



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Platt Ja, Gachuhi & Kwach Ag JJ A)**

**CIVIL APPEAL NO 7 OF 1988**

**MUTHIKE.....APPELLANT**

**VERSUS**

**KENYA FILM CORPORATION LTD.....RESPONDENT**

**JUDGMENT**

*(Appeal from Assessment of Damages by the High Court at Nairobi, Sampson CA, dated 24th March 1987*

*in*

*Civil Case No 1718 of 1986)*

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February 6, 1989, the following Judgment of the Court was delivered.

On 24th March, 1987 Mr Commissioner Sampson completed the trial in this action which had been commenced by Mr Justice J.S. Patel. The latter had ruled on 12th September, 1986 that the defence of the Defendant Corporation, the Kenya Film Corporation Limited, must be struck out as showing no cause of defence and for being vexatious (*inter alia*), under Order VI Rule 13 of the Civil Procedure Rules. Consequently there being no defence, judgment was entered as prayed in the plaint, but damages were to be assessed later. Mr Commissioner Sampson calculated the damages as amounting, in all, to Shs 71,312/-, in accordance with the findings of Mr Justice J.S.Patel. Those findings were as follows:-

“So from the above, it is clear that the Defendant Corporation has no defence at all. It was bound by decision of Mr S.W Wanjohi and he implemented his decision by reinstating the Plaintiff on 1/1/1986 and as such estopped from resuming the same before. As the termination of Plaintiff’s services from 30.12.83 was unlawful and he was reinstated on 1.1.86, the Defendant Corporation was bound to pay to him his salary, allowances and other benefits for these two (2) years and any other damages that the Plaintiff may have suffered due to this wrongful and other lawful termination.” (sic).

Following these lines Mr Sampson, though doubtful of the view taken by Mr Justice J.S. Patel, (indeed he agreed with the ruling of Mr Justice Cockar setting aside Mr Justice J.S. Patel’s judgment set out above, even though Mr Justice Cockar’s ruling was later on set aside for want of jurisdiction, thus reinstating Mr Justice J.S. Patel’s ruling on the 12th September, 1986), assessed the damages at the net figure of the

plaintiff's salary in the month of December 1983. The plaintiff considered that the assessment was too low and appealed to this Court.

The Defendant Corporation fell into some difficulty in cross-appealing. On 18th March, 1988 Notice of cross-appeal was filed. But on 27th October, 1988 this Court ruled that the Notice of cross-appeal must be struck out because it sought to question the judgment of Mr Justice J.S. Patel after so much time had lapsed. But the Court noted that if it would be any consolation to the Respondent there might still be a way in which it could seek the vacation of Mr Justice J.S. Patel's order. That must mean that he must seek leave to appeal against Mr Justice J.S. Patel's order out of time. That step has not been taken. It must also be said that the Defendant Corporation has repeated its claim in this Court that no damages could be awarded because the Plaintiff did not work for the Defendant Corporation for two (2) years. On the whole the Defendant Corporation, which has already been required to pay the sum assessed by Mr Sampson to the Plaintiff, seems to have considered that Mr Sampson's assessment was justified if he had to follow Mr Justice J.S. Patel's judgment.

It will have been gathered from the foregoing, that Mr Muthike (the Plaintiff) had been employed by the Defendant Corporation as a Senior Administration Officer until 31st December, 1983 when the Defendant Corporation unlawfully terminated his services. The termination was said to last for 24 months and as a result he claimed damages for wrongful dismissal and the payment of his salary and allowances for 24 months. He further claimed interest on each item and the costs of the suit. In answer to those claims Mr Sampson held that the Appellant had not proved that he was entitled to any general damages for wrongful dismissal because it was not wrongful termination which had caused the Plaintiff to be unemployable, but because of his previous convictions for dishonesty. Then with regard to his claim for arrears of salary and allowances Mr Sampson had before him the Plaintiff's salary slip which showed that in December 1983 when the Plaintiff was dismissed his basic pay was Shs 4,190/- and the house allowance Shs 1,450/-. From this total of Shsh 5,640 taxes and contributions had to be paid and he was left with a net salary of Shs 3,320/-. Mr Sampson multiplied that figure by 24 and reducing the result by Shs 8,380 he reached the final figure Shs 71,112/-. He then allowed interest on that sum from the date of judgment until payment in full.

Mr Muthike raised a number of issues in disputing these calculations. He claimed, for instance, that the items of salary and emoluments as set out in the letter of Appointment should have been used and the award revised upwards. Secondly, the increase component having been rejected, should now be allowed. Thirdly, Mr Sampson had failed to give directions as to what should be done with monies deducted from the basic salary which the Defendant Corporation should not retain for its own benefit. Those sums were P.A.Y.E, N.S.S.F, Provident Fund, Society Contributions, Society loan interest.

We take it that there is no appeal against the finding that the Plaintiff/Appellant is not entitled to an award for general damages.

The appeal lies on the second main heading and as far as salary is concerned, it is argued that the basic salary rose to Shs 4,300/- p.m between July 1984 and June 1985; and then to Shs 5,240 per month in July 1985 to December 1985. The last salary rate was apparently based on the Ramtu Commission Report. Mr Sampson had this to say:-

“I asked the Plaintiff to produce the Ramtu Commission Report in evidence before me if he wanted to rely on it. He was unable to do so and eventually gave up his claim based on that Report.”

The Court is still unaware what the contents of the Ramtu Commission Report were and whether it applied to the Plaintiff's case. We find that we must allow the claim based on that Report to be given up. As it happens, a claim for Shs 9,930/- for housing allowance from 1st January 1984 to 31st December 1985 was also based on the Ramtu Report. For the same reason as relates to the increase in salary, extra housing allowance was also not proved.

Concerning the actual increase in salary increment Mr Sampson held that a person cannot claim that

increment if he did not work. Something might depend on the terms of the settlement, whereby the Plaintiff was reinstated in his work as from the 1st January, 1986. Generally speaking once an employee has been dismissed that terminates his employment. If the employee is then reinstated the benefits which he may claim depends on the new contract between the employee and the employer. Hence the terms of the settlement arranged by Mr Wanjohi should have been pleaded and proved so as to state what the liability of the employer was after the reinstatement. The plaintiff did not plead the terms of the settlement but merely claimed loss of salary and allowances for 24 months. Mr Justice J.S. Patel found that Mr Wanjohi communicated his decision as investigator in the dispute between the parties on the 3rd August 1984, in which he found that the Plaintiff's termination was unlawful and unfair, in which case he recommended that the Plaintiff be reinstated to his former position. Mr Justice J.S. Patel understood that to mean that having reinstated the Plaintiff, the Defendant Corporation was bound to pay him his salary, allowances and other benefits. Mr Sampson has interpreted that to mean that the Plaintiff was reinstated to his position as at 31st December 1983, and while he could claim salary and housing allowance on that basis, he could not claim any increments because he did not work. Bearing in mind that Mr Justice J.S. Patel found that the reinstatement was simply to his former position or equivalent position, there is nothing stated that there were to be special terms, that on reinstatement the Plaintiff would be paid 24 months' salary with incremental increases and other increases due to the Ramtu Commission Report. Hence, on what was before the Court, Mr Sampson was correct in holding that the Plaintiff was not entitled to incremental increases and other increases on the basis of the reinstatement. Indeed as the reinstatement was to his former position that would in general terms refer to his position as Senior Administration Officer at a salary of Shs 4,190/- per month and a housing allowance at Shs 1,450/- per month.

Turning to housing allowance, the Plaintiff was anxious that his Letter of Appointment should be considered. It says that on the confirmation of his appointment, he would be entitled to a house allowance at the maximum rate of £678 per annum. We have no idea whether the Plaintiff was confirmed. He had only worked from 1st October 1982. But assuming that the probationary period was three months and that the housing allowance had been granted to him, it would appear that he had been confirmed. On the other hand, the maximum allowance of Pounds 678 per annum would appear to work out that Shs 1,130. It would seem therefore that as the Plaintiff was being paid Shs 1,450 per month, he was getting more than he was entitled to in his Letter of Appointment.

As Mr Sampson calculated his net salary as shown on the payslip exhibited in Court, based on the basic rate of salary plus increased housing allowance as at December 1983, the calculation is not at fault. There remains the question what is to be done about the deductions from salary and housing allowance. The Appellant says that these sums have been left in the hands of his employer although he is still responsible for them. That may well be so. When an employer pays salary, he may be required by law or the employee to make certain deductions, and then the employer pays the employee his net salary. If a court awards compensation based on the net salary, it is presupposed that the employer will make the necessary deductions. Consequently as Mr Sampson's judgment is based on the net salary, the Appellant is entitled to presuppose that his employer, the Respondent, has made the necessary deductions, and hold them on behalf of the legally authorised recipients or the Appellant as the case may be. As a result the Appellant will be able to refer any queries or enquiries raised by the Income Tax Department or any other authority or fund holder to the Respondent.

There was a deduction of Shs 8,380 covering two months' salary; one month as accrual salary for the period of notice of one month, and one month's leave outstanding. That would appear to be all that is necessary to comply with the benefits set out in the Letter of Appointment. The Appellant has received this sum.

The consequence is that on the terms of the judgment of Mr Justice J.S. Patel, we cannot find any fault with the assessment of damages and the award of interest and costs. The appeal must therefore be dismissed; but we would like to add a short note of clarification. We would like to make it absolutely clear that we do not endorse Mr Justice J.S. Patel's judgment in any way. On the other hand, it is necessary for appeals to be properly instituted. It would seem to us that where liability has been established by a preliminary decree, it is necessary to appeal within proper time against that preliminary

decree. We would commend the decision in *Baker v Rush* [1964] E.A 602 as establishing that point. The foundation is section 68 of the Civil Procedure Act, but the decision of this Court's predecessor in *Baker v Rush*, which analyses the meaning of a preliminary decree, is of importance, as having declared the law which has been followed for a long time. The argument is very well set out on pp 604 and 605 where the distinction was drawn between preliminary decrees and interlocutory orders. The former conclusively determine the rights of the parties on some issue or issues though further proceedings must be taken before the suit can be completely disposed of. That follows the definition of "decree" in the Civil Procedure Act. As against that there are ordinary interlocutory orders on such matters as misjoinder, jurisdiction, limitation and so forth. The latter are seen as having the effect of merely regulating procedure and do not decide the rights of the parties.

Bearing this distinction in mind, Mr Justice J.S. Patel decided that the Defendant Corporation had no defence and that the Plaintiff's rights to damages must prevail. Consequently Mr Justice J.S. Patel's decision resulted in a preliminary decree, which could not be the subject of a mere cross-appeal. It should have attracted its own appeal. The court did its best to indicate this to the Defendant Corporation but no action was taken. Consequently there being no appeal against the preliminary decree, Mr Justice J.S. Patel's judgment had to stand; but without our approval.

We order that the appeal be dismissed with costs, subject to the question of the deductions referred to above.

**Dated and delivered at Nairobi this 6th day of February , 1989**

**H.G PLATT**

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**JUDGE OF APPEAL**

**J.M GACHUHI**

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**JUDGE OF APPEAL**

**R.O KWACH Ag**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**