



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 174 of 2004

PETER M. OMAERA.....PLAINTIFF

VERSUS

EWASO NGIRO SOUTH RIVER BASIN

DEVELOPMENT AUTHORITY.....DEFENDANT

JUDGMENT

The plaintiff herein, **Peter Omaera** was employed by the **Ewaso Ngiro South River Basin Development Authority** on 4th February 1998 as the personnel and administration manager. The plaintiff was duly confirmed following a satisfactory performance of the six (6) months probation period. On the 15th of August 2003 the plaintiff was summarily dismissed from employment, having served a suspension period from the 27th February 2003. The reasons given in the letter of dismissal was the fact that the plaintiff was responsible for the loss of the Pajero engine and misappropriation of the defendant's funds.

The plaintiff thus filed the present suit in which he has alleged that the defendant breached the laid down procedure under the **Authority's Code of Regulations** by dismissing him without being given a chance to be heard and for alleging loss of motor vehicle engine which was not within his custody. The plaintiff pleaded that, as a result of the said dismissal he has suffered loss and he has particularized the loss in the pleadings.

The plaintiff contended that the dismissal was unlawful and instigated by malice on the part of the defendants. He therefore sought for the following orders;

- (a) General and exemplary damages as prayed for unlawful dismissal from employment.**
- (b) A declaration of this Honourable Court that his dismissal was unlawful and unprocedural and therefore void ab initio.**
- (c) Payment of his terminal benefits.**
- (d) Costs of this suit plus interest at court rates.**
- (e) Any other relief that this Honourable court may deem fit to grant.**

The defendant filed a statement of defence and denied any wrong doing on their part as regards the

dismissal of the plaintiff from employment. It was the defendant's view that the plaintiff was dismissed in accordance with the **laid down procedures** and **ENSDA Code of Regulations**. The defendants did not attend court to support their defence. The plaintiff gave evidence in support of his claim and relied on the evidence of two other witnesses.

According to the plaintiff, he started working for the defendant on the 1st March 1998 and his duties included recruitment and staff training and security of the organization including that of the motor vehicles. Sometimes in February 2002 he was called to an executive board meeting and he was given an investigation report on a motor vehicle engine that was supposed to have been bought and fitted on Vehicle registration No. KAD 345B and the report indicated that the plaintiff had stolen the engine. The plaintiff was shocked to receive the report although he had no notice that he was under investigation nor was he called by the investigating committee to seek his views on the lost engine. The plaintiff denied that he had anything to do with the lost engine or that he was the one who arranged for the vehicle to be taken to the garage nor did he accompany the driver to collect the motor vehicle after the alleged engine had been fitted. After the plaintiff was called to the meeting he responded to the allegations but before he could hand over the response, to the managing director he was served with a suspension letter dated 27th February 2003 in which he was required to vacate the premises with immediate effect and to hand over his office to another personnel officer.

The plaintiff wrote a letter to the managing director of the defendant which was copied to the office of the Vice-President and he raised several issues regarding the investigations committee which he contended was unprocedurally constituted. He also accused the investigation committee of failing to interview him and yet he was the one allegedly implicated, and for failure to consider that the plaintiff had nothing to do with the motor vehicle which was driven by a driver to Nairobi Derby Motors for the repairs but it was clandestinely moved to Choda Motors where it was purportedly fitted with a new engine. The plaintiff also requested the defendant to involve the police if indeed they had evidence that the plaintiff had been involved in theft.

The plaintiff also relied on the evidence of **Geoffrey Ndambuki** who used to work with the defendant until August 2002. According to this witness it is the managing director of the defendant Dr. Punywa who authorized the vehicle to be taken for service. The vehicle was supposed to be taken to Darbey Motors but the Managing Director directed that the vehicle be moved to Choda Motors and the Managing Director authorized the plaintiff to sign the work ticket which enabled the vehicle to travel from Narok to Nairobi. After the vehicle was repaired, the Managing Director directed that the invoice be settled and Kshs 290,000/= was paid towards the repair. The vehicle returned to the defendant's premises until the issue of old engine was raised. This witness denied that the plaintiff could have stolen the engine because he had nothing to do with the vehicle.

During cross-examination this witness confirmed that he resigned from the defendant's organization in the year 2002 but he confirmed that he was not present when the Managing Director authorized the plaintiff to release the vehicle for the repairs. All that he told the court is what he was told by the plaintiff.

The plaintiff also relied on the evidence of **Joseph Karori Kamau** who was a director of the defendant upto the year 2005. This witness confirmed that he was a member of the disciplinary committee which was charged with the responsibility of dealing with the staff issues. He came to know about the plaintiff from 1998 and he recalled that when there was a problem regarding the loss of Pajero engine the matter was not referred to the full board meeting, but the vehicle was taken for repairs to Choda Motors through the instructions of the Managing Director. He also contended that when the vehicle started having problems, the investigating committee was not properly constituted by the board but by the then Managing Director who selected only two members of the board. According to this witness the plaintiff had nothing to do with the loss of the engine and in his opinion, the dismissal of the plaintiff was wrongful. He also complained about the dismissal of the plaintiff through a letter which he wrote to the Minister complaining about rampant corruption within the Authority and the composition of the committee that investigated the plaintiff which in his opinion should have been done by the sub-committee on finance. However during cross-examination he confirmed that the work of the board was to

do with the policy direction of the authority and it was not within the scope of the board members to deal with the day to day management of the authority. He also confirmed that he did not know when the vehicle was taken to Nairobi.

Parties also filed extensive submissions and authorities which clearly show that they conducted thorough research in this matter. I will refer to those cases cited in the course of the analysis of the evidence before me.

As I stated earlier in this judgment, the defendant did not offer any evidence to controvert the issues raised in the plaintiff's evidence regarding his dismissal from employment. However the plaintiff raised legal issues in their written submissions regarding the defendant's power to terminate employment of an employee as provided for in their terms and conditions of service and code of regulation and also the employment Act. I will ignore issues of facts which have been irregularly introduced by the defence counsel through the written submissions. Counsel for the defendant made reference to extensive court cases regarding the interpretation of wrongful dismissal in which it has been agreed in several decided cases that an employer can terminate the services of an employee and what the employee is entitled to, is due notice as provided for in the letter of employment and if no notice is given damages should be restricted to the period of notice. See the case of **Githinji vs. Mumias Sugar Co. Limited [1991] LLR 1373 (CAK)**.

The position taken by the High Court and the Court of Appeal also reiterate the common law position with regard to termination of employment as was held in the case of **Rift Valley Textile Limited vs. Ogada [1992] LLR 308 (CAK)** where the Court of Appeal while setting aside the judgment of the High court held that:

“We have no doubt whatsoever that the law did not entitle the judge to do any of those things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it is also provided for what was to be done if either party was unable to comply with the said notice period namely to pay the other party for the notice period. In our view even though the respondent's dismissal was unlawful he had been paid under and in accordance with the terms of his contract with the appellant.”

As regards the claim for special damages the defendant's counsel submitted that special damages must be pleaded and since the plaintiff did not plead any special damages none should be granted and in this regard counsel put forward the decision by the Court of Appeal in the case of **David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996 (Nairobi) (unreported)** where it was held;

“It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks by this court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Shabani v. City Council of Nairobi (1982-88) 1KAR 681 at page 684:

“..... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C. J. in Bonham Carter vs. Hyde Park Hotel Limited (1948) 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages. They have to prove it.”

On the part of the plaintiff, counsel also filed written submissions and urged the court to award the plaintiff a sum of Kshs 1,389,120/= being one month's salary in lieu of notice, severance pay for five years, leave earned and not taken and general damages and exemplary damages. Counsel for the plaintiff relied on the authority in the case of **Tobias Ogani Auma & Others vs. Kenya Airways Corporation Nairobi HCCC No. 4434 of 1992** where the plaintiff was ordered to be paid for the remaining period of his contract since the unlawful termination. Also in the case of **Michi Gitau –vs- National Social Security Fund Nairobi HCCC No. 3264 of 1993** the High Court found that the plaintiff was unlawfully

dismissed by the defendant while on leave and was not given an opportunity to be heard before the decision to terminate his services was arrived at. The court also found that the procedure adopted by the defendant in dismissing the plaintiff was arbitrary and tainted with malice. The court awarded damages to the plaintiff assessed at Kshs 400,000/- as well as special damages. In determining the issues in controversy the matters to bring to bear is whether the plaintiff has proved his case to the required standard i.e. the lawfulness or otherwise of his termination from employment. The plaintiff's contract of employment was stipulated in the letter of appointment and more specifically spelt out in the defendant's code of regulation and scheme of work.

According to the terms and conditions of service and code of regulations an employee can be suspended under regulation 7-15, 4(b) due to an act of misconduct. An employee can also be summarily dismissed under regulation 7-15(2) for reasons stipulated thereunder which includes misappropriation of funds or property of the authority. The evidence before me shows that the plaintiff's services were terminated on allegations of misappropriation of the authority's property namely the loss of the Pajero engine. The plaintiff sought to exonerate himself from the loss of the engine and set out to show that his dismissal from employment was wrongful and actuated by malice. There was no evidence to controvert the plaintiff's evidence and in this case I find that the plaintiff's dismissal was wrongful.

Having found that the plaintiff's dismissal was wrongful the issue to determine is the measure of damages. It is generally agreed from the decisions by the Court of Appeal that the principle to be followed is that the damages to be awarded in a case of unlawful dismissal should be limited to the period of notice provided for in the contract of employment. This position is also the one taken in common law as articulated by the House of Lords in the case of **Addis v. Gramophone Co. Ltd** where it was held that:-

“In an action for wrongful dismissal, the jury in assessing the damages, are debarred from awarding exemplary damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain fresh employment.”

According to the plaintiff's letter of employment read together with the terms and conditions of employment the plaintiff was entitled to one month's salary in lieu of notice if his services were terminated by the employer. The plaintiff also led evidence to the effect that he suffered loss as a result of the summary dismissal on the grounds that he had stolen from the authority. I would find that the allegations labeled against the plaintiff that he had stolen an engine were actuated by malice, granted that if there was evidence to support the allegations that the plaintiff had stolen the engine the best option for the defendant was to institute criminal proceedings against the plaintiff. In deed the plaintiff requested the defendant to involve the police to investigate whether he had stolen the engine. For this reason I am satisfied that the plaintiff's case can be looked in two ways.

Firstly, the unlawful dismissal for which I would award the plaintiff one month's salary in lieu of notice. I would take it that the loss that the plaintiff suffered was more due to the allegation of theft. If the defendant had not made the allegations of theft which they failed to substantiate either before this court or before the police the plaintiff would not be entitled to this award of damages. It is evident that the plaintiff suffered as a result of the malicious labeling that he had stolen from the defendant an engine worth Ksh 290,000/ which sum was supposed to have been deducted from his benefits. I assess the loss suffered by the plaintiff and hereby award him Kshs 290,000/=. Judgment is hereby entered for the plaintiff as follows:

- a) Kshs 27,785/= being one month's salary in lieu of notice.
- b) Kshs 27,785/= being in lieu of the leave not taken.
- c) General and exemplary damages of Kshs 290,000/=
- d) The costs of the suit.

It is so ordered

Judgment read and signed on 9th day of November, 2007

M. KOOME

JUDGE