THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CIVIL APPEAL NO. 29 OF 2005
(Arising from Civil Suit N0. 196 of 2003)

NGEGE LTD :::::::::::::: APPELLANT

VERSUS

MULUMA STEPHEN :::::::::::::: RESPONDENT

JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA

1. Introduction

The appellant being dissatisfied with the judgment and decree of the trial Magistrate, her Worship Agnes Nkonge, Magistrate Grade 1 in Civil Suit N0. 196 of 2003 delivered on the 2nd day of June, 2005 at Nakawa brought this appeal against the respondent. The appellant is represented by M/s Makeera & Co. Advocates. And the respondent is represented by Makada & Partners & Co. Advocates.

2. Facts of the appeal

The brief facts of the appeal are that the respondent (plaintiff) sued the appellant (defendant) for special and general damages for wrongful dismissal from employment and costs of the suit. The respondent pleaded in the plaint that he was employed by the defendant in 1995 till 2002. That the respondent was unlawfully dismissed by the appellant on 29/11/2002. The appellant in the written statement of defence pleaded that the respondent absconded from duty without any justifiable cause and without authority. The appellant denied dismissing the respondent from employment. The suit was heard interparties and judgment was entered in favour of the respondent. The appellant was also condemned in costs and damages. Hence this appeal.

3. The appeal is based on the following grounds of appeal; that:-

1. The learned trial Magistrate erred in law and fact when she decided the suit in favour of the respondent.
2. The learned trial Magistrate erred when she failed to evaluate the evidence on record thereby coming to a wrong decision.

3. The learned trial Magistrate erred when she held that the respondent was wrongly dismissed instead of finding that he absconded from work.
4. The learned trial Magistrate erred when she failed to give due regard to the defence evidence.
5. The learned trial Magistrate erred when she failed to find that the respondent's claim was inconsistent with his claim.
6. The learned trial Magistrate erred when she failed to consider authorities and law presented by the appellants.
7. The learned trial Magistrate's findings and awards were excessive and contrary to the law and facts of the case.

4. Resolution of the appeal

The appellant's Counsel argued grounds of appeal 1, 5 and 6 together, then grounds 2, 3 and 4 of appeal and ground of appeal No. 7 alone. The respondent's Counsel followed the same sequence. After perusing the submissions of both parties in resolving the grounds of appeal, I will handle grounds 1, 2, 3, 4, 5 and 6 together and ground of appeal no. 7 alone.

Mr. Makeera Salim, Counsel for the appellant on grounds of appeal N0s'1, 5 and 6 submitted that the plaint did not disclose the cause of action against the appellant (defendant). That the trial magistrate did not properly consider the second and third elements necessary to establish a cause of action. He relied on the case **Auto Garage vs Motokov no. 3 [1971] EA.514**. In reply, Mr. Makada Fred, Counsel for the respondent submitted that the appellant's submission in respect of grounds 1, 5 and 6 are not concise in that the appellant's arguments are centered on failure to disclose cause of action instead of submitting on the grounds as presented in the memorandum of appeal. He submitted that failure to disclose a cause of action is not listed as a ground of appeal. He further submitted that the appellant's submissions on grounds 1, 5 and 6 are a abuse of the Rules of procedure since the memorandum of appeal does not reflect any ground of failure to disclose a cause of action. For that proposition he relied on Order 43 rule 1 of the Civil Procedure Rules, S.1. No. 71-1.

I have considered grounds 1, 5 and 6 of appeal, they are to the effect that the trial Magistrate did not resolve the issue that was framed by the parties in the original trial of:-

"Whether the plaint discloses a cause of action",

In accordance with the evidence and authorities given by the appellant in the trial court, it is clear that the main contention of the appellant in the lower court and in this appeal is that the suit that was filed by the plaintiff/respondent did not disclose a cause of action. Wherefore, I hold that these grounds clearly cover the issue of whether the plaint discloses a cause of action or not.

In resolving the issue of whether the plaint disclosed a cause of action, the trial Magistrate at page 4, 2nd, 3rd and 4th paragraphs of her judgment, had this to say:-

> **" This court has carefully heard and considered the submissions by learned Counsel and his evidence on record and concurs with learned Counsel for defendant on the submissions of the case of Auto Garage vs Motokov supra, and the elements therein; which are that:**
> 1. **the plaintiff enjoyed a right,**
> 2. **the right was violated,**
> 3. **the defendant are liable,**
>
> **In respect to the 1st element, it is not disputed that plaintiff was an employee of the defendant. See Exhibit E1 and was supposed to be paid a salary of 225,000/= per month, leave of 30 days annually see E1 as such he enjoyed a right. As whether the right was violated……..."**

I now turn to consider the grounds of appeal nos. 1, 2, 3, 4, 5 and 6 in the Memorandum of appeal.

The plaintiff/respondent in his evidence stated that he was given a dismissal note on 20/12/2002, prior to that he was given a suspension letter which was exhibited in court as Exh. E2 and was given no chance to defend himself. DW1 P.K Johnny confirmed this in cross examination that the respondent never went to the factory to explain why he wasn't working. From the evidence above, it seems to me that the plaintiff was not given a chance to defend himself which they should have done. However, the circumstances under which Exh.E2 came into the hands of the respondent were explained by P.K Johnny

(DW1) at page 39 of the record of the court proceedings. In cross examination he explained that the purposes of writing Exh. E2 in his notebook was to remind him to find out from the General Manager why the respondent/plaintiff was not working.

As to whether the plaintiff was wrongfully dismissed or not. From his evidence the plaintiff stated that he was given a suspension letter first, this was marked as Exhibit E2, this he stated was not addressed to him. He however added that the Managing Director suspended him orally. He further added that despite receipt of Exhibit E2, he continued working but was later stopped from working, he didn't know why. DW1 for the defence witness stated that he was not aware that the company had stopped him from working. He further testified that the plaintiff was never terminated and never suspended. That there is no written letter of suspension. He continued to state that Exhibit E2 is a piece of paper from his notebook. He said further that the company management told him that the plaintiff absconded from work. The respondent himself at page 36 line 6 of the record of proceedings testified that he continued working after receiving Exh. E2. This clearly shows that the respondent was never suspended at all by the appellant on the basis of Exh. E2.

In his submissions Learned Counsel for respondent stated that the appellant failed to give the plaintiff/respondent a fair hearing and that rendered the dismissal unlawful. However, learned counsel for appellant/defendant in reply submitted that the plaintiff/respondent absconded from work and he was not dismissed as the claimed. He argued that there is no official letter of termination of the respondent from employment. I tend to believe him, in that in the absence of a formal letter of termination of employment, the context of Exh. E2 becomes irrelevant. The evidence of DW1 was never challenged at all by the respondent. Had the trial magistrate evaluated the evidence of both parties, she would have found out the truth in respect to DW1's evidence.

Learned counsel for the defendant/appellant further argued that Exhibit E2 was not addressed to the plaintiff/respondent. Learned counsel for defendant/appellant further submitted that the appellant's/defendant's evidence should be believed in preference to that of the plaintiff/respondent. Learned counsel for appellant/defendant further submitted that the plaintiff/respondent failed to prove that he was dismissed. In this case I have

noted that Exh.E2 is not addressed to anybody or is not indeed on the appellant's headed paper, in the premises, it was therefore correct when P.K Johnny (DW1) explained in evidence why that Exh. E2 was written by himself. This piece of evidence by the defence was never challenged by the respondent at the time of the original trial.

The finding of the trial Magistrate in her judgment at page 6, 1st paragraph, lines 3 and 4 is that:-

> **"…….. to the contrary this court holds strongly that much as there is no documentary evidence other than Exhibit E2, the plaintiff was dismissed by the defendant."**

Then at the same page 6, 3rd paragraph the trial Magistrate held that:-

> **"It is this Court's considered view that the plaintiff was dismissed without being given a chance to defend himself and was not warned which in essence rendered the dismissal wrongly."**

These two findings of the trial magistrate not tally. The conclusion I make out from them is that the trial magistrate noted that there was not enough evidence to support the allegation of dismissal of the respondent. But her conclusion that the respondent was dismissed is not supported by evidence on record.

I have evaluated the evidence on record and ascertained that the respondent did not produce and documentary evidence to prove on the balance of probabilities that the appellant company dismissed him. Exhibit E2 was DW1's working notes and as found by the trial Magistrate, could not amount to a letter of dismissal of the respondent. It was not addressed to him and how the respondent got that document was not explained by him. The only evidence available in that regard is the evidence of DW1 who stated that the said Exhibit E2 was a piece of paper that was plucked out from his notebook. DW1 as his immediate supervisor never received a copy of the respondent's dismissal letter. His testimony was that the respondent absconded from duty. The reason given for the respondent's abscondment from duty by DW1 was that the respondent had financial problems with the appellant. This piece of evidence was not challenged by the respondent neither in examination – in – chief nor in cross-examination. The trial Magistrate,

therefore, should have believed the evidence of DW1. To the contrary, the trial Magistrate believed the respondent's evidence that he was orally dismissed by the Managing Director of the appellant, despite the detailed evidence by DW1 about how dismissal of employees are done in the appellant company. In view of the foregoing reasons, I hold that the findings of the trial magistrate that the respondent was dismissed by the appellant are not supported by concrete evidence from the record of proceedings of the Court.

Consequent to the above and of interest, is the case of **Stephen Muluma vs. Ngege (U) Ltd, High Court Civil Suit No. 193 of 2003**, attached to the respondent's conferencing notes as his authority he is relying on. The plaintiff filed this civil suit No. 196 of 2003 between the same parties claiming against the defendant special and general damages for wrongful dismissal. In the Civil Suit No. 193 of 2003 thereof, the plaintiff (respondent in this appeal) brought this suit against the defendant (appellant in this appeal) seeking for the following orders:

1. That the defendant returns the plaintiff's Motor Vehicle or payment of its market value.
2. That the defendant pays special damages.
3. That the defendant pays 8,500,000/= being lost income for the vehicle.
4. That the defendant pays costs of the suit.

In his submissions, Counsel for the respondent submitted that:

> **" We will invite this court to take special note of the Appellant's untruthfulness in that in this case Civil Suit No. 196 of 2003, the Appellant denies ever suspending the respondent, while in another case HCCS No. 193 of 2003 between the same parties the appellant clearly admits suspending the respondent because he had allegedly refused to park the vehicle. We invite court to look at the judgment by Hon. Justice Oumo Oguli in HCCS No. 193 of 2003 page 4 paragraph 4, page 8 paragraph 2, page 10 paragraph 3 where the appellant admits suspending the respondent from work until he parked the vehicle. Court should not allow the appellant to mislead this court because the appellant cannot be seen to deny a fact in another matter then admit the very fact in another suit between the same parties. The cited case HCCS No. 193 of 2003 is attached on to the Respondent's conferencing notes."**

Of major importance to the parties in this appeal hereby reproduce the contents of the said judgment at page 8 paragraph 2 and page 10 paragraph 3:-

> **"<u>page 8 paragraph 2 of Hon. Lady Justice Oumo's judgment</u>:-**
> **DW2 stated that the plaintiff kept on reporting late or rarely went missing completely from work and he gave the excuse that he was chasing the owner of the vehicle to give him the logbook and the transfer forms. That that the plaintiff was managing the stores and Production Department, which were having problems and they agreed to put him out of work until he succeeded in bring the log book and transfer forms**
>
> **<u>Page 10 paragraph 3 thereof:-</u>**
> **DW2 testified that it caused the plaintiff to be irregular at work and this forced management to put the plaintiff on suspension until he delivered the logbook and transfer forms".**

On the quick observation of the above, it is clear that appellant all along among other things was bothered by the continued abscondment from duty by the respondent. Therefore, Counsel for the respondent's submissions in that direction does not hold any water at all as against the appellant, as can be seen in the judgment of the judge in HCCS No. 193 of 2003.

The trial **judge Hon. Lady Justice Margaret C. Oguli Oumo**, in that case, after considering the evidence of both parties in the said suit, made findings that:-

> **"The plaintiff did not at any time tell Court when he handed over the logbook to the legal Officer. According to his own evidence, on the 8th of November 2002, a day after he had received the money, he paid the seller and received the logbook he went to thank the General Manager for the money and he never mentioned anything about the logbook which he accepted he received from the seller after he had paid the final installment on the 07th of November, 2002. The fact that the plaintiff had taken possession of the car on 16th September 2002 <u>indeed explains his conduct of absconding from work and his reluctance</u> to hand over the logbook and transfer forms,** *(underling is mine for emphasis)*
>
> **The plaintiff was suspended on 29th of November 2002 because he failed to bring the logbook and transfer forms.**
>
> **In the circumstances, Court is for the opinion that the plaintiff's failure to deposit the logbook and transfer forms was a breach of**

> **the loan agreement and the defendant acted lawfully when he confiscated the vehicle. It is clear that the plaintiff did not have the intention of paying the money let to him and the defendant's possession of the car is therefore lawful since he did not present the logbook even after he was suspended on 29/11/2002 but kept on saying that he was still pursuing the seller of the logbook which he already had."**

From the judgment of the Court in HCCS No. 193 of 2003, and the evidence of the appellant in the instant appeal it is clear that the respondent because of the financial problems with the appellant absconded from the duty. It is also clear that the respondent caused his own problems in the company by being dishonest to his employer.

The Civil Suit no. 196 of 2003 against the appellant by the respondent was therefore brought to Court in bad faith. I, therefore, agree with Counsel for the appellant's written submissions on grounds 1, 2, 3, 4, 5 and 6 of the Memorandum of Appeal. I, accordingly answer each of the said grounds of appeal in the affirmative.

On ground of appeal No. 6, I have read the judgment of the trial magistrate and noted that the latter applied most of the authorities as presented in the arguments/submissions by Counsel for the respective parties. Further, at page 4 of the trial Magistrate's judgment, she stated that:-

> **"The court has carefully heard and considered the submissions by learned Counsel and his evidence on record and concurs with the learned counsel for the defendant on the submissions of the case of Auto Garage vs Motokov Supra ……"**

At pages 6 and 7 of the trial magistrate's judgment that trial Magistrates ably considered some cases in support of her findings in the judgment. Therefore, I agree with counsel for the respondent that the trial magistrate addressed her mind to the authorities of the appellant. In the result and for the reasons considered hereinabove, on grounds of appeal nos.1, 2, 3, 4 and 5, there is no need for the court to rule otherwise. I wish to emphasizes that had the trial magistrate properly applied the law and considered the evidence on record and the submissions of the both parties, she should have ruled in favour of the appellant. In the premises I find this ground in the affirmative.

I now turn to consider ground of appeal no. 7. Counsel for the appellant submitted that the award of Ug. Shs 1,000,000/= as general damages was excessive given the fact that the respondent had been given Ug. Shs 675,000/= being the three months payment in lieu of notice. That this award is not justified in law or by any evidence on record. In reply, counsel for the respondent submitted that the award of Ug. Shs. 1,000,000/= as general damages was not excessive. That the award of general damages lies within discretion of the trial Court and depending on the circumstances of the case.

I would agree with Counsel for the respondent on the fact that the award of damages lies within the discretion of the Court. However, in this instant appeal where it is quite evident that the respondent absconded from duty and that he was not dismissed, the claim of any damages must fail. The respondent did not come to court with clean hands.

On the same ground of appeal No. 7, Counsel for the appellant submitted on the counterclaim that:-

> **"Regarding the counterclaim, the defendant raised a counterclaim in paragraphs 7, 8, 9 and 10 of the written statement of defence. No reply was filed by the plaintiff to this counterclaim nor was evidence led to deny it. This matter was raised in the appellant's submissions and the judgment acknowledges these facts."**

In her judgment at page 8, the trial Magistrate dismissed the counterclaim. The appellant did not frame a ground of appeal to cover its dissatisfaction of the dismissal of its counterclaim. Therefore, the appellant cannot be heard on the issue of the counterclaim which was never canvassed in a ground of appeal. In any case the counterclaim by the appellant in the main suit was about abscondment from duty by the respondent. Nonetheless, in view of the reasons given hereinabove on this ground of appeal it ought to succeed. Henceforth, ground of appeal no. 7 is answered in the affirmative.

5. Conclusion

All in all, and for the reasons given hereinabove in this judgment this appeal is allowed in favour of the appellant in the following terms:-

(a) Judgment in this appeal is entered in favour of the appellant.

(b) The judgment of the lower court and all the orders/decrees arising from it are set aside.

(c) Civil Suit No. 196 of 2003 is dismissed.

(d) Costs here and in the lower Court are awarded to Appellant.

Dated at Kampala this 01st day of February, 2011.

Sgd
JOSEPH MURANGIRA
JUDGE