



IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 287 OF 2003

MARSHALLS (EAST AFRICA) LTD. APPELLANT

AND

JEREMIAH KIPROP LANG'AT RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (Nambuye, J.) dated 5th April, 2002

in

H.C.C.C. NO. 46 OF 1999)

JUDGMENT OF THE COURT

JEREMIAH KIPROP LANG'AT, the respondent herein, was by a letter dated 3rd November, 1976 employed as an unionisable staff of the appellant, *Marshalls (E.A.) Ltd.* By a letter dated 3rd February, 1977 he was confirmed in his employment with the appellant. The letter of 3rd February, 1977 stated:

“Mr. Jeremiah Kiprop Lagatt, (38-2238),

P.O. Box 216,

KITALE.

Dear Sir,

CONFIRMATION OF APPOINTMENT

This letter confirms your appointment as a Cashier Grade IV under the terms and conditions shown in your letter of appointment dated 3rd November, 1976.

Yours faithfully,

MARSHALLS (E.A.) LTD.

M.J.C. MILLS,

BRANCH MANAGER

cc. *The Director/Company Secretary.*

Personal file.”

It would appear that the respondent continued working for the appellant without any problem until one day when he received a letter of suspension. In that letter dated 30th April, 1996 the respondent was informed as follows:-

“Mr. Jeremiah Kiprop Lagat,

Staff Serial No. 38-2238,

KITALE BRANCH.

Dear Sir,

S U S P E N S I O N

Pending investigations into the matter, the nature of which you are well aware, you are hereby suspended from duty with immediate effect.

Please, be reporting to the undersigned at 8 a.m. daily until the matter is resolved.

Yours faithfully,

B.C. KIRUI,

BRANCH MANAGER

cc. *Personnel Services Manager,*

Group Internal Auditor,

Director of Operations

W/shop Manager.”

While contemplating on what befell him, the respondent received yet another letter dated 14th May, 1996 stating as follows:-

“Mr. Jeremiah Kiprop Lagatt,

Staff No. 38-2238,

KITALE.

Dear Sir,

D I S M I S S A L

This letter serves to advise that as a result of your suspension, the Management has decided to dismiss you from the services of this Company with effect from 30th April, 1996 with loss of benefits for theft of cash.

Yours faithfully,

J. GATHONI (MISS),

PERSONNEL SERVICES MANAGER

cc. *Branch Manager - Kitale.*”

The respondent did not wish to take the foregoing lying down and hence filed a suit against the appellant seeking judgment for a declaration that his dismissal was unlawful, special and general damages, interest and costs of the suit. The hearing of the suit commenced in the superior court (Nambuye, J.) on 3rd May, 1999 when the respondent (*as the plaintiff*) testified at length in a bid to prove his case against the appellant. It was the respondent’s evidence that he was an employee of the appellant since 1976 and that at the time of his dismissal, he had worked for the appellant for **19½ years**. He went on to state that there was no time he was found drunk while on duty and that he discharged his duties without blemish. He explained how he rose through the ranks and earned salary increments so that by the time of his dismissal his monthly salary was **Shs.16,850/=**.

As regards what led to his predicament, he stated that on the material day he broke for lunch and went to Bongo Bar and Restaurant where he had soda but on coming back to work he started feeling drowsy and sickly. He was escorted home to take a rest and that is where he was found by the workshop manager who took him to the doctor. The doctor carried out tests like asking him to walk straight with eyes closed and to read a newspaper. He was then asked to surrender any money and he produced **8,000/=** which he gave to the workshop manager. It was the respondent’s evidence that on the material day he was not drunk but unwell. For that reason the appellant contended that his dismissal was unlawful.

On its part, the appellant called **Dr. Amlani (DW1)** who examined the respondent and in his evidence in chief, he testified, inter alia:-

“On 29th April, 1996 at 5:00 p.m. I was brought an employee of Marshalls called Mr. Jeremiah Lagat. He was brought by the Manager of Marshalls Mr. Kirui. I was asked by Mr. Kirui to examine him and to certify. I examined him.

My assessment was that at that particular time Mr. Jeremiah Lagat was unfit to work in his capacity as the Chief Cashier of Marshalls. Upon examination I talked to him and while talking to him I found that he was smelling alcohol. He was drowsy, red eyes and while I was interviewing him he was going on and off to sleep. He told me that he had not worked that day. I decided to do another test to see if he is fit to work. I made him to walk in a straight line and he could not raise (sic) in a straight line. I asked him to stretch his hand to touch the nose and he could not do that. I gave him a local newspaper to read and he could not do that.”

The appellant’s second witness was **Benson Kirui (DW2)** who was the Branch Manager of Marshalls (E.A.) at Kitale. It was Kirui’s evidence that the respondent was absent from his office on 29th April, 1976 and that he (respondent) was later found at his house sleeping. **DW2** decided to take the respondent to **Dr. Amlani** who examined him and found him unfit to discharge his duties as he was drunk. As a result of this incident the respondent was suspended and auditors called in to carry out further investigations. It was as a result of the investigations that the respondent was dismissed.

The learned Judge considered the rival positions of the parties and correctly, in our view, formed the opinion that what was to be decided was whether the respondent’s employment with the appellant was unlawfully brought to an end. She observed that it was the appellant’s contention that the respondent was dismissed for gross misconduct. The learned Judge considered all the material placed before her and came to the conclusion that the respondent’s dismissal was both wrongful and unlawful. In her judgment delivered on 5th April, 2002, the learned Judge concluded thus:-

“In the final analysis, I make the following orders for the plaintiff as against the defendants:

- 1. An order be and is hereby made and declared that the plaintiff’s dismissal from employment was unlawful and against the rules of natural justice.***
- 2. The plaintiff is entitled to the following special damages.***
 - (i) Three months salary in lieu of notice Kshs.56,550.00.*
 - (ii) Thirty days pay in every year he worked for the defendant Kshs.328,575.00.*
- 3. Interest at court rates on item (i) and (iii) from the date of filing till payment in full.***
- 4. Item (ii) disallowed for the reasons given.***
- 5. Item (iv) disallowed and the plaintiff directed to lodge his claim with the board of trustees of the provident fund.***
- 6. The plaintiff will have costs of the suit.”***

Being aggrieved by the foregoing, the appellant company through its advocates filed this appeal citing the following grounds of appeal:-

“1. The learned trial Judge misapprehended the issues in the suit which led to a miscarriage of justice in that:-

- (a) She took into consideration Rules of Natural Justice to be applicable in contracts of Employment despite authorities to the contrary.*
- (b) She failed to consider the evidence of the appellant and the circumstances of the respondent’s dismissal from employment.*
- (c) She failed to consider the appellant’s submissions and issue that Rules of Natural Justice could not form a basis of cause of action for the respondent’s suit.*

2. The learned trial Judge misdirected herself in holding that the appellant should have given the respondent an opportunity to explain himself and or have him charged in a court of law for criminal acts as a condition before dismissing the respondent.

3. The learned trial judge erred in law and fact in applying the evidence on record in a discriminative and selective manner.

4. The learned trial Judge erred in admitting unproved parole evidence and disregarding the appellant’s evidence which occasioned an injustice in that:-

- (a) She failed to consider the contradictions in the respondent’s pleadings and evidence;*
- (b) There was no proof of the respondent having undergone medical treatment for drugging more so after the appellant’s doctor had examined the respondent for alcoholic drunkenness (sic).*

5. The learned trial Judge erred in law and fact in shifting the burden of proof from the respondent to the appellant.

6. The learned trial Judge erred in law and fact in holding that there was a contractual obligation on the appellant to pay the respondent severance pay.

7. *The learned trial Judge misapprehended the law of Employment and in particular regarding the termination of Contracts of Employment.*
8. *The learned trial Judge erred in law and fact in failing to consider the circumstances under which the respondent was examined by medical doctor who gave evidence.*
9. *The learned trial Judge erred in law in making a finding on matters that were neither raised in the pleadings nor submissions.*
10. *The learned trial Judge erred in law and fact in disregarding the appellant's evidence and submissions generally.*
11. *The learned trial Judge was biased against the appellant."*

This is the appeal that came up for hearing before us on 25th February, 2009 when Mr. Kelvin Mogeni appeared for the appellant, while Mr. R.W. Kigamwa, appeared for the respondent.

In his submissions, Mr. Mogeni stated that there was gross misconduct which entitled the appellant to summarily dismiss the respondent. He further submitted that even if there was no gross misconduct the superior court was not entitled to award damages like severance pay. It was contended that the respondent left his place of work without permission and that later he was found sleeping at his residence and smelling of alcohol. It was then discovered that the respondent had not accounted for the money he had received in the course of his employment.

In view of the foregoing, Mr. Mogeni submitted that the respondent was properly dismissed summarily. It was for that reason that Mr. Mogeni submitted that the respondent was not entitled to the sums of money awarded to him. It was further submitted that severance pay was not payable in the circumstances since this was not a case of redundancy. For all these reasons, Mr. Mogeni asked us to allow this appeal with costs.

In answer to the foregoing, Mr. Kigamwa submitted that the respondent was dismissed for theft of cash and hence the question of the respondent being drunk should not feature in this dispute. Mr. Kigamwa further submitted that as loss of cash was never established, there was no reason for his dismissal. As regards intoxication, Mr. Kigamwa submitted that the respondent gave a clear explanation of what happened to him on the material day. In Mr. Kigamwa's view the respondent had given a plausible explanation supported by medical evidence.

On the issue of payments, Mr. Kigamwa reminded us that the respondent had worked for **19½ years** and hence on balance of probability the learned Judge was entitled to make a finding in favour of the respondent.

For the foregoing submissions Mr. Kigamwa asked us to dismiss this appeal with costs.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusions but always remembering that we have neither seen nor heard the witnesses. It is for that reason that we briefly set out the evidence tendered by either side in the superior court. In **SELLE AND ANOTHER V. ASSOCIATED MOTOR BOAT COMPANY LTD. AND OTHERS [1968] E.A. 123** at p. 126 Sir Clement de Lestang V-P said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMEED SAIF V. ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270).”

The above has been cited with approval in numerous decisions of this Court e.g. WILLIAMSON DIAMONDS LTD. V. BROWN (1970) E.A.1. and ARROW CAR LIMITED V. BIMOMO & 2 OTHERS [2004] 2 KLR 101.

The incident that triggered the respondent's problems related to his conduct on 29th April, 1996 when he went for lunch at Bongo Bar and Restaurant within Kitale town. It was his evidence that he took a soda at the said establishment and it would appear that there was something wrong with the soda. He felt dizzy and retired to his residence where he was later found by his workshop manager who took him to the doctor. However, according to his employer the respondent disappeared from his place of work without permission. He had not carried out his duties of banking whatever had been paid to him in the course of his employment and when he was traced at his house, he was drunk. He was taken to the doctor who confirmed that the respondent was, indeed, drunk and incapable of carrying out his duties. An Audit Report showed that the respondent had misappropriated some **Shs.46,784/=**.

On our re-evaluation of the evidence, it may well be that the respondent disappeared from his place of work on 29th April, 1996. It may well be that he had not carried out his normal duties of banking the proceeds received as he was required to do but he instead went away and allegedly took some alcohol which could have rendered him incapable of performing his duties. The doctor who examined him gave evidence and in his report produced as **Exhibit D 2(a)**, Dr. Amlani states:-

***“This is to certify that I have today at 5:25 p.m. examined Mr. Jeremiah Lagat. He was brought to my office by the Manager of Marshalls, Mr. B. Kirui, who I understand fetched him from home and he had disappeared from his place of work at around 3:00 p.m. Mr. Jeremiah Lagat tells me that he has not worked today.*”**

***From my examination I can certify that Mr. Jeremiah Lagat is under the influence of alcohol and that he is not fit to carry out his duties as the branch cashier of his company i.e. as I have seen him today.*”**

From the foregoing, it may well be that the respondent had taken some alcohol which might have rendered him unfit to carry out his duties as the branch cashier of his employer (**Marshalls (E.A.) Ltd.**). However, it is significant to observe that the alleged loss of this money was reflected in the *Audit Report* dated 16th May, 1996. This means the respondent was dismissed even before the appellant had any evidence of the alleged loss of money. We say so because the respondent's dismissal was communicated to him via a letter dated 14th May, 1996. For that reason as at 14th May, 1996, the respondent's dismissal could only have been based on the fact that the respondent was found drunk. It would appear that the appellant through its officers was bent on dismissing the respondent. It is for that reason that the learned judge had the following to say in the course of her judgment:-

“The conduct of DW2 left a lot to be desired and the haste with which the plaintiff was unprocedurally dismissed from the employment goes to show that DW2 and the Workshop Manager were upto some mischief and that is why the contents of the audit report were not brought to his attention to refute the allegations or to accept them.”

On our part, we deplore the conduct of the appellant's manager of going to the respondent's house and forcing him to see a doctor for examination. Once the respondent disappeared from his place of work it was not the business of his employer (*through the managers*) to track him down to the privacy of his residence and unprocedurally march him to the doctor for medical examination.

This is a case in which the learned Judge considered the evidence of the witnesses who testified before her and came to the conclusion that the appellant was not justified in dismissing the respondent. These were all findings of fact and on our part we decipher no error on the part of the learned Judge.

In ***EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI WAMBUGU (1982-85) 1 KAR 275*** at p. 292 Hancox, J.A. (as he then was) said:-

“A Court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence of the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

The first holding in that case is also relevant namely that:-

“The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”

Taking into account all the circumstances of this case, we are satisfied that the learned Judge cannot be faulted in her findings and conclusions. However, we are of the view that although the conduct of the respondent might have been wanting we note that in his letter of appointment there were no clear terms of employment stated therein. We think that in the circumstances of this case three months salary, in lieu of notice would have been appropriate. In our view there was no basis to award severance pay since this was not a case of redundancy.

In view of the foregoing, this appeal is allowed to the extent that the sum of ***Shs.328,575/=*** awarded to the respondent is set aside. We however uphold the award of ***Shs.56,550/=*** being equivalent to ***three months salary*** in lieu of notice.

Although the appellant has partially succeeded in this appeal, we are of the view that taking into account the relationship of employer and employee which existed between the appellant and the respondent, we order that each party shall bear its own costs of this appeal and the costs in the superior court.

Dated and delivered at Eldoret this 24th day of April, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR