



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OUKO, KIAGE & MURGOR, JJA)
CIVIL APPEAL NO. 43 OF 2016

BETWEEN
PREMIER BAG & CORDAGE LIMITED.....APPELLANT
AND
PETER WAKABA WACHIE.....RESPONDENT

(Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi of Wasilwa, J,) dated 21st January 2016

in

Emp & Labour Relations Cause No. 413 of 2013)

JUDGMENT OF THE COURT

By a Memorandum of Claim dated 26th March 2013 filed by *Peter Wakaba Wachie*, the respondent against the appellant, Wakaba stated that he was employed by the appellant on 8th March 1991 as a spinner, though he was not provided with a job card. It was a term of the contract of employment that either party could terminate the employment by providing the other with one month’s notice in writing. According to Wakaba on 4th July 2012, the appellant suspended him from employment for reasons that the was under investigation. The suspension was not lifted, following which Wakaba was evicted from the appellant’s residence he occupied thereby signifying his dismissal from employment.

At the time of his dismissal, Wakaba contended that he had been employed with the respondent for 21 years and that he was earning a monthly salary of Kshs 6,485. It was his further complaint that, in the month of June, 2012 he was issued with a payslip which indicated that an amount of Kshs 742 being a uniform deposit was deducted from his salary.

As a consequence of the dismissal, and the failure to pay the sum of one month’s salary in lieu of notice, Wakaba stated that he was unlawfully dismissed, and claimed the following sums;

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|---|------------------------|
| <i>a. Service Pay</i> | <i>Kshs. 90,790.00</i> |
| <i>b. Compensation for loss of earnings</i> | <i>Kshs. 77.820.00</i> |

c. Salary in lieu of notice	Kshs. 6,485.00
d. Salary for the month of July	Kshs. 6,485.00
e. Leave days accrued for 3 years	Kshs. 114,395.00
Less amount received	Kshs. 10,238.00
Total Kshs.	285,737.40

The appellant stated that according to a letter of employment, Wakaba was initially engaged as a casual employee on 20th August 1998; that on 3rd June 2012, Wakaba and a colleague John Busisa were abusive towards the Production Manager with whom they were involved in a heated argument, which resulted in their suspension.

After a verbal warning, the Human Resources Manager, summoned the two employees and requested them to resume their duties, but only John Busisa returned to work. Wakaba refused to resume his duties and instead reported the matter to the District Labour Officer in the month of July, 2012 claiming that he had been wrongfully terminated. The appellant stated that it had informed the District Labour Officer, that Wakaba had been requested to resume his duties, but had refused to do so, or even to contact his employer, and that he moved out of the housing accommodation provided by the appellant leaving no doubt of his intention never to return to work.

As a consequence he was summarily dismissed from employment, and his final dues of Kshs.10,238 paid into his bank account in July 2012. The respondent further stated that Wakaba also refused to clear with the appellant or to collect his Certificate of Service, and denied owing him the sums claimed.

In its judgment, the Employment and Labour Relations Court (Wasilwa, J) found that the appellant had wrongfully dismissed Wakaba from employment and ordered that he be paid a total sum of Kshs.130,645, comprising one month's salary in lieu of notice, 12 months salary as damages for unlawful termination, salary for 4 days worked in July and leave for the year 2012.

Being aggrieved by the court's decision, the appellant has appealed to this Court. The grounds of complaint are that the learned judge was biased and acted in gross violation of the Constitution by awarding unpleaded and unproven amounts to Wakaba; that the learned judge denied the appellant the right to re-examine the appellant's 2nd witness; that the learned judge misdirected herself in taking into account irrelevant matters, and made an award not supported by the evidence; and that the learned judge failed to evaluate and analyse the evidence.

The appellant filed written submissions dated 15th March 2017, which were highlighted by **Mr. Omuga**, its learned counsel, who faulted the learned judge for failing to evaluate the evidence and in so doing arrived at the wrong conclusion; that the sums awarded by the court were not based on any evidence, and that the learned judge failed to take into account the sums already paid by the appellant to the respondent. It was counsel's further submission that the court stated that the respondent called John Busisa as a witness, which was incorrect as the appellant's witnesses were Ibrahim Abdulla and John Busisa, which evidence was in any event disregarded by the learned judge. That in addition, the court erred when it calculated the 12 months compensation on the basis of a salary of Kshs. 9,231 instead of Kshs. 6,485, and further that the award of compensation was contrary to the stipulations of **section 49 (1) (c)** of the **Employment Act**.

On his part the respondent did not file written submissions and though served, on 7th March 2017, there was no appearance for him.

We have considered the record, the evidence and the submissions and consider that the issues for our determination are;

i. whether the respondent was summarily or unlawfully dismissed from employment; and

ii. whether the respondent was entitled to the sums claimed.

As a first appellate court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this. **Selle vs Associated Motor Boat Company Limited [1968] EA 123.**

We will begin by addressing the issue of whether the respondent was summarily or unlawfully dismissed from employment. The lower court found that despite the contention that Wakaba had refused to work which resulted in his dismissal for gross misconduct, there was no written termination letter, and that the allegation that he had been dismissed should have been in writing, in the form of a dismissal letter. The court concluded that the failure to issue a summary dismissal letter meant that that Wakaba was orally terminated without reason.

The court cited **sections 43 (1) and (2) of the Employment Act** which specifies that in termination of a contract of employment the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be considered unfair within the meaning of **section 45** of the Act. The court further cited **section 41** which mandates the employer to accord the employee a fair hearing before termination which the learned Judge found was never accorded to respondent.

The determination of whether Wakaba's summary dismissal was justifiable or unlawful requires a re-evaluated of the facts afresh so as to enable us reach our own independent conclusion.

According to Wakaba, he was employed by the appellant on 8th March 1991 as a spinner and by the time of the termination of his employment he was earning a monthly salary of Kshs. 6,485.

It was his case that he was verbally suspended on 4th July 2012 by, and informed that he would be recalled back to work once investigations were complete; that prior to the suspension in June 2012, Wakaba and his fellow workmates discovered that a sum of Kshs. 742 had been deducted from their salaries as a uniform deposit. When Wakaba and a colleague John Busisa, enquired as to the reason for the deduction they were suspended. It was his case that he was not informed of the reason for his suspension and neither was he recalled to his duties. Following enquiries with his employer, he found that his services had been terminated without reason or the issuance of a letter of termination.

The evidence of Ibrahim Abdalla, the appellant's Human Resource and Administration Manager was that on 4th July 2012, Wakaba and a colleague John Busisa were abusive towards the Production Manager with whom they had had a heated argument, resulting in their suspension. After a verbal warning, the Human Resources Manager, summoned the two employees and requested them to resume their duties, but only John Busisa returned to work. Wakaba refused to resume his duties and instead reported the matter to the District Labour Officer in the same month of July, 2012 claiming that he had been wrongfully terminated. Despite being requested to resume his duties by the respondent and the District Labour Officer Wakaba refused to do so or even to contact his employer, and had left the housing accommodation provided by the employer. He further testified that Wakaba's employment was not terminated, but that he had absconded from work is a consequence of which he summarily dismissed.

Section 44 of the Employment Act provides that an employer may terminate the employment of the employee without notice or with less notice period than that which the employee is entitled by any statutory provision or contractual term. **Subsection (3)** allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.

Section 44 (4) (a) and (e) of the **Employment Act** upon which the appellant relies stipulates;

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause...

(a) without leave or lawful cause, an employee absents himself from the place appointed for the performance of his work.”

Subsection (e) provides

“an employee fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.”

Section 45 (1) and (2) stipulates;

“No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment is unfair if the employer fails to prove;

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason;-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer;

and

(c) that the employment was terminated in accordance with fair procedure.”

It is not in dispute that Wakaba was suspended together with John Busisa on 4th June 2012 pending investigations following an altercation between them and the Production Manager at their place of work.

While Wakaba testified that he was dismissed on 4th July 2012, the appellant stated that when the investigations into the altercation were completed, both employees were requested to resume their duties, but that Wakaba refused to do so, and had instead reported to the Thika Labour Officer that he had been unfairly dismissed.

What is of significance is that, besides the evidence of Ibrahim and John Busisa, there is nothing in writing to show that that Wakaba was summarily dismissed for failing to resume his duties. There was no letter requiring him to resume his duties with immediate effect. There are also no reasons in writing advanced for the summary dismissal. It is for this reason that the learned judge stated that “...it would have been prudent and fair to have the dismissal in writing...”, and that “...the allegation by the Respondent that he had refused to work, should have been put in writing in form of a dismissal letter”.

Without a letter specifying the reasons for summary dismissal, we find that Wakaba’s employment was unfairly terminated.

We now turn to whether Wakaba was entitled to the sums claimed. The learned judge awarded Wakaba the following sums;

1. 1 months salary in lieu of notice Kshs. 9,231.00;
2. 12 months salary as damages for unlawful termination = Kshs.110,772.00
3. Salary for July 4 days = Kshs. 1,230.804. Leave for 2012 = Kshs.9,231.00

Total Kshs. 130,645.00

Section 49 of the Act provides for the remedies for both wrongful dismissal and unfair termination, while **subsection (9)** sets out the factors that the labour officer or the Employment and Labour Relations Court has to take into account in deciding whether to recommend the remedies.

We will begin with whether Wakaba was entitled to the award of twelve months compensation. Under **Section 49 (1)(c)** of the **Employment Act** the lower court in the exercise of its discretion, awarded the appellant 12 months salary as compensation for unfair termination of his employment with the appellant.

Before we can interfere with the learned Judge's discretion in respect of that award, we must be satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision or, that it misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another vs Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,

".....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice...."

Section 49 (4) (K) of the **Employment Act** requires the court in determining compensation, to take into account a number of factors. They include whether the employee contributed towards the termination of employment.

Notwithstanding that, we have already found that the appellant unfairly dismissed Wakaba by its failure to provide a written notice of summary dismissal specifying reasons for dismissal as required by **section 44**.

However, there is evidence from the respondent's witnesses, Ibrahim Abdalla and John Busisa pointing to the fact that Wakaba contributed to the termination by failing or refusing to report back on duty in July, 2012. This evidence was significant, and the lower court ought to have taken it into account when determining whether or not to award compensation for unfair termination, and if so, how much to award. In view of the fact that the employment may have continued save for the refusal to return to work, and also appreciating the length of the employment, we would award six months compensation.

With respect to the payment of one month's salary in lieu, there is no dispute that by the time the employment was determined, Wakaba was earning a monthly salary of Kshs. 6,485. Despite this, the learned judge erroneously concluded that Wakaba was earning a sum of Kshs. 9,231. In addition, the July 2012 payslip bears an item referred to as **"...TERMINATION NOTICE..."** of a sum of Kshs. 7,335, indicating that the appellant had already paid Wakaba one month's salary in lieu of notice. As a consequence, Wakaba was not entitled to the sum being one month's salary in lieu of notice as claimed, and we so find.

On the claim for unpaid leave, it is evident that Wakaba worked for 6 months having been dismissed in June 2012. As a consequence he was only entitled to leave for the half of the year amounting to Kshs. $6,485/2 = \text{Kshs.}3,242.50$.

Regarding the salary for July 2012, we would agree with the court below that Wakaba was entitled 4 days for the month of July amounting Kshs.865.00

That said, we find that the appeal is merited in part and is hereby partially allowed Kshs.130,645, comprising one month's salary in lieu of notice, 12 months salary as damages for unlawful termination, salary for 4 days worked in July and leave for the year 2012. Instead, we make the following orders;

1. Wakaba be paid the following as his terminal dues;

(i) 4 days worked in July 2012 @ Kshs. 6,485/30 x 4 = Kshs. 865.00

(ii) Unpaid leave January to June 2012 @ Kshs 6485/2= Kshs.3,242.50

(iii) 6 months' salary in compensation Kshs. 38,910.00

Total Kshs. 43,017.50

2. As the appellant has partially succeeded, each party shall bear their own costs of this appeal and the costs in the Employment and Labor Relations Court.

It is so ordered.

Dated and delivered at Nairobi this 6th day of October, 2017.

W. OUKO

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JUDGE OF APPEAL

P.O.KIAGE

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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.