



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

Civil Appeal 155 of 2004

**KENYA REINSURANCE CORPORATION LTD.....
APPELLANT**

VERSUS

**ELIUD M. NDIRANGU.....
RESPONDENT**

J U D G M E N T

On 8/3/2004, the appellants moved to this court, by way of an appeal, challenging the judgment of the Subordinate Court in CMCC No. 4271 of 1997, on the following three (3) grounds:-

1. That the learned Magistrate erred in law and in fact in holding that:

(i) the reasons given for the dismissal of the Respondent collapsed when the Respondent (accused) was acquitted of the criminal charge in Criminal Case No. 1992 of 1995.

(ii) Because of the acquittal of the Respondent in Criminal Case No. 1992 of 1995, the Respondent (Plaintiff) was and still entitled to be paid three months salary in lieu of notice which amounts to 166,441/20.

2. The lower court erred and totally misconstrued the law when considering the issue of payment in lieu of notice vis-à-vis the Criminal Case No. 1992 of 1995.

3. The Learned Magistrate grossly erred in law in declaring that the Respondent was entitled to be paid K.Shs.166,441/20 being payment in lieu of notice whereas they never sought an order declaring the summary dismissal unlawful.

Wherefore the appellants pray that: the lower courts finding that the Respondent was entitled to three months pay [K.Shs.166,441/20] in lieu of Notice be set aside; this court sets aside the lower court's finding that the reasons given for the summary dismissal of the Respondent collapsed when Respondent was acquitted of the Criminal Charge; an order dismissing the Respondent's claim of K.Shs.166,441/20 with costs to the appellant.

The facts in the case from which this appeal arose are that: On 3/3/1987 the Plaintiff and the Defendant entered into an employment contract, under which the Plaintiff was to be paid K.Shs.55,480/40 per month. The Plaintiff avers that on 15/6/95 the Defendant unlawfully and without justifiable reasons summarily dismissed the Plaintiff from employment without three months notice and refused to reinstate him to the job. Further, avers the Plaintiff, on 12/5/95, the Defendant had falsely and maliciously leveled

allegations against the Plaintiff at the Central Police Station, Nairobi, as a result of which the Plaintiff was arrested and detained for three days at the said Police Station. On 24/5/95, the Plaintiff was charged with several offences including stealing by a person employed in the Public Service contrary to Section 280 of the Penal Code, in CMC 1992 of 1995.

The Plaintiff was tried, but acquitted on 8/2/1996 under Section 210 of the Penal Code.

He then sued and claimed: Special damages for three months salary in lieu of Notice [K.Shs.166,441/20] leave allowance of K.Shs.83,745/- for the years 1992/93; 1993/94; 1994/95; Advocates fees in the criminal case [K.Shs.100,000/-] travelling to and from court – [K.Shs.3,900/-.] He also prayed for general damages.

In its defence, the Appellant admitted summarily dismissing the Respondent but averred that the dismissal was justified under the Respondent's terms and conditions of employment under the Employment Act, as he, the Respondent, was guilty of gross misconduct.

Ground of Appeal No. 1 raises the issue of the effect of acquittal in the criminal case, **vis-à-vis** the Civil Case and appeal before this court. The Learned Magistrate held that the reasons given for the dismissal of the respondent collapsed upon the Respondent's acquittal in the Criminal case proceedings. That is legally incorrect.

Under the Employment Act, the employer is duty bound – has a legal/statutory obligation – to give the reasons for terminating an employee's employment. Such reasons do not have to have undergone legal scrutiny to establish their irrefutability or their correctness. All the Act provides, under Section 17(g) of the Employment Act, Cap. 226, Laws of Kenya, is:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful case.....if 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 employe's property”

From the above statutory provision, it is apparent that the lower court misconstrued the legal implications of the acquittal in the criminal case **vis-as-vis** the summary dismissal. The acquittal is not tantamount to the erroneous conclusion, by the lower court, that the Respondent was cleansed of the “**reasonable and sufficient grounds of suspicion of having committed a criminal offence**”

Of even greater force is the legal position that the standard of proof in criminal cases is totally different from that required in Civil cases. An acquittal in a Criminal case because the prosecution has not proved its case beyond all reasonable doubts is not the same as a finding of liability on the balance of probabilities required in Civil cases.

I also find it contradictory of the Learned Magistrate that whereas the employment contract did not provide for salary in lieu of notice under summary dismissal, still the Respondent was entitled to the three months salary in lieu of notice. This confusion can only be explained by the error in thinking that acquittal cleansed the Respondent from any reason to warrant summary dismissal. Once such position is held, as I have done, to be incorrect in law, nothing further need to be said on the lower court's holding. It is untenable.

The above holding subsumes the issues raised in ground of appeal No. 2, and I need say nothing more on that ground.

Ground of appeal No. 3 is partly subsumed in the findings and holdings in grounds of appeal No. 1 and 2 above. Once it is held that there is no salary in lieu of notice where the Respondent is dismissed summarily, the question of entitlement to salary in lieu of notice does not arise. This is as per the contract of employment entered into by the parties on 3/3/1987.

The court does not write contracts for the parties. The court's role and place in such contracts is simply to interpret the terms and conditions therein.

In the present case the contract document has, under Section 22 (c) 7, provision for summary dismissal, which is directly lifted from Section 17(g) of the Employment Act, Cap. 226, Laws of Kenya, and incorporated into the contract between the parties.

I need to add that ground of appeal No. 3 clearly repeats the issues raised and disposed of in grounds of appeal No. 1 and 2. The Learned Magistrate's judgment clearly shows that the court was aware that there was no prayer for declaration of the dismissal as unlawful. The lower court never made such declaration.

The K.Shs.166,441/20 was awarded under the erroneous view that the acquittal at the criminal case proceedings cleansed the Respondent of the gross misconduct, entitling the appellant to invoke the summary dismissal clause. This led to the erroneous conclusion that the Respondent was thus entitled to notice or salary in lieu of notice.

I have already disposed of that misconception.

All in all therefore, the appeal succeeds on all the grounds.

The Judgment of the Learned Magistrate is hereby set aside; the Respondent's claim of K.Shs.166,441/20 is hereby dismissed.

The Respondent is ordered to pay the costs of both this appeal and the costs of the Civil Case CMCC 4271 of 1997.

It is so ordered.

DATED and delivered in Nairobi, this 25th Day of October, 2006.

O.K. MUTUNGI

JUDGE