JARED OKUNE MASIGA :::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

KENYA POSTS & TELCOM. :::::::::::::::::: RESPONDENT

J U D G E M E N T

The plaintiff was employed by the then Kenya Posts and Telecommunications Corporation from 2nd January 1982.

It is common ground that the plaintiff's employment record had no blemish until 12th August 1993, when he was interdicted for gross misconduct. Thereafter, the plaintiff was dismissed from service, on 8th March 1994.

Being aggrieved with the dismissal, the plaintiff filed a case before this court. In the original plaint, the plaintiff's claims against the defendant were;

"(1) Reinstatement to employment with his full benefits;

In the alternative,

1. ***General Damages***

2. ***Full salary and allowances from the date of interdiction, at 4,385/= per annum to the date of execution.***

3. ***Costs of this suit"***

Subsequently, the plaintiff filed an application for leave to amend the plaint, and the defendant conceded to the proposed amended plaint. In the amended plaint, the plaintiff abandoned the claim for reinstatement. In its place, the plaintiff claimed "**terminal benefits**."

The other significant amendment was that the defendant was now a company known as Telkom Kenya Ltd.

At the trial, each of the parties called only one witness. The plaintiff testified on his own behalf, whilst Mr. Evans Jagugu Koyi testified on behalf of the defendant.

PW1, JARED OKUNE MASIGA, told the court that in August 1993, the then President of the Republic of Kenya, Mr. Daniel Arap Moi visited Kakamega. During the said visit, and whilst the President was moving along a street in Kakamega Town, the President waved his one finger. As PW1 said the President was deemed to be giving to the members of the public, the salute of KANU, which was the political party then in power in Kenya.

PW1, who was by the roadside, responded to the President's salute by waving his two fingers.

Having done so, PW1 was swiftly arrested by the police who were on patrol. However, the President ordered that PW1 be released, and the police complied. But later, on the same day, the police did re-arrest the plaintiff, and had him held at the Kakamega Police Station.

The plaintiff was thereafter charged with the offence of being drunk and disorderly.

As far as the plaintiff was concerned, when the defendant heard that the plaintiff had been arrested and then charged before a court of law, they ordered him to go home whilst the defendant investigated the matter.

The letter notifying the plaintiff that he was being interdicted is dated 9th August 1993, and is "**Exhibit P1**."

It was the testimony of the plaintiff that on 12th August 1993, the defendant wrote another letter to him, asserting that he was guilty of "**gross misconduct**." The defendant told the plaintiff that he should provide the defendant with his written defence within 48 hours, failing which very severe disciplinary action may be taken against him.

Meanwhile, on 9th August 1993, the plaintiff was charged with the offence of being drunk and disorderly contrary to ***section 42 (1)*** **of the Liquor Licensing Act**. The record of the proceedings in the Kakamega Principal Magistrate's Court Criminal Case No.1915 of 1993 was produced in evidence by the plaintiff.

It is evident, from the record, that the plaintiff pleaded guilty, and was convicted on his own plea to that effect. He was then sentenced to a fine of KShs.200/=

Following the conviction and sentencing, the plaintiff filed an appeal before the High Court. When the said appeal (No.59 of 1993) came up for hearing on 2nd June 1995, the learned State Counsel conceded it. He told the court that the conviction could not be sustained because the prosecution had failed to read out the facts giving rise to the charge.

The record of the proceedings before the High Court reveal that the said court quashed the plaintiff's conviction and set aside the sentence.

Before the appeal had come up for hearing, the defendant had already written to the plaintiff on 8th March 1994, notifying him that he was being dismissed on the grounds of gross misconduct, coupled with a conviction by a court of law.

As the plaintiff felt that his dismissal was unfair, he sued the defendant.

He told the trial court that he considered the dismissal to be wrongful because he had done nothing wrong to his employer. He also testified that he had not breached any of the terms of his contract of employment.

As the plaintiff considers his record to be clean, he asked this court to award him damages for wrongful dismissal. He also claimed his terminal benefits as well as the costs of the suit.

During cross examination, the plaintiff said that as at 2007, if he did flash the two-finger salute, nothing would happen to him. But he also added that he did not know that he would be arrested for doing so in 1993.

According to the plaintiff, he, as an employee of a parastatal, was enjoined to respect the Government and the President of the Republic of Kenya.

Later, in re-examination, the plaintiff denied having been disrespectful of the Government.

When asked about his salary, the plaintiff produced in evidence, a payslip for January 1993, which showed that his salary was KShs.3,935/=. However, in his testimony, the plaintiff said that his salary per month was KShs.4,395/=.

Whilst that was said to be the gross salary, the plaintiff explained that his net monthly salary was KShs.2,705/=.

When he was questioned about the provisions of his contract which governed the termination of his employment, the plaintiff said that he was entitled to one month's notice of termination and salary in lie of the notice.

When Evans Jegugu Koyi testified, he told the court that he had not personally handled the plaintiff's case at the material time. At material time, the defendant's witness had been based in Nairobi.

Later, in his capacity as the Assistant Manager in charge of Human Resources, DW1 was based at Kakamega, in the defendant's Western Region.

DW1 said that the plaintiff was dismissed for gross misconduct, arising from:

> "***an incident involving sloganeering against the Head of State."***

According to DW1, the plaintiff was first interdicted from duty, after which he was charged departmentally, for gross-insubordination.

It was the testimony of DW1 that the plaintiff was given an opportunity to defend himself. But after the plaintiff had put forward his defence, the defendant did not find sufficient grounds to warrant the reinstatement of the plaintiff.

In the assessment of DW1, the defendant had handled the plaintiff's matter in accordance with the rules and regulations of the Human Resource Department of the defendant.

During cross-examination, DW1 failed to produce a copy of the document embodying the terms and conditions of employment of the defendant's employees.

It was interesting to note that whilst DW1 first said that the dismissal of the plaintiff was not because of sloganeering, the witness went on to concede that it was the sloganeering which constituted the gross-misconduct for which the plaintiff was dismissed.

When pressed further to explain where the said act of gross-misconduct was committed, DW1 said that he did not know if the same was done on the road, at a bar or at the plaintiff's place of work. Nonetheless, it was DW1's view that the dismissal of the plaintiff was not for extraneous reasons. Although that view seems somewhat inconsistent with the fact that the defendant's only witness did not even know if the gross-misconduct had taken place away from the place of work, DW1 went on to explain the plaintiff was required to conduct himself in a dignified manner whether he was on duty or otherwise.

It was the understanding of DW1 that the defendant's code of conduct, about which the plaintiff was allegedly aware, stipulated that employees of the defendant must conduct themselves in a dignified manner whether they were on duty or not.

Regrettably, however, the defendant did not make available to this court, the document or documents embodying the code of conduct or even the terms and regulations which govern employees of the defendant.

Secondly, DW1 did not provide the court with any information regarding the manner in which the plaintiff's attention had been drawn to the code of conduct or to the terms and regulations. Therefore, this

court is unable to make an informed decision on the issue as to whether or the alleged code of conduct or the terms and regulations contained a provision such as the one which DW1 talked about. And even if the said requirement was embodied in one or more of the said documents, the defendant did not demonstrate that the plaintiff was made aware of it.

When it is borne in mind that, in law, it is he who asserts who is obliged to prove his assertion, I find that the defendant failed to prove that it was a term of the plaintiff's employment contract that the plaintiff could not express a political opinion that was not consistent with that of the Head of State.

DW1 confirmed to this court that the plaintiff's record of employment with the defendant was clean. He added that;

"***There were no allegations of any offences at the place of work.***"

It must therefore follow that the allegations which the defendant leveled against the plaintiff were in relation to matters that were extraneous to the place of work.

In any event, DW1 was well aware that;

"……***..employees of the defendant are entitled to hold their own political opinions, and express such opinions, as citizens of this country.***"

In the light of that very clear understanding of the rights of each and every citizen of this country, it is indeed very baffling that the defendant nevertheless expressed the view that the plaintiff was guilty of gross-misconduct, for having expressed his political opinion.

DW1 explained that the plaintiff was dismissed for sloganeering. In effect, the defendant was saying that the plaintiff used words which constituted the slogan of a political party. "Chambers Concise Dictionary" defines the word "slogan" as;

"***a phrase used to identify a group or organization, or to advertise a product.***"

Although the defendant talked of sloganeering, and even went further to assert that it had sufficient evidence that the plaintiff shouted at the Head of State, the defendant did not give particulars of the words allegedly uttered by the plaintiff.

Indeed, it would appear that the plaintiff only raised a two-finger salute, in response to the one-finger salute of the President. Whether or not such an action is indicative of courage on the part of the plaintiff, or if it is a reflection of sheer buffoonery, in the circumstances, is anybody's guess.

However, the gesture earned the plaintiff an immediate arrest by the police.

In the submissions of the defendant, the dismissal of the plaintiff was justified because the plaintiff used;

"***insulting gestures at the President of the day, and we urge the court to take Judicial Notice of the prevailing climate and culture of intolerance to opposition by the powers of the day in 1993.***"

It would appear to me that the defendant was inviting this court to hold that political intolerance was alright in 1993. I am afraid that I am completely unable to accept the defendant's invitation. To my mind, political intolerance has never been acceptable.

But even assuming that political intolerance was acceptable in Kenya in 1993, I would not accept that such intolerance should be extended to the relationship of an employer and his employee.

In any event, in this case, it was none other than the President who ordered the police to release the

plaintiff. That action was not at all indicative of the insult which the defendant perceived as having been hurled by the plaintiff, at the President.

It would appear that the defendant read much more into the plaintiff's conduct than the very person against whom the plaintiff had raised the two-finger salute. The President ordered the police to set free the plaintiff, but the defendant held the incident against the plaintiff. Clearly therefore, it was the defendant who was intolerant.

First, on 9th August 1993, the defendant interdicted the plaintiff. They did so pending the finalization of the case by the police.

Three days later, the defendant wrote to the plaintiff again. They accused the plaintiff of;

"***shouting slogans in favour of an opposition party and criticizing the leadership of the ruling party.***"

Those actions were deemed to constitute gross misconduct. Therefore, the defendant told the plaintiff that he should respond to the allegations within 48 hours, failing which the defendant would take severe disciplinary action.

The plaintiff wrote back to the defendant on 20th August 1993. By his said letter, the plaintiff denied having been anywhere near the Head of State. He also denied having shouted any slogans in favour of any opposition political party. However, he admitted having been drunk.

It is significant that by the time the plaintiff wrote that letter, he had already been convicted for the offence of being drunk and disorderly.

Notwithstanding the fact that in the dismissal letter, the defendant cited the conviction of the plaintiff, as a basis for his dismissal, when this case came up for hearing, the defendant made it clear that the sole reason for the dismissal was the sloganeering which constituted gross misconduct.

And, as I have already held, the defendant failed to prove the alleged sloganeering. Therefore, the defendant failed to justify the dismissal.

As the incident in issue happened in August 1993, the applicable law was the Employment Act, Cap.226. Pursuant to ***section 17 (b)*** of that Act, the defendant could have been entitled to summarily dismiss the plaintiff;

"***if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work.***"

In this case, the plaintiff was drunk, but it was outside working hours. Therefore, the issue of his inability to properly perform his work did not arise.

Pursuant to ***section 17 (d),*** the defendant could have been entitled to summarily dismiss the plaintiff;

"***If an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer.***"

The plaintiff herein is alleged to have shouted insults at the President. The alleged insults were, however, not proved.

Pursuant to ***section 17 (f)*** of the Employment Act, the plaintiff would have been liable to summary dismissal;

"***if, in the lawful exercise given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released or otherwise lawfully set at liberty."***

In the case of the plaintiff, he was arrested on 8th August 1993. He was arraigned in court on the following day.

After he pleaded guilty to the offence of being drunk and disorderly, the plaintiff was sentenced to a fine of KShs.200/=.

At no time was he in custody for more than 10 days. Therefore, section 17 (f) of the Act was inapplicable to the plaintiff.

In any event, the conviction was later quashed and the sentence set aside, by the High Court. Therefore, there is no criminal record against the plaintiff.

In the event, I have no hesitation whatsoever in holding that the plaintiff's dismissal was wrongful.

The next issue for consideration is the compensation to be awarded to the plaintiff. On his part, the plaintiff has asked me to award him both aggravated and exemplary damages. His submission was that he was entitled to those awards because the defendant had simply victimized him for his political opinion. He believes that nothing could be more humiliating and traumatizing than to lose your source of livelihood because of your political views.

In **MICHIE GITAU Vs. N.S.S.F. BOARD OF TRUSTEES, NBI HCCC NO.3264/1993**, Bosire J. (as he then was) held that the plaintiff was entitled to;

"***some element of aggravated and exemplary damages to show the court's displeasure at the defendant's arbitrary behaviour."***

I must say that the invitation by the plaintiff appeared attractive to me. However, in my understanding of the law, if a plaintiff seeks to be awarded either aggravated or exemplary damages, he ought to specifically plead the same in his plaint.

Therefore, because the plaintiff's claim did not seek any exemplary or aggravated damages, I am unable to award the same.

However, if I should be wrong in that respect, and if the plaintiff may be awarded aggravated or exemplary damages, I would assess the exemplary damages at KShs.300,000/=.

In respect to the other claims, I note that the contract of employment expressly stipulated that it could be terminated by either party, by giving one month's notice to the other party. As the defendant did not give notice to the plaintiff, the plaintiff is entitled to the equivalent of one month's salary.

The said salary is not the net pay, as suggested by the defendant, but the gross pay. In other words, the plaintiff is awarded KShs.4,384/= as his salary in lieu of notice.

Meanwhile, because the plaintiff was earning only one-half of his salary during the period of interdiction, he is now entitled to the other half, which was retained by the defendant between August 1993 and March 1994.

As regards the claim for terminal benefits, I hold that the plaintiff is entitled to the same. Of course, I am aware that the plaintiff did not particularize the said terminal benefits, but that is not an impediment to the defendant paying the same, in accordance with the terms and conditions governing terminal benefits payable to those whose services with the defendant had been lawfully terminated.

I also award to the plaintiff, the costs of the suit, together with interest on the damages. The damages shall attract interest at court rates from the date of filing suit until payment in full.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 30th day of March, 2009

FRED A. OCHIENG

J U D G E