REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal Case 633 of 2003

AUTOLITHO LIMITED ……APPELLANT

VERSUS

JOHN MARICH NDEGWA……..…….. RESPONDENT

J U D G M E N T

On 4/10/04 the Appellants moved to this court, challenging the Judgment of the Subordinate Court, Nairobi, in CMCC No. EJ. 868 of 1999, delivered on 8/9/03 on the following grounds:

1. The Lower court erred in law and in fact in dismissing the evidence of the appellant and entering judgment for the Respondent in the sum of K.Shs.206,702/- together with interest and costs.

2. The Lower Court erred in law and fact in holding that the dismissal of the Respondent by the appellant was wrongful, as gross misconduct was not proved;

3. The Lower Court erred in law and in fact in holding that since Respondent had been acquitted in Nairobi Criminal Case No. 2807 of 1998 of the offence of theft by servant he had been absolved of the allegation of theft then article 12(b) of the Collective Bargaining Agreement could not be invoked in summarily dismissing the Respondent.

4. The Lower Court erred in law and in fact in failing to appreciate that according to the proceedings in Criminal Case No. 2807/98 and the evidence before the Learned Magistrate, the Respondent was indeed found in possession of the calendars which did not belong to him but were the property of the appellant.

5. The Learned Magistrate erred in law and in fact in failing to appreciate the authority cited before her, Civil Appeal No. 164 of 2001 where it was observed that dismissal of an employee cannot necessarily and merely be found on criminal culpability but can be based on neglect of duty.

6. The Lower Court erred in law and fact in awarding the Respondent salary in lieu of Notice, House Allowance and gratuity when there was no basis for the same.

7. The Lower Court erred in law and in fact in awarding the Respondent salary for he months of December 1998 to March 1999 when the Respondent never worked on these days and therefore never

earned this salary.

8. Had the lower court considered the weight of evidence, the submissions by counsel for the appellant and the authority cited before the Learned Magistrate, it would have only awarded the Respondent the amount admitted and dismissed the balance of the claim.

Wherefore the appellant prays that: the appeal be allowed; the award of K.Shs.206,702/- be substituted with an award of K.Shs.39,299/- which had been admitted; costs of the appeal.

At the commencement of the hearing of the appeal, counsel for both sides, by consent, recorded in court, agreed to conduct the appeal by written submissions. This judgment is thus based on those written submissions.

The FACTS in the case, at the Lower Court, are briefly as under:

The Respondent, sought, from the Appellant K.Shs.313,939/- being terminal benefits, particularized in the Plaint. He also sought costs, general and exemplary damages. The Respondent averred that he was employed by the Appellant on 16/9/1982 at a salary of 1,850/- per month, and terminated on 22/12/98, when he was on a monthly salary of K.Shs.17,191/-. He averred that his services were unlawfully terminated on alleged theft for which he was charged and the criminal court acquitted him in Criminal case No. 2807/1998 and thereby absolved of the allegations of theft. The appellant refused to reinstate him despite the acquittal. The Respondent also claimed K.Shs.40,000/- being legal fees for the Advocate who represented him at the Criminal Proceedings.

I have carefully perused the pleadings and the submissions by Learned Counsel for both sides, as well as read the authorities cited and relied upon. I have reached the following findings and conclusions.

The gist of the appeal is whether the dismissal was wrongful or lawful, in light of the acquittal of the Respondent at the Criminal Case in the Subordinate Court, in Nairobi. The rest of the grounds stem from the answer to the above question as to the lawfulness or otherwise of the summary dismissal.

Clause 12(b) of the Collective Bargaining Agreement between the parties provided that "**an employee may be summarily dismissed for proven gross misconduct and paid up to and including the date of dismissal plus accrued leave."**

The criminal court, the record for the proceedings produced at the civil suit for unlawful dismissal; the evidence adduced and before the lower court, is that the Respondent was searched and found with calendars belonging to the Appellant company. That is when, and why, he was reported to the Police who instituted the criminal proceedings, but all the same, the Respondent was acquitted of the offence of theft by servant.

The Respondent's case is that there was no proven gross misconduct since the Appellant failed to prove the alleged theft for which he had been terminated from his employment. Accordingly, contends the Respondent, the dismissal was an affront to the Collective Bargaining Agreement.

That is what the lower court upheld in giving judgment in favour of the Respondent which sparked the appeal herein.

I begin by observing that the problem stems from the meaning attached to the word "**proven"** in the Collective Bargaining Agreement. Proven at what standard of proof? is the obvious question that comes to any lawyer's mind. This is critical because the standard of proof in criminal cases is totally different from that required under civil cases. Without unnecessary beating of a dead horse, suffice it to state that an acquittal in a criminal case does not necessarily mean that the accused is totally absolved of the alleged crime. The acquittal may be on very technical point, but most importantly because the **prosecution has not proved its case beyond any reasonable doubt.** That however, is not the same as saying that there is no evidence to prove the case on the balance of probabilities, which is all that a Plaintif is required to do

in a civil suit.

On the foregoing basis, I find, and hold, that the lower court erred in applying the standard of proof in the criminal case to the standard required for the Appellant, to prove its case for gross misconduct, and hence justification for summary dismissal.

Having held as herein above, the appeal is hereby allowed with costs to the appellant and against the Respondent. However, the appellant is ordered to pay the Respondent his dues as per Clause 12(b) of the Collective Bargaining Agreement. That is what the appellant had admitted as its liability to the Respondent.

Finally, I think there is need to address the issue of gratuity, which is not raised in the Memorandum of appeal, nor addressed by the learned counsel for both sides. I think the reason is that to the appellant, if, and once, the appeal succeeds, there is an implicit assumption that other than what is contained in Clause 12(b) everything else goes. That is not correct and is fallacious.

In my view to fail to address the issue of gratuity would cause injustice to the Respondent in terms of the gratuity which the lower court awarded, and which is governed by Clause 13(a) of the Collective Bargaining Agreement. That clause gives an employee who has served for two or more years of continuous service with the employer an entitlement to a minimum of 15 days pay for every completed year of service, by way of gratuity, based on the employee's wages at the time of the termination of his service.

In the present case, the Respondent had served for about 16 continuous years with the Appellant.

I find, and hold, that he had the entitlement to gratuity and that right is not in any way abrogated by the summary dismissal. Gratuity is for the period already served up to, and as at, the time of the termination.

Accordingly, I find and hold that the lower court's judgment and order on this point is quite proper and I uphold it. The Appellant is thus ordered to pay the Respondent his gratuity over and above his rights under Clause 12(b) of the Collective Bargaining Agreement.

It is so ordered.

Dated and delivered in Nairobi, this 28th Day of June, 2007.

O.K. MUTUNGI

JUDGE