



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)**  
**CIVIL APPEAL NO. 7 OF 2015**

**BETWEEN**

**BARRACK MUSUMBA.....APPELLANT**

**AND**

**NYANZA SUGAR & PRODUCE .....RESPONDENT**

*(Appeal from the judgment of the Industrial Court at Kisumu, H.S. Wasilwa, J.) dated 17<sup>th</sup> September, 2014*

**in**

**Industrial Court No. 273 of 2013)**

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**JUDGMENT OF THE COURT**

In this appeal, *the appellant, Barrack Musumba*, claims that the respondent unlawfully terminated his employment and failed and/or refused to pay him severance pay, underpayment of salary, allowances and damages.

The appellant’s claim is that he was employed by the respondent as a driver in March, 1988 to September, 2009 and that he was earning a monthly salary of Kshs. 9,000/= which was later increased to Kshs. 14,000/= per month. He claimed that the respondent wrongfully terminated his employment on 13<sup>th</sup> September, 2009.

The appellant filed a claim against the respondent in the Employment and Labour Relations court for a sum of Kshs. 3,406,200/=, made up as follows;

- a) Payment in lieu of 3 months’ notice: Kshs 14,000/- x 3 = Kshs. 42,000/-;
- b) Payment for unlawful or summary termination;

- c) Payment for house allowance;  $15\% \times 14,000/- \times 12 \times 21 \text{ years} = \text{Kshs. } 529,2000/-$
- d) Service/ gratuity  $15 \times 21 \text{ years; Kshs } 7000/- \times 21 = \text{Kshs. } 147,000/-$
- e) Salary underpayment;  $\text{Kshs. } 10,000/- \text{ per month for } 21 \text{ years} = \text{Kshs. } 2,520,000/-;$
- f) Severance pay; and
- g) Exemplary damages; Costs of the suit and Interest on (a) and (b).

It was his case that, his employment was terminated by a verbal communication, and that the respondent refused to pay him house allowance or leave allowance; that he was paid less than the minimum wage which he claimed should have been Kshs. 18,000/= a month.

On the theft of the motor vehicle, the appellant denied having been involved, and blamed the turn boy who was charged in court with its disappearance. He admitted that he received a sum of Kshs. 100,000/= from the respondent.

In cross-examination, he testified that he had issued his employer with a retirement notice, and had left employment in 2010. It was whilst he was serving the notice period that the motor vehicle, a Mitsubishi 10 tonnes lorry, had disappeared. He denied that the respondent had failed to settle his claim for Kshs. 322,000/=, but admitted receipt of a sum of Kshs. 100,000/=.

It was the respondent's defence that the appellant was employed as a driver in September 1989 and that he served until 31<sup>st</sup> October, 2009 when he was summarily dismissed. At the time of his termination, he was earning a basic salary of Kshs. 14,000/=. The appellant reported a dispute to the labour officer following which, a mutual conciliatory agreement was reached. In terms of the agreement, the appellant signed a certificate of payment for a sum of Kshs. 100,000/= as full and final settlement, and confirmed that he had no further claims against the respondent or its directors.

Nailesh Kumar Magral Raichush Roy testified on behalf of the respondent. He stated that on 9<sup>th</sup> August, 2009, the appellant was assigned a Mitsubishi lorry to collect and transport sugar from Mumias Sugar Company and to deliver it to their shop in Kisumu. After the sugar was loaded, neither the appellant nor the motor vehicle returned to the workplace. When he reappeared the following Monday, the appellant informed the witness that the motor vehicle had been stolen, whereupon, the matter was placed under investigation. So as to facilitate investigations, the respondent sent the appellant on leave.

Nailesh Kumar testified that the appellant was later charged in court at Butere, and thereafter, when he was unable to explain the loss of the motor vehicle on the date in question, the respondent had summarily dismissed him by a letter dated 31<sup>st</sup> October 2009. The appellant reported the matter to the labour office where his terminal dues were calculated, and the summary dismissal was changed to redundancy as he no longer had a vehicle to drive.

In the judgment, on the question of whether the appellant was dismissed or had resigned from employment, the learned judge found that the appellant was still in employment when the motor vehicle was stolen, which had resulted in his summary dismissal from employment. The court concluded that the dismissal was justifiable. With regard to the question of whether the appellant was entitled to all the benefits and allowances claimed, the court found that since the employer had suffered substantial loss arising from the theft of the motor vehicle and the sugar consignment, which the appellant had been unable to explain, he was not entitled to the sums claimed, and with that, the court dismissed the appellant's claims with costs to the respondent.

The appellant was aggrieved by the decision of the lower court and has filed this appeal on the grounds that, the trial court erred in concluding that the appellant committed a criminal offence against the respondent and therefore was properly dismissed; that the appellant's dismissal was within the provisions of **section 44 (4) (g)** of the **Employment Act**; that the appellant occasioned loss to the respondent; that the

court failed to find that the appellant had not been properly compensated by the respondent for summary dismissal; that the court relied on matters that were not pleaded in the defence or raised in court during the trial; and that the court fell into error by dismissing the appellant's claims.

In his submissions, learned counsel for the appellant, **Mr. M.B. Mabale**, submitted that the trial court came into a wrong conclusion when it found that the appellant was summarily dismissed, yet he had been declared redundant. Counsel argued that no criminal liability was established, and the appellant was not charged with the offence of robbery.

It was further submitted that since the parties had agreed that he was to be declared redundant, no fault could be attributed to him. Further, that in the event that the appellant was summarily dismissed under **section 44 (4) (g)** of the **Employment Act**, the respondent had failed to afford him a fair hearing.

With regard to the appellant's claims, counsel submitted that since the court also concluded that the appellant had been declared redundant, it should not have disregarded the amounts claimed, as they were the appellant's lawful entitlement, and the amount of Kshs. 100,000/= paid to the appellant did not cover the redundancy amounts due to him.

In reply, learned counsel **Mr. D.M. Ouma** for the Federation of Kenya Employers, opposed the appeal. Counsel submitted that the jurisdiction of the court was not in respect of a criminal suit, but concerned a contractual dispute where mutual trust and confidence in the employee had broken down following the theft of a motor vehicle which at the time, was under the appellant's care; that the fact that the robbery took place and the turn boy was arrested has not been denied by the appellant. The summary dismissal was based on the belief that the employee had breached his contract with the employer.

Counsel further posited that the notion of a redundancy was arrived at by consent under the Ministry of Labour conciliatory agreement and the payment of Kshs. 100,000/- was based on an amicable agreement to which the employee had appended his signature. The appellant later challenged the agreement well after the period specified by law, and demanded the payment of terminal dues.

Regarding the appellant's claims, counsel submitted that the claim for 3 months' payment in lieu of notice had not been proved, and that he was not entitled to compensation for unlawful dismissal as he was summarily dismissed under **section 44 (4) (g)** of the **Employment Act**.

Regarding underpayment of salary and the claim for house allowance, counsel submitted that the learned judge rightly found that the salary of Kshs. 14,000/- was not an underpayment, and was inclusive of house allowance, as this was in compliance with the **General wages order and sectoral wages order**.

Regarding Service or Gratuity, counsel submitted that these were two different concepts, an employee who contributed to National Social Security Fund was not entitled to service as this would amount to a double payment. In addition, gratuity was not a compulsory payment. On exemplary damages, it was submitted that the circumstances of this case do no call for an award of exemplary damages.

Having considered the pleadings and submissions of the parties, we are of the view that the questions for determination in this appeal turn on whether the respondent terminated the appellant's employment by summary dismissal, or by his having been declared redundant, and further, dependent on the findings in respect of the termination of his employment, whether the appellant was entitled to 3 months' pay in lieu of notice; underpayment of salary; payment for unlawful or summary termination; payment of house allowance; service/gratuity; and exemplary damages claimed.

Before we address the issues before us, it will be necessary to restate our duty on a first appeal as set out in ***Makube vs Nyamiro [1983] KLR 403***;

***"...a Court of Appeal will not normally interfere with a finding of fact by a trial court, unless it is based on no evidence, or on a misapprehension of evidence, or the judge is shown demonstrably to have acted on wrong principles."***

We will begin by considering whether the appellant was summarily dismissed, and if so whether it was unlawful. **Section 44 (4) (g)** of the **Employment Act** provides that an employer can summarily terminate the services of an employee if;

***“An employee commits or on reasonable and sufficient grounds is suspected to have committed a criminal offence against or to the substantial detriment of his employer or his employer’s property.”***

The appellant’s complaint is that he was summarily dismissed through a verbal communication without notice, and further, that the theft of the motor vehicle had caused the respondent to declare him redundant since he no longer had a motor vehicle to drive. As a consequence he claimed that he was entitled to redundancy and severance pay.

The respondent’s case on the other hand is that the appellant was summarily dismissed following the theft of its motor vehicle, a Mitsubishi 10 lorry together with a consignment of sugar, whilst under the appellant’s care. The appellant did not return to his work place soon thereafter, and it took a further two days for him to report the theft to his employer.

To facilitate investigations, the respondent sent the appellant on one month’s leave. When he returned, the appellant was provided an opportunity to explain, how the motor vehicle had disappeared, and when this was not forthcoming by a letter dated 31<sup>st</sup> October 2009, he was summarily dismissed. The letter read in part;

*“On 8<sup>th</sup> August 2009 together with your turn boy you were assigned to transport company goods from Mumias Sugar Company to Kisumu. To date you have not been able to deliver the same goods or give a clear explanation on the whereabouts of the same goods. You are aware that it was duty (sic) to safely deliver the goods.*

*Now that you have been unable to account for company property to your possession by virtue of your employment, you are hereby dismissed for gross misconduct.”*

It is not disputed that the respondent’s motor vehicle was stolen on 8<sup>th</sup> August 2009. There is also no dispute that the appellant was still in the respondent’s employment on the material day, as he had been assigned the motor vehicle to transport a consignment of sugar. The appellant has also not denied that the motor vehicle was stolen whilst in his possession. He testified that;

***“My turn boy was arrested and charged when it was stolen. I was in the vehicle. It was from a robbery. Vehicle was Mitsubish (sic) FH.”***

**Section 44 (4) (g)** makes it is clear that an employee may be summarily dismissed where an employee commits or on reasonable and sufficient grounds is suspected to have committed a criminal offence against, or to the substantial detriment of his employer or his employer’s property.

In the instant case, the appellant’s actions following the theft of the motor vehicle gave rise to a reasonable and sufficient ground for suspicion of his possible involvement in the theft of the motor vehicle. This was for reasons that, he failed to immediately report the theft of the motor vehicle to his employer, failed to deliver the goods as instructed, and failed to report to his work place until two days later. In addition, despite the contention that he was not afforded a fair hearing, the letter of dismissal stipulated that he was provided an opportunity to explain the circumstances leading to the loss, but he had failed to do so.

The appellant’s actions, together with the unexplained loss of the motor vehicle and the consignment of sugar, led the respondent to suspect that the appellant may have been involved in criminal conduct, as a consequence of which, it suffered substantial loss of its property. On this basis, we agree with the learned judge, that the requirements of **section 44 (4) (g)** of the Act were complied with. When this is considered in conjunction with the evidence, that the appellant though awarded an opportunity to explain the loss, he

failed to do so, we therefore, find that his summary dismissal which was communicated through the letter dated 31<sup>st</sup> October 2009, was justified and lawful.

It was the appellant's further contention that he was declared redundant, and as a consequence was entitled to redundancy and severance pay.

The question of an alleged redundancy arose after the appellant was summarily dismissed. He subsequently lodged a complaint with the labour office. By a conciliatory agreement made between the appellant and the respondent, the appellant was declared redundant, and he agreed to accept a sum of Kshs. 100,000/- in full and final settlement of any sums due and owing. In his evidence the appellant denied signing the agreement claiming that his thumbprint was forged.

The circumstances prior to the conciliatory agreement show that a letter of summary dismissal dated 31<sup>st</sup> October 2009 was issued to the respondent. Subsequent to that, there is nothing to show that the respondent withdrew that letter, or that the appellant's employment was reinstated. When the so called redundancy is considered in the face of the letter of summary dismissal, we find that, unless withdrawn, the latter took precedence over any purported redundancy. As a consequence, any declaration of redundancy is unfounded, and the claim for redundancy and severance pay accordingly fails.

Since we have found that the appellant was summarily dismissed, the next issue for our consideration is whether the appellant was entitled to the sums claimed.

On the claim for three month's salary in lieu of notice, **section 44 (1)** of the Act provides that summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice. In this case, we have found that the appellant's summary dismissal was justifiable, and in terms of **section 44 (1)**, the employer was entitled to terminate his employment without notice. As such, this claim fails.

In the same way, based on our findings on summary dismissal, a claim for unlawful dismissal similarly fails.

We also decline to grant salary underpayment for reasons that according to the **General wages order and sectoral wages order**, as at May 2009, the basic salary for a driver of a medium size lorry was Kshs. 10,405/-. The appellant was initially paid Kshs. 9,000/- which was gradually increased to Kshs. 14,000/-. This was well above the stipulated statutory minimum. As a result, the question of salary underpayment did not arise. In addition, the evidence shows that his monthly remuneration was inclusive of house allowance. Since his basic salary was above the minimum wage, any sums in excess of this also comprised a house allowance computed at 15% of his basic salary. Therefore, the claim for underpayment of salary, and unpaid house allowance is without merit.

On the claim for service/gratuity, the appellant has not shown any contractual or statutory provision upon which the claim for gratuity is established. Without such provision, this claim also fails.

On the claim for exemplary damages, the case of **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR** is self-explanatory. There this Court stated thus:

***“As held in the celebrated case of Rookes vs Barnard [1964] 1 ALL ER 367, there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff. None of these ingredients was in existence in the matter before us. The principles enunciated in Rookes vs Barnard were followed by this Court in the cases of Haria Industries vs P.J. Products Limited, [1970] E.A. 367 and in Obongo & another vs Municipal Council of Kisumu, [1971] E.A.91. For this reason we think that the award of exemplary damages was a serious error.”***

Similarly in the instant case, we do not find that the circumstances meet the criteria that would warrant an award for exemplary damages, and therefore this claim is rejected.

In view of the foregoing, we find no reason to disturb the decision of the Employment and Labour Relations Court, and dismiss the appeal with costs to the respondent.

***It is so ordered.***

***Dated and delivered at Kisumu this 30<sup>th</sup> day of March, 2017.***

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original**

**DEPUTY REGISTRAR**