



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CIVIL APPEAL NO. 7 OF 2017

(FORMERLY KISII CIVIL APPEAL NO. 126 OF 2008)

(Before Hon. Justice Mathews N. Nduma)

TELKOM KENYA LIMITEDAPPELLANT

VERSUS

ROBERT GWARO OTUCHORESPONDENT

J U D G M E N T

1. An Appeal was lodged by the Appellant against the Judgment of Hon. Magistrate Mrs. Wewa in Kisii CMCC 944 of 2005 on the following grounds:-

- (a) The Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities cited.
- (b) The Learned Magistrate erred in law and fact in finding that the Respondent had proven his case on a balance of probability.
- (c) The Learned Magistrate erred in law and fact in awarding the Respondent damages.
- (d) The Learned Magistrate erred in law and fact in failing to find the Respondent was not entitled to damages.
- (e) The Learned Magistrate erred in law and fact to find that the Respondent had been summarily dismissed for gross misconduct and was not entitled to damages.

2. The appellant filed record of proceedings, written submissions and list of authorities.

3. This is a first appeal and the court may examine the evidence tendered before the Magistrate Court afresh and consider the law available. The Court must however always remember that the court aquo heard the testimony of the witnesses and had the advantage of evaluating all the aspects of it including demeanor and credibility.

4. The court has carefully considered the pleadings, the record of the proceedings and the judgment of the Learned Magistrate. The court has in light of the above carefully looked at the grounds of appeal and has come to following conclusions of facts and law:-

- i) The defence filed by the Respondent was completely inconsistent with the defence case put forth under oath by DW1 and DW2 for the Respondent in that, in the defence, it was categorically stated by the defendant did not at any one time employ the Plaintiff and therefore it could not have dismissed the plaintiff as alleged or at all.

5. Pleadings, are not a game, and in as much as the Plaintiff is bound by his/her pleadings, so is the defendant.

6. DW1 & DW2, put forth a case which contradicted wholly, and in material respects, its defence. To that extent, the Learned Magistrate did not err in not believing the defence put forth by the defendant, believed the testimony by the Claimant that he was an employee of the Respondent as a clerk from 24th July 1987 and worked continuously, for the Respondent until 11th April, 2005. That at the time the Plaintiff earned Kshs.25,902.40.

7. The court did not err in its finding that the Plaintiff had proved a case of wrongful and unlawful dismissal in that he was wrongfully accused of submitting false telephone payment batches. That the Plaintiff gave a reasonable explanation in writing that he was not the one who prepared the suspect batch but was not given opportunity to appear before the disciplinary committee that dismissed him summarily

from employment.

8. That indeed it is the finding by this court that, in view of the contradictory case put forth by the defendants in its statement of defence and the oral testimony by DW1 and DW2, the Respondent did not rebut the testimony by the Plaintiff satisfactorily and the Plaintiff proved on a balance of probabilities that the summary dismissal was wrongful, unlawful and did not follow a fair procedure.

9. The Plaintiff also demonstrated to the lower court that he was entitled to the reliefs sought because he was not paid any terminal benefits upon his dismissal.

10. The learned magistrate awarded the Respondent ½ salary withheld during the five (5) months period of suspension in the sum of Kshs.64,756, one month salary in lieu of notice Kshs.25,902.40 and equivalent of 10 months salary in compensation for the unlawful termination in the sum of Kshs.259,020.00. In her judgment, the Learned Magistrate erroneously termed the ten (10) months salary award as payment in lieu of notice. This in the court's view was an oversight on the part of the learned magistrate which does not negate the award.

11. The Claimant had specifically prayed for the award of General damages for wrongful termination of employment and in view of the finding on liability by the learned magistrate in her judgment, the equivalent of 10 months' salary was correctly awarded as General Damages.

12. In the final analysis, the court enters the following judgment-

(i) The Appeal is dismissed and the judgment of the lower court upheld.

(ii) The appellant to pay the costs of the appeal and proceedings in the court below.

Dated and Signed in Kisumu this 15th day of March, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Kalya for Respondent

Ms. Obaga for Respondent

Chrispo – Court Clerk