



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1663 OF 1999

JOSPHAT M. MUDAMBA PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY DEFENDANT

JUDGMENT

Up to 19.8.1998, Josphat Mulusa Mudamba (the plaintiff) was an Assistant Preventive Officer working for Kenya Revenue Authority (the defendant). His gross salary was Shs.35,367/=. He had initially been employed by the East African Community in 1974 as a Preventive Officer Grade III but was, in 1977, absorbed in the Civil Service when the East African Community collapsed and designated as Preventive Assistant Grade III.

On the date aforesaid, he received a letter from the Deputy Chief Human Resources & Administrative Manager dismissing him from the Authority. According to the dismissal letter, the grounds for Mudamba's dismissal were:- "gross misconduct for having flouted laid down clearance procedures on imported goods which led to huge revenue losses" Prior to the dismissal, the plaintiff had been suspended from employment by a letter dated 19.8.1998; he was however given an opportunity to defend himself against the several allegations which led to his suspension. Those allegations included:-

- (1) grossly flouting laid down clearance proce dure on baggage duty assessment;***
- (2) erroneously failing to reflect the quantities of the items on which duty was assessed thereby creating a scenario whereby a serious loss of revenue was suspected to have occurred; and***
- (3) being negligent and/or dishonest.***

In response to the letter of suspension, the plaintiff wrote to the defendant on 28.8.1998 in an attempt to clear his name. He denied having failed to show quantities of items on Form 88 which was the form in use at the time of assessment of duty and which it was alleged he did not complete properly. The plaintiff stated that the form did not have any provision for showing quantities of items.

The plaintiff's attempt to defend himself does not appear to have helped him very much for on 19.8.1998, he received the letter mentioned above dismissing him from service. The plaintiff considers the dismissal illegal and unlawful and he has brought this suit against the defendant for a declaration to that effect and also for special damages as shown herebelow. The claim for general damages was however abandoned during the hearing of this suit.

As indicated by learned counsel for the two parties, the issues to be determined in this suit are very simple. They are:-

(a) whether the dismissal of the plaintiff was lawful; and

(b) if it was not lawful, what damages and benefits are due.

As the reasons for the plaintiff's dismissal were put in writing, it is not at all that difficult to determine whether or not the dismissal was lawful. The reasons for the plaintiff's dismissal as stated in the dismissal letter have been described above.

Although all the plaintiff's misdeeds have been collectively characterized as gross misconduct, the evidence tendered shows that the only act of alleged misconduct with which the plaintiff was charged was in fact the failure to show quantities of items he assessed duty on. Regarding that allegation, I think it is not contested that the plaintiff did, on at least 12 occasions, assess duty using the defendant's form known as Baggage Duty Assessment Form (Form 88) without showing the quantities of items on which he was assessed. That is the action which according to the defendant constituted misconduct. It is the only occurrence which constituted the misconduct upon which the defendant based his complaint against the plaintiff. Given that fact, the issue that has to be determined is whether the plaintiff's failure to show the quantities in Form 88 was as alleged by the defendant (a) 'a gross flouting of laid down clearance procedure on baggage duty assessment' and (b) if proven it constituted sufficient basis for the dismissal of the plaintiff.

As aforesaid, the plaintiff claims that the failure to show the quantities did not violate any rules or procedures and therefore his dismissal was unjustified and unlawful. The defendant asserts that the failure to show the quantities was in breach of laid down procedures. Section 107(1) of the Evidence Act provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Since the dismissal of the plaintiff is not denied and the defendant's explanation of it is that it was justified on account of the plaintiff's allegedly having flouted laid down procedures on baggage duty assessment, the burden shifts to the defendant in terms of Section 107(1) of the Evidence Act to prove that such procedures were in fact in existence and that the plaintiff flouted them. Further, the defendant has to prove that the plaintiff's alleged misdeeds constituted "gross misconduct" as is claimed in the letters of suspension and dismissal.

Only two witnesses testified on behalf of the defendant. The first one, Patrick Nderitu Munuhe (DW1) is employed by the defendant as a human resource manager, a modern term for what in the older days used to be called a Personnel Manager. Although DW1 produced the Forms said to have been completed by the plaintiff in which the quantities on what duty was assessed were allegedly not indicated, in my view, he merely repeated the charge that the defendant had made against the plaintiff namely that the plaintiff's failure to indicate the quantities flouted "the regulations" without specifying what those alleged regulations were or where they could be found. The witness however claimed that the plaintiff was in breach of Rules 3.1.2, 3.2.3, 3.1.9 and 3.5.4 of the Code of Conduct. These are general rules of the defendant relating to employee discipline and I cannot see their relevancy to the specific charges the plaintiff faced. They are wholly unrelated to the question whether the failure to show quantities flouted any rules of procedure relating to assessment of duty.

The defendant's second witness, Ernest A. Muhilikha did not help either. He holds the position of Senior Revenue Officer and one would have expected him to tender detailed evidence regarding the so called laid down procedure which the plaintiff is alleged to have flouted but he did nothing of the sort. He merely stated that in assessing duty at the passenger terminal at JKA, which incidentally is not the station where the plaintiff was working at the time of dismissal, the department uses form F 88. And in relation to the form which the plaintiff is said to have failed to properly complete (i.e. Exh. A1 – A12) the witness repeated what DW1 had said, that is that they were not properly completed. He however admitted in cross examination that the Forms do not indicate that measurements or quantities have to be indicated. Indeed

he conceded that there was in fact another form in existence in the department, namely Form C15, in which the quantity and type of items were specifically required to be shown. Asked about the procedure followed in freight terminals, DW2 answered that he was not familiar with it. He also said that he had never worked at Eldoret Airport.

On his part, the plaintiff stated that Form 88 did not have any provision for showing quantities and that assessment of duty was based on the value of the item which is determined by either (a) reliance on what the passenger says the value of the item is; (b) or what the officer assessing duty considers to be the reasonable value of such item. He explained that the determination is arrived at after examination of the item. The plaintiff added that in order to determine the value of items, an officer considers what the value of a similar item in the local market is; he could also rely on invoices if they are available. He said that he had a discretion to base an assessment of duty on what the passenger declared and he did not therefore have to always show the quantities on which duty was assessed. He denied having occasioned any loss to the defendant and said that he had followed the right procedure. In any case he added his assessment of duty was cross-checked by his supervisor, a certain Mr. Koech to ensure that what he had done was right and the passenger duty would be paid only upon confirmation by the supervisor that the assessment was correct.

Evidence was tendered by DW2 that at the time of trial of this matter, Mr. Koech was based at JKA. Since the plaintiff had testified that Mr. Koech had cross-checked the assessment, it was in my view incumbent upon the defence to tender to show that what the plaintiff said about Mr. Koech was not correct. Since the plaintiff's evidence had also touched on the procedure for completing duty assessment forms, the evidence of Mr. Koech would have been vital in the determining the procedure and practice employed at Eldoret Airport at the material time. But instead of tendering such important witness, the defendant called DW2 who readily admitted that he had never worked at Eldoret Airport and was unfamiliar with the procedure followed in assessing duty at flight terminals. His evidence was therefore of no assistance to the defendant and in my view what the plaintiff said in his evidence regarding the practice applicable in assessing duty and the claim that his assessments were cross-checked by his immediate supervisor Mr. Koech, stands unchallenged.

In the event, I find that the defendant has not established that there were any laid down procedure on duty assessment which the plaintiff flouted. It has also not been established that the plaintiff was guilty of any gross misconduct as claimed by the defendant or at all. Neither for that matter was it shown that the defendant suffered any loss as a result of the plaintiff's actions. It follows from that the plaintiff's dismissal was unlawful and that he is entitled to special damages arising from that unlawful dismissal.

In a claim for unlawful damages, the only damages payable to a party in the plaintiff's position are damages. The plaintiff has already abandoned the claim for general damages. In the event what is payable to him is salary in lieu of notice. As an Assistant Preventive Officer, the plaintiff occupied a senior position in the defendant's department and in my view was entitled to a reasonable notice if the termination had been properly done. I assess such notice to be 3 months. Accordingly, it is ordered that he be paid 3 months salary in lieu of notice such salary to include the usual allowances as reflected in his salary slip (Exh. 4) less of course income tax and other statutory deductions. In addition, the plaintiff will receive all relevant benefits to be calculated as if he had been normally retired. The defendant will bear the plaintiff's costs of this suit.

Dated at Nairobi this 23rd day of March, 2001.

T. MBALUTO

JUDGE