



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.19 OF 2017

UCHUMI MATTRESS LTDAPPELLANT

VERSUS

JOHN KARUGA WARUINGI1ST RESPONDENT

NICODEMUS NDEMO ONDIGI2ND RESPONDENT

Being an appeal from the judgement and decree arising from Nakuru CMCC No.1562 of 2004 delivered by Hon. J Mwaniki on 20th June, 2012.

JUDGEMENT

1. The suit was originally filed at the Chief Magistrates Court Nakuru in Civil Suit No.1652 of 2004 and judgement delivered by Hon. Mwaniki on 20th June, 2012.
2. The suit before the lower court was filed on 23rd July, 2004 and related to claims by the respondents herein who were the plaintiff and seeking general damages and payment of gratuity for 7 years and their leave entitlement from the year 2000. The facts were that the respondents had been employed as Shop Assistants and worked for the appellant from the year 1997 but on 10th May, 2000 they were summarily dismissed without any reasonable cause. There was no notice issued or payment in lieu of notice thereof. The termination of employment was unlawful.
3. The appellant in defence denied the claims and stated that the respondents had been employed as shop assistants but deserted their employment for no good cause and are not entitled to any compensation in damages or gratuity.
4. The respondent counter-claimed notice pay from the respondents for deserting employment without notice.
5. The counter-claim was denied on the grounds that the respondents did not desert employment, they were unlawfully terminated from their employment.
6. The trial court delivered judgement on the findings that the respondents had been orally dismissed from employment by the conduct of the appellant and were entitled to damages for unlawful dismissal. Damages were awarded based on 12 month salary and costs.
7. The counter-claim was dismissed.
8. Aggrieved, the appellant filed the appeal against the judgement and decree of the trial court on the grounds that;
 1. *The trial magistrate erred in law and fact by making findings in favour of the plaintiff.*
 2. *The trial magistrate erred in law and fact by entering judgement for the plaintiff against the defendant in total disregard to the rules of procedure and practice.*
 3. *The trial magistrate erred in law and fact by making findings in that the plaintiff had proved his case on a balance of probability.*
 4. *The trial magistrate erred in law and fact by failing to consider the weight of the issues raised in the defendant's defence, evidence and submissions.*
 5. *The trial magistrate erred in law and fact by making a finding on issues not pleaded or supported by evidence.*

9. The appellant's case is that on these ground the judgement of the trial court should be set aside with costs and cost due before the trial court.
10. Parties agreed to address the appeal by way of written submissions.
11. The appellants in support of the appeal submitted that the respondent testified before the trial court that they were officials of *Sisi kwa sisi* a self-help group where money went missing and was given a loan by the appellant to repay and have half salary as investigations went on. That there was no termination of employment.
12. The trial court relied on the provisions of section 49 of the Employment Act, 2007 to award damages which law was not in force at the time the respondents left the employment of the appellant. Such was a wrong finding and resulted in injustice and the appeal should be allowed.
13. The respondents on their part submits that employment was by the appellant and not *sisi kwa sisi* as alleged by the appellant. The kitty *sisi kwa sisi* was not the employer but Woolmat Supermarket formerly Uchumi Mattress. The respondents were dismissed from employment for the alleged loss of money belonging to the members of *Sisi kwa sisi* a welfare group. The respondent was told to leave work and when they reported back they were sent away until the lost money was paid. The respondents proved their case on a balance of probabilities and the findings of the court and damages paid were appropriate.
14. The respondents also submitted that in the case of **Joseph Sitati Nato versus Kenya Ports Authority [2010] eKLR** the court held that where there was no evidence of wrongdoing to justify dismissal the employee should not be used as a scapegoat. Even where the employer has the right to dismiss the employee at any time the reasons given must be substantiated.
15. The trial court applied the proper law in calculating compensation for unlawful termination under section 49 of the Employment Act and the judgement should be confirmed with the dismissal of the appeal and payment of costs.

Determination

16. This is a first appeal and the court has the duty to re-evaluate the evidence to reach a conclusion aware that the trial court had the advantage of hearing and observing the demeanour of witnesses. The court will however interfere with a finding of fact by the trial court where there is a finding based on no evidence or on a misapprehension of evidence or where the trial court is found to have acted on wrong principles in reaching its findings and judgement as held in the case of **Dikianga Distributors (K) Ltd versus Kenya Seed Company Limited, Civil Appeal No.168 of 2011 (Kisumu)**. also See **Mary Njoki versus John Kinyanjui Muthuru [1985] eKLR** where the Court rendered itself thus:-

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484.

17. From the pleadings before the trial court in the Plaintiff it can be discerned that the cause of action is alleged to have arisen on the 10th May, 2004 where the appellant is said to have summarily dismissed the respondents from employment.
18. In this regard the 1st respondent testified before the trial court that he was employed by the appellant in the year 1996 and was issued with a letter of appointment in the year 2003. On 10th May, 2004 he was called by Mr Herison Thiong'o and told that as chairman of the staff kitty called *sis kwa sisi* he was liable for the loss of money. He was told to pay Kshs.43, 800.00 or leave.
19. The 2nd respondent made similar averments that he was dismissed following money missing from the staff welfare kitty *sis kwa sisi*. He was called and told to defend himself before management and he committed himself to repay the missing monies. He was verbally told to leave.
20. Effectively, on the pleadings and evidence, termination of employment having taken place on 10th May, 2004 the applicable law with regard to any matter between the parties was the Employment Act Cap 226 Laws of Kenya (now repealed). The application of the Employment Act, 2007 for any matter herein was not applicable.
21. The compensation due to an employee unfairly dismissed from employment is only applicable to claims lodged and premised on termination of employment found to be unlawful and or unfair under the provisions of the Employment Act, 2007 and not the Employment Act Cap 226. The application of the wrong statute led to misapplication of the law and a wrong finding.
22. As noted above, the respondent testified that following loss of monies relating to the welfare kitty *sis kwa sisi* and relating to employees of the appellant, they were called and questioned and directed to pay the money. They were laterally directed to leave employment and pay back the money.
23. In defence the appellant's case is that the respondents absconded duty. They did not give notice. In evidence, the respondent called Samwel Wang'a a shop attendant who testified that;

... we had formed staff welfare and we would make contributions. The 1st plaintiff was the chairman and 2nd plaintiff was the

treasurer. One day they alleged that contributions had been stolen from a cash box. The issue was reported to management. The members decided the plaintiffs either produce the money or quit employment. The member's resolution was sanctioned by the management. ...

24. Through its witness, the appellant confirmed that the respondent's termination of employment followed loss of the employees' welfare contributions and when they requested they pay or quit employment, the employer, the appellant herein sanctioned it.

25. Under the Employment Act Cap 226 Laws of Kenya (now repealed) an employer had the discretion to dismiss an employee from his employment subject to issuance of notice or payment in lieu thereof. Whether there is written or verbal termination of employment, the due notice should issue or payment in lieu therefore.

26. On the evidence of the parties and particularly the appellant, where they sanctioned the action of its employees upon demand to dismiss the respondents, the due notice pay is due. save that the award was based on a wrong computation.

27. The appellant in the defence claim for a notice pay at gross wage of kshs.12, 653.00 and 15,889.00 respective for each respondent. I take this was the gross wage for each respondent per month. Such is the due notice pay due.

28. The respondents were also claiming damages for unlawful termination of employment. The trial court made a finding that the appellant had sanctioned the resolution by the welfare group and did not allow the respondents back to work until they paid the money allegedly lost. The trial court held that;

... in their submissions they said they were entitled to general damages for unlawful dismissal. They said the same is based on 12 months' pay pegged on the gross salary as provided for under section 49 of the Employment Act, 2007. The defendant on submissions said the section does not apply as the suit was instituted in [the] year 2004 before the Act came to force. ...

29. Before the trial court, the respondents pleaded that they were unlawfully terminated from their employment. The remedy sought is payment of general damages.

30. A claim that termination of employment is *unlawful* must be based on the law which is alleged to be breached. The alleged acts of breach must be established. On the other hand, where the respondents were employed and issued with a contract of service, employment of letter of appointment spelling out terms and conditions of employment and such was breached, the remedy ought to be for wrongful termination of employment.

31. In this case, the pleadings and evidence are left bare as to the nature of the *unlawful* acts of the appellant and why the remedy of payment of *general damages* is sought as a result. The basis for the pleadings with regard to unlawful conduct, acts or violations must be established by the one who has pleaded for the court to have a basis upon which a finding and assessment of the due remedy in damages is awarded.

32. Without establishing the basis upon which the respondents had premised the claim for unlawful termination of employment, to proceed and make an award based on the concept of compensation under the provisions of section 49 of the Employment Act, 2007 is in error as such provision and basis for payment and assessment for compensation under the Employment Act, 2007 is premised on a finding that there was *unfair termination* or *unfair dismissal* from employment. The contradiction is necessary as to rely on the provisions of the Employment Act, 2007 without laying the basis and foundation for the award of general damages in a case where the respondents had pleaded that termination of employment was *unlawful* is overreaching and cannot find justification in law and particularly under the provisions of the Employment Act Cap 226 (now repealed).

33. Before the trial court, the respondents had the duty to plead and demonstrate a case of unlawful termination of employment. In the case of **The Watersklo of Municipality and South African Local Government Bargaining Council (Western Cape Division versus Arbitrator Adv C De Kock N.O** while quoting from **Council for Scientific and Industrial Research v Fijen (1996) 17 ILJ 18 (AD) at 26E-G** observed thus at page 13;

"it is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the „innocent party” to cancel the agreement On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgements in the LAC to this effect ... It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow naturalia contractus."

34. Also in **Michael Dowling versus Work Place Safety and Insurance Board**

[2004] CAN LII 43692 the court held as follows;

...It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct. ... Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the

faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer [underline added].

35. Without an interrogation of the reason(s) leading to termination of employment as to whether they complied with the applicable law or that the contractual terms of the Employment letter were adhered to, to award in damages was without the requisite interrogation.

36. The award of general damages is not justified under the applicable law.

Accordingly, the appeal partly succeeds save that the respondents are entitled to notice pay at kshs.12, 653.00 and 15,889.00 respectively for each respondent. each party to bear own costs for the appeal.

Dated and delivered at Nakuru this 1st day of November, 2018.

M. MBARU JUDGE

In the presence of: