



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 273 of 2004

KENYA TEA DEVELOPMENT AGENCY LTD.....APPELLANT

VERSUS

JUSTUS KIMANI OCHARO..... RESPONDENT

JUDGMENT

The respondent was the plaintiff before the trial court. He stated in his plaint that upto and including 28th November 2002, he was an employee of the appellant as a driver, earning a monthly salary of Kshs.9, 200/=. On 11th December, 2002 (the actual date is 11th December 2001), he was suspended on account of an accident that occurred on 3rd December, 2001. He contended that the alleged accident never occurred and therefore the appellant's act of dismissing him on 28th November 2002 was unlawful. He prayed for damages for wrongful and illegal termination of duties, terminal benefits and costs of the suit.

The appellant filed a statement of defence and stated that the respondent, by a written contract of employment, was its employee upto 11th December, 2001, when he was suspended from duty pending some investigations. On 28th November, 2002, the appellant terminated the respondent's employment with effect from 11th November, 2002. The appellant further averred that in addition to the accident which occurred on 3rd December, 2001, the respondent's previous duty performance record formed the basis of the said suspension which was lawful and within the terms and conditions of employment between the parties. The appellant added that the respondent was asked to collect two months' pay in lieu of notice and other terminal benefits but he refused to do so.

The trial court held that the termination of the respondent's employment was wrongful and awarded him damages of Kshs. 20,000/=. The court further ordered that he be paid his terminal benefits as well as salary for the period he was under suspension, that is, from 11th December 2001 to 28th November 2002.

Being dissatisfied with the said judgment, the appellant preferred an appeal to this

court.

During the hearing of the appeal the appellant submitted that the appellant's termination of the respondent's services was in terms of the contract of employment and that the respondent refused to collect his salary in lieu of notice and other terminal benefits all amounting to Kshs. 29,417.05. In the circumstances, damages for wrongful dismissal were not properly awarded because the respondent's services were terminated in terms of the contract of employment.

The appellant further submitted that the respondent did not pray for unpaid salary for the period when he was under suspension. The trial court was therefore in error to award a sum that had not been prayed for. In any event, the appellant added the collective bargaining agreement between the appellant and the Kenya Plantation and Agricultural Workers Union stipulates that for offences that can be construed as gross misconduct an employee may be suspended and shall not be paid for the period which he shall remain under suspension. Counsel further submitted that general damages are not payable where a claim is based on termination of a contract of employment. He cited the Court of Appeal decision in **DAVID MAGATI –VS- KENYA TEA DEVELOPMENT AUTHORITY**, Civil Appeal No. 165 of 1997 at Kisumu. But even if the trial court found that the contract of employment had been breached by the appellant, the quantum of damages the respondent could have recovered would be the income that he would have received during the period of the notice and that sum needed to be specifically pleaded, the appellant's counsel added.

The respondent's counsel submitted that the learned trial magistrate was right in entering judgment for his client. The respondent had been suspended for one year before his services were terminated. The appellant slapped the suspension on the respondent long before investigations into the road traffic accident were commenced. No salary was paid to him over the period of suspension although he was still an employee of the appellant until the date he received a letter of termination of his services, counsel submitted.

It was further contended that there was no clause in the respondent's appointment letter to the effect that he would not be paid his salary while under suspension. The trial court was therefore right in ordering that the respondent be paid his salary for the 12 months' period he remained under suspension.

The respondent's contract of employment with the appellant started on 7th May 1998. In the letter of appointment dated 21st May, 1998, the relevant clause regarding termination of services read as follows:

“On completion of three years' service, the notice by either party shall be two months or payment of two months' salary in lieu of notice.”

On 11th December, 2001, the appellant suspended the respondent from his employment. The relevant portion of the said letter read as follows:

“Your record of performance is also not favourable. The company has decided to suspend your services forthwith to allow a thorough in-depth investigation of this incident. You are requested to comprehensively hand over any

responsibilities bestowed upon yourself to the in charge of our workshop upon receipt of this letter.”

The aforesaid investigations related to a fatal accident that occurred on 3rd December, 2001.

On 28th November, 2002, the appellant wrote to the respondent as hereunder:

“REF: TERMINATION OF SERVICES.

We refer to your past duty record as a driver and note that it has been poor. Your driving has been reckless to the extent of causing a fatal accident. This is a serious case of gross negligence and misconduct which cannot be pardoned. Consequently, we regret to inform you that it has been decided that you be and are hereby terminated from the services of Nyansiongo Tea Factory Company Limited with effect from the date of this letter.

Note that you will not be paid any money for the period served under suspension but you will be paid two (2) months’ salary in lieu of notice alongside your other benefits subject to the normal clearance formalities. You are required to hand over any company property under your charge by virtue of employment before your dues are effected.”

The respondent contended that his suspension and ultimate termination of his services was without any basis because on 10th February, 2003, the Keroka Resident Magistrate’s court acquitted him of the charge of causing death by dangerous driving which had been preferred against him in Traffic Case No. 1143 of 2001. However, the appellant’s position was that the termination of the respondent’s services was not only due to the occurrence of the aforesaid accident but also due to his general conduct. It had therefore acted in accordance with the terms of the employment contract.

In **DAVID MAGATI –VS- KENYA TEA DEVELOPMENT AUTHORITY**(supra), the facts were more or less the same as in this one. The respondent terminated the appellant’s services for unacceptable conduct of his duties. The respondent directed its financial controller to pay the appellant two months’ salary in lieu of notice plus any terminal benefits that may have been due to him. That was in terms of the contract of employment between the parties. The appellant filed a suit and stated that **“the said termination was unlawful, without any reasonable cause and/or excuse”**.

The trial court dismissed the appellant’s suit and he preferred an appeal.

The Court of Appeal held that:

“Quite obviously the letter terminating the appellant’s services showed that his services were not terminated summarily but in terms of the contract of employment. It is in this premises that we approach this appeal. The appellant filed suit, in the superior court, on the basis that his services were terminated summarily. He used the words ‘the said determination was unlawful, without any

reasonable cause and/or excuse'. The respondent took a similar stand saying that the appellant's services were terminated as he was dishonest in the course of his service and had grossly misconstrued himself.

.....

As we see it, and as already pointed out, the termination of services was simply under the contract of employment. The respondent was to pay two months' salary in lieu of notice and any terminal benefits due. That is how the appellant's case in the superior court should have been argued and not on the basis it was argued."

The court proceeded to allow the appeal to the extent that the respondent was ordered to pay to the appellant two months' salary in lieu of notice plus any terminal benefits that were due to him. The court went to hold as follows:

"It is also settled law that there can be no general damages awarded if the services of an employee are terminated in terms of the contract of employment. The appellant's claim as regards general damages is dismissed."

The respondent herein was under suspension for a period of 12 months before his services were terminated. It would appear that over that period of time he was not being paid his salary or any part thereof. I believe the terms of the Collective Bargaining Agreement aforesaid stipulated that while an employee is under interdiction he shall be entitled to one half of his monthly salary until his case is concluded. If the interdiction is uplifted the employee receives back the unpaid salary arrears for the days he was under interdiction. That notwithstanding, in his plaint, the respondent did not claim any salary arrears for the period he was suspended from duty. He only prayed for damages for wrongful termination of services and terminal benefits. It is trite law that cases are determined on the basis of the parties' pleadings. If at all the respondent intended to claim salary arrears for the 12 months' period he was under suspension he ought to have made a specific claim to that effect. Loss of income is special damages which must be pleaded and proved. And a litigant cannot be entitled to such relief unless it has been so pleaded and proved. See **PETER NJUGUNA JOSEPH & ANOTHER –VS- ANNA MORAA**, Civil Appeal No. 23 of 1991.

The learned trial magistrate seemed to appreciate that fact but still went ahead to order that the respondent be paid for what he had not pleaded nor proved. She was plainly in error.

On the basis of the decision in **DAVID MAGATI –VS- KENYA TEA DEVELOPMENT AUTHORITY**(supra), I hold that no general damages were payable to the respondent because the termination of his services was made under the contract of employment between him and the appellant. It matters not whether the respondent was acquitted of the charge of causing death by dangerous driving. The respondent was only entitled to the two months' salary in lieu of notice and terminal benefits which the appellant had all along offered to pay but was rejected by the respondent.

For the aforesaid reasons, I allow this appeal and set aside the judgment by the trial court. I substitute therefor an

order dismissing the respondent's suit before the trial court. The respondent shall bear the costs of this appeal as well as the costs of the case that was before the subordinate court.

DATED, SIGNED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE, 2010.

D. MUSINGA
JUDGE.

17/6/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Ogweni for Mr. Masese for the Respondent

N/A for the appellant

Court: Judgment delivered in open court on 17th June, 2010.

D. MUSINGA
JUDGE.