



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Appeal 114 of 2007

BOOM A. BOSIRE.....APPELLANT

-VERSUS-

GUSII MWALIMU SACCO LTD.....RESPONDENT

JUDGMENT

The appellant was the plaintiff in the lower court. He sued the respondent (who was defendant) following his suspension and subsequent retrenchment from the employer of the respondent. His case was that both the suspension and retrenchment were illegal and sought a declaration to that effect, and then that he be paid salary arrears, general damages, costs and interest. The respondent denied the appellant was illegally suspended or retrenched. Its case was that the termination of employment was within the terms and conditions of service signed between the parties.

In the course of the testimony by the appellant, he sought to produce in evidence letter dated 20/9/2004 from the secretary of the board of the respondent retrenching him. Mr. Mogikoyo for the respondent objected to the production on basis that the signature on the letter was not that of the secretary of the Board, and that it was therefore a forgery. He claimed the contents of the letter had been manipulated to suit the case. Counsel stated that the letter of retrenchment that was in the respondent's file had different signature and different clause. Mr. Bosire for the appellant opposed the objection by saying the letter had come from the respondent to the appellant and had letter-head and reference number of the respondent. He asked the respondent to lead evidence to show this was not their letter. The trial court upheld the objection to production. It looked at the letter and compared it with copy held by the respondent's counsel and concluded the signature of the writer was different. The letter was on two pages, pages 1 and 2. The court observed that the print on page 2 of the appellant's letter agreed with the copy held by counsel, but that the print on page 1 was different. The appellant was not allowed to produce the letter. It is this decision that the appellant could not produce the letter that was appealed against.

The appellant's Memorandum of Appeal alleges that the trial court fundamentally misdirected itself in law and fact when it rejected the production of the letter.

Mr. Mogikoyo was entitled to cross examine the appellant about the signature, contents or print of the letter by comparing it with the copy in the respondent's file. But that did not mean that the letter the appellant held, and having been written to by the respondent, was not admissible or could not be produced by him. The case between the parties was about the appellant's retrenchment by the respondent. The appellant was saying that this was the letter that retrenched him and was written by the respondent. The letter was relevant to the fact in issue and was therefore admissible. The appellant was the recipient of the letter and was entitled to produce it to support his case.

The respondent was entitled to say, during its evidence, that either it did not write the letter or that the letter they wrote was different. It would then produce copy of the letter it held. The court's attention would then be drawn to the salient differences in the two letters and be asked to accept whichever of the two as the letter that came from the respondent retrenching the appellant.

The letter the respondent held in its file had not been tendered in evidence yet, and the court could not have used it as basis to reject the appellant's letter.

In short, the appellant was perfectly in order when he sought to produce the letter. The court fell into grave error

when it prejudged it as not having come from the respondent. The matter proceeded without the letter until the appellant closed its case. By that time this appeal had been filed that is when it was ordered that the case be adjourned generally to await the outcome of this appeal.

The appeal is allowed. The appellant will be allowed to produce the letter in his evidence. It means the appellant will re-open his case. I have found the trial court pre-judged the appellant's document before hearing all evidence. This means the case was not properly tried and it is a proper one for a retrial. (See *Muchungu .v. Muchungu [1984]KLR 202*). The retrial shall be by another court. Costs shall be paid by the respondent.

Dated, signed and delivered at Kisii this 16th Day of November, 2009.

A.O.MUCHELULE

JUDGE

16/11/2009

16/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Leitepa for Mr. Bosire for the Appellant

COURT: Judgment in open court.

A.O.MUCHELULE

JUDGE

16/11/2009