



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 146 OF 2008

FULGENCE SUNZA MASAIPLAINTIFF

VERSUS

KENYA REVENUE AUTHORITYDEFENDANT

JUDGMENT

The the reliefs sought in the plaint are:-

- (a) A declaration that the Plaintiffs termination of his employment with the Defendant was unlawful and or wrongful or illegal and a declaration that the Defendant is liable to pay and make good to the plaintiff terminal dues and other benefits and or emoluments as pleaded in paragraph 11 of the plaint.**
- (b) Special damages of Ksh. 4,784,531**
- (c) General and exemplary damages for malicious prosecution.**
- (d) Costs of the suit.**
- (e) Interest on (b) (c) and (d) at Court rates.**
- (f) Any other relief that this Court may deem fit and just to grant.**

In its defence the Defendant avers, that, the plaintiff was lawfully dismissed for gross misconduct in that the plaintiff was implicated in a case involving the irregular use of cheques for oil companies.

Secondly, that the termination of the plaintiffs services was done procedurally an din accordance with the provisions of the Defendants code of conduct and the Defendant did not breach the tenets of natural Justice.

Parties in this case filed a list of agreed issues on 16th July, 2009. These are:-

- (a) Was a termination notice required on the part of the Defendant before dismissal of the plaintiff from employment?**
- (b) Was the Defendant entitled to dismiss the plaintiff on account of gross misconduct and was the dismissal lawful?**

(c) Did the Defendant in any manner cause the institution of criminal charges against the plaintiff in Criminal case number 2246 of 2001?

(d) Was the arrest of the plaintiff in the above Criminal Case unlawful and without any reasonable or probable cause?

(e) Was the dismissal of the plaintiff from employment to the Defendant irregular, un-procedural and in breach of the tenets of natural Justice?

(f) If yes, has the plaintiff suffered any loss and damage as a result thereof? What is the nature and extend of such loss and damage?

(g) Is the plaintiff entitled to the damages, terminal dues and emoluments set out in paragraph 11 and 16 of the Plaint?.

(h) Is the plaintiffs suit time barred by virtue of the lemitation of Actions Act?

It is not in dispute that the plaintiff was an employee of the Defendant and that his duties were that of a cashier at the Defendants cash office at Kilindini, Mombasa before his services were terminated with effect from 25th July, 2001.

At that time he had risen from a clerical officer to that of a senior clerical officer. At the time of dismissal he was earning a basic salary of Ksh. 17,485/=.

In the month of July, 2001 the plaintiff was arrested and charged with several Counts of stealing a cheque Number [particulars withheld] and fraudulently accounting for the cheque.

Subsequently, the Defendant wrote the plaintiff a letter dated 25th July, 2001 (Plaintiff Exhibit No. 7) as follows,

“ It has been reported that you were arrested by the police due to suspected malpractice that you were involved in likely to endanger government revenue. Consequently, you are hereby suspended from duty without pay with immediate effect pending further investigations”.

The plaintiff was served with a letter dated 13th August, 2002 to show cause in writing why he should not be dismissed on grounds of gross misconduct.

The plaintiff replied to that show cause letter by another one dated 2nd September, 2002 on 21st June, 2003 the plaintiff was dismissed vide a letter of even date (Exhibit No. 12) and was advised that he could lodge an appeal addressed to the Commissioner General's office. He appealed vide a letter dated 4th September, 2003 (Exhibit No. 14).

The appeal was reflected on 9th August, 2004.

In his defence the plaintiff had stated that on the day of the alleged misconduct he had been called by his supervisor one Mr. Joseph Omwenga and was given an offence file for Bureau Clearing and a cheque number [particulars withheld] which he was required to receipt in favour of the owners of that offence file.

It is the contention by Counsel for the Defendants that a termination notice is not required before dismissal of the plaintiff from employment.

He has buttressed his argument by diut of the provisions of Section 44(3) of the Employment Act which provides,

“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising

under the contract of service”.

He also relies on the case of *Erick Karanja Gakenyo & Another –Vs- Samson Gathimba (2011) eKLR*, where Emukule Judge held,

***“Summary dismissal usually connotes dismissal of an employee, without giving the notice to which the employee is entitled by virtue of the contract of employment. In the case of the relationship of employee and employer, suspicion lead to erosion of confidence and trust by the employee and in the case of suspicion of loss or theft of property of the employer, It may lead to summary dismissal without notice*”.**

On the question whether the Defendant was entitled to dismiss the plaintiff on account of gross misconduct and whether the dismissal was lawful?

It is contended that an internal Audit was conducted which revealed that the plaintiff as the cashier at the Defendants cash office negligently and or fraudulently allowed the wrongful receipting of a cheque number [particulars withheld] as a result of which government revenue was lost. Further that in his defence through his letter dated 2nd September, 2002 admitted to having hurriedly receipted the cheque to the wrong party without exercising diligence. That he as the cashier in charge failed to detect or conspired with others to allow cheque number [particulars withheld] for Ksh. 353,397 drawn by Caltex Oil (K) Ltd. for payment of IDF fees to be diverted and used for clearance of other goods belonging to Nzuga Investment Ltd.

It is further contended that the findings of the Audit report indicated that the plaintiff as cashier in charge negligently and or carelessly performed his duties as a result of which government revenue was lost.

Further that the plaintiff was dismissed in accordance with the Defendants employees code of conduct rules and regulations.

That the Defendant was only required to demonstrate it had a reasonable and justifiable ground to believe that the plaintiff had committed the offence with which he was charged with.

As to whether the Defendant in any manner did cause the institution of criminal charges against the plaintiff in Criminal Case number 2246 of 2001 and whether the arrest of the plaintiff was unlawful and without any reasonable or probable cause it is the Defendants contention that what it did was to make a complaint to the police to investigate the report that the KRA and the government were losing millions of shillings through the diversion of oil company cheques. Investigations were done and criminal charges were preferred against the Accused and others.

Further that there was no dispute that Oil company cheques had been diverted as a result of which the government lost revenue.

As regards the claim for malicious prosecution its the Defendants submission that it cannot be sustained for the reason that the Attorney general had not been enjoined.

Further that there was no evidence to the effect that there was lack of reasonable and probable cause in their prosecution.

The other issue is whether the dismissal of the plaintiff from employment to the Defendant was irregular, un-procedural and in breach of the tenets of natural justice.

It is the Defendants contention that it was done regularly, procedurally and was not in breach of the tenets of natural Justice. To this end the Defendant relies on the provisions of Section 41 of the Employment Act.

That the reasons for the suspension of the plaintiff was sufficiently explained to him vide the letter dated

13th August, 2002 and there is protracted correspondence towards that end. Further that the plaintiff did not make a request to be allowed to appear before the Disciplinary committee to defend himself and was denied that opportunity.

As to whether the plaintiff was entitled to work until retirement age and whether he was entitled to the damages, terminal dues and emoluments as prayed in the statement of claim, the Defendants submission is that the plaintiff was not entitled to work till retirement and the claim for loss of salary for twelve (12) years is an attempt at unjust enrichment. That the plaintiffs employment was governed by the contract of employment exhibited by the letter of appointment. That his employment could be terminated at any time in accordance with the KRA code of conduct and the Employment Act.

Further that as regards the prayer for full salary and allowances (including house allowance) during the period of suspension as prayed in paragraph 11(ii) of the plaint same cannot be granted reason being that under the KRA code of conduct applicable in the year 2001 penalties Section 3.7.2 at page 14 an employee of the Defendant is not entitled to salary or allowance during suspension.

Further that the plaintiff was summarily dismissed and was therefore not entitled to any terminal benefits. That the plaintiff was summarily dismissed and no termination notice was issued in which he would be entitled to terminal benefits. However, he was refunded his pension contributions as per KRA Pension rules.

It is further submitted that the amounts claimed at paragraph 11 amounting to Ksh. 4,704,531 are unconscionable because the benefits payable (if any) are equivalent to the period of Notice, where the period is not provided the employed act provides for one month.

Damages payable is salary in lieu of notice.

On the issue of liability for malicious prosecution. It is the Defendant contention that malicious prosecution is malicious instigation against another of unsuccessful Criminal proceeding without reasonable or probable cause. No malice was proved.

The plaintiffs submission is that the termination was unprocedural and irregular and in breach of the tenets of natural justice in that the Defendant had drawn up a code of conduct which was embodied in the contract of employment under clause 3 of the letter of appointment dated 23rd September, 1996 (Plaintiff Exhibit No. 10).

That the plaintiff was suspended in accordance with Section 3.7.2 (c) which provides that,

“The authority may suspend an employee when charged with misconduct or gross misconduct and the question of his dismissal is being contemplated”.

That Section 3.3.4. provides,

“An employee with a disciplinary case may be allowed to appear before the disciplinary committee or staff committee to defend himself against the allegations leveled against him”.

It is submitted that considering the gravity of the alleged offence and the penalty prescribed the Defendant was under a duty to enquire whether or not the plaintiff wished to be heard orally in his defence.

That the entire disciplinary process took three years contrary to the period of three (3) months provided for in the rules of conduct. That the delay was unprocedural and unfair and against the rules of Justice.

It is further submitted that Section 3.4.4. provides that,

“An employee who appeals against a punishment meted out may be granted an interview If he so

wishes to present his case in person and may be accompanied by a fellow employee”.

That he was not given such an opportunity and hence there was no fair hearing.

As to whether the Defendant was entitled to dismiss the plaintiff on account of gross misconduct, it is submitted for the plaintiff that the proper procedure was not followed. Further that he had been called by his boss one Mr. Joseph Omwenga and was given an offence file for Bureau clearing and a cheque number [particulars withheld] which he was required to receipt in favoring the owners of that offence file. That he assumed his boss had perused the contents of the cheque. Such that he required the plaintiff to account and receipt for it as instructed. That the plaintiff could not question his boss. That there was no evidence to the effect that the plaintiff accounted and receipted the cheque as he did for his own personal interest or that he benefited in any way from that transaction.

It is further submitted that there was no evidence of dishonesty, lack of integrity, negligence in the performance of his duties and that after the case went for trial the plaintiff was acquitted for lack of evidence. It is further the plaintiffs contention that it is the Defendant who initiated the prosecution of the case by lodging a complaint. That the prosecution was actuated by malice.

The plaintiff submits for general damages in the sum of Ksh. 600,000/= and exemplary damages in the sum of Ksh. 300,000/=.

On the issue regarding damages, terminal dues and emoluments set out in paragraph 11 and 16 of the plaintiff's submission that the plaintiff would have worked till retirement at 55 years of age had it not been for the dismissal.

It is further submitted that he is entitled to compensation in terms of lost salary and allowances such as medical cover, leave allowance, severance pay and housing allowance from the date of suspension upto the date of filing suit.

It is the plaintiffs submission that the letter of appointment produced as plaintiff Exhibit number 4 did not contain a termination clause or notice and none can be implied. That the employment Act 2007 provides under Section 49(1) (c) that in such a case one of the remedies of wrongful dismissal and unfair termination is,

“the equivalent of number of months wages or salary not exceeding twelve months wage or salary of the employee at the time of dismissal”.

Section 50 ...,

“in determining a complaint under this Act involving wrongful dismissal or unfair termination of the employment of an employee the Industrial Court shall be guided by the provisions of Section 49 of the Act”.

Damages for malicious prosecution.

The plaintiff was arrested and prosecuted by police after the Defendant lodged a complaint. This was after investigations were carried out by the Defendants Internal Audit Department.

In its report at page 6 paragraph 2.18.1 it states,

”Mr. J. Masaai who was serving as a cashier in Kilindini warehouse was expected to issue receipts as directed by the Drawers of the cheque. It is a general requirement that the cheques payable to Customs Department indicate the station which should accept the payment and the account to which the credit should be given which is normally the name of the importer or the clearing agent as per the entry. The cheque Number [particulars withheld] used by Mr. Masaai in the warehouse had the payee name clearly noted as Customs and Excise Department Kilindini – Account Caltex Oil (K) Ltd. Mr. Masaai

however, went ahead to use cheque meant to pay for Caltex Oil (K) Ltd Account and issued receipts to a clearing agent who had not made any payment of duty for the cargo they were clearing.

Mr. Maasai in this respect facilitated the importers through their clearing agents to use a stolen cheque to clear their goods thereby defrauding the authority the duty accruing from importation of the cleared goods”.

It is upon this report that the Defendant lodged a complaint with the police and the police proceeded to prefer charges against the plaintiff and his boss among others. The plaintiff and his co-accused were later acquitted under Section 210 of the Criminal Procedure Code for no case to answer.

Counsel for the Defendant submits that it was fatal for the plaintiff not to enjoin the Attorney General as he represents the police and he has cited the case of **Harridon Andala Ashikube -Vs- Standard Group Ltd. 2010 eKLR** where the Court of Appeal stated,

“The Respondents case as it appears in the plaint was that he claimed damages for false arrest, malicious prosecution and false imprisonment. He did not join the police in the suit although it was clear that the acts complained of were infact committed by police There was no evidence to suggest that the arrest and prosecution of the Respondent was brought without reasonable of probable cause”.

Reasonable and probable cause was defined in the case of **Hicks -Vs- Faulkher 1962 AC 766** as follows,

“An honest belief in the guilt of the Accused based upon a full Conviction founded upon reasonable grounds of the existence of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the Accuser, to the conclusion that the Accused was probably guilty of the Crime imputed”.

I find that there was no evidence adduced by the plaintiff to the effect that the report made was false and or malicious. Indeed the plaintiff admitted the contents of the report but instead lay blame on his supervisor because he was acting on his instructions. He also in his letter dated 2nd September, 2002 (Plaintiff Exhibit number 12) did admit to negligently handling the cheque in question.

“When I got back to my office, I gave priority to that case and hurriedly receipted the payment in the name that was on the offence file as is the practice unaware that the cheque indicated differently i.e. Caltex Oil (K) Ltd. This was in the assumption that my boss had perused the contents “.

This goes to show that the audited report was through and it was not actuated by malice.

In the case of **Nzoia Sugar Company Ltd. -Vs- Collinsus Faugututi Civil Appeal No. 7 of 1987** the Court of appeal held that,

”A suspect who is acquitted of a Criminal case is not sufficient ground for filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established”.

No such evidence has been adduced and or established and as a result the claim for damages for malicious prosecution cannot stand.

On the issue as to whether the plaintiff was entitled to work until retirement and whether he is entitled to damages, terminal dues and emoluments this has to be gleaned from his employment contract and the Employment act unforceable at the time.

Section 41 of the Employment Act provides,

Subject to Section 42(1),

“An employer shall before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee in a language the employee understand, the reasons for which the employer is considering termination”.

Section 43 (2) provides,

“The reasons for termination of a contract are the matters that the employer at the time of terminating of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee”.

It is not in dispute that the plaintiff was explained the reasons of his termination through correspondence. That he also defended himself through correspondence vide a letter dated 2nd September, 2002.

The plaintiffs contention is that he was not given the chance to offer his defence orally.

Section 3.3.4 of the KRA code of conduct provides,

“An employee with a disciplinary case may be allowed to appear before the Disciplinary committee or staff committee to defend himself against the allegations levelled against him”.

It is the plaintiffs contention that had he been allowed an oral hearing he would have said what he wished to say.

In his letter dated 2nd September, 2002 while admitting some measure of negligence and failure to exercise due diligence he placed blame on instructions from his supervisor. Even if he was given the chance to defend himself orally there is no true indication that he would have taken another line of defence from that of placing blame on his immediate boss.

In the case of ***Kenya Revenue Authority -Vs- Manguiya Salim Murgani (1010) eKLR*** cited by Counsel for the Defendants it was held,

“The thrust of Dr. Kurias submission was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the Respondent either by the staff committee or by the Board being the appellate body or both. However, in our view, the fairness of the hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing”.

Section 3.3.4 of the code of conduct uses the word “**may**” but not “**shall**”. It was not mandatory that the plaintiff personally appear before the board or staff committee.

There is no evidence that such a request was made and it was declined.

I am satisfied that the correct procedure was followed but the entire disciplinary process took three years whereas the KRA code of conduct provided for three months period.

As to the question whether the Defendant was entitled to dismiss the plaintiff on account of gross misconduct. I find that there was sufficient evidence to the effect that the plaintiff being the cashier in charge had negligently performed his duties as a result of which government revenue was lost. The dismissal was in accordance with the Employment Act and the Kenya Revenue Authority code of conduct.

Section 3.5.1 of KRA code of conduct provide,

- I. **Lack of integrity or dishonesty by an employee.**
- II. **Where KRA sustains a loss, shortage or any damage as a result of dishonesty, negligence or want of care of an employee.**

Gross misconduct is defined by Hulsbury's Laws of England paragraph 567 as,

“Conduct so undermining the trust and confidence inherent in the particular contract of Employment that the Employer should no longer be required to retain employees”.

Misconduct include theft or fraud, physical violence or bullying deliberate and serious damage to property, serious misuse of organizations property or name deliberately accessing the internet containing phonographic offensive or obscene material, serious insubordination, unlawful discrimination or harassment bringing the organization to serious dis..... serious in capacity at work brought by alcohol or illegal drugs, causing loss of damage or injury through serious negligence, a serious breach of health and safety rules and serious breach of confidence”.

I am satisfied that the Defendant armed with the Audit report was entitled to summarily dismiss the plaintiff.

On the issue as to whether the plaintiff is entitled to damages, terminal dues and emoluments, this is also governed by the Employment Act in operation at the time and the Kenya Revenue Authority regulations.

It is the contention of the defendant that the only terminal benefits payable are equivalent to the period of Notice and where the period is not provided, the Act provides for one month.

In the case of **Kenya Revenue Authority –Vs- Manyinya** it was held,

“There are clear put decisions of this Court that even where dismissal or termination is wrongful, the damages payable to the employee is the salary which would have been paid lieu of Notice”.

The Court further held that the Respondents entitlement was six months salary in lieu of Notice together with the Respondents own contribution. This Court has noted that the Kenya Revenue Authority code of conduct provided disciplinary cases to be disposed of expeditiously Section 3.3.5.

Section 3.7.2 (g) cases of suspicion must be determined within three (3) months. The plaintiff was suspended on 25th July, 2001 and was asked to show cause on 13th August, 2002 which was more than one year later.

Deliberations on the plaintiffs defence took ten months and the determination of the appeal took one year. Clearly this was not in line with the provisions of the code of conduce.

The upshot is that this Court finds six months as reasonable notice. It is ordered that the plaintiff is entitled to six months salary in lieu of notice as of 21st June, 2003 the plaintiff was earning a basic salary of Ksh. 17,485/= which amounts to Ksh. 104,910/=.

He is not entitled to any other damages and or declarations as prayed in the plaint.

Since he has succeeded substantially in his claim he is awarded costs of the suit plus interest at Court rates.

Judgment delivered dated and signed this **13th** day of **June, 2014**.

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M. MU YA

JUDGE

13TH JUNE, 2014

In the presence of:-

Apolo Muinde for the Plaintiff

M. MUYA

JUDGE

Court: Copies of the Judgment to be furnished to both parties.

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M. MUYA

JUDGE

13TH JUNE, 2014