



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 528 OF 2013

STEPHEN NG'ANG'A KAHIGA.....APPELLANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

(An appeal from the judgment of Mrs. T. Wamae, SRM, delivered on 26th August, 2004 in Milimani CMCC No.10380 of 2004)

JUDGMENT

The appellant filed a case against the respondent where he pleaded that he was a civil servant, after which his duties were terminated by the respondent as a representative of the Permanent Secretary Ministry of Labour and Human Resources Development. It was his case that his employment was terminated wrongfully, unlawfully, illegally and contrary to the terms of employment between him and the government. He further pleaded that he had not been paid any pension since termination of employment.

He prayed for a declaration that he was a civil servant in the service of the Government of Kenya entitled to a monthly pension and terminal benefits. He also sought a declaration that his termination of employment was wrongful and unlawful. Finally, he prayed for costs of the suit and interest at court rates and any other relief that the court deemed fit to grant.

His claim was denied by the respondent. The case was heard by the lower court and both parties called evidence in support of their pleadings. Other than the appellant himself and production of several documents, no other witness was called to testify. On the other hand, the respondent called two witnesses.

In a brief judgment delivered on 26th August, 2004 the lower court dismissed the appellant's case. Aggrieved by the said verdict, he filed this appeal. Several grounds have been set out in the Memorandum of Appeal the thrust of which was that, the trial court erred in law and fact in holding that the appellant was not a civil servant and that the termination of his employment was lawful. At the hearing of the appeal, an order was made that parties file submissions but only the appellant complied.

As the first appellate court it is my duty to evaluate the evidence adduced before the trial court, with a view to arriving at independent conclusions. This I have done. The appellant was given a letter appointing him to a department of vocational training. However, it was disputed that, that communication made him an employee of the government or that he became a civil servant. The court found that, since the plaintiff was to work in a department under the Government Ministry, he was subject to be posted, transferred and indeed being promoted using government letter heads of various Ministries.

That notwithstanding, the letters did not confer upon him the status of a civil servant. The lower court also found that, whereas it is true the appellant was issued with an identity card, that alone did not confer upon him the status of a civil servant.

It is important to set out part of the judgment of the lower court which reads as follows,

“DW 1 explained that the government founded village polytechnics through grants and that officers in those institutions were paid a salary from the grants. He testified that the payslip was issued for accounting purposes. This is confirmed by plaintiffs own exhibit 6 dated 24.8.92 which at paragraph 2 explains that salary would be paid through grants.

Plaintiff did not produce a letter of termination of employment. Pext 12 is a letter by which plaintiff was informed that his salary grant had been withdrawn and it is not a letter terminating his services.

From the evidence on record, plaintiff has failed to prove to this court that he was appointed as a civil servant and that his services were terminated.

In the result I find plaintiff's case not proved on a balance of probability and it is dismissed with costs to the defendant."

I have had occasion to go through the various correspondence produced by the appellant in the trial. The appellant was engaged as an instructor vide a letter authored by the County Clerk, County Council of Kiambu dated 29th April, 1972.

The letter is clear that his engagement was a one year contract at a salary that was set out therein. Later on, the appellant was transferred and or promoted to various Ministries and or departments. Nowhere in the correspondence produced was he defined and or described as a civil servant. A description of a person as an employee without any other qualification does not confer upon such a person the title of a civil servant.

Terms and conditions of employment are expressly are set out in the letters of employment. Looking at the documents produced, there is nowhere is it stated that the appellant shall be entitled to any pension whatsoever. The letter he says terminated his employment clearly states that it was a notification for withdrawal of government salary grant.

The appellant was formally notified that his name would be deleted from the payroll and his services were no longer needed. It may be true that the appellant entertained a legitimate expectation that he would be considered alongside other civil servants in the performance of his duties. Regrettably that expectation was misplaced in view of the conditions of his employment which he was made aware of, and which formed the basis of his engagement with the government institutions.

The lower court was correct in the analysis of the documents produced and the conclusions arrived at. I agree that the appellant failed to prove his case to the required standards and the lower court was correct in dismissing the suit. This appeal therefore fails.

I note that the appellant was ordered to pay costs to the respondent. In my view, this was punitive and therefore I order that the parties bear their own costs both in the lower court and in this appeal.

Dated, signed and delivered at Nairobi this 16th Day of May, 2019.

A. MBOGHOLI MSAGHA

JUDGE