



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 677 OF 1988

CATHERINE MUTHONI KAGAUPLAINTIFF

VERSUS

KENYA CATHOLIC SECRETARIAT.....DEFENDANT

RULING

The plaintiff, Catherine Muthoni Kagau, filed this case on the 24th February 1998 against the Kenya Catholic Secretariat, the defendant, for breach of a contract of service and claimed two years salary from 1st April 1987 to 1st April 1989 calculated at Ksh. 3,350/= per month, being the plaintiff's salary at the time of the termination of this contract. The two years salary thus claimed is Shs. 81,400/=. She is also claiming two years house allowance for the same period amounting to Ksh. 32, 880/= calculated at Shs. 1,370/= per month. She has further claimed two years annual gratuity amounting to Shs. 20,350/= calculated at 25% of the annual salary. The total of her claim in this suit against the defendant is for a liquidated sum of Ksh. 134,630/=. There is also the usual claim for general damages, costs of this suit and interest at Court rates.

The plaintiff's case is that on the 1st April 1986 she entered into a three year contract of service with the defendant as a secretary. The expiry date of the contract was the 1st April 1989. She gave evidence before me and produced a copy of that contract as exhibit No. 1. She further gave evidence to the effect that, at the time she entered into this contract, she had already been married under Kikuyu Customary Law, in April 1985. She did not tell the Court whether she disclosed this fact to the defendant at the time this contract was signed. Although she gave evidence to the effect that she gave birth in November 1986, thereby implying that at the time of signing this contract she was at least one month pregnant, she did not tell the Court that she had also disclosed this fact to the defendant. Be that as it may, after working for the defendant for seven months she applied for maternity leave on the 17th October 1986. She held discussions with the Secretary General of the Defendant before leave was approved. She gave evidence to the effect that she was told to rectify her marriage during the maternity leave and be able to produce a marriage certificate before she could resume duty but that was not part of the conditions of her employment. She stated that her leave was approved via a letter Ref. KCS/PN/27/82 dated the 23rd October 1986 which reads in part:-

“Re: Maternity Leave

I acknowledge receipt of your letter dated 17th October 1986 applying for maternity leave. Your leave is approved and your date of return accepted – 19th February 1987. However following our discussion regarding your marriage condition, you said your marriage will be rectified by December. I therefore state that you bring your Marriage Certificate with you when you resume duty. Wishing you the best of God's blessings.

Yours sincerely

Fr Maurice Lwanga

SECRETARY GENERAL

It is clear from the contents of this letter that the plaintiff was merely being reminded to do what she had said she would do i.e. to rectify her marriage by December, and to take her Marriage Certificate to the Defendant upon her resumption of duty. The Plaintiff's is that this letter cannot be said to be introducing a new condition into the contract of service to the effect that the plaintiff had to rectify her marriage by December and prove it by the production of a Marriage Certificate failure to do so would result in the termination of her services. If this had been the intention of the defendant then that intention was not expressed in this letter.

The plaintiff gave evidence and said that, when her leave expired on 17th February 1987 she resumed duty before rectifying her marriage and she worked for some time. Then she received a letter on the 27th March 1987 which she produced as exhibit No. 3 in which her services were terminated. This letter read:-

TERMINATION OF CONTRACT

Pursuant to section 5 paragraph III of the contract you signed with Kenya Catholic Secretariat on the 31st July 1986, and with my letter dated the 12th January, 1987 regarding the condition to be fulfilled before reporting on duty after your maternity leave, I regret to inform you that K.C.S has terminated your contract with effect from 1st April 1987. Kindly collect your terminal benefits from Accounts Department at your convenience.

Yours sincerely

Fr Maurice Lwanga

SECRETARY GENERAL

Upon receipt of this letter the plaintiff said that she went and saw Fr. Lwanga and explained to him that she had not been able to go through a marriage ceremony in church for lack of funds. She told him that she had spent all her money in the hospital and for treating her child. She said that she was allowed to work for some time without production of the Marriage Certificate but eventually she was told to leave, and she did so. She told the Court that exhibit 3, the letter of termination of her services, referred to Clause 5 (111) of the contract of service which gave the defendant the right to terminate the contract instantly for any gross misconduct. She said she inquired from the defendant what gross misconduct she had committed but she received no explanation.

The defendant did not call any oral evidence and opted to proceed under Order XVII Rules 1, 2 and 3 of the Civil Procedure Rules. Mr. Mutua, who appeared for the defendant, made submissions to the effect that this contract of service was terminated under clause 5 (111) and 10 (a). he submitted that the plaintiff was guilty of gross misconduct by refusing to formalize her marriage to converting it from one under Kikuyu Customary Law to one under the Christian rites and therefore she disobeyed a lawful and proper command from her employer, the defendant.

The contract of service between the plaintiff and the defendant contains a termination clause 5. The defendant could, under clause 5 (iii) terminate this contract on the part of the plaintiff. Gross misconduct is not defined anywhere in this contract but it should be given its ordinary meaning, as provided in section 17 of the Employment Act Cap. 226 Laws of Kenya. This section provides what may amount to gross misconduct so as to justify an employee's summary dismissal. It states: -

S. 17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the numeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal –

- a. If, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work.
- b. If during working hours, becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work.
- c. If an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
- d. If an employee uses abusive or insulting language or behaves in such a manner insulting to his employer or to a person placed in authority over him by his employer;
- e. If an employee knowingly fails or refuses to obey a lawful and proper command which is within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.
- f. If, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty.
- g. If an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.”

It has been submitted by the defendant's counsel that by refusing to convert her marriage into a Christian Marriage, the plaintiff disobeyed her employer's lawful and proper order and thereby committed an act of gross misconduct so as to justify her summary dismissal under S. 17 (e) of the Employment Act I reject this submission. This condition had not been disclosed to the plaintiff at the time of entering into this contract of service. It was not a condition precedent to the contract but was introduced over eight months after the contract had been entered into. Therefore, the defendant has failed to establish gross misconduct or conduct which is incompatible with the faithful discharge of duties by the plaintiff. The termination of her services was therefore wrongful.

I will now deal with the damages. This is a very unfortunate case where the defendant acted very hastily in terminating the services of the plaintiff by summary dismissal or under clause 5 (iii) of the Contract of Service. I have already held that the dismissal of the plaintiff was wrong. She had committed no act of misconduct to justify it. In my view monetary compensation in full must be paid to the plaintiff for the proximate damage that she has suffered. She is entitled to a full indemnity but only against the usual consequences. I will follow the rule stated in the case of HADLEY v. BAXENDALE (1854) 9 Exch. 341 which states that

“where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The plaintiff has specifically pleaded for salary and house allowance for the remaining two years of the contract and annual gratuity arising therefrom. I agree with counsel for the plaintiff that the sum of Ksh. 134,630/= as pleaded in the plaint would be a fair judgment for the plaintiff in the circumstances of this case.

On general damages, whereas I agree that during these times when employment opportunities are scarce the plaintiff may have difficulties in obtaining an alternative permanent employment, I would not agree that I should award her general damages equivalent to one year's salary and house allowance. I would

however award her six months salary and house allowance as general damages being Shs. 33,570/=. I will also find the defendant liable for costs of this suit and interest thereon.

I will therefore enter judgment for the plaintiff against the defendant for the sum of Shs. 168,2000/=, costs of this suit and interest thereon.

Dated and delivered at Nairobi this December 13, 1995

A.G.A ETYANG

JUDGE