



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
APPEAL NUMBER 26 OF 2015

BETWEEN

MASOUD M.Y. NOORANIAPPELLANT

AND

GENERAL TYRE SALES LIMITED RESPONDENT

[An Appeal against the Judgment of the Hon. Resident Magistrate B. Yator, delivered on the 9th February 2010 at Mombasa, in SRMC Case Number 544 of 2006]

BETWEEN

MASOUD M.Y. NOORANIPLAINTIFF

VERSUS

GENERAL TYRE SALES LIMITEDDEFENDANT

Rika J

Court Assistant: Benjamin Kombe

K.A. Kasmani & Company Advocates for the Appellant

Daly & Inamdar Advocates for the Respondent

JUDGMENT

1. The Appellant filed a Claim in the Senior Resident Magistrate's Court against the Respondent, his former Employer. He claimed he was employed by the Respondent as a Sales and Marketing Manager in June 1997. He worked up to 29th August 2005, when he was informed by his Employer that his position had been rendered redundant. There was no more work for him. He stated his salary was Kshs. 72,500 per month. He was not paid redundancy benefits and sought from the Court, against the Respondent, the following orders:-

a) Severance pay over a period of 8 years at 15 days' salary for every completed year of service, at Kshs. 290,000.

b) 2 months' salary in lieu of notice at Kshs. 143,000.

Total... Kshs. 433,000

c) Costs and interest.

2. The Respondent, holding that the Appellant's monthly pay was Kshs. 40,000 and not Kshs. 72,500 as claimed, offered to pay to the Appellant 2 months' salary in lieu of notice at Kshs. 80,000 less Kshs. 40,000 received; and pro-rata leave at Kshs. 10,000- total Kshs. 50,000.

3. In a very brief Judgment, the Court went by the offer made by the Respondent, finding the Appellant was entitled to 2 months' salary in lieu of notice at Kshs. 80,000, and pro-rata leave of Kshs. 10,000- total Kshs. 90,000. Less Kshs. 40,000 paid, the sum granted by the Court was exactly what the Respondent had offered.

4. Dissatisfied, the Appellant lodged an Appeal, registered at the High Court Mombasa, as Civil Appeal Number 123 of 2010. The Appeal was subsequently transferred to the present Court, registered as Appeal Number 26 of 2015. The Appeal was heard on 26th October 2016.

The Appeal:-

5. The Appellant raises 3 main Grounds of Appeal: the Trial Court did not make any proper findings on evidence adduced; the Trial Court erred in not making a finding on the prayer for severance pay; the Judgment was against the weight of the evidence.

6. He submits his salary was Kshs. 72,500 per month, paid part in cash and part in cheque. He gave his salary schedule [page 27 of the Record of Appeal] showing he earned Kshs. 72,500 monthly. The Respondent corroborated Appellant's position that he was paid in cash and cheque. Trial Court did not take into account that Appellant's salary was paid in these modes.

7. Respondent's Witness told the Trial Court sales went down, occasioning redundancy. The Appellant was entitled to severance pay at the rate of 15 days' salary for every year of service. The Court did not take into account evidence of redundancy. The Appellant prays the Court to allow the Appeal.

Response

8. The Respondent urges the Court to uphold the Judgment of the Trial Court. It was shown through payroll records, that the Appellant's monthly salary was Kshs. 40,000. No evidence was adduced showing the monthly salary to be Kshs. 72,500. The Trial Court took into account all evidence. The Appellant conceded he did not have any document indicating his salary was Kshs. 72,500.

9. The Respondent conceded the prayer for 2 months' salary in lieu of notice.

10. The Appellant did not prove his contract was terminated on account of redundancy. The reasons for termination were given in the letter of termination. Poor performance and general negligence were the reasons. Another Employee was recruited to fill up the Claimant's position. The position was therefore not declared redundant. The Trial Court dismissed the claim for severance pay, because termination was not based on redundancy.

The Court Finds:-

11. The Judgment of the Trial Court as observed above is extremely short. Page 1 gives an overview of the Claim, and summary of the Appellant's Case. Half of page 2 contains a summary of the Respondent's

Case. At the tail end of these summaries, the Trial Court states:

“I have considered both the Plaintiff’s and Defendant’s evidence and find as follows:-

- i. *The Plaintiff is entitled to 2 months’ salary in lieu of notice at Kshs. 40,000 per month- total Kshs. 80,000.*
- ii. *Pro-rate 3/12 leave.... Kshs. 10,000.*

Total... Kshs. 90,000

iii. *Plus costs and interest. ‘*

12. The evidence given by the Parties was itself quite brief, and could perhaps be the reason why the Trial Court made what reads like a microwave Judgment.

13. Nevertheless the evidence by the Parties, raised issues which were not addressed by the Court.

14. The rate of monthly pay was in dispute. The Appellant stated he was paid Kshs. 72,500 per month, while the Respondent stated the rate was Kshs. 40,000 monthly. The Court did not make a finding on the applicable rate. There is no comment on the documents supplied by the Parties, supporting their respective claims on the applicable rate. The Trial Court simply went by the rate of Kshs. 40,000, without giving reasons.

15. Similarly there was a claim made, that the Appellant’s position was declared redundant. He sought severance pay. The record indicates the Appellant cited the Regulation of Wages [Motor Engineering Trades] Order, in claiming severance pay. The Trial Court did not make any comment on redundancy, severance pay, or the legal instrument the prayer was made under. The Respondent alleged the reasons for termination were poor performance and general negligence. The Trial Court did not resolve the dispute over the reasons for termination. Submission made by the Respondent that the claim for severance pay was rejected because termination was on other grounds, is not supported by the Judgment of the Trial Court. It is not stated why the prayer for severance pay was rejected. The word ‘severance pay’ is not to be found in the Trial Court’s Judgment.

16. *The Appeal succeeds on the ground that the Trial Magistrate did not make findings based on evidence adduced before him.*

17. An evaluation of that evidence shows the Respondent produced payrolls, indicating the Appellant’s monthly salary was Kshs. 40,000. The Appellant signed against his name on the payroll. If there was additional salary paid to him by whatever mode, it was not captured. He did not call any Witness who, even in the absence of documents, could vouch for his claim that he earned a total of Kshs. 72,500. The Salary Schedule from page 27 of the Record seems to have been authored by the Appellant himself. It was not shown to be a document originated from the Employer. The Trial Court rightly adopted the monthly rate of Kshs. 40,000.

18. Ramesh Shah, Respondent’s Director testified at page 5 of the Court Proceedings that sales went down, and the Respondent had to reduce costs. Other reasons stated in the termination letter which the Appellant disputes having received, are peripheral. The main reason was given by Shah in his testimony. The Appellant left, to allow the Respondent reduce costs. He left employment involuntarily, and for economic reasons related his Employer’s business performance. The Employee who took over Appellant’s duty was promoted from within the Respondent Company. It is not true that the Respondent employed from without.

19. Consequently the Trial Court should have found the Appellant left employment on redundancy, and granted him the prayer for severance pay. It was not denied that the Regulation of Wages [Motor Engineering Trades] Order, applied to the Appellant. Parties agreed on 2 months’ salary in lieu of notice as stipulated under clause 19 [1] [b] of the Order. Clause 16 [f] entitled the Appellant to severance pay at

the rate of 15 days' salary for every completed year of service. This position had support in the repealed Employment Act Cap 226 the Laws of Kenya. The Act of 2007 is not relevant to the dispute.

20. The Appellant worked between June 1997 and 1st July 2005. This is the period indicated in the Plaint. It is not clear why the Appellant stated elsewhere, that he worked up to 25th August 2005. He definitely worked 8 complete years. ***He is granted severance pay at 15 days' salary at Kshs. 20,000, for each of the 8 years, totaled Kshs. 160,000.***

21. Costs of the Appeal to the Appellant.

22. Interest granted at 14% per annum, from the date of Judgment.

IN SUM, IT IS ORDERED:-

[a] Appeal is allowed.

[b] The Respondent shall, in addition to the amount granted by the Trial Court, pay to the Appellant severance pay at Kshs. 160,000.

[c] Costs to the Appellant.

[d] Interest allowed at 14% per annum, from the date of Judgment.

Dated and delivered at Mombasa this 10th day of February 2017.

James Rika

Judge