



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 42 of 1998

KENYA POWERAND LIGHTING CO.LTD.....APPELLANT

VERSUS

JOSEPH MWANGI THEURI.....RESPONDENT

(From the decree and order of D. K. Gichuki,SRM in Meru

CMCC NO.69 of 1996)

JUDGMENT

The appellants were the defendants in the lower court while the respondent was the plaintiff. The plaintiff in his plaint dated 16.1.1996 and filed in court on 25.1.1996 claimed against the defendant a judgment in terms of a declaration that his dismissal from his job by the defendant who was the plaintiff's employer was wrongful.

The plaintiff/respondent therefore had sought a reinstatement and in the alternative damages for loss of earnings, terminal benefits and all his dues. In his judgment the trial Magistrate found for the respondent by awarding him general damages of Kshs.80,000/- as well as payment of respondent's provident fund if not paid plus costs and interests. The appellants having been aggrieved, appealed to this court.

The grounds of appeal included the following –

- (1) That the award of general damages for wrongful dismissal was wrong in law because(a) it was not prayed for in the plaint, the respondent having only prayed for loss of earnings and terminal benefits and in view of the fact that law did not allow it.**
- (2) That the honourable Magistrate erred in finding on facts that the dismissal of the respondent case was wrong.**
- (3) That the Honourable Trial Magistrate erred in doubting that the Respondent had not been paid his dues when evidence on record is clear that he was paid.**

On the other hand the respondent argued that the appeal was fatally incompetent having been filed out of time. Mr. Isaboke who represented the respondent also argued that the court properly awarded general damages since it had the power and right to do so.

I have carefully considered the facts of this case. It is common ground that the respondent who was an employee of the appellants, was so employed under a written contract which stipulated the mode of

termination of the contract by either party – exhibit 14(a). As pointed out by the honourable trial Magistrate, Clause 17 of the said contract stipulated that an employee, like the respondent, may be dismissed for gross misconduct as defined in S.27 of the Employment Act. The honourable Magistrate then having considered the contract and the provisions of the law above mentioned, decided that the respondent's dismissal was without good cause and was therefore unlawful. In my view, the honourable trial Magistrate properly found that the court had no power or authority to order a reinstatement as sought by the respondent in his plaint. He further found, rightly again that reinstatement, if ordered, cannot be practically enforced and it would as well be plainly wrong to impose an employee on an employer as decided in the case of **DALMAS B. OGOYE -V- KNTC LTD**, Court of Appeal in Nairobi Civil Appeal No.125 of 1996.

The contract agreement relied on by both parties, as earlier stated, was exhibit 14A. Clause 3(iii) provided the duration period of notice of termination of employment either party would be entitled to in case either wanted to terminate the employment of the other. It stated thus –

“on satisfactory completion of probationary period of service either the company or an employee shall be obliged to give the other party one month's notice of intention to terminate the employment or one months wage in lieu”

In the case of GITHINJI – V – MUMIAS SUGAR CO.LTD., (1995-98), 82, the Court of Appeal at page 83 stated thus in circumstances which were similar as in this case before me-

“The most recent and authoritative decision of this court which applies the common law principles is the case of Rift Valley Textiles Ltd – V- Oganda(1992) LLR 308(CAK). In that case, the contract of service of the respondent therein provided that it could be terminated by either party giving a notice of three months to the other or paying salary in lieu of notice. When the matter came before the High Court, the Learned Judge, having found that the dismissal was unlawful, and despite the respondent's admission that he had paid three months salary in lieu of notice, proceeded to award the respondent twelve months gross salary as general damages. On appeal to this court, this court had no difficulty in holding that the Learned Judge's decision was wrong”

The Court of Appeal then went on to state, (putting it in general terms), that if the contract of employment between the parties, specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the such provision, namely to pay the other party for the notice period, then the court's duty and authority would be limited only to enforcing those terms of the contract and not further.

As also was stated in the case of **KENYA COMMERCIAL BANK LTD – VJACKSON O.OMAMBIA**, C.A No.166 of 1991, which interestingly the honourable trial Magistrate appeared to apply, stated thus:-

“The law has been long settled that where a servant is wrongfully dismissed from employment(as in the present case), the damages for dismissal cannot include compensation for the manner of the dismissal, for his injured feelings or the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain fresh employment”

There is no doubt that the honourable trial Magistrate in this case did not accept the position averred by the appellant, that it had rightly terminated the employment contract of the respondent. He concluded, as earlier stated, that the appellant wrongfully terminated the employment between them. Upon the principles discussed above the respondent would be entitled first and foremost to a termination notice of one month or one month's salary in lieu of notice. It follows therefore that the honorable trial Magistrate's award of Kshs.80,000/= whose basis in any case, was not shown or explained , was totally unfounded and totally unsupported by the law.

As touches the 3rd and final issue , the respondent had clearly admitted in evidence that under his

letter of dismissal, exhibit 3, he had received his full salary, up to the date of dismissal, full salary for three months in lieu of notice, salary in lieu of 65 days terminal leave and provident fund. There was no reason therefore, for the trial Magistrate to doubt this clear evidence and his conditional order for the payment of the provident fund in case it was not paid, was superfluous.

Having come to the conclusions above, I need not consider the other grounds of appeal, except the contention that the appeal was filed without leave of court. I have considered this issue as well. It is unfortunate that the appellant failed to annex the extension of time granted to him to file this appeal. I notice that the same was granted by Juma, J on 7.7.98 under this court's, Misc. Application No.18 of 1998 whose relevant file is part of this court file. It is necessary for the appellant who files an appeal out of time to annex the order to the Memorandum of Appeal and failure to do so can easily lead to the striking out of the appeal. Had this issue been taken as a preliminary point of law, and not in a casual way it was handled herein, this court could have taken a more drastic step against the appellant. Let this be a warning for parties in their future conduct. It is not enough for the appellant who files an appeal out of time to be merely contented that such evidence of leave is somewhere in the appeal bundle. It must be annexed to the Memorandum of Appeal for ready proof to the court hearing the appeal that extension of time was indeed obtained.

The end result is that this appeal is merited and must succeed. The order of the award of Kshs.80,000/= plus costs and interest, is hereby set aside as the respondent's claim contained in the lower court counterclaim is as well dismissed. The costs are to the appellant except those in the lower court arising from the counterclaim.

Orders accordingly.

Dated and delivered at Meru this 15th day of September,2005

D. A. ONYANCHA

JUDGE