



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Appeal 1 of 2007

*Appeal against both conviction and sentence of the senior Resident Magistrate's court at Kericho,
[A.G. KIBIRU ESQ., SRM] delivered on 5th December, 2007 in Civil Case No. 762 of 2003)*

WILLIAMSON TEA (K) LTDAPPELLANT

VERSUS

JOHN ONSONGO MAKORIRESPONDENT

JUDGMENT

Appeal on summary dismissal

I: Appeal –Background

1. Being dissatisfied with the decision of the trial magistrate, the appellant M/S Williamson Tea (K) Ltd and Morris Owade filed this appeal against John Osongo Makori, the original Plaintiff in the lower courts on grounds that:-

- a. **The trial magistrate erred in not dismissing the respondent's case in its entirety upon reaching the conclusion that the respondent dismissal was [not] wrongful.**
- b. **By awarding benefits and terminal dues that was unmerited.**
- c. **That the trial magistrate erred in making an award.**
- d. **That the plaintiff/respondent was entitled to a notice before dismissal.**
- e. **That there was a serious miscarriage of justice .**

2. The relationship between the original plaintiff and defendants 1 and 2 is that of employee/employer. The original plaintiff (*herein referred to as the Respondent*) was first employed with M/S Williamson Tea Kenya Ltd (*herein referred to as employer*) as a head watchmen in the year 1983. This 2nd respondent Morris Owade was his immediate supervisor and head.

3. The respondent was first employed on 1st April, 1986 earning Kshs. 635/= per month. He joined a union for workers and was under the

collective agreement placed and agreed to between the employer and employee.

4. The union that he was a member was known as

“The Kenya Tea Growers Association.

The employer was a member of

“The Kenya Plantation and Agricultural Workers Union

and the agreement entered into was in respect of wages and a term and conditions of employment in regard to unionisable employees.

5. This agreement was (*emphasis supplied*) produced in the subordinate courts in evidence. It laid three methods of treatment of workers on misconduct namely,

5.1. Warning system

5 i) Where a misconduct (committed by an employee) does not constitute “gross misconduct” or warning in writing:-

5.a)[a] First warning is entered in the employees record in presence of a shop steward.

5.b)[b] second and third warning is sent to the branch secretary of the union. The employee has a right of appeal to the employer through the shop steward.

5.c)[a] third warning if issued and a fourth offence that is not gross misconduct would amount to the right of the employer to terminate the service of the worker.

6. Termination of contract

6.9. Where a newly employed employee is on probation to three years employment Except for Gross misconduct the employer may give a months notice or pay in lieu to terminate employment an employee likewise and vice versa can give such notice.

6.b. An employee has served 3-5 years service – Except for Gross misconduct a forty five (45) days notice or pay in lieu is required to be issued by the employer and vice versa for the employee.

6.c. Over five years employment contract service and Except for gross misconduct a two months notice to terminate the service or pay in lieu for employment and vice versa for the employee.

6.d. A permanent employee shall, Except in cases of Gross misconduct receive at least three warnings in the case of a misdemeanour, in the presence of a union representative failure to the representative being present, a notification within twenty four hours. There may be consultation of the union representative with the employer. An employer may dismiss.

7. Summary dismissal

7.1 The agreement described gross misconduct as grounds that justify such summary dismissal.

7a). “if without leave or other lawful cause an employee absents himself from the place proper and appointed for the performance of his work”

7b) **“If the employee is intoxicated and incapable of performing his duties.”**

7c) **“If an employee willfully neglects to perform work which it was his duty to have performed.”**

7d) **“If the employee uses abusive language and or behaves in an insulting manner.**

7e) **“If the employee refuses to obey any lawful proper command.”**

II: Facts

8. The respondent was requested on 13th December, 2005 to guard a “*dias*” where a cultural event had just taken place with the community of workers. The chairs and tables would not be safe if left overnight without a guard. The respondent deliberately declined to do the work assigned to him by the 2nd original defendant Morris Owade. The immediate supervisor, a letter was then written to him. The respondent left for six days without lawful permission and returned on 18th December, 2005. He was summarily dismissed for “*Gross misconduct*”.

9. The respondent then filed a suit for wrongful dismissal at the Law court at Kisii. My understanding of this was that when he went for his dues he was first offered Kshs. 2/=.

10. The time the suit was filed he was represented by M/S Omachi & co. advocates of Kisii. On 27th July, 2005 he changed advocates to Bana & Co. advocates of Oyugis. By the time the trial began it appears he was acting in person. I was unable to see such a notice to court to this effect.

11. The case was transferred to the Principal Magistrate’s court at Kericho where two separate magistrates heard the trial on separate occasion. The latter magistrate then concluded the case and gave evidence.

12. The respondent informed the court that he had very many hours of leave and was accordingly entitled to the said leave to be able to go off. He claims that the summary dismissal against him was wrong as he was protected by the collective agreement.

13. I believe the respondent did not think that his conduct fell in the category of “*Gross misconduct*”.

14. Nonetheless, the latter trial magistrate who wrote the judgment in this matter stated:-

“From the foregoing, I find that the defendants were within the LAW when they took the steps to dismiss the plaintiff summarily and they cannot be faulted”.

15. A dismissal summarily means only that a gross misconduct had occurred, as such the trial magistrate ought to have dismissed the original Plaintiff’s/ respondent’s suit. Instead he proceeded to acknowledge that the respondent was indeed a person who had worked for the appellant well over twenty years and entitled to his dues from then.

16. The employer filed this appeal in the High Court of Kenya at Kericho.

III: Appeal

i) Argument by the Appellant

17. The appellant argued that the trial magistrate ought to have dismissed the Plaintiffs suit in its entirety. That the plaintiff/ the respondent herein admitted to have failed to take lawful orders, failed and or refused to write a letter as requested to explain his conduct and finally absconded from duty without permission. This amounts to a misconduct.

ii) Arguments by Respondent

18. The respondent argued in person that the warning letter of 13th December, 2002 was what he relied on. My interpretation of this is that he ought to have received three to four warning letters and be paid his dues. What the respondent may not have realized is the fact that the dismissal was and did amount to “Gross misconduct” as held by the trial magistrate.

IV: Findings

19. This court finds that for gross misconduct as outlined in the collective agreement the respondent was found by the court to be on the wrong. He is therefore not entitled to any dues.

20. The appeal is allowed. The judgment of the trial magistrate is hereby set aside and quashed the same. This High court enters judgment of dismissal of the original plaintiffs/respondent’s suit with costs to the appellants.

DATED this 27th day of July, 2009 at **KERICHO**

M.A. ANG’AWA

JUDGE

Advocates

H.O. Abok instructed by the firm of M/S E.K. Owinyi & Co. advocates of Kakamega

Respondent – in person