



PETER ONGONDIPLAINTIFF

VERSUS

KENYA PORTS AUTHORITYDEFENDANT

JUDGMENT

Peter Ongondi, the plaintiff, sued the Kenya Ports Authority seeking a mandatory injunction, “to compel the defendant to put the plaintiff back into possession of his dwelling house within the Inland Container Depot, Embakasi”. The plaintiff sought a “declaration that the dismissal of the plaintiff by the defendant was wrongful and unlawful”.

The plaintiff also sought, “Damages for loss of gratuity and loss of half salary from 19th December, 1997 to 19th September 1999 and damages for loss of leave allowance and (3) months salary in lieu of notice”. The plaintiff also prayed for costs of the suit.

The plaintiff’s cause of action arose when he was placed on interdiction by the defendant on, “suspension of being involved in the disappearance of 215 sets of motor vehicle tyres from a container lying in the inland container depot at Embakasi where the plaintiff was working and as a direct result of the interdiction the plaintiff was earning only half salary”. The plaintiff claimed further that about 10th day of September 1999, the defendant unlawfully terminated his services in a summary manner without lawful cause and or justification.

The plaintiff went further to say that the “loss of tyres was investigated by the police and three people were arrested and arraigned in court having been charged. That he (the plaintiff) assisted the police with investigations and was called by the State as a witness.” The plaintiff lamented that he lost all benefits under his contract of employment because of the dismissal from work. The defendant denied that the plaintiff’s dismissal was wrongful. The defendant contended further that the loss complained of occurred when the plaintiff was on duty, and internal investigations were conducted which resulted in the plaintiffs interdiction and final dismissal.

The defendant admitted at para 11 “to having evicted the plaintiff from its premises and avers that upon the termination of the plaintiff’s services it was the plaintiff’s duty to surrender to the defendant property, including a dwelling house held by the plaintiff by virtue of his employment in default of which it was the defendant’s right to recover the same from the plaintiff. The defendant prayed finally for the dismissal of the plaintiff’s suit. In court during the hearing of the suit, the plaintiff Peter Histon Omalwa Ongondi testified that he sued the defendant because they dismissed his services alleging that he was involved in theft of goods in transit.

The plaintiff explained that he was working as a security guard. He had a letter of appointment dated 21st October 1988, which he produced in court. He was confirmed in his position on permanent and pensionable terms on 7th August, 1991. The plaintiff lamented that on 19th December, 1997 he received a letter of interdiction and thereafter complied with its terms, i.e. reporting on duty twice a week every Monday and Friday.

The plaintiff received a letter of dismissal on 10th September, 1999. He instructed her lawyer to write to

the defendant to notify them of his intention to sue over his dismissal. He produced the letters in court. He testified further that the defendant came to his house after that letter and started harassing him, and eventually forced him out despite his lawyer writing letters of protest.

The plaintiff denied allegations leveled against him saying that the matter was investigated and he was not charged with any offence. He produced over payslip to show that he was placed on ½ pay during the period of interdiction. The plaintiff asked to be given his job back as well as his house, he conceded however that when he was dismissed he was paid the half pay which had been withheld during the period of suspension. The plaintiff also explained on questioning that when one is dismissed, one is not paid anything.

The plaintiff also admitted having been paid his contribution under the Pension Scheme, with interest. The plaintiff lodged an appeal against his dismissal by the defendant, but the same was not considered as this suit was already in court. A Personnel Officer, with the defendant, Paul Kiprotich Cheruiyot testified that the plaintiff was employed with the defendant as a docket (non-skilled employees), with effect from 21st October 1988. The plaintiff was subsequently trained as a security guard then later confirmed as a security private, grade PA12. Because of the training, he was now considered skilled and assigned duties as a guard.

The witness confirmed that the Committee of Inquiry appointed by the defendant to investigate the allegations of theft found that the plaintiff was involved. The report prepared by the Committee was sent to the plaintiff's advocate, not the plaintiff, who had participated in the hearing.

The witness confirmed that the plaintiff was dismissed after report of the Committee had been read. That he was paid his dues, i.e. the half salary withheld during the period of interdiction. The plaintiff signed a payment voucher dated 8.10.99 to that effect. The witness stated further that the plaintiff was also paid cash in lieu of deferred pension. The witness produced evidence to show that the plaintiff was paid a total of Kshs.88,523/= under the head, plus leave allowance due to him in 1999. All the documents to support the payments made to the plaintiff were produced in court as exhibits.

The witness explained further still that the plaintiff was dismissed as per the Staff Regulations a copy of which he produced in court as an exhibit. The plaintiff appealed to the parent Ministry, the Ministry of Transport and Communications before he was dismissed. The letter was produced as an exhibit. The Ministry responded on 11.11.99 and copied the letter to the respondent. This letter was produced as an exhibit in court. The witness explained that it is the responsibility of the defendant to guard all properties in its yard in Mombasa, Nairobi, Kisumu, until duty is paid and such property is claimed by the owners. The defendant watches over the property as bailees, until it is claimed.

The witness prayed that the plaintiff's case be dismissed as his termination was not wrongful since he failed to act reasonably in the public interest. Reading para 8 of the defence, the witness clarified that the New Pension Rules under Retirement Revenue Benefits Authority came into being in January 1999, so when the defence was drafted in February, 2000, they were in operation and the defendant erroneously stated in the defence that it was not entitled to pension. However, this position was later corrected and the plaintiff was paid under the defendant's Pension Fund.

On re-examination, the witness confirmed that the plaintiff was paid all his dues. I have considered the oral evidence of the plaintiff and the defendant's representative a long side the pleadings filed. I have also considered the submissions which the parties filed. Together with all this was a list of issues which counsel for the defendant summarized and this forms part of his submissions. The plaintiff's termination arose from the incident of alleged theft of 215 tyres. The evidence relating to this is all on record, and the steps taken by the employer the defendant as investigations are going on. I consider the inquiry report to be very important because it is as a result of it, that the plaintiff was finally dismissed. The report concluded inter alia, "There is no concrete evidence to prove that Mr. Ongondi (the plaintiff) was directly involved in the disappearance of tyres as charged. However, from the available information, the committee suspects that he had a hand in the theft. As explained above, he failed to act reasonably and in the public interest. He is not to be trusted with security duties which duties which require a person

of high integrity and responsibility. According to Cap. 226 Section 17(g) of the Employment act, an employee can lawfully be dismissed, “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’s property.....”.

The Committee then recommended the plaintiff’s dismissal, “with subsequent payment of the half salary withheld during the interdiction period any other dues as provided by the regulations and labour laws.....”

It is these payments which the defendant testified to in court, and produced evidence to show that the plaintiff signed for what he received, and this included

- (i) the half salary withheld during the period of interdiction,
- (ii) cash in lieu of deferred pension, evidence to this effect was produced in court.
- (iii) Leave allowance due to him in 1999.
- (iv) Payment of pension under the defendant’s pension scheme, with interest, which the plaintiff admitted.

It is as a result of all these payments that the defendant maintained in court that the plaintiff was paid all his dues. Even his appeal was refused. Upto the time the plaintiff was giving evidence in court, he asked that he been given back his job, plus the house he was living in, however, having considered all the evidence on record, I find that it was within the defendant’s right to dismiss the plaintiff, given the circumstances. Though even the plaintiff conceded that upon dismissal, an employee is usually not entitled to payment of any benefits, however, in this case, the defendant paid the plaintiff all his entitlements under his contract of employment.

The plaintiff claimed to have given NOTICE to the institution of this suit as required, but I did not find evidence of this in the court file. It was not amongst his exhibits either, yet such notice is required before the institution of such a suit. The plaintiff was not charged in court with any offence, however, the results of the inquiry held by a Committee appointed by the defendant implicated him, this causing the defendant to lose trust in him as a security officer, and therefore recommended dismissal. Having been dismissed from employment, the plaintiff was not entitled to payment of benefits, but as I have already stated above, the defendant paid him benefits under various headings. He did not lose his ½ salary withheld during the period of suspension as he prayed in his plaint. This was paid to him in full. Leave allowance for 1999 was paid, but salary in lieu of notice could not have been paid because he was dismissed! The plaintiff was also paid for a total of 131 months in which he served the defendant.

The plaintiff has failed to prove his claim against the defendant, on a balance of probabilities, as I find that his termination from employment was NEITHER, WRONGFUL NOR UNLAWFUL.

I proceed to dismiss the plaintiff’s suit against the defendant with costs.

Dated at Nairobi this 14th day of July, 2005.

JOYCE ALUOCH

JUDGE