similarly on the 28th November 2003 when the case came up for defence hearing the coram is indicated as follows:

“28/11/03

Before C. D. Nyamweya – SRM

Court Clerk – Ann

Mahinda for Defendant

Mahan for Plaintiff

DW1 Dr. Joseph Abuya:”

From the foregoing, the issue that has been nagging me is whether the two witnesses and who were the only witnesses in the case testified on oath. From the record both the original and typed, it would appear that the witnesses may have testified without being sworn. It is also possible that they may have testified on oath but the learned magistrate inadvertently failed to record. However this is a court of record. There is no room for speculation and or conjecture. Going by the record, I am prepared to hold that perhaps the witnesses testified without being sworn. What is the effect of the evidence not given oath? To my mind it amounts to no more than a mere statement of no probative value to the case.

They were mere statements I realize though that this is not an issue which was canvassed before me by any of the counsel’s on record. However I do not think that that such failure did not occasioned any injustice and prejudice to any of the parties. The record speaks for itself and the law is settled. Evidence must be taken on oath unless except for children of tender years as well as those who choose to be

affirmed. I do not think that the submissions on the issue by counsel would have made any difference. In any event as the issue in focus goes to jurisdiction, this court has jurisdiction to address the same suo moto. On this issue alone, this appeal ought to succeed. However I will take the liberty to address two other technical issues raised in this appeal i.e. whether the appellant had the capacity to sue and be sued and secondly, whether the amount awarded to the Respondent was in the nature of special damages which ought to have been specifically pleaded and proved.

Regarding the capacity of the appellant to sue and or be sued, the appellant in its defence specifically pleaded “..... **The Defendant avers that its not an independent body and (sic) but admits operating under the auspice of the Archdiocese of Nyeri and therefore avers that its no suable (sic) as such in its own name**” what the appellant seems to be saying is that it is not a legal entity capable of suing and being sued in its name. It would appear that the respondent was aware of this fact for in her plaint she described the appellant as “..... **The Defendant is a hospital situated at Mathari area, under the auspicious of Archdiocese of Nyeri.....**” Despite the aforesaid averment of the Appellant, the respondent saw no need to file a reply to counter the same. Of necessity therefore, it must be taken that the Appellant in its own name cannot sue or be sued. It was duty of the learned magistrate to address this issue in his judgment. He did not. Counsel who appeared for the parties in the lower court did not help matters either. They never addressed the issue in their respective submissions. Nonetheless the learned magistrate was duty bound to consider the issue. In its written submission before me, the appellant has raised the issue. I would have expected that the respondent to counter it. She has not. The appellant has submitted that there is no evidence on record, ascertaining the legal personality of the appellant. Accordingly to the appellant, it is a trust. As such it cannot be sued on its own without enjoining the trustees as required by order XXX rule 2 of the Civil Procedure rules. In support of this submission, the appellant referred the court to the following authorities:-

(a) Jane Nyambura Joshua v/s Apostolic Faith Church, Nbi HCCC No. 2841 of 1997 (O.S.)

(b) Maurice Ooko Otieno v/s Mater Mastelodie Hospital Nbi HCCC No. 6071 of 1999 at

Much as these authorities are all from the High Court and therefore not binding on me, I am nonetheless in agreement with the reasoning and conclusions reached therein. In both cases, the court found the suits incompetent for want of inclusion of the trustees in the suit. In the case of **Maurice Ooko Otieno (Supra) Justice Ang’awa** delivered herself thus:

“..... The law requires that a suit be brought against a legal entity. This is an individual, a limited liability company, the Attorney General on behalf of Government department, certain parastatals (sic) and or Co-operations (sic). Matter Misericodie Hospital has not been described as a limited liability company. It therefore has no legal capacity to be sued. The plaintiff required to find out what the status of the hospital was. If it is a business name or a firm then order 29 CPR requires to be complied with. If it deals with trustees, Executors and administrators then order 30 CPR required to be looked into. Be as it may, M/S Mater Misericodiae Hospital not being sued (sic) the suit against it cannot stand.....” This reasoning applies with equal force to the circumstances obtaining in this case.

In its judgment the court awarded the respondent pecuniary relief which was in the nature of special damages which had neither been pleaded nor specifically proved. In her plaint the Respondent merely prayed:

- 1. That the purported Notice dated 28th day of June, 2002 is illegal and void as against the plaintiff.**
- 2. That the plaintiff’s notice to terminate the employment is lawful and a declaration that lawful date of Cessation of employment is 14th January 2003.**
- 3. General damages**
- 4. Costs of this suit with interest”**

Nowhere in these prayers has the Respondent pleaded for salary arrears of Kshs.80,000/= plus 10% increment until 14/1/2003 which she was granted by the learned magistrate. One may argue that, the award could easily have been made under the prayer for General damages. However in his judgment, the learned magistrate specifically stated on the issue of general damages that “**since the plaintiff’s notice has been accepted there will be no need of awarding general damages**” General damages were not awardable therefor.

Further whatever was awarded to the respondent was in the nature of special damages. It is trite law that such claims must not only be specifically pleaded but also specifically proved. There are various High /court and court of appeal authorities on the issue and I need not cite any for this simple but notorious maxim of law. The respondent in her submissions maintains that it was not necessary to specifically plead the issue. I am unable to agree with the position taken by the respondent on the issue however. The Respondent ought to have specifically pleaded and proved her claim to salary arrears. She did not and consequently the learned magistrate erred in awarding the amount.

Arising from the foregoing, it is my finding and judgment that this appeal has considerable merit. It is allowed. The judgment dated 16th January 2004 and the ensuing decree in favour of the respondent is set aside. The respondent shall pay the costs of this appeal and of the lower court.

Dated and delivered at Nyeri this 31st day of January 2008.

M. S. A. MAKHANDIA

JUDGE