



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 927 of 2003

DANIEL MUYAH SIMON APPELLANT

VERSUS

NYAKIO GENERAL CONTRACTORS LTD RESPONDENT

**(An Appeal from the Judgment of the Senior Principal Magistrate at Milimani Commercial Courts
Hon. Mr. Nyakundi dated 21st November, 2003)**

JUDGMENT

By a Plaint dated 4th July, 2001, the Appellant (Plaintiff in the Lower Court) claimed special damages of Shs.103,926 from the Respondent being terminal benefits and other dues arising from his alleged employment with the Respondent.

In its defence filed on 22nd August, 2001, the Respondent denied that the Appellant was ever its employee. The onus was clearly on the Appellant to prove, on a balance of probability, that he was indeed an employee of the Respondent, what the terms of his employment were, and how the sum claimed by him was made up. According to the Lower Court, he did none of that. Here is how the Lower Court expressed itself, in part, in its Judgment dismissing the claim.

“The first issue which the Court agree to establish is whether the plaintiff was an employee of the defendant. The answer to this issue as per the evidence by the plaintiff a letter exhibited dated 22-5-2000. The exhibit contains a list of workers one of whom is the plaintiff. It is purportedly dealing with the claims of workers. In the document exhibited the terms and conditions of employment are not set out. One cannot determine when the workers were employed. How their services were terminated. What they earned at the time of employment. What designation and decisions they were engaged in at the time of employment. Besides the name of Daniel Simon marked on No.8 nothing is stated about the employment. The defendant worker who is the administration officer has denied knowledge of the document. The document is said to have been made between the defendant company and the former workers. I find that the reliance of this document by the plaintiff is not evidence to prove employment contract with the defendant. The agreement drawn does not even indicate the signatories are directors of the company.”

It is against that Judgment that the Appellant has preferred this Appeal, based on the following ten grounds of Appeal:

1. THAT, the Learned Magistrate erred in law and in fact in dismissing the Plaintiff’s suit.

2. ***THAT, the Learned Magistrate erred in law and in fact in dismissing the Plaintiff's suit with costs.***
3. ***THAT, the Learned Magistrate erred in law and in fact in failing to award the Plaintiff the special damages claimed.***
4. ***THAT, the Learned Magistrate erred in law and in fact in failing to find that the Defendant unlawfully terminated the Plaintiff's services.***
5. ***THAT, the Learned Magistrate erred in law in failing to find the Defendant liable for the breach of the contract of employment.***
6. ***THAT, the Learned Magistrate erred in law for failing to take into account all the relevant facts of the Defendant's breach of contract/duty.***
7. ***THAT, the Learned Magistrate erred in failing to hold that the Defendant did not pay the Plaintiff his dues and terminal benefits.***
8. ***THAT, the Learned Magistrate erred in failing to hold that the Defendant was liable to meet the Plaintiff's claim***
9. ***THAT, the Learned Magistrate erred in failing to hold that the Defendants defence was composed merely of denials.***
10. ***THAT, the Learned Magistrate erred in failing to apply the correct legal principles to the suit.***

In his submissions before this Court, Mr. Modi, Counsel for the Appellant, stated that the hand written document headed "Agreement between former workers and Family Elders" (PEX.1) was sufficient to establish a contract of employment; and that the onus was on the Respondent employer to draw up and produce the contract of employment.

Mrs. Alice Wahome, Counsel for the Respondent, argued that the suit was time-barred, a point taken by her during submissions, but ignored by the Lower Court; and that in any event there was no evidence that the Appellant was an employee of the Respondent.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion.

I uphold Mrs. Wahome's argument that the Appellant's suit in the Lower Court was time-barred, and should have been struck out on that ground alone. By his own admission in the Plaint, the Appellant alleged that he was in the Respondent's employment from 1984 to 1992. This suit was filed on 5th July, 2001, well past the six year limitation period prescribed for a suit based on breach of contract. **This Appeal is dismissed on that ground alone.** However, let me add that having re-evaluated the evidence before the Lower Court, I am satisfied that the Appellant had not established, on a balance of probability, that he was an employee of the Respondent. I reject the argument that PEX1 demonstrates that the Respondent was an employee of the Appellant. It does not by any stretch of imagination, and I find that there is absolutely no evidence of any contractual or employment relationship between the parties to this litigation.

There is absolutely no merit to this Appeal and the same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 17th day of May, 2007.

ALNASHIR VISRAM

JUDGE