Civ.App: 27/2012

In the Court of Appeal of Sierra Leone

Between:

Comium (S.L.) Ltd - Appellant

And

Jemima M. M'Cormack - Respondent

Coram:

Hon. Justice S. Bash-Taqi Jsc.

Hon. Justice V. M. Solomon J. A.

Hon. Justice A. Charm J.

Advocates:

E. Pabs-Garnon Esq. for the Appellant.

I. Kanu Esq. for the Respondent.

8th May 2014

Hon Justice V. M. Solomon J. A.

Judgment

BACKGROUND:-

1) The respondent/plaintiff commenced this action in the High Court in which she sought the following orders to wit: salaries from 1st January, 2007; terminal benefits including NASSIT contributions; medical and nursing care from 4th November, 2006; recovery of $30,000/00 or its equivalent in Leones as redundancy employment; recovery of $50,000/00 or its equivalent in Leones as damages for unlawful and unfair termination; interest at a rate of 35% per annum; further and other orders; and costs. An appearance was entered after judgment in default had been taken which was set aside; and a defence was filed. Directions were given and the matter proceeded to trial.

2) The brief facts are that the respondent/plaintiff was an employee of the defendant and went on a promotional tour in Bo when she fell ill. The appellant/defendant brought her to Freetown where she received medical treatment by its doctor; and referred to the cupid nursing home where she received medical attention. The respondent/plaintiff's mother been not satisfied moved her out of the cupid nursing home. It is averred that the respondent/plaintiff moved out of the cupid home without knowledge UMS and consent of the attending physician. It is also averred that she did not provide any medical evidence of her inability to work; nor did she request for sick leave from absence from work; nor was she granted leave. The appellant/defendant further contended that the respondent/plaintiff was provided with adequate medical and nursing care, and that she did not suffer any loss as alleged or at all. Two witnesses testified for the respondent/plaintiff and one testified for the appellant/defendant. Judgment was delivered on the 16th April, 2012 in favour of the respondent/plaintiff herein. It is against this judgment that the appellant/respondent filed a notice of appeal dated 18th April, 2012.

GROUNDS OF APPEAL.

3) The appellant/defendant has filed notice of appeal dated 18th April, 2012 which main grounds are as stated in paragraph 3 thereof to wit:

3. a) That the learned trial judge failed to properly evaluate the evidence led relating to the questions of termination when he totally failed to take into account or address the legal concept of "abandonment of employment" raised by the defendant and the arguments of counsel in his address to the court on the provisions of the Collective Agreement of 1st November 2006 and published in the Sierra Leone Gazette of 3rd June, 2009.

b) That the learned trial judge contradicted himself in that after finding the plaintiff did not contact the defendant for about 18(eighteen) months and even then only did so with a

falsified and "self serving" sick report then proceeded to hold the defendant did not serve the plaintiff a notice of termination even though the plaintiff had abandoned her employment was plainly not in contact or communication with the defendant and that in such a case the onus was on the plaintiff to provide a reason for her absence as she later belatedly tried to do.

c) That the learned trial judge erred in law after having rightly held that the "Defendant had done all that was expected of it" proceeded to make an award of Le30,000,000/00 to plaintiff based on "humanitarian grounds" even after noting that "the plaintiff should not bear the brunt of her mother's mistakes and over reaction" thus tacitly finding that the fault was not that of the defendant but that of the mother of the plaintiff who removed her from the hospital where she was receiving professional medical care.

d) Further to C above that the learned trial judge did not have any jurisdiction to arbitrarily make an award of Le 30, 000, 000/00 as humanitarian award to the plaintiff when she did not have a valid claim in law and without any basis in fact or any evidence to suggest such a quantum even more so after he himself the learned trial judge had rightly noted it was a "case of think of a figure and cannot in any way be substantiated" when the very same act had been attempted by counsel for the plaintiff.

The appellant/defendant prayed that the judgment of 16th April, 2012 be set aside; judgment be entered in its favour and that the respondent/plaintiff bears the costs in this court and the court below.

4) I shall now consider the grounds of appeal as filed by the appellant. I shall consider the first and second grounds which are interrelated and relates to the legal concept of "abandonment of employment". Certain matters not in dispute are that the appellant/defendant employed the respondent/plaintiff who was sent to Bo. She fell ill in Bo and was brought to the Cupid Nursing Home for medical treatment. The appellant/defendant was responsible for all her medical bills. She was seen by Dr. Kelvin Nichols whose medical report is on page 106 of the

records. The respondent/plaintiff was moved from the Cupid Nursing home by her mother and without knowledge and consent of the attending physician. She made no communications with her employers the appellant/respondent till about 18 months after her illness, by the letter of her solicitor of 15th May 2008 in page 27 of the records. The question of abandonment of the employment of the respondent/plaintiff was raised in the appellant's/plaintiff's defence at paragraph 6 - see page 10 of the records. PW1 in her evidence and under cross-examination did attest to these facts. She stated under cross-examination at page 170 of the records thus:

> "I am aware that the defendants took her there and that they were responsible for all her medical bills. I admit that after silence of 18 months I took the matter to a lawyer and the matter came to court."

This witness testified to facts which could not be recollected by the respondent/plaintiff (PW2). The latter's evidence was of a very little evidential value. She seemed not to recall any of the events/facts put to her. She stated that she just signed her statement and did not know what she was signing. The respondent/plaintiff took up employment with appellant/defendant subject to terms and conditions of the policy HRO23 as seen in the letters of 25th May and 25th July 2006 on pages 92 and 93 of the records. There is no evidence that the respondent/plaintiff neither applied for sick leave nor did she proffer any medical report to her employers the appellant. The appellant has relied on the Collective Agreement Government Notice No. 140, published on Wednesday 3rd June, 2009 (hereinafter called "Agreement"). A question which I pose is whether she is covered by that agreement? The respondent/plaintiff will be covered by this agreement if she is below supervisory level. She was employed as desk receptionist a fortiori is

below supervisory level and so is covered by this agreement. By article 49 of the agreement it is provided thus:

> "It is agreed that an employee who absents himself from work without prior permission for **two (2) consecutive working weeks** or without any valid reason thereafter, shall be deemed to have abandoned his employment and his services shall be considered terminated **as from the last day he was at work"**.
>
> (Emphasis mine)

The onus is on the respondent/plaintiff to communicate the reason for her absence. The evidence is that since she fell ill on 7th November, 2006 she never returned to work. The appellant/defendant only got communication from her through her solicitor per letter of 15th May, 2008 - see page 11 of the records. Upon receipt of the aforesaid letter the appellant/defendant responded by letters of 19th and 30th May, 2008. In the judgment the Learned Trial Judge at page 2 recorded on page 181 of the records he had this to say:

> "I accept the submission that the defendant had done all that was expected of them and that it was after a silence of about 18 months that the matter was taken to a lawyer."

The Learned Trial Judge did not go further to determine whether silence of 18 months and the respondent/plaintiff not returning to work had abandoned her employment. I agree with submissions of counsel for the appellant that he did not and should have considered this issue as it is integral a part of the appellant/respondent's defence. But even if I accept Mr. Kanu's submissions that the respondent/plaintiff's services

were terminated pursuant to Article 46 of the Agreement by Article 46(c) where an employment is terminated within Article 46

> ".....the EMPLOYER shall give one month's notice in writing to the employee or shall pay one month's salary in lieu of such notice"

In the instant case, which is not disputed, the appellant/defendant paid the respondent/plaintiff salary for the months of November and December 2006. A fortiori, the appellant has complied with this proviso. In the premises therefore, the appellant succeeds on these grounds of its appeal.

5) As has been stated in paragraph 4 supra the Learned Trial Judge did hold that the appellant/defendant did all that it was able to do and it was after 18 months that it received a letter from Mr. Kanu, solicitor for the respondent/plaintiff making a claim. That is not in dispute. He further opined at page 181/182 of the records to wit:

> "In my own humble opinion, Exhibit B the letter purportedly dated 9th November 2006 carried a false date. I believe as a fact that Exhibit C the sick report was received by the Defendant on the 27th of May, 2008 as an attachment. The purpose of putting a false date cannot be other than to gain advantage."

Indeed the Learned Trial Judge did hold that the sick report was "self serving" and that the respondent/defendant only contacted the appellant/plaintiff 18 months after she fell ill. I do not see how an employee who has not notified her employer of her illness for a period of 18 months cannot be deemed to have abandoned her employment.

She was paid one month's salary for the month of December 2006 as stipulated and in my view is not entitled to more.

6) The Learned Trial Judge in spite of the foregoing did award the sum of Le30,000,000/00 to the respondent/plaintiff based on "humanitarian grounds". I shall refer to his judgment at page 3 recorded in page 182 of the records. He said thus:

> "All said and done, having seeing the plaintiff's condition of health I think she should not bear the brunt of her mother's mistake and/or over-reaction. I feel the plaintiff deserved an award on humanitarian grounds. This is because the evidence that the plaintiff was seriously ill was not seriously challenged."

With respect to the Learned Trial Judge, I do not find his conclusions based on law. I do not share his view that the respondent/plaintiff was seriously ill and that was not challenged. There was no evidence from her to substantiate her illness. She saw three doctors. She only saw one Dr. Sama once and then went on for prayers and herbalists. The medical report of Dr. Sama dated 20th June, 2008 is on pages 95 to 98 of the records. This medical report was prepared after the first letter addressed to the appellant/defendant dated 15th May, 2008 - see pages 27 and 28 of the records. It is clearly self-serving and in contemplation of instituting proceedings which the respondent/plaintiff commenced on 30th June 2008. Dr Sama did not testify to verify his findings nor did any other medical practitioner whom she saw. It is unfortunate that the respondent/plaintiff's mother overacted; removed her from the nursing home without approval and knowledge of the attending physician; and took her away to her own physician; to the church and herbalists. The appellant/defendant is not to be held

responsible for lack of medical care which was not within its purview, and/or with its knowledge and consent. There is no evidence that the appellant/defendant refused to provide medical care for the respondent/plaintiff.

7) There should be a distinction between special and general damages. Damage of the kind which the law will presume to flow from the wrong complained of is known as "general damages". There is no evidence that the respondent/plaintiff's employment was terminated or that she was dismissed. In fact the Learned Trial Judge did find all claims for damages for redundancy; unlawful and unfair termination; as frivolous and without merit. How then was the sum of Le30,000,000/00 quantified as a humanitarian award? This type of award is unknown to common law. The employment of the parties is governed by the letters of appointment and the agreement as the employee is below the level of a supervisor. In the case of Shaw v Director of Public Prosecutions (1961) H.L. 2 All ER. p. 261 the House of Lords deliberated on whether a conspiracy to corrupt public moral existed in common law. I refer to the dissenting judgment of Lord Reid at page 457 in which he opined that:

> ".... this House is in no way bound and ought not to sanction the extension of "public mischief" to any new field, and certainly not if such extension would be in any way controversial. Public mischief is the criminal counterpart of public policy, and the criminal law ought to be even more hesitant than the civil law in founding on it in some new aspect".

He referred to the case of Richardson v Mellish (1824), 2 Bing. At p. 252 per Burrough J:

> "I ..... protest..... against arguing too strongly upon public policy; - it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail".

A humanitarian award is not known in law and cannot fall within the ambit of general damages. There was no evidence led to substantiate the claim for damages whether special or general. It cannot be granted on the basis of public policy because courts of law only look at the particular case, and do not have the means of bringing before them all those considerations which ought to enter into the judgment. To grant awards on public policy will not only open the flood gates to claims of unsubstantiated damages but will lead the courts away from sound law which would create controversy and bad precedents. I agree with the findings of the Learned Trial Judge that this is not a matter for the assessment of damages. In the premises therefore the award of Le30,000,000/00 is arbitrary and without any basis in law.

8) In spite of the aforesaid findings, I wish to state that I do share the Learned Trial Judge's comments about the pleadings of counsel for the respondent/plaintiff in its claim as filed. I will reiterate his findings at page 182 of the records to wit:-

> "As regards the other claims it is indeed astounding that the plaintiff's claims against the defendant are stated in U.S dollar which makes them liquidated damages but it is significant to note that there is not a jot of evidence that the plaintiff expended even one U. S dollar or a cent of which means the figure stated are just a case of think of any figure and cannot in any

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way be substantiated. I therefore consider the claims to be ridiculous if not frivolous and without any merit".

He opined further:

> "It is trite law that a plaintiff is as good as his case. He or she can only succeed on what is pleaded and proved and not just financial claims such as in the instant case. It is sheer commonsense that one can only recover what one has proved to have expended as pecuniary loss and not otherwise. For all the foregoing reasons, I dismiss all the above claims for want of evidence. This is not a case for assessment of damages. Assessment of damages comes in where general damages are claimed".

He went further on page 183 of the records:

> "In making this order I feel impelled to say that the plaintiff's case was badly handled in terms of pleading and the evidence led in support of it ..... In my own candid opinion most of the claims put up on behalf of the plaintiff are just to raise her hopes unnecessarily for a huge award without any basis for it in law".

The aforesaid is very telling of the conduct of the plaintiff case which in my opinion is without merit and a waste of time.

9) In the premises therefore, and after due consideration of the evidence adduced the appeal of the appellant is upheld. The judgment dated

16th April, 2012 is hereby set aside. The claim of the respondent/plaintiff is without any merit. All the claims of the respondent/plaintiff are dismissed. Judgment is entered in favour of the appellant/defendant. The respondent/plaintiff is to bear the costs in this court and in the court below which are to be taxed if not agreed upon. In the event that costs were paid to the respondent/plaintiff such costs are to be refunded to the appellant/defendant.

Hon. Justice V. M. Solomon J. A.

I agree

Hon. Justice A. Charm J.