



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NUMBER 576 OF 2016**  
**(ORIGINAL HIGH COURT CIVIL APPEAL NO. 204 OF 2007)**

**RESORT KENYA LIMITED.....CLAIMANT**

**VERSUS**

**ROBERT OMBEVA MUSILA.....RESPONDENT**

**(Being an Appeal from the judgement of the Honourable**

**Mr. E. C. Cherono SRM delivered on 23<sup>rd</sup> February, 2007**

**in Milimani CMCC No 1910 of 2004)**

**-BETWEEN-**

**ROBERT OMBEVA MUSILA.....PLAINTIFF**

**VERSUS**

**RESORT KENYA LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The appellant being dissatisfied with the judgement of Hon. Cherono (SRM) delivered on 23<sup>rd</sup> February, 2007 appealed to this court against the entire decision on the following main grounds:

- a. The Learned Magistrate erred in law and in fact by holding that the plaintiff sought an award of gratuity notwithstanding that nowhere in the plaint as the same sought or prayed for.
- b. The Learned Magistrate erred in law and in fact by recognizing a claim for service which term is unknown to the law
- c. The Learned Magistrate erred in law and in fact by holding that the plaintiff was dismissed from the defendant's employment on allegations of involvement in the theft of the defendant's motor vehicle notwithstanding the defendant's concise evidence as to the circumstances leading to his dismissal.

d. The Learned Magistrate erred in law and in fact in finding that the plaintiff was wrongfully dismissed from the defendant's employment.

e. The Learned Magistrate erred in law and in fact in holding that the Plaintiff's allegations had not been controverted anywhere.

f. The Learned Magistrate erred in law and in fact in finding that the plaintiff was entitled to payment of a salary for December 2003.

g. The Learned Magistrate erred in law and in fact in finding that the plaintiff was entitled to two months pay in lieu of notice for wrongful dismissal yet the period of notice was not proven.

2. In support of the appeal, Ms Ngode for the appellant submitted that the learned magistrate erred in law and in fact by granting awards or reliefs not sought. According to the appellant, the respondent herein only sought for special damages which were tabulated as salary for December 2003, salary in lieu of notice for two months and costs of the suit and interest. There was no mention of an award of gratuity in the pleadings.

3. In support of his submission, counsel relied on the case of **Blay Vs Pollard & Morris [1930] 1KB 682.** Where it was stated that cases must be decided on the issues on record. Counsel further relying on the case of **Central Bank of Kenya Vs Davies Kiriko Muteti [2009] eKLR** submitted that in law, there is a wide difference between severance pay which at the time was a payment entrenched in the Employment Act (cap 226) and was payable under redundancy provisions introduced in the Act through Act No. 6 of 1994.

4. Gratuity on the other hand has nothing to do with an employee being declared redundant. It was further Ms Ngodes contention that the applicable Act was the Employment Act cap 266 (now repealed). Accordingly the learned magistrate misdirected himself and erred in law when he entered judgement in favour of the respondent in the sum of Kshs 91,000/= on account of gratuity which was not considered under the Employment Act cap 226.

5. In support of grounds 6 and 7 of the appeal, the appellant submitted that the learned magistrate erred when she awarded a relief based on unproven facts. According to counsel the respondent in its amended plaint dated 10<sup>th</sup> February, 2006 had sought salary for the month of December, 2003 and salary in lieu of notice for two months yet did not produce any documentation to prove that he was entitled to two months pay in lieu of notice. Further the learned magistrate awarded the respondent salary for December, 2003 though termination was effective from 3<sup>rd</sup> November, 2003. There was no evidence the respondent worked in December, 2003.

6. In support of ground no 4 and 12 of the appeal counsel submitted that the learned magistrate erred in finding that the respondent was wrongfully dismissed. According to counsel, the applicable law at the time of the suit was the Employment Act, cap 226 and section 17 of the Act permitted summary dismissal on grounds listed thereunder further, under the repealed Act an employer had the right to dismiss any employee without affording the employee any reason. In support of the submission, counsel relied on the case of **Rift Valley Textiles Ltd Vs Edward Onyango Oganda [1994] eKLR.**

7. Concerning the finding that the respondent's claim remained uncontroverted, counsel submitted that the appellant filed an amended defence to the claimant and filed submissions which indicated there were glaring omissions in the respondent's case. The appellant further called four witnesses in support of its defence. The appellant further adduced evidence to the effect that the internal investigations were carried out by the head of security which revealed the respondent failed to perform his duties whilst in the employment of the appellant. This showed the appellant had established a cause and a valid reason necessitating summary dismissal.

8. Therefore according to the counsel for the appellant, her client not only discharged its duty in defending the suit and the allegations of unlawful termination but also proved that the respondent had

failed to prove the claim in the court below on a balance of probability. The respondent on its part submitted that regulation of Wages and Conditions of Employment Act cap 229 empowered the Minister for Labour to make regulation of Wages (Protection Security Services) order of 1998. Under this order gratuity was recognized and payable.

9. Counsel for the respondent, Mr Wangalwa further submitted that since the trial court had made a finding that the respondent's summary dismissal was wrongful, the magistrate was right to award the respondent gratuity or service payment. Mr Wangalwa further submitted that none of the appellants' four witnesses either in evidence in chief or cross-examination gave evidence showing the respondent was culpable.

10. According to counsel, the learned magistrate found that there was no evidence that had been given linking the plaintiff to the theft of the motor-vehicle. He was only sacked because the appellant had lost confidence in him after the vehicle had been stolen. Regarding notice of termination, Mr Wangalwa submitted that the appellant's own witness, Mr Ndichu stated that if the defendant were to give the plaintiff notice before dismissing the plaintiff, the notice would be two months' notice but since the plaintiff was summarily dismissed, he was not entitled to it. Concerning December, 2003 salary, counsel submitted that none of the appellants witness denied the respondent's claim that he received the summary dismissal letter on 10<sup>th</sup> December, 2003.

11. This being a first appeal, the court is charged with the responsibility to consider the evidence afresh and see if the decision of the trial court was based on the correct apprehension of the evidence and the law. The court at this stage however relies entirely on the record and does not have the benefit of listening to oral evidence of witnesses and their cross-examination. I have in this regard reviewed the evidence and considered the trial magistrates analysis of the same and the conclusion reached in his judgement and do not seem to see where he erred as averred by the appellant.

12. At page 76 of the record of appeal, the learned magistrate observed that the plaintiff was dismissed by the defendant on allegations that he was involved in the theft of a motor vehicle belonging to the defendant. The plaintiff on the material day was on night shift from 8.00 p.m. until 4.00 a.m. No evidence was given linking the plaintiff to the theft of the said motor vehicle. He was only sacked because the defendant had lost confidence in him. The learned trial magistrate further observed that the theft of the defendant's motor vehicle was reported to Jogoo Road Police Station. The police investigation however did not reveal that the plaintiff was involved in any way with the theft of the said vehicle.

13. He was neither asked to record any statement nor charged with any criminal offence. The learned magistrate further observed that the vehicle allegedly stolen was not specifically assigned to the plaintiff to take care of. The plaintiff was assigned general security duties. According to the learned magistrate, the security guards who were manning the two gates were also not called as witnesses.

14. It is not correct that summary dismissal under section 17 of the repealed Act did not require an employer to have reasons before dismissing an employee. If that was the correct interpretation then there was no need to provide for circumstances when a summary dismissal would take place. A summary dismissal is a drastic step and can only be undertaken by an employer.

15. The law knows no such thing as summary termination of employment by an employee. Under the old law, an employment relationship could under normal circumstances be terminated by giving a notice period provided for in the contract of service or the Act or payment in lieu thereof. An employer or an employee opting to terminate the contract of employment under such normal circumstances was not unlike now, required to give any reason provided the requisite notice of termination was given or salary in lieu thereof, paid.

16. From the foregoing, an employee summarily dismissed had the right then as it is now to question the reason for such dismissal before a court of law and the court properly seized of the matter has jurisdiction to interrogate the veracity of the reason for such dismissal and make an appropriate finding as the case

before me.

17. In conclusion the court has carefully considered and reviewed the judgement of the trial court and became of the view that the same was sound in law and finds no reason to disturb the same. The appeal therefore fails and is hereby dismissed with costs.

18. It is so ordered.

Dated at Nairobi this 17<sup>th</sup> day of February, 2017

**Abuodha J. N.**

**Judge**

Delivered this 17<sup>th</sup> day of February, 2017

**In the presence of:-**

No appearance for Appellant and

Mutahi h/b for Wangalwacfor the Respondent.

**Abuodha J. N.**

**Judge**