



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1942 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

HARRISON BIGIYO CLEMENT.....CLAIMANT/APPELLANT

VERSUS

PREMIER MILLS LIMITED.....RESPONDENT

JUDGMENT

(Being an appeal against the judgment of T. W. C. Wamae (Mrs.) Chief Magistrate delivered on 12th May 2012)

By the Plaintiff dated 13th June 2007, the Plaintiff/Appellant sued the Defendant/Respondent for unlawful and illegal termination and breach of contract of employment. The Appellant sought unpaid salary for 10 months, unpaid leave for 10 years worked and terminal benefits among other reliefs. The Respondent in its Defence dated 20th April 2007 denied the allegations set out in the Plaintiff and prayed that the suit be dismissed for being fatally defective.

The suit proceeded to hearing before T. W. C. Wamae (Mrs.) CM. The Plaintiff called only one witness PW1 being the Plaintiff himself while the Defendant called two witnesses: DW1 (Benson Iguna Riara) and DW2 (Abdulatif Abeyd Oyier).

On 18th May 2012, judgment was delivered dismissing the case with costs. The Plaintiff was aggrieved by the said judgment hence this appeal.

Appellant's Case

The Appellant's Appeal is based on the grounds that:

- a. The learned trial Magistrate erred in law and in fact in failing to analyze all the evidence and award the Plaintiff damages as pleaded in the Plaintiff.
- b. The learned trial Magistrate erred in law and in fact in failing to find that the Plaintiff had proved his case on a balance of probabilities.
- c. The learned trial Magistrate erred in law and in fact in not finding that the dismissal of the Plaintiff was admitted by the Defendants.
- d. The learned trial Magistrate erred in law by dismissing the Plaintiff's suit.

Respondent's Case

Subject to this Court's directions and the filing of a supplementary Record of Appeal, the parties agreed to canvass the appeal by way of written submissions. The Respondent did not file its written submissions. The Respondent only appeared before this Court once, on 27th May 2015.

Appellant's Submissions

On the issue whether the learned trial Magistrate erred in law and in fact in failing to analyze all evidence and award the Plaintiff damages as prayed in the Plaint, the Appellant submits that he had testified that he had worked under contractual employment for the years between 1994 to 2003 and that the contract was renewed on a yearly basis and he ought to have been paid damages for unlawful dismissal as well as leave days and severance pay owing to him. The Appellant further submits that the learned magistrate made a presumptuous assumption by stating that *“its unlikely that the Plaintiff was paid leave for 2005 and not for the other 9 years.”*

On the issue whether the learned trial magistrate erred in law and in fact in failing to find that the Plaintiff had proved his case on a balance of probability, the Appellant submits that he had proved his case on a balance of probabilities. The Appellant relies on section 18 of the Employment Act, 2007 which provides that upon summary dismissal an employee is entitled to all moneys, allowances and benefits due up to the date of dismissal. The Appellant further relies on section 43 of the Employment Act, 2007 which compels an employer to prove reason (s) for the termination and that where this is lacking, the termination is unfair. The Appellant further relied on section 44 of the Act arguing that the Section compels the employer to give the employee ample time to defend himself against any allegation raised. The Appellant submits that the opportunity was never granted nor were reasons for termination issued.

On the issue whether the learned trial Magistrate erred in law and in fact in not finding that the dismissal of the Plaintiff was admitted by the Defendant, the Appellant submits that the reason for termination given by the Respondent should have been adjudicated between him and the Defendant and the Appellant given a chance to be heard before his dismissal.

The Appellant prays that the judgment in CMCC No. 1062 of 2007 be set aside and judgment entered in favour of the appellant with costs of the trial court and the appeal herein.

Determination

On the issue whether the learned trial Magistrate erred in law and in fact in failing to analyze all evidence and award the Plaintiff damages as claimed in the Plaint, the Appellant sought the following prayers in his pleadings dated 13th January 2007: -

- a. Unpaid salary for 10 months, unpaid leave for 10 years worked and terminal benefits as pleaded in paragraph 6 of the Plaint (total figure to be supplied on or before the hearing hereof).
- b. Cost of the suit.
- c. Interest on (a) and (b) at court rate.
- d. And any other relief that this Honourable Court may deem fit and just to grant.

In a first appeal the court is under obligation to consider all the facts and arrive at its own independent determination. Refer to the case of ***Selle and Another –V- Associated Motor Boat Company Limited and Others (1968) EA 129.***

The learned Magistrate found that the Appellant’s claim for terminal benefits had failed because he had not explained the basis for claiming terminal benefits and how much. Further, the learned Magistrate was of the opinion that even if the Appellant had been able to prove his claim, the same would not have been awarded because it had not been pleaded in the plaint.

The Appellant submits that the learned trial magistrate erred in law and in fact in failing to analyze all evidence and award the Plaintiff damages as prayed in the Plaint. A perusal of the plaint discloses that the Appellant did not seek damages in his plaint dated 13th January 2007. Further, he did not adduce any evidence on the same. There is a difference between terminal benefits and damages. Terminal benefits are awarded according to the provisions of the contract and one special damages that must be pleaded while damages are awarded at the discretion of the court. Further, the Claimant is not entitled to damages for wrongful termination as the same is not provided for in the repealed Employment Act, which was applicable at the time of the termination of his employment. The Court in **ELRC Cause No. 165 of 2015; Dorcas Kemunto Wainaina vs. IPAS** found as follows:

“Nearly all unfair terminations of employment would lead to some embarrassment and or torture to an employee, but the statute has provided the primary remedies which do not include general damages. This would be inappropriate case to consider this head of claim and relief.”

I find that the learned trial Magistrate did not err in law and in fact by failing to award the Appellant terminal dues as the same was neither proved nor pleaded.

On the issue whether the learned trial Magistrate erred in law and in fact in failing to find that the Plaintiff had proved his case on a balance of probability, it is trite law that the threshold of proof in civil cases in on a balance of probabilities. The term *“balance of probability”* was defined by the Court in ***Kanyungu Njogu vs. Kimani Maingi [2000] eKLR*** as follows:

“When the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. “

During cross-examination, the Appellant admitted that he was not actually a permanent employee but a contractual employee employed for a term of 3 months. From the Contracts adduced in evidence by the Respondent, the Appellant’s contract dated 1st March 2005 indicated that he was employed from 1st March 2005 to 31st May 2005. He adduced as evidence in court two pay slips: one dated 8th August 2000 and the other dated May 2005. Nothing else was produced to support his claims. There were no receipts adduced to prove the special damages, no

evidence adduced to show that he had never taken leave for a period of 10 years. As such, the suit fell below the standard of proof in civil proceedings. Consequently, the learned trial magistrate's decision to dismiss the Plaintiff's suit was justified and proper in law.

On the issue whether the learned trial magistrate erred in law and in fact in not finding that the dismissal of the Plaintiff was admitted by the Defendant, the learned magistrate found that the Defendant's evidence that the Plaintiff did not go back to work after 23rd May 2005 was untruthful. The learned trial Magistrate was of the opinion that DW1 did not have authority to hire and fire and could therefore not have known that the Plaintiff had been fired. The learned trial magistrate further found that the Plaintiff's evidence of being fired to be undisputed. As such, the learned Magistrate did actually make the finding that the dismissal of the appellant was admitted by the respondent.

On the issue whether the learned trial Magistrate erred in law by dismissing the Plaintiff's suit, the Appellant did not make submissions. Nevertheless, having found that the Plaintiff had not proved his case on a balance of probabilities, the learned trial Magistrate had no option but to dismiss the suit.

Conclusion

From the foregoing, the appellant's appeal has no merit and is for dismissal. I accordingly dismiss the same. Since the respondent did not actively participate in the appeal, there shall be no orders for costs in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE