



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO 49 OF 2018

[FORMERLY NAIROBI HIGH COURT CIVIL APPEAL NO 683 OF 2006]

AMOS W. GITHAIGA.....APPELLANT

VS

KENYA RAILWAYS CORPORATION.....RESPONDENT

(Appeal from the Judgment and Decree of Hon. K.L. Kandet, RM

dated 12th September 2006 in Nairobi CMCC No 4693 of 2002

delivered on 12th September 2006)

JUDGMENT

Introduction

1. This appeal was initially filed in the High Court at Nairobi as Civil Appeal No 683 of 2006. By an order made by **Njuguna J** on 30th October 2018, the matter was transferred to this Court.
2. When the parties appeared before me on 15th November 2018, the Appellant had filed his submissions and the Respondent undertook to file its submissions by close of business on that day. This judgment is therefore based on the Record of Appeal and the submissions filed by the parties.
3. In his Memorandum of Appeal dated 11th October 2006 and filed in court on 12th October 2006, the Appellant cites the following grounds of appeal:
 - a) The trial Magistrate erred in law and fact in not appreciating the fact that the Appellant's evidence was unchallenged as the Respondent did not call any evidence;
 - b) The trial Magistrate erred in placing a lot of weight on the non-availability of letter of appointment and therefore misconstrued the issue before the Court which issue was of a disciplinary nature (endorsing cheques) and would not be covered in the letter of appointment;
 - c) The trial Magistrate erred in law in not appreciating that the Appellant was charged under Regulation G2 (i) of the Personnel Regulations but was found guilty under a different Regulation G13(a) (i) to which the Appellant had not been called upon to defend himself;
 - d) The trial Magistrate erred in law and fact in ignoring the exhibits tendered by the Appellant and which originated from the Respondent and clearly exonerated the Appellant from any blame;
 - e) The trial Magistrate erred in not appreciating that the Deputy Managing Director's circular exempted the Appellant from its application and the Appellant was authorized to endorse the pensioners' cheques and it was therefore wrong for the Respondent to allege that the Appellant contravened it;

- f) The trial Magistrate erred in not finding as a fact that the two cheques the Appellant endorsed were already authorized and duly approved for payment by the Respondent and that all payment formalities had been finalized by the Respondent;
- g) The trial Magistrate erred in not finding that the two cheques would nevertheless have been paid had the payees presented them for payment at a bank since the same were duly signed for payment by the authorized signatories of the Respondent;
- h) The trial Magistrate erred in law and fact in misconstruing the issue of withheld half-salary the Respondent admitted withholding and which amount was all along with the Respondent and was not disputed;
- i) The trial Magistrate erred in law in confusing the standard of proof required in civil matters with that obtaining in criminal matters;
- j) The trial Magistrate erred in both law and fact in not appreciating that upon failure by the Respondent to tender any evidence to controvert the Appellant's evidence the case proceeded as if it was formal proof and it was futile for the trial Magistrate to attempt to act as if he was the Advocate for the Respondent;
- k) The trial Magistrate erred in law in misconstruing the Appellant's case based on reinstatement to his post and ignored the averments in the Plaintiff;
- l) The trial Magistrate's decision was clearly against the weight of evidence and it was an error in law on his part to dismiss the Appellant's case without any evidence from the Respondent challenging the Appellant's evidence.

4. This is a first appeal and as restated by the Court of Appeal in *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR the duty of a first appellate court is to consider and evaluate the evidence on record and draw its own conclusions always bearing in mind that it has neither seen nor heard the witnesses.

5. The Appellant has presented twelve grounds of appeal which in my view may be grouped under two broad heads:

- a. The burden of proof placed on the parties;
- b. Procedural fairness requirements.

6. On the question of burden of proof, the learned trial Magistrate found that the Appellant failed to present two crucial documents on which he sought to rely namely; his letter of appointment and the Respondent's Personnel Regulations. The trial court further found that the Appellant had failed to adduce evidence to prove his claim for withheld salary for 9 months.

7. The Appellant faults the trial Magistrate on this score and states that because the Respondent did not call any witness then the Appellant's testimony was unchallenged. With much respect, I disagree. Even in undefended claims, the claimant must prove their case. It is not enough to make averments and unsupported statements. The Appellant was under a duty to prove his claim before the trial court, on a balance of probability.

8. With regard to the claim for withheld salary for a period of 9 months, this Court agrees with the trial Magistrate that the claim, being in the nature of special damages, should have been specifically pleaded and proved.

9. Regarding the issue of procedural fairness, the Appellant told the trial court that he was charged under one Regulation G2 (i) of the Personnel Regulations but found guilty under Regulation G13 (a) (i). The Personnel Regulations were however not availed to the trial Magistrate. He therefore correctly found and held that the Appellant's plea in this regard could not be verified.

10. Having evaluated the evidence on record, I find nothing that would cause me to interfere with the judgment of the trial court.

11. The Appellant's appeal is therefore dismissed with costs to the Respondent in this Court and in the Court below.

12. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 17th DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Kirikafor the Appellant

Miss Kavaji for the Respondent