REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 20 OF 2008

MASENO UNIVERSITY.....APPELLANT

VERSUS

MICHAEL OTIENO ABIRA.....RESPONDENT

JUDGMENT

The respondent herein approached the seat of justice by way of a plaint dated 24th day of October 2005 and filed on 31st day of October 2005. The salient features of the same are that:-

- **The respondent had been employed by the appellant as a caretaker at a monthly salary of Kshs. 28,213.00.**

- **The course of compliant arises from a letter of suspension dated 7th July 2005 vide which the respondent was suspended from duty.**

- **That the cause of the suspension was because of allegations of a criminal offence reported to the police station investigated and found to be false and the police declined to prefer any charges against him.**

- **Despite the police finding no basis for preferring charges against the respondent the appellant**

went a head and summarily dismissed the Respondent from the service on 19th September 2005.

- **By reason of this summary dismissal the Respondent became aggrieved because the action of the appellant was illegal and malicious.**

In consequence thereof, the Respondent sought from the appellant the following reliefs:-

(a) The plaintiff's case against the defendant is therefore for general damages for wrongful and malicious dismissal, 3 months salary in lieu of Notice, leave pay for 95 days unpaid salary fro 3 months worked before dismissal.

(b) Costs

(c) Interest

(d) Any other order alternative remedy this Honourable court deems just to grant.

The plaint was accompanied by a verifying affidavit verifying the correctness of the content of the plaint. Summons to enter appearance were taken out and served on the appellant who entered appearance dated and filed on the 14th day of November 2005. The defence is dated and filed on the 25th day of January 2006. The salient features of the same are as follows:-

- Vide paragraph 5. That on the 5th day of July 2005 the Respondent was intercepted by the appellant's security men leaving with 20 liters of paint the incident was however not reported to the police because the respondent had approached several of the appellant's senior officers seeking pardon and persuading them not to press the charges. The end result was that a report was made to Maseno Police Post two (2) days later, where upon police carried out investigations but were unable to press charges due to the lapse of time.

- **Vide paragraph 6, 7, and 8, the Respondent was taken before the staff disciplinary committee, the body mandated to deal with staff malpractices, he was given a hearing on those allegation and then a decision was taken to summarily dismiss him from the employment.**

- **Vide paragraph 9, 10 and 11, that the procedure followed to dismiss the Respondent s was proper as the same was within the terms of the Respondent contract and the same is distinct from the intended police prosecution should the police have found it fit to initiate prosecution for any disclosed criminal offence.**

- **Vide paragraph 13 that general damages are not available considering that there was in place a contract of employment.**

- **Vide paragraph 14 that the plaintiff's claim for 3 months salary in lieu of notice, leave pay for 95 days and unpaid salary for three months are improperly pleaded and the defendant would at the**

hearing object to proving of the same.

The parties were heard on merit and the learned trial magistrate gave a judgment on 4th March 2008, in favour of the Respondent.

After reviewing the evidence tendered by both sides, the learned trial magistrate made the following findings on the same:-

(1) At page 3 of the judgment line 1 – 12 from the bottom the learned trial magistrate disallowed the Respondent claim for 95 leave days because-

(i) he did not produce a leave application from showing that he had applied for leave which was declined and for this reason permission given to him to carry forward the said leave days

(ii) There is no mention that leave had been accumulated with permission

(iii) For the reasons stated in (i) – (ii) above the learned trial magistrate only allowed 30 days leave days for the year the Respondent was dismissed.

(2) At page 4 of the judgment after reviewing various clauses of the terms and conditions of service for staff of Maseno University starting at line 1 from the top the learned trial magistrate made a finding at line 16 from the bottom that exhibit 7 is a demonstration that the appellants disciplinary committee was properly constituted and had authority to deal with disciplinary issues concerning middle level grade staff.

(ii) At line 9 from the bottom, the learned trial magistrate did not make a finding that the respondent was targeted as a person considering that investigations were being carried out involving other staff members. And at line 8 arrived at the conclusion that the disciplinary committee arrived at a conclusion after hearing from witness some of whom were not staff of the University. Further that the Respondent had not specified any particulars of malice against any particular member of the disciplinary committee or generally against all of them. Further that there was no provision in the regulations which required that investigations by police be carried out before the appellants disciplinary committee could take any administrative action against any staff at fault

- **At page 5 line 1 from the top that the fact that the police had not taken any immediate action to prosecute the, Respondent, it does not mean that a prosecution is ruled out in the future, as criminal prosecution do not have any time limit within which they can be prosecuted.**

- **At line 4 from the top, found that proper procedure was followed by the university that justified the action that was, taken to dismiss the plaintiff as it was in accordance with the terms of employment between the plaintiff and the defendant.**

- **At line 8 from the top, that it was upto the plaintiff to prove his allegations that he was wrongly unlawfully and maliciously dismissed.**

- **At line 11 from the bottom, made findings that the letter of suspension of 7th July 2005 which suspended the plaintiff did not specify whether the plaintiff was to remain on suspension at full salary, half salary or no salary at all.**

- **At line 8 from the bottom that the terms and condition of same are also silent on what should happen to the salary of a staff member who is on suspension or whether these staff are to be paid salary while on suspension upon dismissal and on this account of line 3 from the bottom ruled in favour of the plaintiff that he should be paid salary from 7th July 2005 to 19th September 2005 when he was dismissed because he was technically in employment until 19th September 2005.**

- **At page 6 of the judgment, upon running the terms and conditions of service on clauses dealing with notice on termination of service. At line 15 from the bottom that the clauses on notice reviewed by the learned trial magistrate give a of discretion on to the authority deciding either to give or refuse to give notice and for this reason it was incumbent upon the defendant to specify in the letter of dismissal that discretion to waive, or remove plaintiff without notice had been exercised in accordance with the terms and condition. That in the absence of specific indication, that the notice is allowed the plaintiff was to be entitled to payment of 3 months salary in lieu of notice.**

- **At line 9 from the bottom that this was a contract with specific terms and conditions and can't be treated like a tout where damages are quantified and awarded.**

- **At page 7 of the judgment drawing inspiration from the decision in the case of Gitau =vs= East African Power and Lighting Co Ltd [1986] KLR 365 which spelt out clearly that damages for compensation for wrongful dismissal are meant to compensate the employee for loss of his wages or salary but not to punish the employer for the wrongful dismissal and the damages recoverable will be the amount of wages or salary for the period of proper notice which amount will represent what the employee has lost by being dismissed without such notice and finally where the employee has been given the amount which represents his salary or wages for the period for such notice no action for wrongful dismissal will i.e.**

The appellant became aggrieved by the said decision and he appealed to this court citing four grounds of appeal was dated 14th day of March 2008. These are that:-

(1) The learned trial magistrate having correctly found that the summary dismissal of the respondent by the appellant was proper, it was not open to her to find that the Respondent was entitled to be paid 3 months salary in lieu of notice or be given 3 months notice of termination of his employment

(2) The learned trial magistrate misdirected herself in law and evidence in her interpretation of Article 15; 7; 3 by not appreciating that once that article was properly applied by the applicant to its employee as was the case here, the said employee in this case the respondent ceased to be entitled to a notice of termination of his employment or salary in lieu of notice.

(3) The learned trial magistrate erred and misdirected herself in awarding the respondent 30 days leave and in not appreciating that the same could only be earned upon completion of a full year

service whereas the Respondent was dismissed on 19th September 2005 before working for a full year

(4) The learned trial magistrate erred in awarding the Respondent salary for the period he was under suspension when the same were not recoverable.

The parties elected to proceed by way of submissions. Those for the appellant are dated 14th day of February 2011, and are filed on the 18th day of February 2011. A perusal of the same reveals that the following points have been stressed:-

(i) Three months salary in lieu of notice should not have been ordered because the court had agreed that the procedure followed to dismiss the Respondent as well as the basis for the said dismissal was sound and beyond legal reproach

(ii) Clause 15:7:3 of the terms and conditions of service entitled the council to dispense with the requirement of notice

(iii) The ……xxreserved the right to summarily dismiss an employee in which case where this course of action has been taken an employee is not entitled to any compensation

(2) (i) That once the trial court reached a finding that the dismissal was lawful and proper, it was contradictory for the learned trial magistrate to order that the Respondent was entitled to (3) three months salary in lieu of notice

(3) Clause 15.1 and 15.2are irrelevant to the present dispute and if any of them is applicable then they are over shadowed by the provisions of clause 15: 7 – 3.

(4) Contents that entitlement to leave earned is not available because once an employee is dismissed them any right for any benefit from the employer becomes extinguished had.

Those for the Respondent are dated 21st day of February 2011, and Filed on the 23rd February 2011 and a perusal of the same reveals

that the following has been stressed:-

(1) **The appeal is incompetent because of the following reasons:-**

(i) On 27/09/10 the court ordered the appellant to file a decree within 14 days following that direction the appellant filed a supplementary record of appeal containing a decree whose copy is not on the court file

(ii) The said decree is also not certified in terms of order 42.

(iii) It contravenes or it offends the provisions of Order 21 Rule 8 (i) Civil Procedure Rules as it does not tally with the judgment which was delivered on 4th March 2008.

(3) As for merits the court is urged not to disturb the findings of the learned trial magistrate as the learned trial magistrate was right in holding that the Respondent was entitled to payment of salary for the period between the date of suspension and dismissal

(ii) Payment of leave is proper as DW1 did not dispute this as all that he said was that he did not know that it was to be paid for if not taken.

(iii) The appellants witness admitted at page 148 that the Respondent was entitled to terminal benefits which is proof that the Respondent's case was treated as one of termination with benefits and not one of dismissal with loss of benefits.

On case law and legal texts the court was referred to Halisburys laws of England Fourth Edition Volume 6, 1976 Editions page 435 paragraph 640 where it is stated that:-

"An employer has a common law right to dismiss his employee without notice on the grounds of the employees serious misconduct. The common law as to dismissal is of diminished importance since employees now have a statutory right not to be unfairly dismissed".

Paragraph 641: **An employee's willful disobedience to the lawful and reasonable instructions of his employer justifies summary dismissal if the disobedience is so grave that it goes to the root of the contract of employment. An employee is not however , bound to obey instructions to do something not properly appertaining to the character or capacity in which he was hired and instructions which involve a reasonable apprehension of danger to the employee's life or person are unlawful and the employee is justified in refusing to obey them.**

Paragraph 642: **Misconduct inconsistent with an employee's proper discharge of the duties for which he was engaged is good cause for his dismissal, but there is no fixed rule of law defining the degree of misconduct which will justify dismissal……..."**

The respondent referred the court to the case of **Gabriel Ayienda Chalango =vs= Ouma Juma & 2 others Kisii HCCA NO. 89 of 2007** decided by Musinga J on the 3rd day of March 2009. At line 10 from the top the learned Judge made the following observations:-

(i) In any event it is a legal requirement that a certified copy of the decree appealed against be filed within the memorandum of appeal. See Order XLI Rule 1 A & B (4) Civil Procedure Rule. Failure to do so is fatal to the appeal. See Kyuma =vs= Kyema [1988] KLR 185……."

The case of **South Nyanza Sugar Company Limited =vs= Silvan Ketch Kisumu Civil Appeal No. 203 of 2008** decided by the Court of Appeal on the 5th day of February 2010. At line 10 from the bottom at page 2 the learned law lords of the Court of Appeal made observations that:-

(i) **It is plain from the reading of the judgment delivered on 18th May, 2007, that the decree was incorporated in the record of appeal is completely at variance with the judgment of the superior court and not only contains words which were not used by the learned judge but also words deliberately calculated to mislead……..."**

The extracted decree was therefore improperly approved by the Deputy Registrar as it contravened the mandatory Provisions of Order XX Rule 7 of the Civil Procedure Rules. It must therefore fail.

Therefore the said decree is invalid and it cannot be the basis of appeal. Consequently and for those reasons the appeal is incompetent".

The case of **J.T Limiri-VS- Tana and Athi Rver Development Authority, Naoribi HCCC No. 2923 of 1988** decided by F.E. Abdalah as he then was on the 20th day of June 1991. At page 5-6 the learned judge as he then was faulted the summary dismissal which had been based on a conviction which conviction had been ousted (upset) on appeal. At page 5 line 6 from the bottom the learned judge as he then was had this to say:-

"If the defendant did not wish to continue the employment of the plaintiff, it could and should have terminated his employment by giving one months notice in terms of paragraph 4 of the letter of appointment and went ahead to hold that the plaintiff was entitled to one months notice as of that date's salary and other benefits as setout in the plaint…….".

This court has given due consideration to the afore set out rival submissions and considered the same in the light of the evidence that was adduced before the lower court. The findings of the learned trial magistrate, the appeal raised against those findings and in this court's opinion, the following are own framed questions of law for determination in the disposal of this appeal:-

(1) What are this court's general observations of the dispute herein?

(2) What is this court's mandate in relation to the aforesaid general observations?

(3) In a summary form, what complaint did the respondent present to the lower court?

(4) What is the appellant's response to that complainant?

(5) What is the learned trial magistrate's findings on the said complaint and response thereto?

(6) What is the appellant's complaint with regard to the findings of the learned trial magistrate?

(7) What is the respondent's response to the said complaint?

(8) What are this court's findings on the same?

(9) What final orders are to be made herein by this court on the disposal of the said appeal?

In response to own framed question this court's generalobservations of the appeal are as follows:-

(i) The respondent moved to the lower court seeking unquantified damages for unlawful

dismissal.

(ii) The lower court ruled that the dismissal of the respondent was not unlawful but proper and went ahead to confirm the same.

(iii) The confirmation of the dismissal not withstanding, the learned trial magistrate on the basis of the reasoning in the said judgment granted unquantified reliefs with regard to pay leave days earned but not taken. Though these were reduced to 30, salary for the period from the onset of suspension to the date of dismissal, three months salary in lieu of notice.

(iv) The appellant has no quarrel with the finding and confirmation of the dismissal order but has a general with the finding on and the award of the unquantified reliefs to the respondent hence this appeal.

(v) There is no cross appeal by the respondent.

(vi) The appellant has urged this court to upset the lower court's finding on the unqualified claims in favour of the respondent. Whereas the respondent has urged the court to dismiss the appeal both on procedural technicality and on merits as well.

This court's mandate as an appellate court is donated by section 78 of the Civil Procedure Act and in a summary form is simply to assume the role of the lower court as an original court, revisit the facts on record, and re-evaluate the same, apply the principles of law applicable, scrutinize the documents assessed by the lower court, arrive at its own conclusion on the said facts and then determine whether the conclusions reached by the lower court are to stand or not.

In response to own framed questions 3, 4, 5 and 7, these have already been assessed on the record and summarized in the general observations above with the exception of the legal technicality raised by the respondent on the legality and the regularity of the appeal.

In response to own framed question 8 it is evident that this court's findings will be on two fronts namely the technical front and the merit front.

The technical front arises because of the submission by the respondent that the appeal is invalid because of failure to annex a decree or a proper decree. Reliance has bee placed on order 42 Rule 2 formerly 1 A. it reads:-

"Order 42 Rule 2: where no certified copy of the decree or order appealed against as filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as this court may order and the court need not consider whether to reject the appeal. Summarily under section 79 B of the Act with such certified copy is annexed".

Applying this to the rival arguments herein, it is clear that from the record of appeal the lower court judgment is found at page 176-182 and the date of the judgment which should be the date of the decree is 4-3-2008. It is evident that the memo of appeal found at page 1-2 of the record does not mention the date of the judgment and decree appealed from. It is also evident that the alleged grieving decree has not been

annexed to the memorandum of appeal or else where in the said record. The copy in the record of appeal appears to have been filed on the 20-3-2008.

There is however a loose copy of the memorandum of appeal filed on 14-3-2008, paid for vide receipts number 1787814 showing the bottom that payment was received on 14-3-2008. This should be the memo of appeal which should have found its way into the record of appeal. The loose papers in the appeal file do not yield a loose decree save one annexed to the replying affidavit. There is however an order by Karanja judge made on 27-9-201 as follows:-

"By consent the appellant file a decree within 14 days of that date and thereafter the appeal to be fixed for hearing. Fourteen days when counted from 27-9-2011 ended on 10-11-2010. Since the decree was ordered to be filed within 14 days of 27-9-2010 means that the decree should have been filed on or before 10-11/10/2010".

The supplementary record of appeal found on the record was indeed filed on 29-9-2010 within 14 days. The record however indicates that the same was filed pursuant to leave granted on the 18th day of June 2010. A perusal of the hand draft record reveals that on 18-6-2010 parties were absent and the matter was marked SOG. For this reason it is erroneous for the supplementary record to state that the same was filed in pursuant to orders made on 18-6-2010. The only orders with regard to the filing of additional paper work are those made on 27-9-2010. A perusal of the consent inside reveals that indeed the only consent in the supplementary record is the decree. It is however indicated to have been dated at Kisumu on the 26th day of August 2010 and issued on the 26th day of August 2010. There is a stamp which can operate as a seal.

From the above assessment, it is evidently clear that there is no competent appeal on record for the following reasons:-

(i) The loose memorandum of appeal found in the court record bears a different date stamp as the date when it was received by the high court registry from the copy found in the bundle forming the appeal record this discrepancy creates doubt as to whether the appeal herein was filed in time.

(ii) Both the copy in the appeal record and the loose copy traced on the court file do not bear the date of the judgment and decree appealed from, save that the loose copy traced in the court file bears a hand written note reading "made on (4th March 2008"). The note is not initiated or counter signed. It is not known who made it or when it was made. It is therefore of no value to the appellant. It means that the appellant's appeal is defective in so far as the memorandum of appeal does not state the date the grieving orders were made as that is when the cause of the appeal arises.

(iii) As mentioned, the judgment was on 4-3-2008 and this is the date which should be quoted throughout as the date of the decree. This date does not however agree with the date of the decree in the supplementary record. If this date of 26th August 2008 is allowed as the date of the decree, then the appeal herein is misplaced as it purports to appeal against a decision made on 4-3-2008 as evidenced by the content of the grounds of appeal. For the reasons given in number i-iii above on the procedurality of the appeal the appellant's appeal is invalid and a proper candidate for striking out.

The striking out order finalizes determine the appeal but for purpose of jurisprudence only this court also visits the merits as well. The rival arguments are on the record.

The learned trial magistrate's findings and reasoning are also on the record. The argument revolves around the construction of clause 15 of the terms and conditions of employment of the disputants. Both sides agree that these were the terms applicable to the contract of employment of respondent. This court has set out at length the construction of the said clause 15 by the learned trial magistrate. To oust that reasoning, the appellant's counsel has relied on common law principles. Although the court agrees that these are sound principles, it is of the opinion that these do not operate to oust the clear terms of the contract executed and binding on both sides. The court is satisfied that the learned trial magistrate was right in giving it primacy over common law principles.

This court has on its own visited the said terms of clause 15 and finds indication that nowhere in them does clause 15:7 has primacy over clause 15:1, 15:2. are important and these construed should be construed as such. This court has duly considered the entire clause 15 and agrees with the findings of the learned trial magistrate on the interpretation of the said clause. It is therefore satisfied that the same were correctly interpreted and had the appeal survived the technicality axe, it would have been dismissed on its merits.

For the reason given in the assessment, the court proceeds to make the following findings on the same:-

(1) For the reasons given in the assessment with regard to the regularity of the memorandum of appeal and the purported decree the paper work appeal is found to be invalid and the same is struck out.

(2) For purposes of completeness of the proceedings only, had the purported appeal survived the technicality axe the same would have been dismissed for lack of merits on reasons given above by this court which concurs with the findings of the learned trial magistrate findings on the same as explained above.

(3) The respondent will have the costs of the struck out appeal both appeared on appeal and the court below.

Dated, read and delivered at Kisumu this 13th day of July 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/aao