



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1197 of 2005

STEPHENE MUNGA MWANGI.....PLAINTIFF

VERSUS

UNITED STATES OF AMERICA AGENCY

FOR INTERNATIONAL DEVELOPMENT.....DEFENDANT

RULING

The plaintiff herein was heard exparte on the basis of a further amended plaint further amended the 7th day of August 2007 and filed on the same date of 7th August 2007. For purposes of the record the reliefs sought were as follows:

1. severance pay at lest 370,440 /=
2. damages for wrongful dismissal
3. spent damages Ksh 3,024,000/=
4. Costs of this suit
5. Damages for interference with my confidential rights Ksh. 5,000,000/=
6. Damages for wrongful dismissal
7. Interest in (a) (b) and (c) above.
8. Costs of dismissal.

This court duly heard the evidence of the plaintiff/applicant seeking medication, exhibits the plaintiff had in his possession, assessed the evidence and arrived at the matter contained in a judgment delivered by this court the 14th day of February 2008. In it the court made the following ground in favour of the plaintiff.

1. 3 months salary in line of notice Ksh 75,347,00
2. severance pay Ksh 134,099.88
3. The claim for general damages for wrongful dismissal is dismissed.
4. The claims for damages for interfering with the plaintiffs contractual rights is dismissed
5. The claims for loss of salary for the lost remainder of 6 years up to the retirement age of 60 years dismissed.
6. The amount in No 1 and 2 above will carry interest at court rate from the date of filing till payment is full.

7. The plaintiff will somehow cash of the suit with interest at court rate.

The plaintiff became aggrieved by the said judgment and he moved to this court by way of amended chamber summons amended on the 12th day of April 2008 and filed on the 17th April 2008 seeking review of the judgment entered herein and that costs be provided for.

That application was heard *ex parte* and in a ruling delivered by this court on the 11th day of July 2008, the application was struck out for the reasons that the same was incompetent by reason of failure to comply with the relevant rules in that the plaintiff or applicant had not executed and annexed the decree sought to be renamed. This led to the orders made in the ruling delivered on the 11th day of July 2008 striking out the said incompetent application.....here to applicant to file another application after extracting the decree.

This led to the filing of the application currently under consideration dated 22nd July 2008 and filed on the same date. It seeks this prayer:-

1. That the judgment delivered by Hon. Lady Justice R.N. Nambuye on 14th February 2008 be reviewed.
2. Those costs of this application be provided for.

The grounds in support are set out in the body of the application. Grounds in the supporting affidavit and ...submission in court.

The major complaints are

(a) that the learned judge wrongly computed the amount for the 3 months notice in lieu of notice which could come to Ksh 126,052,60

- He should have been paid damages for interference with the plaintiff contractual rights.
- He should have been paid salary for 6 years he lost before the retirement age.
- Interest should have been paid from the date of dismissal.
- Severe pay was also miscalculated.

Benga say person no case allows referred to the court.

On the courts judgment of the facts herein, it is clear that being an application for review that entire one applicant has to demonstrate is that he is within the ingredient required for review. This provide:-

“O.XLIV.I (J) Any person considering himself aggrieved-

(a) by a decree order from which an appeal is delivered, but from which an appeal has been preferred or

(b) by a decree order from which no appeal is hereby delivered and who from the delivery of new and competent matter of evidence which, after the excuse of the judgement, was not within his knowledge or could not be provided by him at the time when the decree was passed or the order made, or an account on some mistake or error apparent on the face of the record or for any other situation reason desire to obtain a review of the decree or order may apply for a review of judgment to the court which passed my decree or made the order without unreasonable delay”

The argument that the applicant has demonstrated as per the above provision are as follows.

(i) A demonstration that the applicant is aggrieved by a decree order from which an appeal is allowed but none has been prepared of one. In which no appeal is allowed. Herein there is a place a *ex parte* court judgment delivered by this court on 14th day of February 2008. The same was applicable but no appeal was filed by the plaintiff against the courts assessment but no appeal was preferred hence the option for review is ruled to be proper.

(ii) Demonstration that there is a discovery of new and important matter evidence after the exercise of due diligence was not within his knowledge around no be produced by him at the time when the decree was passed or made the application here in is not relying on this ingredient.

(iii) That there is same content or error apparent on the face of the record. The applicant has relied on this ingredienterror us the calculation of the delay due as the calculation was based on herself as opposed to a one months salary.

(iv) Demonstration that there is any other sufficient reason. This was joined up with ingredient (iii) above and all hinges in the allegation that the court made an error in calculation on the sum found payable in the first instance.

In the second instance that same claim disallowed should not have been disallowed.

(v) A demonstration that the application for review was amended properly. This was satisfied because the judgment was delivered on 14th February 2008 the first application for review was dated 10th day of March 2008 and filed on 11th March 2008. It was amended on 12th day of April 2008 and the amended application filed on 17th April 2008. The ruling struck out the amended application was delivered on 11th July 2008, and the application subject of this ruling was dated 22nd day of July 2008 and filed on the same 22nd day of July 2008. The forgoing sequence ofthat the applicant was moved with his defence to seek the relief of review and so the same is prepared before this court and will be considered on merit.

.....to the complaints raised and reasons as to why this court handed over judgment delivered herein on 14th February 2008, the reason as to why and how this court amended at the conditions sought to be reviewed is set out in the assessment runs from page 16 line 10 from the bottom up to the end of the judgment the court will bear them in mind in demonstration the same is to be reviewed or not the sequence to be formed will be as per the item in the fund would set out at page 22 of the said judgment.

Item one of the awards deals with three month salary in line 9. The court has awarded three months salary in view of notice. This was awarded because the plaintiff was relieved of his employment with notice. Case law that this court had judicial notice of and which this court reflected on the record had set in place principles to the effect that where an employee is in prosedcially terminated from his employment is entitled to the value of notice calculated on the basis of the monthly salary. The value of the notice is itself devised from the contract document where the contract document is not available the court applies what is usually termed as reasonable notice. Reasonable notice depends on the peculiar documentation of each case and is a matter of discretion for of the court. In the circumstance of this case the plaintiff alleged that the contract document or employment letter got lost. This being the case the court had no alternative but asses the reasonable notice period of 3 months the plaintiff has not complained about the length of the period but the calculation in this court opinion, the 3 months notice was reasonable and still stands.

As for the calculation the court used figures on the pay slip are about 4. Although the plaintiff has claimed 42,000.00 the pay slip read 25,115.65 with the statutory deduction coming to Ksh. 358, 05 when deducted it leaves a balance of Ksh. 19,757.00. The plaintiff applicant has drawn the court attention to the period indicated at the top which indicate that the payment was for the period as from 13/11/94 to 26/11/94 a period of 13 days. The court agrees that it is indeed an error in the part of the court for failing to take note of the said period for this reason the court is inclined to review the same the plaintiff has not provided a full pay slip to show whether the Ksh. 42,000.00 he claim is indeed the statutory deduction or after statutory deduction for avoidance of doubt of the court will lessen there with statutory deduction which in most cases are usually standard. This will give a figure of Ksh. 42,000.00 less statutory deduction of Ksh. 5,358.03 which erroneously had not been reduced from the Ksh. 25.115.03 when review working was done. This leave a figure of Ksh. 36,641.97 rounded up to the nearest figure of Ksh. 36,642.00 time 3 months given 9 resultant figure of Ksh. 109,926.00 severance pay under claim 2 will be worked out the same was using the from the plaintiff had given. This will work out as Ksh. 36,642.00x21x3.5% which comes to Ksh. 269,318.70.

Item 3 and 4 which dealt with claim for general damages for wrongful dismissal and the claim for damages for interfering with the plaintiff contractual rights still stand disallowed. The reason being that the court examined the case law on the remedies available to a wrongfully terminated employment available for an a grieved employee and found out that the guiding principles is that such an employee is only entitled to the value of termination notice which was not issued plus any occurred benefits not pad. Other than saying then it should have been awarded, the plaintiff has not countered any of those decisions. The decision was arrived at on the basis of this courts own function of the law. If the constitution is wrong then the defects is curable by an appeal. To the court of appeal and not by way of review in its for interference with future in factual rights the court assessed the evidence and arrived at the decision that there was no supportive evidence in the first instance in the second instance the court stated that such a relief is fully not available to a litigant who has allegedly been unlawfully dismissed. The applicant plaintiff has stated that he would have proved it had the legal officer surrender capila been availed as a witness. It is on record the proceedings were exparte and still are exparte. There is no way this court can conifer up what the said legal officer would have said on gross earn and on and whether the responses would have proved the plaintiff defection or not. For now it is important to note that the facts as presented to the court at the trial have not been altered and so the position remains the same as find by this court on that claim.

As for the claim for cost diary for the remainder of 6 years up to the retirement age, the court disallowed the claims because case law from the court of appeal did not allow such a claim to be disallowed in the first instance and in the second instance there was no document showing that the retirement age is 60 years. The plaintiff had explained that he had lost all documents to that effect. The plaintiff has now annexed annexure 7 to show that indeed the retirement age for Kenyans working with USAIA was 60 years.

The court has gone further and laid hands on a decision of the court of appeal on the subject decided on 24th December 2007 which appears to have changed the position. It is the decision in the case of **COD DAVID OJUANDO VERSUS**

- (1) PROF. NIMROD BWIBO Chairman Maseno University council.
- (2) PROF. F.N. ONYANGO vice Chancellor Maseno University
- (3) MASENO UNIVERSITY.

At page 16 of the judgement the learned judge of the court of appeal made the following observations at line 6 from the bottom.

“ having on our own assessed the evidence on record were satisfied that the applicant was allegedly effected from office in other disregard of the Act and before his due retirement age and in the process he was claimed his benefits, consequently had thereby suffered damage. (At page 17 line 1 from the top continued thus)

In the result and for the foregoing reasons we clear this appeal. For avoidance of doubt we declare that the compulsory retirement age of the applicant is 65 years of age. Further the applicant shall be paid all arrears of salaries and all other benefit as specified under the regulations and the Act and as should be assessed by the superior court”

This court constitution of that decision is that there is new adaptive by the court of appeal from the earlier stand that a wrong fully dismissed employee is only entitled to the value of the notice application to normal termination notice plus any other accrued benefits. This now claim on levy foundation for holding that in circumstances where an employee has been wrongfully forcefully effected from his employment he can get compensation for the lost salary.

In a recent decision by my brother Judge Ojwang decided on the 23rd day of September 2008. The leaned judge made the following observation:- *“claim for the defendant, though not the defence witness had given the impression that the plaintiff was only an ordinary employee of the defendant when the defendant could readily dismiss if his services were thought to be infection such an argument for any category of employees would be showed especially with regard to a public institution such as the defendant and baring in mind the special relationship which inevitably comes to exist between employer and employees. In so far as the employees person the bank of his or her time in the service of the employer letter other whether in most cases is earned by the employee outside the framework of the employment relationship of this fact this court takes judicial notice and it must then be considered that the status quo of the employers relationship inherently vest in the employee both normal right, and refunate expectation. In a public institution invariably there will be code 1 of management which by claim right and expectation of the employees as well as procedures of discipline and termination employment. Disciplinary procedure in public bodies are judicial matters requiring fair procedures of resolution, there being expressed in particular in rules of national justice”*

At page 37 line 4 from the bottom the learned judge went on:-

“It is clear that the plaintiff employment was terminated with suit regard for the binding rule 1 of natural justice. And it is clear that the defendant as it fall into that impropriety either wrong or right to have known that review employment and career damage with consequential losses would be occasional to the plaintiff”

At page 40 line 6 from the bottom quoted with approval the text of S.A. Borrows entitled remedies for suit and breach of contract (lands) Butter worth 1987 among others this: ‘the rule of common laws 1 that where a party sustain a loss by reasons of a breach of contract he is, so for as many can do it to be pleased in the same situation with respect of damages as if the contract had been performed. On the contrary it is accepted without dispute that the compensation claims is and should be to put the plaintiff into a gross position as if no just had been committed”

At page 45 line 11 from the bottom the learned judge went on to state. These facts are to be applied to the governing principles of law that on aggrieved party in a civil dispute has the obligation to multiage his or her own losses’

This decision is a decision of a court of convenient jurisdiction and therefore not binding on this court. It is of persistence character. But considering it in the right of the CA decision the court is satisfied that it chooses the central theme in the CA case that an employee can not be allowed to terminate the employment of an employee wrongfully with impurity where this is established the employer has to face the consequences of payments of compensation.

As regard the period of compensation the guiding principle is that the aggrieved party whop has been wrongfully terminated from his employment cannot fold arms and mouth. He is expected as a prudent man to mitigate his loss by starting some other activities to continue generating in course to replace what he has lost with this cause the determination of the period for compensation which is a matter of discretion of the court which discretion on the part of the court but which discretion has to be exercised judicially and with a reason.

Herein the plaintiff engaged into correspondent with a view of to compensation and reinstatement. He said in his evidence that he started negotiation immediately. In this courts opinion a period of three years would have been sufficient for him to realize that reinstatement was not possible and then embark in another income generating activity. The compensation for the plaintiff would work out as Ksh. 36,642.00 x 12x3 which come to Ksh. 1,328,812.00.

For the reasons given thee decision of this court delivered on 14th February 2008 be and is hereby revised on the followed term:-

1. 3 months 5 days in low of notice is revised to read Ksh. 36,642.00 x 3 which comes to Khs. 109,926.00
2. Severance pay revised to read Ksh. 36,642.00x21x3.5% which comes to Ksh. 269,318.70.
3. 3 years loss of future employment as per reasons given Ksh. 36,642.00 x 12x3 Ksh. 1,328,812.00.
4. the sums will carry interest at court rates from the date of filing interest will run from the date of dismissal because the plaintiff is not being compensated for sum which he had expended 5. The order on cost still remains as review by ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2008.

R.N. NAMBUYE

JUDGE