



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 2 OF 2015

(Originally Nakuru High Court Civil Appeal No. 128 of 2011)

STEPHEN BORO GICHERU

APPELLANT

v

NJORO CANNING FACTORY

RESPONDENT

(Being an appeal arising out of the judgment of the Honourable Mr. B. Atiang, Senior Resident Magistrate, Nakuru, in Nakuru CMCC No. 711 of 2003 dated and delivered on 22nd June 2011)

JUDGMENT

1. The Appellant sued the Respondent in the subordinate Court on 24 March 2003 alleging summary dismissal and breach of contract. He sought general damages, severance pay, leave allowance, salary in lieu of notice and other benefits.
2. The trial Court found the summary dismissal unlawful and awarded the Appellant 2 months gross pay in lieu of notice at the rate of Kshs 33,220/- and general damages of Kshs 50,000/-.
3. The Appellant being dissatisfied with the judgment preferred an appeal before the High Court and in a Memorandum of Appeal filed in Court on 29 July 2011, he listed some 7 grounds of appeal.
4. The Appellant filed a Supplementary record of appeal on 29 August 2012.
5. The appeal was admitted on 9 March 2012 and directions were taken before the High Court on 4 May 2012 and 12 July 2013.
6. On 17 February 2015, Mshila J ordered that the appeal be transferred to this Court for hearing and determination.
7. The parties informed me on 21 April 2015 that they would file submissions and the same were filed and duly highlighted on 2 July 2015.

Appellant's submissions

8. According to the Appellant, the award of Kshs 50,000/- as general damages was inordinately low because the trial Court absolved him of any wrong doing and that he served the Respondent for 29 years. The Appellant suggested general damages of Kshs 500,000/- or the equivalent of 12 months wages by dint of section 49(1)(c) of the Employment Act, 2007.
9. The Appellant also submitted that pursuant to the provisions of a collective bargaining agreement in place, he was entitled to severance pay at the rate of half salary for each year served.
10. It was also urged that according to the terms of the contract, the Appellant was entitled to 3 months pay in lieu of notice and not the 2 months awarded.
11. The Appellant further urged that he should have been awarded leave and leave travelling allowances from 2001.
12. The Appellant was distraught that the trial Court did not consider his evidence and submissions.

13. The Appellant contended that the appeal was filed within time.

Respondent's submissions

14. The first point taken by the Respondent was that the appeal was filed outside the stipulated timelines without leave because the judgment was on 22 June 2011, while the Memorandum of Appeal was lodged in the Court on 29 July 2011 contrary to the provisions of section 79G of the Civil Procedure Act.
15. According to the Respondent, severance pay, leave and leave travelling allowances were special damages and ought to have been specifically pleaded and strictly proved. It was submitted that the same were not specifically pleaded. The authority of *Juvanji v Sanyo Electrical Company Ltd* (2003) KLR 431 was cited.
16. On the award of general damages, the Respondent urged that the trial Court was wrong to award the same after awarding 2 months pay in lieu of notice. The decision of *Peter Whitton & Ar. V Kenya Educational Trust Ltd*, High Court Civil Case No. 56 and 57 was referred to.
17. The Respondent submitted that the letter of appointment did not provide for period of notice.
18. The Respondent urged the Court to dismiss the appeal.

Evaluation

19. Because of the view the Court has taken of the appeal, it will only address the issues of merit and not the question of filing of the appeal out of time.
20. The Respondent correctly cited the authority of *Kamau v Mungai* (2006) 1 KLR 150 which set out the role of a first appellate Court where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
21. The Court has re-evaluated and assessed the evidence tendered before the trial Court. However, the success or failure of this appeal hinges mainly on the law.
22. The Court also takes note that there was no cross appeal.
23. The Employment Act, 2007 has no application in this appeal. The applicable law at the material time was the Employment Act, cap. 226 (repealed). That statute was complemented by the common law as was applicable.
24. Therefore compensation under section 49(1)(c) of the Employment Act, 2007 is not material and cannot provide any succor to the Appellant. He cannot get the 12 months wages compensation by invoking the current Act.
25. And what was the position under the common law on general damages for unlawful or wrongful dismissal? The authorities are legion and I can only make reference to one or two.
26. In *Nakuru Civil Appeal No. 27 of 1992, Rift Valley Textiles Ltd v Edward Onyango Oganda*, on the question of general damages for unlawful dismissal, it was held that

But the appellant appeals to this court because having found and held that the summary dismissal was unlawful, the learned Judge proceeded to award to the respondent twelve months gross salary as general damages and despite the respondent's repeated admission that he had been paid for the three months salary in lieu of notice. Was the Judge entitled in law to do this? We have no doubt whatsoever that the law did not entitle the judge to do any of these things.

27. I wish to say no more on the ground of inadequacy of general damages except to restate there was no cross appeal.
28. As to pay in lieu of notice, the contract was silent on the appropriate period of notice and as held in *Barclays Bank of Kenya Ltd v Njau* (2006) 1 KLR 91 a reasonable notice would be adequate.
29. The trial Court awarded the equivalent of 2 months wages as pay in lieu of notice and the Appellant has not demonstrated that it was not reasonable.
30. On the grounds in respect of severance pay, annual leave and leave travelling allowance, I do agree with the Respondent that these are in the nature of special damages.
31. However, severance pay under the then prevailing legal framework, as under the current one is

- payable only upon termination of employment through redundancy. The Appellant herein was dismissed and it would be legally untenable for him to be awarded severance pay.
- 32.The annual leave and leave travelling allowance were generally pleaded in the Plaint. No figures were given.
- 33.During testimony, the Appellant produced a copy of the appointment letter and made reference to a collective bargaining agreement. The collective bargaining agreement was not produced.
- 34.The letter of appointment did not provide for payment of leave allowance or leave travelling allowance. The Appellant cannot therefore found a claim for these 2 heads of claim upon the contract.
- 35.The letter of appointment provided for 21 days annual leave. But the Appellant did not lay any evidential basis for payment of any accrued leave. Dates when he did not take leave were not disclosed. That could have formed a basis to shift the burden to the Respondent who as an employer would have been expected to keep and maintain employment records.
- 36.The Appellant also urged that the trial Court had disregarded some parts of his evidence/submissions.
- 37.But in the view of the Court, the Appellant has failed to demonstrate which part of his evidence or submissions were disregarded by the trial Court.

Conclusion and Orders

- 38.Considering the foregoing, the Court has no option but to dismiss the appeal with costs to the Respondent.

Delivered, dated and signed in Nakuru on this 4th day of December 2015.

Radido Stephen

Judge

Appearances

Appellant Ms. Njoroge instructed by Nancy Njoroge & Co. Advocates

For Respondent Mr. Nyamwange instructed by Ms. Wamaasa & Co. Advocates

Court Assistant

Nixon