



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Case 39 of 2006**

**DANSON K. NGUNDO.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff, Danson Ngundo was an employee of the Defendant, Kenya Power & Lighting Co. Ltd from 11.6.1986 until 11.4.2006. In his Complaint filed on 28.4.2006, he averred that his employment came to a sad end because of falsehoods and malice actuated by the Defendant. The falsehood, it is added, was that the Plaintiff had absconded from duty and was found in a bar consuming alcohol during working hours. Thereafter, although he was cleared of that allegation, his services were terminated with loss of benefits and in contravention of the Employment Act and the Plaintiff's terms of employment.
2. The Plaintiff's prayers are in the main, a declaration that the Defendant's conduct aforesaid was wrongful and unlawful and the Plaintiff should be reinstated to his job and an injunction to restrain the Defendant from stopping payment of the Plaintiff's salary and allowances and in the alternative, an order that the Defendant does pay damages for loss of earnings totaling Kshs. 13,395,800/=, general damages for unlawful dismissal and costs of the suit plus interest thereon.
3. I should state here that the final claim is predicated on an Amended Complaint dated 25.6.2008 and the claim for Kshs. 13,395,800/= is based on the proposition that at the time of termination of employment, the Plaintiff was earning Kshs. 66,979/= and he had 16 years and 8 months before retirement and the loss of earnings is calculated upon that sum and period respectively.
4. The Statement of Defence dated 10.5.2006 admits that the Plaintiff was indeed an employee of the Defendant for the period aforesaid but that his employment was terminated due "**to gross misconduct and dereliction of duty.**" That the suit discloses no cause of action and is premised on a wrong footing both in law and on the facts.
5. The Plaintiff in his evidence before this court stated that he had worked faithfully for the Defendant until 16.12.2005 when events of that day triggered his dismissal. He claimed that on 15.12.2005, he had been granted 15 days leave to end on 6.1.2006 and so on 16.12.2005 he was on leave properly given by the Defendant. While at Eureka Restaurant in Machakos Town at 2.00 p.m on that day, a stranger took a photograph of him as he had lunch and when he protested, a workmate, one Benjamin Ofiri came and confessed having instructed the photograph to be taken and the said Ofiri then left. The Plaintiff reported

the incident at Machakos Police Station and he was advised to seek the services of a lawyer and by a letter dated 14.2.2006, (P.Exhibit 7) the said Mr. Ofiri was asked to explain his conduct on that fateful day. Before any response was received, the Plaintiff was prevailed upon to withdraw the threat of legal action and sort the matter amicably. He acceded to the request and wrote a letter to his lawyers on 24.2.2006 withdrawing the threat. (P. exhibit 8). That inspite of that compromise, on 2.3.2006, he received a letter (P. exhibit 9) stating that he had absconded from duty and was found drinking alcohol during working hours. He explained the events of that day but was instead dismissed under clause 13 of his Employment Agreement. He denied those allegations and denied being in breach of any term of employment.

6. I have taken into account submissions made by advocates for the parties and will revert to them along the way. In determining this matter, I should resolve one issue first; was the Plaintiff on leave on 16.12.2005? I have seen P. exhibit 5, a letter dated 14.12.2005 which states as follows:-

**“LEAVE ALLOWANCE**

**DANSON NGUNDO- S/NO. 8131**

***The above named employee will be on leave for 15 days with effect from 15.12.2005 to 06.01.2006.***

***Please arrange to pay him Kshs. 16,000/= being leave allowance for year 2005.***

***.....signed***

***FOR: BENEFIT AND STAFF RELATIONS MANAGER***

***CC.***

***Danson Ngundo”***

7. With that letter being unchallenged, because the Defendant called no evidence at all before me, I can only properly conclude that indeed the Plaintiff was on leave on 16.12.2005 when his life took an interesting turn. Having said so, one must then juxtapose the contents of that letter with the contents of P.exhibit.9- a letter dated 2.3.2006 seeking an explanation from the Plaintiff for his conduct on 16.12.2005 when his **“Supervisor found [him] drinking in a bar”** having allegedly **“absconded [from his] duties.”** That letter should be reproduced in full for its effect and tenor to be clearly understood. It reads as follows:-

***“Mr. Danson Ngundo, S/N 8131***

***Thr’o***

***Customer Service Manager***

***Dear Sir,***

**EXPLANATION**

***It has been noted with concern that you absconded your duties on 16<sup>th</sup> December, 2005 and your Supervisor found you drinking in a bar.***

***Note that management views drunkenness while on duty very seriously. However, before any action is taken, you are hereby given a chance to show cause why disciplinary action should not be taken against you for this offence.***

***Your reply should be received within 72 hours from the date of this letter, failure to which it will be assumed that you have none and management will institute appropriate disciplinary action without any further reference to you.***

***Yours faithfully,***

***For: Kenya Power & Lighting Co. Ltd***

***.....signed***

***Chief Manager, Distribution & Customer Service***

***CC***

***Chief Manager, Human Resources & admin.***

***Chief Manager, Nairobi Region***

Was the above letter justified? “**Abscond**” is defined to mean;

***“To depart secretly or suddenly especially to avoid arrest, prosecution nor service of process.”***

8. In the context of the letter of 2.3.2006, it means that the Plaintiff “***secretly***” and/or “***suddenly***” left his duties as an employee of the Defendant and instead went to Eureka Restaurant to consume alcohol in violation of his employment contract. But how can that be when it is clear that he was on lawful absence from duty as is clear from P.exhibit 4- a leave application from which has all the necessary approvals and the letter dated 14.12.2005 which I have reproduced above? I can only conclude and, there is no evidence on record to the contrary, that the actions of Benjamin Ofiri on 16.12.2005 and the Defendant subsequently was based on a falsehood and the disciplinary action threatened in the letter of 2.3.2006 was based on a similar falsehood activated by Benjamin Ofiri and his photographer on 16.12.2005 and perpetuated by the Defendant in that letter.

9. The second issue to address is whether the termination of the Defendant’s employment was lawful. The letter of termination of service is dated 11.4.2006 (P. exhibit 10.) and it reads as follows:-

***“Mr. Danson Ngundo, S/N 8131***

***Thr’o***

***Customer Service Manager***

***Dear Sir,***

**TERMINATION OF SERVICE**

***In exercise of the rights reserved under clause 13 of your employment Agreement, the Company hereby terminates your services with effect from 11<sup>th</sup> April 2006. Under the said clause, you are entitled to one month’s notice of termination of service or one month’s pay in lieu of notice.***

***As you will not be required to work the notice period, the Paymaster is hereby requested to pay you as follows:-***

***(1) One months salary in lieu of notice (cheque no. 6528 for Kshs. 35,111.75 is enclosed).***

***(2) Salary upto and including 11<sup>th</sup> April, 2006, your last working day.***

3. 103 days accumulated leave.

Please note that you owe the company the following liabilities:-

Safari advance - Kshs. 9,190.00

Fridge Cooker Loan - 18,700 .00

Car loan differentials - 533,185.08

Kshs. 56,075.98

By copy of this letter the Paymaster is advised to recover the total amount from your final dues.

As regards your interest in the Retirement Benefits Scheme, a separate communication will be sent to you and for this purpose, you are requested to leave a forwarding address.

However, please note that payment of items 2 and 3 above, as well as payment of your dues on the Retirement Benefits Scheme will be subject to your completing the Clearance Certificate enclosed herewith.

Yours faithfully,

For: The Kenya Power & Lighting Co. Ltd

.....signed

Chief Manager, Distribution & Customer Service

CC

Chief Manager, Human Resources & Admin.

Internal Audit Manager

Paymaster

Principal, Human Resources Officer ,MP&E

Benefits & Staff Relations Manager

General Manager, Stima Co-op

Customer Service Manager-(Please remove the staff from staff tariff with effect 11<sup>th</sup> April, 2006)”

10. The Defendant in its Statement of Defence and in submissions by its advocate has argued that the events of 16.12.2005 and subsequent matters have bearing on termination of employment under clause 13 aforesaid. Clause 13 provides as follows:- (in exhibit 2);

**“On completion of your probationary period, this agreement may be terminated by either party by giving one month’s notice or one month’s salary in lieu of notice.”**

11. The argument made for the Defendant is that the termination must be read against the totality of the contract and I agree. In a bid to connect the events of 16.12.2005 to termination of employment on 11.4.2006, the Plaintiff stated as follows in his evidence;

***“If I was guilty, I should have been sacked under clause 12(b). Clause 12 and 13 could not be used at the same time.”***

12. He howsoever missed the point because clause 13 was invoked and had he for example wanted to leave employment, he would have simply invoked the same clause. Sadly for the Plaintiff he cannot import the events of 16.1.2.2005, false as they were, to termination of his services ex contractu. Sympathetic as I may be to his treatment on the 16.12.2005, the genesis of this suit is the letter of 11.4.2006 and I am unable to state properly that the letter was actuated by those prior events because it does not state so and is instead solidly based on a contractual provision to which he acceded to when he signed his contract of employment on 1.6.1996. I am fortified in that position by the case of Imenye vs Kenya National Co. Ltd [1986] KLR 350 where Apaloo, J. ( *as he then was*) stated as follows:-

***“I have already set out the termination provisions. Under it, the company is entitled, without assigning reasons, to terminate the contract by either giving three months notice or by paying three months salary to the Plaintiff. It did exactly that. In what sense can the exercise of this legal right expressly conferred by the contract be said to be wrongful?” (emphasis added).***

13. The learned judge answered the questions in the negative as I also do in this case. The same reasoning was applied by Schofield, J. in Gitau vs East African Power & Lighting Co. Ltd [1986] KLR 365 where the contract in issue was in the same words as the one before me and where clause 13 above was invoked by the Defendant in terminating Gitau’s services. Both Apaloo, J. and Schofield, J. also followed the decision of Muli, J. in Ombanya vs Gailey Roberts Ltd [1974] E.A. 522 which I also agree with.

14. If the termination was lawful, then the declaration and injunction as sought at paragraph (a) and (b) of the Amended Plaint must fail. The claim for damages for unlawful dismissal similarly fails.

15. Regarding the prayer for loss of earnings totaling Kshs. 13,395, 800/= the claim cannot stand for the above reasons and also because it is unlawful. I can only quote Apaloo, J in Imenye (supra) to make the point. At page 355, Paragraph 6 the judge stated thus;

***“It should be borne in mind that the plaintiff’s right, if any against the company arises ex contractu and not ex delicto. Even if I have found that the contract of employment had been broken by the company, the quantum of damages the plaintiff would have recovered would be the total income he would have received during the time of notice, that is, three months salary. See Lukenya Ranching v Kavoloto [1970] E.A. 414 and Ombanya v Gailey & Roberts Ltd [1974] E.A. 522 at 525. See also Addis v Gramophone Co.Ltd [1909] AC 488. To suggest that the company incurred an obligation to provide compensation for the plaintiff on the basis of his “lost years” is to confuse damages awardable in tort for that which is properly awardable in contract.***

***It seems to me manifest that the plaintiff has not been disabled from earning his living for the remainder of his working life because the company exercised its right of determination. Indeed, the plaintiff himself said shortly afterwards, he obtained a comparable job with reduced salary. Even if he had remained unemployed till this day, the company’s liability would have been discharged once it paid or offered to pay him three month’s salary as stipulated in the contract of employment.***

***Accordingly, my answer to the only question namely, whether the termination of the plaintiff’s employment was wrongful, is in the negative. That being so, cadit quaestio. There must be an end of this case. In my opinion, the plaintiff must fail in this action and I hold he has. I dismiss the plaint and enter judgment for the defendant with costs.”***

I wholly agree with this reasoning.

16. The above being my finding, perhaps the Plaintiff should have pursued the events of 16.12.2006 as he did by hiring a lawyer and suing for that matter because in my view the claim for wrongful termination is misguided and that being the case, the suit is dismissed with costs to the Defendant.

17. Order accordingly.

Dated and delivered at **Machakos** this **29<sup>th</sup>** day of **October 2009**.

**Isaac Lenaola**

**Judge**

In the presence of; Mr. Mwangi h/b for Mr. Mulekyo for Defendant

Mr. Makau h/b for Mrs Nzei for plaintiff

**Isaac Lenaola**

**Judge**