



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

CIVIL CASE 53 OF 2004

JAFRED MAKHAKHA PLAINTIFF

V E R S U S

PAN AFRICAN PAPER MILLS DEFENDANT

J U D G M E N T

The suit herein was originally filed in the High Court at Bungoma but was on 9-6-2004 transferred to this court. It had been partly heard by the Honourable Mr. Justice J. K. Sergio. On 29-11-2004, the parties through their advocates recorded a consent to the effect ***“that the evidence of the Plaintiff, Jafred Makhakha as recorded may be taken as having been given before me.”*** On 29-11-2004, the Plaintiff continued with his evidence in chief before me and called one witness, Peter Kabuga Ondari (PW2) after which he closed his case. The Defendant called one witness, Stanley Andika Mukoko, its Deputy Personnel Officer and closed its case.

The parties put in written submissions in October, 2006.

In the suit herein, the Plaintiff sought to recover from the Defendant which had employed him damages on account of wrongful termination of employment. In paragraph 3 of his plaint dated 24-10-2000, the Plaintiff averred that ***“at all material time the Plaintiff was the assistant engineer to the Plaintiff”*** and that ***“without any prior breach of terms of employment or misbehaviour to warrant any reprimand or warning”***, the Defendant on 27th February, 1995 wrongfully terminated the Plaintiff’s employment on alleged absenteeism although the Plaintiff was on leave.

These allegations were denied by the Defendant in its defence in which it contended that the Plaintiff’s employment was terminated lawfully and without malice.

The Plaintiff did not produce his letter of appointment which he said he had misplaced. He was employed by the Defendant on 5-5-1978 as a supervisor trainee in Engineering department of the Defendant after his A Levels. By a letter dated 9-6-1989, he got promoted to the position of Assistant Engineer with effect from 1-1-1989. The Plaintiff had graduated from Alliance High School and had a Principal Pass in pure Maths. He had been given a certificate of long service dated 4-5-88.

On 9-2-1995, while working with the Defendant, the Plaintiff was arrested in connection with a criminal offence in which it was alleged that he was spreading rumours about robberies in Webuye town. He was released on bond on 15-2-1995. On the day he was arrested, the Plaintiff testified that he notified the head of his department, one Krishan, who approved and gave 23 days leave to be earned which were to be brought forward. He was later acquitted in the criminal case in Bungoma.

On 8-3-1995 the Plaintiff received a letter dated 27-2-1995 terminating his employment with the Defendant. The termination letter which was produced as exhibit No. P1 shows that the cause of termination was due to the Plaintiff's arrest and confinement in lawful custody. At the time he received the termination letter, the Plaintiff had worked with the Defendant for 16 years and 10 months, having joined the Defendant on 5-5-1978 and at the time his employment was terminated the Plaintiff was in management of the Defendant in the position of Assistant Engineer. The Plaintiff alleged that he was not given opportunity to be heard before termination of his employment but in evidence he admitted that he had not made this allegation in his letters before action. Although the Plaintiff alleged malice in termination of his employment, he did not in his plaint provide any particulars of malice. He also conceded that the claim he was making in court was different from the claim made by him in the plaint in the suit. In the suit herein the claims were for (a) unpaid special terminal benefits, (b) general damages, (c) costs of the suit and (d) interest on (a) (b) and (c). These claims were denied by the Defendant which maintained that the Plaintiff's employment was terminated lawfully.

The Plaintiff called one witness, a practicing Certified Public Accountant, one Peter Kabuga Ondari, who testified that he had done financial computations for the Plaintiff following the Plaintiff's termination of employment and produced a report (exhibit No. P8) which he amplified in his evidence by stating that the Plaintiff was entitled to KShs.133,680,285/= for loss of salary earnings, loss of pension, loss of medical provision, pension, amongst other claims. But the suit did not contain any claim for special damages and the evidence and claims for special damages were therefore misplaced. The only special damages which could be said to be part of the claims in the suit were the amounts set out in paragraph 6 (a) to 6 (j) of the plaint which, in absence of the letter of employment showing that the terms of employment included payment of the monies claimed, the claims were not maintainable as the general law did not bind the Defendant to pay the sums claimed. In short, the Plaintiff did not adduce evidence to prove that he was entitled to the various sums set out in paragraph 6 of the plaint. It was held in **Galaxy Paints Co. Ltd. v. Falcon Guards Ltd. [2000] 2 EA 385** that ***"issues for determination in a suit generally flow from the pleadings and a trial court would only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings."***

The evidence in this suit shows that the only claim that can stand if proved is the claim for wrongful termination of employment. The circumstances in which the Plaintiff's employment was terminated shows that – he did not get notice to which he was entitled. In **Shimba Tourist Services Ltd. v. Wilson Mise Kigani CA Civil Appeal No.135 of 1994 NBI** (unreported) the court held that ***"in a claim by an employee against his employer for damages for wrongful dismissal, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with its terms by giving either the proper notice or salary in lieu thereof."***

The Defendant's letter dated 27-2-1995 terminated the employment of the Plaintiff with effect from 27-2-1995. That was a notice of a day or less. The evidence of the Plaintiff and the Defendant's witness, Stanley Andika Mukoko, the Defendant's Deputy Personnel Manager shows that the Plaintiff was not dismissed because of bad conduct. If that was so, it would have been stated. Stanley Andika Mukoko's allegations were not in consonance with the contents of the termination letter which alluded to the Plaintiff's absence from duty due to the criminal case he had in Bungoma. The Plaintiff's evidence that he was granted leave days was not dislodged. The evidence shows that the termination was wrongful. The Plaintiff is clearly entitled to one month's pay in lieu of notice computed on the basis of his last salary of Shs.10,478/85. Although the Defendant expressed intention to settle payment of Retirement Benefits Scheme funds, this was not claimed in the plaint and I see no basis for granting it.

But the Defendant offered to the plaintiff one month's salary in lieu of notice. This is what the Plaintiff was entitled to. The Plaintiff's pay slip for the month of February, 1995 (exhibit No. P5) showed that he earned a basic pay of Shs.9,400/ and a gross pay of Shs.10,475.85. The Plaintiff has no other legitimate claim against the defendant.

In the result, I dismiss the suit and make no order as to costs.

Delivered, dated and signed at Kakamega this 8th .day of November, 2007

G. B. M. KARIUKI

J U D G E