



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2852 OF 1998**

PETER N. NGELE.....PLAINTIFF

-VERSUS-

KENCHIC KENYA LIMITED.....DEFENDANT

JUDGEMENT

(a) BACKGROUND

The background to this case is that the Plaintiff who was employed by the Defendant as Accounts Controller Supervisor rising to the rank of Credit Controller in 1984 until 1996 when he was summarily dismissed. He filed this suit contesting the dismissal and asking to be paid the dues which were not paid to him due to the summary dismissal.

(b) EVIDENCE

In his evidence, the Plaintiff said that at the time he was dismissed in October, 1996 he was a Credit Controller. He explained how the Company allowed employees to cash their cheques to avoid having to leave work to go to the bank. His duties included collection of debts. He took the Court through the arrangement by the Company of the Pension Scheme in which the Company contributes 7 ½% and the employees contribute 5%. He said when his employment was terminated the Company refused to pay him the Company's contribution in the Scheme.

Mr. Zablon Wachuko the defendant's administrator gave evidence for the Defence. He said that the Plaintiff was dismissed following an internal audit carried out and which established that the Plaintiff had:

- (1) Cashed several cheques without the authority of the Chief Accountant within 3 months. They were 70 cheques totaling over 2 million shillings.
- (2) A certain cheque from a customer was not banked for a long period, thereby occasioning loss to the Company.
- (3) He cashed his own cheque which on banking was unpaid by the bank.
- (4) He had a habit of holding on up country cheques thereby occasioning loss to the Company.

According to this witness the dismissal was justified and he was paid for the 9 days he had worked. The issue to determine is whether the summary dismissal of the Plaintiff was justified. It will be necessary to examine the law on employment to see whether what the Plaintiff is accused of by his employer justified summary dismissal. Section 17 of the Employment Act Cap. 226 of the Laws of Kenya empowers the

employer to summarily dismiss an employee for gross misconduct. From the evidence of the Defence witness the Defendant is saying that the Plaintiff was guilty of negligence in the performance of duty. Under the Act, gross misconduct includes negligence in performance of duty. One of the reasons given in the letter of dismissal 11.10.96 was that the Plaintiff had cashed a number of cheques without the authority of the Chief Accountant in that the Chief Accountant had not endorsed the cheques. The Defendant did not give evidence as to these cheques it seems to suffice for the Defendant to make the allegation. None of these cheques were produced to show that they were not authorised and the defence did not call any evidence from the office of the Chief Accountant or the cashier. Neither was there any proof that the Defendant suffered any loss because of the actions of the Plaintiff. What is more intriguing is that the Plaintiff was not paying himself. The cheques alleged to have been paid were paid by the cashier who could have refused to pay. I find no negligence on the performances of duty by the Plaintiff on this accusation. It was for the Defendant to prove this allegation.

The other accusation is that the Plaintiff had cashed his own cheque which was not paid by the bank but was subsequently paid when it was rebanked. There was no evidence led to show what loss was suffered by the company as a result of this cheque. The defence witness agreed that employees were allowed to cash cheques with the cashier instead of going to the Bank. When the management allowed the employees to cash cheques they must have known that there will be a possibility that some cheques could be returned by the banks for a variety of reasons.

The fact that the management did not issue a rule on cheques which are not paid means that the management accepted this eventuality I do not find that accusation amounted to a gross misconduct on the part of the Plaintiff. The dismissal letter informs the Plaintiff of some other misdeeds in a general manner. The letter says: "You are aware of the other several transactions which you conducted in similar ways as detailed above." These misdeeds are not described. I may point out that Summary dismissal is a very serious action, which must be taken by an employer when there is clear act of gross misconduct by the employee. It is serious because of the consequences to the employee as it will deprive the employee of some of his rights and benefits he has worked for sometimes in all his life he worked with the Employer. From the evidence before the court I find that the defendant did not establish that the Plaintiff had committed an act of gross misconduct which entitled the Defendant to summarily dismiss the Plaintiff.

© COUNTER-CLAIM

The Defendant has in its defence filed a counter claim in which it is demanding a total of Ksh.350,352.45. The claims are under six items.

(1) Advances taken from the employer being Shs.31,499.45. According to the Defence witness there are money's shown on a print out which has no date and was produced as exhibit No. 4. Although they are termed as advances the witness said they were no advances but called so because they were medical bills which the company had paid for the Plaintiff. There was no other evidence to show that this money was paid by the Defendant on behalf of the Plaintiff. The Statement was not shown to the Plaintiff before he was dismissed or during the time of his employment. The witness was at pains to explain how the Company claimed this money from the Plaintiff as advances or as medical bills. It was quite obvious that this claim was computed after the Plaintiff's dismissal and is an attempt to justify a claim, which the Defendant is not able to prove. I reject this claim.

(2) Returned Cheque of Carry Pot for Shs.19,970. This turned out to be a cheque paid to the defendant by a customer. The Plaintiff did not make it clear why if the cheque was unpaid the amount should be passed to the Plaintiff. The Defendant had the option to sue the customer to recover the money instead of demanding it from the Plaintiff. I find no justification for the Defendant to demand this money from the Plaintiff and the claim is rejected.

(3) Rejected medical claims. The Plaintiff did not justify this claim. No bills were produced and no evidence to show that the Plaintiffs had incurred them. The claim is rejected.

(4) Unpaid cash sales of Ksh.58,520/- This is another claim for which there was no evidence to support it and it is rejected.

(5) Lost interest on up country cheques amounting to Shs.26,366. The Defendants case on this item was that the Plaintiff had a habit of holding on cash paid and taking up country cheques which would take 10-14 days before they are paid by the banks. There was no attempt to show which was this cash which the Plaintiff withholds and when. Just as there was no attempt to show which were these up country cheques the Plaintiff accepted. The witness, Mr. Wachuko had difficulties explaining what the claim was about and it was evident that he was expected to give evidence on an area which is not his. I reject the claim for lack of proof.

(6) Kenchic Cooperative Society for Shs.90,431/- One failed to understand why the Defendant would want to put this claim against the Plaintiff. It turned out from the evidence that this was a matter between the Society and the Plaintiff of which he was a member. To say that the Defendant was helping the Society recover the money because the Society was young is stretching Defendant's rights too far. The claim demonstrates bad faith on the part of the Defendant. This claim should never have been made and it is accordingly rejected. I find that the Counter claim on the whole had no basis and is dismissed.

(D) FINDINGS

It now remains to determine what are the Defendant's rights now that I found the summary dismissal was unlawful. In the plaint the Plaintiff is claiming payment of salary for 3 months in lieu of notice. The defendant maintained that the plaintiff is entitled to one month's notice and not three. The defendant relies on the letter of employment dated November 1983 which offered him employment as an Accounts Supervisor. Paragraph 4 of the letter tells him that other terms and conditions of "our employment will be exactly the same as you presently enjoy under BAT. Kenya Development Limited terms and conditions of Service and your existing Letter of Appointment"

The BAT Letter of Appointment referred to is dated 19.11.1981 and his appointment is that of Assistant Accountant and paragraph 6 tells him that after confirmation he was entitled to one months notice or one month's salary in lieu of notice. The Plaintiff explained that these two appointments were clerical and that in 1994 he was promoted to Credit Controller which put him in the management level. The defence witness confirmed that the Plaintiff was so promoted and that the new post was in the management category. The letter of promotion was not produced. The Plaintiff said that in this category he would be entitled to 3 months notice. Mr. Wachuko said that even the management staff were entitled to one months notice. I did not find this evidence convincing. I was not shown any terms of employment of the management staff, which states that notice is of one month. I would expect that there would be difference between the clerical staff and the management staff on the question of notice. If the defendant wanted the court to accept that there is no difference between the two categories of employees there is nothing simpler than producing the terms of employment for the Management Category. In the absence of such proof I accept the Plaintiffs evidence that the notice for Management Category is three months and not one month. Accordingly, the Plaintiff will be paid three months salary in lieu of notice.

The Plaintiff claims damages for the wrongful dismissal. Having found that the Plaintiff was entitled to 3 months notice the damages payable would be the loss the Plaintiff incurred during this period of three months. See Kenya Oil Field Services Ltd. vs. Peter Njoroge Civil Appeal No. 124 of 1985.

In this case the Court of Appeal observed that: "The circumstances of the present case were such that the respondent had risen in the ranks to the position of Manager in his employment. He had acquired knowledge and experience as the manager in the field he was employed by the appellant. As the Manager, his employment amounted to a career and the loss he sustained would, in our view, be compensated by an award equivalent to a reasonable notice of termination of his employment, which in our view is three months salary in lieu of notice in addition to other benefits"

This is a decision of the Court of Appeal which is binding on this Court.

In addition to these the Plaintiff will be entitled to:

(a) the 9 days he had worked in October, 1996

(b) Leave earned during the years 1995 and 1996

(c) The defendant's contribution for the pension benefits which had been withheld by the defendant.

There will therefore be judgment for the Plaintiff that the dismissal of the Plaintiff by the defendant was unlawful and the Plaintiff will be paid damages as follows:

(1) General Damages for unlawful dismissal Ksh.103,500/-

(2) Salary for 9 days

Worked in October, 1996 Ksh. 12,650/-

(3) Leave earned during 1995 and 1996 Ksh. 48,773/-

(4) Pension benefits Ksh.488,963/- (less any amount paid if any)

Total Ksh.653,886

The Plaintiff shall be paid the costs of this suit and interest.

Delivered and dated this 1st day of August, 2000.

KASANGA MULWA

JUDGE