



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 63 of 2007

MICHIMIKURU TEA FACTORY LTD.....APPELLANT

VERSUS

GEOFFREY KITHELA KANAA.....RESPONDENT

(An appeal from the judgment and order of J. N. Nyaga, Ag.P.M of 24/5/2007 in Maua PMCC No.127 of 2004)

JUDGMENT

The appellant Michimikuru Tea Factory Limited was the employer of the respondent one Geoffrey Kithela Kanaa. From the received evidence it appears that by a letter of Appointment dated 13th September 2000 (P Exhibit No.1), the respondent was employed by the appellant as a Leaf Collector Clerk. The terms and conditions of employment as per letter of employment were, Salary Kshs 6,025 per month, House Allowance Kshs 695 per month payable in arrears at the end of each month if a house is not provided by the employer. He was to serve on probation for a period of three (3) months from 2nd October, 2000. That during the probation period, either party could terminate the appointment by giving the other three weeks notice in writing or by paying three weeks salary in lieu of notice. That on satisfactory completion of the probationary period and up to a period of three years continuous service, either party could terminate the appointment by giving one months notice in writing or by paying one months salary in lieu of notice. That on completion of 3 years service, the notice by either party was agreed to be 2 months or payment of two months salary in lieu of notice. That the respondent was eligible to leave or full salary at the rate of 30 working days per annum to be taken at the discretion of the Agency Ltd. The respondent was required to make himself conversant with and abide by Appellant's Standing Orders, currently in force or as may be amended from time to time. In the instant case, the respondent having completed three years service, the notice to terminate by either party required giving of two months notice or payment of two months' salary in lieu of notice.

That in the year 2004, the respondent proceeded on leave and in March while on leave, he received a letter from the appellant suspending him from duty. The letter informed the respondent he had been involved in theft of tea leaves. The respondent produced the letter dated 8th March, 2004, as Exhibit No. 2 . The letter referred to 6 other letters written to the respondent varying from complaint on his duty performance, insubordination, letter of 13th January 2004, giving the respondent final notice and his response dated 21/01/2004, complaining on respondent's behavior by Patrick Amuri, Leaf losses which letters the respondent never bothered to reply to. Leaf falsification which respondent never responded to. The respondent was as per the said letter placed on suspension with immediate effect till further notice. The letter further informed the respondent that he won't be paid for the period under suspension.

The appellant wrote a final warning to the respondent which respondent produced as P Exhibit 3. The

respondent in the said letter was granted 48 hours to respond.

The respondent in his claim claimed that the appellant never paid him salary since March 2004 and that he had not been served with summary dismissal letter. That at the time of suspension, the respondent was earning Ksh. 10,932. He produced pay slip as Exhibit 4. The payslip showed gross amount of Ksh.10,932 and net Ksh. 7814.50. The respondent in his claim was seeking that he be reinstated to work or be paid his benefits. He also prayed for General damages and costs of the suit.

The appellant on the other hand averred that the respondent was suspended on 8.3.2004 and communication was made to him. The suspension arose out of complaints from Kigucwa Tea Buying Centre. The appellant received further complaints that the respondent was falsifying weight of the tea leaves to get extra bags from centre No.4. The appellant sought respondent's explanation through a letter D Exhibit 2, and the respondent replied through a letter D. Exhibit 3. The complaint had been made in writing by committee T.No.4 copy was produced as D Exhibit No. 1. The appellant terminated respondent's services through a letter dated 27/0/2004, produced as D Exh. No.4, and forwarded on 6/10/2004.

The appellant indicated that they were ready to pay the respondent his dues. The appellant averred that it terminated the respondent's services in accordance to the terms of his employment and he cannot be reinstated as he had accepted the terms of service.

The trial court in its judgment held that after considering the evidence, it was not persuaded that the appellant had sufficient grounds for suspending the respondent from work and found that the suspension was unlawful that the respondent's services were terminated after filing of his claim in court. That the respondent denied service of the termination notice, and that the appellant did not produce record on service such as Delivery note. The trial court further found the appellant did not amend their defence to indicate that they had terminated the respondent's service, and that as such, the issue of termination of service was therefore not part of the suit before the court. The court therefore found that the respondent remained an employee of the appellant who is still on suspension. The trial court ordered as the suspension was illegal, the respondent is entitled to be paid salary and allowances from the date of suspension to date. The respondent should be served with termination letter and be paid terminal benefits and that if such amount is paid to the respondent, he won't be entitled to claim of General Damages.

The appellant being aggrieved by the trial court's judgment preferred the appeal setting down 9 grounds of appeal in the amended Memorandum of Appeal dated 3rd July 2007.

When the appeal came up for hearing, both counsel agreed the appeal be determined by way of written submissions. M/S C.B. Mwongela & Co. Advocates filed their submission on 19th April 2012, whereas M/S Mbaabu Inoti & Co. Advocates filed their submission on 24/5/2012.

The court has considered the written submissions by both counsel. It has also considered the pleadings, proceedings and judgment delivered by the learned trial magistrate, and the parties respective opposing positions.

The appellant narrowed its ground of appeal to three (3), that is whether unlawful termination was proved, whether the respondent is entitled to reinstatement or payment of full salary and allowances to the date of judgment, or whether damages are payable in case of unlawful termination of services.

In the instant case, the respondent admit having been served with suspension letter by the appellant. The respondent produced the letters as P Exh.No.1. and P Exh.No.2. The respondent on being cross-examined confirmed that he did not respond to various charges raised in the appellant's letters within 48 hours as required of him. Secondly, the contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period namely, to pay the other party for the notice period it therefore follows that even if the dismissal was unjustified or was wrong, it follows that the respondent is entitled to benefits according to terms of contract. The respondent it follows is not entitled to general

damages.

In the case of **RIFT VALLEY TEXTILES LTD-V-EDWAD ONYANGO OGANDA C.A NO.27 OF 1992 COURT OF APPEAL** stated:-

The position in the present appeal is exactly the same with that dealt with in the KABUTE case, supra. The respondent had been paid damages according to the terms of his contract. He had worked for seven days in the month before he was wrongfully dismissed; he was paid KShs.1,495/= for that period. He had a notice period of three months and he was paid KShs.19,230/= for that. Again, he was entitled to a leave allowance of KShs.600/= per year and he had not gone on leave for three years. He was paid Kshs.1,800/= for that. Finally, he was entitled to a gratuity payment upon the termination of his contract and on that head he was paid a total of KShs.32,050/=. In our view, even though the respondent's summary dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant. The learned judge says in his judgment and we quote him:-With respect to the learned judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the

employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better paid job and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. As we have said, unless there be a specific provision for the application of the rules of natural justice

to a simple contract of employment, those rules are irrelevant and cannot find a cause of action. We have already held that the respondent had been paid all that he was entitled to be paid for the wrongful termination of his employment.'

The appellant in the instant case had shown displeasure with the respondent and had lost confidence with the respondent. The appellant opted to exercise its right of termination of the contract between itself and the respondent, whether there were good reasons or none. An employer cannot be forced or compelled to retain services of an employee who it has no confidence in. Courts have been recently been reluctant to make orders for reinstatement because such relationships are purely contractual and any order made by the court on such terms would be like imposing a contract on a party which is not a function of the Court of Law. In such situations the parties should fall back to contract of employment entered between themselves. The issue as to whether or not respondent was entitled to reinstatement is that the evidence show that the respondent was dismissed for performance below expected standards and for leaf falsification. A similar issue to this one was dealt with by Court of Appeal.

In the matter of **Dalmas B. OgoYe Vs K.nT.C.A NO.125 of 1995** in which the Court of Appeal said

“the 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 with the reluctant employer.”

The other issue for consideration is whether the respondent is entitled to damages for wrongful dismissal. The employee's service is governed by the contract of employment. The employee and employer relationship is governed by the provisions of the contract of employment and in such Contract, there is no room for general damages because the remedies incase of breach of termination of the contract of employment are specifically set out in the employment Act or by contract entered into between the employee and employer.

In case of **Cyrus Nyaga Kabute Vs Kirinyaga County Council Civil Appeal No. 29 of 1985**(un

reported) the appellant had made prayers for amongst others:-

“(iii) General damages for loss of employment and retirement benefits from the date of judgment to the attainment of the appellant’s 60th birthday.

(iv). Aggravated damages and general damages for breach of contract.

In rejecting these claims, this court said:-

“Apart from that, even if the appellant were able to re-open that matter and supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers which he prayed in the plaint. Even though the dismissal may be wrongful, it stands and what flows from the breach of the conditions of service, is damages according to the terms of contract. Those damages would not have been aggravated damages and would not have given him benefits up to his 60th birthday, not arrears of salary from July,1980. In fact appellant was given on normal retirement arrears of salary up to June, 1980, gratuity and payment in lieu of leave.....”

In view of the foregoing, the trial Magistrate erred in Law in ordering the reinstatement of the respondent to his former position with pay and allowance from 8th March 2004, to the date the appellant would serve the respondent with termination letter. The appellant had terminated the respondent’s services through a letter dated 27/09/2004, and the appellant need not issue a fresh termination notice. That even if the respondent did not receive the notice as he contended, he is deemed to have noted that his services were terminated, since 8th March, 2004 when he received suspension letter and failed to receive a letter reinstating him to his employment. The appellant cannot be bound to pay the respondent for services which he has not rendered since 8th March,2004. The respondent’s relief is per the Contract of the employment.

The upshot is that the appeal is allowed and I proceed to make the following orders:-

- 1. That the judgment of the subordinate court delivered on 24/5/2007 ordering for reinstatement of the respondent as an employee of the appellant and/or that the respondent be paid salary and benefits for the period that he was under suspension and terminal benefits be set aside and vacated.***
- 2. That the respondent’s suspension and ultimate termination of employment was within the terms of contract of employment and justified due to insubordination on the part of the respondent and dishonesty in the performance of his appointed Duties, however the respondent is entitled to his terminal benefits in terms of contract of employment as set out in the letter of appellant dated 13th September, 2010 together with salary for 6 months suspension period as the appellant exceeded 6 months suspension period allowed by law without terminating respondent’s services.***
- 3. That no general damages are payable in cases of unlawful termination of services between an employer and an employee***
- 4.Costs of the appeal to the appellant.***

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF DECEMBER, 2012

J. A. MAKAU

JUDGE

Delivered in open court in Presence of:

1. Mr. C.O Otieno h/b for Mwangela for Appellant

2. Mr. Kiambi for Respondent

J. A. MAKAU
JUDGE