



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1814 of 1999

**LINUS DON BOSCO AGOYA PLAINTIFF
Versus
KENYA REVENUE AUTHORITY.....DEFENDANT**

JUDGMENT

The Plaintiff filed this suit seeking Judgment against the Defendant for:-

- (a) A declaration that the purported dismissal was wrongful and void
- (b) Special damages in the sum of Kshs 1,018,230.60 and as tabulated in paragraph 52 of the plaintiff

The Plaintiff also prays for costs of the suit and interest.

At the material time, the Plaintiff was an employee of the Defendant as Assistant Examining Officer, having commenced working on 1st October, 1996 on a secondment from the Revenue section, Customs and Excise Department of the Ministry of Finance of the Republic of Kenya and East African Community respectively where he had worked from 28th October 1971 as a Custom Officer grade Three.

On 2nd November 1995 the Defendant temporarily suspended the Plaintiff without pay for a period of twelve months and on 5th August 1997 the Defendant summarily dismissed the Plaintiff from its employment accusing the Plaintiff of desertion.

It is the Plaintiff's case that that was contrary to the terms and conditions of the Plaintiff's employment with the Defendant. He contends that he neither deserted duty, as alleged by the Defendant, nor committed any other act warranting his dismissal from his service with the Defendant. Further, on a without prejudice basis, the Plaintiff says that the alleged desertion, if any, was a result of the Plaintiff's persistent and serious illness which the Defendant had knowledge of and in respect of which the Defendant had previously and on several occasions accused the Plaintiff.

The Plaintiff maintains that his dismissal was wrongful and without justification at all and that were it not for such dismissal, the Plaintiff would have served his employment until retirement on terms entitling the Plaintiff to the benefits due to him under his terms of employment aforesaid.

He says that by those reasons, he has been deprived of salary, allowances, pension payments and has suffered loss and damage.

He gives particulars of special damages totaling Kshs 1,018,230.60 made up of

- (a) loss of pension under the Pensions Act for the period 28th October, 1971 to 16th January 1996 = Ksh 657,090.60
- (b) Loss of pension under the Kenya Revenue Authority Contributory Pension Scheme Rules for the period 16th January, 1996 to 5th August, 1997 = kshs 87,715.00
- (c) Unpaid salary and medical allowance for the suspension period 2nd November, 1995 to 22nd October 1996 = Kshs 249,060.00.
- (d) Salary in lieu of notice = Kshs 24,365.00

On the part of the Defendant, it denies that the Plaintiff was wrongfully dismissed and therefore denies that the Plaintiff's salary, allowance and other payments has been deprived and contends that the Plaintiff is not entitled to any special damages. Otherwise the Defendant says the Plaintiff should prove his case against the Defendant.

It is not disputed that the Plaintiff was an employee of the Defendant as stated and that he was being paid Kshs 24,365/= per month.

According to the Plaintiff, having been employed in 1972, he started being sick suffering from acute muscle spasm from 1995 and was being attended to by Dr Yonga who would prescribe medicines and sick off. In 1977 he was given several sick offs on and off as he was getting treatment. He was also being attended to by AR Medical Services. A letter from Nairobi Hospital dated 17th October, 1997, exh 3. He also got sick sheets from Department of Customs.

A letter dated 6th February, 1996 was written to the Plaintiff to explain his whereabouts. He replied by his letter dated 14th February, 1996. There was no response but he got another letter dated 10th May 1998, exh 4.

The Plaintiff's evidence is rather disjointed with regard to letters received and sent by him as he claims he did not receive some letters sent to him and apparently produced no letter dismissing him though producing letters on appeals.

The Plaintiff then says:

“In November 1997 a dismissal letter was written to me and forwarded to the wrong address. It was dated 26.11.1997, it was marked RTS and I received an envelope with my name on from the Defendant. I was still working. I obtained a letter for the confidential file. I wrote an appeal dated 3.3.98. I produce the appeal as Ex 9. I got a reply on 17.4.98 saying that the appeal was not accepted. The reply is produced as Ex 10. I wrote to the Commissioner General, Kenya Revenue Authority appealing further. The letter is dated 10.5.98. I produce the letter as Exh 11. I also wrote to the head of Civil Service to ask for help. On 8.10.98, I got a reply from the Defendant, saying that there was no merit in my appeal. I produce the letter as an exhibit. On 8.12.98 I wrote a further appeal. The Defendant finally wrote to me on 12.2.99 again my appeal was not successful I decided to seek legal advise and that is how this case was filed. By 12.2.1999 I had left the Defendant's Offices. I was not paid my dues. I now go through my prayers. I maintain that dismissal was wrong. We also pray for costs of the suit.”

During cross examination, the Plaintiff said he was addressed in 1993 for being absent from duty. He said that is the time he started being sick. He added “I was given a final warning on 22.10.96 for being absent from duty.”

The Plaintiff was the only witness on his side.

The Defendant's only witness was Patrick Nderitu Munuhe from Human Resources Department of the Defendant as a Senior Assistant Commissioner.

He said the Plaintiff worked for the Defendant as Assistant Examining Officer on Permanent and pensionable terms of service up to 5th August 1997; and that prior to the case of absenteeism which led to the case of dismissal, the Plaintiff had had a history of absenteeism from duty dating back to 1993 whilst serving the Kenya Government.

In 1993, a letter was written to the Plaintiff regarding absenteeism from duty and poor punctuality. He produced exhibit C. Plaintiff gave an explanation in his letter dated 12.11.1993, exhibit 13, explaining he had been unwell and was being treated at home.

Subsequently, a report was made about his absenteeism by the commissioner of customs to the Permanent Secretary's office in a letter dated 26.5.94.

On 30.1.96 a report was made by the Plaintiff's supervisor about absenteeism in exhibit F. On 6.2.1996 a letter was written to the Plaintiff by his supervisor, exhibit G. On 14.2.1996 the Plaintiff submitted an explanation saying he was unwell, exhibit H.

On 26.2.96 again the Commissioner General, Kenya Revenue Authority, wrote to the Plaintiff asking for an explanation. It was produced as exhibit I. The Plaintiff's response dated 12.3.1996 exhibit J.

On 14.8.1996, the Plaintiff's supervisor wrote to the Plaintiff and disagreed with his explanation, exhibit K. On 22.10.1996 the Plaintiff was written a letter of final warning to change his attitude towards work, exhibit L. The Plaintiff wrote on 25.11.1996 acknowledging receipt of the warning letters exhibit N.

On 11.8.97 the Plaintiff was given a letter telling him to resign from KRA, the Defendant herein as the 40 year rule did not apply, exhibit O.

On 22.9.1997 a letter was written to the Plaintiff by the Defendant asking the Plaintiff to explain his absence from duty with effect from 5.8.97, exhibit P. the Plaintiff did not respond to that letter and his case was presented to the Disciplinary Committee and on 26.11.1997 a letter of dismissal was written to the Plaintiff to be effective from 5.8.1997. Plaintiff was informed of the right to appeal. The letter is

exhibit Q.

On 3.3.98 the Plaintiff wrote to the Commissioner General appealing against dismissal, exhibit R. that appeal and further appeals were not accepted.

The witness, Patrick Nderitu Munuhe, said that the Plaintiff breached provisions 3.5.10 and 3.5.11 of the Code of Conduct he produced as exhibit V. He said the Plaintiff is not entitled to claim for loss of pension under the pension's Act or pension under KRA Rules because he was dismissed. He did not get his refund because he did not submit his clearance certificate. As for salary and medical claims, the Plaintiff is not entitled because he was not on duty. Salary in lieu of notice is not payable because the Plaintiff was summarily dismissed.

The letter of dismissal dated 26th November 1997 was produced by the Defendant was exhibit Q and I think it is important to quote it in this Judgment. It is as follows:-

“Dismissal

You absented yourself from duty without permission from 5th August, 1997 and your whereabouts remain unknown. You have also failed to respond to our letter addressed to you on 1st September, 1997. It is also noted that on 22nd October, 1996 you were given the last warning regarding your earlier absences but it is clear you have not changed your attitude towards work. It has therefore been decided that you be dismissed with Effect from 5th August, 1997 on desertion grounds. Please note that upon dismissal, you lose all your terminal benefits. However, you have a right to appeal against this decision within a period of thirty days from the date of this letter if you have any grounds to warrant such an appeal. Please complete the attached clearance certificate and return it to the undersigned within two weeks from the date of this Letter.”

The letter was signed by M/S J. N. Githinji, the then Deputy Chief Human Resources and Administration Manager.

I should remark that I fail to understand why the Plaintiff should have decided to file this suit after he had chosen not to exhibit this letter of his dismissal. In a suit of this type such a letter is so important to the Plaintiff that filing a suit while ignoring the letter is like going to dig in a shamba without a jembe.

I am not surprised therefore that the Plaintiff did not care to bring out, in his case, the rules or regulations or legal procedure which it is alleged the Defendant breached in dismissing him instantly with loss of all benefits.

This is a suit with a line of letters starting from the year 1993 when the Defendant started complaining about absenteeism on the part of the Plaintiff. The fact that the Plaintiff allowed the matter to develop up to the stage of dismissal on the ground of desertion surprises me because under normal circumstances, such a stage would not have been reached.

In my view, the Plaintiff himself is to blame for what happened to him and the evidence he has brought before this court does not prove the allegations he is making against the Defendant even if the Plaintiff was falling sick and had to be treated. Where are the doctors? On the contrary this suit has in my view, given the Defendant the opportunity to prove what they are saying against the Plaintiff.

Accordingly the Plaintiff's suit against the Defendant is hereby dismissed with costs to the Defendant.

Dated this 5th day of February 2010.

J. M. KHAMONI

JUDGE

Present

Githaiga & Company, Advocates for the Plaintiff

Beatrice Akinyi Odundo, Advocate for the Defendant

CC Kabiru