



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 833 OF 2006

BOAZ WESONGA WANGIA.....PLAINTIFF

VERSUS

DEL MONTE (K) LIMITED.....DEFENDANT

JUDGMENT

This is a claim by the Plaintiff Boaz Wesonga Wangia against the Defendant Del Monte (K) Ltd for damages suffered by the Plaintiff as a result of his alleged dismissal by the Defendant.

The facts that gave rise to this litigation may briefly be stated. The Plaintiff is a graduate with a Bachelor of Science degree in Accounting and Master of Business Administration from the University of Bentley Massachusetts USA. On returning to Kenya, he successfully applied and was offered a job as Assistant Accountant with the Defendant on 11th October 1976. He served 12 months probation before he was confirmed on his job. The terms of his employment contained a termination clause which provided that termination of service would be subject to 3 months' notice being given in writing by either side. There is no doubt that the Plaintiff performed his duties satisfactorily with the result that he gained promotions he had attained the grade of Financial Controller at the time of his exit on 28th March 2006 when he was served with dismissals letter which informed him that he had been dismissed from service of the Defendant for gross negligence of duty one which resulted in the loss of Sh. 550,000/= to the Defendant. He had served the Defendant for 29 years and had only 26 months to his retirement. He filed this suit claiming the following special damages namely:-

- (a) 3 months' salary in lieu of notice.
- (b) Unpaid salary increment at 9% for the months of January, February and March 2006.
- (c) House allowance for 3½ months.
- (d) Pay in lieu of his 26 months to retirement.
- (e) In the alternative of (d) above payment for 29 years of service gratuity rendered at the rate of 1 month's pay for every completed year of service.

The Defendant on being served with the summons filed a defence denying the Plaintiff's claim stating

that the Plaintiff was summarily dismissed for gross negligence namely:-

- (a) Failure to ensure proper reconciliation of accounts of the Defendant.
- (b) Failure to take action regarding loss of Shs. 550,000/= as the Financial Controller.
- (c) Failure to physically check the defendant's Accounts as required of him.
- (d) Failing to put in place proper accounting measures to ensure the Defendant's money is not lost.

The Defendant also filed a counterclaim claiming from the Plaintiff a sum of Sh. 550,000/= being the money belonging to the Defendant which was lost through the negligence of the Plaintiff.

Evidence was called by both sides and the loss of Sh. 550,000/= was confirmed but investigations were carried out by David Gatano (DW 5) Head of Security which investigations –exonerated the Plaintiff to any involvement in the loss of the cash as the culprits were singled out and punished. Having considered the Plaintiff's case in light of the evidence on record and the submissions by both counsel I find no evidence as alleged to show that there was gross negligence on the part of the Plaintiff to warrant his summary dismissal.

There is no dispute that the Plaintiff was employed by the Defendant in November 1976 and rose in the ranks until he became the Financial Controller in the Defendant's employment. His employment was summarily terminated in March 2006 as aforesaid. During his period of the employment by the Defendant he obtained increments and had never had any problem with his employer. There was no evidence to suggest that the Plaintiff's performance in the Defendant's employment was in any way unsatisfactory.

On the morning of 28th March 2006 he was summoned by the Managing Director and was handed over the letter of summary dismissal. On my evaluation of the evidence of' the Plaintiffs the Plaintiff's termination of his employment on the grounds advanced by Mr. Carlos Mejia the Managing Director was certainly unlawful. Having come to that conclusion the next issue before me is that of award of damages.

The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. In the case of Kenya Oilfield Services Ltd vs. Peter Njoroge CA No. 124 of 1985 the Court of Appeal said:-

“where the employer and the employee enter into a service contract which stipulates a termination clause or notice to terminate the employment and following the unlawful termination of such service contract there in the breach of that contract and the measure of compensation or indemnity or general or special damages, call them what you may, is the loss the employee would incur during the stipulated period of the termination clause or of notice.”

The Plaintiff is not entitled in law to any of the benefits and/or emoluments claimed as set out in the plaint. As a retiree he would not be entitled to any such claims apart from his normal monthly retirement benefits.

The Court of Appeal was faced with a similar situation in the case of **Edward Otieno vs Kenya Ports Authority CA No 120 of 1997**. Otieno was employed by the Kenya Ports Authority pursuant to a letter dated 25th September 1971. It was a term of his contract that he could only be made to retire on attainment of the age of 51 years but his services were terminated when he was 51 years. He filed a suit against the Kenya Ports Authority claiming loss and damage. He gave particulars of loss of salary, pension medical allowance, housing allowance, leave allowance, mileage claim telephone allowance and security services.

“The Court of Appeal held that to pay the Plaintiff his full salary and other emoluments till he attains the age of 55, as he claimed, would, on proper analysis, be tantamount as if he was being re-

instated to his employment, to which he is not entitled.”

In view of the foregoing in my judgment the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause or notice to termination the employment which is 3 months calculated by Sh. 301,417/= which was his monthly salary at the time of his exit.

Accordingly there shall to judgment for the Plaintiff for Sh. 904,425/= with costs and interest at court rates to be calculated from the time he was dismissed.

Dated and delivered at Nairobi, this 25th day of July 2008.

J. L. A. OSIEMO

JUDGE