



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 225 OF 2004

ISAAC NYANYIEMI ONDIEKI.....APPELLANT

VERSUS

THE SECRETARY)

THE CHAIRMAN) BOARD OF GOVERNORS

THE TREASURER) LENANA SCHOOL.....RESPONDENTS

(Being an appeal from the judgment of the Chief Magistrate's Court at Nairobi by the learned Magistrate Hon. T.W.C. Wamae, (SRM)

delivered and dated the 14th September 2006)

JUDGMENT

This is an appeal against the judgment of the Principal Magistrate delivered on 5th March, 2004 in Milimani CMCC No 3919 of 2003 dismissing the Appellant's claim with costs. The Appellant had in that case claimed for reinstatement and payment of salary for the whole period he had been out of his employment on the ground that his services had unlawfully been terminated. Although the respondent did not call any evidence, upon consideration of the Appellant's evidence the trial court nonetheless found that the proper procedure had been followed in terminating the Appellant's services and dismissed his case with costs.

Briefly the facts of the case are these. The Appellant was an employee of Lenana School (the School). By his letter dated 24th October, 2000 the School's Principal terminated the Appellant's services alleging against him constant absenteeism without permission. Apparently realizing that he had no authority to dismiss the appellant, on 21st November, 2000 the Principal wrote to the Appellant and withdrew his earlier letter of termination and instead interdicted him. On 6th September 2001 the Appellant was summoned to appear before the Executive Committee of the School's Board of Governors on 19th September 2001 and he complied. After considering his case that committee terminated his services pending ratification by the School full Board. The full Board met on 19th October 2001 and ratified that decision. Thereafter the Appellant filed a suit in the lower court alleging that his services had been

terminated without any prior warning and that the School's Board of Governors did not accord him an opportunity to be heard before his services were terminated. As I have pointed out his claim was dismissed thus provoking this appeal.

The twelve grounds in this appeal raise two points: That the learned trial magistrate erred in dismissing the Appellant's uncontroverted evidence and instead based her decision on extraneous matters and that she erred in denying the Appellant both general and special damages which he was clearly entitled to.

I have carefully read the lower court record and considered the written submissions by counsel for both parties. It is true, as the learned trial magistrate found, that the Appellant did not specifically deny that he was guilty of the alleged absenteeism. That, however, cannot be taken as an admission on his part of that charge as the trial court implied. Although in both of his pleadings and evidence in court he harped on the procedural impropriety of the termination of his services, the Executive Committee of the Board did not say he admitted and that together with his complaint that the full Board did not give him a hearing is clear that he denied the charge.

The regulation in the Education Act relating to schools do not require the Board of Governors to give employees a hearing before terminating their services. In the circumstances I dismiss the Appellant's ground on this point.

On the issue of notice the Appellant is on firm ground. It is trite law that a contract of service must be terminated by notice – **Paramount Bank Ltd. Vs Mohamed G. Qureishi & Another [2005] eKLR (Civil Appeal No. 239 of 2001 (CA))**. If therefore an employer terminates the services of his employee without giving him notice or unlawfully dismisses him, the court will always award him damages. It is also well established that the measure of damages payable to such an employee is dependent on the terms of the contract of employment.

Where a contract of service provides for its termination upon notice and none is given the measure of damages the court will award in payment of salary equivalent to the length of the notice period. Our law reports are replete with authorities on this point. Suffice it to cite **Ombaya Vs Gailey & Roberts Ltd. [1974] E.A. 166, Rift Valley Textiles Limited Vs Edward Onyango Oganda Civil Appeal No. 27 of 1992** and **Dalmas B. Ogoye Vs K.N.T.C. Ltd Civil Appeal No. 125 of 1996**.

If on the other hand, the contract is silent on the termination notice or its length the courts will not construe that to mean no notice is required – **Payzu Vs Hannafore, [1918] 2 K.B. 345**. Notice is always required and its length in such case will be determined by usage – **Hamilton Vs Bryant 30 T.L.R. 408**. If there is no usage, then the court will determine the reasonable notice required to be given in the circumstances of each case. See **Crediton Gas Company vs Crediton U.D.C., [1928] Ch. 174** and **Ombaya Vs Gailey & Roberts Ltd. (supra)**

Where the contract of employment does not have a termination clause the court decides what a reasonable notice period should be depending on the circumstances of each case. In **Kyobe Vs East African Airways, [1972] E.A 403** the court found a six months' notice reasonable for a general manager who was wrongfully dismissed by an Airline. In **East African Airways Vs Knight [1975] E.A 165** the court found 18 months notice reasonable for a pilot. More recently in **Barclays Bank of Kenya Ltd. Vs Joseph Mwaura Njau Civil Appeal No. 314 of 2001**, the Court of Appeal upheld a 12 months' notice found reasonable by the High Court.

In this case the Plaintiff's letter of appointment **Exhibit 1** states that his employment was "subject to the terms of agreement between the Ministry of Education and the Domestic and Hotel Workers Union for the time in force, on the terms and conditions of service of person employed by the Boards of Governors established under the Education (Board of Governors) Order, or any other order establishing any other Board or governing body of any institution established under the Education Act (Cap. 211)." None of those documents is in the court record. So it is not clear whether or not the Appellant's contract of employment had any termination clause. It was both the parties' duty to place that evidence before court but neither did.

In the absence of that evidence I take it that the Appellant's contract did not have any clause on the termination notice and in that case I have to decide on a reasonable notice as stated in the above cited authorities.

The learned trial magistrate found that the Appellant's services were terminated without any prior warning. In view of that and the Appellant having worked for about 15 years I find that he was entitled to six months termination notice. He should therefore be paid six months' salary in lieu of notice. If he was paid three months salary as stated in the Respondent's letter of 24th October, 2000, he should be paid a further three month's salary.

The plaintiff also claimed in his plaint for salary and allowances "for all the period he remained dismissed from employment of Lenana School." To accept that claim would be tantamount to reinstating him which I cannot do. But he was under interdiction for a year. It was not his mistake that the interdiction lasted that long. He is therefore also entitled to full pay for that period. I find that he is entitled to pay during the period he was under interdiction.

The Appellant also claimed for reinstatement. Specific performance is never granted in contracts of employment.

For these reasons, I allow this appeal and order that the Appellant be paid the above stated sums with interest thereon from the date of this judgment. The Appellant shall also have the costs of this appeal.

DATED and delivered this 12th day of July 2011.

**D.K. MARAGA
JUDGE**