



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.14 OF 2015

WILLIAM NYANGARESI MOSOTI..... APPELLANT

VERSUS

MEGA SPIN LIMITED.....RESPONDENT

[Being an appeal from the judgement of Hon. J Ntuku, Magistrate

dated 30th October, 2015 in Nakuru CMCC No.1254 of 2002]

JUDGEMENT

The appellant filed his Complaint in CMCC No.1254 of 2002 claiming that on 6th September, 1999 he was summarily dismissed by the respondent on the grounds of gross misconduct which dismissal was unlawful and he suffered damage and thus claimed for unpaid increments amounting to Ksh.26, 702.00, overtime worked Ksh.2, 600.00; notice pay Ksh.6, 445.75 and annual leave pay Ksh.7, 045.25.

In defence, the respondent denied the claims save that the appellant was entitled to Ksh.2, 835.50 which he had refused to collect since the year 1999 and then counter-claimed that before the appellant was dismissed he had overdrawn account amounting to Ksh.451.50 and remained in debt.

The learned trial magistrate heard the parties and in judgement delivered on 30th October, 2015 held the appellant was entitled to dues amounting to Ksh.33,295.75 comprising unpaid increments Ksh.26,702.00, annual leave allowance Ksh.7,045.25 and less Ksh.451.50 counter-claimed. The appellant was awarded costs.

Aggrieved by the judgement and decree therefrom, the appellant filed the appeal on 5 grounds which can be summarised as follows. That the learned trial magistrate erred in law and in fact in finding that there was lawful dismissal from employment, failing to award notice pay, failing to award overtime worked and deducting Ksh.451.00 counter-claimed after such counter-claim had been dismissed and also for failing to award the appellant interests on the awards made.

Both parties have filed written submissions.

The appellant submitted that at the time the appellant was dismissed by the respondent the employment was regulated under the repealed Employment Act Cap 226, Trade Disputes Act and by a collective bargaining agreement (CBA). The CBA provided for three warnings valid for 365 days before dismissal. The defence evidence was that the appellant had been issued with five warnings but only three warning letters were produced. However at the time of dismissal, there was no valid warning in the file and the finding that the dismissal was lawful was not correct.

The appellant also submitted that the trial court failed to appreciate the evidence in its totality and consider that the CBA provided for warnings which were only valid for 365 days. The appellant should be awarded notice pay in the circumstances.

The appellant had worked for extra hours each day but not awarded overtime pay as claimed. The defence was general and did not challenge the claims made. The claims made for overtime pay Ksh.2, 600.00 should be awarded.

The appellant also submitted that the trial magistrate erred in not awarding interest whereas the Civil Procedure Act provides that where there is a money decree, interest may be ordered. Costs are also due to the appellant.

The respondent submitted that the appellant was dismissed following numerous warning letters issued to him over a period of 365 days.

There were 5 warnings relating to absence from work vide letter dated 2nd April, 1997, absenteeism vide letter dated 15th November, 1997, on similar grounds vide letters dated 5th January, 1998 and 10th February, 1998 and finally for being negligent at work vide letter dated 23rd March, 1998. The respondent complied with the CBA which provided for summary dismissal upon issuance of 3 warnings in 365 days.

The claim for notice pay is not due and section 44 of the Employment Act allow the employer to dismiss an employee for gross misconduct. Absence from work without permission and being negligent while at work these are grounds for summary dismissal.

The appellant is not entitled to overtime pay as claimed. The sum of Ksh.2,600.00 claimed for overtime work is on the basis that the appellant worked an extra hour each day and he kept his work records but nothing was produced to support such a claim.

The trial magistrate deducted the sum of ksh.451.00 from the judgement amount as the appellant had overdrawn such amount and owed the respondent. The court was correct in this finding.

Interest and costs are not due as these are discretionary upon the court being satisfied that such should be awarded. In this case the trial court as correct in not awarding interests.

Determination

I have considered the submissions of the parties in this appeal. This being a first appellate court, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

The appellant as the plaintiff had his case that on 6th September, 1999 he was summarily dismissed by the respondent on the grounds of gross misconduct and that such summary dismissal was unlawful and he suffered damage. He claimed for unpaid increments, overtime worked, notice pay and annual leave allowances.

The learned trial magistrate made a finding that by the applicable CBA the appellant was entitled to claimed increment and annual leave allowance. The claim for notice pay was declined on the basis the summary dismissal does not allow for such pay. On the awards made no interest was ordered.

As the cause of action arose with the summary dismissal of the appellant on 6th September, 1999 the applicable law is the repealed Employment Act Cap 226 and not the provisions of section 44 of the Employment Act, 200 as submitted by the respondent. The repealed Employment Act at section 17 allowed for summary dismissal of an employee for being absent from work and for negligent performance of work. See section 17 (a) and (c) of the repealed Employment Act, Cap 226 Laws of Kenya.

The facts leading to the summary dismissal of the appellant are not contested in any material way. He was issued with warnings relating to absence at work and negligent performance of his work. Under the applicable law, summary dismissal was justified in this regard.

The appellant has relied on the CBA and on the grounds that it allowed for 3 warnings in a period of 365 days. The warnings attached in defence are dated 2nd April, 1997, 5th January, 1998 and 23rd March, 1998 with regard to being absent from work without permission and negligent performance of work.

The CBA attached and relied upon by the parties does not override the applicable law. Its contest must be read in tandem with the law and to read it outside the law is misdirection. The CBA must also be registered with the court for it to take the force of law and create rights. Though this is not a matter gone into during the trial proceedings, it becomes relevant herein. Though signed by the parties to it, the CBA under the Trade Disputes Act, repealed cannot confer rights to any party unless there is evidence of registration with the court and or with its predecessor the Industrial Court of Kenya.

The law applicable as at 6th September, 1999 did not allow for notice pay in a case of summary dismissal. The awards made therefrom for unpaid increment and annual leave allowances are not faulted and there is no cross-appeal. Such awards stand.

The claim that the trial magistrate erred in failing to award the claimed overtime pay and made a deduction of ksh.451.00 as counter-claimed is well analysed in the judgment and a finding that the claim for overtime was without evidence and terminal dues were paid less what the appellant owed the respondent as an employer. Section 6 of the repealed Employment Act Cap 226 allowed the employer to make a lawful deduction from the wages of an employee if overpaid, paid as an advance, there was a loan or such amount was due to the employer as of right. On the evidence before the trial court under exhibit 5 and showing the appellant owed an overdrawn amount of Ksh.451.00 such was lawfully due to the respondent at the end of his employment.

On the claim for interests, the appellant has relied on the Civil Procedure Act at section 26 to claim for interests on the awarded dues. The operative word under section 26 is *May* and not *shall* meaning the award of interests is discretionary upon the trial magistrate. Unless it is demonstrated that the trial magistrate failed to apply such discretion properly, the findings that such interests are not due and not awarded cannot be faulted by this court.

The appellant has relied on the case of **B.O.G. Tambach Teachers Training College versus Mary Kipchumba [2018] eKLR** and this court reading of this matter is that the Judge well applied the provisions of section 26 of the Civil Procedure Act and the provisions that *interest may* be awarded at such a rate as the court may deem reasonable to be paid on the principal sum. The court may give interest and costs at any rate not exceeding 14%.

The authority and discretion of a Court to award interest or costs is provided for in Section 27(2) of the Civil Procedure Act. It is in the following terms:

The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Hence, the Trial Court has wide latitude to award interest. However, there is no rule of thumb that a successful litigant who has an award must get interest or costs. Indeed, the decisional principle in our jurisdiction seems to run in the opposite direction: it is not normal to award interest or costs. This was the holding in **Hasanali versus City Motor Accessories Ltd & Others [1972] EA 423**.

The findings by the trial magistrate to the extent set out above cannot be faulted.

Accordingly, for the reasons set out above, the court finds no merit in the appeal and is hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 10th day of July 2019.

M. MBARU JUDGE

In the presence of:

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