



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 2 OF 2016

(Before Hon. Justice Mathews N. Nduma)

THE CHAIRMAN B. O. G. ST. TERESA'S

SECONDARY SCHOOL.....APPELLANT

VERSUS

EUNICE J. ADHIAMBO.....RESPONDENT

J U D G M E N T

1. The Appeal before court is against the Judgment by Hon. Ezra Awino, Senior Principal Magistrate dated 5th June, 2012 in which the Respondent was awarded Kshs.205,000 in respect of twelve (12) months compensation for unlawful dismissal in the sum of Kshs.60,000; Unpaid salary during the period of suspension Kshs.5,000; Gratuity for eight (8) years served Kshs.40,000 and damages for malicious dismissal Kshs.100,000.
2. The Appeal is based on the grounds that the Plaintiff/Respondent had not proved her case on a balance of probabilities, the learned Magistrate misdirected himself in evaluation of evidence and Law relating to employment leading to a wrong decision.
3. The learned Magistrate erred in Law in awarding the Plaintiff General damages for malicious dismissal, Gratuity and 12 months' salary in lieu of notice.
4. Furthermore, the Magistrate erred in Law in awarding the Plaintiff Judgment in a matter where no filing fee was paid for the amended plaint.
5. The Plaintiff/Claimant filed a cross appeal in which she alleges that the trial Magistrate erred in Law and fact in failing to award the special damages that were specifically particularized, pleaded and proved during the hearing and that the Magistrate misdirected himself in making an award on damages that was grossly on the lower side.
6. The court will at the outset deal with the question whether the amended plaint was invalid for failure by the Plaintiff/Respondent to pay filing fees.
7. The court notes that this issue was not raised at all before the trial magistrate, except in the final submissions by the Respondent/Appellant.
8. The learned Magistrate did not make any determination on that matter. There is no evidence before this court as to the true status of the amended plaint. The Plaintiff/Respondent has avoided the matter all together. However, there is no evidence before this court to conclusively make a finding as to whether or not court fees was paid in respect of the amended plaint. The same bears the stamp of the court and the presumption in absence of any evidence to the contrary is that the amended plaint was validly filed and the requisite fees paid. It was incumbent on the appellant to raise objection during the trial. The Respondent did not and it was not sufficient to simply make a submission on the matter in the final written submissions.
9. The court has however noted the decision of the Court of appeal at Kisumu in civil Appeal No. 127 of 2003, in which the court found that where the requisite fee has not been paid the Plaint is not properly filed and –

“that being so there was no valid plaint upon which the learned Judge of the Superior Court could proceed to deliver his Judgment. The Judgment was based on no valid plaint.”

10. This case is distinguishable from the present one in that the issue of non payment of filing fees was fully canvassed before the trial court and the Deputy Registrar of the court had purported to exempt the Respondent from paying requisite fee on the basis that he was an advocate.
11. This ground of appeal is dismissed for lack of factual basis.
12. The second issue for determination is whether the Trial Magistrate misdirected himself in Law and fact by finding that the Plaintiff had proved her case on a balance of probabilities and awarded the Respondent Kshs.205,000.
13. The court notes that the award of Kshs.205,000 was in respect of the stated claim for unlawful and malicious dismissal and the separate claims for terminal benefits in respect of Gratuity for years served and one month's salary for the period of suspension.
14. The court will first deal with the issue as to whether the Plaintiff proved to the standard required that she was unlawfully and maliciously dismissed from employment. In this assessment, the court bears in mind that this is a first appeal and it has the mandate to evaluate the evidence before the trial court afresh bearing in mind that the trial court had the benefit of hearing the testimony live and evaluating the veracity of the same and credibility of the witness.
15. The claimant Eunice Judith Adhiambo testified as PW 1 and called Denis Adanya Yala PW2 in support of her case.
16. The Claimant told the court that she was employed by the Respondent as a librarian in January 1998 and was given a letter of appointment dated 10th December, 1997. That she had no problem with the Respondent until 24th April, 2006 when she was given a letter of suspension and accused of incitement and insubordination.
17. On 24th May, 2006, she was called to appear before the Board of Management by letter dated 16th May, 2006. She was accompanied by her lawyer. She had written and asked to be told why she should appear before the board. She said everyone was abusing her. Then she was not given a fair hearing. She was not paid salary during suspension. Her salary was Kshs.5,000 per month and produced her pay slip. That she was underpaid by Kshs.1,049,656. The calculations were done by the union. Under cross examination, PW1 admitted that her letter of appointment did not provide for house allowance; medical allowance and gratuity. That she had worked for 9 years. That the disciplinary hearing could not proceed because everyone was shouting. That she was being insulted by board members. Her lawyer was also called names. That she only went on leave once in 9 years. She was entitled to 28 days leave per year.
18. PW2 was a Union representative. He testified that the Claimant was a member of the union. That PW 1 was suspended in 2006 and when they approached the head mistress on the matter she was unwilling to discuss the matter. The union reported the disputes to Ministry of Labour. That Union wrote a letter of demand claiming benefits using civil service scale as there was no Collective Bargaining Agreement in place.
19. The Respondent called DW1, professor Peter Wanyande the Chairman of the Board of Management of the Respondent. DW 1 told the court that the reason for suspending the Claimant was insubordination of the Board and incitement of non-teaching staff and support staff and collusion with people of doubtful characters against the staff and the Board. That on 2nd May 2006, the disciplinary meeting could not take place due to absence of DEO. That Claimant was re-invited to defend herself on 18th August, 2006. DW1 did not explain if this meeting took place or not. On 18th August 2006, the Board dismissed the Claimant for insubordination, false information and making threats. That Claimant was not entitled to gratuity, house allowance and medical allowance. That claimant was not entitled to any benefit upon dismissal.
20. The learned trial magistrate simply stated that in his view, the dismissal was unlawful without providing reasons for that finding. However from the oral and documentary evidence before the trial court, it is apparent that in the letter of suspension dated 24th April, 2006 the Plaintiff was not required to answer the three allegations made against her. The letter did not specify the particulars of insubordination; incitement and collusion alleged in general terms in the letter.
21. The letter dated 16th May 2006, simply asked the Plaintiff to appear before the Board of Governors on 24th May, 2006. The Claimant sought particulars of charges made against her by a letter dated 20th May, 2006. The letter was not responded to. The disciplinary hearing did not proceed on 24th May, 2006 and none was held until the Plaintiff was dismissed.
22. The Claimant had from the record, proved on a balance of probabilities that her dismissal was unlawful and unfair. The trial court did not err in this respect. The court upholds the decision of the court in this respect therefore.
23. On the issue of remedies awarded to the plaintiff, the court finds that the award of one month salary during the period of suspension and payment of gratuity in terms of the guidelines given by the Ministry was adequately proved by the Plaintiff on a balance of probabilities.
24. The suit was filed before the promulgation of the Employment Act, 2007 and Cap 226 which was applicable to the suit did not provide for 12 months maximum compensation for unlawful dismissal.
25. The Plaintiff was entitled to one month's salary in lieu of notice. The award of 12 months' notice pay is substituted with an award of one month salary in the sum of Kshs.5,000 in lieu of notice.
26. With regard to the award of damages for unlawful and malicious dismissal in the sum of Kshs.100,000, the court has no basis to fault the discretion exercised by the Learned Magistrate in this respect.
27. The court rarely interferes with the discretion of the trial court unless it finds that trial court grossly misdirected itself on matters of Law and fact as to arrive at a decision which no court, reasonably guided would arrive at. This is not the case in the present matter. **See the case**

of Paramount Bank Limited VS Mohammed Ghias Qureishi and Another Nairobi CA No. 239 of 2001 and Barclays Bank of Kenya Limited VS Joseph Mwaura Njau, Nairobi CA No. 314 of 2001 where – General damages were awarded. The court however misdirected itself by making an award of damages for unlawful dismissal and in addition damages for malicious dismissal as separate items. Only one and not the other could stand in the circumstances of the case. The cross appeal has no merit and is dismissed.

28. In the final analysis, the appeal partly succeeds and Judgment is entered against the appellant in favour of the Respondent as follows:-

- a. One month salary in lieu of notice in the sum of Kshs.5,000.
- b. One month salary for the period of suspension Kshs.5,000.
- c. Gratuity for eight (8) years served in the sum of Kshs.40,000.
- d. General Damages for unlawful and unfair dismissal in the sum of Kshs.100,000.

Total award Kshs.150,000.

- e. Appellant to pay costs of the suit at the trial court and interest at court rates from date of judgment of the trial court till payment in full.
- f. The cross Appeal fails in its entirety.
- g. Each party to bear the costs of the Appeal and cross Appeal respectively.

Judgment Dated, Signed and delivered this 4th day of October, 2018

Mathews N. Nduma

Judge

Appearances

M/s. Bagwasi for Appellant

M/s Obodo for Respondent

Chrispo – Court Clerk