



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 937 of 2003

(From the Judgment of Senior Principal Magistrate Mr. Nyakundi in CMCC No.1583 of 1999 at Milimani Commercial Courts)

ZEPHANIAH OJWANG OKANGA.....APPELLANT

VERSUS

THIKA CLOTH MILLS LTD.....RESPONDENT

J U D G M E N T

This appeal arises from a suit which was filed by Zephaniah Ojwang Okanga (hereinafter referred to as the appellant), against his former employer Thika Cloths Mills Ltd (hereinafter referred to as the respondent). In that suit, the appellant contended that he was wrongfully dismissed from his employment by the respondent after 22 years of service. The appellant claimed judgment for payment of his terminal benefits which he tabulated as follows: -

- (a) Two months salary in lieu of notice Kshs.66,220
- (b) Salary for 19 days worked in November 1988 Kshs.19,806
- (c) Gratuity of 15 days salary for every year worked Kshs.363,110

Total	Kshs.448,936
Less	Kshs.3,000
Net	Kshs.445,936

The respondent filed a defence in which it admitted that the appellant was its employee between 3rd August, 1976 and 17th November, 1998. The respondent maintained that the appellant was lawfully dismissed for gross misconduct in accordance with Section 17 of the Employment Act. In the alternative, the respondent contended that the appellant's employment was terminated in accordance with his contract of employment which provided for termination of the appellant's contract by giving of one month's salary in lieu of notice. It was contended that the appellant declined to accept the one month's salary and other

terminal dues. The respondent denied owing the amount of Kshs.445,936/= claimed by the appellant, but admitted owing the appellant in respect of two months salary in lieu of notice, 17 days worked and 12½ days leave, totaling the sum of Kshs.98,420/= (less statutory deductions). The respondent further contended that the appellant was not entitled to payments of any gratuity as his contract of employment provided for payment of gratuity only upon retirement at the age of 55 years or upon death in employment.

During the trial before the Senior Principal Magistrate, the appellant and one Arnold Kaaria, testified. Their evidence was briefly that the appellant was employed by the respondent on 3rd August, 1976. Initially, he was sponsored by the respondent to study textile technology. He was later engaged as a weaving preparatory master. The appellant produced a sponsorship agreement signed with the respondent and a letter from the respondent spelling out his terms of employment. The appellant also produced a bundle of letters from the respondent increasing his salary from time to time. The appellant maintained that his services were terminated without any reason. He denied having received any warning letter and maintained that he obeyed all instructions given to him by the respondent. He maintained that his dismissal was wrongful. Arnold Kaaria was also employed by the respondent as a supervisor. He was also dismissed in March, 1998.

The respondent testified through Dady Saleb Abbahna Sipare, who was at the material time employed by the respondent as the mills manager. The witness explained that the appellant was dismissed on 17th November, 1998 and that one of the reasons for his dismissal was his failure to take instructions. The witness maintained that the terms and conditions of appellant's employment were reviewed and that gratuity was only payable either upon death of employee whilst in service or upon retirement of an employee at the age of 55 years. It was therefore contended that the appellant who was 46 years of age, did not qualify. The defence witness maintained that the appellant was only entitled to two months salary in lieu of notice, 17 days worked and payment in respect of leave. This added up to 98,420, less the statutory deductions leaving a balance of Kshs.69,519.50.

In his judgment, the trial magistrate, found that appellant's dismissal was illegal and unlawful, and that the respondent did not abide by the terms and conditions of employment. The trial magistrate found that the appellant was entitled to 2 months salary in lieu of notice, and 18 days worked in November. The trial magistrate further found that the appellant had provided 22 years continuous service to the respondent and was entitled to gratuity of 14 days basic salary for every completed year of service. The trial magistrate however found, that the appellant's claim for Kshs.448,936 was not established as there was no evidence that he was entitled to severance pay. He therefore awarded the appellant damages of Kshs.66,220 in respect of two months salary in lieu of notice and Kshs.19,806 in respect of 18 days salary for days worked.

Being dissatisfied, the appellant has lodged this appeal raising 8 grounds as follows: -

- (i) That the learned principal magistrate erred in law and in fact in rejecting the plaintiff's evidence and that of the plaintiff's colleague.
- (ii) That the learned senior principal magistrate misdirected himself in accepting the defence witness's evidence which contradicted itself and was not even corroborated.
- (iii) That the learned magistrate erred in law and fact in awarding an amount less than what even the defendant had computed as owing to the appellant.
- (iv) That the learned magistrate erred in law in accepting the defence witness's evidence which was not supported by any documents.
- (v) That the learned magistrate misdirected himself in failing to see that the plaintiff's record was clean and no warning had ever been issued against the said plaintiff.
- (vi) That the learned trial magistrate erred in failing to appreciate that the appellant was said to have

been rude to only one person and not to any other person in the whole managerial line-up.

(vii) That the learned magistrate erred in law in failing to award damages and service for 24 years worked by the appellant.

(viii) That the learned magistrate misdirected himself in not taking into account the plaintiff's evidence that the dismissal was due to the fact that the appellant was agitating for the rights of his fellow workers having been in top managerial position and elected by the members to forward their grievances.

In support of the appeal, counsel for the appellant submitted that the trial magistrate erred in failing to award the appellant gratuity for 22 years after finding that the appellant was unlawfully dismissed. She maintained further that the respondent having indicated its willingness to pay the appellant a sum of Kshs.98,420/=, the trial magistrate was wrong in awarding the appellant less than the amount admitted. It was further submitted that the trial magistrate failed to consider the principles laid down in **HCCC No.2603 of 1994, Joseph Mwaura Njau vs Barclays Bank of Kenya Ltd** which was cited by the appellant's counsel.

For the respondent, it was submitted that the trial magistrate did not award a lesser amount as he awarded a sum of Kshs.83,026/= after deductions which was higher than the amount the respondent had admitted. It was submitted that the appellant did not qualify for gratuity as terms of his employment were clear that gratuity was only payable either upon death or retirement. The respondent's counsel maintained that the trial magistrate was wrong in finding the appellant's dismissal wrongful as there was no evidence that the appellant was summarily dismissed.

I have carefully reconsidered and evaluated the evidence as I am expected to do in this first appeal. I have also considered the pleadings and submissions of counsels. It is evident from the examination of the plaint and the defence, that the respondent in paragraph 8 of the plaint admitted the appellant's claim to the extent of Kshs.98,420/= in respect of 17 days salary, 12½ days leave salary, two months notice pay. That being so no issue arose for consideration by the court with regard to whether the appellant was entitled to payment in respect of the admitted sum. The trial magistrate ought to have given judgment for the admitted sum. Moreover, there was no reason why the trial magistrate did not allow the appellant's claim in respect of the leave days when the same was not disputed.

From the pleadings, what was in issue was the appellant's claim for Kshs.363,110/= in respect of gratuity for the 22 years he had worked with the respondent. While there was no dispute that the appellant had worked for 22 years, the respondent maintained that the appellant's terms of service provided for a gratuity of 14 days basic salary for every completed year of service only in cases of retirement at 55 years of age or death in employment. Although the appellant claimed gratuity at the rate of 15 days for each completed year of service, he was not able to avail any evidence that this was the agreed rate. I accept what was pleaded by the respondent in paragraph 10 of the defence that the agreed rate was 14 days basic salary for each completed year of service. This was consistent with the letter dated 2nd March, 1998 signed by the respondent's general manager.

In this case, the respondent terminated the appellant's employment before he had reached the age of retirement. Although the respondent maintained that the appellant was dismissed from his employment because of gross misconduct, the evidence adduced by the respondent fell far short of establishing the allegations made by the respondent in paragraph 5 of the defence. There was no specific evidence adduced to show how the appellant had been negligent in performance of his duties, or what lawful instructions he was given and he failed to follow or who gave those instructions, or to whom the appellant exhibited rudeness and arrogance. There was therefore no evidence to support the respondent's contention that the appellant was guilty of gross misconduct. I find that the appellant's dismissal was wrongful. Indeed, the respondent has by implication admitted that the appellant was neither given notice or salary in lieu of notice. I find that according to the appellant's terms of employment, he was entitled to gratuity upon termination of his employment either through retirement or death. The gratuity should not be confused with severance pay which is only applicable in cases of redundancy. The assumption was that the appellant was going to work until either of the two events i.e. death or retirement occurs. In this

case, the appellant's termination of employment was not caused by any of those two events, nor was it caused by any election on the part of the appellant. The termination was due to an election on the part of the respondent. Under those circumstances, it would not be fair nor just to allow the respondent to deny the appellant what he would have been lawfully entitled to by prematurely terminating the respondent's employment unlawfully. The appellant having served the respondent for 22 years, gratuity was his legitimate expectation which the respondent could not deny him through wrongful and unlawful termination of his services.

Accordingly, I allow the appeal and set aside the judgment of the lower court. I give judgment in favour of the appellant as against the respondent as follows: -

- (i) The sum of Kshs.98,420/= being two months salary in lieu of notice, 17 days salary and 12½ leave days salary, subject to the lawful statutory deductions.
- (ii) payment of gratuity at the rate of 14 days salary for each completed year of service for the 22 years worked.
- (iii) The judgment shall be less the sum of Kshs.3,000/= which was admitted as advance payment.
- (iv) Costs of the suit in the lower court and this appeal.

Those shall be the orders of this court.

Dated and delivered this 28th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant

Mrs. Kea for the respondent