



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Appeal 135 of 2006

SILVESTER O. WANDERA.....APPELLANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

J U D G M E N T

This appeal arises from the decision of the Senior Resident Magistrate in Kisumu CMCC No. 403 of 2003 in which the appellant's claim save pray (c) was dismissed with costs.

Prayer (c) of the amended plaint dated 5th October 2004 was for terminal benefits actually earned and reasonably expected to be earned for the unexpired duration of the employment.

The suit was essentially a claim for damages arising from an alleged breach of a contract of employment made between the appellant and the respondent resulting in the appellant being forcefully retired in public interest on false allegations of theft.

The appellant contended that the termination of his employment was unlawful, unreasonable and malicious. He also contended that his reputation was injured in the process and prayed for damages for defamation.

Being dissatisfied with the decision of the learned Senior Resident Magistrate, the appellant preferred the following grounds of appeal:-

- (1) The learned magistrate erred in law and fact by ignoring the evidence of the plaintiff without affording any reason as required by law.
- (2) The judgment was against the weight of the evidence on record.
- (3) The learned magistrate erred in law and fact in failing to find that the plaintiff was entitled to General Damages for defamation, aggravated and exemplary damages for libel and malicious falsehood.
- (4) The learned magistrate erred in law and fact in failing to find that the plaintiff's retirement on public interest was unlawful and contrary to the defendants regulations and that he was entitled to reinstatement.
- (5) The learned magistrate erred in law and fact in failing to find that the plaintiff was entitled to an unconditional apology from the defendant over the false accusation.
- (6) The learned magistrate misdirected herself grossly on the evaluation of the evidence adduced to the detriment of the plaintiff.
- (7) The learned magistrate erred in law and fact by failing to consider permanent issues as points for determination to the document of the plaintiff when arriving at her decision.
- (8) The trial magistrate erred in law and fact in failing to consider the evidence of the plaintiff as it emanated from the cross-examination of the defendant's witnesses.
- (9) The learned trial magistrate erred in law and fact in failing to award the plaintiff the costs of the suit without affording any reasons thereto.

The appellant prays that his appeal be allowed so that the judgment of the learned trial magistrate in the said Kisumu CMCC No. 403 of 2003 dismissing prayers (a), (b), (d),(e) and (7) of the plaint be set aside or viewed in his favour.

Alternatively, the appellant prays that the sums payable with respect to prayers (a) and (e) of the plaint be assessed.

Learned Counsel, Mr. Odeny argued the foregoing grounds on behalf of the appellant but chose to condense them into three b..... grounds. He submitted that tender Order 20 Rule 3 of the Civil Procedure Rules, the judgment shall be signed and dated at the time of

procurement.

Mr. Odeny contended that the judgment pronounced in court was undated and therefore ceased to be a judgment. He also submitted that the learned trial magistrate failed to find that the allegations made against the appellant were unproved and untruthful. He contended that the matter was investigated by the police and that the subject matter of the loss did not even belong to the respondent and has never been claimed any person to date.

Mr. Odeny further submitted that in the eyes of the right thinking members of society the appellant was branded a thief and had sought to clear the stigma arising from the allegations made against himself by the respondent.

In urging this court to allow the appeal, Mr. Odeny contended that the learned trial magistrate failed to assess general damages as she was required to do notwithstanding the dismissal of the appellant's claim.

Mr. Aboge, learned counsel, opposed the appeal on behalf of the respondent and contended that even if the judgment was undated the omission was not fatal to violate the judgment and neither was any prejudice occasioned by the omission.

Therefore, the omission was excisable such that judgment may be treated as being proper and valid.

In that regard, Mr. Aboge cited the decisions in the case of Magana Holdings Ltd –VS- Lilian Njeri Mungai & Another Civil Appeal No. 143 of 1996 and the case of Akamba Bus Services Ltd –VS- Emily Caroline Barasa & Another Civil Appeal No. 45 of 2005 at Busia.

In relation to the allegations made against the appellant, Mr. Aboge, submitted that a report of a Commission of Inquiry on the allegations was compiled after the committee inquired into the allegations and confirmed that the charges were put to the appellant whereupon he admitted through his representative, a co-worker, called John Ateku that he removed the material property on defamation, Mr. Aboge contended that the allegations leveled against the appellant were proven and justified and that he was never called a thief.

On damages, Mr. Aboge submitted that the appellant admitted to have been paid all his dues if not more and that in employment. Contracts general damages are not awardable.

All the foregoing arguments and contentions being put into consideration this court is reminded of its duty as enunciated in the case of Selle & Another –VS- Associated Motor Boat Co. Ltd & Others [1968] EA 123.

In the case of Ephantus Mwangi & Another –VS- Duncan Mwangi Wambugu [1982-88]1 KAR 278, the court state that:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misappre.....of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did”.

The facts from which the appellant's case was grounded was may de deciphered from the pleadings and the evidence are that the appellant, Sylvester Wandera Oyolo (PW1) was at the material time employed by the respondent, Kenya Ports Authority as a PPM Operator on job group PA6 earning a monthly salary of Kshs. 28,206/=. He worked upto the 3rd July 2002 when his services were terminated. He was retired in public interest in accordance with regulation G8A of the staff regulations and without being given prior notice. He contended that he was not informed of any complaint against himself neither was he called to answer any allegations. He however admitted having received a letter in the year 2001 informing him that he would be questioned in connection with some chip boards which went missing. He was indeed questioned and gave his explanation. He said that the owner of the missing property stated that no theft had occurred. He was therefore not charged in a court of law in connection with the alleged theft of the chip boards, but a charge sheet was prepared against him by the respondent. He defended himself but was retired at the age of 44 years even though he was expected to work until the age of 55 years. He still had eleven (11) more years to work.

He contended that his dismissal was wrongful, unlawful, unreasonable and contrary to the staff regulations as he had never stolen or done anything wrong in his twenty one (21) years employment with the respondent. He further contended that he was defamed by the allegations made against himself by the respondent.

After his testimony before the learned Senior Principal Magistrate, M/S Olga Sewe, the appellant closed his case and there being no appearance nor any defence from the respondent the judgment was slated for 16th July 2003. However, interlocutory judgment had been entered against the respondent on the 30th June 2003 in default of appearance and/or defence.

The proceedings before the learned Senior Principal Magistrate were essentially for assessment of damages or formal proof. The learned Senior Principal Magistrate delivered her judgment on 10th September 2003 when she had already become a Chief Magistrate.

In the judgment, the appellant was awarded three months salary in lieu of notice, terminal benefits and three months salary for wrongful termination. He was also awarded interest and costs.

The ex-parte judgment was however set aside on 10th May 2004 on application by the respondent on the conditions that the respondent do deposit the entire decretal sum together with costs in an interest earning account in the joint names of the counsel for both sides within thirty (30) days.

The respondent was allowed to file a written statement of defence within ten (10) days and was to bear the costs of the application and any throwaway costs.

Thereafter, the trial of the case commenced afresh on the 19th May 2005 before the learned senior Resident magistrate, M/S W.B. Mokaya. In the re-trial the appellant repeated more or less what he had stated in the first trial conducted ex-parte. He gave a history of his employment with respondent and exhibited a letter of employment from the respondent dated 18th December 1987. He said that he was a permanent and pensionable employee upto the time he stopped working in the year 2002. he was retired in public interest vide a letter dated 20th June 2002 even though he denied the charges leveled against him in connection with theft of chip boards belonging to Foam Mattress Ltd.

The appellant indicated that he earned a monthly salary of Kshs. 27,677/= and that he had appealed against his retirement but because of the incident leading to the retirement people know him as a thief. He was unable to secure employment elsewhere. He therefore asked for damages for wrongful dismissal and for defamation.

The appellant called three witnesses (PW2, PW3 and PW4) whose evidence was to show that the appellant was a unionisable employee in grade P.A 6 thereby failing within regulation G. 4 of the staff regulation.

The evidence also showed that the appellant was a talented and trustworthy person who represented his country in sporting activities but the trust accorded to him by his friends went down after he was sacked in connection with the alleged stolen clip boards.

The evidence further showed that the said chip boards belonged to Foam Mattress Ltd but were left in safe custody at the respondent's Kibos terminal.

The respondent denied the appellant's claim and most of the allegations made against itself by the appellant. In setting out its case, the respondent called three witnesses including Morris Milimo (DW1). The respondent's Pension Scheme Administrator whose duty was to pay terminal benefits to employees leaving the service. In that regard, he paid the appellant his benefits upon his dismissal from employment. Mulimo said that the appellant was relieved at the age of forty six years and six months when he was at grade PA 7 and after having served the respondent for two hundred and thirty three (233) months. He (appellant) was entitled to his deferred pension or cash equivalent. He opted to be paid in cash and was paid a total of Kshs.669,476/= less Kshs.34,386/= tax. His total worth was Kshs. 703,000/=.

A clerk in the respondent's personnel department by name Nathan Olindo (DW2) said that he was also a shop steward and had worked with the appellant when the material chip boards went missing. Prior to that, he had noticed an undue interest in the chip boards on the part of the appellant and after the chipboards went missing he gave evidence in the inquiry that followed. Thereafter, the appellant's services together with those of two other employees were terminated.

The respondent's personnel officer in-charge of discipline. Paul Kiprotich Cheruiyot (DW3), confirmed that on the 8th May 2001 the appellant was accused of misconduct. A committee of inquiry was constituted by the management after the appellant requested for a hearing of the complaint against him. He was heard in September 2001.

Cheruiyot said that he was the secretary of the committee and that the evidence adduced proved the allegations made against the appellant. A report of the inquiry was compiled and thereafter, the appellant was retired in public interest and paid his dues in a lump sum even though he received two payments not due to him. Cheruiyot said that the appellant was paid for leave days occurred and three months salary in lieu of notice.

All the foregoing facts show that there was no discipline in that the appellant was employed by the respondent and that his service were terminated in the public interest following a disciplinary mechanism necessitated by the allegations of impropriety made against him. The appellant appeared before the committee of inquiry which was convened in accordance with the existing rules and regulation and whose mandate was to inquire into the allegations made against the appellant.

The appellant attended the proceedings of the committee and was heard. He was represented by his colleague called John Ateko and denied that he took away any clip boards.

In his testimony before the learned trial magistrate, the appellant contended that his colleagues merely complained about the theft of the chipboards but did not say that he stole them.

It was clearly established that prior to his dismissal the appellant was accorded a fair hearing and the opportunity to vindicate himself from the allegations made against himself. He could not be heard to complain that he was treated unfairly and unjustly. His contention appeared to be that he was wrongfully and/or unlawfully dismissed after having been branded a thief by the respondent. He said that the letter of termination called him a thief thereby causing injury to his reputation.

However, evidence availed by the respondent showed that the appellant's dismissal was in accordance with the rules and regulations governing his employment and that the allegation made against him were investigated and confirmed in a process that was essentially administrative.

The issue that presented itself for determination by the trial court was whether the appellant's dismissal was wrongful and/or unlawful

and if so, whether he was entitled to the damages sought.

On the periphery, there was the issue whether the appellant was defamed in the process of being dismissed from his employment. As regards the alleged wrongful and/or unlawful dismissal, it was evident that the appellant was subjected to internal disciplinary mechanisms following the allegations leveled against him which allegations emanated from his own workmates. He was given the opportunity to be heard and defend himself but after the conclusion of the proceedings of the committee of inquiry whose secretary was the respondent's personnel officer (DW3) it was found that the appellant was guilty as charged. This was followed by the appellant's retirement in public interest.

The dismissal letter dated 20th June 2002 indicated that the appellant had been charged with the removal of a piece of chipboard from a shed using a police vehicle contrary to section G2 (a) (viii) of the staff regulations.

The letter also indicated that the appellant was given a hearing but explanation was unacceptable.

His guilt having been established he was retired in public with immediate effect pursuant to section G8(a) of the revised staff regulations 1992. The letter informed the appellant that he would be paid three months salary in lieu of notice and any other terminal benefit due to him. The evidence adduced indicated that the appellant lodged an appeal against his retirement but what became of it remained uncertain.

A wrongful termination of employment would invariably be characterized by unfairness or injustice and be contrary to the law. In view of this court, the evidence availed by the appellant did not show that such was the case herein.

The appellant was treated fairly and in accordance with the existing rules and regulations. His being found guilty of misconduct was preceded by due process.

As did the trial court, this court would find that the appellant's dismissal was neither wrongful nor unlawful. He was regularly retired before attaining the set retirement age of 55 years.

There was ample and credible evidence to show that the appellant was paid his terminal dues in accordance with regulation G8 (c) of the 1992 revised staff regulation. He admitted having been paid pension dues amounting to Kshs.703,863/=, three months salary in lieu of notice, seventeen (17) days accumulated leave and goods warrant allowance at Kshs.110,000/= instead of the required Kshs.55,000/=.

Having received all his lawful dues the appellant was not entitled to an award of damages. Even if the dismissal was wrongful and/or unlawful the position in law is that the appellant would only be entitled to damages according to the terms of the employment agreement (see, Kenya Ports Authority –VS- Silas Obengele Criminal Appeal No. 38 of 2005 (C/A)).

In Kenya Ports Authority –VS-Edward Otieno Civil Appeal No. 120 of 1997, the Court of Appeal emphatically state that “there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract”.

Consequently, there was no basis for the grant of prayers (b) and (c) of the amended plaint.

However, this court agrees with the learned trial magistrate that the appellant was entitled to payment of pension under scale 6A rather than scale 7. This is confirmed by his letter of promotion dated 1st August 2001 which shows that at the time of his retirement he was a PPM/Front loader Operator, grade PA6.

As regards the allegations of defamation, there was no evidence that the respondent acting with malice made false accusation against the appellant.

To the contrary, the allegations came from the appellant's colleagues and were found to be truthful after the committee of inquiry carried out investigations and confirmed that the appellant was guilty as charged.

There was also no evidence to demonstrate that the appellant's reputation was in anyway injured by the allegations made against himself. Simply calling his friends to say that they viewed him differently and lost trust in him after the allegations were made against him was not sufficient. There was no basis for the grant of prayers (a), (d) and (e) of the amended plaint.

If the fact of defamation had been established against the respondent this court does not think that there was room for an award of more than Kshs.100,000/= as general damages for defamation.

On the issue pertaining to Order 20 Rule 3 of the Civil Procedure Code, this court may only state that the judgment of the trial court was signed but not dated. However, the omission was not fatal as to invalidate the substance and import of the judgment.

In any event, the record shows that on the 15th June 2006, the learned trial magistrate gave notice that the judgment would be delivered on 25th July 2006. There is nothing to show that the judgment was not delivered as scheduled.

In the Magana Holdings Ltd case (Supra) the Court of Appeal noted that where from the record of the court concerned the date of the judgment or ruling is clearly discernable holding that the ruling or judgment is undated is restricting the provisions of Order 20 Rule 3 (1) unduly.

All in all this appeal is not merited and is hereby dismissed with costs.

Dated, signed and delivered at Kisumu this 12th day of February, 2010.

**J.R. KARANJA
JUDGE**

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