



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3657 OF 1992

KEPHA RIANGA KIMAIGA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT

JUDGMENT

Plaintiff seeks the following reliefs:

- (a) A declaration that the termination of employment was unjustified and unlawful
- (b) An order for reinstatement of plaintiff to his employment with full benefits and entitlements
- (c) An order for payment by the defendant to plaintiff of the Salary and benefits which would accrue to him if he was in his active employment since 10.7.90 to the day of reinstatement
- (d) Alternatively, payment of general damages for loss of employment and earnings
- (e) Costs of the suit and the interest at court rates until payment in full

Plaintiff gave evidence. He did not call any witness. Defendant did not adduce any evidence.

By a letter dated 3.7.90. defendant terminated plaintiffs employment with the defendant on the ground of gross negligence in the performance of his duties. The letter states in the relevant part:

“The investigations which were carried out following the recent fraudulent activities within the cost section have revealed that you were grossly negligent in your duties as a cashier. Consequently upon the above themanagement has decided that your services with the company should be terminated with immediate effect”.

Plaintiff was informed by the same letter that he would be paid

- (i) Two months salary in lieu of notice
- (ii) Salary up to and including 9.7.90
- (iii) Salary in lieu of 34 days accumulated leave

The defendant informed plaintiff that all those payments would be paid on production of a duly signed clearance certificate. Plaintiff was further informed that his interest in the provident fund would be

communicated to him,.

Plaintiff admits that he was given the clearance forms which he did not submit to the defendant. He further admits that he did not collect his dues as stipulated in the letter terminating his services. He explains that he did not collect his dues because he was disputing the termination of his services.

Defendant pleads in paragraph 4 of the Defence that plaintiff was negligent in the performance of his duties in that he failed to check that he was making payments to the correct persons.

Plaintiff admits that he paid out the claims which were being investigated and that he came to know later that the claimants were “ghost workers” He admits that he did not pay the claimants themselves and that he paid the claimants agents instead..

He concedes that even if the claims were authorized, he was required to verify them before payment.

Plaintiff appealed against the termination of his services. He was informed by a letter dated 25.2.92 that his case had been reviewed but it was found that he was grossly negligent in the performance of his duties.

Plaintiff’s case is based on the averment that his services were not terminated on a lawful cause because he was not negligent in the manner he handled the payment to “Ghost Workers”.

By section 17 (c) of the Employment Act, an employee can be summarily dismissed for gross misconduct. If, inter alia, he performs his duties carelessly and improperly. Plaintiff admits that he paid agents of four “Ghost Workers”. He admits that he was required to verify whether or not the claims were genuine.

He paid the claims although the claimants did not appear before him to collect the payment. How did he verify that the claims were genuine if he did not require the claimants to appear before him, and identify themselves? All the evidence relating to the payment of the claims is not before the court.

The evidence on procedure for payment was not given. The claims which were made are not before the court.

The documents relied on to make the payments are not before the court. In short, there is no evidence on which the court can make a conclusive finding whether or not plaintiff was negligent in paying the claims. But the fact that he made the payments to other persons and not the claimants themselves and the fact that he did not required the claimants to appear and identify themselves is evidence which show on a balance of probabilities that plaintiff was negligent in effecting the payments.

Plaintiff complains that he was not given a chance to be heard. Rules of natural justice does not apply to a simple contract of employment Eric Makhoha & Others versus Lawrence Sagini & Others – Civil Application No. Nairobi 20 of 1994

In any case, the letter terminating the plaintiffs employment indicates that the employer the investigated incident plaintiff admits that he was asked to make a statement. He concedes that his services were terminated after he had made the statement.

The making of a statement is a form of hearing as applicant was given a chance to explain his side of the case before termination.

After the investigations the defendant was satisfied that plaintiff was negligent in effecting the payments. These proceedings are not an appeal against the decision of the defendant or proceedings to quash the decision of the defendant.

Although the letter terminating plaintiff services show that plaintiffs services were terminated with

immediate effect this was not in effect a summary dismissal because the defendant agreed to pay plaintiff 2 months salary in lieu of notice; his arrears of salary and terminal dues as he is entitled to under the Provident Fund. A contract of employment can be terminated without reasons if the contract provides for termination by each side giving the other side Notice.

Plaintiff has not produced his contract of employment. He has not shown that the contract could not be terminated, even without assigning reasons, upon giving 2 months notice or payment of 2 months salary in lieu of Notice Even when a period of Notice is not provided for in a contract of employment, such contract can be terminated upon giving a reasonable Notice. For the foregoing reasons, plaintiff has shown on balance of probabilities that the termination of his employment was wrongful. Even if plaintiff proved so, the remedies sought in prayers (b) (c), (d) cannot be granted in the circumstances of this case. Defendant has lost confidence in the plaintiff The court should not impose an employee on an employer. Plaintiff cannot be paid for a period he has not worked. General damages for loss of employment and loss of earning are not normally awardable for breach of a contract of employment. The lawful damages which can be awarded is the salary for the period the notice should have been current. In this case, defendant offered to pay salary for two months in lieu of Notice which salary plaintiff failed to collect.

For the above reasons, I dismiss the suit with costs to the defendant.

E. M. Githinji

Judge

30.5.2002

Mr. Kiptoo for Mr. Nyakundi for plaintiff present

Miss Ndosi for defendant present

Miss Ndosi

I apply for copy of typed judgment

Mr. Kiptoo

I also make a similar application

E. M. Githinji

Judge

Order: Judgement to be typed and copies supplied

E. M. Githinji

Judge