



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Sui 1515 of 1990

SAMUEL KAMAU MUKONO PLAINTIFF

versus

NAIROBI CITY COUNCILDEFENDANT

JUDGMENT

By this suit filed on 26th March, 1990 the plaintiff seeks judgment against the defendant for damages for unlawful dismissal, salary arrears, 3 months salary in lieu of notice, costs and interest on the grounds that his services were unlawfully terminated by the defendant. On the other hand, the defendant by a defence filed on 24th May, 1990 contends inter alia that the defendant had been lawfully summarily dismissed as he had allegedly misappropriated the sum of Shs. 330,000/= from the defendant. Consequently prior to the hearing of the suit, the following issues were framed by the parties for determination by the court, namely:-(i) Whether or not the defendant unlawfully suspended the plaintiff from employment on 3rd January, 1985 and subsequently terminated his employment on 14th March, 1988?

(2) Whether the plaintiff was given any notice prior to the said termination.

(3) Whether or not the plaintiff is entitled to benefits as in paragraph 8 of the plaint? According to the pleadings and the plaintiff evidence, the plaintiff was in the employment of the defendant prior to the events complained against in the suit. He was an Accountant III in charge of disbursement and collection of the defendant's funds. To be exact, the plaintiff was employed on local pensionable terms with effect from 19th July, 1972, as a clerical officer II and confirmed to the post on 3rd April, 1973. He then progressed through the ranks and was promoted to the position of Accountant III in the defendant's Housing Department with effect from 1st November, 1980 at a salary of £1488 per annum to a maximum of £2196 per annum. By the time the event complained about arose in January, 1985, he was earning Shs. 4,865/= per month.

As bad luck would have it, on or about 3rd January, 1985, the plaintiff was served with a letter suspending him from his duties indefinitely on the grounds that he had misappropriated some funds from the defendant. According to the letter, it appears that the plaintiff had also misappropriated some funds from the defendant previously and that sum was being recovered from his salary. He was however required to reply to the said allegations by way of exculpation and he duly denied the allegations levelled against him.

The investigations into the allegations made against the plaintiff appear to have not been fruitful, though referred to the Criminal Investigation Department of the Police Department. By letters dated 26th September, 1985 and 6th May, 1986, the Criminal Investigation Department wrote to the defendant exonerating the plaintiff from the alleged wrong doing and requesting it to take internal administrative action against the plaintiff. After a delay of nearly three years 'suspension' during which period no salary

payments were made to the plaintiff, by a letter dated 14th March, 1988 and served on the plaintiff on 23rd March, 1988, the defendant terminated the plaintiff's services with effect from 3rd March, 1985 (a date long past) and that 3 months salary in lieu of notice would be paid to the plaintiff. Further by a letter dated 4th October, 1989 the defendant agreed to pay to the plaintiff terminal benefits as stipulated in the relevant terms and conditions. Despite the above promises, no payments were actually made and the plaintiff had to file this suit. On being served with the plaint and despite having agreed to pay terminal benefits and 3 months salary in lieu of notice, the defendant filed a defence contending that it had lawfully summarily dismissed the plaintiff from its services as he had misappropriated Shs. 330,000/= from the defendant, but did not make a counterclaim for the said money against the plaintiff. At the hearing, the defendant did not produce any evidence to prove the alleged misappropriation of funds.

After the hearing, the parties filed written submissions by consent. According to Mrs. Ndegwa for the plaintiff, the plaintiff was entitled to 3 months salary in lieu of notices from the date the letter of dismissal was served on him and all the salary during the period he was under suspension plus terminal dues as agreed by the defendant. In the counsel's view, termination could not be backdated nor can a letter of termination have retroactive effect and should be deemed to be effective as from the date received. To support this submission, the court was referred to the cases of *Ombanya vs. Gailey and Roberts limited* [1974] EA 358 and *Addis vs. Gramophone* [1909] AC 488. She also submitted that as the plaintiff was still in service, he should be paid leave allowance of Shs. 2,000/= per annum and cashier's allowance of Shs. 20/= day_ three and a half years, making a total of Shs. 6,000/= and Shs. 17,220/= for leave and cashier's allowance respectively. On the other hand the plaintiff's counsel, Mr. Chepseb submitted that the plaintiff had breached his terms of service by misappropriating the defendant's funds and as such he was not entitled to any compensation from the defendant. In support of the aforesaid contention he referred to a case known as *Mansard Engineering Co. Ltd. vs. Taylor* (1978) I.e. 44 E.A.T., a copy of which was not given to the court nor is the court aware of where it could be obtained. The learned counsel also stated that as the defendant was entitled to summarily dismiss the plaintiff, he was also entitled to backdate such dismissal to the date it suspended the plaintiff from duty. Despite the aforesaid contention, the learned counsel submitted that the plaintiff was "only entitled" to 3 months notice in lieu of notice, but not to leave and cashier's allowances as the termination had been backdated.

As can be seen from the above, the main issue is whether or not the defendant was entitled to summarily dismiss the plaintiff. In this regard it is observed that no evidence was produced by the defendant to show that the plaintiff had misappropriated its funds. Further in agreeing to pay 3 months salary in lieu of notice and terminal benefits it had thereby impliedly conceded that it had wrongfully terminated the plaintiff's services. In the result my answer to issue (1) and (2) is that the defendant unlawfully suspended the plaintiff from employment on 3rd January, 1985 and unlawfully subsequently terminated his employment on 14th March, 1988 and that no prior notice was given prior to the termination of the plaintiff's services.

On issue (3), which is whether, the plaintiff is entitled to benefits set out in paragraph 8 of the plaint and tabulated in paragraph 9 of the plaint, it is observed that the plaintiff has set out the following items as damages due to him by reason of the 'wrongful dismissal'. They are:

- (a) Damages for wrongful dismissal.
- (b) _____ Salary arrears from 3/1/85 to 16/1/88 as provided in the relevant terms and conditions of service.
- (c) 3 months salary in lieu of notice to terminate employment.
- (d) Interest.

In paragraph 9 of the plaint, the plaintiff also claimed Shs. 226,178.30 as special damages made up as follows:

- (a) Unpaid salary from 1st January, 1984 to 14th March, 1988 - Shs. 157,137/= inclusive of 3 months notice.

(b) Leave allowance for 3 years - KShs. 1,800/=

(c) Cashier's allowance at 20/= per day for three years Shs. 15,840/=.

(d) Dues on Provident Fund - Shs. 51,401/30

Grand Total Shs. 226,178/30 I will deal with the above claim in the following order:

(a) Salary and dues during suspension including unpaid salary, salary arrears, cashier's allowance and leave allowance.

(b) Dues under provident fund.

(c) Pay in lieu of notice to terminate service.

(d) Damages for unlawful dismissal.

With regard to the pay and dues during the suspension periods, it is observed that during that period the plaintiff was still in the employment of the defendant. He could not have taken alternative employment without breaching his terms of employment which also provided that the employee could be dismissed with effect from the date of suspension if found guilty of gross misconduct. As the defendant failed to establish gross-misconduct or a conduct which is incompatible with faithful discharge of his duties, by calling evidence, it was not open for it to terminate the plaintiff's services from the date of suspension and is deemed to have been in the service of the defendant until it summarily dismissed the plaintiff by its letter dated 14th March, 1988. The plaintiff is therefore entitled to be paid all the salaries which were due to him until the date of termination of service including the increments he would have been granted during the period he was in suspension less statutory deductions. I however find that as he was not performing the duties of a cashier during the suspension period, he is not entitled to cashier's allowance as that is an amount payable while actively performing the duties and not by reason of holding that designation. I believe that this is so, as it was not payable on weekends or during leave when the plaintiff was not in the office. I therefore allow the plaintiff's claim for Shs. 142,542/= {after deducting 3 months salary in lieu of notice which I will deal with separately) in respect of unpaid salary during the suspension period less statutory deductions plus salary increments/arrears which he would have been entitled to had he not been so suspended, subject also to normal statutory deductions on such payments. I also allow the claim for leave allowance of Shs. 1,800/= which he would have earned if he had not been suspended. I will deal with provident fund dues separately. I hereby dismiss the claim for cashier's allowance of Shs. 15,840/=.

The plaintiff also claims his provident dues as he had been confirmed and had qualified for same. He also claims 3 months salary in lieu of notice of dismissal. The defendant admitted in its letter of 4th October, 1989 that it would pay the plaintiff the terminal benefits which I take to be the provident fund dues plus 3 months salary in lieu of notice. I therefore allow the Plaintiff's claim for his provident fund dues to be calculated until the date of his dismissal i.e. on 14th March, 1988.

What is now left is the plaintiff's claim for unliquidated damages for wrongful dismissal. It is common ground that the plaintiff was suspended from his duties on 3rd January, 1985 and was dismissed from duty with effect from that date by a letter dated 14th March, 1988 without notice. As the defendant has failed to establish an act of misconduct, gross misconduct or any conduct which may rank as serious misconduct, I have allowed his claim for unpaid salaries up to and including the date which the letter of dismissal was written and served on him. I have also allowed his claim for leave allowance, provident fund during that period and payment of 3 months salary in lieu of notice as stipulated in his terms of service. I have no evidence on actions taken by the plaintiff to mitigate his losses after the 14th March, 1988. Mrs. Ndegwa for the plaintiff did not press for this prayer in her written submission. Mr. Chepseb. in his written submissions did not also deal with this prayer although the plaintiff did not formerly withdraw it.

It is now established law that when a person is employed and one of his terms of employment include a period of termination of employment, damages suffered are the wages for the period during which the

notice would have been current. In the instant case the notice period was three months notice, which I have already awarded. He therefore has no further cause of action. I therefore dismiss the plaintiff's claim for damages for unlawful dismissal.

In summary, I hereby enter judgment against the defendant for the plaintiff for unpaid salary of Shs. 142,542/= from 3rd January, 1985 to 14th March, 1988, leave allowance of Shs. 1,800, 3 months salary in lieu of notice of Shs. 14,595/= salary increments of 3/1/83 and of 16/5/88 so far as it affects salary due before 14th March, 1988 and provident fund dues up to 14th March, 1988, all to be less normal statutory deductions under the law. I also award to the plaintiff the costs of the suit and interest on damages and costs from the usual dates at usual rates. The actual figures for damages to be worked out and agreed by the parties and in default to be determined by the Deputy Registrar of this court with liberty to apply to the court in the event of a dispute thereon, Orders accordingly.

Dated at Nairobi this 11th day of February, 1998.

G. P. MBITO

JUDGE