



REPUBLIC OF KENYA

HIGH COURT AT NAKURU

Civil Suit 447 of 1996

HILLARY MUNUHE GACHINGA..... PLAINTIFF

VERSUS

NORWEGIAN PEOPLE'S AID..... 1ST DEFENDANT

GRAHAM WOOD..... 2ND DEFENDANT

JUDGMENT

The plaintiff, Hilary Munuhe Gachinga, filed this case against the Norwegian People's Aid (1st defendant) and Graham Wood (2nd defendant), seeking, among other prayers;

- (a) a declaration that the plaintiff was irregularly and wrongfully dismissed from employment
- (b) a declaration that the defendants are in breach of the agreement of 10th April, 1996, for the defendants to pay the plaintiff all his salary and dues for the remainder of the contract period from 10th April, 1996 upto 14th December, 1996.
- (c) General damages for wrongful dismissal and breach of contract reached on 10th April, 1996.
- (d) A declaration that the letter dated 17th April, 1996 giving the plaintiff one month notice is irregular.
- (e) An order that the defendants should pay the plaintiff all his salary and dues from 10th April, 1996 upto 14th December, 1996.

On 14th December, 1995, the 1st defendant employed the plaintiff for a period of one year, as a Logistics Officer in Nairobi, by an agreement dated 26th November, 1995 and produced as exhibit one. His gross salary was KShs.50,000 per month.

In paragraph 7.2 of the said contract of employment, the plaintiff could exercise discretion as to any information he received in connection with the assignment and which be considered harmful to the first defendant.

That paragraph provided that:-

"The employee shall exercise discretion as to information he gets in connection with the assignment which may be harmful for the co-operative organisations, authorities, etc in the programme area, or

NPA. This discretion must also continue after the termination of the assignment."

It was the plaintiff's evidence that the 1st defendant terminated his services by letter dated 17th April, 1996, which gave him one month's notice.

His last day in the office, according to that letter (exhibit one), was 16th May, 1996. The letter was signed by the Resident Representative of the first defendant, one HELGE ROHN. No reasons were given in the letter but the plaintiff suspects that the first defendant may not have been happy with the plaintiff's criticism of the many things that were going on within the organisation and which the plaintiff considered illegal. For example, he said that the first plaintiff, in matters of customs clearance, evaded tax by bribing customs officers. The plaintiff had discussed this issue with the second defendant and told him that it was wrong. This strained relations between the plaintiff and the employer and the second defendant discussed with the plaintiff and the two agreed to terminate his services upon payment to the plaintiff of his salary from 10th April, 1996 up to 14th December, 1996. This oral agreement, according to the plaintiff was reached on 10th April, 1996. The total sums payable were agreed at Kshs.471,000 arrived at as follows:-

- (a) Remaining contract period - Kshs.350,000
- (b) Use of personal car for period worked - Kshs. 21,000
- (c) Failure to renew contract for no reason - Kshs. 100,000

Kshs.471,000 This money was payable on or before 17th April, 1996, and on that date, the plaintiff received the notice, terminating his services with effect from 16th May, 1996. It is upon receiving this letter that he filed this case against the defendants.

The record shows that the defendants were served with summons to enter appearance, on 23rd March, 1997 but they neither entered appearance nor filed defence hence the interlocutory judgment signed on 5th June, 1997.

I have read through the letter of appointment dated 26th November, 1995 (Exhibit one) paragraph six of the letter covers an item called, "Other terms" of employment. It then shows that these other terms are to be found in a document, namely, "NPA standard terms". These standard terms are part of a document also produced as exhibit one and entitled, "Memorandum". "The standard terms of employment" and which forms the last four pages of that document. Each of the four pages is dated 2nd January, 1995. Paragraph ten (10) of the terms of employment, makes provision for termination of services. Paragraph 10 (b) provides that, NPA Nairobi may terminate the employment of contract on any of the following grounds in respect of employees with one year service:

- "(1) When the contracting parties agree to terminate the contract(2)...
- (3) when the employee for health or other reasons is no longer fit for the service
- (4) ...
- (5) when NPA decides to terminate the work fully or partly in the area
- (6) ...
- (7) ...
- (8) -.

(9) ...when the employee does not show, in carrying out his work, the knowledge... reasonably expected of him."

In each of the cases set out above, paragraph 10(b) (10)(1) provides for one month's notice in respect of staff with one year service or less. The plaintiff falls in this category and so, in order to terminate his services, all that the first defendant was required to do, in law, was to serve him with one month's notice, and this is what the first defendant did.

From the plaintiff's testimony, the first defendant was unhappy with the way the plaintiff made criticism of the organization, which criticism the plaintiff says was constructive and was allowed, according to the terms of employment. As a result, it was agreed between the plaintiff and the 1st defendant, represented by the second defendant, that, the plaintiff's services should be brought to an end. Paragraph 10(b) (1) of the terms of employment, contained in exhibit one (1) provides that where the employer and the employee (the contracting parties) agree to terminate the contract, the 1st defendant is under obligation to serve one month's notice upon the employee (plaintiff). It is the plaintiff's evidence that, the oral agreement to terminate his services, was on condition that the 1st defendant pays to the plaintiff a total sum of Kshs. 471,000 as earlier mentioned.

The plaintiff, in his plaint did not plead any special damages, specifically. The sum of Kshs. 471,000 is made up of two months salary for failure by the 1st defendant to review the plaintiff's contract. The contract (exhibit 1) signed by the plaintiff and the defendant is for one year and it does not make any provision for renewal of the same. Although the defendants entered no appearance and filed no defence, it is unlikely that the defendants would enter into an oral agreement to compensate the plaintiff for failing to renew his contract, which contract made no provision that the same was renewable. This sum cannot be allowed.

A sum of Kshs. 21,000 is claimed in evidence as damages for the use of the plaintiff's personal car for the four months when the plaintiff worked for the defendants. Again, the terms of the plaintiff's contract made no provision for mileage allowance. It is also noted that this sum of Kshs. 21,000 is special damages, which in law must be pleaded with particularity before the same can be proved, for a party cannot embark on the task of proving what was never pleaded. The same cannot be allowed.

A sum of Kshs. 350,000 is claimed in the plaintiff's evidence as salary for the remaining contract period (seven months). I have read through the terms of employment produced as part of exhibit one. There is no provision that if a contract is terminated, then the plaintiff would be entitled to salary for the remaining contract period. All in all, the sum of Kshs. 471,000 claimed as damages by the plaintiff, is not provided for in the contract of employment, and even though the defendants neither entered appearance nor filed defence, it is doubtful that if they wanted to terminate the services, of the plaintiff, they would enter into an oral agreement with the plaintiff to vary the terms of the contract to their disadvantage by committing themselves to pay him Kshs. 471,000 instead of giving him the one month's notice or salary in lieu thereof. Since the contract of employment was in writing, I am satisfied and I find that had there been an agreement reached on 10th April, 1996, the same could have been reduced into writing. The plaintiff has not alleged that the 2nd defendant refused to have the oral agreement of 10th April, 1996 reduced into writing, neither has he alleged that he ever asked the second defendant to reduce it into writing.

The plaintiff and the defendant agreed that the plaintiff's contract with them should be terminated. This is provided for in paragraph 10(b)(1) of the contract of employment, and all that the defendant was required to do, under the terms of the said contract of employment, was to serve the plaintiff with one month's notice, and this was done vide exhibit number one (1) dated 17th April, 1996. Any discussion and agreement the plaintiff and the second defendant may have had, were outside the contract of employment and the court cannot be involved.

The plaintiff has failed to show on a balance of probability that the defendants are in breach of any

agreement. I find no merit in the plaintiff's claim and this suit is dismissed with an order that the plaintiff shall bear his own costs of the suit it is so ordered

Dated this 16th day of September, 1999

SARAH C. ONDEYO

JUDGE

Delivered this. 17th day of September 1999