



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Case 135 of 2000
EMPLOYMENT

**A claimant once employment is terminated cannot
claim for salary for the period after such termination**

HUMPREY GITONGA ASHFORD PLAINTIFF
VERSUS
B.O.G. CHUKA HIGH SCHOOL DEFENDANT

JUDGMENT

The facts of this case are simple. It is accepted by all parties that the plaintiff was in the defendant's employment from July 1986 to February 1988. The plaintiff was in February 1988 interdicted by the defendant without pay. By the date of his interdiction, the plaintiff was the defendant's school bursar. The letter of his interdiction was dated 27th February 1998. It is in the following terms:-

"27/2/1998

*Mr. Humphrey Gitonga Ashford
Bursar
Chuka High School*

RE: INTERDICTION

I am directed by the Board of Governors of Chuka High School to inform you that, following your arrest by the police and being charged in court on allegations of converting the Chuka Boys' High School monies which came into your possession by virtue of your employment, to personal use, without the authority of the Board, you be interdicted with effect from 19th February 1998 without pay.

On 19th February 1998, you were arrested and charged in Embu Court Ref. C.I.D. Chuka Criminal Case No. 481/51/98.

*Peter S.N. Kathambara
Principal/Secretary (B.O.G.)*

/fu

*CC. The Permanent Secretary
Ministry of Education
P.O. Box 30040
NAIROBI*

*The Provincial Director of Education
P.O. Box 123*

EMBU

The District Education Officer

P.O. Box 113

CHUKA.

That letter mention a criminal case which the plaintiff was facing. That criminal case was withdrawn by the prosecution under Section 87 (a) of the Criminal Procedure Code. The proceedings of that criminal case were exhibited in this case and they show that the withdrawal followed the unsuccessful application by the prosecution to have the case adjourned. The plaintiff has filed this present claim claiming the following prayers:-

1. ***A declaration that the defendant is bound and liable to pay the plaintiff the whole of his salary arrears and service gratuity for the period between February 1998 to payment in full.***
- 1a. ***An order that the defendant do pay salary arrears to the plaintiff computed at the rate of Kshs. 9,342/= per month from February 1998 to payment in full.***
- 1b. ***An order that the defendant do pay service gratuity to the plaintiff to be computed at the rate of one tenth 1/12 of the gross current salary Kshs. 9,602/= from February, 1998 to the date of termination of the contract of employment between the defendant and the plaintiff or until payment in full.***
2. ***Costs of the suit.***
3. ***Interest at Bank's rate from February, 1998 to payment in full.***
- 3a. ***Interest at bank's rate of 12.5% per cent per annum to be computed on monthly balances from February 1998 to payment in full.***

During the hearing, the plaintiff's counsel stated that paragraph 3 of the above prayers was not amongst the prayers that the plaintiff required determination in this case. The defendant filed a defence denying the plaintiff's claim. In paragraph 4 of that defence, the defendant stated:-

"The defendant avers that the plaintiff is not entitled to any of the relief sought."

After the criminal charges were withdrawn against the plaintiff, it does seem that the plaintiff was not reinstated into his employment with the defendant. The plaintiff in evidence stated that he went to the defendant's school seeking to continue his employment after the withdrawal of the criminal case but according to him, he was told by the defendant to wait. The plaintiff therefore now seeks from this court for payment of his full salary of Kshs. 9,682/= as of February 1998 up to the date of this judgment. The plaintiff also seeks gratuity at ½ his salary from February 1998 up to the date of judgment. The primary issue to determine in this matter is whether the plaintiff's employment was terminated or whether he was made redundant. The operative statute is the Employment Act Cap 226 (now repealed). In order to address the issues at hand, I can do no better than refer to the decision of Vishram J. (as he then was) in the case **Francis**

“In the absence of the Collective Bargaining Agreement or any contract for employment stipulating the terms and conditions of service the parties are governed by the Employment Act, Cap 226 Section 16A of that Act provides, in material fact, as follows:-

16A (1) *A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:*

- (f) *An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.*

16A (2) *“Redundancy” has the meaning assigned to it in section 2 of the Trade Disputes Act.*

The Trade Disputes Act defines redundancy as follows:-

“The loss of employment, occupation, job, career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the service of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment due to Kenyanisation of a business.”

“It is therefore clear that the appellant would have been entitled to severance pay only if he had been declared “redundant”. However, the evidence is clear that he had not been declared redundant. By his own admission, his job, which he could not perform because of his own ill-health, was taken by another person indeed, he was not retrenched, his job was not abolished, neither had it become superfluous. He was therefore not entitled to severance pay, and his appeal must fail.”

The termination of the plaintiff’s employment does not fall within the definition of redundancy as seen in the Trade Disputes Act reproduced in the above quotation. The position of the defendant’s school bursar did not become abolished after February 1998 when the plaintiff was interdicted. It therefore follows that the plaintiff’s termination was not redundancy. That being so, the plaintiff is not entitled to claim gratuity. The Court of Appeal in the case **Marshalls (East Africa) Ltd Vs. Jeremiah Kiprop Lang’at** Civil Appeal No. 287 of 2003 considered an appeal where an employee of Marshalls was dismissed from employment after the employer suspected that he was drunk whilst on duty. The employee sued the employer in a claim for unfair dismissal and for severance pay. The Court of Appeal set aside the High Court award of severance pay and in doing so stated:-

“We are of the view that although the conduct of the respondent might have been wanting we note that in his letter of appointment there were no clear terms of employment stated therein. We think that in the circumstances of this case three months salary, in lieu of notice would have been appropriate. In our view there was no basis to award severance pay since this was not a case of redundancy.”

I too make a finding that the plaintiff in this case was not declared redundant to entitle him to payment of gratuity as sought. The plaintiff did not prove on a balance of probability the existence of any agreement with the employer to pay such gratuity on termination of his employment. I also find that the plaintiff's claim for salary from February 1998 to date to be far fetched. I say so because, in my view, the plaintiff's employment was terminated as at the date of interdiction, that is, 27th February 1998. In this regard, I rely on authorities submitted by the defendant as follows:- **Gunton V. Londo Borough of Richmond upon Thames** [1980] 3 ALL ER. The finding in that case is very relevant to our case. The court made the following findings:-

“In the ordinary case of master and servant, however, the repudiation or the wrongful dismissal puts an end to the contract, and a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more.....”

Their Lordships consider that it is beyond doubt that on October 1, 1957, there was de facto dismissal of the appellant by his employers, the respondents. That on that date he was excluded from the council's premises. Since then he has not done any work for the council. In these circumstances, it seems to their Lordships that the appellant must be treated as having been wrongly dismissed on October 1, 1957, and that his remedy lies in a claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957, he had continued to be and that he still continues to be, in the employment of the respondents.....

An employee dismissed in breach of his contract of employment cannot choose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period; he must sue for damages for the wrongful dismissal and must of course mitigate those damages so far as he reasonably can.....

It has long been well settled that if a man employed under a contract of personal service is wrongfully dismissed he has no claim for remuneration due under the contract after the repudiation. His only money claim is for damages for having been prevented from earning his remuneration.....His sole money claim is for damages and he must do everything he reasonably can to mitigate them.”

Of use also in this present case is the following case. **DenmarkProductions Ltd Vs. Boscobee Productions** 1968 3 ALL ER 513. It was decided in that case as follows:-

“It is clear beyond argument that a wrongfully dismissed employee cannot sue for his salary or wages as such, but only for damages. It is also in my view equally clear that such an employee cannot assent that he still retains his employment under the contract.

If a servant is dismissed and excluded from his employment, it is absurd to suppose that he still occupies the status of a servant. Quite plainly he does not. The relationship of master and servant has been broken, albeit wrongfully by one side alone. The same would apply to a contract of service, such as an agency. If a two year contract is made between principal and agent, and the principal wrongfully repudiates the contract of agency after only one year, quite plainly the agent cannot hold himself out as still being the agent of the principal. He is not. The relationship of principal and agent has been broken. I do not think it follows, however, from the rapture of the status of master and servant, or principal and agent, that the contract of service or the contract of agency has been terminated by the wrongful act of the master or principal. What has been terminated is only the status or relationship.

So in the result the servant cannot sue in debt for his wages which he is wrongfully deprived of the

opportunity to earn or for his fringe benefits such as the house which he had a right to occupy as part of his emoluments. As the relationship of master and servant is gone, the servant cannot claim the reward for service no longer rendered.”

It follows from the facts of this case that the plaintiff was defacto dismissed in February 1998. Even his own advocate when making demand from the defendant so accepted by his letter dated 30th September 1999 albeit that he mentioned the date of termination to be February 1999. In that letter, he stated:-

“Our instructions are that our client was your employee between the period July, 1986 to 27th February, 1999 when you illegally terminated his employment without paying his termination benefit.”

That letter acknowledges that the plaintiff clearly knew that he was not in the employment of the defendant for the period he now claims, that is, up to the date of judgment. The defendant, his witness in giving evidence did concede that the plaintiff was entitled to receive a salary from 27th February 1998 the date of interdiction up to the date the criminal case was withdrawn. That contention was also repeated in the defendant’s written submissions. In those submissions, the defendant stated that the plaintiff’s net pay being Kshs. 9,342/= net as seen in exhibit number 5 would be multiplied by 15 months making the total amount payable to the plaintiff be Kshs. 140,130/=. The plaintiff’s claim for gratuity having failed, the only award that will be given to the plaintiff is that amount which is conceded by the defendant. The plaintiff also did not adduce evidence to prove his entitlement to interest at bank rate. The plaintiff did not even give evidence of the bank rate prevailing at the time when he gave evidence. In the end, I must state that I considered the submissions made by plaintiff’s counsel and authorities he relied upon but in view of my finding, I find it is not necessary to reproduce the same here. Accordingly the following is the judgment of this court.

- 1. There shall be judgment for the plaintiff for damages of Kshs. 140,130/= plus costs and interest at court rate from the date of this judgment up to payment in full.***
- 2. The plaintiff shall pay the necessary further court fees before executing for the judgment amount.***

Dated and delivered at Meru this day of 4th June 2010.

MARY KASANGO

JUDGE