



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & ODEK, J.J.A)

CIVIL APPEAL NO. 151 OF 2015

BETWEEN

DANIEL NJUGUNA MUCHIRI APPELLANT

AND

SUGAR BAKERY LIMITED RESPONDENT

(An appeal against the Judgment and Decree of the Industrial Court of Kenya

at Nairobi (Maureen Onyango, J) dated 8th May, 2013

in

Industrial Cause No. 355 of 2010)

JUDGMENT OF THE COURT

This appeal challenges the refusal by the Industrial Court (now the Employment and Labour Relations Court) (**Maureen Onyango, J.**) to declare that the employment of the appellant was wrongfully terminated, and the rejection of a claim of KSh.2,296,000/= made as a consequence of that termination.

The appellant was employed by the respondent in 1995 as the manager of its bakery in Kerugoya. The employment terms were not reduced into writing and it is not clear what his initial salary was. But he pleaded that on 22nd July, 2009, he was summarily and unfairly dismissed from the employment by the Managing Director (MD) of the respondent. At the time, his salary was Sh.30,000/= per month. Five days later, on 27th July, 2009, the appellant reported the dismissal to the labour officer in Kirinyaga, demanding through him, KSh.1,511,500/= as terminal dues. The labour officer summoned the MD with that demand but the MD wrote back admitting only KSh.294,000/= contending that the dismissal was due to the appellant's gross misconduct. A conciliation meeting was subsequently called and in the end, an agreement was reached for the respondent to pay KSh.442,000/= to the appellant,

broken down as follows:

a) 4 years annual leave	kshs 84,000/=
b) Rest days (2) years	kshs 104,000/=
c) Public holidays (2) years	ksh 44,000/=
d) Service pay for 14 years	kshs 210,000/=
Total	kshs 442,000/=

The agreement was signed before the labour officer on 21st October, 2009 and the respondent committed to pay the agreed sum by six installments of KSh.80,000/= with effect from 8th December, 2009. It is acknowledged that the respondent paid

KSh.193,500/= to the appellant on 8th November, 2009, but made no other payment by the time the appellant went to court on 7th April, 2010. In his statement of claim, the appellant changed tact and demanded special damages in excess of KSh.2 million which he tabulated as follows:

(a) Salary arrears	- shs 163,500/=
(b) Notice	- shs 30,000/=
(c) Off days	- shs 728,000/=
(d) Public holidays	- shs 308,000/=
(e) Gratuity	- shs 210,000/=
(f) House allowance	- shs 756,000/=
Total	2,195,500/=

He also claimed general damages for the wrongful dismissal which he claimed were occasioned by the dismissal thus injuring his dignity, self respect and humiliating him.

In its defence, through the MD, the respondent averred that it had summarily dismissed the appellant for gross misconduct in that the appellant absconded work between 17th and 22nd July, 2009. On 27th July, 2009, the MD asked him about the persistent theft of crates of bread from the company, but the appellant physically beat him up. A report of the assault was made to Kerugoya Police station and a medical report was produced to confirm it. He denied that any money was due to the appellant asserting that the agreement signed before the labour officer for payment of KSh.442,000/= was made in good faith without admission of liability, but the appellant had turned round to extort money from the respondent. He had no money to pay the appellant because he left Kerugoya for good after threats were made to his life.

Only the appellant and the MD testified orally in the suit. After the hearing, the trial court found that the appellant had not proved that his dismissal was unfair. The court then went ahead and considered each item of claim as stated above and found as follows:

(a) Salary arrears: proved at Shs.163,500/= as it was not denied.

(b) Notice: not claimable since dismissal was not unfair.

(c) Off days: Dismissed. There was no strict proof as required for special damages. It was not clear how many days are claimed and at what rate. At any rate a claim of off days for a period in excess of 3years was time barred under **Section 90** of Employment Act.

(d) Public Holidays: Dismissed. Part of the claim was time barred while the rest was not proved.

(e) Gratuity: Dimissed. No proof that gratuity was part of the terms of employment as gratuity is not provided for by law. Service pay at 15 days salary for each year worked as provided for in **Section 40** of the Act awarded in respect of severance pay at Kshs.210,000/=.

(f) House Allowance: Not claimable since the salary was consolidated and therefore inclusive of house allowance as provided for in **Section 31 (2)** of the Employment Act.

In the end, the court held as follows:-

"In conclusion therefore I would find that the Claimant is entitled to a total of Shs.373,500/=. However, as I mentioned earlier, there was an agreement for the Respondent to pay the Claimant the sum of Shs.442,000/=. The Claimant stated in his testimony that this was not accepted by him. There is however no indication anywhere that he objected to the agreement. On the contrary he accepted a sum of Kshs.193,000/= after the signing of the agreement. The logical conclusion is that he accepted the settlement and received part payment pursuant to the settlement. I therefore find that there was a valid settlement of the claim by the Claimant reached through the conciliation of the Labour Officer Kerugoya District, a Mr. L. N. Nthaka, that the Claimant received Shs.193,000/= in part payment of the same and that he is therefore estopped from claiming additional compensation over and above the sum agreed. In any event, the sum agreed to is higher than the amount I have found that the Claimant is entitled to which is Shs.373,500/=. I therefore give judgement to the Claimant in the sum of Kshs.442,000/= less Kshs.193,000/= already received leaving a balance of Kshs.249,000/= which I award him."

Those are the findings that aggrieved the appellant who lays out four grounds of appeal essentially complaining that the trial court erred in:

"1. failing to find that the appellants employment was unfairly terminated.

2. making judgment against the weight of the evidence in respect of the claim for Ksh.2,296,000/=.

3. failing to find that the appellant had proved on a balance of probabilities his full claim for Kshs.2,296,000/=.

4. disregarding admissions made by the respondent."

At the hearing of the appeal, only learned counsel for the appellant **Miss Kiragu**, instructed by M/s Magee wa Magee & Company Advocates, made an appearance. Neither the respondent nor his counsel, who was served, appeared before us. On her part, Ms Kiragu simply told us that she was relying on written submissions filed in the matter without any highlighting, and cited no authorities.

In the written submissions, the appellant went into great length to show that his employment was unfairly terminated because he was not given any notice or paid his terminal dues as tabulated in his statement of claim. He should therefore, in his view, have been awarded 12 months' salary as compensation. He was also entitled to one month's salary in lieu of notice. As for the findings made on the other claims, the appellant submitted that the pleadings specified the number of off days he was not given and it was easy for the court to calculate the compensation due; that part of the claim was admitted by the respondent under the settlement agreement dated 21st October, 2009; that the pleadings referred to the public holidays worked and the court could have taken judicial notice without proof; that part of the claim was admitted in the settlement agreement dated 21st October, 2009; and that the onus was on the employer to prove that there was no house allowance payable, otherwise **Rule 4** of the **Regulation of Wages (General) Order** for payment of 15% of the salary as house allowance would apply. He concluded by summarizing the amounts due to him as follows:

a) Salary arrears -Kshs. 163,500/=

b) Gratuity -Kshs. 210,000/=

c) Damage for unfair termination of services -Kshs. 360,000/=

d) One month's Salary in lieu of notice -Kshs. 30,000/=

e) Sum due for off (rest) days for 14 years -Kshs. 728,000/=

f) Sum due for public holidays for 14 years -Kshs. 308,000/=

g) House allowance for 14 years -Kshs. 759,000/=

TOTAL -KSHS. 2,555,500/=

We have considered the appeal in the usual manner of a retrial in order to arrive at our own conclusions in matters of fact and law. See **Rule 29 (1) (a)** of the Court's rules. Again, as usual, we caution ourselves that the findings of fact made by the trial court are entitled to deference at the first appellate level. The findings may, however, be interfered with where they are 'based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings'. In the case of **Mwangi vs Wambugu [1984] KLR 453**, this Court stated thus:

"An appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

As stated above, the trial court made findings on whether the termination of the appellant's employment was unfair and proceeded to make other findings on particular claims, allowing some and dismissing others. However, in our view, all that was in *obiter dicta*. That is because the reasons for the decision, or the *ratio decidendi*, was not based on those findings. As shown above, the trial court held that the appellant was bound by the agreement signed before the labour officer in which the claims now made before the court were compromised. Judgment was accordingly entered for the sum agreed on, less the amount paid.

The initiative to refer the matter to the labour officer was the appellant's own. Indeed, he made it the basis of his claim in the pleadings and referred to it in oral evidence and in submissions before us. Strangely, however, the appellant seems to invite us to totally ignore the agreement and consider the claim as pleaded.

There is nothing unlawful about parties to a dispute resorting to alternative methods to resolve that dispute. Indeed the Constitution in **Article 159 (2) (c)** encourages the promotion of such initiatives. In turn the **Employment and Labour Relations Court Act, 2011** in **section 15** allows for conciliation over disputes emanating from employment and labour relations. It provides in relevant part:

15. Alternative dispute resolution

(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.

And so it is that the conciliation made before the labour officer in this matter on 21st October, 2009 cannot be ignored. The appellant initiated it, both parties were involved; it was not made 'without prejudice', the appellant pleaded it, testified on it; and received part payment under it. In those circumstances, the trial court did not err in finding that the appellant was estopped from denying the settlement. The appellant would have done better enforcing the settlement rather than filing a fresh suit. To do so, in our view, would be in abuse of court process.

In the result, we find no merit in this appeal and we order that it be and is hereby dismissed. As there was no attendance by the respondent at the hearing of the appeal, there will be no order as to costs.

Dated and delivered at Nairobi this 10th day of May, 2019.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR