REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET
APPELLATE SIDE
CIVIL APPEAL 32 OF 2003

(Appeal from Judgment and decree of the Chief Magistrate at Eldoret in Eldoret

CMCC 1132 of 2001, dated 13/3/2003 by Solomon Wamwayi Esq. (CM).

JAMES KOSKEI CHIRCHIR.....APPELLANT

V E R S U S

CHAIRMAN – BOARD OF GOVERNORS ELDORETPOLYTECHNIC..RESPONDENT

JUDGMENT

James Koskei Chirchir, joined the services of Eldoret Polytechnic in April 1989 as a plumber where he worked until 8/10/2001 when his services were terminated, on the grounds that he had disposed of some electrical items with the intention of stealing an act which he denied and maintained that he had authority to dispose of the items.

Being aggrieved by the termination which he maintained was unlawful, he moved the court on 23/10/2001 and made the following claims, in his amended plaint of 15/7/2002:

1. Underpaid house allowance for the months of:

July, 2000,	Shs. 590/-
July – August 2001,	Shs. 2,400/-,
October, 2001	Shs. 2,900/-
Totaling	Shs. 5,890/-.

2. Salary arrears for:

July – December 1995 and October 2001	Shs. 9,785.70.

3. Unpaid leave allowance for 2001 Shs. 10,205/-.

4. Gratuity for 12½ years Shs. 127,562/50.

5. Loss of future earnings.

6. Three months salary in lieu of notice Shs. 30,615/-

7. Damages for wrongful dismissal.

He also claimed costs, and interest on the above awards.

The Polytechnic which denied that Chirchir had been its employee however averred that his dismissal was lawful and denied owing him any money by way of unpaid dues or damages, or that it had deprived him of future earnings at all.

After a full trial, the learned trial Magistrate found that Chirchir had not been given a fair hearing, and as a result of which he had been condemned unheard; that in the circumstances, his dismissal was unlawful. He then proceeded to award him two months salary in lieu of notice in accordance with the Collective Bargaining Agreement (CBA), between KUDHEIHA (" the Union') and the Ministry of Education, which I shall now refer to as 'the CBA', and though he also granted him unpaid leave for the year 2001, which sums totaled Shs. 20,430/-, he however declined to grant him gratuity as he had not provided sufficient proof that he was a member of the Union, nor was he successful in his other prayers.

Being aggrieved by the decision, Chirchir whom I shall hereinafter refer to as 'the appellant' has now preferred this appeal which is based on nine grounds.

1. The learned trial magistrate erred in law and fact in partially relying on the provisions of the CBA instead of relying on the whole of it in arriving at his decision.

2. The learned trial magistrate erred in law and fact in holding that the appellant was not entitled to rely on the provisions of the said CBA, which was in force.

3. The learned trial magistrate erred in law and fact in holding that the appellant was entitled to two months salary in lieu of notice of Kshs. 13,620/- instead of three months salary in lieu of notice of Kshs. 20,430/-.

4. The learned trial magistrate erred in law and fact in holding that the appellant had not proved the claim of Gratuity of Kshs. 127,562.50 while there was ample evidence to that effect.

5. The learned trial magistrate erred in law and fact in holding that there was no evidence to support the claim on salary arrears of July to December 1995 of Kshs. 9,785.70 while the appellant had actually proved that he was entitled to the claim.

6. The learned trial magistrate erred in law and fact in not awarding the appellant the claim of his salary for the month of October 2001. 7. The learned trial magistrate erred in law and fact in holding that the appellant had not proved his claim on house allowance underpayment for the month of July 2000, July and August 2001 and the House allowance for the month of October 2001 while he had actually proved that he was entitled to that claim.

8. The learned trial magistrate erred in law and fact in holding that the appellant had not proved that he was entitled to the loss of his future earnings for a period of 23 years while there was ample evidence to that effect.

9. The learned trial magistrate erred in law and fact in applying wrong principles to arrive at his decision.

Mr. Omwenga, learned counsel for the appellant, chose to urge all the 9 grounds, and in the process, he consolidated grounds 5 and 6 as one ground.

It was his submission the trial Magistrate had made a proper finding in relying on the CBA, on which basis he had found that the dismissal was unlawful, and after which he made the award, but that the

learned Magistrate seemed to have gone against his earlier finding, when he declined to take the CBA into account, that therefore, the trial Magistrate had erred in applying the provisions of the agreement partially, and he had therefore no basis for rejecting the other claims; that having found that the dismissal was unlawful, the appellant should have been awarded all his terminal dues including arrears of salary as well as gratuity as he served continuously for 12 years and a half years.

It was also his submission that, the appellant was entitled to loss of earnings for 23 years, and to this effect he relied on Esther Adagala v Attorney General H.C.C.C. (Nai) No. 4086 of 1992, where an award had been made to the plaintiff for loss of future earnings after it had been established that her dismissal was unlawful, and that she was unable to secure another job due to the circumstances surrounding her dismissal.

However, the respondents have filed their cross appeal, which is based on the grounds that the learned Magistrate erred in law and fact in making and finding that the plaintiff was wrongly dismissed, when sufficient evidence had been adduced to prove that prior to the summary dismissal, the principals of natural justice had been applied and adhered to, and that he had also erred in awarding the plaintiff Kshs. 6,810/- being unpaid leave for the 2001 when the same had not been proved to the required standards, and also in awarding him Kshs. 13,620/- being two months salary, when the same should not have been awarded under summary dismissal. It was the submission of Mr. Andambi, learned counsel for the respondent that it was wrong for the trial Magistrate to find that termination was unlawful, but he stated that the only award, which should have been available to the appellant should have been three months salary in lieu of notice.

I have taken the submission of both counsels into account and I would like to point out at this initial stage, though his letter of appointment indicated that his terms of service would be subject to the prevailing CBA, he however had an option, and could choose whether or not to become, or remain a member, a situation which is clearly catered for in clause 7 of the CBA which clearly stipulated that no employee, such as this appellant would be compelled to be a member thereof.

Though he had joined the Union during his early years of employment, he later withdrew his membership, and by his own admission during the trial, he was not a member of the Union at the time of his dismissal.

Since he was not such a member, he could then not derive any benefit from the CBA, and on that account alone the learned trial magistrate was partly right when he declined to rely on the said CBA, but I find that he was otherwise wrong when he relied on it and proceeded to make an award of two months salary in lieu of notice.

What then should an employee who is not a member of the relevant Union fall back on should a need arise, such as arose in this appellants case?

In my mind, the relationship between parties to a written contract, such as the appellant and respondent herein, would otherwise be governed by the terms of the Employment Act Cap 226 of the Laws of Kenya, which recognises parties to a contract of service be it “written or oral and whether expressed or implied ……..”

The issue that would then arise is whether or not the termination was lawful.

Section 17 (g) of the said Act, specifies one of the instances which would justify summary dismissal, which instance the respondents claim to have been warranted, for it is stipulated therein that:

> ***‘Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal-***

(g) 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 employer's property".

Upon perusal of the exhibits on record, I find that having admitted in writing that he had tampered with the respondents property, in a manner that, to my mind, incriminated him in a criminal offence, and having attended the meeting of the disciplinary committee of the Board, where his letter was tabled and considered, and where a resolution to dismiss him was arrived at the right procedure was adhered to up to that point. But it is what happened thereafter that raises concern, for he was dismissed soon after the committee met and before the Board had ratified the decision of its committee. I find that in dismissing him before the ratification, the principal overstepped his jurisdiction for it was imperative that the Board ratifies the decision first, and in the circumstances, the procedure that was followed was not proper, and for that matter the dismissal was unlawful.

That being the case then I have had to refer to section 5 (3) of the said Act to establish what he would be eligible for in the circumstances, for it is clearly stipulated therein that *"where an employee is summarily dismissed for lawful cause, he shall be paid on dismissal all the moneys, allowances and benefits due to him up to the date of his dismissal"*, but it cannot be gainsaid that where a party files an action, in which he claims such dues, his claim is for quantified sums, and it shall be for special damages.

It is trite that special damages must not only be specifically pleaded, but that they must be specially proven.

I find that though he had specifically pleaded his special damages, the appellant however failed to specially prove them, and it was not for his counsel to make an attempt of it at the level of appeal. On that ground I find no reason to fault the finding of the learned trial magistrate.

Having found the procedure to dismiss him was not proper, and in view of the above finding, he would be entitled to three months salary in lieu of notice, which is Shs.30,615/00, and not to any other sums as he was not able to specially prove them. Likewise, his claim for loss of future earning was not proven on a balance of probability.

I do therefore set aside the award by the learned trial Magistrate and instead do make an award of Shs. 30,615/00 as shown hereinabove. Each party shall bear its own cots of this appeal as well as the costs in the subordinate court.

Dated at Eldoret this 16th day of June 2005.

JEANNE GACHECHE

Judge

Delivered at Eldoret this 16th day of June 2005**.**

GEORGE DULU

Ag. Judge

Delivered in the presence of:

Mrs. Kabuga for appellant

Mr. Andambi for respondent