



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO.34 OF 2014

ROBERT KINYUA MIGWI.....CLAIMANT

VERSUS

MANYA BETTARELLO.....1ST RESPONDENT

VITTORIO BETTARELLO.....2ND RESPONDENT

***(Appeal against judgment made by Honourable Mr. K. Ngeno, Senior Principal Magistrate, in Nyeri
CMCC No. 393 of 2005)***

JUDGMENT

1. This cause has two appeals namely appeal number 72 of 2009 and 30B of 2008. Appeal No. 72 was filed by the employee while 30B was filed by the employer. In other words, appeal No. 72 is in nature a cross appeal number 30B.
2. The dispute in respect of which these appeals arose was initially commenced in the Chief Magistrate's Court under CMCC NO. 393 of 2005. In that suit, the plaintiff in the main averred that at all material times he was an employee of the defendants until 5th January, 2005 when via a verbal notice his services were wrongfully and summarily terminated. As a consequence, the plaintiff sought from the defendant the sum of Kshs.928,670 comprising of unpaid salary for January, 2005, one month's salary in lieu of notice, house allowance, unpaid overtime, gratuity and leave for one year.
3. The defendants resisted the plaintiff's claims by their re-amended defence filed on 26th July, 2005 in which they aver among others that the plaintiff vide a letter dated 30th November, 2004 offered to resign from his employment which offer was accepted by the defendants through their advocates. The defendant further avers that they tendered to the plaintiff upon termination of his employment, all moneys lawfully due to him totalling to Kshs.30,000.
4. The foregoing issues in controversy were canvassed before the trial magistrate who upon conclusion of the trial and upon review of witness' testimonies and evidence came to a finding that the claim for overtime failed because there was no record produced in court to show overtime work and that it was probably true as the defendant asserted that the plaintiff took overtime work as off-duty on Fridays, Saturdays and Sunday whenever the defendants were out of the country. The court further found that the plaintiff was only entitled in addition to what the defendant offered ex gratia, to one month's pay in lieu of notice.
5. The plaintiff being dissatisfied by the finding of the trial court filed an appeal to this court complaining among others that the trial magistrate erred in law and fact in finding that the appellant had been paid and received salary for December 2004 and January, 2005 despite clear

- acknowledgment by respondent that they were still holding the funds and had not released the money to the appellant. He further complained that the trial magistrate erred in law and in fact in failing to comprehensively evaluate and analyse the evidence on record in order to find that the appellant's summary dismissal was wrongful and unjustified. The appellant additionally faulted the finding of the trial court on the issue of overtime stating it was misdirection by the court in failing to find he was entitled to overtime yet there was uncontroverted evidence to support the claim for overtime.
6. The defendants on their part also filed separately, an appeal against the decision of the trial court being appeal number 30B of 2008, referred to earlier in this judgment. In that appeal, the defendant raises only two grounds namely: that the trial court erred in arriving at the finding that the appellants/defendant, dismissed the respondent from employment rather than that he resigned from the same. Second, that the trial court erred in granting the plaintiff the sum of Kshs.280,000 on account of gratuity contrary to law and the contract of employment between the plaintiff and the defendant.
 7. Counsel for the parties in both appeals filed written submissions elaborating on their respective positions. When they appeared before me for the highlighting of the written submissions, Mr. Mahinda for the plaintiff (appellant in appeal number 72) submitted that the dispute in this appeal arose out of a letter dated 30th November, 2004 written by his client in which he claimed responsibility allowance and overtime. According to counsel, this letter was taken by the employer as a resignation from employment. It was Mr. Mahinda's submission that his client did not intend to resign. For this reason, his client declined to take the money being offered as a consequence of the purported resignation.
 8. On the issue of gratuity pay, Mr. Mahinda submitted that his client was entitled to this award.
 9. Mr. Kariuki for his part submitted that the claimant wrote the resignation letter in issue hence his intention was to resign and seek to be re-employed. According to Mr. Kariuki his clients were entitled to respond to the resignation letter in the manner they did. According to counsel therefore, the plaintiff having resigned is not entitled to pay in lieu of notice. It was Mr. Kariuki's submission that the offer to pay by his client was ex gratia. He further submitted that the employee was housed at his place of work hence the issue of house allowance did not arise.
 10. Concerning overtime, Mr. Kariuki submitted that the claimant produced his own extracts of what he thought were overtime records from his note book but did not produce the notebook itself. To this extent, according to counsel, the trial magistrate was right in refusing to grant overtime. He further submitted that the nature of the claimant's job did not require him to work overtime.
 11. Regarding claim for gratuity, counsel submitted that this claim had no basis in law. According to him, contract of employment was like any other contract hence governed by law of contract and statute. He thus contended that since there was no provision for gratuity in the contract of employment, the trial court erred in making an award in respect thereof. Counsel however conceded that the employee did not receive his salary for the 19 days worked in December, 2005 and overtime for the preceding month but these were however factored in the ex-gratia offer made to the employee which he rejected.
 12. The determination of both appeals depend on the issue whether the plaintiff in the court below resigned or was dismissed by the defendants. The resolution of this issue will decide the consequential processes that follow resignation or dismissal.
 13. Central to this issue is the letter dated 30th November, 2004 referred to earlier in this judgment and found at page 61 of the record of appeal number 72 which I reproduce in full as follows:

“Dear Sir/Madam

Happy X mas and a happy new year. Let me take this opportunity to thank you for employing me for the last 14 years, "May God bless you" Your co-operation toward day to day activities is also good and for that matter I am willing to continue working with you for the rest of my time.

I have few things to comment over my working condition and I have seen it wise to inform you in good faith so that you can rectify for the benefit of both of us.

1. You can agree with me that I have worked for a considerable period of time as a person in-charge of everything and your home in general. As a matter of fact I am always forced to work for excess hours without pay and spending tireless nights in your home hence forced to abandon my family most of the times. No salary adjustment for a long time despite my various request for the same without success.

In view of this I am requesting you the following:-

(a) To enable me settle few financial problems which are currently facing me pay my severance pay for the years I have worked with you plus all overtime worked since I was employed (i.e overtime copy attached).

(b) Thereafter renew my employment contract with the following conditions:-

(i) Adjust my wages and include payments of responsibility allowance payable at the end of every month.

(ii) I should work for 8 hours a day , any excess hour worked must be paid at the end of every month.

(iii) After the normal working hours I will be proceeding at my home to join my family without being forced to spend nights in your home as there before.

You are requested to review the same as from 1st December, 2004.

Thanks in advance.

Yours faithfully,

ROBERT KINYUA"

14. In response to this the defendants through their advocate responded as follows:

"Dear Sir

RE: CLIENT: KENIMO S. A

-----SUBJECT: YOUR RESIGNATION

We have been instructed to act for Kemimo S. A. concerning your letter dated 30th November, 2004 to Mrs. Bettarello of the said institution and to respond thereto as follows:-

Kemimo S. A accepts with sincere regrets your offer to resign from its employment and conveys its profound thanks for the service you have rendered to it.

Your resignation takes effect from the 19th day of January, 2005.

Your offer to be re-employed is not acceptable to our client.

However our client would if a suitable position arises in future consider offering you such a position.

Our client is willing to pay to you ex-gratia a sum of Kshs.70,000 together with full pay for the current month in the sum of Kshs.20,000 whose combined cheque you should collect from us upon the understanding that our client is fully discharged of all claims arising from your employment for which you requested to sign and return us the duplicate copy of this letter where indicated.

Yours faithfully

MWANGI KARIUKI & COMPANY

15.The plaintiff in his letter dated 30th November, 2004 states in material part as follows:-

“To enable me settle few financial problems which are currently facing me, pay my severance pay for the years I have worked with you plus overtime...” ...thereafter renew my employment contract..”

16.From the foregoing it would seem the plaintiff was operating from the premise that his years of service had earned him some financial entitlement which he would trade with his employer for money in order to settle his financial commitments. To this extent, it cannot be said that the plaintiff's main intention was to resign from employment. In other words the letter of 30th November, 2004 was not unequivocal about the plaintiff's resignation but was rather a suggestion of an arrangement which if was acceptable to the defendants, could have given the plaintiff financial relief as he continues to work for the defendant under the new proposed terms. This far, the court comes to a finding that the plaintiff did not resign from his employment, consequently the response contained in the letter dated 15th January, 2005 by the defendants' counsel failed to address the plaintiff's suggestions contained in his letter of 30th November, 2005. The treatment of the plaintiff's said letter as resignation is therefore construed by court as unlawful dismissal. This ground of appeal therefore succeeds.

17.The court having so found, the plaintiff's dismissal took place in January, 2005. The applicable law then was the repealed Employment Act (Cap 226) since the current Act had not been enacted.

18.Under the repealed Act, at section 16, either party to a contract of service could terminate such contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him in respect of the period of notice required to be given. The contract of employment produced at the trial does not seem legible enough to discern the full terms thereof however from the pleadings and the record of proceedings it would seem the notice period was one month. To this extent the plaintiff would be entitled to one month's pay in lieu of notice of termination of employment. Further, the termination letter took effect from 10th January, 2005 hence the plaintiff would be entitled to the 19 days worked in January, 2005.

19.Concerning the issue of overtime and gratuity, these are matters of contract which the court cannot make a finding thereof unless provided for in the contract of employment. The contract of employment as observed earlier is illegible hence the court is unable to discern if these were provided for in the contract. In any event the plaintiff himself admitted during the trial that his contract did not

provide for gratuity. Further unlike the current Employment Act, the old Act made no provisions for service pay or gratuity. In any event the trial court made no finding on the issue of gratuity hence the court does not seem to understand the basis of this ground of appeal.

20.In conclusion the two appeals are decided as follows:

(a) The plaintiff in writing the letter dated 30th November, 2004 never intended to resign from employment as understood by the defendant. Therefore the letter dated 15th January, 2005 accepting his resignation and refusing to renew his employment amounted to unlawful termination of employment.

(b) The plaintiff having been terminated without notice is entitled to one month's salary in lieu of notice assessed at Kshs.20,000.

(c) By the time of termination of the plaintiff's employment he had worked for 19 days hence he is entitled to this which is assessed at Kshs.12,700.

(d) Whereas employment relationships are based on trust and mutual confidence, and further considering that the plaintiff as at the time of termination of his employment was not accused of any impropriety relating to his work and further considering his length of service to the defendant there is a sense in which the offer of Kshs.100,000 was an acknowledgment of his good work. This amount will therefore be awarded to the plaintiff in addition to his statutory rights above.

(e) The total sum awarded to the plaintiff will therefore be Kshs.132,700 together with costs and interest hence the order of the court below is substituted to that extent.

(f) Since either party are partially successful in this appeal, each shall bare their own costs.

21.It is so ordered.

Dated at Nyeri this 26th day of September, 2014.

ABUODHA J. N

JUDGE

Delivered in open Court in the presence of Mr. Ngunjiri h/b for Mahinda Advocate for the Claimant and in the presence of Mr. Mwangi Kariuki Advocate for the Respondent.

ABUODHA J. N

JUDGE