



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**APPEAL NO. 7 OF 2014**

**(Formerly H.C.C. Appeal no. 478 of 2012)**

**LAXMANBHAI CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**VERSUS**

**FILIMON MBAYAGI KEDOGO.....RESPONDENT**

**(Appeal from the Judgment and decree of the Principal Magistrate Court at Nairobi dated 30<sup>th</sup> August 2013)**

**M/S Maina for Appellant**

**Mr. Sifuma for Respondent**

**JUDGMENT**

1. This is an appeal against the whole of the Judgment and decree of Principal Magistrate Mr. P. Nditika delivered on 30<sup>th</sup> August 2013 **in Nairobi CMCC No. 3930 of 2006.**
2. The Court *aquo* declared that the termination of Respondent services was irregular and that the Respondent should be reinstated forthwith with full salary and allowances from the date of termination to date of reinstatement and that the Respondent be refunded irregular deductions in the sum of Kshs.39,850.00. In the alternative, the sum of Kshs.183,610.00 severance pay be paid to the Respondent with costs and interest.
3. The learned magistrate had also delivered a ruling on 26<sup>th</sup> May 2009 dismissing a preliminary objection raised by the Appellant to the effect that the magistrate Court had no jurisdiction to entertain the suit.
4. In the memorandum of appeal dated 7<sup>th</sup> September 2012 and filed on 10<sup>th</sup> September 2012, the Appellant states *inter alia*;
  - i. The Honourable Magistrate erred in law and fact in failing to find that the Respondent's case was not proved on a balance of probability.
  - ii. The Honourable Magistrate erred in law and in fact in failing to find that the Court had no jurisdiction to entertain the Respondent's case.

iii. The Honourable Magistrate erred in law and fact in failing to find that the law applicable to the Respondent's employment was the Employment Act, Cap 226 (repealed).

iv. The Honourable Magistrate misapprehended and misapplied the law in failing to find that severance payment made by the Appellant was lawful.

v. The Honourable Magistrate erred in law and fact in awarding interest on the decree with effect from 6<sup>th</sup> April 2002.

5. On the issue of jurisdiction, which the Court was obliged as it did to determine from the outset, it was submitted by the Appellant that the Court *aquo* had no jurisdiction to entertain the matter in light of the fact that the Respondent, together with other employees of the Appellant had chosen to file a complaint at the labour office on or about May 2002. The dispute was heard and determined by the Principal Labour Officer who delivered a ruling on the matter on 12<sup>th</sup> June 2002. That no appeal was lodged against the decision of the Provincial Labour Officer.

### **Determination**

6. The Respondent and others had been declared redundant under Section 16A(1) of the Employment Act, Cap 226 of the Laws of Kenya as amended by Act 6/94. (now repealed).

7. Section 40(1) of Cap 226 provided;

*“whenever an employer or employee neglects or refuses to fulfil a contract of service or whenever any question, difference, dispute arises as to the rights or liabilities of either party, the party feeling aggrieved may make a complaint either to a labour officer or to a magistrate empowered to hold a Magistrate's Court of the first or second Class.”*

8. Under Section 40(2) was provided;

*“whenever a complaint is made under subsection (1) of this Section-*

*(a) to a labour officer, he shall use his best endeavours by taking of such lawful steps as may seem to him expedient, to effect settlement between the parties.”*

9. It is common cause that the Principal Labour Officer dealt with the matter and recommended a settlement in LD 64 cases for 33 employees who included the Respondent herein.

10. The report of Mr. S. M. Mbae, the Provincial Labour Officer was tendered as evidence and on the face of it, it is not a ruling, but a report of investigations of the 33 cases dealt with jointly by himself in terms of a reference made to him by the Commissioner of Labour.

11. In the Report the Principal Labour Officer concluded as follows;

(i) The 33 employees were paid service / severance pay at the end of every year and payment vouchers signed by the workers acknowledging payment of the severance pay were produced and confirmed by the 33 workers including the Respondent herein.

12. The officer acknowledged the reasons given by the Appellant for the advance payment of severance pay which otherwise would have become due and payable upon declaration of redundancy as happened in this case.

13. With respect to the parties, the Provincial Labour Officer found that the Appellant owed him transport allowance to his home and one month salary in lieu of notice in terms of the agreement between the Respondent and the Appellant entered into on 3<sup>rd</sup> February 2002 which is part of the record.

14. In the said Agreement, the parties agreed that the Respondent was owed;

1. one month salary in lieu of notice;
2. sixteen (16) days severance pay for year 2001;
3. January 2002 leave allowance;
4. one way transport to the home area;
5. leave travelling allowance still pending;
6. February 2002 salary of days worked.

15. During the trial before the Magistrate Court, the Respondent purported to repudiate this agreement stating that he was owed severance pay for the entire period of his employment *inter alia*.

16. It is the Court's finding that the Provincial Labour Officer conducted an investigation on the dispute and made recommendations to the parties. The report of the Provincial Labour Officer did not amount to a ruling or judgment. The Respondent was not barred from approaching the Court upon being dissatisfied by the recommendation of the Provincial Labour Officer. The Magistrate Court was clothed with jurisdiction in terms of Section 40(1) of the Employment Act, Cap 226 (repealed) to hear and determine the matter.

17. The Act did not preclude an aggrieved party to seek adjudication before the Magistrate Court if the settlement of the dispute was not achieved in terms of Section 40(2) of the Act. The learned Magistrate did not err in finding that he had jurisdiction to entertain the dispute.

18. On the second ground of Appeal, regarding whether or not the Respondent proved on a balance of probability that;

- a. his employment was irregularly terminated;
- b. he was owed severance pay in the sum of Kshs.183,610; and
- c. Kshs.39,850.00 being unlawful deductions from his salary.

19. The Court has carefully considered the Appeal record including the written submissions by the parties and has come to the following conclusion of law and fact;

It is manifestly clear from the Report of the Provincial Labour Officer, the agreement between the parties signed on 3<sup>rd</sup> February 2002 and the testimony by the Appellant on record that the Appellant paid all its workers severance pay at the end of each year and in addition remitted the National Social Security Fund (NSSF) deductions on behalf of the employees. In this regard, the lower Court erred in finding that the Respondent was upon declaration of redundancy owed further severance pay by the Appellant on the face of compelling evidence before Court to the contrary.

20. Section 16A of Cap 226 did not preclude an employer, on good reasons to pay the severance pay in advance at the end of each year to cushion itself from inability to pay in future for reasons of bankruptcy or other unforeseen eventualities. The Agreement which the Respondent sought to repudiate corroborated the testimony by the Appellant in this respect and this Court finds that the Appellant did not owe the Respondent further severance pay except for the year 2001 at the time of termination of employment.

21. In this respect the learned Magistrate erred in finding that the Respondent had proved his case on a balance of probability. The Magistrate further erred in applying the provisions of Section 40(1) of the Employment Act, No. 11 of 2007, on the face of the non-contested evidence that the termination took

place in the year 2002 when the Employment Act, No. 11 of 2007 had not been enacted.

22. Consequently, the learned Magistrate misapprehended and misapplied the law applicable and as a result made unwarranted award to the Respondent.

23. Regarding the matter of alleged irregular deductions of Kshs.39,850.00 from the salary of the Respondent the evidence before Court and especially, the agreement between the parties dated 8<sup>th</sup> February 2002, the report of the Provincial Labour Officer and the documentation produced before Court aquo indicate clearly that the Respondent did not prove such deduction on a balance of probability and the learned magistrate erred in awarding the same to the Respondent.

24. Accordingly, the Court sets aside the entire Judgment delivered by the lower Court on 30<sup>th</sup> August 2012 with costs to the Appellant on the proceedings before this Court and the lower Court.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of January 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**