



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 584 of 2004

JORAM THUO WAIREGI ..... APPELLANT

VERSUS

ESTHER MUGURE MUTEGI ..... RESPONDENT

(An Appeal from the Judgment of Hon. G. M. Mburu (Mrs), RM in

Limuru SRMCC No. 21 of 2004 delivered on 8<sup>th</sup> July, 2004)

JUDGMENT

By a Plaintiff dated 12<sup>th</sup> January, 2004, the Respondent (Plaintiff in the lower Court) claimed the sum of Kshs.65,860/= being terminal benefits and unpaid salary and other dues arising out of her employment with the Appellant from 1<sup>st</sup> June, 1990 to 30<sup>th</sup> November, 1999, as a receptionist with the Appellant's hotel known as "Nairobi Forest Lodge".

The lower Court, in its Judgment dated 8<sup>th</sup> July, 2004, found for the Respondent and awarded her the sum claimed. It is against that Judgment that the Appellant has appealed to this Court, citing the following six grounds of appeal:

1. *The learned trial Magistrate erred in law and fact in reaching a decision which was against the weight of evidence on record.*
2. *The learned trial Magistrate erred in law and fact in deciding the case against the Appellant upon the ground that the Respondent was declared redundant by DW 1 and further erred when she held that DW 1 was an agent of the Appellant.*
3. *The learned trial Magistrate erred in law and fact in deciding the case against the Appellant on matters which were not pleaded and only introduced in evidence during the trial without any amendment to the pleadings.*
4. *The learned trial Magistrate erred in law and fact in accepting and relying on the unsatisfactory and discredited evidence of the Respondent while rejecting the truthful and unshaken evidence adduced by the Appellant's witnesses.*

5. *The learned trial Magistrate erred in law and fact in awarding damages or claims which were not proved during the trial.*

6. *The learned trial Magistrate erred in law and fact in allowing the Respondent's claims in respect of severance pay, salary in lieu of notice, annual leave and/or alleged unpaid salary when these were not proved.*

Mr Amuga, Counsel for the Appellant, argued before this Court that the damages pleaded by the Respondent were not actually proved in Court; that the claim for damages was based essentially on "redundancy" which was never proved; that the letter dated 30<sup>th</sup> November, 1999, proving redundancy (Exhibit 1) was issued without authority. The Respondent's evidence was not consistent with paragraph 5 of the Plaint in which she pleaded that it was in fact a letter dated 30<sup>th</sup> January, 1999 which declared the Respondent redundant. No such letter was produced in Court; that there was no evidence before the Court that the Respondent had worked during the period August to November 1999; that the claim for leave was statute barred; and finally that because the Respondent left the employment voluntarily, she was not entitled to any severance pay.

In his reply, Mr Wachira, Counsel for the Respondent, submitted that the Respondent had proved her case on a balance of probability; that Exhibit 1, which was written by an authorized officer of the Appellant, was sufficient proof of redundancy; that the breach here being of continuous nature, the claim was not statute barred; and that in any event limitation was not pleaded in the lower Court.

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.

The lower court found as a fact that the Respondent was an employee of the Appellant from 1990 to 1999. This evidence was not in dispute. What was in dispute is whether the Respondent's employment was terminated on the grounds of redundancy, in which case she would be entitled to claim severance pay. In my view, the lower court correctly found that the Respondent was terminated on account of "shortage of work", as per exhibit one. The Appellant's denial that Exhibit 1 is a legitimate document issued by an authorized officer is completely unfounded. The letter is signed by the Appellant's Manager, stamped by its rubber stamp, and had never been repudiated. Any claims of "lack of authority" were an after-thought, and without any legal basis.

The Appellant's claim that the evidence produced in Court was inconsistent with paragraph 5 of the Plaint is equally unfounded. The record shows that the Respondent had applied for, and was given leave to amend the date of the letter in paragraph 5 of the Plaint to 30<sup>th</sup> November, 1999. Accordingly, the "evidence" produced in Court to demonstrate redundancy was indeed consistent with the pleadings.

As the learned Magistrate found, that letter was not disowned by DW 1 (John Kangethe) who signed and stamped the same as an authorized officer of the appellant.

With regard to unpaid salary, and leave for nine years, I agree with the lower Court that that evidence was not controverted by the Appellant.

Accordingly, all the claims pleaded by the Respondent in her Plaint were proved on a balance of probability, and I find that there is no basis to this Appeal. The same is dismissed with costs.

Dated and delivered at Nairobi this 22<sup>nd</sup> day of November, 2006.

**ALNASHIR VISRAM**

**JUDGE**