

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 376 OF 1992

CARTON MANUFACTURERS LTDAPPELLANT

VERSUS

MOSES BOSIRE.....RESPONDENT

JUDGMENT

This appeal arises from the judgment of M/s S Ondeyo Senior Principal Magistrate, as she was then, in CMCC 4526/92 at Sheria House Nairobi.

In that suit the respondent had sued the appellant for summarily terminating his services on May 27,1990. The appellant had denied that claim. Both sides had called witnesses. The learned trial magistrate found for the respondent ordering that he gets 2 months salary in lieu of notice to terminate his services. She also gave him 21 days salary in the month of April 1990. These are the days he had worked in that month when on 21.4.90 he was arrested by police from his place of work with the appellant, in the presence of one of the appellant's directors. The respondent had been suspected of stealing the property of the employer. He was charged in a criminal court but he was acquitted. Also awarded was Shs 30,000/= general damages for wrongful dismissal.

Mr Wanjau argued the appeal on the three grounds covering those awards. Mr Nganga on his part maintained that the judgment was proper. He even added in a cross – appeal that the general damages should be increased.

This Court is of the view that the respondent was wrongfully dismissed. S 17(g) Employment Act (Cap 226) may allow an employer to dismiss the employee on suspicion or committed theft. That claim is laid in this appeal. But what of the collective agreement with the union to which the respondent belonged? At least the evidence has it that a letter of dismissal was sent to a union – not the respondent! That aside, the respondent was arrested in the presence of a director of the appellant company on 21.4.90. So from that date the appellant knew why the respondent was not on duty. Indeed evidence had it and it was not denied that when respondent came on duty after his release on bond one director at the appellants premises told him to keep away until probably the case was finished. When he was acquitted, he was not taken back. So all along the appellants were aware as to why the respondent did not report on duty with effect from 21.4.90 until the court case ended. Respondent had no control over this. So dismissing him for failing to come to duty was wrong. Ground 1 is dismissed.

But the lower court was wrong in finding that the notice to terminate the respondent's employment was two months. There is no evidence or law to back this up.

However it is usually a practice in industrial relations that where no specified notice time exists, it should be presumed that the notice takes as long as to earn a salary – usually one month or a week. Here the respondent was earning salary monthly. The appellants ought to have given a month's notice (probably the collective agreement gave a longer period but it was not pleaded or exhibited) and that is what the respondent is entitled to in salary terms. See s 14 (5) (iii) of Employment Act too.

By this the finding and the award of 2 month's salary in lieu of notice is varied to read one month's salary in lieu of notice. The respondent gets what his salary per month was – Shs 1560/= since he was dismissed

on 27.5.90 while there was an agreement with effect from 1.5.90 bringing the respondent's salary to Shs 1560/= pm. Ground 2 and 7 partially succeed.

Ground 6 on award of general damages. Case law cited before this Court is more than clear that no general damages issue in cases of this type for the loss and damage suffered is to the extent of wages for the period of notice. (See *Ombanya vs G & R* [1974] EA 522, *Nyaga vs Air Zaire* [1990] LWR 65, *Waibi vs Railways & Harbours* [1971] EA 235). The respondent was also entitled to the 21 days he had worked in April, 1990.

Accordingly the appeal succeeds on this ground and the cross-appeal is dismissed.

In the end the appeal succeeds to the extent stated with costs set at 2/3 against the respondent. The respondent's cross appeal is dismissed with costs.

Judgment accordingly.

Dated and delivered at Nairobi this 30th day of November, 1995

J.W MWERA

JUDGE