



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 134 OF 1999
EDWARD MUTHURI.....APPELLANT
VERSUS
AIRFREIGHT FORWARDERS LIMITED..... RESPONDENT

J U D G M E N T

On 10/12/04 the appellant moved to this court by way of appeal against the judgment of the Senior Resident Magistrate, Milimani in SRMCC. No. 995 of 1996, delivered on 17/3/199 on the following grounds:

1. The Learned Magistrate erred in law and in fact in holding that the appellant ought to have given three months notice during the six months probation period.
2. The Learned Magistrate erred in law and in fact in considering evidence that was not adduced and/or produced and therefore not before the court in arriving at its decision.
3. The Lower Court erred in law and in fact in holding that either party was to give three months notice and that the issue of probation should not arise as the contract had been entered into without considering that there was no contract produced in court and that there was no provision for the notice period to be given by either party in order to terminate the said employment during the probation period.
4. The Lower Court erred in law and in fact in finding that the appellant left the employment of the Respondent without sympathy and in finding that reason to be the basis for the appellant to pay the Respondent three months salary in lieu of notice.
5. The Learned Magistrate erred in law and in fact in holding that there was distinction under the employment clause as to whether one was still on probation or should be confirmed without considering that there was no evidence adduced to support such reasoning and that there was no contract produced at all.
6. The Lower Court erred in law and in fact in dismissing the appellant's defence and failed to find in appellant's favour considering the Respondent did not prove its case on a balance of probability.

7. The Lower Court erred in law and in fact in failing to find that the basic salary of the appellant was not K.Shs.32,000/- but K.Shs.16,000/- per month.

8. The Learned Magistrate erred in law and in fact in not considering appellant's evidence and not finding that the appellant was not paid his November, 1995 salary.

Wherefore the appellant prays that the Judgment of the lower court be set aside with costs of the appeal and at the lower court.

I have perused through the pleadings and considered the submissions by Learned Counsel for both sides.

Before getting into each of the grounds of appeal, it is my view, after going through the pleadings, that most of the issues forming the basis of the appeal herein are factual matters. Very little law is involved or would be called upon to determine and dispose of most of the contested issues.

The brief facts of the case from which the appeal arose are that: the Plaintiff – Afrofreight Forwarding Limited – and the Defendant – Edward Muthuli entered into an employment contract on 16/8/1995. The Defendant was employed as Assistant General Manager on the following terms: Salary K.Shs.16,000/- per month; car allowance of K.Shs.4,000/-p.m., water and electricity allowance K.Shs.6,000/- p.m.; entertainment allowance K.Shs.6,000/-p.m. Another important term and condition of service, as far as this case is concerned, is that provided in Clause 15 of the Agreement, that **“this agreement may be terminated by either of the parties hereto giving the other three months notice of its intention to terminate or three months salary in lieu.”**

On 25/11/1995, the Defendant purported to terminate the said contract of employment without either giving to the Plaintiff the said 3 months notice or 3 months salary in lieu thereof thereby putting the Plaintiff to loss and damage. There was, in Clause 14 of the Agreement, a provision that the employee – the Defendant – will be on six (6) months probation period.

In his defence, the Defendant stated that, he worked for the Plaintiff for 3(three) months; had not completed his probationary period when he resigned; that he resigned because he was transferred to Mombasa contrary to agreement with the Plaintiff leaving his family in Nairobi and his wife fell sick and the Plaintiff denied him permission to go to Nairobi and be with his family.

The Subordinate court found for the Plaintiff and against the Defendant and hence this appeal.

As alluded to herein earlier, most of the contested issues in this appeal are, in my view, largely factual, rather than legal. I begin with one of the major legal issues that has been raised, and that is the contract of employment. It is the appellants contention that the Agreement was not produced-put in- but merely referred to. On that basis, continues the appellant, the lower court had no basis or evidence on the terms and conditions of the employment contract; and it erred both in law and fact, to base its decision on non-existent evidence.

With all due respect, I have difficulty in accepting such a challenge. Going through the proceedings and the Record of appeal, the agreement, duly signed by both parties, is part of the record of appeal, and part of the documents in the lower court's file. Of even greater importance is the fact that, at the lower court, the proceedings proceeded on the basis of the Agreement Document, now being challenged. The appellant and the Respondent alike, cross-examined each other's witness [each called only one witness] relying on the contract of employment.

I must stress that neither party – appellant or Respondent – challenged that Contract Document at the Subordinate Court level. It would be unheard of to allow the challenge at this appellate stage when the same document was used in evidence at the trial stage without any objection from either party.

I therefore find and hold that the Contract Document is beyond reproach at this level, as there is no basis - legal or factual, to do so.

It is a common ground that the appellant did not give the Respondent three months salary in lieu of notice as stipulated in the Contract Document. The appellant's case, in defence of that apparent breach of the contractual agreement, is that such notice or provision does not apply prior to confirmation or expiration of the probation period; which in this case is six months and the appellant had worked for only three months.

I will return to the interpretation of the notice vis-à-vis the probationary period, later on in this Judgment.

I now turn to factual matters raised in the grounds of appeal and the learned counsel's submissions. Such matters include the three months salary in lieu of notice, if, and only if, such payment is found payable subsequent to the interpretation of probationary clause vis-a-vis its applicability to the Notice of termination. In my view, this is purely an arithmetical exercise from the Contract Document.

There seems to be an unnecessary or deliberate confusion of the figures, leading to unwarranted arguments on simple issues. From Clause 8 the Contract Document, the appellant's basic salary is Kenya Pounds K£ 9,600 per annum. That translates to K.Shs.16,000 per month. Then follows the monthly allowances as under; electricity and water K.Shs.6,000/- per month; car allowance K.Shs.4,000/- per month; entertainment allowance K.Shs.6,000/- per month. These allowances total to K.Shs.16,000/- per month. BUT this is when the car allowance is taken into account. The evidence before me shows that there was a car which the appellant was using. In the absence of evidence – pay slips, which the appellant said he never used to get and that he was paid cash from the employer's pocket, it is difficult to confirm whether the car allowance of K.Shs.4,000/- p.m. was actually being paid to the appellant when the same appellant was also provided with an official vehicle.

Under the circumstances, I find and hold that the car allowance should not be taken into account in calculating the appellants monthly earnings. To that end, the monthly package for the appellant is not K.Shs.32,000/- but K.Shs.28,000/-.

This is assuming that salary includes allowances. The parties, and the proceedings at the lower court, proceeded on what to my understanding is a false assumption that monthly salary includes the monthly allowances payable to the appellant. I am of the view that salary and allowances are two distinct and different concepts. Consider the following:

“Salary is a fixed regular payment usually made every month to employees doing professional or office work” OXFORD ADVANCED LEARNER'S DICTIONARY.

The same Dictionary defines “an allowance” to mean “an amount of money somebody earns or is given regularly for a specific purpose free of tax”

Chambers Concise Dictionary carries a similar definition of the same two terms. I respectively adopt the above definitions of the terms salary and allowance, but hasten to add that one of the distinguishing factors between the two terms is that whereas an allowance may be given in kind, in lieu of money, (e.g. housing; employer's work car or medical/health care) salary is always in cash form, or in whatever is the accepted medium of exchange.

From the foregoing, I find and hold that the Clause or term of Contract between the parties herein, “salary in lieu of notice” means salary as herein above defined and does not mean or include allowances as herein above defined.

For avoidance of doubt, in the case before me, three months salary in lieu of notice means K.Shs.16,000/- per month, for three months. The allowances for: electricity and water, entertainment; are not part and parcel of what was to be paid by either party intending to terminate the contract. Only three (3) months salary, excluding allowances.

I now turn to the gist of the appeal before me – whether the clause on the three months notice or three months salary in lieu of notice is applicable during the probationary period.

In search for the answer to the above question, one must always keep in mind the age – old position that courts do not, and cannot, write the contracts for the parties. The role and place of the courts is to interpret and give meaning to what the parties have agreed upon.

In the case before me, the relevant Clause for interpretation in the Contract Document is Clause 14 which provides as follows:

“The employee will be on six month’s probation period and on successful completion of the probation period the employee will be eligible for appointment as a director of the company with enhanced salary/allowances and on completion of one year of successful service, the employee will be considered for allotments of shares by the employer provided always that such consideration shall be dependent upon the employee PROVEN performances and output in the course of the said one year and provided further that such consideration shall be at the entire discretion and upon such terms and conditions as the employer may deem fit.”

My reading of the above Clause is that the three months notice or three months salary in lieu thereof is applicable from day one of the employment contract to such a time as the parties work together as employer/employee. This could even run for years and up to the period just before employee’s retirement age, if that were applicable. Accordingly, the Notice and probationary Clause, in the absence of any other provisions to the contrary, are part and parcel of the contract the parties signed. There is no provision for confirmation or termination at the end of the six months probationary period. What the Clause provides for are appointments as director of the company with an enhanced salary and allowances, not at the end of the probationary period, but on completion of one year, and consideration for allotment of shares in the employer/company.

All in all, and for avoidance of doubt, I find and hold that the employee/appellant is in breach of the contract of employment by failing to give three month’s notice or three month’s salary in lieu thereof, to the Respondent. Thus, I uphold the lower court’s judgment on this.

On how much the appellant should pay to the Respondent/employer, that is three month’s salary, as found and held herein earlier, and that is 3 x K.Shs.16,000/- which totals to K.Shs.48,000/-.

Accordingly, I dismiss the appeal with costs to the Respondent and against the Appellant. The said K.Shs.48,000/- damages to be paid with interest at court rates from the date of the judgment at the Subordinate Court, till payment in full. Costs at both the lower Court and at this appellate court, with interest, at court rates, from the date of filing of the suit and this appeal respectively, till payment in full.

DATED and issued at Nairobi, this 6th Day of March, 2007.

O.K. MUTUNGI

JUDGE