



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 158 OF 2014**

**(Formerly High Court Civil Appeal No.165 of 2010 at Nyeri)**

**(Being an Appeal from the Judgment and Decree given on 31.08.2010 by the Honourable M.W.Mutuku, Senior Resident Magistrate, in Daniel Irungu Wanjohi Versus Julius Macharia Ndugire and 2 Others, Civil Case No.110 of 2007 at the Magistrate's Court at Kagumo)**

**JULIUS MACHARIA NDUGIRE (CHAIRMAN).....1<sup>ST</sup> APPELLANT**

**WINNIE WANJIRU KARURI (TREASURER).....2<sup>ND</sup> APPELLANT**

**MIRIAM NJAMBI KIMANI (SECRETARY).....3<sup>RD</sup> APPELLANT**

**VERSUS**

**DANIEL IRUNGU WANJOHI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 25<sup>th</sup> September, 2015)

**JUDGMENT**

The respondent filed the plaint dated 11.07.2007 at the Senior Resident Magistrate's Court at Kigumo through Kirubi, Mwangi Ben & Company Advocates. The appellants were sued in their capacity as the executive officials of Kamung'ang'a Health Centre. The respondent prayed for judgment against the appellants jointly and severally for:

- a) The defendants be ordered to pay the plaintiff the owing legal terminal benefits plus money expended in following up the claim.
- b) Costs and interest of the suit.
- c) Any other or better relief the honourable court may deem fit to grant.

The appellants filed their defence on 6.08.2007 through Kamau Kuria & Kiraitu Advocates and prayed that the suit be dismissed with costs.

The honourable trial court found that the plaintiff's computations were well explained and were reasonable and further that the plaintiff had proved his case on a balance of probabilities. The trial court entered judgment in favour of the plaintiff against the defendants (the appellants) for payment of **Kshs.131, 051.30**, costs and interest of the suit.

The appellants were dissatisfied with the judgment and decree as delivered by the trial court and filed the memorandum of appeal on 21.09.2010. The appellants urged that the honourable trial court erred:

- a) in law and fact in awarding the plaintiff legal benefits and emoluments amounting to Kshs. 131, 051.30 despite the fact that the particulars of claim being special damages were not specifically pleaded in the plaint;
- b) in admitting the evidence of the plaintiff who contradicted the labour officer's evidence and his own evidence;
- c) in law and fact in ignoring wholly the evidence given in support of the appellants' case;
- d) in law and fact by wholly ignoring the uncontroverted evidence that the plaintiff's employment was governed by a contract between parties and section 16 of the Employment Act, Cap 226 of the Laws of Kenya; and
- e) in allowing the plaintiff's claim despite the fact that the same was not proved on a balance of probability.

The appellants prayed for:

- 1) The judgment of the magistrate's court delivered on 25.08.2010 be set aside.
- 2) The costs of this appeal and proceedings of the Magistrate's Court be awarded to the appellants.

Submissions were filed for the respondent on 26.10.2012 and for the appellants on 22.11.2012.

The **1<sup>st</sup> issue** for determination is whether the respondent pleaded the particulars of the special damages of Kshs. 131,051.30. It is the appellants' case that the claimant failed to plead the particulars of the special damages. The appellants relied upon Ouma –Versus- Nairobi City Council (1976-80)1KLR where it was held that for a plaintiff to succeed on a claim for special damages he must plead it with sufficient certainty and particularity and must prove it by evidence. In this case it is not disputed that the respondent stated in paragraphs 4 and 5 as follows:

**“4. At the time of such termination of employment, the plaintiff was entitled to legal benefits and emoluments as arising from his position which have been computed and particularized by the Labour Offices at Kshs.131, 015.30 and which sum he claims.**

**5. The plaintiff has further expended Kshs. 3,000.00 in following up his claim and which sum he also claims.”**

The appellants requested for particulars on 3.08.2007 and the respondent provided the particulars as at page 19 of the record of appeal. The judgment by the honourable trial court shows that Julius Maina Wachira, the labour inspector for Murang'a North and South, testified in support of the plaintiff's case and he had computed the money owed to the claimant as Kshs. 131, 015.30 and as was pleaded in the plaint. Accordingly, the court finds that the special damages were pleaded, particulars were provided as requested and evidence was provided. The particulars as provided, in the opinion of the court, cured any shortcomings the plaint may have suffered. To answer the 1<sup>st</sup> issue for determination the court returns that the respondent pleaded the special damages, particulars were provided as requested and there was certainty in the facts as set out for the respondent. In any event, the particulars had been pleaded by way of reference to their situ, the computation by the labour office. In this court's opinion, such pleading sufficiently set out the particulars and with certainty. That ground of appeal will therefore fail.

The **2<sup>nd</sup> issue** for determination is whether the honourable trial court ignored the evidence that the respondent's employment was governed by a contract between the parties and section 16 of the Employment Act, Cap 226 of the Laws of Kenya. It was the appellant's case that the contract of service

between the parties provided for a sum of Kshs.1, 500.00 per month which would be adjusted upward by 4% every year. It was submitted that in arriving at the judgment the honourable trial court ignored the terms of that contract. Further, in terms of section 16 of the repealed Employment Act, Cap 226 which was in force at all material time, the appellants were entitled to terminate the respondent's employment by paying him one month salary in lieu of the termination notice as was held in **Central Bank of Kenya – Versus- Nkabu, Civil Suit No. 81 of 2000.**

The court has revisited the record of the trial court. There were no allegations of wrongful or unfair termination. The respondent's case did not relate to manner of termination but to service gratuity, annual leave, off duties, public holidays, house allowance, and underpayments as provided for in the statute, and, legal fees incurred in pretrial matters. The court finds that the cited statutory provision and submission was not justified in the present case as it was irrelevant to the matters in dispute. While making that finding, the court holds that contractual provisions cannot override the minimum statutory terms of service and remuneration so that the trial court was entitled to uphold the minimum statutory provisions on remuneration in favour of the respondent.

The **3<sup>rd</sup> issue** for determination is whether the honourable trial court erred in allowing the plaintiff's claim despite the fact that the same was not proved on a balance of probability. As submitted for the appellants, the record shows that the labour officer testified that the respondent did not proceed on leave in 2006 whereas the respondent testified that he went on leave in 2005 and 2006.

The court finds that the honourable court erred in awarding the respondent Kshs. 2,314.20 and failing to consider and find that the evidence on record was contradictory and the respondent had admitted taking leave in 2006. Accordingly, the court finds that the money in the trial court's judgment and decree will be varied by subtracting Kshs. 2,314.20 so that the claimant will be paid a sum of **Kshs.128, 701.10**. To that extent the appeal will partially succeed.

In conclusion, the appeal is determined with orders as follows:

- 1) The final orders in the judgment and the decree by the honourable trial court are varied by deleting Kshs. 131, 015.30 and substituting **Kshs.128, 701.10**.
- 2) Subject to order (1) above, the judgment and decree by the honourable trial court is hereby upheld.
- 3) Parties shall bear own costs of this appeal.

**Signed, dated and delivered** in court at Nyeri this **Friday, 25th September, 2015.**

**BYRAM ONGAYA**

**JUDGE**