



**MERU CENTRAL FARMERS CO-OPERATIVE UNION .....APPELLANT**

**VERSUS**

**MURITHI MEMEU.....RESPONDENT**

***(Being an appeal from the judgment of the Senior Resident Magistrate's Court***

***D.K. Gichuki in Meru CMCC No. 1123 of 1997 delivered on 5<sup>th</sup> April 2000)***

### **JUDGMENT**

The respondent in this appeal filed a claim in the lower court claiming Kshs. 101,270/= for unpaid salary for March to August 1997 and payment for one month in lieu of notice and 36 days of leave not taken. In his claim, he further sought general damage for wrongful dismissal of employment and for liable. The appellant defended the claim and denied the respondent's claim for the amount of Kshs. 101,270/= and for general damages. The appellant denied further in its defence that the minutes of the meeting of the management committee and the letter of suspension of the respondent amounted to defamation. The lower court after hearing this case found that the respondent had proved his case and proceeded to award the respondent more than the respondent had claimed and his plaint. The respondent was awarded Kshs. 101,887.50/=. This amount represented salary for March to August 1997 leave not taken and included housing allowance at 25% p.a. The learned magistrate awarded 14% interest on that amount from the date of termination and in total awarded the respondent Kshs. 144,680.25/=. He further found in favour of the respondent for defamation and awarded him Kshs. 100,000/=. The respondent was also awarded of Kshs. 80,000/= damages for wrongful dismissal. That judgment aggrieved the appellants who have filed the present appeal. The respondent case was that he was employed by the appellant on 16<sup>th</sup> October 1995 as assistant mills manager. In the letter of appointment dated 16<sup>th</sup> October 1995 there was a provision that each party could terminate the contract of employment by giving 30 days notice or 30 days salary in lieu of that notice. The respondent's salary at the time of employment was Kshs. 9,310/=. The respondent was suspended from duty by letter dated 14<sup>th</sup> March 1997. The basis of his suspension was that he had received wheat straws with plant seed and dust purporting it to be good grain of undergrade wheat. The letter of suspension stated that this bad wheat had been received between 13<sup>th</sup> December 1996 and 7<sup>th</sup> January 1997. In evidence, the respondent stated that his duties as assistant mills manager were not specified, that he had been specifically told by the general manager and the mills manager that it was not his duty to receive or refuse to take goods. Those instructions were given to him after one occasion when he had refused to accept the delivery of material. Respondent said that the material which was cited in his suspension letter were received by the appellant employees namely Erastus Kundu and Mburugu. Later after the suspension, the respondent appeared before the management committee of the appellant. That the management committee accused him of having received poor quality material purported to be wheat bran. The respondent in evidence stated that the accusation made by the management committee was at variance to what was stated in his suspension letter. The respondent denied that it was his responsibility to order and/or receive goods on behalf of the appellant. He then stated in evidence that his duties were:-

***“In manufacture of animal feed, several mixtures and formulas are required to be taken. I was in charge of this section.”***

He further stated that once goods were received in the store, he had no power to reject them. After the management committee meeting, his services were terminated by a letter dated 22/8/1997. At examination in chief, the respondent stated that he did not know the number of leave days that he had not taken. He however stated that he was entitled to be paid for 17 days worked in March 1997. He further said that he was claiming one month's salary in lieu of notice. His letter of suspension was copied to the District Co-operative Officer. He said that the letter had defamed him and his reputation has suffered since then. He said that he was portrayed by the letter as a dishonest person. The minutes of the management committee were also copied to the District Co-operative Officer and the District Livestock Officer. As a result of copying those minutes to those persons, he said that he was viewed as not being sincere or honest. He said that he had been trained as animal production officer and had obtained a Bachelor of Science degree in animal production. He did accept under cross examination that the position he held within the appellant organization required him to "*rationing various ratios quantity and quality to ensure that quality of animal feed was in order.*" However due to what he termed as 'malicious accusations' made in the letter and the minutes, he had not been able to get employment after the termination of his employment by the appellant. He failed to prove that he had been unsuccessful in getting a job due to the appellant's letter and minutes. PWII stated in evidence that he read the minutes where the respondent had been questioned about the quality of animal feed. He said that he read the minutes at Kadoo Farmers Co-operative Union head office. The minutes were on the notice board. They were read even by other persons with whom PWII had attended a meeting. At the close of the respondent's case, the appellant called its accountant as the first witness. The accountant gave the procedure used for ordering material. At first, a requisition order is addressed to the store assistant who then requested the accountant to raise an LPO for the raw material. He said that an assistant mills manager is expected to get quality raw material because he is expected to produce high quality feed. Further he said that the appellant organization did not have any specific supplier. That it was the assistant mills manager who determined who the supplier was to be. Once the products were delivered, it was the responsibility of the assistant mills manager to confirm the quality. If not him, he could be represented by supervisor under him. The consignment which was the subject of this case was requisitioned by the respondent. That the respondent had prepared and signed the requisition. When the raw material was manufactured into animal feed, consumers complained of the poor quality. The accountant together with other employees were mandated to carry out an investigation into the complains by the consumers. The investigation concluded that the respondent as the assistant mills manager was responsible for having produced poor quality material. DWII was the mills manager. He had been in that position for 10 years. The respondent was his assistant. The respondent, according to him, was responsible for animal feed plant. To this end, he had the responsibility to order materials that required for his section. The position that the respondent held required one to have technical know-how which the respondent had. He stated that it was the respondent's sole responsibility to determine the quality of the feed. He too confirmed that the appellant did not have specific suppliers but that it was the mills manager to determine who was to supply material. He said that the respondent was responsible to requisition material and was to be present when the material was received to confirm that it met the required standards. After the complains were made, some of the bags of the material were found to be of poor quality. The respondent on being questioned about that, he was unable to state how such poor quality had been ordered. Before the management committee, according to this witness, the respondent had accepted that he ordered that consignment but was unaware when the same was received. As a result of that unsatisfactory response, the management committee decided to terminate the respondent's services. DWIII was in charge of administration and personnel. He confirmed that according to the terms of employment, either the respondent or the appellant could give the other one month's notice or one month's salary in lieu of notice to terminate. That the respondent on being suspended was receiving  $\frac{1}{2}$  his salary every month until termination of his employment. This witness conceded that the letter of appointment was silent on what responsibility each party had when there was suspension. At the time of his suspension, the respondent was receiving monthly salary of Kshs. 9,880/=. The respondent was entitled to 37 and half days' leave which worked at Kshs. 12,350/=. He was also entitled to payment of 17 days that he had worked in March 1997. On termination, the respondent was entitled to 1 month's salary in lieu of notice. The lower court having made a finding in favour of the respondent, the appellant filed the following grounds of appeal:-

**1. The Learned Senior Resident Magistrate erred in Law and in fact in finding that the**

**termination of the respondent's employment with the appellant was wrongful or otherwise unjustifiable against the pleadings and evidence before the court.**

- 2. The Learned Senior Resident Magistrate erred in Law and in fact in awarding general damages for wrongful dismissal in a simple employment contract.**
- 3. The Learned Senior Resident Magistrate erred in Law and in fact in holding that a case for defamation had been proved without any such proof.**
- 4. The Learned Senior Resident Magistrate erred in law and in facts in awarding Kshs. 101,887/50/= with interest from 22/8/1997 making a total award of more than his jurisdiction and without proof of the respondent's entitlement to the same.**
- 5. The Learned Senior Resident Magistrate erred in Law and in fact in awarding manifestly excessive sums of money in general damages for the purported wrongful dismissal and libel making total award more than his pecuniary jurisdiction.**
- 6. The Learned Senior Resident Magistrate erred in law and in fact in arriving at a judgment wholly against the pleadings and the evidence before the court.**

I am of the view that the above grounds call upon me to interrogate three key areas of the lower court's judgment. Firstly is whether the lower court was right to find that the respondent had been wrongly dismissed. On this case, having re-evaluated the lower court's evidence, I find that the respondent was hired by the appellant because of his technical know-how. The respondent himself confirmed that he had a Bachelor of Science degree in animal production. It is clear from the evidence that was adduced in the lower court that the appellant relied on the respondent to ensure high quality production of animal feed was achieved. The appellant's witnesses in evidence repeatedly stated that even if the raw material was not received by the respondent, the respondent was responsible to ensure that the end product of animal feed was of good quality. That responsibility did not diminish even if the respondent did not receive the raw material. Even the minutes of the meeting before the management committee concluded in those terms. It is therefore clear that the respondent was negligent to have allowed two consignments to be milled resulting in poor quality production of animal feed. The appellant, in my view, bearing in mind that negligence on the part of the respondent was titled to terminate the respondent's employment. The termination in my view was therefore not wrongful. The second issue raised by the appellant's ground of appeal is even if the termination of the respondent was wrongful, was the lower court entitled under the law to award the respondent damages for such wrongful dismissal. The learned magistrate was wrong to have awarded the respondent damages to the tune of Kshs. 80,000/= for wrongful dismissal. The Court of Appeal in the case of **Alfred J. Githinji V. Mumias Sugar Company Limited** (Civil Appeal No. 194 of 1991) unreported stated:-

*"The most recent and authoritative decision principles is the case of **Rift Valley Textiles Limited Vrs. Edward Onyango Oganda** Civil Appeal No. 27 of 1992 (unreported). In that case, the contract of service of the respondent therein, provided that it could be terminated by either party giving a notice of three months to the other or paying salary in lieu of notice. When the matter came before the High Court, the learned Judge having found that the dismissal was unlawful, and despite the respondent's admission that he had been paid three month's salary in lieu of notice, proceeded to award the respondent twelve months gross salary as general damages. On appeal to this court, this court had no difficulty in holding that the leaned Judge's decision was wrong. This Court's view was curtly and shortly put this way:-*

*"We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it is also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the respondent's dismissal was unlawful, he had been paid under and in accordance with the terms of his contract with the appellant."*

There it can be seen the lower court was wrong to have awarded damages for wrongful dismissal. The respondent, if indeed he was wrongly dismissed was only entitled to what was provided in his letter of appointment i.e. one months salary. Thirdly, for my consideration in this judgment is whether the lower court was correct in finding that the respondent had been defamed. In other words, did the respondent make out a claim for defamation? The appellant by the defence filed stated that the letter of suspension had not been published. The letter was copied to the chairman of the appellant's organization and to the District Co-operative Officer. It is not clear whether that can be regarded as publication as required under the law of defamation. The respondent did not dwell greatly in the alleged publication of that suspension letter. As rightly submitted by the appellant, that letter of suspension was not defamatory. It stated that the respondent had failed to carry out his duty and had failed to give explanation for that failure. The letter then stated that he was suspended until the management committee had an opportunity to meet. Similarly, the minutes of the management committee clearly shows that the respondent was given opportunity to respond to the allegations made against him. He however failed to respond. At the hearing before the lower court, the respondent did not allege that there was any error in recording those minutes. I am also in agreement with the appellant's submissions that those minutes did not amount defamation. Blacks Law Dictionary on defamation provides:-

***“The wrong of defamation consist in the publication of a false and defamatory statement concerning another person without lawful justification.”***

The respondent did not prove what can be regarded as false in those documents. I however must state that the appellant was wrong in submitting that action in defamation ought to be filed within 6 months. The period provided by the Limitation of Actions Act is one year. See section 4(2) of the Limitation of Action Act. Having considered grounds number 1 to 3, grounds number 4 and 5 fall by the wayside. On being suspended, the appellant stated that the respondent was receiving half a salary up to the time of termination. In my view, he cannot be said to have been entitled to full salary during the period of suspension and yet he was not engaged in employment at that time. In the end, the appellant's appeal does succeed. The judgment of this court is as follows:-

***1. That the lower courts judgment be and is hereby set aside and is substituted with the judgment of this court as follows:-***

***(a) Judgment is entered for the respondent for payment of one month's salary in lieu of notice being Kshs. 9,880/=.***

***(b) Judgment is entered for the respondent for payment of 37 and half days of leave not taken in March 1997 being Kshs. 12,350/=.***

***(c) Judgment is entered for the respondent for payment of 17 days worked in March 1997 being Kshs. 5,598/=.*** In total, judgment is entered for Kshs. 27,828/=.

***2. Since the respondent failed to collect his dues from the appellant despite being requested to do so, the respondent will not be awarded costs for the lower court case.***

***3. The appellant is awarded costs of this appeal.***

Dated and delivered at Meru this 25<sup>th</sup> day of March 2009.

**MARY KASANGO**

**JUDGE**