



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCA NO. 205 OF 2008

GALSHEET KANYA LIMITED.....APPELLANT

VERSUS

STEPHEN MUTUKU MUTISYA.....RESPONDENT

[Being an appeal from the original judgment and decree of the Machakos Chief Magistrate's Court in civil suit no. 233 of 2006 delivered on 15.9.2008 by Hon.D.G Karani (RM)]

JUDGMENT

INTRODUCTION

1. The appellant had been sued by the respondent in the trial court for allegedly terminating his employment unlawfully and without any justifiable cause. The respondent sought general damages for dismissal and reinstatement to employment together with payment of arrears of monthly salary since the month of June 2001 until the date of reinstatement. The appellant had filed its defence on 3/06/2006 denying the plaintiff's claim and stated how the respondent had been in breach of his employment contract. Judgment in the lower court was entered for ksh.280,000/= in favour of the Plaintiff being general damages for unlawful dismissal

2. The appellant was dissatisfied with the same and filed a Memorandum of Appeal on 28/11/2008 setting forth the following specific grounds of appeal:

"a. The magistrate erred in law and fact in finding that the respondent's dismissal was unlawful.

b. The learned magistrate erred in law in making a determination, which was against the weight of evidence.

c. The learned magistrate erred in law in awarding general damages as compensation for an employment related dispute whilst the terms of contract of employment were clearly set out

d. The learned magistrate erred in law in making an award of damages, which was neither supported by evidence, nor law.

Reasons wherefore the appellant prays that:

a. The appeal be allowed.

b. The judgment was delivered in favor of the plaintiff on 1/09/2008 be vacated and replaced with an order dismissing the plaintiffs claim.

c. The respondent do pay the appellant the cost of this appeal and the cost of the suit in the subordinate court."

The pleadings.

The plaint

3. The respondent (plaintiff) had filed a plaint at the Machakos Court and averred that Galsheet Kenya Limited had employed him on 21/09/1999 with a starting salary of Ksh6,300 at the time of dismissal he was earning and he was earning Ksh12,480/= by the time of his dismissal. He further stated that under the employment contract the company could not terminate him unlawfully. He set the particulars of

breach of employment contract as follows:

- i. Terminating the plaintiffs services unlawfully and indeed illegally*
- ii. Failing to give the plaintiff notice of its intention to dismiss him*
- iii. Failing to accord the plaintiff a hearing thereby contravening the rule of natural justice*
- iv. Failing to heed to the provisions of the employment act and other labour laws.*
- v. Failing to pay the defendant his salary.*

The defence

4. The appellant (defendant) averred that the respondent was summarily dismissed on 22/06/2001 owing to his inability to account for money received between the months of July 2000 to June 2001 amounting to ksh.659,399/=. The money was to be paid to the defendant's casual workers.

The particulars of the plaintiff's breach of employment contract was listed as below:

- i) Failure to account for money had and received from the defendant between the months of July 2000 to June 2001 amounting to Ksh.659,399/=.*
- ii) Failure to account for Ksh.659,399/= intended to be paid to the defendants casual workers.*
- iii) Dishonestly obtaining money from the defendant, his employer, purporting that the same was intended for payment to casual workers when in fact it was not.*
- iv) Failure to inform the defendant that he was irregularly retaining the said Ksh.659,399/=.*
- v) Failure to forward to the Defendant the net difference between the actual amounts collected and the amount paid to casual workers in every month from July 2000 to July 2001.*
- vi) Giving the defendant the impression that the accounts were in order when he knew or ought to have known that the same were not proper.*

5. Further, the appellant alleged that the respondent was justifiably dismissed from employment without notice within the terms of contract and he was, therefore, not entitled to general damages. He was only entitled to salary earned up to the date of dismissal and any earned leave the amount of Ksh.23,531/=.

Evidence

6. During trial at the lower court the respondent testified that he was employed on September 1999 to June 2001. He produced a letter of appointment dated 21/09/1999 which showed he was earning Ksh.6,300/=. He was sacked on the allegation of stealing from the company, he was arrested and charged in Machakos Criminal Case No. 1549/01. He was, however, acquitted under section 210 of the CPC. Further he was similarly dismissed without notice. He averred to have accounted for all monies more so on payment of casual workers.

7. On cross-examination he stated that the letter of appointment gave the instances when he could be dismissed without notice. He said that when he was acquitted he asked for payment of his terminal dues, and the appellant had asked for the outcome of the criminal case.

8. The defence (appellant) availed Mr. Benard Nyajora, the accounts officer. He testified that the respondent was in charge of recruitment of casuals and he did not account for money received on his behalf. The respondent would prepare a manual list and raise a petty cash voucher; however, the amount reflected on the petty cash was more than the one reflected on the employment list. This was for a period of 6 months. On cross-examination he testified that the chief accountant had detected the anomaly.

Submissions

9. The parties filed written submissions on their respective contentions as follows.

The Appellants submissions

10. It was their submission that the respondent had been acquitted under Section 210 on the basis of technicality and the court was never given an opportunity to decide the case on merit on whether he had misappropriated the money. Therefore, the magistrate's decision awarding a sum of Ksh.280,000/= was unwarranted.

11. The law applicable in the year 2001 is the now repealed Employment Act Cap 226 Laws of Kenya Section 17 whereof provided as follows:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause. But the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the factors giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal: -

a) If, without leave or other lawful cause, an employee renders himself unwillingly or incapable to properly perform his work.

b) If an employee willfully neglects to perform any work which if it was his duty to have performed, or if he carelessly and improperly performed or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

c) If an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer.

d) If in the lawful exercise of any power if arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within the days either released on bail or on bond or otherwise lawfully set at liberty.

e) If an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.”

12. They further urged the dismissal was in accordance with the contract of employment clause 10(b) which provided that one could be summarily dismissed if he was found guilty by the company for dishonesty or in insobriety or any other serious misconduct or neglect of duty. In **Erick Karanja Gakonyo v. Samson Gathimba** [2011] eKLR Anyura Emukule J. held that Section 17 established the grounds for summary dismissal.

13. The appellant further contended that an employer could summarily dismiss an employee if he has committed an act of gross misconduct. The applicable test is whether the employee has breached a fundamental term of the contract. The fact that the respondent was arrested and arraigned in court was sufficient to amount to suspicion and the justification to the summary dismissal. This was because in the case of employer – employee, suspicion led to erosion of confidence of trust by the employer and it could lead to summary dismissal without notice.

14. In **Kenya Reinsurance Ltd v. Eliud M. Ndirangu** [2006] eKLR, O.K Mutungi J. held that if an employee committed or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer then it amounted to gross misconduct. The applicant urged that the acquittal by the court did not cleanse the respondent from the criminal offence. The prosecution had not proved its case beyond reasonable doubt was not the same as a finding of liability on the balance of probabilities required in civil cases.

15. It was further urged that the magistrate erred when he misdirected himself on the evidence of the respondent that he was not given any opportunity to fair hearing. This was not part of the repealed Employment Act but was only introduced by the Employment Act 2007.

16. The court was to rely on whether the facts that emerged proved a breach of contract and not whether the employer heard the employee in his defence as was held by Kuloba J. in **Joseph Muchiru v. Conservation Corporation Kenya Ltd** Civil suit No. 1212 of 2001 and **Muthuri v. National Industrial Credit Bank** (2003) KLR 145.

17. Further the court was urged that an award in general damages should not arise in cases of summary dismissal, and that the award of Ksh.280,000/= was not supported by law or evidence. In **Erick Karanja** (Supra) the court held that.

“our superior courts have time and again held that general damages cannot be held for breach of contract because damages arising out of breach of contract are usually quantifiable and are not at large.”

18. It was also contended that where there has been termination of employment whether lawfully or unlawfully the remedy available is damages in terms of emoluments payable for the Notice period and that Sec. 16 of the Employment Act provides for payment of wages in lieu of notice in cases where employment is terminated without notice. The only damages the respondent was entitled to if the court found the termination was unlawful is the amount he would have been entitled to if the contract was brought to an end in the manner stipulated in his contract. This was the same position held in **Mary Wakwabubi Wafula v. British Airways** [2015] eKLR. The appellant urged that the respondent had failed to prove his case on a balance of probabilities and prayed that:

i) *The appeal be allowed.*

ii) *The judgment delivered in favor of the plaintiff / Respondent on the 15th September 2008 be vacated and replaced with an order dismissing the plaintiff's claim.*

iii) *The respondent to pay the appellant the costs of this appeal and the cost of this suit.*

Respondent's Submissions

19. The respondent urged his dismissal was unlawful having been employed in the year 2000 as he was not given an opportunity to be heard and the appellant's accusations were not proved at any one point. Paragraph 10(b) of the appointment letter provided that an employee could be dismissed without notice if he was found guilty of dishonesty and in sobriety or any serious misconduct or neglect of duty, however, this

had to be proved before he was dismissed. The criminal case against him did not succeed and there has to be justifiable grounds for summary dismissal from work. It was urged that the intention of the drafters of the Employment Act was to enable employers to hear their employee before dismissing them. In this regard, they urged the court to refer to **Gabriel Kariuki Chomba v. Top image Ltd** petition no. 1567/2012 and in **Lawrence Onyango Oduori v. K.C.B** [2014] eKLR, and prayed that the appeal to be dismissed.

Issues for determination

20. The court has referred to the record of appeal, the evidence on record, the submissions and the authorities relied on and has framed the following specific issues:

- a. Whether the respondent was lawfully summarily dismissed.
- b. Whether and to what extent the respondent is entitled to compensation.

Determination.

21. The appellant herein urged the court to find that the respondent was lawfully dismissed. This being a first appeal this court is duly bound to re-evaluate the evidence and make its own conclusion. The Record of Appeal at page 9 of the proceedings indicates that the respondent testified and the appellant availed one witness. The evidence on record shows it is not disputed that the respondent was employed on 21.09.1999 as per the appointment letter, which was produced as pex no. 1 which contained the terms of employment. Paragraph 10 of the appointment letter indicated the terms for dismissal without notice as follows:

Dismissal without notice

“For contravention of all or any of the following, the employee may be immediately dismissed from his employment without prior notice, if he shall at any time, inter alia.

a) Disobey, neglect or refuse to perform or comply with any lawful directions.

b) Be found guilty by the company for dishonesty or insobriety or any other serious misconduct or neglect of duty.

c) Be convicted of any offence involving fraud dishonesty or moral turpitude or be sentenced to imprisonment without the option of a fine for any offence whatsoever.”

22. The appellant urged though the respondent was not **found guilty** in the criminal case against him, the appellant had been justified to dismiss him and the allegation on fair hearing did not arise as at that time, the appellant had been dismissed in 2001 way before the 2010 Constitution which introduced the aspect on every person having to fair hearing as enshrined in Article 50, and fair trial did not arise under the now repealed Employment Act.

23. It was the respondent’s submission that though paragraph 10 (b) had given a ground to justify dismissal one had to be **found guilty** of an offence. In the Kenyan system a criminal offence is tried before the trial court. The respondent was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The respondent was however acquitted under Section 210 of the Criminal Procedure Code. The trial Magistrate gave the reason that the prosecution had not been carried out by a police officer who was in the rank of an acting inspector or inspector of police. The appellant was aggrieved by the fact that the trial court had gone a head to acquit the respondent on a ‘technicality’.

24. Section 17 (g) of the repealed Employment Act gave room for the employer to dismiss his employee on a reasonable or sufficient ground of having committed a criminal offence. In **Erick Karanja** (supra) the court emphasized that *“summary dismissal usually connotes dismissal of an employee without giving the notice to which the employee is entitled by virtue of the contract of employment. It is justified if the employee’s conduct is such that it prevents further satisfactory continuance of the relationship.”* as held in **Sinclair v. Neighbour** [1967]2 G.B.275.

25. In the book of **Employment Law** 5th edition by Gwyneth Putt, summary dismissal is justifiable where-

*“Even if the employer terminates the contract with no notice or with inadequate notice, the employee will not be able to claim wrongful dismissal if the employer is justified in summarily dismissing him or her. **When is summary dismissal justified? Essentially, in the same circumstances in which an innocent party would be entitled to terminate any other contract; that is; when the other party has committed a fundamental breach. The test is whether the employee has disregarded a fundamental term of the contract.”***

In view of the above the appellant urged this court to find the respondent had acted in gross misconduct. The appellant did not tender evidence to do with documentation so as to enable the court arrive at a decision that the respondent was in fundamental breach.

26. Of course, the acquittal on the trial court criminal case would not form a basis for the finding that the respondent had been wrongfully dismissed as was held in **Kenya Reinsurance Corporation Ltd v. Eliud M. Ndirangu** [2006] eKLR.

27. In **Gabriel Kariuki Chomba** (supra) the claimant had been employed as a retail center representative and it was for a five year contract term, however he would sell his own accessories and he even overpriced a laptop and sold a software that did not belong to the shop which

caused a customer's laptop to crush. The customer gave evidence. This case is different from the present case since the appellant's witness (DW1) only testified and said the appellant could not account for money in the petty cash and manual list, which varied. No documentation was produced in court to support his testimony.

28. I respectfully agree with Nambuye J. (as she then was) in **Joseph Irungu** (supra) as follows:

“In an ordinary case of master and servant it does not at all depend on whether the employer has heard its employee in his defence it depends on whether the facts emerging at trial prove breach of contract.

(Emphases added)

29. The appellants' evidence in examination-in-chief and in cross-examination did not prove at all fundamental misconduct of the respondent to warrant termination of contract.

30. However, the term of the contract herein justify summary dismissal where the employee is “*found guilty by the company for dishonesty or insobriety or any other serious misconduct or neglect of duty*” implies a proceeding, although not as in a trial before a court, for determination that the employee is **found guilty** and this must at least afford an employee an opportunity to respond to any suspicion of theft or other dishonesty or other serious misconduct. Accordingly, I find that a right to be heard was a term of contract between the parties herein.

Damages for wrongful summary dismissal

31. The appellant had terminated the respondent's employment without notice and he was entitled to as pleaded for general damages for unlawful dismissal. In **Muthuri** (supra), Ringera J. (as he then was) held as follows:

“The measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment was terminable by notice or from the period of dismissal upto the time the contract would have ended if the employment was on a fixed term basis.

In an action for wrongful dismissal, the court in asserting the damages, is debarred from awarding employment damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant and also from considering the fact that the dismissal will make it more difficult for him to obtain fresh employment.”

32. The letter of appointment in regard to an employee being dismissed under paragraph 10 stated as follows in regards to the benefits entitled by a person.

a) Salary earned upto the date of such dismissal

b) Earned leave upto the date of such dismissal.”

There had been no evidence that upon receiving the letter for payment for his dues, the appellant had paid him.

33. As I understand the matter, there is no general damages for breach of contract, and only special damages within the contemplation of the contract may be recovered upon breach. This position has long been established since the House of Lords decision in **Addis v Gramophone Co Ltd** [1909] UKHL 1, [1909] AC 488. The Rule in **Addis v Gramophone Co Ltd** is expressed in the words of Lord Loreburn, LC as follows:

“If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.”

34. Applying the decision of **Addis v Gramophone**, in CA 124/1985 **Kenya Oilfield services Ltd v. Peter Njoroge**, the Kenya Court of Appeal (Muli/Akiwumi/Tunoi JJA) held that:

“The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination clause the measure of compensation is for the reasonable period of notice depending on the nature of the employment.”

See also Waki, J. (as he then was) in **Godfrey Mwangi Wanjohi v Mitchell Cotts Kenya Ltd** [2002] eKLR.

35. The measure of damages for unlawful dismissal is the amount, which the employee would have earned during the period of notice if the employment was on a fixed term basis. As regards the length of notice the same is that which is agreed by the parties and if none is agreed, a reasonable period. Since the letter of appointment states one is to be paid salary earned up to the date of such dismissal then the respondent was entitled to salary for the month of June 2001, which is a one month notice. At the time of dismissal the respondent earned Ksh.12,480/= but there was no document proof of the same.

Conclusion

36. The respondent was not given an opportunity to be heard and **found guilty** by the company as required by the contract of employment to justify his summary dismissal, and he was consequently unlawfully dismissed from his employment. The appellant had a duty to prove breach of contract by the respondent and the appellant did not discharge this burden. The court therefore finds the summary dismissal of the respondent to have been wrongful and the respondent was entitled to damages for breach of contract, the measure for which is the one month's pay in lieu of notice provided for regular termination of contract.

Order.

37. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appellant's summary dismissal of the respondent was unlawful.
2. The appellant shall pay to the respondent the amount conceded as "salary earned up to the date of dismissal and any earned leave of Ksh.23,531/=" (less all statutory deductions) with interest at court rate of 14% pa from the date of wrongful dismissal on 22nd June 2001.
3. The award of general damages of Ksh.280,000/= as compensation for wrongful dismissal is set aside and substituted with an award of damages for breach of contract in such sum equivalent to **one month's salary** as at the time of his dismissal (less all statutory deductions) together with interest at court rate of 14% pa. from the date of wrongful dismissal on 22nd June 2001.
4. The respondent shall have the costs of the suit in the trial court and each party shall bear it's own costs of the appeal as the error necessitating the appeal was committed by the trial court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances:-

M/S A.F. Gross & Co. Advocates for the Appellant.

M/S J.N. Kimeu & Co. Advocates for the Respondent.