IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MILLER CJ, NYARANGI & PLATT JJ A

CIVIL APPEAL NO. 92 OF 1986

ALOYCE MARIERA …….....… APPELLANT

VERSUS

KENYA BUS SERVICES (MSA) LTD……..….DEFENDANT

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

This is an appeal from a judgment of Bhandari J following a hearing which took place at Mombasa to determine the claim of the appellant as plaintiff that the defendant summarily and wrongfully dismissed him from his employment. By that judgment, the plaintiff's claim was dismissed with costs to the defendant.

The plaintiff was employed by the defendant as a bus conductor at a salary of Kshs 97 per month. In 1978 the plaintiff was appointed a toll collector attached to the defendant's Likoni ferry where he served until October 18, 1976 when he received a letter from the defendant by which he was summarily dismissed. The plaintiff's claim is that he has suffered loss and damage and, therefore, he claims general and special damages.

The defendant's contention is that whilst in the employment of the defendant as a toll collector, the defendant falsified entries in the ticket machine used by him in the course of collecting fares at the ferry, causing the defendant to summarily dismiss him. The defendant further contends that the plaintiff has not suffered any loss and that he has neglected or refused to collect his salary at the time he was dismissed. In his short memorandum of appeal, the plaintiff says that the trial judge erred in law by allowing the defendant to adduce evidence of what purportedly took place on September 18, 1976 thereby prejudicing the plaintiff's case and that it was an error for the judge to find that the plaintiff / appellant stole Kshs 21 from the respondent and that the judge erred in law by refusing to admit the plaintiff's evidence.

The first complaint lodged by Mr Juma, the plaintiff's advocate, was that the judge, having disregarded the incident of September 18, 1976 affecting the appellant, should not have taken the evidence of the incident against the appellant. Secondly, that the appellant should have been permitted to produce his agreement with the defendant and so prove what he had lost by the wrongful dismissal. Also that the appellant's evidence was shut out in that he was not allowed to produce cards which documents were relevant to the plaintiff's claim of general damages.

Mr Satchu for the defendant argued that the trial judge had before him evidence about the plaintiff other than the incident of September 18, 1976. Reference was made to the three dates ie September 25, 26, and 27, 1976 whose evidence the judge bore in mind and which was not challenged by the plaintiff in his evidence. It was pointed out that there was no evidence from the Department of Labour in support of the plaintiff's claim. Mr Satchu submitted that if this court upsets the trial judge, there should be no order as to costs because in view of counsel, the plaintiff's case was not properly presented.

This is a first appeal from a trial by the High Court. Therefore, this court must reconsider the evidence, evaluate it and make its own conclusions though bearing in mind that it has neither seen nor heard the witnesses and appropriately allowing for that. If the trial court failed on some relevant point to consider some particular circumstances, this court would not feel bound to accept the judge's finding of fact; *Selle v Associated Motor Boat Co Ltd* [1968] EA 123 at page 126 and *Peter v Sunday Post*, [1959] EA 424 at page 429.

We turn to consider the submission on behalf of the appellant under the first and second grounds. The judge referred to the defendant's evidence that the plaintiff stole from the defendant on September 18, 1976 and held that the evidence was not strictly admissible and added,

"the court, therefore, disregards all evidence produced in respect of September 18, 1976."

However, the judge proceeded to find that the charge of theft in respect of Kshs 21 was proved, on the grounds as we understand the judge's reasoning that the standard of proof of a criminal charge is on the balance of probabilities. That conclusion is not sustainable in the absence of evidence that the plaintiff was charged with theft of Kshs 21, tried and convicted. An allegation by a party that another has stolen is no proof of the offence of theft. There was no evidence before the judge that the plaintiff stole Kshs 21, the property of the defendant between September 25, 1976 and September 27, 1976.

The evidence against the plaintiff was that as a toll collector, he must have fiddled with the sweda machine because on September 27, 1976 when Jahir (DW1) checked the machine he noticed one "A" ticket among "B" tickets and that the "A" ticket had been altered by hand to read "B" and that as a result there was a shortfall on each of the three days ie September 25, 26 and 27, 1976. According to the personnel manager, the company concluded that the plaintiff had stolen those monies.

The judge found justification for the summary dismissal on the complaint that during the plaintiff's theft there was a ticket punched with "A" worth Kshs 21 which meant that the total amount was increased from Kshs 3,301 to Kshs 3,322. There was no evidence that the defendant was Kshs 21 short in respect of his shift. That would appear to support the plaintiff's evidence that the key of the lock X which has its own key and which was used to take out the previous numbers and then provide the plaintiff with his staring number was kept by the supervisor who also keeps all other keys was not challenged. It will be seen that the judge did not refer to that evidence before concluding that the theft in respect of Kshs 21 had been proved. That is vital evidence and no reason was given for overlooking it. Having taken into account the plaintiff's evidence and viewing the whole matter in that light we do not think that the decision of the judge can be said to have been reached after a full consideration of the evidence. For our part on the evidence we are far from accepting that the plaintiff fiddled the sweda machine or that he stole Kshs 21 from within the machine.

The second ground on which the plaintiff seeks to upset the judgment of Bhandari J is that he was not allowed to adduce evidence as to the agreement between him and the defendant. Section 14 of the Employment Act, cap 226, which settles the matter in favour of the plaintiff, provides,

"14 (1) Every contract of service:

(a) for a period, or a number of working days which amount in the aggregate to the equivalent, of six months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to

be completed within a period, or a number of working days amounting in the aggregate to the equivalent, of six months, shall be in writing."

It was an error for the judge to hold against the plaintiff that he could not refer to the contract because the fact of the contract was not pleaded. The plaintiff was seeking to cite a statutory provision, and a relevant one at that, which he did not have to plead. The erroneous decision on that limb of the plaintiff's case was prejudicial to the plaintiff's case. With regard to Mr Satchu's view that in the event of the appeal being allowed, there should be no order as to costs, we are of the opinion that the grounds on which we are allowing the appeal originate in the judge's handling of the evidence and of the Employment Act. The advocate for plaintiff at the trial did not contribute to errors, nor in our view, do the pleadings. For the successful plaintiff to be deprived of his costs, on the ground advanced by Mr Satchu, the charge of dereliction of duty, on the part of the plaintiff's advocate, in the High Court, in failing to present the plaintiff's case properly, making it difficult for the defence to know what case to meet, would have to be made out. That is not the case here.

Accordingly, we allow this appeal, with costs and order that there be assessment of the amount due to him.

Platt JA (Dissenting). The principle questions raised in this first appeal are whether the employer, the Kenya Bus Services (Mombasa) Ltd had been entitled to summarily dismiss its employee Aloyce Mariera, and if so, whether the employer had paid all dues to Mr Mariera. The latter had brought a suit against his employer claiming general damages, and special damages of Kshs 1,516.05 for wrongful dismissal. The High Court dismissed this suit with costs. Mr Mariera has now appealed to this court. But it will be convenient to refer to the parties as they were at the trial.

The case pleaded by the plaintiff was that by a contract, not stated to be in writing, the defendant employed the plaintiff as a bus conductor in 1954. In 1959 the plaintiff was made a toll collector, stationed at the defendant's Likoni ferry. The plaintiff worked there until October 18, 1976 when by a letter of that date, he was summarily dismissed. The plaintiff complained that he had not been given any notice, and leave salary had not been paid.

His salary at the time of his dismissal had been Kshs 708.05 and accordingly he claimed one month's salary in lieu of notice and one month's leave salary for leave due. That came to Kshs 1,516.10. Above that he claimed general damages. But that claim would be controlled by the terms of the contract (see *Ombanya vs Gailey & Robert's Ltd*, [1974] EA 552). This pleading proved to be faulty. To begin with, the plaintiff admitted in evidence that he had enjoyed his leave in 1976 before he had been dismissed. He therefore had no claim for salary in lieu of leave. The case proceeded to trial on the issue whether the defendant had been entitled to dismiss the plaintiff without notice in the course of which difficulty arose as to the nature of the contract. Was there a written contract, and if so what were its terms? The learned judge held that the plaintiff has stolen his employer's money, and that disentitled him to any notice, beyond which no further general damages could be awarded. The learned judge considered that as the plaintiff's advocate had amended his plaint even though he had had two years in which to do so, the Court could not consider whether a written contract existed, let alone what its terms were. It was stated in argument that this concerns some claim for Provident Fund. This is a somewhat unreal problem in view of the cheque for Kshs 2,866.60 offered to the plaintiff, as will be seen presently.

The plaintiff challenges the finding that he had stolen the defendant's money, and indeed the learned judge's reasoning is not entirely logical. The defence pleaded that the plaintiff while carrying out his duties as a toll collector, falsified entries in the ticket machine used by him when collecting fares at the ferry. It did not claim that the plaintiff had stolen any fares paid by the motorists using the ferry. It is important to notice that falsification of the entries in issuing tickets was not tied to any specific dates.

The learned judge went further than the defence and held that the defendant had proved one charge of theft in respect of Kshs 21. This sum of money emanated from one ticket sold on September 18, 1976. But a little earlier in his judgment, the learned judge had held that the evidence relating to September 18, 1976 was not strictly admissible, because neither the complaint sheet, the letter of discharge nor any other

document had mentioned September 18, 1976. Naturally Mr Juma considered that the appeal must succeed if that were so – that there was no evidence to support the finding of theft of Kshs 21. As a logical development from the exclusion of evidence on September 18, 1976, Mr Juma must be right. But the real answer to this point is that the learned judge was wrong to exclude this evidence, and indeed wrong to stray into findings of theft, unless he explained that the dismissal was given on different grounds to those on which the defence was based.

There was ample evidence to prove that on September 18, 1976, the plaintiff operated his sweda ticket machine, while collecting tolls on the second shift of that day, namely the "B" afternoon shift. A colleague had carried out the "A" shift. A ticket issued from the machine would indicate the shift, the date and how much the ticket represented in cash. Ex D was a ticket issued by the plaintiff. It was punched with "A" and then altered to "B" in handwriting. It fell between other "B" tickets, as the audit rolls shows (Ex B). The audit roll was similarly altered in the way that the ticket had been altered. The waybill covering this transaction was made out by the plaintiff and accounted for the same total money collected as the audit roll. The account for the "A" shift was altered to add Kshs 21 to it. Because of these accounting documents, the dispute as to who had the keys, (the appellant or the defendant's servants) had to be resolved in favour of the defendant. Otherwise his audit roll could not have been altered from B to A, which then had to lead to the correction of A shift's total when the master key was inserted, to the disadvantage of the A shift.

It is an inference, correct beyond peradventure, that the plaintiff altered these documents, and I would agree that the further inference of theft was reasonable suspicion of the committal of the offence of fraudulent accounting contrary to section 330 of the Penal Code.

Similar alterations took place between September 25 and 27, 1976. On September 27, 1976 plaintiff was reported to the Personnel Manager, Mr Ocharo (DW2). As a result of these investigations a case sheet was drawn up charging the plaintiff with stealing from the company by punching wrong keys from the sweda machine while on duty on September 25, 26 and 27, 1976 at Likoni ferry on duty 2B did steal money and forged letter "A" altering it to be letter "B". But although the witnesses testified what they had found, the audit rolls were lost for the days September 25 and 27, 1976. Consequently no evidence in the form of exhibits was tendered, and the High Court seems to have preferred the evidence of what occurred on September 18, 1976. The learned judge passed on from noting the loss of audit rolls relating to September 25 and 27, 1976, to the proof of one theft on September 18, 1976, which he accepted.

The learned judge was greatly troubled by the charge of theft set out in the case sheet. Although he found theft of Kshs 21 on September 18, 1976 actually on the documents (Exs A,B,C,D and E), yet he had also held as Mr Juma pointed out, that these documents had been inadmissible, because the case sheet had not referred to September 18, 1976. I presume that the learned judge thought the defence could not be wider or based on different grounds from those stated in the charge sheet. The common law is stated in terms in *Halsbury's Laws of England* Vol 16, 4th Ed para 647.

"647 *Grounds for dismissal discovered subsequently*. It is not normally a term of the contract of employment that the employer, dismissing an employee for good cause, should state the ground for the dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of fact ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time."

This is more greatly elaborated in *The laws of Master and Servant* by Batt, 4th Ed P 76 where in *Boston Deep Sea Fishing Co vs Ansell* (1880) 39 Ch D 339. It was held that if the fact was established after the time the action was brought, dismissal would be justified by proof of that fact. It is also mentioned that in *Baillie vs Kell* (1838) 4 Bing NC 638 a different reason was allowed to be proved on the defence of a claim for wrongful dismissal, than that given at the time of the dismissal. It follows that at Common Law the learned judge was bound to regard the defence as the vital issue and not what was said at the time of dismissal. Had he done so he would have found that there was evidence of falsification of the documents in circumstances that fraud was intended.

Although that may be the position at Common Law, it is of course necessary to ascertain whether that law holds good under the Employment Act (Cap 226). The learned judge noticed sections 5(3); 17(g) and 14 of the Act. I agree with the learned judge that these are the only relevant provisions of this Act. But section 14(1) needs facts, which are not on the record, before it can be decided whether this agreement relates to one of the contracts in section 14(6) and whether the contract is one falling within section 14(1). Then section 17 merely specifies a catalogue of what may be grounds for summary dismissal, section 17(g) providing that it may be a sufficient ground:-

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

This section, does not state when knowledge of any such error may come to hand, and indeed even if proved section 17 allows the employee to dispute whether the facts give rise to gross misconduct, which is the generic description of all the complaints in the section. It is my opinion therefore that the Common Law still applies as to when the employer must finally justify his action in dismissing his employee.

There was evidence before the High Court to justify a finding of false alteration of the accounting documents. That evidence pertained to all the dates, September 18, 25, 26 and 27. No doubt the evidence was most cogent on September 18, but the evidence of the officials of the bus company as to what occurred on September 27, 1976 was important, and their other discoveries were not negligible. These were all shown to the Union officials and the appellant. The case sheet also indicated that the plaintiff had altered documents, and punched the wrong shift letter on the ticket. That is all germane to the defence. Hence these falsifications were in themselves a case of committing a criminal offence of fraudulent false accounting or giving rise to reasonable and sufficient suspicion that that offence had been committed. The learned judge need not have excluded any evidence, and need not have unnecessarily confused the case sheet with the defence.

On this basis, there was evidence in support of the defence pleading which justified summary dismissal. The honest operation of the sweda machine must have been a cardinal part of the plaintiff's duty. The falsification proved allowed the plaintiff to deduct money received, but also infringed his colleague's work, causing the latter to account for an extra Kshs 21. His employer could not accept this type of falsification over several days. It was not an isolated occasion. In my view there was every justification in the employer dismissing the plaintiff summarily, even for one improper falsification, since it brought another colleague into disrepute.

I pass on then to the question of the provident fund, or whatever other terms the appellant now wishes to rely upon. I agree with the learned judge, with respect, that it is necessary to plead the complaint fully. If a contract is to be relied upon, it is to be pleaded, whether oral or in writing, and especially the clauses which have been breached or are otherwise to found a claim. Order VI Rule 3(1) of the Civil Procedure Rules requires this. Rule 3(2) of those Rules requires the substance of a document to be set out if relied upon. (See also Order VII Rule 6 of the Rules). What happened in this case is that the plaintiff relied on provisions about pay in lieu of leave and notice. General damages claimed must be restricted to the period of notice.

On this basis the plaint sufficed. But if special terms were to be introduced which were to be found in a document not hitherto pleaded, it was quite correct for the defendant to expect the plaintiff to amend as required under

Order VI Rule 3 of the Rules. The plaintiff did not do so over a period of some two years. It does not matter whether the contract was by law required to be in writing; what matters in this context is what was claimed in the plaint. That is for the plaintiff to decide. He had advice from counsel and apparently it was that it was unnecessary to plead the terms of the written contract, after the matters had been put in issue in court. So be it.

The learned judge's attitude to the plaintiff's presentation of his case was confirmed in this court. As Mr Juma felt aggrieved that some claim had not been pleaded, this court inquired whether he would like to

amend the plaint even at the stage of the appeal. Mr Juma declined to take any step. In those circumstances it cannot be right for this court, or the High Court, to guess at what some claim might be. I am the more content to leave the matters as they stand because of the calculation of Kshs 2,866.50 offered to the plaintiff. It included an element of leave pay, which was extra to his entitlement, and it also included the return of the plaintiff's contributions to provident fund. The plaintiff can therefore recoup himself at least to some degree. If there is any further claim outstanding, then there are still other procedures that he can adopt to recover what he thinks is owed, but which he has not claimed in the High Court.

For these reasons, I consider that the appeal should be dismissed, albeit for other reasons than those stated by the learned judge. I would dismiss the appeal with costs in this court to the respondent.

Dated and Delivered at Mombasa this 30th Day of April, 1987

C.H.E MILLER

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CHIEF JUSTICE

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL