

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 535 of 2003

PETER NJENGA GATHEA
APPELLANT

VERSUS

POSTAL CORPORATION OF KENYA
RESPONDENT

(An Appeal from the Judgment of Hon. (Mrs.) M. A. Murage, SRM in Milimani Commercial Courts Civil Suit No. 7979 of 1995 delivered on 22nd July, 2003).

JUDGMENT

By a Plaint dated 14th July, 1995, and amended 4th October, 2000, the Appellant (Plaintiff in the lower court) claimed damages for wrongful dismissal and terminal benefits amounting to Kshs.166,563.10. The Respondent, in a defence dated 1st September, 1995, denied the claims and averred that the dismissal was lawful.

The lower court, in its Judgment dated 22nd July, 2003, dismissed all the Appellant's claims, except Kshs.2,054/= being his contribution to the Provident Fund to which he was entitled. It is against that Judgment that the Appellant has appealed to this Court, citing the following four grounds of appeal:

- 1. That the learned magistrate erred in law and fact in relying on the evidence of the defence which was res judicata as the matter had been determined earlier by a court of competent jurisdiction.**
- 2. That the learned magistrate erred in law and fact by failing to make an award as prayed in paragraph 7 (a) to (e) of the plaint.**
- 3. That the learned magistrate erred in law and fact in awarding Kshs.2,054/= while documentary evidence tendered to her was for Kshs.16,740/=.**
- 4. That the learned magistrate erred in law and fact by totally disregarding the Appellant's evidence.**

Mr Sane, Counsel for the Appellant, abandoned ground 1 relating to "res judicata". With respect to the other grounds, Mr Sane argued that the lower court ignored the Appellant's evidence relating to his claims outlined in paragraph 7 (a) to (e) of the Plaint; that the Appellant had contributed Kshs.16,742/= to the Provident Fund, but was awarded only Kshs.2,054/=; and that his dismissal was wrong and accordingly was entitled to full severance pay.

In his reply, Mr Issa, for the Respondent, submitted that the Appellant's own evidence (page 16 of the Record) showed that he had contributed Kshs.2,054/= and not Kshs.16,742/= to the Provident Fund; that no evidence was led to prove any of the claims in the Plaint; and that the dismissal here was based on fraud that the Appellant had committed, which he eventually admitted, and even refunded part of the money which he had fraudulently obtained.

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 her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

With respect to the Appellant's claim for Provident Fund, the record of his own evidence on page 16 shows that his contribution amounted to Kshs.2,054/= and no more. The lower court was correct in making this award.

With respect to the other claims, the lower court found as a fact that the Appellant was involved in fraudulent transactions in the course of his duties, and that despite his acquittal in a related criminal case, he was lawfully dismissed from employment. This finding is clearly based on the evidence before the Court, which was not challenged. Having reviewed the evidence, I am satisfied that the lower court came to a correct finding of fact.

Accordingly, and for reasons outlined, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 12th day of October, 2006.

ALNASHIR VISRAM

JUDGE