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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 382 of 1994

DAVID MUEMA MUNGUTI PLAINTIFF

VERSUS

TELKON (K) LIMITED DEFENDANT

JUDGMENT

1. David Mwema Munguti in his Complaint dated 26/8/1994 sued his former employer, The Kenya Posts and Telecommunications Corporation and averred that his services were unlawfully terminated by a letter dated 30/8/2003. That as a result thereof he suffered loss and damage and sought the following orders:-

- a. "A declaration that the Defendant acted wrongfully and in breach of the terms of the contract of employment between the Defendant and the Plaintiff in purporting to dismiss the Plaintiff without the requisite notice;
- b. General damages for wrongful dismissal;
- c. An order directing the defendant pay the Plaintiff all his benefits under the permanent and pensionable establishment;
- d. Interest on (b) & (c) above at court rates; and
- e. Any such other or further relief as this Honourable court may deem fair and just to award."

2. In the Statement of Defence dated 22/11/1995, the Defendant denied that there was any valid cause of action against it in view of section 38 of the Kenya Posts and Telecommunications Act, Cap 411 Laws of Kenya. Further, that no notice under section 109 (a) of the same Act was ever given and prayed that the suit be dismissed with costs.

3. The hearing commenced before Mwera J on 5/11/1998 and in his evidence, the Plaintiff stated that he was employed as an Assistant Workshop Supervisor and by letter dated 22/2/1985, he was confirmed on permanent and pensionable terms. In the letter, parties agreed that the employment contract could be terminated by giving three months notice of the intention to do. That by letter dated 30/8/1993, the Defendant terminated his services and in that letter (P.Exh.3) the Defendant stated as follows:-

“Mr. David M Munguti

Asst. Workshops Supt.

Thro’

AM/Southern

DISMISSAL FROM SERVICE ON GROUNDS OF DOUBTED INTEGRITY.

Your undated letter which was in reply to ours reference PF:27866 dated 27/6/1992 is relevant.

Your representations were accorded due consideration but I regret to inform you that the explanation you advanced was unacceptable. Investigations carried out revealed that you actively engaged in the theft and irregular disposal of spare parts. You took the opportunity to do so after the spares were bought for OMV’S which had been grounded at the Workshops and instead of the spares being fitted they disappeared while the vehicles remained grounded. In some cases one set of spares ordered for a specific vehicle would disappear and another set had to be supplied. A case in point is for OMV KUL:858 for which items worth K.shs. 2,877.70 which you received had to be replaced because they disappeared. All in all, the spares you took against signature and which you could not account for between September, 1990 and September, 1991 were worth a total of shs.27,311.70. This shows that you are an officer who is dishonest and who cannot be retained in the service of the Corporation.

Consequently, approval has been obtained to dismiss you from the service with loss of all privileges on grounds of doubted integrity from the date of this letter. You are requested to return to K.P. & T.C. identification card and any other official property that may have come into your possession by virtue of your employment. Should you fail to do so and they are thereafter misused in any way you will be held responsible.

Issued in duplicate, copy to be noted and returned.

F.N. NGATIA

For: REGIONAL MANAGER/EASTERN.”

4. Prior to that letter, the Plaintiff had been interdicted by letter dated 24/6/1992 pending investigations into his alleged dishonest conduct.

5. In his further evidence, the Plaintiff denied the allegations of theft, dishonesty and want of integrity and stated that he fully explained the circumstances under which the spare parts may have been lost but the explanation fell on deaf ears and he was instead dismissed without notice. He therefore wanted damages and benefits for services rendered to the Plaintiff.

6. The Plaintiff called no witness and for the Defendant, one Simon Kiplangat Cheruiyot stated as follows:-

That he was an employee of the Defendant Corporation as its Machakos office and was aware of the matters in dispute. That the Plaintiff was properly and lawfully dismissed from employment because of

doubted integrity.

Before that witness could conclude his evidence, he was stood down on the application of the advocate for the Defendant. This was on 4/2/1999 and after a number of appearances by parties, the same was listed before me on 26/6/2008 and I noted that since the matter was not moving at all, an adjournment was not allowed and Mr Kaula for the Defendant closed his case.

7. I have taken into account the submissions made by the advocates for the parties and I will refer to them if necessary. I should at this juncture point out that the Plaintiff was amended on 8/12/1999 so that the Defendant is now Telkom (K) Ltd and not the Kenya Posts and Telecommunications Corporation. The issues to determine are;

- i. whether the termination of the Plaintiff's employment was lawful or not;
- ii. whether the Plaintiff is entitled to general damages for wrongful dismissal;
- iii. whether the Plaintiff is entitled to all his benefits under permanent and pensionable terms;
- iv. Costs.

8. On the first question, counsel for the Plaintiff submitted that;

"The plaintiff contests his summary dismissal from employment as being wrongful and unlawful for the twin reasons that the explanation for his dismissal is not among the reasons envisaged in his employment contract. Secondly he is not of doubtful character neither was the any proof that he did not account for the spare parts purportedly lost. His explanation in his evidence in chief as to what transpired and the regulations governing storage of the defendant's equipments has not been controverted since the defendant has not offered any evidence to challenge the plaintiff's case herein, for which we urge you your Lordship to therefore find that the termination of the plaintiff was unlawful and wrongful."

9. I am however not persuaded that the dismissal was in any way unlawful. I say this because in the letter of interdiction dated 24/6/1992, the Defendant stated that investigations would be undertaken as to theft of vehicle spare parts from the supplies motor stores at Machakos and in that letter, the Plaintiff was notified as follows:-

"It is therefore intended to take a severe disciplinary action against you which may include dismissal with the loss of all privileges. However, before a decision is taken you are invited to submit any representations you may have in your defence against the proposed disciplinary action. Your representation, if any, should be in writing and should be submitted to your Controlling Officer within 48 hours from the date you receive this letter. If no representations are received by that time it will be assumed that you have none to make and the proposed action will be taken without any further reference to you.

Issued in duplicate, copy to be noted and returned."

10. One of the complaints made was that the Plaintiff was either "an officer of doubtful integrity or ... guilty of gross negligence both of which are serious offences under the regulations." After the investigations and after the Plaintiff had a chance to make his representations vide his undated letter referred to in the Defendant's letter dated 30/8/1993, he was summarily dismissed. Section 17 of the Employment Act, Cap 226 gives instances where an employee can be summarily dismissed. Section 17 of the Employment Act Cap 226 which is similar to section 44 (1) and 4 (c) and (g) of the Employment Act No. 11 of 2007 provides as follows:-

"44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory

provision or contractual term;

(b)

(c) an employee willfully neglects to perform any work with it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d)

(f)

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

11. From the two letters referred to and the Plaintiff's own evidence, there cannot be any doubt that there was reasonable cause for the Defendant to take the drastic action of summary dismissal and I am not convinced that the Plaintiff's explanation in court is any evidence that he did all that was required with respect to the spare parts when he failed to produce the undated letter which in fact triggered his dismissal. The explanation in court without that letter amounts to an afterthought and since it was he who was to dispute, with proof, that the dismissal was unwarranted, when he failed to do so, then his case was lost at that point. As Cockar J held in Njeru vs Agip (K) Ltd (1986) KLR 480 where an employee was habitually neglectful in performing his duties and had failed to perform those duties with due care and attention, then the Defendant had good grounds to dismiss him. In this case, the Plaintiff's conduct was similar and his dismissal was lawful.

12. With regard to general damages for wrongful dismissal, although it was pleaded, I have seen nothing to justify the claim. In any event once I have found that the dismissal was lawful no damages can flow from the act. I have been referred to the decision of Bosire J (as he then was) in Owaga vs Transocean (K) Ltd (1990) KLR 197 where the learned judge held that if an employee is dismissed, it would be easy to precisely calculate what is due to him and that sum should be claimed as a special damage. I agree and in this case, without any specific sum being claimed, even if it was due and owing, and it is not, no sum can be awarded.

13. On the last issue, the point is really simple; even if the Plaintiff had been unfairly dismissed, it is not then enough to fall back on the term permanent and pensionable to say that he was entitled to all his benefits. As was said in Chase vs Barclays Bank of Kenya Ltd (1990) KLR 595.

"The Plaintiff's employment with the Defendant was permanent and pensionable. However, permanent employment does not necessarily mean employment for life or until retirement; it merely means that the employment is to continue for an indefinite period with an element of permanency and a degree of security of tenure."

14. The claim for terminal benefits in this case has no merit and is also dismissed.

15. In the end, the suit herein is frivolous and is dismissed with costs to the Defendant.

16. Orders accordingly.

Dated and delivered at Machakos this 14th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Nyamogo h/b for Mr Sumba

ISAAC LENAOLA

JUDGE