REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 20 OF2009

GRACE KASOHA EBOSO…….....APPELLANT

VERSUS

THE BOARD OF GOVERNORS ELDORET SPECIAL

SCHOOL FOR THE MENTALLY HANDICAPPED.....RESPONDENT

(Being an appeal against the Judgment of Hon. Mr. N. Shiundu.(SRM) in Eldoret Chief Magistrate's Court Civil Case No. 589 of 2006 delivered on 9th February, 2009)

JUDGMENT

The appeal is from Judgment of Hon. N. Shiundu, Senior Resident Magistrate made on 9th February, 2009. In a plaint dated 7th July, 2006 the Appellant who was the Plaintiff had sought the following orders: -

> ***(i) A declaration and salary arrears and accrued allowances per paragraph 8*** *(albeit the declaratory pronouncement not indicated)*
>
> ***(ii) Costs of the suit..,***
>
> ***(iii) Interest on (i) and (ii) above at court rates.***
>
> ***(iv) any other and further relief as this Honourable Court may deem fit to grant.***

Under paragraph 8 of the Plaint, she had claimed the following entitlements;

> ***(a) Salary arrears from January, 2006 until the determination of this suit at the rate of Ksh. 5,8531= per month.***
>
> ***(b) House allowance from January, 2006 until the determination of this suit.***

The case of the Appellant was that she was an employee of the Respondent where she earned Ksh. 5,853/= per month and was, as well provided with housing by the Respondent. She averred that on 3rd January, 2006 the Respondent suspended her from employment without giving her any reason and forcefully evicted her from her house. She averred that the suspension was without justification, merit, plausible explanation and was done maliciously. She then outlined particulars of malice under paragraph 5 of the Plaint as follows-

> ***(i) Harassing the Plaintiff through the police by making false and unstantiated allegations***

against her prior to the suspension.

(ii) Suspending the Plaintiff without granting her opportunity to be heard.

(iii) employing irregular and unprocedural steps in suspending the Plaintiff from work.

(iv) Making a report to the police against the Plaintiff without any probable and/or reasonable cause.

(v) Purporting to suspend the Plaintiff on the basis of personal vendetta.

The learned trial Magistrate found that indeed, the Appellant was an employee of the Respondent and that she had been charged with and convicted for the offence of threatening to kill which led to her suspension and ultimate dismissal from employment.

In his Judgment, the learned Magistrate observed that, as per employment regulations, the Appellant *was entitled to the statutory half salary from.the period of suspension upto the time her services were terminated on 30th October, 2006.*

The trial court further observed that the Appellant had not provided a contract of service demonstrating other emoluments but that she did show that she earned a salary of Ksh. 5,853/=. Upon computing half of this salary for the 10 months between the period of suspension and termination, the court awarded her a total of Ksh. 29,265/=.

The appellant was dissatisfied with this amount and appealed to this court on the following grounds:-

1. The learned Magistrate erred in law and fact when he granted the Plaintiff an equitable relief of Kshs. 29,265/= as damages on the basis of ten months half salary from the period the appellant had been on suspension from employment.

2. The learned Magistrate erred in law and fact in failing to find that the Appellant's services had not been terminated upto the date of the Judgment and ought to have awarded her all her outstanding salary arrears.

3. The learned Magistrate erred in law and fact in failing to find and hold that the Respondent had not terminated or even attempt to terminate the Appellant's services.

4. The learned Magistrate erred in law and fact in giving an award that was inordinately low in the circumstances and which was contrary to his findings in the suit.

5. The learned Magistrate erred in law and fact in failing to hold that the Appellant had been treated in a very inhuman and degrading manner by the Respondent.

6. The learned Magistrate erred in law and fact in failing to consider the history, full facts and documentary evidence placed before him before arriving at his decision and thus based his decision on wrong principles of law and fact.

7. In the alternative to all the foregoing the learned Magistrate erred in law and fact in arriving at the decision he did without sufficient cause leaving out all the terminal benefits the Appellant was entitled to considering all the circumstances of the case herein.

In a defence filed on 4th August, 2006, the Respondent conceded that the Appellant was its employee but denied that she had diligently discharged her duties. It denied it unlawfully terminated her employment and that the suspension was done without justification, merit, explanation or maliciously. It averred that the said suspension and termination from employment were lawful and justified due to the Appellant's bad conduct, leading to her being charged with a criminal offence in Eldoret Chief Magistrate's Court

Criminal Case No. 246 of 2006. It averred that the Appellant was entitled to half pay during the period of her suspension which she had declined to collect.

In a Reply to defence filed on 10th August, 2006, the Appellant reiterated the contents of her plaint and put the Respondent to strict proof thereof.

The appeal was canvassed by way of filing written submissions. Those of the Appellant were filed on 24th September, 2013 by her counsel. In a nutshell, Appellant's counsel have submitted that the trial Magistrate rightly found that the Appellant was an employee of the Respondent and that she had proved her case against the Respondent on a balance of probability but disregarded the Appellant's testimony and documentary evidence and awarded accrued salary arrears in the sum of Ksh. 29,265/= on the basis of ten (10) months half salary from the time of her suspension which was too low.

Respondent's submissions were filed on 21st June, 2013 on its behalf by M/s. Nyairo & Co. Advocates. The gist of the submissions is that the trial court rightly found that the Appellant was only entitled to a half pay and solely relied on the case of **JOSEPH MUJIBI OUMA -VS- THE NATIONAL CEREALS AND PRODUCE BOARD AND GERALD KIRIMI KIRURITU AND ATTORNEY GENERAL (2006) KLR**

They submitted as follows:-

- That the Appellant's suspension was lawful because the Appellant had threatened to kill her employer, the head teacher for that matter.
- That the notice of suspension was lawfully and the Respondent exercised its lawful authority in suspending her.
- That the Appellant faced criminal charges and was convicted and she failed to show cause why disciplinary action should not be taken against her.
- That due to the Appellant's conduct that necessitated her suspension, she could not be allowed to stay in school compound and that the house allowance claimed was not proved.
- That as the Appellant was on suspension, she was only entitled to statutory half salary for January, 2006 to 30th October, 2006 when, by her conduct she revoked the implied contract of employment by refusing to appear before the board. That this led the Respondent to invoke Section 14 (5) of the Employment Act, Cap 226, Laws of Kenya.

The Respondent also urges the court to find that the Appellant should pay the costs of this appeal.

Before I outline the issues for determination, it is important to briefly summarize the evidence tendered before the trial court. The Appellant testified as PW1. She said that she was employed by the Defendant school sometime in 1990 as a cleaner and she produced an employment card as P. Exhibit 1, and in 1996 she was promoted as a school mother. That on 6th January, 2006 she was called to the office and given a letter dated 3rd January, 2006 stating that she would no longer work for the Defendant and she should vacate the house the Defendant had provided for her. She produced the said letter as P. Exhibit 3. She said she was not given an opportunity to defend herself and asked the court to order her reinstatement. She stated she was paid a salary of Ksh. 5,853/= and was entitled to a house allowance of 15% of her salary.

The defence on the other hand called only one witness, one Miliana Ikireut Ipapa who was the head teacher of the Eldoret School for Mentally Handicapped and also the Secretary of the Defendant . According to DW1 the suspension of PW1 was decided by the Board of Governors. She said that since her suspension, PW1 had not been paid her salary.

DW1 further testified that PW1 was charged alongside two others in Eldoret Chief Magistrate's Criminal Case No. 246 of 2006 with the offence of threatening to kill for which they were all convicted. She produced a copy of the Judgment as D. Exhibit 1. She denied there was malice or harassment against PW1 in the process of the termination. She said that although PW1 was entitled to half of her salary for the period of her suspension, she had not gone to collect it. She urged the court to dismiss the suit with costs as all allegations in the plaint were not true.

It is now clear that both parties are in consensus that the Appellant was at all material time an employee of the Respondent and that she was suspended from duty on 3rd January, 2006. It is also not in dispute that as at the time of the suspension she was earning a monthly salary of Ksh. 5,853/= and that the court ordered that she be paid accrued arrears of Ksh. 29,265/= tabulated at the rate of half pay for the ten (10)-months she was on suspension before the termination of employment on 30th October, 2006. It is however contested that accrued arrears should have been paid at half pay as opposed to full salary. The Appellant does also contend that the Appellant was as well entitled to accrued house allowance pegged on 15% of the salary.

Based on this analysis and having regard to the facts of the case, the evidence tendered and the respective submissions, I frame the issues for determination as follows:-

1. What did the Respondent (employer) envisage in suspending the Appellant?

2. What did the act (conduct) committed by the Appellant leading to her suspension amount to under the repealed Employment Act (then Cap 226, Laws of Kenya)?

3. Flowing from (2) above, would that act (conduct of Appellant) lead to a suspension from, or a termination of employment?

4. Would the Appellant (depending on answer to question 3) be entitled to salary/remuneration or benefits pending termination, or a dismissal, as the case may be.

With regard to the first question it is important to first define the word suspension.

The Black,s Law Dictionary, 7th Edition defines the word suspension as:-

> ***Suspend — to temporarily keep a person from performing a function, occupying an office, holding a job, or exercising a right or*** *Privilege'*

The Employment Act, Cap 226, now repealed, was the applicable statute governing employment and matters incidental thereto and connected therewith.

The same neither defines 'suspension' nor discusses it at all, meaning that it did not envisage a situation in which an employee would seek refuge under it in the event he is suspended from employment. However, the practice of suspending an employee following misconduct on his part in the course of his employment is not a novelty. More often than not, it is taken as a measure (not necessarily disciplinary) pending investigation of the employee in a case where an employer, say, can no longer afford to pay an employee.

In the instant case, the Appellant was employed by the Respondent way back in 1990 as a casual labourer and was promoted in various capacities upto the rank of a house mother. Her letter of suspension dated 3rd January, 2006 (not found in both Records of Appeal but lower court file), read:-

> ***"It has been decided that you be suspended from duty from the date of this letter until further notice. You should vacate the school house on the same date. You should not be in the school compound, or within the Premises of the schoo whatsoever."***

What prompted the writing of this letter is that the Appellant, Harrison Opuru and Hulia Ngetich Menjo all employees of Eldoret School for Mentally Handicapped had threatened DW1 (school head) with death on 24th December, 2005. This prompted DW1 to report the matter to the police, consequent wherefore the three were charged with a criminal offence of threatening to kill DW1. It is in the meantime, as the criminal trial was pending for determination that DW1, in her capacity as Secretary to the Respondent's board wrote the above letter to the Appellant.

Given this scenario of the crude conduct of the Appellant it is obvious the school did not want anything to do with her. Therefore, although the letter itself was in the wording of *'suspension'*, at the end of the day,

the Respondent did not envisage or intend to reinstate the Appellant back to employment due to her conduct.

Even the tone of the letter itself was telling. PW1 wrote ***"..... you should not be seen in the school compound.."*** and ***"you should vacate the school - compound"...*** indicative of the employer's displeasure with its employee. It is then easy to deduce that the Respondent wanted to completely get rid of the Appellant once and for all. .

It is obvious the letter was vague by not giving definite time of the period of suspension *("suspended from duty from the date of this letter until further notice").* However, owing to the gravity of the employee's conduct (threatening to kill) it cannot be said that the employer suspended the employee with the intention of reabsorbing her back and continue with a hitherto cordial relationship. It is my view that the letter was framed with its unclear terms of the suspension merely because it was written by a lay person, and that its real purpose was to ensure the Appellant never returned on job again. That is to say, she ought to have been terminated from employment.

I will consider questions 2 and 3 simultaneously. It is now undisputed that there was no written employment contract between the parties which this court would revert to in determining the Appellant's entitlement. It is also correct to state that an employees service is governed by the contract of employment. In the absence of the said contract, such employee/employer relationship is governed by the Employment Act. I have already observed that the Employment Act , (repealed) Cap 226, Laws of Kenya that was operational then did not envisage a situation in which an employee would be suspended from duty. It only refers to summary dismissal and grounds which can give rise to it under Section I7. The same reads as follows:-

> ***"17 Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause,but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal-***
>
> ***(a) if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;***
>
> ***(b) if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;***
>
> ***(c) if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly;***
>
> ***(d) if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;***
>
> ***(e) if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;***
>
> ***(f) if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;***
>
> ***(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.***

The conduct of the Appellant herein (threatening to kill) falls under ground (g) which is - ***"if an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property"***. The emphasis on this point cannot be gainsaid. It is also not beyond any maladventure to say the threat issued by the Appellant was beyond suspicion or based on malice, unjustifiable grounds or hatred. It was real. The Appellant was indeed charged with. the offence of threatening to kill vide **ELDORET CHIEF MAGISTRATE'S CRIMINAL CASE NO. 246 OF 2006**. She was convicted and she and her co-accused persons were each sentenced to two years probation. That verdict has not been upset to date by an appellate court.

This clearly demonstrates that, and which I hold, that the Appellant's act (conduct) leading to the suspension ought to have been construed as an act amounting to *gross misconduct*. Therefore, what ought to have ensued as at the date the suspension letter was given was not a suspension but a summary dismissal on ground of gross misconduct. It is further my view that notwithstanding the error by the Respondent to issue a suspension letter as opposed to a summary dismissal letter, by the very conduct of the Appellant, she stood dismissed from employment from the date of the letter, that is 3rd January, 2006.

So then, and finally, I dwelve into whether, by virtue of her gross misconduct, she was entitled to any . accrued remuneration including house allowance. Again, the Employment Act does not envisage a situation in which any remuneration or benefits are payable if an employee is dismissed on ground(s) of gross misconduct. But it is my view, depending on circumstances of each case, court may order such payment of such remuneration or compensation as it deems fit.

In ordering payment of half salary for the ten months, the trial Magistrate said,

> ***"As per the regulations she was entitled to the statutory half salary from the period she was suspended until the board of governor terminated her services."***

The Respondent also quickly picked up this finding and advanced a case in response to the appeal that the Appellant ought to have been paid the said half salary but she failed to collect it.

But none of the two parties justified this argument by evidence of any available employment regulations or a statute as referred to by the court. The circumstances surrounding the termination of employment of the Appellant were so grave, so severe that even in her mind, she knew she would not return to the employment of the Respondent. And so to order her to be paid any monies, would be totally unjustified. Even the argument that she should be paid more because she, was not *"sacke*d" per se is defeatist and an abuse of justice system. It may also give rise to an avalanche of suits in which employees will conduct themselves in such manners as to arouse summary dismissals bearing in their minds that the courts will compensate them, after all.

In a nutshell, therefore, I hold that the Appellant was not supposed to paid any dues/salary/remuneration or house allowance save for the period she had so far worked prior to the 3rd January ,2006.

It is important to note, though, that both the proceedings in the lower court and this court do not show that the Judgment of the lower court was stayed. This means that the Appellant may already have received the amounts ordered by the trial court. If that has already happened, she should count herself lucky. If she has also received the costs of that suit, I do not have the intention of disturbing that status save to emphasize that, it follows that since she deserved no payments, no costs were entitled to her.

Suffice it to say, the scenario presented by this instant case is very grey in the decided precedents. Most of such cases deal with wrongful dismissals under various circumstances not synonymous with this case. But it is important to both compare and distinguish this case with the case I was referred to by counsel for the Respondent — **JOSEPH MUJIBI OUMA -VS- NATIONAL CEREALS AND PRODUCE BOARD & 2 OTHERS (2006) e KLR** In the case, the Plaintiff claimed special and general damages for wrongful dismissal and malicious prosecution. The Plaintiff was an employee of the 1st Defendant. He was suspended from employment and finally dismissed. It was alleged he was involved in loss of his

employer's gunny bags. He was as a result charged in the Principal Magistrate's Court with stealing by servant contrary to Section 281 of the Penal Code. Fortunately, he was acquitted. He was suspended between 1st July, 1993 and April, 1994 when he was dismissed while Judgment of the criminal trial was delivered on 7th August, 1996.

The High Court addressed five issues for determination as follows:-

(a) *Whether any malice was established on the part of the defendants, by castigating the criminal charges*. Court found in favour of the Defendants noting that the 1st Defendant was entitled to make a complaint with the police, and an acquittal per se did not absorb the Plaintiff from civil liability.

(b) *Whether the Plaintiff was entitled to special damages arising from the criminal case*. Court found he was not entitled to the damages as he did not prove malice against the Defendants and did not specifically plead them.

(c) *Whether the Plaintiff was entitled to damages for mental anguish and distress*. *While referring to the Court of Appeal decision in* **Kenya Ports Authority -Vs- Edward Otieno CA 120 of 1997**, the Court said that mental anguish and distress or injury has no place for consideration in assessing general damages.

(d) *Whether or not the Plaintiff was entitled to reinstatement.* The court relied on Court of appeal decision in **DALMAS B. OGOYE –VS KNTC CA NO. 125 OF 1995** in which it was held that ***"courts do not order reinstatement in such cases because such an order would be difficult to enforce besides it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer"***

(e) *Whether the Plaintiff was entitled to general damages for wrongful dismissal.* Again the Plaintiff failed under this head because he did not. plead such damages. He also did not exhibit any employment contract' to prove he was not terminated in accordance with that contract. Court said in this respect, his relationship with the 1st Defendant was governed by the Employment Act which did not give room for payment of the damages.

The suit was of cause dismissed with costs.

The only similarity I draw between the two cases is with respect to the last issue for determination. The Judge in that case upheld the Defendant's submissions that the Plaintiff ought to have been dismissed for gross misconduct. It is trite that in the instant case, the parties did not enter into employment contract and that is why I reverted to the Employment Act, Cap 226, in determining whether the Appellant was entitled to any payments. I have already decided for the Respondent in this respect and no more can be said.

In the end, this appeal is dismissed with costs.

It is so ordered.

DATED and DELIVERED at ELDORET this 3rd day of April, 2014.

G. W. NGENYE MACHARIA

JUDGE

In the presence of:-

Mr. Onkoba Advocate for the Appellant

Mr. Makuto Advocate for the Respondent