



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 23 OF 2009

BOARD OF GOVERNORS

AGA KHAN ACADEMY, MOMBASA.....APPELLANT

VERSUS

JOSEPH ODOYO AWUONDA.....RESPONDENT

(An Appeal arising out of the judgment of Hon. R. Ondieki SRM delivered

on 27th January 2009 in Mombasa Senior Resident Magistrate's

Court Civil Suit No. 2850 of 2007)

JUDGMENT

Introduction

1. The Appellant was the original Defendant in Mombasa Senior Resident Magistrate's Court Civil Suit No. 2850 of 2007, and it has appealed against the judgment of the trial Magistrate, which was delivered in the said suit on 27th January 2009. The Respondent was the original Plaintiff in the said suit. The Respondent had sued the Appellant in the trial Court by way of a Plaint dated 21st September 2007, wherein he claimed that he had been working as a teacher for the Appellant pursuant to a contract dated 17th January 2007, which provided that he was to work upto 31st July 2007 with a provisions for renewal on mutual agreement.

2. However, that on 3rd August 2007, the Appellant served him with a letter dated 7th July 2007 terminating the said contract, and the Respondent handed over all the Appellant's properties in his possession. The Respondent averred that the contract was brought to an end improperly as he was not served with the requisite one month's notice as stipulated therein, and he had as a result suffered loss and damage .

3. Particulars of the said loss and damage were that the Respondent was forced to look for alternative accommodation, his family was made to suffer due to loss of income and his holiday was interfered with. The Respondent sought payment of Kshs 110,000/= being notice in lieu and unpaid house allowance for July 2007, compensation for loss of work and holiday and costs.

4. The learned trial magistrate in his judgment granted the Plaintiff payment of Kshs 110,000/= being notice in lieu and unpaid house allowance for July 2007, less 15.000/= that was paid to the Plaintiff as full and final settlement. The Appellant subsequently moved this Court through a Memorandum of Appeal dated 24th February 2009 in appealing against the said judgment.

5. The grounds of appeal raised by the Appellant in summary are that the trial magistrate erred in law and in fact in entering judgment from the Respondent as aforesaid; in holding that the Respondent's employment with the Appellant was terminated in breach of the terms of the contract of employment; in failing to appreciate that the said contract of employment was terminated by reason of effluxion of time; and in failing to appreciate the evidence adduced during trial, and the submissions and authorities cited therein.

6. The Appellant is praying that the appeal be allowed, and that the lower court's judgment on be set aside and the suit therein be dismissed with costs. The Appellants also prayed that they be awarded the costs of this appeal.

7. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

8. I will therefore firstly proceed with a summary of the evidence given in the trial Court. The Respondent gave evidence as PW1 and produced his letter of employment dated 17th January 2007 as exhibit 1; a contract dated June 2004 as his Exhibit 2; a letter of termination of employment dated 7th July 2007 as his exhibit 3; and a letter dated 3rd August 2007 on payment of his full and final dues of Kshs 15,000/= as exhibit 4. His evidence was that he was employed on a temporary contract and that on the expiry of the contract each party was to give one month's notice which was not given to him.

9. Simon Otieno, the Principal of Senior School Aga Khan Academy testified for the Appellant as DW1. He gave the circumstances of the Respondent's employment as a teacher at Aga Khan Academy and the Respondent's teaching duties and performance. It was his evidence that the Respondent's employment was to last until 31st July 2007, the letter of employment had all the terms of employment, and that the exhibit 2 produced by the Respondent was not binding on terms and conditions. Further, that the Respondent was a temporary teacher therefore he was not put on probation and his contract was not renewed. Lastly, that the Appellant was not bound to give the Respondent a notice before termination, and that the notice was implied in his letter of termination.

The Issues and Determination

10. The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, A.B. Patel & Patel Advocates, filed submissions dated 16th May 2016, while the Advocates for the Respondent, Hezron Gekonde and Co Advocates, filed submissions dated 16th July 2018.

11. The Appellant relied on various decisions including **Bernard Wanjohi Muriuki vs Kirinyaga Water and Sanitation Company Limited & Another (2012) e KLR** and **Margaret A. Ochieng vs National Water Conservation & Pipeline Corporation (2014) e KLR** for the position that fixed term contracts carry no expectancy of renewal and the Appellant was not obliged to issue a notice to the Respondent of its intention to terminate the contract. Further, the Appellant urged that the Respondent's contract of service lapsed by effluxion of the agreed fixed term, and there was no unfair termination of employment.

12. The Respondent on his part urged that the letter of appointment was a contract in itself, and as the Respondent had not completed probation period, he was entitled to one month salary in lieu of notice. Further, that the letter of termination was served on the Respondent when he was serving another term of a contract and he was thus entitled to notice.

13. From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the issue herein are whether the Respondent's contract of employment was a fixed term contract, and whether the Respondent's contract of employment was lawfully terminated.

14. The letter of appointment relied upon by the Respondent dated January 17, 2017 that he produced as his exhibit 1 had the following term: "Please note that this is a temporary contract until July 31st, 2007 and renewal will be by mutual agreement". This term is not disputed by the Appellant, who urges that the contract was thereby a fixed term contract that expired by effluxion of time.

15. A fixed term contract lasts for a specified period which is set and agreed in advance, or upon completion of specified task. However, the contract the Appellant entered into with the Respondent had the possibility of extension of time of the contract. In addition it was also stated to be a temporary contract, which differs from a fixed contract in the sense that the end of the contract could be subject to change. Therefore, the Appellant's argument that the contract terminated by effluxion of time cannot hold, as the time of the contract was indeterminate. The judicial authorities relied upon by the Appellant are also distinguished on the ground that the nature and terms of the contracts therein are different from the contract entered into between the Appellant's agent and Respondent.

16. On the second issue, the Respondent's letter of employment also refers to his salary as being Kshs 90,000/= based on 4 points, "as per the terms and conditions". The letter of appointment therefore incorporated and implied certain terms and conditions, which the Respondent produced as his exhibit 2, being the "Aga Khan Academy Mombasa Local Faculty and Local Hire of Expatriates Revised Terms and Conditions" dated June 2004. The Appellant did not contest that the said terms and conditions was its document, save to state that they did not apply to the Respondent's contract. Paragraph 1.2 of the said terms and conditions however contain the salary scales referred to in the Respondent's letter of appointment, and these were the terms and conditions that were clearly being referred to by the Appellant.

17. Paragraph 1.15 of the said terms provide for a period of notice of 1 month during the probationary period, and 3 months upon completion of probationary period. The probation period under paragraph 1.11 is stated as one academic year, and it is reiterated in the said paragraph that during that period either party may terminate the contract with one month's notice. Therefore, a plain reading and construction of the said terms would mean that the Respondent, not having served one academic year, was deemed to be on probation and was thus entitled to one month's notice of termination of his employment.

18. I am in this respect persuaded by the opinion in **Chitty on Contracts, Twenty Fifth Edition, Vol. II** at paragraph 3487 where it is stated as follows on the construction of employment contracts when it comes to termination by notice:

"Apart from any relevant statutory provisions, any question as to the duration of the employment, its terminability by notice, the length of the notice required to determine it, or the time at which notice to determine it may be given, will depend on the intention of the parties, either revealed in the express or implied terms of the contract or to be inferred from all the surrounding circumstances. If there are express terms to these issues, the problem is one of construction"

19. The Respondent produced as his exhibit 3, the letter of termination dated July 7, 2007 from the Head of Senior School at Aga Khan Academy in Mombasa, that notified the Respondent of the loss of opportunity to continue working at the school, and requested him to clear with various departments before collection of his final dues.

20. The Appellant did not produce any evidence of having served the Respondent with the said letter on 7th July 2007, to give credence to the evidence by DW1 that the said letter thus served as notice. The Respondent claims he was served with the letter of termination on 3rd August 2007, which is the same date he was paid his final dues of Kshs 15,000/=. I thus find that the trial magistrate did not err in finding that the termination was in breach of the Respondent's employment contract as there was failure to give the requisite one month's notice, which ought to have been given by the Appellant by the last day of June 2007.

21. This appeal therefore fails. I accordingly uphold the award by the trial Court, save to specify that the Respondent shall be paid Kshs 75,000/= being his one month's salary in lieu of notice, less the Kshs 15,000/= paid to him as his final dues.

22. The Appellant shall bear the costs of the trial and appeal.

23. It is so ordered.

DATED AT MOMBASA THIS 2ND DAY OF NOVEMBER 2018.

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 9TH DAY OF NOVEMBER 2018

D. O. CHEPKWONY

JUDGE