



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 939 OF 2016

(Formerly High Court Civil Appeal No. 539 of 2010)

BATA SHOE COMPANY (K) LIMITED.....APPELLANT

VERSUS

FELIX JOHN BOTA MOTONU.....RESPONDENT

JUDGMENT

1. This is an appeal against the decision the decision of the Hon. A. O. Aminga Resident Magistrate in a civil case No. 113 of 2008 Limuru between **Felix John Bota Motonu v Bata Shoe Company (K) Ltd** wherein the learned Magistrate awarded the Claimant (Plaintiff) Kshs. 170,670.35 being the terminal benefits – leave days (18 days) unpaid salary Kshs. 4,289.75, leave travelling allowance Kshs. 937.50 and general damages of Kshs. 150,000/-. In the judgment delivered on 9th November 2010, the sums awarded were also accompanied by interest and costs.

2. The Record of Appeal was filed on 19th May 2011 and in the Memorandum of Appeal filed 1st December 2010, the Appellant herein had 4 grounds of appeal. The grounds were:-

- 1) That the learned trial Magistrate erred in law in awarding general damages as a remedy for breach of contract when there was no basis for such an award.
- 2) That the learned trial Magistrate erred in failing to consider the Defendant's evidence when there were no facts entitling him to do so thus caused injustice to the Defendant.
- 3) That the learned (*sic*) misapprehended and misconstrued the law of contract and law of evidence in assessing and awarding general damages for breach of contract.
- 4) That the learned Magistrate's judgment is against the weight of evidence.

The Appellant thus sought that the learned Magistrate's judgment be set aside and the Respondent be ordered to meet the cost of the appeal.

A supplementary record of appeal was filed on 23rd September 2014 annexing the Decree of the learned Magistrate.

3. I have carefully perused the record of appeal and the High Court file and have not seen any grounds filed by the Respondent or any cross appeal. It would be safe to proceed on the basis that the Appeal had not been challenged by cross-appeal.

4. The parties appeared before a few judges of the High Court before the file was transferred to this court on 6th May 2016 by the Hon. Serгон J. Upon directions being taken before this court on the 23rd September 2017, the parties were directed to appear on the 16th October 2017 and on that date directions were given for the filling of submissions. This was finally done on 13th December 2017. In the submissions the Appellant urged in the main that the Magistrate erred in awarding general damages for both the unlawful dismissal and loss of property. The Appellant submitted that the award of the global sum was in breach of trite law. It was urged that the Plaintiff (Respondent in the appeal) had not pleaded for general damages for the loss of property and that the claim for the lost property is one for special damages. It was the Appellant's position that the Respondent ought to have produced receipts, invoices etc. as proof of the value of the lost items as well as specifically plead the particular loss. The Appellant relied on the case of **Allan Nyamu v Insurance Training and Education Registered Trustees and Another [2017] eKLR**. The Appellant argued that the Learned Magistrate departed from his own finding that the courts do not give orders in vain before awarding the general damages without any evidence to support the finding that the Respondent was entitled to

such an award. The Appellant submitted the applicable law in force at the time of dismissal on 20th May 2005 was the repealed Employment Act Cap 226. The Appellant argued that under the said law there was no award for the damages perceived in the Act. Reliance was also placed on the cases of **Jackline Kiaraho v Co-operative Bank of Kenya [2017] eKLR** and **Peter Onyango Onyiego v Kenya Ports Authority [2000] eKLR** where the courts held that the measure of damages is the period of notice which the employee would otherwise have been entitled to. The Appellant prayed that the counter claim be awarded as prayed in the lower court. It was submitted that as the Respondent (Plaintiff) had failed to prove on a balance of probabilities, the suit ought to have been dismissed by the learned Magistrate save for the sum conceded by the Defendant (Appellant) in the defence filled before the Senior Resident Magistrate's Court.

5. The Respondent on his part submitted that the Magistrate ought to have awarded a higher sum in damages than the Kshs. 150,000/- awarded to the Respondent because the Respondent had not been accorded an opportunity to give an explanation prior to dismissal. The Respondent argued that having subjected themselves to the jurisdiction of this court, the court should find that the lower court was right in its finding that the Respondent was entitled to compensation and terminal benefits. The Respondent submitted that the Plaintiff had proved his case before the lower courts on the balance of probabilities by properly explaining the circumstances of his summary dismissal. The Respondent submitted that after investigating the matter leading to the dismissal, the recommendation was for action to be taken against the Plaintiff but not dismissal and the fact the Respondent was the only person dismissed in the department was pure discrimination. The Respondent submitted that on the issue of pay for 25 years, there was a consent to include the prayer and that because the consent was never vacated, the Appellant should not submit to the contrary. The Respondent submitted that the defense case was re-opened but the Appellant failed to call the anticipated witnesses and thus failed to challenge the Plaintiff's case. The Respondent urged the dismissal of the appeal with cost and the award of the lower court be enhanced to meet the requirements of the current Employment Act the parties having submitted to the jurisdiction of this Honorable court.

6. This is an appeal against the decision by the Magistrate. Appeals in the previous regime of laws lay to the High Court and that is why the Appeal first landed before the High Court. Under the Civil Procedure Act, no grounds can be advanced at the hearing of the Appeal that was not contained in the Memorandum of Appeal. In that regard, the quest by the Appellant to have the decision of the learned Magistrate replaced with a finding in favor of the Appellant's counter claim cannot stand. The 4 grounds advanced in the Memorandum of Appeal were focused on the decision made relating to the general damages awarded.

7. General damages are strictly speaking not in the class of reliefs a labour court in our jurisdiction can grant. The High Court and this Court when dealing with contracts of employment are confined to the provisions of Employment Law. Any award of a court exercising jurisdiction over an employee and employer must bear in mind the special relationship a contract of service has. It is not a general contract as say, a sale agreement or a contract for carriage of goods. The Employment Act, both the Repealed Act (cap 226) and the 2007 Act, does not have provisions for general damages. The learned Magistrate fell in error when he granted the Plaintiff (Respondent in this appeal) an award of Kshs. 150,000/- as the global sum for damages for the loss of property and the dismissal. The claim for the loss of property was in the nature of special damages for which there should have been specific particulars given and evidence led to prove each and every single allegation made. The fact that no evidence was led by the Plaintiff and no proof availed of the loss renders the decision to award compensation for the loss tenuous. In my view the judgment in that regard is faulty and must be corrected by the reversal of that finding.

8. The Appeal is successful to the extent that the learned Magistrate's decision awarding Kshs. 150,000/- as general damages is set aside. The award of Kshs. 20,670.35 cost and interest at court rates stands. The sum of Kshs. 150,000/- held by the Registrar of the High Court vide a deposit by bankers cheque on 18th April 2011 under Deposit Receipt No. 0096804 be released to the Appellant's Advocate M/s Obura-Mbeche & Co. Advocates. Each party in the Appeal will bear their own costs.

It is so ordered.

Dated at Nairobi this 8th day of January 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 18th day of January 2018

Radido Stephen

JUDGE