



REPUBLIC OF KENYA
HIGH COURT AT ELDORET

Civil Appeal 128 OF 2003

MILLING CORPORATION (K) LTD:.....APPELLANT

VERSUS

PAMELA NDEGE:.....RESPONDENT

J U D G E M E N T

The respondent **PAMELA NDEGE** was an employee of **MILLING CORPORATION (K)** from 1996 to 2001 when her services were terminated. She was a sales Representative based in Eldoret. On 23rd March 2001 her services were terminated. Later after that she was arrested and charged with the offence of stealing by servant before Eldoret Chief Magistrate's court. She eventually sued the appellant and the Attorney General claiming that services were terminated unlawfully and as such she claimed for damages. She also claimed that her arrest was unlawful and the prosecution malicious. Also the act of her arrest was defamatory. Eventually the case was heard by W.W. Njage Principal Magistrate who ruled that the respondent's services were unlawfully terminated and awarded her a total of shs.25,000/= as special damages. He however found the claim of unlawful arrest, malicious prosecution and defamation were not proved and dismissed them. The appellant being dissatisfied with the judgement preferred this appeal.

Ms Wambua who prosecuted the appeal submitted that the trial court erred in finding that the respondent was unlawfully sacked when in fact she was retrenched. She also took issue with damages awarded. She submitted that the respondent was only entitled to Shs.6000/= as one month's salary in lieu of Notice and not Shs.18,000/= as awarded. She was not entitled to Shs.143,000/= awarded as overtime as no overtime was being paid by the appellant. Further her leave balance was only 69 days and as such the award of Shs.75,000/= was not proper.

The trial court had also awarded Shs.17,320/= as 165 days salary of every year worked. This was severance pay showing that respondent's services were terminated and that she was not sacked.

Mr. Gisamba for the respondent opposed the appeal and supported the judgement. He submitted that the written judgement was a general denial of the claim and there were no particulars. The respondent's services were terminated and as such she was entitled to the dues claimed.

I have carefully considered the appeal and the evidence on record in lower court. There was no dispute that the respondent was an employee of the appellant as a sales representative earning a salary of Shs.6000/= from 1996 to 23rd March 2001 when her services were terminated. Trial court found the termination lawful. The evidence however shows otherwise. The court only said the termination was unlawful without giving any reason. The appellant had in his defence denied that the termination was

unlawful. In paragraph 4 of the defence it was clearly said that she had been retrenched alongside others. Appellant called a witness **BARNABAS KIPTARUS BARNO (DW1)** who candidly told the court how the respondent and others were retrenched when the operations of the company went down. He produced a list which had the name of the respondent. The letter terminating her services was very clear that her services were being terminated as a result of reduction in production. She was determined to be surplus. It is clear that the appellant clearly established that the respondent was retrenched. That was not unlawful termination. The respondent on her part never made any efforts to show that the termination of her services were unlawful. It was not enough to merely say she was sacked and then plead it was unlawful. In cross-examination Pg.93 line 28 Record of appeal – she said:

“I was sacked by milling corporation due to surplus employee(sic)”

She therefore knew why her services were terminated. The appellant had no option if its production which had gone low but to reduce the number of employees other wise the whole company would go under.

In the letter terminating her services the appellant informed her she will be paid one months salary in lieu of notice. There was no contract between the appellant and the respondent indicating what should happen in case of termination. Court awarded three months salary in lieu of notice which was Shs.18000/=. This I don't think was unreasonable. I uphold the same.

As I have said the respondents services were lawfully terminated. The court seemed to appreciate that and awarded shs.17,500/= as 16 days salary for every year worked. This was severance pay and was proper.

As to the issue of overtime the appellant made no efforts to prove the same. It is trite law that any claim of special damages must not only be pleaded but strictly proved. In her evidence the respondent did not say how they arrived at the figure of shs.143,000/=. She did not say how many hours she worked as overtime and when. It is not enough to put a figure in the pleadings and fail to prove it. The trial magistrate seemed to lay emphasis in the submission by the counsel for the respondent that the defence filed was a mere denial and relied on the holding. In **Maguga Geneva Ltd 1982-1981 KAR 3a** as approved **FIRESTONE E.A. (1969) LTD VS. BUCKLEYS TYRE SEVICES LTD Civil Appeal No.138 of 1993**. However in those cases court was dealing with a situation where there was an application to strike out a defence at an interlocutory stage. That was not the case in this matter. There was no application to strike out the defence. The defence was never struck out and the case went for a full hearing. The respondent cannot cry at the end of the hearing that the written defence was a mere denial. In any case the appellant called evidence to back that defence. The court was therefore wrong to hold that the defence was a mere denial and proceed to find the respondent on that strength. The respondent need to prove her claim and she did not show that she worked overtime and how she arrived at the figure of Shs.143,000/=. The appellant denied they were paying overtime.

The same thing applies to the claim of leave allowance. Respondent just put a figure of Shs.75,000/= she never told the court how she reached that figure while on the other hand appellants witness testified that the respondent had 69 days leave outstanding. Respondent never made any efforts to show how she arrived at her figure. He who alleges must prove. The award of Shs.75,000/= therefore was without any support. The proper amount should have been Shs.13,800/= for the 69 days

The upshot of the above is that I allow the appeal to the extent that I set aside the lower courts judgement and substitute it with one for judgement for the plaintiff as follows:-

1. 3 months salary in lieu of Notice - Shs.18,000/=
2. Severance pay - Shs.17,320/=
3. 69 days leave - Shs.13,800/=

Total Shs.48,120/=

As this appeal only partly succeeds the court orders that each party to bear its/her own costs.

Dated and Delivered at Eldoret on 11th day of July,2007.

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF:-

C/C - David

Ms. Wambua for applicant

Mr. Okara for Gisamba for Respondent.