



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 217 of 2006

MOHAMED IBRAHIM

KHALIL.....DEFENDANT/APPELLANT

-AND-

1. SALIM AWADH SAID

2. ABDALLA QATWANPLAINTIFFS/RESPONDENTS

3. MOHAMED KHAMIS ALI

(Being an appeal from the Judgment and Decree of the Honourable Resident Magistrate, Mr. H. Adika dated 5th December, 2006, in RMCC No. 4043 of 2005 at Mombasa Law Courts)

JUDGMENT

The plaintiffs' suit, dated **19th December, 2005** related to the management and control of a school establishment set up under the auspices of a Muslim community in Mombasa. The plaintiffs/respondents are members and officials of the Falah Muslim Community which claims to have employed the defendant as a teacher and manager of the Community's school.

The plaintiffs had sought an injunction to restrain the defendant by himself, his servants or agents or otherwise howsoever, from interfering with or taking part in the functions and activities of the said school, and to restrain him from "interfering in the management, running and operations" of the school. The plaintiffs sought damages against the defendant, as well as vacant possession of the house which the Community had allocated to him; and they asked for costs incidental to their suit.

The learned Magistrate recorded from the evidence that the defendant/appellant had served as an employee of the Falah Muslim School for some 40 years; that the Falah Muslim School Society had written to the Secretary, "African Muslim School", on **9th June, 2001** conveying the message that the services of the defendant were no longer required; that as late as the year 2005, the defendant was still in position as **Mudir** (Principal) of the school and he was recruiting new students; that the Falah Muslim School Society summarily dismissed the defendant, as an employee, on **9th October, 2005**; that the reason for the dismissal was that the defendant had refused to close the boarding section of the school.

It was the trial Court's finding from the evidence that the Falah Muslim Society was the owner of the school in question; and so a suit of the kind brought by the respondents herein, had to be a representative suit, involving officials of the society. The Court held that the plaintiffs were, indeed, "the proper persons to bring [the] suit and that they are trustees of the Society"; and that although the defendant's remuneration was not being paid by the school, he was subject to the direction and control of the trustees. While acknowledging that the defendant had rendered good service to the school and to the Muslim Fraternity, "at the end of the day it is the trustees to decide his fate".

Despite holding that the maintenance of a boarding facility at the school was only a façade, in the cause for the purported dismissal of the appellant herein, the trial Court held the dismissal to be valid in law; a passage in the Judgment runs thus:

"It must be remembered that an employer has the prerogative to hire and fire. I will not at this point consider.....whether the dismissal was wrongful or not.....In this regard I fully subscribe to the findings in the case of Rift Valley Textiles Ltd v. Edward Onyango Oganda, Civil Appeal No. 27 of 1992 (Nakuru). I find that the defendant was dismissed from his employment, and the only thing he can do is move out of the premises and challenge the dismissal if he so wishes".

The learned Magistrate went on to hold that “the plaintiff had proved his case on a balance of probability”. The trial Court granted the plaintiffs’ prayers.

The defendant was dissatisfied with the Judgment and Decree of the trial Court, and he lodged an appeal based on the following grounds:

- (i) **that the trial Magistrate erred in law, in concluding that the respondents herein had proved their case on a balance of probabilities;**
- (ii) **that the trial Court erred in law in its evaluation of the evidence and it came to a wrong conclusion;**
- (iii) **that the trial Court’s judgment carries material contradictions, and thus the respondents’ case should have failed;**
- (iv) **that the trial Court failed to take into account the appellant’s evidence.**

The defendant/appellant asked that his appeal be allowed, and the trial Court’s judgment be set aside, and an order made dismissing the suit with costs.

Learned counsel for the appellant submitted that the verdict of the trial Court stood in contradiction to the evidence: though the trial Court found that “the contention by the plaintiffs that there has never been a boarding facility at the Falah Muslim School is not true”, the Court “went on to find that the appellant had been properly dismissed from his employment”.

It was the appellant’s recorded evidence that he had joined the Falah Muslim School in **March, 1967** and, in his words:

“We started a boarding school in 1969.....There was [a] boarding [facility] already. There [were] four rooms. Some students lived in the school [while] others lived outside. I managed to build the school and now the plaintiffs want to take over the classes.....Boarding has been there for a long time.....”

Learned counsel submitted that the boarding facility at the school, has been in place for decades, and this has not at any time been an issue occasioning management disagreements. Counsel submitted that, in the light of the trial Court’s findings regarding the boarding facility, “the learned Magistrate ought to have dismissed the suit”.

Counsel urged that the respondents had not proved their case on a balance of probability, and thus, the judgment rendered went contrary to the evidence.

Counsel for the respondents, however, took the contrary stand, that the trial Court’s judgment “was consistent and meritorious with due regard to the pleadings filed in Court and the evidence adduced in the matter”.

Counsel urged that the appellant had been dismissed “for flatly refusing to close down the boarding section of the school run by the Society”; that the appellant had been employed at the school run by the society as a **Mudir** or head thereof; that the appellant was only answerable to the respondents; that the Court rightly adopted the principle in **Rift Valley Textiles Limited v. Edward Onyango Oganda**, Nakuru Civil Appeal No. 27 of 1992: that the remedy of a wrongfully dismissed employee lies in damages.

What is the tenor and effect of the **ratio decidendi** in the said **Rift Valley Textiles Limited** case, and to what extent does it have a bearing on the issues in the instant appeal?

The appellant in that case, Rift Valley Textiles Limited, informed the respondent, on **7th June, 1988**, that he stood dismissed from the appellant’s employ; and on **9th June, 1988** the same decision was conveyed to him by way of a letter. On the question whether the dismissal, in these circumstances, was in accordance with the law, the Court of Appeal thus held:

“.....the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here,.....an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to give a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better-paid job, and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment those rules are irrelevant and cannot found a cause of action”.

Such a position, by the terms of the Court of Appeal judgment, will apply to “a simple contract of employment”, which expression is, in my opinion, likely to be referring to employments **directly in the gift of an individual private employer**, or a private corporate body with no complex decision-making structure; with no **public-law obligations**; with no **defined procedures of termination of employment**; with no **collective safeguards** for the employment relationship.

On the basis of the foregoing interpretation, the appellant’s case herein is to be considered. What was the **nature of the employment contract** for the appellant herein? What were the **terms of employment**? Was this a case of “**a simple contract of**

employment”?

By the appellant’s evidence, his relationship with the Falah Muslim School did not constitute “**a simple contract of employment**”; he said he is a teacher of Arabic and Islamic religion; that he has been attached to the Falah Muslim School for some 40 years; that he came to find the school starved of resources, and he is the one who raised the funds for keeping the school running; that he had teamed up with other members of the school committee to purchase plot No. 560/**XVII**, where the school is now located; that the School Committee gave the appellant a house in which to live as he worked for the School.

Mohamed Ayub Khamisi (DW2) gave evidence consistent with that of the appellant: although the appellant had worked for the school, his remuneration had not been paid by the School ? and this was also the finding of the trial Court.

Not paying much regard to the foregoing evidence, learned counsel for the respondents contended as follows: the appellant had been dismissed from employment by the Falah Muslim School Society and so, “he had no colour of authority [or] right to continue to involve himself or interfere in the management of the school and/or to live in a house reserved for the head of the school”; the school no longer required the appellant’s services and it had already engaged another **Mudir**; the appellant had filed no counterclaim before the trial Court challenging the propriety of the decision to dismiss him; the appellant enjoys a service contract with the Falah Muslim School Society and such contract was capable of being terminated at the instance of the Society, “without assigning reasons therefor”.

From the evidence on record, it is not possible to say there existed, with regard to the status of the appellant, an “employer” and an “employee”, a contract of employment, a “**simple contract of employment**” in the terms of the Court of Appeal decision in the **Rift Valley Textiles Limited** case; no **proof** of these elements was undertaken by the respondents as plaintiffs in the Court of first instance.

The scenario emerging is that of a religious-community social initiative, in which the collective mobilization is the main factor of progress, rather than an organized institutional set-up with structured employer-employee relationships. Upon such a framework of social and economic relations, it is not possible to impose the play of the “**simple contract of employment**”, without doing violence to the focused design and application of the law.

The effect is that the plaintiffs, before the trial Court, had not succeeded in proving their case on a balance of probabilities; but it was **their** case, and it did not rest on the defendant/appellant to prove it for them.

This appeal, therefore, is to be allowed. The trial Court’s judgment is set aside. The plaintiffs/respondents shall bear the costs of the suit and of the appeal, costs of the suit bearing interest at Court rates as from the date of filing suit; and costs of the appeal bearing interest at Court rates as from the date hereof.

Decree accordingly.

DATED and DELIVERED at

MOMBASA this 25th day of August, 2010.

J. B. OJWANG

JUDGE