REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 104 OF 2000

JOSEPH KIPKOECH KOGO ……..…… APPELLANT

VERSUS

KENYA FLOUSPAR COMPANY LIMITED ……....……..…… RESPONDENT

(Being an appeal from a judgment of the learned Resident Magistrate's at Eldoret in

SPMCC. No. 91 of 1998 (Mary Kiptoo R.M.) dated 10th August 2000

JUDGMENT

Upto and until 2/8/1998, Joseph Kipkoech Kogo was an employee of Kenya Flouspar Company Ltd (hereinafter called 'the Company'), having been employed as a security guard.

He filed a case in the subordinate court on 21/1/1999 against the company in which he claimed that his services were summarily, and therefore unlawfully terminated by the Company on 2nd August 1998, despite the fact that he had been employed under a contract whose terms specifically provided that he was to be served one month's written notice or that he would be paid one month's salary in lieu. He also claimed that despite having qualified to benefit under the Company's Retirement Benefit Scheme he did not enjoy whatever was due to him under the scheme nor was he paid his salary increments, leave travelling allowances as provided for in the Collective Bargaining Agreement ("C.B.A.") and as a result of which he suffered loss and damage.

He presented his case to the Resident Magistrate at Eldoret after default judgment had been entered on 13/4/1999 against the company, which had failed to enter appearance and to file its defence to the case. In her judgment the learned trial Magistrate found that he had proved his case on a balance of probability and awarded him Shs. 30,000/- for general damages "together with Shs. 66,601/-, being accrued benefits herein, costs and interest of the same."

This judgment and all consequential orders was however later set aside upon application by the company, on the grounds that it had not been served with the summons to enter appearance and the plaint, after which it proceeded, as ordered to file its defence, in which, save for the descriptive parts of the plaint it denied all else and put Kogo to strict proof thereof.

After a full trial, the learned trial Magistrate found that Kogo was not a unionisable member of staff and further that apart from one month's salary in lieu of notice, he had otherwise no claims against the company as he had been paid all his dues, as per the contract of employment.

That is the decision which has aggrieved Kogo who has now preferred this appeal which is based on six grounds, namely:

"1. The learned Magistrate erred in law and in fact in holding that the Plaintiff was not bound by the collective bargain agreement.

2. The learned Magistrate erred in law and in fact in holding that the plaintiff was not unlawfully terminated.

3. The learned Magistrate erred in law and in fact in holding that the plaintiff was not a union member.

4. The learned Magistrate erred in law and in fact in holding that the plaintiff had been paid all allowances and benefits due to him.

5. The learned Magistrate erred in law and in fact in failing to take into account the Appellant's submissions.

6. The learned Magistrate erred in law and in fact in failing to hold that the Plaintiff had proved his case as pleaded in the plaint."

I shall now refer to Kogo as 'the appellant'.

Mr. Mwinamo, learned counsel for appellant informed Court that he intended to urge grounds 1 & 3 together, then grounds 4, 5 & 6 together and finally ground 2 on its own. It was his submission that paragraph 6 of the plaint in which he claimed that his termination was unlawful and thus in breach of contract, was not denied in evidence by the defendant who failed to adduce evidence to dispute the termination, and that in any event the appellant produced the CBA and contract of employment, yet notice of termination was not availed by the company. The court should have found that the appellant was wrongfully dismissed on 2/8/1998.

He urged the court to find that upon expiry of the contract on 22/2/1998 the CBA would come into force and it was thus applicable. It was also his submission that contrary to the finding of the court, the appellant was a member of the Union.

Mr. Chebii, learned Counsel for the Company was of a very different view for according to him, the issue was whether the appellant's services were unlawfully terminated and whether he was a member of the Union. He however concurred with the findings of trial Magistrate who had found that appellant was not a member of the Union and that he was therefore not entitled to what was provided for in the CBA.

It was also his submission that though, in their opinion the termination had been lawful the company had however been ordered to pay one month's salary in lieu of notice; that it had complied with the order and it did not cross-appeal against that particular aspect as it was satisfied with it.

I have as is expected of me re-evaluated the evidence on record, and taken into account the pleadings by both parties, bearing in mind that not only are parties bound by their pleadings but that it is for the plaintiff to prove his case on a balance of probability, the rule being that he who alleges must prove it.

The company has already conceded that the appellant was entitled to a month's salary in lieu of notice, which sum it has already paid.

The only issue for my determination is whether the appellant was a member of the Union for if he was, he would be eligible to enjoy all the awards of salary increments which the unionisable employees benefited from during the time when he was in service, as well as all the other packages which unionisable members of staff were entitled to.

I would also have to establish whether he would be eligible to annual leave travelling allowance at the rate of Shs. 2,500/- per annum, the benefits under the Retirement Benefits Scheme, as well as baggage and travelling allowance. I have looked at the appellant's evidence during the trial as well as that of his

witness (PW2), who was the Chairman of Kerio Valley Branch of the Union. It is important to note that the CBA was only marked for identification, but was not produced as an exhibit. Indeed, none of the two was able to provide sufficient proof that the appellant was a member of the Union, as the pay slips which the appellant produced as exhibits clearly show that no deductions were made by the Company under the heading of "Union Dues"; nor was he able to give his Union membership number. I would in the circumstances find that he was not able to prove on a balance of probability that he was a member of the Union, and in which case, he could not benefit under the CBA, and in the circumstances, since it was only under the CBA and not the contract, that the baggage allowance was catered for, and not being a unionisable member his claim under this heading was therefore bound to fail. The same would apply to the increment of income which he would have expected had he been a member of the Union.

Leave travelling allowance among the items which were provided in the contract of employment was only payable when one proceeds on leave. The appellant could not qualify for it if he never took leave during the term of his employment.

He was not able to specifically prove his case under the Retirements Benefits Scheme. In fact this claim was not even alluded to in his evidence at all.

It must be borne in mind that all the above benefits which he claimed were quantifiable and were thus special damages which must not only be specifically proven, but they must be specially proven. The appellant was not able to prove his claim at all.

Having found as I do, I find that the learned trial Magistrate's finding was proper and I would have no reason to upset her judgment.

I do in the circumstances dismiss this appeal with costs.

Dated and delivered at Eldoret this 5th day of October 2005.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Konuche for the appellant

Miss Wambua for the respondent