



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 437 OF 2015**

**BONIFACE NGWILI MUSYOKA T/A PALM TRAVEL AGENCIES..... APPELLANT**

**VERSUS**

**METAL CROWN LIMITED.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This appeal is against the judgment and decree of the Resident Magistrate in **Milimani CMCC No. 3415 of 2013** delivered on the 21<sup>st</sup> August 2015.

2. The appellant sued the respondent vide plaint dated 22.05.2013 claiming Kshs. 1,432,348/= being payment for two (2) months in lieu of notice as well as general damages for breach of contract. Judgment was delivered on the 21.08.2015 dismissing the appellant's suit on the grounds that the appellant had failed to discharge his duty to establish the claim.

3. The appellant being aggrieved by the decision preferred this appeal on the following grounds: -

**1. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant proved his case on a balance of probabilities having adduced evidence that proved that: -**

**a. There was breach of the staff transport contract by the respondent.**

**b. The appellant was entitled to payment in lieu of notice.**

**c. The appellant was entitled to general damages for breach of contract.**

**2. That the magistrate erred in law and in fact in failing to appreciate the evidence tendered in support of the appellant's case and failing to weigh it vis-a-vis the respondent's evidence.**

**3. That the magistrate erred in law and ignoring the submissions and authorities/precedents relied upon by the appellant that could have led to a different finding/conclusion.**

**4. That the magistrate erred in law and in fact in failing to address herself properly or at all to the main issues raised in the suit and in particular whether the respondent was in breach of the terms of the agreement between the appellant and the respondent.**

**5. That the magistrate's decision was against the weight of evidence and was based on wrong principles of law and this has thereby occasioned a miscarriage of justice.**

4. No appearance was entered for the respondent in this matter despite service of the same by the appellant.

**B. Appellant's Submissions**

5. The appellant submitted that having found the respondent liable for terminating the contract without notice, the trial court erred by failing to conclude that the appellant was entitled to monetary terms compensation.

6. The appellant thus sought that the judgement in the trial court be set aside and judgement be entered in its favour as prayed. He relied on

the case of Francis Namatoui Obongita v Cocker Printer and Designers Ltd [198] eKLR and that of Jackline Wanjiku Munyua & Another v AAR Health Services Limited (2012) eKLR.

### **C. Analysis and Determination**

7. The duty of the first appellant court is to re-evaluate as well as examine afresh the evidence and to arrive at our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in the case of Selle & Another v. Associated Motor Boat Company Ltd & Others [1968] EA 123 as follows: -

**“... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should made due allowance in that respect ...”** [See also Jivanji vs Sanyo Electrical Company Ltd [2003] KLR 425]

8. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited [2016] eKLR, Macharia Waiguru vs Muranga Municipal Council & Another [2014] eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, Ksm CACA 179 of 1995 (ur). In the latter case this Court was emphatic that

**“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.**

9. In his evidence, the appellant maintained that it was a misdirection on the part of the trial court to deny him monetary compensation having found that the respondent was liable for terminating the contract without notice and relied on the cases of Francis Namatoui Obongita (supra) and that of Jackline Wanjiku Munyua & (supra).

10. I do not discern from my reading of these decisions a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. I am of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that category.

11. There was no evidence of whatever kind led at the hearing of the suit to show that the appellant suffered this loss. The appellant did not produce credible evidence to show that indeed he incurred the sum quoted in the plaint, Kshs. 1,432,348/=. The appellant merely alleges that the cost of staff transport on a 14 seater and 29 seater is Kshs. 2,800/= and Kshs. 3,300/= per trip exclusive of V.A.T. There was no evidence whatsoever was led by the appellant on this aspect. It is the duty of the person who alleges to prove that a certain fact exists.

12. I already stated, the claim of Kshs. 1,432,348/= was an abstract figure which was given to the court with a mere statement that it was “payment for 2 months in lieu of notice”.

13. If the appellant’s claim was for two months’ salary in lieu of notice, he was required to adduce evidence of his monthly earnings to facilitate the court in computing his claim

14. In the case of Ryce Motors Ltd & Another vs Muchoki (1995-98) 2 E. A 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;

**“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”**

15. The appellant was duty bound to prove that he suffered damages for breach of contract. He was required to show that as a result of the alleged breach, there were damages he suffered that arose natural in the usual course of things upon termination of the contract. This evidence would have assisted the court to assess the claim of general damages. The learned magistrate relied in the case of Francis Namatoui Obongita vs Cocker Printers and Designers Limited which expressed and stated the burden of proof on the preponderance of evidence.

16. I find that the magistrate was correct that the burden of proof was not discharged by the appellant in his case as required and as such, It is my considered view that the appellant failed to prove that he suffered any loss by the termination of the contract. The magistrate was therefore correct in failing to award general damages for there was no proof of loss or damage.

17. As for special damages, the appellant failed to prove the claim of Kshs. 1,432,348/- per se. The trial court cannot be faulted in its finding that special damages were not proved.

18. I find no merit in this appeal and it is hereby dismissed with costs.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**F. MUCHEMI**

**JUDGE**