



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Appeal 35 of 2002

EAST AFRICAN TANNING EXTRACT CO. LTD APPELLANT

VERSUS

JOSEPH OTIENO OLIECH RESPONDENT

R U L I N G

This is an appeal against the Judgment of the Honourable Ms. Ngigi, Resident Magistrate delivered on 19th March, 2002 in Eldoret CMCC No. 455 of 2001, JOSEPH OTIENO OLIECH –VS- EAST AFRICAN TANNING & EXTRACT LIMITED.

In the said suit the Plaintiff (present Respondent) had sued for:-

1. General Damages for malicious prosecution.
2. Special Damages for wrongful dismissal amounting to Kshs. 47,376/=.
3. Re-allocation of a piece of land No. C 222.

In her judgement, the trial Magistrate disallowed the claim for general damages for malicious prosecution; she held that the particulars of malice had not been given and the claim was in effect not proven.

The Appellant abandoned prayers 4, 5 and 6 of its Memorandum of Appeal dated 17th April, 2002 thereby leaving the following grounds; that:-

1. The Learned Magistrate erred in law and in fact in awarding Kshs. 47,376/= to the Respondent notwithstanding the fact that these being special damages, they were never specifically proved as by law required.
2. The Learned Magistrate erred in law and in fact by making a finding that the Appellant re-allocates Plot No. C.222 to the Respondent inspite of:-
 - (i) No agreement was produced in evidence to show that the alleged plot was ever allocated to the Respondent.
 - (ii) The Respondent never adduced any documentary evidence or otherwise vis-à-vis consideration paid.
 - (iii) The Respondent did not produce or show to court any application for allocation of land, letter of offer or letter of acceptance thereof.

(iv) The Respondent did not tender any proof that the Appellant had made Redundancy Deductions against his salary/wages which was a pre-requisite to the Appellant's allocation of land to its employees.

(v) The Appellant did not and never had any land to give out freely.

3. The Learned Magistrate erred in law and in fact in failing to find that the dismissal of the Respondent from his employment with the Appellant was lawful.

4. (withdrawn)

5. (withdrawn)

6. (withdrawn)

7. The Learned Magistrate erred in law and in fact in failing to find that the Respondent had not proved his case as required by the law.

8. The Learned Magistrate erred in law and in fact in misapprehending the issues.

9. The Learned Magistrate erred in law and in fact in failing to dismiss the Plaintiff's suit in its entirety with costs to the Defendant.

I have carefully perused the Memorandum of Appeal, the proceedings and judgment. I have also considered the submissions by Counsel, the law and case law cited. It is my view that the issues raised in this appeal are as follows:-

1. Whether the Honourable trial Magistrate erred in law and fact in finding that the Plaintiff was unlawfully and wrongfully dismissed from his employment by the Defendant.

2. If the answer to the above is in the affirmative, whether the Plaintiff was entitled to special damages on the sum of Kshs. 47,376 and whether this was proved.

3. Whether the Learned Magistrate erred in law and in fact in making a finding that the Defendant re-allocates Plot No. C 222 to the Plaintiff.

ISSUE NO. 1

The Respondent testified that he had worked for the Appellant for 24 years. On the 16.7.2000 the Plaintiff was accosted by guards from the Defendant Company. They took him to Langas Police Station. They carried with them trees allegedly found in the Plaintiff's possession. At the Police Station he was charged with the offence of stealing trees. He further stated that at the trial the case was withdrawn due to the non-attendance of the Complainant. He added that on 21.7.2000, he was summarily dismissed from his employment. He produced the letter of summary dismissal (Exhibit No. 1). The letter read as follows:-

"Ref: 2.0001/194 21st July, 2000

Mr. Joseph Oliech

P/ No. 128

OUTSPAN ESTATE

SUMMARY DISMISSAL

You have contravened normal discipline in that on 16th July, 2000 at 9.00 p.m. you were arrested by

EATEC security guards together with your son George Oliech while stealing firewood at Outspan Estate Block MB6. On searching your house, 1.5 tons of firewood valued at Shs. 1,650.00 (sic).

You have previously been cautioned against the same offence the last being when you were caught stealing at the setwet kuni stacks on 21/5/2000.

This is therefore to advise you that the Company no longer requires your services and you have been summarily dismissed for gross misconduct w.e.f. 21/7/2000.

Your final dues will be:-

- 1. Wages + overtime upto and including 21/7/2000.*
- 2. Leave balance as at 21/7/2000 – 42 days.*

Please collect the above from the Payroll Accountant at Head Office after clearing with this office.

L. P. MUHATI

ESTATE MANAGER – OUTSPAN

.....”

The appellant called its Senior Personnel Officer (DW1) who confirmed that the aforesaid letter of dismissal was issued by the company and served on the Respondent. There is no dispute that when the Respondent was summarily dismissed from his employment on 21.07.2000, he was still in police custody. This was confirmed by DW.1 who stated that the Respondent was dismissed 4 days after his arrest and while in police custody.

The law on the rights of an accused person are clear, he is innocent until proved guilty beyond any reasonable doubt. At the time the Respondent was dismissed, his case had not been heard. The contents of the letter of summary dismissal show that the Appellant made its decision to summarily dismiss the Respondent on the assumption that he was already guilty of the offence he was arrested for i.e. stealing the Company’s trees. Of interest is that by the said date he had not even been arraigned in Court. The Appellant proceeded to take the role of the Court and found the Respondent guilty and “convicted” him. In the letter, the Company inter alia, said:-

“

You have previously been cautioned against the same offence the last being when you were caught stealing firewood at the setwet kuni stacks on 21.5.2000”

It is this Court’s opinion that the Appellant could not in law or fact, reach a decision that the Respondent was guilty of the offence of stealing trees on 16.7.2000. That was the function of the Court before which he was to be charged and tried. I find it as a fact that the summary dismissal was purportedly on the ground that he had stolen trees from the Company. The Respondent was not called to defend himself before the Company. The dismissal was not on the basis of any of the grounds of gross misconduct set out in section 17 of the Employment Act. If this was the case, they were obliged to have expressly stated so in the letter.

I therefore do find that the Learned trial Magistrate was entitled to find and hold that the purported summarily dismissal was not in accordance with the law. It was not justified and the same amounted to unlawful and wrongful dismissal. And the Respondent was entitled to damages under this head.

ISSUE NO. 2

Since the dismissal of the Respondent was unlawful and wrongful, it follows that he was entitled to damages. In the plaint, the Respondent pleaded special damages. The particulars were as follows:-

(a) 3 months' salary in lieu of notice (1600 x 3) Kshs. 4,800/=

(b) 3 years leave allowance (1600 x 3) = Kshs. 4,800/=

(c) Terminal dues (69 x 1 x 24) Kshs. 27,776/=

T O T A L KSHS. 37,376/=

It is trite law that Special Damages must not only be pleaded but also be proven strictly. In the case of "The SUSQUEHANNA" (1926) A.C. 655 at 661, Lord Dunedin stated:-

"If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and if proved will be awarded

The Respondent testified that his salary was Kshs. 1,600/= per month. This fact was not controverted by the Appellant's witness. I hold that the trial Court was justified in proceeding to consider the special damages on this basis.

Was the Respondent entitled to three month's salary in lieu of notice? The law in this regard, is that where an employee is dismissed without notice and the dismissal is found to be unlawful and wrongful then the amount of damages to be paid is that which is similar to the salary for the period of notice. It was therefore incumbent upon the Respondent to prove that in his contract of employment he was entitled to a three month's notice.

In his testimony, the Respondent said that he did not have any letter of appointment. He did have anything to show the terms of employment. I do therefore find that the Respondent did not specifically prove that he was entitled to three month's notice if his employment was to be terminated. In the absence of a written contract, the Employment Act Chapter 226 of the Laws of Kenya would govern the employment relationship between the parties. Section 14 (5) (iii) provides as follows:-

"Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing:

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto."

In the light of the foregoing, the Respondent was entitled to notice of a maximum of 28 days. Since he was not given such a notice and the termination of his employment was unlawful, he was therefore entitled to a maximum of one month's salary in lieu of notice as damages. I therefore hold that the award of Shs. 4,800/= was not appropriate. I therefore substitute the amount award under this head with Shs. 1,600/=.

In their letter of summary dismissal, the Appellants set out the Respondent's outstanding leave allowance to be for a period of 42 days. The Respondent claimed 32 months leave. The Appellant's witness did not produce in Court the Respondent's employment record or file. This, they should have done in all fairness considering the allegations by the Respondent that the Appellant retained all the employment records including even payment slips. This Court takes judicial notice of the unequal bargaining power between employers and low-cadre employees and the lack of job-security for such employees in Kenya. In the circumstances, I am not inclined to interfere with the award of the trial Court under this head. I hold that the Respondent proved this item.

With regard to the last item of terminal dues, the Respondent testified that he had worked for the Appellant for 24 years. The Appellant could not say for how long the employee was employed. He said that he did not have his file with him. I think that on this aspect (length of service) the trial Court was entitled to accept the Respondent's evidence on a balance of probability. This Court is aware that an employee is entitled to gratuity pay under various provisions of the Employment Act and Wages Regulations. However, it is certain from the proceedings that the Respondent and his Counsel did not refer to the provision of law under which the Respondent claimed Shs. 69/= for each year of service. I have no doubt that this head of claim was provable by reference to statutory provisions pertaining to the Respondent's job group or description e.g. wood-cutter, labourer etc. While Court is in sympathy with the Respondent who is clearly among the disadvantaged and underemployed labour force in this country, yet the Court is under a duty to apply the law. I hold that the Respondent did not prove the claim of terminal dues or gratuity for which he was awarded Shs. 37,776/=. With a heavy heart, this amount is disallowed by this Court.

ISSUE NO. 3

With regard to the claim of parcel of land No. C.222, the Respondent's pleadings were bereft of any particulars. The pleading on this claim was astoundingly so brief that it did not lay a foundation for a proper cause of action. In his testimony, the Respondent said that he was given a piece of land by the Appellant which is parcel of land No. C.222. He claimed that this was taken away from him. He produced in evidence a handwritten chit with the words:-

“Godfrey Polisi – 0.5

Joseph Oliech – 0.5 “

It was not on the Company's letter-heads and neither did it say what it related to. He did not say whether the said piece of land if it existed or was identifiable was part of his employment dues. He did not prove that he was among those who had been declared redundant and the terms of any redundancy scheme or arrangement by the Company. The Learned trial Magistrate did not evaluate the evidence, if any, before her in this regard. She said that the Respondent was to be re-allocated Plot No. C.222 after satisfying the requirements. What requirements were these? She did not explain or say. Even this award of land in the form it stands is uncertain and unenforceable. A judgment and/or Decree ought to be clear and certain and leave no room for debate or disputes.

I do hereby hold that the Respondent did not prove this claim on a balance of probability. He fell far short of this standard. In the premises, I hold that the trial Court erred in fact and law in awarding the said parcel of land to the Respondent conditionally or otherwise.

The upshot of the foregoing is that the Appeal herein substantially succeeds. I, therefore, set aside the judgment dated 19th March, 2002 in its entirety and substitute it with a judgment in favour of the Plaintiff (the Respondent herein) as against the Defendant (Appellant) in the sum of Kshs. 5,800/= made up as follows:-

1. One month's salary in lieu of notice – Shs. 1,600/=

2. Three years' leave allowance

(1,600 x 3) - Kshs. 4,800/=

T O T A L - Kshs. 5,800/=

The Plaintiff in the said suit shall have costs to the extent of the said sum now awarded. In exercise of this Court's discretion and taking into account all circumstances, each party shall bear his/its costs in the appeal.

DATED AND DELIVERED AT ELDORET ON THIS 2ND FEBRUARY, 2007.

M. K. IBRAHIM

JUDGE