REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3330 of 1990

MAYNARD LUSAMBILI…….PLAINTIFF

VERSUS

SAROVA HOTELS…….DEFENDANT

JUDGEMENT

By a plaint dated 4.7.90 the plaintiff sued the defendants for wrongful dismissal asking for: -

a) A declaration that summary dismissal of the plaintiff by the defendant was unlawful and void for all purposes.

b) An order directing defendants to pay all terminal benefits and due to the plaintiff together with interest thereon.

c) Damages for wrongful and unlawful termination of employment.

d) Costs.

e) Other relief.

At the hearing of the case the plaintiff gave evidence saying that he was during 1989 employed by SWISS AIR as manager in Kenya in which capacity he was in fact in charge of its sales within East African Region, but as a result of an advertisement he resigned his job and was employed by SAROVA HOTELS under terms of service contained in a letter Ex.1. dated 27.7.1989 signed by both parties. The terms in that letter were among others:

PROBATIONARY PERIOD….Three months with effect from date of commencement.

DISMISSAL

"Your employment may be terminated by the company without prior notice for reasons of gross misconduct or violation of the Laws of Kenya for statements or actions that the company determine in its sole judgment to be detrimental to its best interest and or public relations."

Effective date: - was 1st September, 1989 under "CONDUCT" it was stated that misconduct, insobriety or dishonesty any time during employment may lead to instant dismissal. The Plaintiff said that after his probation he was told by the Group General Manager Mr. Hicks that there was reorganization going on

including increases of salaries and that he took this to mean that he had been confirmed, but on 23.4.90 he was surprised when he was served with a dismissal letter. The letter dated 23.4.90 and signed by the Group General Manager said that the Defendant had decided not to confirm the plaintiff in his appointment. There was no reason cited other than performance and attitude to work. He was given his final dues, which he accepted and received.

They were enumerated in the letter as : -

1. Salary up to and including 23rd April, 1990. Last day of work to be 23.4.90

2. 2 months salary in lieu of notice.

3. 17 days leave earned on pro rata basis to concur with notice.

4. Less any company loans advances etc and other statutory deductions. He said he is now 47 years of age although when he left Sarova he was 41 years and he would have worked until he was 50 years of age.

As a result of this wrongful termination he was embarrassed and humiliated and he has not yet got a job up to now.

In cross examination he said he was paid terminal benefits and on leaving he signed a Discharge certificate signifying that he had no further claims against the Defendants.

The defence filed denied all the allegations but when the hearing came the Defendant who was represented by Mr.Getanga and who cross examined the plaintiff and filed his submissions called no witness in its defence. What it means is that the evidence given by the plaintiff stood uncontraverted

In their written submissions the plaintiff argued that the attempted termination was unlawful and that it lacked proper reason and adequate notice and since the Notice was inadequate it had no effect so the contract service still subsists. That the attempted termination was in itself a breach of contract by the Defendant as it cited reasons not provided for in the letter of appointment and therefore the plaintiff is entitled to damages. That the letter of 23.4.1990 being letter of termination in fact amounted to wrongful dismissal.

In his written submissions, Mr. Getanda counsel for the defendant submitted that during probation period the employee and employer could give 14 days notice of termination and then after that two months was required from either side and that in the present case this was done. He also submitted that by signing Letter of Discharge the plaintiff accepted the situation and should not now complain.

On the 11 agreed issues, which were filed by the parties. Although I have to answer all of them I think answering issues 4 to 9 to a large extent resolves the matter as they can be reduced further in those two main issues. First,, when did the probationary period cease?

The Letter of appointment says probation was for 3 weeks so that as from 1.9.89 to 2.12.89, the Probation period should have been over by then. The agreement did not give any provision for extending this period and even if it did there was no evidence of such extension so according to the agreement the period 23.4.90 was after probation and therefore the question of confirmation at that time was not relevant. Stating as was done in the letter dated 25.4.90 , which MARTIN HICKS Group General Manager, wrote to the plaintiff saying that " the decision has been taken not to confirm you in your appointment" was completely irrelevant if it was meant to be a reason at all.

The question to ask is how then could a person whose probation had matured and passed be put back under probation? Again the agreement provided for a notice of two months on termination and so when the Group General Manager gave the plaintiff 2 months salary in lieu of Notice he must have been acting under the terms of the contract of service, which allowed the period of termination.

Was this vitiated because of the heading entitled "confirmation?" I do not think so. I think by so paying two months salary in lieu of NOTICE the Defendant was in effect executing the terms of the contract of employment, although the way probation could be determined was not provided. Its life was given to be only three months.

Reasons for "Dismissal" were given but were concluded in a way that appeared as if they were also grounds for "termination". Again it appears that to use the style whose effect can only be to obscure the intention of the party contracting is really being too clever by half.

If the reasons were to be for termination then they ought to be (i) Gross misconduct, (ii) violation of the Laws of Kenya (iii) violation of the Laws of Kenya (iv) Action or statements that the company judges to be detrimental to its best interests, or public relations. None of these was cited. It is therefore clear that the reasons given for termination are none of these.

The termination or dismissal therefore was at the whim of the employer couched in a non-existent contractual term.

Termination was therefore completely out of the contractual stated reasons for termination in the contract. It must have been unlawful and I so hold.

If I had to state that the Employer did not have to give a reason, this would also not be in accordance with the stated contractual reasons because to do so there must have been statements or action made by the employee which the company determined to be detrimental to its interest and how it determines that is upon itself. No such determination was made because there was no action or statement alleged to have been made by the employee that was detrimental.

I find the relevant case of this court illustrative and that is the High Court Civil Case No. 2835 of 1993, ROSE PATRICIA OLUOCH VERSUS NAIROBI HOSPITAL

In that case the Contract of Employment provided for probation and after that termination by 2 months Notice. It also provided for Dismissal and reasons for dismissal, because reasons for Summary Dismissal had been given and were acted on. The Employer cited reasons for summary dismissal but gave two months salary in lieu of Notice plus terminal benefits and argued that it was termination only. But this court held that it was wrongful termination, which amounted to wrongful dismissal.

In this case no reason for termination was given and no reason for Dismissal was cited. The employer acted unrealistically on reason that had nothing to do with his action. I THINK this was action against the contract. The Dismissal was unlawful.

All that the Defendant did was to call it "non confirmation" and in my judgment that was a phrasal inexactitude, which I do not believe, is a contractual reason for dismissal or was meant to be a reason for it.

Coming to Damages this has been adequately discussed by the Court of Appeal in the case of KENYA OIL FIELD SERVICES LTD VERSUS PETER NJOROGE (NBI) Civil Appeal No. 124 of 1985 where the court said : -

The Law is well settled that when the service Contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination Clause the measure of compensation or indemnity for unlawful dismissal is for the REASONABLE PERIOD OF NOTICE depending on the nature of the employment.

In my judgment there was wrongful dismissal or wrongful termination, but I however think that what the plaintiff received in form of salary in lieu of Notice and all his entitlements were correctly paid and are adequate.

This was graphically expressed by the Court of Appeal on the case of C.P.C. Industrial Products K. Ltd versus Omweri Angima C.A. No.197 of 1992 (NKR) where I think this case falls under categorization No.1.

In the English case of BAKER VERSUS DENKERA ASHANTIN MINING CORPORATION LTD (1903) 20 T.L.R. 37.

It was held that where wages are payable in lieu of NOTICE and are in fact paid there is no right to damages for dismissal.

There was in cross examination of the plaintiff an admission from him that he had signed a Discharge Certificate in which he declared that he would have no further claim against the Defendant. He admitted that he understood its meaning and that he was paid all his terminal benefits. He was paid 2 months salary in lieu of Notice which was the notice period required after time of probation. Apart from this admission the plaintiff never took this matter up at trial as to whether it was an Estoppel, except that among the issues framed was one asking whether the Defendants had conducted themselves in a way that required estoppel, but it was not pleaded in the defence although this omission may not be fatal.

In the case of BABURAM SON VERSUS KASTURI RAM (1938-39) 18 KLR 21. The facts of the case were that: -

The Appellant sold and delivered goods to the Respondent. They disagreed on payment but the appellant eventually sent a cheque with a letter in which it was written "in full and final settlement" of the transaction. The magistrate held that the appellant had by his conducted accepted the cheque in full and final settlement.

On appeal, the High Court held that the magistrate was entitled as a fact to hold that the appellant had by his conduct accepted the cheque in "full and final settlement". Secondly that it is not necessary on the part of the appellant to plead ESTOPPEL because he was relying on an agreement to accept the cheque in full and final settlement and not on any Estoppel.

So what the evidence in this case shows may be estoppel or an agreement.

S.120 of the Evidence Act Cap 80 provides: -

"When on person has by his declaration, act or omissions, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of such thing."

Although it was not pleaded it was in evidence, as issue No.8 was put in terms as if it had been pleaded. Sometimes such scanty treatment of ESTOPPEL in pleadings have been ignored and Estoppel held to exist. In DUKHIYA VERSUS STANDARD BANK OF SOUTH AFRICA (1959) E.A. 958. Court of Appeal said:

The only fact necessary to estoppel which was not pleaded is that the appellant relied upon an assurance from the respondent that the credits have been effected. When the issues were framed by consent, issue no. 6 was put in terms sufficiently wide to embrace always any defence but it must of course be read in light of the pleadings. To my mind the defect of pleading is not a substantial one and only if the pleading is not a substantial one and only if the pleading of the missing allegation of fact would have altered in some way the presentation of the respondent's case or its counsel's approach to the evidence, do I think the appellant should be debarred from relying on the defence."

Normally estoppel should be pleaded specifically because it is usually a material fact which if not pleaded can take the other party by surprise. But BULLEN AND LEAKE & JACOBS precedent of pleadings 12th Ed. Pp 1056 says: -

It is not however necessary to plead Estoppel in any special forum so long as the matter constituting the Estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer.

The writers also say that the plea of Estoppel can never be in a plaint as it is not a cause of action but only a rule of evidence. It can only be raised in subsequent pleadings like defence and reply to defence.

Estoppel can be relied on such away that the party against which it applies is not to be allowed to allege or prove that fact and this is IRRESPECTIVE of whether the fact is or is not in reality true.

In the particulars of this case I have found that termination was unlawful and the matter relied on being the probation time had in fact expired so the plaintiff based his Discharge on erroneous premise but, I must ask if this can stop estoppel from having effect. The answer is that it would not stop estoppel from running because as is reported in TREVEVIAN VERSUS LAWRENCE (1704) 2 Smiths Leading Cases 13th Ed. 655 (Reported in Bullen Leake & Jacobs 12th Ed. Pp. 1053) it would apply irrespective of whether the fact is or is not in reality true.

The question is was there estoppel? The plaintiff by promising that he will not sue the defendant and that receiving money in full and final payment made a representation which the other party acted on and had him paid. These circumstances estop the plaintiff from denying that the payment he received was in final and complete settlement.

He signed for and accepted these terms out of his own volition without any coercion, indeed he admitted to understanding the terms.

In my judgment the plaintiff is estopped from denying that disclaimer and therefore cannot be heard to say now that he has further claims against the defendants.

In the premises although gallantly fought by Mr.Lubullelah Counsel for plaintiff, I must dismiss the claim with costs. I however answer the issues as follows:

1) Yes

2) As in the letter of appointment dated 27.7.89

3) As in the letter of appointment of 27.7.89

4) As set out in the judgment

5) By effluxion of time

6) Not applicable

7) No

8) Yes, but estoppel was by deed and not by conduct

9) Yes

10) No

Delivered this 29th day of October 1996

A.I. HAYANGA

JUDGE