



BEAUTTA ANSELMO MAALI:.....PLAINTIFF

VERSUS

ETHIOPIAN AIRLINES ENTERPRISES:.....DEFENDANT

JUDGMENT

In a plaint dated and filed on the 7th September, 2007 the plaintiff moved to the seat of justice seeking various reliefs. In a summary, he averred that he was an employee of the defendant, Ethiopian Air lines from 15th September, 1973 on agreement terms and conditions binding both contributing parties, rising through the ranks from a transportation agent to chief officer at the defendant's office in Nairobi. The source of grievance arose from the fact that while in the course of his employment, the defendants caused him to be arrested and charged with a criminal offence in criminal case number C.R. 1930 of 2000 which gave rise to a conviction giving rise to criminal appeal number 662/2003. Prior to the institution of the criminal offences, the plaintiff had served the defendant for 27 years which service could only be brought to an end in accordance with the terms of the contract and according to the plaintiff the said contract has never been brought to an end and for this reason him plaintiff is entitled to the following reliefs:-

(a)Unpaid salaries fifteen million, two hundred and nine thousand and Eleven and twenty cents (Kshs.15,209,011.20)

(b)A declaration that in accordance with the terms of the employment contract, the plaintiff is still an employee of the defendant.

(c)Further and in the alternative general damages for unlawful retention of the plaintiffs salaries and emoluments.

(d)Costs of the suit

(e)Interests on (a) (b) and (c) above at commercial rates.

(f) Life ticket

(g)Any other or further relief that this Honourable court may deem fit, just and expedient for the ends of justice to be met.

The defendants responded to that plaint vide a defence dated and filed on the 11th day of October 2007. In a summary, they admitted paragraph 1 and 2 of the plaint, denied contents of paragraph 3 and 4 of the plaint and put the plaintiff to strict proof, averred that as an employee, the plaintiff was bound by his contract of employment. He was entrusted with the role of collecting deposits from daily sales and bank the same with the defendants bankers and in the process converted to his personal use Kshs. 5,689,104.83 and US dollars 48,169.48. The defendant concedes there were unexplained over deposits. They contend the plaintiff admitted the coversion of the afore stated funds and agreed to withdraw his pension funds with American life insurance company to off set part of the admitted amount converted to the tune of Kshs.4,007.078.00 and US Dollars to the tune of 48,169.48.

In consequence thereof the defendants prayed for the dismissal of the plaintiffs' suit.

The agreed facts of evidence common to both sides as gathered from the evidence of the plaintiff Beatta Anselmo Maali (PW1) who was the sole witness on the plaintiff's side, and Tadese Tilahun (DW1) and Walde Absa (DW2) who gave evidence for the defence is that the plaintiff was an employee of the defendant for 27 years; he was entrusted with collection of funds from the sales and banking the same into the defendants bank accounts; an audit carried out by the defendants revealed a loss of Kshs.5,689,104.83 and use Dollars 48,169.48 the plaintiff was allegedly questioned about the said loss and he admitted responsibility for conversion of the said amount and agreed to refund and did make part refund but did not complete; the defendants reported to police; plaintiff was prosecuted and convicted; plaintiff appealed against conviction and was successful; upon his success in the criminal appeal he called on the defendants for redeployment but the defendants declined necessitating these proceedings. The plaintiff would have retired from the defendants services at age 60 years.

The witnesses were cross-examined and the sum total of the plaintiff's responses is that he did not convert the defendants funds, he signed acknowledgement of responsibility for the loss under duress. He denied knowledge of the content of the Audit reports relied upon by the defence. He contends it is the same evidence which was rejected by the criminal appeal Judge. Concerning the contract of employment, he maintains that the same had not been terminated in accordance with the terms of the collective bargain agreement, that the defendants are in breach and for this reason, the plaintiff is entitled to recover both the lost salary as well as the salary increments together with the attendant benefits.

The defence responses are that indeed losses occurred; the plaintiff admitted; concede the evidence relied upon in these civil proceedings was the same as that relied upon in the criminal proceedings. To them the plaintiff was sacked due to misconduct. They sent the sacking letter to the plaintiffs last known address but these were returned unclaimed forcing the defendants to place an advert in the news papers that the plaintiff was no longer their employee which to them is sufficient notification of termination of the plaintiff's employment with them.

Parties filed written submissions. Those of the plaintiff are dated 22nd day of November, 2011 and filed on the 23rd day of November 2011. The points stressed in support of the plaintiff's case are that:-

- (i) There is no dispute that the plaintiff had been an employee prior to his arrest and prosecution and had he continued in his employment he would have retired at the age of 60 years of age in 2010.
- (ii) Concede indeed the plaintiff was convicted in a criminal prosecution but he was vindicated on appeal when his appeal against conviction was allowed.
- (iii) Upon acquittal by the criminal appeal court, the defendants ought to have reinstated the plaintiff back into his other employment but they failed to do so.
- (iv) The plaintiff is therefore entitled to full salary plus increments for the remainder of his would have been working period.
- (v) There is nothing to show that the defendants terminated the plaintiffs employment as the content of the letters returned unclaimed are unknown and in any case they were not received by the plaintiff.
- (vi) The court is invited to disregard the news papers adverts as notification of termination of employment as these were not in accordance with the terms of the collective bargain agreement.
- (vii) The court is urged to dismiss the defence evidence in its entirety as the documentary evidence relied upon by the defence was never put to the plaintiff to verify in the first instance and secondly the report is undated and not authenticated by the maker and 3rdly it is the same evidence which was rejected by the criminal appeal Judge.
- (viii) That on the basis of the totality of the evidence on the record the court should rule in favour of the

plaintiff as claimed.

The defence submissions are dated 23rd day of January, 2012 and filed on the 25th day of May, 2012 in which the court has been urged to dismiss the entire plaintiffs claim on the grounds that:-

(i) The defendant was entitled to dismiss the plaintiff under section 17 of the defunct employment Act cap 226 on account of gross misconduct based on the plaintiffs' conversion of the employers funds which formed the basis of the criminal prosecution.

(ii) Notification of summary dismissal was complied with as it is on record that these were sent but were returned unclaimed forcing the defendant to place adverts in the newspapers that the plaintiff was no longer their employee.

(iii) The plaintiffs suit is time barred under the limitation of actions Act cap 22 laws of Kenya because the plaintiff had notice of the advertisements for notification of termination of his employment in the year 2000 and yet he lodged his claim in court in the year 2007 which is in excess of the (6) six years allowed for one to lodge contractual claims.

In response the plaintiffs counsel submitted that the defence submission did not hold because the defendant did not plead nor adduce evidence on the plaintiff's summary dismissal for misconduct nor that the plaintiffs claim was time barred.

(ii) The adverts do not assist the defence case as they do not state that they are a notification for termination of employment.

(iii) The plaintiff's cause of action arose from the date the plaintiffs appeal against conviction was allowed in 2006 which is not in excess of 6 years as the action was filed in 2007 hardly a year later.

On case law the plaintiffs counsel relied on the case of **HENRY GIFLEX OMBATI VERSUS UNIVERSITY OF NAIROBI, NAIORBI HCCC 2682 OF 1998** decided by A. Visram J as he then was where by the learned judge found for the plaintiff because his employment had been unlawfully terminated by reason of instigation of criminal charges against him by the defendant. The court found the plaintiff had suffered loss and damage and awarded three months salary in lieu of notice, 20% of his basic salary per month contribution to the pensions plan with 15% thereon per annum. The case of **JUMA MWANGI VERSUS ALEX NJUGUNA AND 2 OTHERS NAIORBI CA NO. 41 OF 2007** where in the court ruled that special damages must be specifically pleaded and proved.

This court has given due consideration to the afore set out rival pleadings evidence and submissions and proceeds to make the following findings of facts on the case.

(i) There is no dispute that the plaintiff has been an employee of the defendant for 27 years to his arrest and arraignment in the criminal prosecution. He was earning over Kshs.107,000.00.

(ii) He asserts that indeed he was falsely accused of having embezzled his employer's funds in the course of his employment which formed the basis of the criminal prosecution which resulted in a criminal conviction which conviction was upset on appeal. The prosecution was based on the same set of evidence currently being relied upon by the defendant's namely alleged letters of commitment by the plaintiff and an Audit report. These documents were scrutinized and found wanting by the criminal appeal court and according to the plaintiff once discounted they have no evidential value.

(iii) The plaintiff relies on clauses 24 and 25 of the collective Bargain agreement which among others make provision that:-

(a) Theft of employer's property is aground for prosecution of the employee on the one hand and dismissal from the employment on account of misconduct on the other hand.

(b) That during the criminal prosecution an employee may be placed on half-pay.

(c) There is provision that an employee whose criminal prosecution leads to an acquittal is entitled to reinstatement. The plaintiff's criminal prosecution first of all ended in a conviction but later ended in an acquittal upon the allowing of an appeal but he was not reinstated hence these proceedings.

(IV) That since the documents relied upon by the defence were discounted by the criminal proceedings any matters relating to their authenticity is Resjudicata and for this reason they cannot be interrogated herein.

(v) That the defendant cannot rely on dismissal on account of misconduct related to theft of amounts which formed the criminal prosecution firstly because those prosecutions led to an acquittal and secondly the defendant has not pleaded dismissal in their defence hence they cannot rely on it.

(vi) There is contention that there is no way the plaintiff's entitlement can suffer deduction of the amount allegedly embezzled by the plaintiff because the defendant has not counter claimed this money in their defence.

(vi) It is the plaintiff's stand that the employer/employee relationship between the plaintiff and the defendant was not brought to an end because there is no proof of a written letter for termination of the employment in writing.

(vii) The defendants cannot rely on the placing of adverts in the news paper as notification of termination of employment between the plaintiff and the defendant because the regulations do not provide for advertisement as a mode of communication of termination of employment.

To counter the plaintiff's factual assertions, the defendant relies on the following:-

(i) Concedes the plaintiff was their employee.

(ii) He embezzled funds from the defendants

(iii) Concedes the plaintiff was prosecuted on account of the money he allegedly embezzled.

(iv) Contends that the plaintiff embezzled funds entrusted to him. This amounted to misconduct which entitled the defendant to dismiss the plaintiff from the employment under the then section 17 of the then employment Act cap 226 laws of Kenya.

(v) To the defendant whether the plaintiff was acquitted of the criminal proceedings offences or not he had misconducted himself in the line of duty and was liable to dismissal and he had been accordingly dismissed.

(vi) That the dismissal was conveyed to the plaintiff vide the letters which were returned unclaimed to them and since the plaintiff could not be reached the defendant was entitled to use an alternative means to reach out to the plaintiff namely by way of advertisement in the news paper which the plaintiff admits to have seen.

This court has given due consideration to the afore set out undisputed factual stands of the parties on the merits of the case and it proceeds to make the following findings in final determination of the dispute herein.

1. Indeed the plaintiff had been accused of embezzlement of the defendant's funds but he was absolved of the same through the criminal process.

2. In law the defendant is entitled to revisit that issue in civil proceedings. They have done so but this court still finds them not proved because the alleged acknowledgement letters of commitment executed

by the plaintiff have been explained by the plaintiff that they were procured under duress.

(ii) They formed the basis of the criminal proceedings and they were also found not to have proved the existence of the commission of the offence. There is no other new evidence to support them.

3. There is also reliance on an audit report which had also formed the basis of the criminal prosecution and was discounted. The same has been produced herein and discounted because it had no date, it had not been signed, it had not been verified by the plaintiff.

4. Discounting of the evidence relied upon by the defendant to oust the plaintiff's claim leads to a finding by this court as did the criminal appeal proceedings that the plaintiff did not embezzle the defendant's funds.

5. By reason of what has been stated in number 4 above and since the alleged embezzlement of funds is what led to the discontinuance of the plaintiff's tour of his employment with the defendant, the plaintiff's employment was unjustifiably brought to an end and he is therefore entitled to redress. More so when the defendant has not counter claimed the said amount from the plaintiff in these proceedings.

6. The relief of dismissal of the plaintiff from his employment is not available to the defendant firstly because it was not pleaded and secondly because it was not resorted to by them as there is no documentation to support it and so it could not be introduced through submissions. There is no basis upon which the defendant's counsel can anchor their assertion that they were entitled to invoke section 17 of the defunct employment Act cap 226 laws of Kenya.

7. The relief of termination of employments is not also available to the defendant, firstly because there is no proof that this procedural step had been undertaken by the defendant in accordance with the laid down clause of the collective bargain agreement.

(ii) The correspondence allegedly conveying the same were returned unclaimed.

(iii) Although adverts were placed in the news papers, these were not the correct mode of communication required by the collective bargain agreement. In any case, they simply read that the plaintiff was no longer an employee of the defendant and not that they were notices of termination of the plaintiff's employment with the defendant.

8. The plea for the plaintiff's action being time barred by reason of the plaintiff having come to court more than six years after his arrest and arraignment in court in the criminal proceedings does not hold because the plaintiff's rightly countered this by submitting that the cause of action arose from the moment the plaintiff's conviction was quashed by the criminal appellate court. The court is in agreement that the plaintiff's employment with the defendant having been interfered with by the criminal prosecution, he could only have a right or justification to complain against that prosecution if exonerated. The exoneration came through the plaintiff's success in the criminal appeal whose decision was given in 2006. As noted, the plaintiff was filed in 2007. As such a period of six years had not lapsed from 2006 to 2007 when the plaintiff filed this suit. Secondly the defendant did not plead this in their defence, did not offer evidence on it in their testimony, hence they are bound by their pleadings. It is now trite that a party is bound by his/her pleadings and cannot be allowed to agitate issues not pleaded.

By reason of what has been stated in the assessment above the court finds that the plaintiff has a genuine complaint. He ought to have been reinstated after the quashing of the conviction by the appellate criminal court. His services were not terminated neither was he dismissed. It has however transpired that he is passed the retirement age. He has pleaded a global sum which the defendant says cannot be allowed as the same has not been particularized. Indeed particulars of the components of the claimed figure have not been given. But from the content of the plaintiff's evidence, all that the plaintiff is seeking is lost salary and salary increment. His argument has been that since he was not reinstated upon acquittal and since he has now reached the retirement age the benefits to be worked out should be based on loss of earnings up to the retirement age.

Both sides agree this claim falls into the category of special claims. The law requires that these be pleaded, particularized and then proved. See the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297 AND HANN VERSUS SINGH (1985) KLR 716**. The court finds that the plaintiff has satisfied the said ingredients by the pleading being made specifically in the plaint. There is sufficient particulars in that there is mention of loss of salary and increments upto the retirement age. What remains to be done is proof- strict proof.

The plaintiff relies on the pay slip as the basic document. It has not been contested. It is contained in the bundle of documents. Although he had pleaded that the retirement age was 55 years, it transpired that since he was in the management cadre his retirement age was 60 years. The court has jurisdiction to enhance the age from 55 years to 60 years under the relief of such and other relief that the court may deem fit to grant as the same is consequential to the main relief claimed.

Since the plaintiff was not reinstated upon the quashing of his criminal convictions, he is deemed to have been unlawfully retired from his service with the defendant mode of assessing of damages in such circumstances has now been crystallized by court of appeal decisions on the subject. There is the case of **KENYA PORTS AUTHORITY VERSUS SILAS OBENGEDE MOMBASA CA NO. 38 OF 2005** wherein the law Lords of the Court of Appeal were faced with the issue as to whether a person who had been wrongly retired or dismissed, the measure of damages payable to such a person should include loss of house allowance, telephone facility, travelling allowance and other related benefits normally enjoyed by employees while still in employment. The court held that **“these benefits are paid to employees while still in employment. These benefits are paid to serving employees not as payment for services rendered or to be rendered but to enable the officer concerned perform his work more conveniently and therefore more efficiently. It is a facilitation payment. That being the case, there is or there could be basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remuneration”**

When applied to the rival arguments herein, it is the finding of this court that salary increments is paid to servicing officers. The terms of the collective bargain agreement does not make provision of its payment to an officer whose salary has been suspended. The plaintiff did not avail the original contract of employment between him and the defendant or letter of employment to determine whether such dues are payable or not. In the premises the court has no alternative but to rule that salary increments are payable to serving officers and for this reason these will be discounted when assessing dues payable to the plaintiffs.

There is also the case of **GAD DAVID OJWANDO VERSUS PROF. NIMROD BWIBO, CHAIRMAN MASENO UNIVERSITY (2) PROF. F.N. ONYANGO VICE CHANCELLOR MASENO UNIVERSITY (3) MASENO UNIVERSITY KISUMU CA NO. 336 OF 2005** wherein the issue in controversy was allegation of unlawful retirement. The CA ruled that **“the appellants compulsory retirement before the age of 65 years which was the retirement age otherwise than in terms of the relevant terms of employment the respondent had acted recklessly and in wanton breach and disregard of the Act and in flagrant violation of the appellants rights as an employee”** The CA confirmed the declaration that the appellant had been unlawfully retired, he was entitled to his benefits, salary and allowances and all other benefits appertaining to his office under his terms of employment with the University until he attained the compulsory retirement age of 65 years.

When applied to the rival arguments herein, since the defendants unlawfully failed to reinstate the plaintiff after the plaintiffs criminal conviction was quashed on appeal, it means that the plaintiff was unlawfully retired from his employment with the defendant and he is therefore entitled to benefits which were appertaining to that employment. The plaintiff has only claimed the salary and salary increment. The increments have been discounted by this court. The salary loss will be calculated in his favour.

There is also the case of **KENYA REVENUE AUTHORITY VERSUS MENGINYA SALIM MURGANI NAIROBI CA 108 OF 2009** decided by the CA on the 16th day of July, 2010 in which the learned law lords of the CA revisited the issue of termination of an employment contract on grounds other than by way of a dismissal or termination by way of issuance of notice. The court allowed assessment of

loss of salary for the remainder of the working period up to the compulsory retirement age.

The afore set out principles of case law being the position, the simple task of this court is to assess the loss of salary based on the amount payable as against the months lost. The plaintiff produced a pay slip showing gross earnings of Kshs.107, 078.72. There is a reflection of Kshs.22, 265.50 as income tax which has to be reduced from the gross figure. There are two other deductions on the pay slip but there is no indication as to what these were for, in order to be treated as statutory deductions or not. For this reason the court will not discount them. The working figure will work out as Kshs.107, 078.72 less the statutory deductions of Kshs.22, 565.50 leaving a balance of Kshs.84, 542.50.

When cross-examined the plaintiff stated that he was born on 14th day of March, 1950. The charge sheet reveals that he was arrested on 14th day of August, 2000. It means that the plaintiff was 50 years of age when he was arrested. Since he was arrested on 14th day of August, 2000. It means that he lost 4½ months salary in 2000. Since he was in the management cadre bracket his retirement age being 60 years, him plaintiff attained the age of 60 years on 14/3/2010. Which gives a period of 9 years 21/2 months when added to the 4½ months lost in the year 2000, the plaintiff lost salary for a period of 9 years and 7 months or alternatively 9 years x(times) 12 months which comes to 108 months +(plus) 7 months comes to 115 months (one hundred and fifteen months). Loss of salary will work out as Kshs.84, 542.50x (times) 115 months which comes to kshs.9, 723,387.50, which is allowed under prayer (a). This figure will not suffer a deduction for accelerated payment because it is ordered to be paid after attaining the age of retirement. Prayer

(b) cannot be allowed because the plaintiff attained retirement age on 14/3/2010. Prayer

(c) cannot be allowed because it is now trite and this court has judicial notice of the same that general damages are never awardable in contracts of employment under

(d) costs usually follow the event. Under

(e) no evidence was adduced as to why interest should be awarded at commercial rates. Interest will run at court rates under

(f) for the life ticket, there is no doubt that this was part of the benefits attached to employment. This privilege was temporarily suspended when the plaintiff was arrested. The privilege would have been restored had the plaintiffs' employment been reinstated. Since it was not reinstated, that privilege was overtaken by events and cannot be granted. As for reliefs under such other or further relief that this court may deem fit to grant, the court grants assessment of loss of salary upto the age of 60 years which was the admitted retirement age in the management cadre.

For the reasons given in the assessment the court allows Kshs.9, 723,387.50 as loss of salary under prayer (a).

(2) The amount awarded under (a) will carry interest at court rates from the date of filing till payment in full. The reason being that the plaintiff should have earned this money even before the filing of the suit.

(3) Prayer (b) and (c) are disallowed for the reasons given in the assessment.

(4) The plaintiff will have costs of the suit.

(5) Under any other or further relief that this court may deem fit to grant, the court approves the retirement age for purposes of assessment of loss of salary to be 60 years as conceded by the defence instead of the 55 years pleaded. The reason being that the raising of the retirement age to be 60 years is consequential to the main plea of loss of salary till the age of 55 years.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE- JA

DATED READ AND DELIVERED AT NAIROBI BY I. LENAOLA ON THIS 28TH DAY OF AUGUST, 2012.

JUDGE