



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 4 OF 2015

(Before Hon. Justice Mathews N. Nduma)

MAURICE ABWAO OKWACH.....APPELLANT

VERSUS

THE CHAIRMAN BOARD OF MANAGEMENT

OTIENO OYOO SECONDARY SCHOOL.....RESPONDENT

J U D G M E N T

1. The Appellant being dissatisfied with the Judgment of the learned Resident Magistrate Hon. B. Kasavuli dated 24TH April, 2015 in Winam PMCC No. 277 of 2007 noted an Appeal.

2. The Appellant raised five (5) Grounds of Appeal as follows:-

(i) The Learned Trial Magistrate erred in law and fact by failing to appreciate that the summary dismissal was instigated by malice and falsehood hence arriving at a wrong decision.

(ii) The Learned Trial Magistrate erred in law and fact by relying on a letter from KASNEB whereas there was no evidence that the Appellant had presented and had in his possession and also in the possession of the Respondents documents confirming that the appellant had indeed obtained CPA 1 Certificates.

(iii) The Leaned Trial Magistrate unfairly relied on the unsubstantiated evidence that the appellant gave false information to Education Officers hence being coloured in the mind that the appellant was guilty of misconduct whereas there was no any lota of evidence to that effect hence arriving at a biased decision and to which decision has occasioned a miscarriage of justice.

(iv) The Learned Trial Magistrate, misinterpreted sections 41 and 44 of the Employment Act and in any event, the Respondent grossly failed to comply with said section.

(v) The Learned Trial Magistrate failed to consider the evidence of the Appellant.

3. The Appellant prays that the Judgment be set aside, the summary dismissal of the Appellant be converted to normal termination and the Appellant be paid terminal dues amounting to Kshs.248,379.

4. From the outset, the court has noted from the record, and in particular the plaint filed by the Plaintiff sought for the award of the following terminal benefits:-

a. Unpaid salary from January 2004 to January 2005 at the rate of Kshs.11,005 per month in the sum of Kshs.143,065.00.

b. Salary upto 17th February 2005, Kshs. 6,239.

c. Three months' salary in lieu of notice, Kshs.33,015.

d. Service gratuity at the rate of Kshs.367 per day for 15 days for each completed year of service in the sum of Kshs.66,060.

The total claim was Kshs.248,379. This is all that is sought by the Appellant, there being no claim for compensation for alleged unlawful summary dismissal.

5. In the statement of defence filed by the Respondent, the Respondent stated that the Appellant had admitted having defrauded the Respondent Kshs.214,792. That the Claimant did not work during the 13 months in respect of which arrear salary is claimed and that the Claimant was not entitled to notice pay, having been lawfully summarily dismissed.

6. This being a first appeal, the court is entitled to relook the evidence adduced before the court afresh. However the court ought not to interfere with the decision by the court simply because it would have arrived at a difficult decision. Interference would only be on the basis that there is no evidence at all to support the finding by the trial magistrate or the lower court grossly misdirected itself on a point of law or fact and by so doing arrived at a wrong and unjust decision.

7. The court has carefully considered the appeal record, and in particular the record of the proceedings before the trial magistrate and the judgment of the trial court and has come to the following conclusion:-

a. The trial magistrate did not apply his mind at all and made no specific finding with respect to the claim for unpaid salary between the period January 2004 to February 2005.

From the evidence before the trial court, the Appellant was suspended on 4th March, 2004, but was not paid salary for January and February, 2004.

The appellant was not paid any further salary until when he received a letter of summary dismissal on 8th February, 2005.

8. From the record of proceedings, none of the witnesses called by the Respondent denied that the Appellant was not paid salary for the period January 2004 to January 2005 and no explanation was offered whatsoever, as to why the arrear salary should not be paid.

9. The Learned Magistrate did not mention this issue at all in his judgment and therefore failed to apply his mind to this specific claim which had not been rebutted by the Respondent. The Learned Magistrate only addressed the issue of alleged unlawful dismissal and found that the appellant was not unlawfully dismissed and was therefore not entitled to any compensation.

10. It is apposite to note that, the Appellant had not sought any compensation from the pleadings before court but had only prayed for the summary dismissal to be commuted to a normal termination. The commutation would then have entitled the Claimant to payment in lieu of notice. The issue is not related at all to the prayers for payment of arrear salaries from the evidence presented to the Learned Magistrate.

11. It is the court's considered finding that the Learned Magistrate misdirected himself in law and fact, by failing to consider the unrebutted evidence by the Appellant in respect to the prayer for payment of arrear salary. In fact, the court made no finding at all in respect of this prayer. Accordingly the court finds that the Appellant had proved the claim for payment of arrear salary from the period January 2004 to February 2005 and is entitled to payment of Kshs.143,065 being arrear salary for 13 months.

12. Furthermore, the second prayer for payment of 17 days salary for the month of February, 2005 was wholly ignored by the learned magistrate. The claim had not been rebutted at all by the Respondent and the magistrate erred in law and fact by ignoring the prayer. The court awards the Appellant Kshs.6,239 being unpaid salary for 17 days in February 2005, prior to his summary dismissal on 17th February, 2005. There was no factual or legal basis that had been placed before the learned magistrate to deny these reliefs to the appellant.

13. Thirdly, and with regard to the prayer by the Appellant for the summary dismissal to be commuted to normal termination, again the learned magistrate misdirected himself in addressing the issues of termination and compensation which were not before him at all.

14. The learned magistrate stated this –

“I have equally considered the useful authority relied on by the defendant and the provisions of sections 41 and 44 of the Employment Act and prima facie, I am convinced that termination of the plaintiff's employment was arrived at after due process and the same was therefore not unlawful.

...I find that, the Plaintiff is not entitled to any compensation thus the last issue for determination is rendered nugatory.”

15. The pleadings by the Claimant and his testimony before court was that he was unlawfully summarily dismissed and prayed the court to commute the summary dismissal to normal termination and grant the appellant payment of terminal benefits. This evidence could only, and did apply only to the prayers for payment in lieu of notice and payment of service gratuity which are not payable upon summary dismissal of an employee but are otherwise payable upon a normal termination of employment, regardless of whether the termination was arrived at upon a finding of fault on the part of the appellant or not.

16. The Learned Magistrate clearly failed to appreciate the claim before him and by so doing misdirected himself in addressing a 'termination' and 'compensation' matters which were not before him.

17. While appreciating this misdirection by the court aquo, and having considered the evidence before the trial magistrate, the court is of the considered view that there was not sufficient evidence before court to warrant the trial court to deny the Appellant payment of his terminal benefits upon commuting the summary dismissal to a normal termination.

18. The Learned Magistrate had before him letters from KASNEB dated 25th October 2017 and 1st October, 2010 which exonerated the Appellant from obtaining or use of forged CPA 1 certificates. The Learned Magistrate observed that the employer did not have the benefit of

seeing these documents at the time it decided to summarily dismiss the Appellant but failed to address the implication of these findings then before him so as to consider the justice of the case.

19. The Learned Magistrate also failed to address the apparent difference in the charges put against the Appellant in the notice to show cause dated 2nd March, 2004 vis a vis the plethora of charges including false representation of qualifications, charges which were hitherto not in the notice to show cause but with which the Appellant was ambushed in the disciplinary hearing. It is the court's considered finding that the Respondent failed the test of procedural fairness in this respect and the trial court misdirected itself in finding that the Respondent had satisfied the requirements of section 41 of the Employment Act, which mandates an employer to give a fair hearing to an employee before summarily dismissing them.

20. Accordingly, the court finds that the Appellant was entitled to payment in lieu of one (1) month notice in the sum of Kshs.11,005 and payment of service gratuity which is payable to non-teaching staff employed by Board of Management in the sum of Kshs.66,660. This claim was not rebutted at all by the Respondents in their pleadings, or in the sworn testimony and the learned magistrate did not specifically deal with it. The same was proved on a balance of probabilities hence the decision by this court to award the same.

21. In the final analysis, the appeal succeeds fully, except that, the Appellant is entitled to payment in lieu of one month notice and not in lieu of three (3) months' notice.

22. Judgment is entered in favour of the Appellant as against the Respondent for payment of Kshs.226,369. The award is payable with interest at court rates from date of filing suit till payment in full. The Respondent to pay costs of the trial before the Magistrate court and the Appeal.

Dated and Signed in Kisumu this 6th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Anyul for Appellant

Mr. Yogo for Respondent

Chrispo – Court Clerk