



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1299 of 1990

APOLLO RICHARD OLUOCH.....PLAINTIFF

versus

KENYA NATIONAL LIBRARY SERVICES DEFENDANT

JUDGMENT

By this suit filed on 5th March, 1990, the plaintiff Mr. Apollo Richard Oluoch claims from the defendant, Kenya National Library Services special and general damages for what he claims to be wrongful and unlawful termination of his services by the defendant. The defendant however denies liability to the plaintiff and contends that the plaintiff's services were lawfully summarily terminated for gross misconduct by the plaintiff.

As can be seen from the pleadings and the evidence on record, the defendant is a statutory corporation charged with the running of libraries in this country. The plaintiff joined the service thereof over 28 years ago in May, 1967. After about 10 years during which I presume he must have served the defendant well, the plaintiff was appointed the Chief Librarian and Chief Executive of the defendant by a letter dated 7th October, 1977 by the defendant's Board. The letter of appointment was under the hand of the then Chairman of the defendant's Board.

After about 10 years service as the Chief Executive of the defendant, some differences appear to have arisen between the parties herein which led to the defendant's Board to request its auditors, Messrs. Cooper and Lybrand by a letter dated 16th September, 1987 to carry out the financial audit of its services. After the defendant had received an initial report dated 14th October, 1987 indicating some malpractices in ordering of books and payments for same, the defendant requested the said auditors to carry out further investigations and in the meanwhile by a letter dated 12th October, 1987 interdicted the plaintiff from his duties during which period he only received half of his salary. This interdiction was followed by a letter dated 31st May, 1988 terminating the plaintiff's services with the Board under the hand of the Chairman of the Board. The letter stated that adverse audit reports had been received and which had led to loss of confidence in the plaintiff by the defendant's Board. Apparently due to some confusion as to who was entitled to terminate the services of the plaintiff, a further letter of termination of services was sent to the plaintiff by the Ag. Director of the defendant dated 27th January, 1989 stating that the Board had on 26th January, 1989 summarily terminated the plaintiff's services as from 12th October, 1987, with loss of all benefits. According to the plaintiff, he had never been asked to defend himself either in the course of investigations or before the termination or his services was reached by the defendant's Board. He also stated that some criminal proceedings were later instituted against him and others for alleged conspiracy, but were later dismissed.

According to the plaintiff, when he was interdicted he found it hard on him. He was humiliated and suffered mental agony, financial embarrassment, family inconvenience and loss of personal and professional credibility before his colleagues. He also stated that that he was then 52 years and

could have worked up to 55 years of age. As a result of the termination, he had only been paid his part of the pension and lost Shs. 136,356/50 which he would have been paid if had

Retired normally. He also said that he had been paid half of his salary up to April, 1988. He denied having committed any irregularities during his long service with the defendant nor

Was he responsible for making payment for goods delivered to the defendant nor had he failed to perform any of his duties.

The defendants' case can be stated shortly. According to the defence filed, it is the defendant's contention that it was entitled to summarily dismiss the plaintiff as from 12th October, 1987 because the plaintiff had misconducted himself in

The service of the defendant by making double payments or payments for undelivered goods and that he had also failed to carry out his duties while in the service of the defendant. A number of instances were alleged but no evidence was called to show that the plaintiff was the author of any of the instances. The instances of misconduct were however denied by the plaintiff and no direct evidence on the instances were produced by the defendant.

On the basis of the evidence produced herein, it was the contention of the plaintiff's counsel that the dismissal was unlawful as no charges were preferred against the plaintiff, nor were reasons given for the dismissal at the time of dismissal. In his view the dismissal had been actuated by malice, resulting into 2 letters of dismissal being issued by the defendant. On damages, the learned counsel submitted that the plaintiff should be awarded damages on same basis as those awarded in HCCC No. 2013 of 1989 between Charles Kariuki Wambugu (who was the plaintiff's deputy) vs. the defendant. To support his submission he referred the court to C.A. Civil Appeal No. 197 of 1992 C.P.C. Industrial Products (Kenya) Ltd. vs. Omweri Angima (unreported) in which the court upheld an award of 15 months salary for wrongful dismissal which was coupled with malice. Damages for mental anguish were however disallowed.

On the other hand, it was the contention of the defendant's counsel that the dismissal was lawful in the light of the auditors' reports. Consequently in his view the defendant's letters dismissing the plaintiff summarily were effective as from the 31/5/1988. He also submitted that an employee is not entitled to notification of intended dismissal or a chance to defend himself under the Employment Act. On damages, he admitted that the case was similar to HCCC No. 2013 of 1989 between C. K. Wambugu vs. the defendant but the court should not award damages to the defendant as he had been lawfully dismissed.

On the evidence on record, as can be seen, the main issue which arises in this case as in the case of C. K. Wambugu, is whether the rules of natural justice were followed by requiring the plaintiff to defend himself prior to the Board of the defendant deciding to terminate the services of the plaintiff. As in the Wambugu case, the audit report, the letters of dismissal or termination and evidence on record do not indicate that this was ever done. The defendant's witness could not help the court as he was not with the defendant's Board when the plaintiff suffered the dismissal herein. The only direct evidence on the point, as in the Wambugu case, is by the plaintiff, namely that he was at no time required to respond to any of the allegations before the various decisions were taken or recommendations made. Consequently the decisions of the defendant's Board were contrary to natural justice thereby rendering the plaintiff's dismissal unlawful. Further, the allegations of misconduct though alleged, were not proved by any direct evidence. They were explained by the plaintiff and in the view of this court were not sufficient to entitle the defendant to summarily dismiss the plaintiff as the letter which first terminated the employment merely "spoke of loss of confidence" and did not refer to gross misconduct. If the reason for termination had been gross misconduct I believe that the defendant would have stated so at the earliest opportunity. In this court's judgment therefore, as in the case of Wambugu, and for reasons given in the said case, which I hereby adopt, the principles of natural justice apply to this case and the plaintiff therefore suffered unlawful dismissal as he was not given a chance to meet the allegations on which his dismissal was based. On account of the above findings the answer to the first issue herein is that the letters of 31st May, 1988, 10/6/1988 and 27th January, 1989, were not ultra vires the defendant's Board. The Board had in the first place appointed the plaintiff and was therefore entitled to terminate the employment of the plaintiff as

he was their employee. The aforesaid letters therefore had legal effect. The answer to the second issue is that there is no evidence that the plaintiff was guilty of gross misconduct and even if he had been, the defendant's Board was not entitled to terminate his services summarily without giving him a chance to defend himself. Consequently misconduct or none was of no consequence in the light of the court's finding that rules of natural justice had been breached by the defendant in terminating the plaintiff's services. As a result of the above conclusions and as in the Wambugu case, the letters of 31/5/88 sent to the plaintiff by the defendant operated as unlawful termination of services from that time i.e. from 31/5/88 and not from the time the plaintiff was merely interdicted to facilitate investigations.

On damages I find that in dismissing the plaintiff the plaintiff disregarded the principles of natural justice and its own terms of service. In the case of *C.P.C. Industrial Products (Kenya) Ltd. vs. Omweri Angima* C.A. C.A. NO. 197 of 1992 Muli JA stated as follows at page 9 of his judgment:

"The appellant company chose to ignore the termination clause and were in breach of the contract of service of their employee the respondent. They cannot hold the respondent bound by the breached termination clause which they had abandoned for to do so would be tantamount to "having their cake and eating it". The respondent is therefore entitled to a reasonable notice for loss of his career." I entirely agree with the above holding. In the current case, the defendant chose not to be bound by the terms of the contract of service relating to termination of service. Consequently his entitlement falls to be determined on the basis of reasonable notice having regard to the peculiar circumstances of the case.

In the instant case, it is observed that the plaintiff had spent all his lifetime in the employment of the defendant.

He was 52 years at the time his chosen career was abruptly brought to an end. At such an advanced age, it is not easy for one to get an alternative employment especially in a specialised field of librarianship at such a high level. Under the provisions of S. 15(1)(c) of Trade Disputes, the court there under can award compensation of up to 12 months salary. I am not aware of the maximum period which this court can award in respect of reasonable notice. In the aforesaid case of CPC, the court of appeal upheld 15 months, although Muli JA thought 12 months were more appropriate. On my part and having regard to the circumstances under which the plaintiff's services were terminated herein including the aborted prosecution which would have further made it difficult for the plaintiff to mitigate his losses by looking for alternative employment, an award of 20 months salary would be reasonable, and I so award herein. As the plaintiff's salary was then Shs. 11,410/= plus house allowance of Shs 6500/= and entertainment allowance of Shs.1000/= per month, his gross pay would be Shs. 18,910/= thereby making the award hereunder a sum of Shs. 378,200/=.

The plaintiff also asked to be awarded the difference of his full pay and the amount paid to him until 31/5/88. He also asked for salary up to the date the second letter of termination was sent to the plaintiff in January, 1989. I see no difficulty in allowing the first limb i.e. the sum of Shs.39,935/= withheld during interdiction. The second limb does not arise as by the time the letter was written, the plaintiff had already been wrongfully dismissed. It was a superfluous letter.

As regards entertainment allowance, I find that if the plaintiff's employment had not been wrongfully determined he would have received it until he is lawfully discharged. I therefore award to him the entertainment allowance as from the date of interdiction to the date of dismissal, a total sum of Shs. 8,000/=.

The plaintiff also claims the defendant's pension contribution. As I have found that the plaintiff was wrongfully dismissed, he is entitled to the defendant's contribution which is said to be Shs. 136,356.50. I also award to the plaintiff his leave days conceded to be 43 days amounting to Shs. 16,354/= plus a sum representing the leave days he would have earned if he remained in employment until after 20 months of reasonable notice.

As regards general damages, apart from the above, I agree with the learned counsel for the defendant that in master and servant cases, no such award can be made. It is included in the reasonable notice figure.

In the upshot I enter judgment for plaintiff for -

- (a) Shs. 39,935/= being unpaid salary during interdiction.
- (b) Shs. 378,200/= being 20 months gross pay in lieu of reasonable notice.
- (c) Shs. 8,000/= for entertainment allowance until 31/5/88 when wrongfully dismissed.
- (d) Shs. 136,356.50 being the employers contribution to the defendants pension plus the sum which the defendant would have contributed if the plaintiff had remained in employment until the period for reasonable notice had elapsed.
- (e) Shs. 16,350/= agreed leave days plus a sum representing the leave days he would have earned during the 20 months of reasonable notice.
- (f) Costs and interest.
- (g) In default of agreement of any further sums due under (d) and (e) the matter to be referred to the Principal Deputy Registrar for assessment.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of September, 1996.

G. P. MBITO

JUDGE