



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 364 OF 2003

GENERAL PLASTICS LTD.....APPELLANT

VERSUS

PATRICK K. MOLO.....RESPONDENT

(Being an appeal from the judgment and order of Hon. Kaikai, Senior Resident Magistrate delivered on 21.1.2003)

JUDGMENT

The appellant in this case has moved this court in the exercise of its appellate jurisdiction against the whole decision on grounds enumerated in the memorandum of appeal filed on 19th June 2003, set aside the order of the court below dismissing the appellant's suit and substitute therefore an order dismissing the appellant's suit as prayed in that court. The appellant further seeks an award of costs in the lower court and that of the appeal.

By a plaint dated 6th March, 1997 the plaintiff/Respondent commenced a suit against the Appellant claiming that it terminated his contract of employment contrary to the Employment Act, wage guidelines and other relevant statutes. He averred that in terminating his services, the Appellant had no valid basis and did not avail him the natural right to be heard.

The Defendant/Appellant on its part resisted the claim in the lower court by its statement of defence dated 28th July, 2000. The defendant averred that the Plaintiff was rightfully and lawfully dismissed from employment for gross misconduct to wit absenteeism from work without any reasonable, lawful and excusable reason. It also denied that the Plaintiff was entitled to any notice, terminal benefits or any sum.

At the trial only the Respondent testified on his part as PW1 and the Appellant called one witness (DW1).

According to the Respondent, he worked in machine maintenance with the Appellant from 1985 as an Assistant Machine Maintenance. That when a fire broke out at the work place on 9th May 1990 he suffered serious burn injuries and was hospitalized for one and a half months. That in January 1995, he visited the hospital and took time off work but when he returned on 4th February 1995 his body started swelling so he returned to Kenyatta National Hospital for treatment and took more time off. When he

resumed work on 30th February 1995, he was barred by the factory manager from reporting and was subsequently dismissed through a letter signed by the Appellant's Personnel Manager.

According to him, he was unfairly dismissed and did not receive his benefits, payment in lieu of notice and gratuity. That though he had not reported to the Appellant about his sickness he assumed it knew he had a 'problem'.

DW1 testified that he knew the Respondent as an employee of the Appellant. He recounted the events that led to his dismissal. As the personnel manager he dealt with discipline, appointment, dismissal and termination of employees. He was notified by the factory manager that the Respondent had not reported on duty for 30 days and he immediately issued a dismissal letter. That the Appellant did not have knowledge of his sickness. That the Appellant did not pay any benefits as the Respondent was not entitled to any.

In cross-examination DW1 stated the reason they summarily dismissed the Respondent was because he did not report to work for a month and he was not on sick off though they did not take any preliminary action like finding out where he had been.

The trial Court found that the Respondent had proved his case on a balance of probabilities and awarded him damages, 3 months salary in lieu of notice, costs of the suit and interest.

The appellant faults the findings of the trial court on 4 grounds –

- i. That the learned Trial Magistrate erred in law and in fact in failing to appreciate and find that the dismissal of the Respondent by the appellant was lawful;
- ii. That the learned Trial Magistrate misdirected himself in fact and in law in holding that the appellant was entitled to general damages for wrongful dismissal;
- iii. That the learned Trial Magistrate erred in law and in fact in failing to address himself adequately to the measure of damages awardable in cases of wrongful dismissal;
- iv. That the learned Trial Magistrate erred in fact and in law in awarding the Respondent damages that were neither proved nor justified.

The appeal was heard by way of written submissions. Those on behalf of the Appellant were filed on 3rd June 2015 while those on behalf of the Respondents were filed on 10th June 2015.

An employer may terminate an employee's service for gross misconduct which includes habitual neglect of one's duties. This is repeated failure to perform one's duties for a period of time depending on the circumstances.

Gross misconduct has been defined in **Halsbury's Laws of England Vol. 16 (IB) 4th Edition** at paragraph 567 to be

“Conduct so undermining the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employees.”

In this case, the gross misconduct attributed to the Respondent is to be found in the dismissal letter dated 22nd February 1995 which referred to the reasons for dismissal namely absenteeism without authority or report of his whereabouts during the time he was away.

This being the first appellate court, it has power to reevaluate the evidence and substitute the decision with that of the trial court. This cause of action accrued prior to the enactment of the Employment Act, 2007; to that extent the provisions of the Act will not apply. The applicable Act is the repealed Employment Act, Cap 226.

Section 17 of Cap 226 which is similar to Section 44(1) and 4(c) and (g) of the Employment Act No. 11

of 2007 gives instances where an employee can be summarily dismissed and provides as follows –

“17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal:-

- a. If, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work”***

At the time the Plaintiff’s employment was terminated, Cap 226 was in operation. This statute unlike Act No. 11 of 2007 which provides for procedure for termination of employment at section 41, did not have any provision on the right to hearing before termination. Absenting himself from work for a period of 30 days without explanation amounted to gross misconduct and the Appellant was justified in summarily dismissing the Respondent. Though he has submitted that since he suffered the injuries in 1990, the Appellant was itching to dismiss him, being away from work for a month without any explanation could only mean that the Respondent was no longer interested in working for the Appellant. On a balance of probability therefore, the Appellant was justified in finding the Respondent guilty of gross misconduct.

The damages awarded for loss of employment upon dismissal are not provided for in the Employment Act and Industrial Court Act other than compensation for 12 months. The Respondent would have had to prove that the Appellant has incapacitated him to an extent that he is unable to find other employment. This is due to the fact that employment is never permanent. It is a contract that usually provides for an exit and either party is only liable to the extent to which they have failed to comply with the exist clause in such contract or as presumed by law. It is not evident from the record that the Respondent’s chances for obtaining employment elsewhere were curtailed.

In conclusion, the appeal is hereby allowed and the court hereby sets aside the lower court's order as it was not properly grounded in law.

The circumstances of this case call for an order that each party shall bear their own costs.

Dated and delivered at Nairobi this 5th Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE