



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

Civil Case 625 of 1997

BONIFACE M. KABAKA.....PLAINTIFF

VERSUS

M.O. MUGASIA.....1ST DEFENDANT

KENYA RAILWAYS.....2ND DEFENDANT

JUDGMENT

The plaintiff was employed by the 2nd defendant on 22nd October 1991 as a lecturer at the Railway Training School and the 1st defendant was the Principal of the Institute while he continued to lecture at the institute he enrolled for masters in Philosophy at the Catholic University of Eastern Africa. He absented himself for one week from 23rd January 1997 to go and take his end of Semesters Examination. He did not inform his employer nor did he have permission to be absent.

On 14th February 1997 he received a letter from the Principal of the Institute 1st Defendant terminating his services. The letter read:-

MR. B.M. KABAKA

ASSIST. LECTURER GROUP "RA"

RAILWAY TRAINING INSTITUTE

NAIROBI.

FORFEITURE OF APPOINTMENT

It has come to my notice that you have been absent from duty without authority for a period of 7 days from 23rd January 1997 and your whereabouts remains unknown to us to date. You are therefore being treated to have deserted duty and to have forfeited your appointment with this corporation with loss of all the privileges from todate aforementioned (i.e. 23rd January 1997) in terms of PRG13(e). Consequently you are required to return any Railway Properties that may be in your possession to this office

immediately and to vacate the Railway Quarters that you are now occupying immediately.

M.O. MUGASIA

PRINCIPAL

The Plaintiffs' services were terminated in terms of PRG 13(e) which provide as follows:-

PRG 13(e) ABSENCE WITHOUT LLEAVE

“e” An employee must not be absent from duty without permission or reasonable excuse, and if he so absents himself for a continuous period of more than seven days he may be regarded as having forfeited, his appointment with effect from the date of such absence. If such employee subsequently presents himself for duty he may, if the circumstances warrant such a course, be reinstated in the service and be permitted to resume duty, subject to such disciplinary measures as may be taken against him. An employee who is regarded as having forfeited his appointment under the provisions of this paragraph will be deemed to have been dismissed in accordance with these regulations.”

Upon receipt of the Letter of terminating his services and after several correspondences the plaintiff brought suit against the defendants seeking:-

- (a) A permanent injunction to restrain the defendants by themselves directly and or indirectly as through their agents from:-
 - (i) Terminating the services of the plaintiff
 - (ii) Withholding the plaintiffs salary or otherwise acting to his prejudice
 - (iii) Evicting the plaintiff from his official residence
- (b) A declaration that the purported termination of the contract of employment is null and void and that the plaintiff is still lawful employee of the corporation
- (c) An injunction to restrain the 2nd defendant from acting upon the purported dismissal of the plaintiff.
- (d) General damages for loss of terminal benefits of £437,600 for unlawful dismissal as particularized in paragraph 6A.

The defendants on being served with summons entered appearance and filed defence in which they aver that the plaintiffs dismissal was legal and procedural and that the plaintiff had been issued with warning letters about his absenteeism on several occasions. They deny that the plaintiff suffered loss as a result of his dismissal, that further and without prejudice to the aforesaid the defendant aver that the plaintiff lost all privileges to him when he forfeited his appointment with the second defendant after he absented himself from duty without permission.

That the principal of the institute the 2nd defendant had power and authority to terminate the services of the plaintiff upon forfeiture of his appointment and that the plaintiffs interest in the 2nd defendant's premises HOUSE NO. L5 LAVINGTON legally terminated when he forfeited his appointment with the 2nd defendant. Both the plaintiff and the defendant agreed by consent not to call any witnesses and requested the court to rely on their written submissions and the exhibits discovered and filed herein.

The plaintiff in his submissions admits that he absented himself from duty without permission or authority from his employer for one week when he went to take his masters degree examination at the CATHOLIC UNIVERSITY OF EASTERN AFRICA but contends that when he reported back on duty he

was denied the opportunity to explain and justify his absence. But his most contentious issue here is whether the Principal of the institute had the power to dismiss him and whether the right procedure was followed in terminating his services.

At the very on set, it is the defendants case that the Plaintiff as drafted does not disclose any cause of action. The first prayer is for permanent injunction restraining the Defendants from terminating the services of the plaintiff and from withholding or evicting the plaintiff from the house occupied by him. It is the Defendants case that the court cannot grant such prayers as the law recognizes that the relationship between the employee and the employer is a contractual one and parties cannot be forced to remain in such a relationship against the will of any one of the parties. See the case of ERASTUS KWAKA OMOLO & OTHERS VS. AFRICAN EVANGELISTIC ENTERPRISES – HCCC NO. 2233 OF 1991 (unreported).

The defendants further submitted that the plaintiffs right to a salary and to housing is tied to his continued employment by the Defendants and once the employment is terminated irrespective of in what manner, then the privilege to a house goes with it. See the case of HELLEN MAKONE VS. STANDARD CHARTERED BANK (K) LTD HCCC 2897 OF 1997 (unreported).

The defendants further aver that the Kenya Railways Corporation Disciplinary Process is quasi judicial and it is the defence submission that this court cannot in a regular suit sit on appeal on its decision. Its decision can only be reviewed by the court by way of judicial review. That being the case, it is not open to the plaintiff to urge case as against the second Defendant by way of a Plaintiff. Lastly the defendants have pleaded in their defence that no notice has been served before the commencement of this pleadings. Under Section 87 of the Kenya Railways Corporation Act Chapter 397 it specifically provides that before proceedings are instituted, a statutory notice of thirty days must be served. This requirement is mandatory and there is no discretion to dispense with it. See the Case of PETER MWOMBE & OTHERS VS. KENYA RAILWAYS CORPORATION – NKU HCCC NO. 489 OF 1998 and J. WAMBUGU & OTHERS VS. KENYA RAILWAYS CORPORATION NBI HCCC NO. 3234 OF 1997 where it was held that failure to serve the said notice is fatal. But this ought to have been raised at the beginning.

As I had said earlier the plaintiff was dismissed for being absent from duty without permission or authority for 7 days. The dismissal was under the provisions and in terms of PRG 13 (e) which provides that if an employee absents himself from duty for more than 7 days without permission or reasonable excuse he may be regarded as having forfeited his appointment with effect from the date of such absence. But his main quarrel in respect of the manner he was dismissed is that the Principal of the Institute had no power whatsoever to terminate his services and more so an employee in Group RA in which the plaintiff falls.

But according to the defendants submissions the plaintiffs dismissal was legal and procedural with due respect to counsel for the defendants, I do not agree with the defendants submissions. The regulations are very clear on this. PRG 13 (c) provides for dismissal of contract employee.

“If the Managing Director considers that the conduct of an employee serving on Agreement is such as to require his dismissal in terms of his contract, he must so inform the employee in writing, setting out the details of his conduct and will require him to show cause why he should not be dismissed.

In the case of an officer in Group RA and above the Managing Director will submit to the Board a copy of his letter to the officer and of the correspondences, if any, of the officer as well as his own recommendations, and the Board will decide what action should be taken regarding the officer concerned.

For the above reasons I have come to the conclusion that the plaintiffs services being an officer in Job Group RA were unlawfully terminated. It is the defendants submission that in the event the court finds that the plaintiff was wrongfully dismissed, the law is well settled in this respect that damages for wrongful termination of a contract of employment is restricted to the salary an employee would have earned during the period stipulated in the contract of employment. See the case of OMBANYA VS. GAILEY & ROBERTS LTD (1974) EA 522 KENYA COMMERCIAL BANK LTD VS. OMAMBIA

CIVIL APPEAL NO. 166 OF 1991 (unreported) and GITHINJI VS. MUMIAS SUGAR CO. LTD CIVIL APPEAL NO. 194 OF 1991 (unreported).

Under the plaintiffs terms of employment the plaintiff would only be entitled to a month's notice in which case the plaintiff would only be entitled to one months pay.

Although the corporations terms of employment stated that the appointment was terminable on one month's notice, the contract of employment unincorporated regulations prescribing the procedure to be followed regarding the dismissal of the officers for breaches of discipline. That procedure incorporated a series of stages including the Principal of the Institute where the plaintiff was a Lecturer writing a letter to the Managing Director about the conduct of the of the plaintiff Managing Director writing the plaintiff requiring him to show cause why he should not be dismissed. The Managing Director to submit a copy of his letter to the officer and of the Representations if any of the officer as well as his own recommendations to the Board and the Board to decide what action to be taken regarding the officer concerned which would normally take considerably longer than a month to implement.

In the instance case the services of the plaintiff were wrongfully terminated by the Principal without following the laid down procedure.

Once the corporation had decided to dismiss the plaintiff on disciplinary grounds it was required to carry out all the steps of procedure that applied and it had admittedly failed to do so.

The wrongful dismissal of an employee did not put an immediate end to the contract of service because applying the ordinary principles of the doctrine of repudiation, it was merely a repudiation of the contract by the employer which only resulted in termination of the contract when it was accepted by the employee.

It followed that the wrongful dismissal of the plaintiff did not immediately terminate the plaintiffs contract of service and in particular did not destroy his right under the contract not to be dismissed on disciplinary grounds until the prescribed disciplinary procedure had been carried out and to be compensated accordingly if they were not. See GUNTON VS. L B RICHMOND UPON THAMES 1980 3 ALL ER 577.

The plaintiff is accordingly entitled to damages assessed on the basis of his salary for the period from 14th February 1999 until the date when the proper disciplinary procedure if carried out expeditiously might reasonably have been concluded plus one months notice.

An employee dismissed in breach of his contract of _employment cannot choose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period; he must sue for damages for the wrongful dismissal and must of course mitigate those damages so far as he reasonably can. See DENMARK PRODUCTIONS LTD VS. BOSCOBEE PRODUCTIONS 1968 3 ALL ER 513.

It is clear beyond argument that a wrongfully dismissed employee cannot sue for his salary or wages as such, but only for damages. It is also in my view equally clear that such an employee cannot assent that he still retains his employment under the contract.

If a servant is dismissed and excluded from his employment, it is absurd to suppose that he still occupies the status of a servant. Quite plainly he does not. The relationship of master and servant has been broken, albeit wrongfully by one side alone. The same would apply to a contract of service, such as an agency. If a two year contract is made between Principal and agent, and the Principal wrongfully repudiates the contract of agency after only one year, quite plainly the agent cannot hold himself out as still being the agent of the principal. He is not. The relationship of principal and agent has been broken. I do not think it follows, however, from the rapture of the status of master and servant, or principal and agent, that the contract of service or the contract of agency has been terminated by the wrongful act of the master or principal. What has been terminated is only the status or relationship.

So in the result the servant cannot sue in debt for his wages which he is wrongfully deprived of the opportunity to earn or for his fringe benefits such as the house which he had a right to occupy as part of his emoluments. As the relationship of master and servant is gone, the servant cannot claim the reward for service no longer rendered.

As indicated I am of the view that the relationship of master and servant was broken on 14th February 1999 but this did not deprive the plaintiff of this contractual right to be protected from a notice of dismissal for the alleged disciplinary offence before the contractual disciplinary procedures had been duly completed.

I have reached the conclusions that the plaintiff is entitled to damages sustained by him by reason of his wrongful exclusion from the service of the corporation from 14th February 1999 until the expiration of a notional one month notice the proper disciplinary procedures if followed, could have been concluded. This day should be determined by estimating a reasonable period from 14th February 1999 for the purpose of expeditiously commencing, carrying out and concluding the disciplinary procedures contained in the Regulations as to staff discipline and more so officers in Group RA in which the plaintiff fails. Not all those procedures are relevant to the estimation of this period. The relevant procedures are in my opinion those defined under PRG 13 (c) of the Regulations. Without having heard argument and therefore without expressing a concluded view, it is my considered opinion that a period of 4 months should be sufficient for the purpose indicated making five months in all from 14th February 1999.

The plaintiffs' salary had been increased from £5061 to £5220 per annum with effect from 1st October 1994 in the scale of £4743 by 159-5379x192-6339x219-7434.

Accordingly there shall be judgment for the plaintiff for Shs.43500 being the salary for 5 months.
(5220x20x5)12

The plaintiff is also entitled to costs of this suit plus interest. It is so ordered.

DATED and delivered at Nairobi this 28th day of March 2006.

J.L.A. OSIEMO

JUDGE