



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

Civil Case 883 of 2000

GEORGE OCHIENG ONYANGOPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITEDDEFENDANT

JUDGMENT

The Plaintiff was employed by the Defendant on 18th March 1987 at a salary of Kshs 34,464/= per annum. The terms of the employment were contained in a letter of the same date signed by the Plaintiff and the Managing Director of the Defendant. On 22nd July, 1993 the Defendant entered into a Collective Agreement with its employees. The said letter of employment and collective Agreement were produced as exhibits 1 and 2 by the Plaintiff. The Plaintiff remained in the service of the Defendant until September, 22, 1994. On that day he was suspended from duty. The Letter of suspension gave the reason for suspension as the Plaintiff's apparent involvement in the use of an account at the Defendant's Queensway House Branch for fraudulent purposes. The suspension was to continue until investigations were completed.

The Plaintiff testified that on 21st September, 1994, when he reported on duty, his manager informed him that four policemen wanted to talk to him. The policemen were accompanied by two inspection Officers of the Defendant. The Plaintiff was taken to one of their offices and was forced to sign a statement. The Plaintiff was then taken to Buru Buru Police Station and later charged in Nairobi Chief Magistrates Court Criminal case Number 4065 of 1994. He was charged with stealing contrary to Section 275 of the Penal Code, uttering false documents contrary to section 353 of the Penal Code and making documents without authority contrary to Section 357 A of the Penal Code. Before the conclusion of the criminal trial the Defendant on 21st November 1994 dismissed the Plaintiff from its service. The reason for dismissal was given as the Plaintiff's irregular involvement in cheque conversion. The Letter of dismissal cited clause A5 (a) (i) of the collective Agreement and clauses 3 and 8 of the terms and conditions of the Plaintiff's employment.

The Plaintiff further testified that during the period of suspension he was paid half salary. During the same period the Plaintiff never appeared before any disciplinary panel regarding the alleged complaints. The Plaintiff denied any misconduct. At the time of dismissal the Plaintiff was earning a monthly salary of Kshs 16,406/= and was entitled to a house allowance of Kshs 1,380/= per month. The Bank (Defendant) did not wait for the conclusion of the criminal case aforesaid before dismissing the Plaintiff. The Criminal case terminated on 31st January, 1996. The Plaintiff was acquitted. The Plaintiff further testified that when he was charged as stated earlier the

Defendant had his account with Kenya commercial Bank Sarit Centre branch frozen. When he was acquitted he had to seek a court order to unfreeze the said account in the criminal case aforesaid. The Defendant instituted NAIROBI High COURT civil case NO.508 OF 1996 against the Plaintiff claiming from the Plaintiff payment of sums lost by its customers. The Defendant obtained an ex-parte order staying the order to unfreeze the Plaintiff's said account. When the matter came up for inter-partes hearing the said order of stay was discharged. The Plaintiff filed the present suit. The said Nairobi HCCC No.508 of 1996 was eventually dismissed with costs which have been paid.

The Plaintiff testified that his dismissal was wrongful and unlawful because he was not invited to defend himself before any disciplinary proceedings. He had worked for the Defendant for 7 1/2 years and for all that period he had not been reprimanded or given any warning. The Plaintiff therefore prayed for orders sought in his Plaintiff.

In cross-examination the Plaintiff admitted that the letter of employment provided for a termination notice of 1 month. He further admitted that the bank could terminate his employment for gross misconduct and for improper conduct. He further admitted that the Collective Agreement also provided for summary dismissal for misappropriation, breach of secrecy, etc. The Plaintiff admitted that he was forced to write a statement in which his misdeeds were indicated and which statement was the basis of his dismissal and the said criminal case. The Plaintiff further confirmed that at the time of his dismissal he was indebted to the bank in the sum of about Kshs1,000,000/=. He was not paid anything. He was however entitled to terminal benefits such as pension, gratuity but he did not know how much and when the same would be payable.

The Defendant called one witness, Araka James Oyamo, the Defendant's Security Manager. He told the court that on 20th September, 1994 he invited the Plaintiff for interview following information that there were cheque conversions through the bank involving the Plaintiff. He was alone with the Plaintiff during the interview which took 2 1/2 hours. The Plaintiff volunteered to make a statement which the witness recorded. The original statement was handed over to the police for their use in the criminal proceedings aforesaid. I did not allow a photocopy of the statement to be produced, the witness further testified, that based on the said statement, the Plaintiff was charged, prosecuted and acquitted. He also produced a letter from the Defendant's industrial Relations Department to its Personnel Director. The letter is dated 7th November, 1994 and confirmed that the Plaintiff was involved in fraud. This led to the dismissal of the Plaintiff.

The witness told the Court that bank employees are supposed to be honest and diligent in all the operations they handle in the cause of their work. The Plaintiff did not meet this expectation.

In cross-examination the Defendant's said witness denied that he interviewed the Plaintiff in the presence of policemen. He testified that he called the policemen after the interview had been completed. The witness believed that there had been disciplinary proceedings before the Plaintiff's dismissal, in his view however, the bank took the right decision against the Plaintiff.

In his submissions in court counsel for the Plaintiff was of the view that the Plaintiff had proved his case on a balance of probabilities and is entitled to judgment as prayed in the plaintiff. Counsel argued that the employment contract did not provide for summary dismissal, and if the Defendant purported to summarily dismiss the Plaintiff this action was not in accordance with the said employment contract, it was therefore unlawful, if on the other hand the Defendant purported to dismiss the Plaintiff under section 17 of the Employment Act the Defendant should have acted fairly by giving the Plaintiff an opportunity to be heard. The Plaintiff's Counsel relied on the case of Charles Kariuki Wambugu -v - The Kenya National Library services - Nairobi HCCC No. 2013 of 1989 (UN reported), where A.M. Akiwumi J., as he then was, said at page 7 of the judgment that dismissal under section 17 of the Employment Act does not exclude the rules of National Justice.

Counsel further relied on the case of Julius Njuguna Kinuthia -v - Barclays Bank (K) Ltd - Nairobi HCCC No. 2072 of 1988 (unreported) where Hayanga J. also said at page 16 that considerations of National Justice are permissible under master and servant situation. Counsel also placed reliance on the case of CP.C industrial Products (Kenya)(Ltd) -v - Omweriva Ngima - Nakuru CA. No.197 of 1992(unreported)

where the Court of Appeal dismissed an appeal and agreed with the trial judges' finding that the respondent's dismissal had been arbitrary, malicious and callous.

On Special damages Counsel submitted that the Plaintiff had proved the same and judgment should be entered for him in the sum of Kshs 305,502/= excluding the sums claimed as pension.

On General damages counsel submitted that as the termination of the Plaintiff was unlawful and without notice he is entitled to general damages which is the equivalent of twelve months salary. Counsel further argued that the Plaintiff had suffered financial loss as a result of the Criminal and Civil proceedings referred to above. He suggested Kshs 250,000/= as general damages.

In reply counsel for the Defendant submitted that the Plaintiff had not established his case on a balance of probabilities. General damages in counsel's view are not awardable for breach of contract particularly in respect of employment contracts. For this proposition he relied on the decision in the case of sonve - v - Siaya Teachers Cooperative Savings and Credit Society and Another: Kisumu C.A. No.108 of 1998 (unreported).

Counsel further submitted that the fact that the Plaintiff was acquitted of the criminal charge did not take away the Defendant's right to dismiss the Plaintiff. For this proposition he relied on the case of Kiggundu -v - Barclays Bank of Uganda Ltd (1975) E.A.569 on Special damages Counsel submitted that these had not been properly pleaded. He further argued that the Plaintiff was lawfully suspended and the claim for salary for this period is without basis. The subsequent summary dismissal was also lawful and the Plaintiff was not entitled to the damages claimed.

On the Plaintiff's claim for full terminal benefits Counsel submitted that no contractual basis had been laid for the same, in any event the same had not been particularized and strictly proved, counsel prayed for dismissal of the Plaintiff's suit.

In my view the entire dispute between the Plaintiff and the Defendant depends on whether or not the termination of the Plaintiff's employment was wrongful. The Plaintiff was employed under a written contract which provided that the employment could be terminated at any time by either party giving one month's notice of termination in writing or paying one month's salary in lieu thereof. There was a proviso to this term in the following terms that should the Plaintiff commit any breach of the conditions of the employment contract or be guilty of unsatisfactory conduct inside or outside the bank, the Bank reserved the right to take disciplinary action against the Plaintiff as appropriate.

The termination of the contract could only be wrongful if it was made in breach of its terms, under the employment contract governing the relationship between the Plaintiff and the Defendant, the Defendant or the Plaintiff could terminate the said contract without giving any reasons by either giving one month's notice or by paying one month's salary in lieu thereof.

The Defendant did not give the Plaintiff one month's notice of termination in writing nor did it pay to the Plaintiff one month's salary in lieu of notice. The Letter of dismissal however cited clause A 5(a)(1) of the collective Agreement in addition to Clauses 3 and 8 of the terms and conditions of employment. The Defendant therefore dismissed the Plaintiff on the ground that he was guilty of gross misconduct and/or serious neglect of duty, it sought to prove this with a document headed strictly private and confidential an internal memo dated 7th November, 1994 from the Defendant's industrial Relations Department to the Personnel Director. This document showed particulars of alleged fraudulent activities of the Plaintiff. This document was based on a statement purportedly written by the Plaintiff. The alleged statement was not produced in evidence by the Defendant. This is the statement that the defence witness Araka James Oyamo attempted to produce unsuccessfully, it is the statement that was the basis of the criminal trial referred to earlier. No evidence was led at the criminal trial by the Defendants. No other evidence was adduced before me to show that the Plaintiff was guilty of gross misconduct and/or neglect of duty, in the result I hold that the Defendant has not shown that it was entitled to summarily dismiss the Plaintiff. The effect of this finding is that the Defendant could only dismiss the Plaintiff pursuant to clause 13 of the employment contract referred to earlier by giving the Plaintiff one month's notice of termination or pay

onemonth's salary in lieu of notice. The termination of thePlaintiffs employment was therefore wrongful for want ofnotice or payment in lieu of notice.

Having found that the termination of the Plaintiff'semployment was not in accordance with the employmentcontract I have to decide whether or not the Plaintiff isentitled to any damages. The Plaintiff claimed thefollowing alleged special damages:

- (a) Full salary from October 1994 until such timeas the Court shall determine the Plaintiff'semployment to have been terminated.
- (b) One month's salary in lieu of notice.
- (c) Full terminal benefits including Gratuityunder the Collective Bargain Agreement foryears worked.

The Law is now settled that special damages must bespecifically pleaded and strictly proved. The Plaintiff'sclaim at paragraph (a) above is for full salary from October 1994 to the date of termination. The Plaintiffs serviceswere terminated by the Defendant by its letter dated 21stNovember, 1994. Although I have found that thetermination was wrongful, the said date is still the date thePlaintiff's employment was terminated. The Plaintiff wastherefore entitled to his full salary for the month ofOctober 1994 up to 21st November, 1994. He was however,only paid ½ salary, under paragraph (a) above l award tothe Plaintiff-

- (i) Kshs 8,203/= being half salary that was notpaid to the Plaintiff for the month ofOctober 1994.
- (ii) The Plaintiff also testified that he was paidhalf salary for the month of November 1994.The Plaintiff in the light of what l have saidabove was entitled to full salary for the daysworked in November, 1994 which should havebeen Kshs 12,304.50 but he was instead paid¹/₂of this. The Plaintiff is entitled to thebalance which is Kshs 6,152.25. The totalamount awarded under paragraph (a) aboveis therefore Kshs 14,355.25.

The Plaintiff's claim under paragraph (b) above isprovided for under the employment contract referred toabove. Having found that the Defendant was not entitledto summarily dismiss the Plaintiff for gross misconduct orneglect of duty, and therefore the termination waswrongful, the claim under this paragraph is valid. TheCourt of Appeal in the case of Alfred J. Githinji -v - Mumiassugar Company Ltd: NAIROBI CA. N0.194 of 1991(unreported) dealt with this issue and held that upon thewrongful termination of the employment of an employeehe is entitled only to the amount specified in his contractof service as payable to him by his employer upon thetermination of his employment wrongful or otherwise, inlieu of notice and not to general damages at large. Iaccordingly award the Plaintiff one month's salary in lieuof notice which is Kshs 16,406/=.

The Plaintiffs claim at paragraph (c) above althoughpleaded, has not been proved. The Plaintiff indeed had no idea what he was claiming under this head. The same isaccordingly rejected.

The Plaintiff further claimed general damages. Thisclaim I am afraid must fail. The decision of the court ofAppeal in the cases of Alfred J. Githinji -v - Mumias SugarCompany Ltd: Nairobi C.A. 194 of 1991 (supra) and James N.Sonve -v - Siava Teachers Co-operative Savings and creditSociety and Another (supra) are binding on me. in thesecases the Court of Appeal held that upon the terminationof employment of an employee he is entitled only to theamount specified in the contract of employment in lieu ofnotice and not to general damages at large. Thecircumstances of the Plaintiff are irrelevant. The previousproceedings criminal or civil are not also relevant to thePlaintiffs present claim.

In summary judgment is entered for the Plaintiff asfollows:-

- (a) Kshs 14,355.25 being unpaid salary
- (b) Kshs 16,406/ = being one month's salary inlieu of notice.

(c) Interest on (a) and (b) at Court rates from the date of filing suit until payment in full.

(d) Costs plus interest on costs as usual but the costs shall be on the subordinate court scale.

DATED AND DELIVERED AT NAIROBI THIS 17th DAY OF JUNE 2004.

F. AZANALALAA. JUDGE