



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 299 of 1990

SILAS MIHESOPLAINTIFF

- Versus -

MODERN BUSINESS COMMUNICATIONS LIMITED.....DEFENDANT

J U D G M E N T

In 1984 the plaintiff was employed by the Furniture Centre Ltd. in Mombasa. But in May he entered into negotiations with the defendant's managing director.. Those discussions culminated in two things: in the month of August 1984 the plaintiff voluntarily quit his employment with the Furniture Centre and then joined the M.B.C (the defendant). According to the letter, dated 31st August 1984 (Exh.P1) the plaintiff was appointed customer Engineer with the defendant at a starting salary of £2520 p.a,

"plus the guaranteed bonus amounting to £1080 (to) make a total of £3600 p.a." .

He was also told that he was "entitled to all M.B.C. staff benefits."

In paragraph 8 of the plaint herein it is averred:

"Pursuant to the said agreement the plaintiff entered upon the said employment until 20th of May 1988 when the said defendant wrongfully and in breach of the said agreement and without giving the plaintiff three months' notice to determine the said employment by their letter dated 20th May 1988 dismissed the plaintiff with effect from 16th May 1988 and refused to allow him in their employ."

By this action he asserts that as a result of the defendant's wrongful breach of the agreement' he suffered loss and damage. In paragraph 11 of the plaint he categorises and quantifies the loss. I will inevitably consider each of those aspects in the later parts of the judgment. ,

In its statement of defence the defendant made a total denial of all averments in the plaint. Paragraph 7 of the statement of defence reads:

"Save as to which is expressly herein admitted, the defendant denies each "and every allegation contained in the -plaint as if the same was set out therein verbatim and traversed seriatim."

The variance of the issues raised by the parties calls for detailed examination of the evidence adduced on each aspect.

First, there is a claim for refund of 3 months salary to be paid to the previous employer viz Furniture Centre Ltd.

According to the plaintiff it was verbally agreed between him and the managing director of the defendant that the latter would pay money to Furniture Centre in lieu of the notice which he (the plaintiff) would have given before terminating his contract of employment. This evidence is supported by the letter (Exh.P2). However, in my view the cause of action in relation to this aspect could only accrue to the plaintiff's previous employer who would have been entitled to the notice. Thus, it is impossible to see how the failure on the part of the Furniture Centre to have insisted on the payment in lieu of notice could have constituted a loss (or benefit) to the actual defaulter on that contract; Consequently, I disclaim this claim.

I will now consider the evidence in relation to the following 3 items, namely:

- (i) 3 months salary in lieu of notice;
- (ii) Unpaid salary for the months of April and May 1988.

The relevant events "in relation to these aspects are traced to the letter dated 6th April 1988 (Exh.5) by which the plaintiff was transferred to Nairobi from Mombasa where he had stayed since the date of the inception of his employment.

According to the plaintiff this letter came to him as a shock since it had been made to believe or understand that he would always work in Mombasa; and that he was untransferable. But he agrees that there was no written agreement between him and the defendant prior to his joining them. He said that if it had been specifically indicated that at one stage he could be moved from Mombasa to another town he would have declined the offer which had been made to him by the defendant and would have remained in the employment of the Furniture Centre.

Despite his reluctance he wrote a letter dated 11th April 1988 to the defendant (Exh.6). In this letter he complained that the notice for him to move to Nairobi was too short, and one which rendered it difficult for him to secure a house in Nairobi for renting. In the letter he also mentioned that he had been assigned to investigate an issue concerning one J.A. Aruko for completion of which he required more time. He also inquired whether he would be paid disturbance allowance.

In this connection it is pertinent to read from a few paragraphs of the defendant's letter in which the plaintiff was transferred to Nairobi in order to gauge whether or not his reaction or fears were reasonable and logical. They read as follows:

"I do realise that you have a plot transfer problems in which case you can use your leave to sort out the problems.

MBC will provide you with accommodation in Nairobi for two weeks while you are looking for a house.

A disturbance allowance equivalent to a quarter of your monthly salary will be paid. Transportation of luggage from Mombasa to Nairobi will be paid for on production of necessary receipts. Salary and allowances will be the same as you are getting now. Should you require any further clarification on the above points please do not hesitate to contact me for further clarification."

'As I have already pointed out, in P.Exh.6 the plaintiff evidently exercised his right expressed in the last sentence of the defendant's letter (Exh.5) to seek clarification on certain points: He complained that that notice had been too short to enable him to overcome his personal problems which were in fact known to the boss; he had an office assignment which he had not yet completed; he raised the difficulty he would encounter in finding a house to rent in Nairobi within two weeks; he wondered why he would now be paid ¼ of month's salary instead of one full month's salary. Can it be said that his letter was unnecessary and merely mischievous?

In my view, he raised some cogent points which an employee in a democratic regime is entitled to raise. After all, the letter from the boss showed that he was entitled to seek clarification on an issue with which

he was dissatisfied or indoubt.

The plaintiff said in these proceedings that there was no reply to his letter. According to his evidence he then continued to attend to his duties in the Mombasa office while awaiting a reply to his letter. But instead he was dismissed in a letter dated 20th May, 1988.

The managing director who wrote that letter cited the plaintiff's failure to report to Nairobi on the 16th May 1988, and failure to indicate what reasons had prohibited his transfer movement as the grounds prompting the dismissal. It was also said that he had deserted from duty during the period.

I must, first of all, deal with the aspect of desertion from duty since in these proceedings the defendants have cited it as their justification for the dismissal act taken against (him (the plaintiff)). Did he desert duty? The plaintiff, absolutely denies that he deserted from duty.

The defendant's evidence was adduced by DW.1 who was/ at the time the Engineering Supervisor, and then by Mr. Muhanga (DW.2) who worked in the Mombasa branch. In the first place, the dismissal letter of 20th May, 1988 (Exh.7) does not specify the Period during which the plaintiff had been absent from duty and had not been working in Mombasa. Both DW.1 and DW.2 contended that the plaintiff's last working day was 22nd March, 1988; they based themselves on the working sheet which, allegedly an engineer like the plaintiff was required to complete when on duty. But if this had been so, the supervisor or such other officer would have first written to the plaintiff and sought from him an explanation why he was absent from duty before concluding that the absence constituted gross breach of the contract of employment. The "transfer" letter is dated 6th April, 1988. It did not all mention or allude to the plaintiff's absence from duty. There is nothing in this letter which suggests that the plaintiff had been irregular in attending duty. On the contrary, the letter merely says that the plaintiff's proposed stint in Nairobi would enhance his skills and experience in handling the latest machines. I feel impelled to highlight the relevant evidence of DW.1 and DW.2 on this point: .

DW.1 said: "He (the plaintiff) never came to the office in the months of April and May 1988. He had no worksheets which were filled in at the time; For, an engineer it is not possible to be in the employment without filling in the worksheets.

DW.2 produced (Exh.2) and then said:

"This document (Exh.2) does not inform anybody that 22nd of March 1988 was the" last day he worked. It only shows that he worked on that day."

It is thus clear that the evidence of the DW.1 and DW.2 is mere surmises: it does not conclusively show that the plaintiff deserted duty, and if so, when.

I recapitulate the points which I have discussed as follows:

- (a) The plaintiff was entitled to write his letter (Exh.6). It is not a letter of a defiant employee; rather it was a letter from an obedient officer, who was only anxious or worried about certain aspects of his welfare.
- (b) The letter (Exh.6) certainly deserved a reply from the boss in Nairobi.
- (c) The failure on the part to reply that letter put the employee in a position where he was hesitant and uncertain as to his position. He may very well have thought that the boss was still reconsidering his requests. This did not mean that he had defied the transfer order.
- (d) There is no clear-cut evidence showing that the plaintiff absconded from duty.

In my considered view, the defendant's officers had deliberately precipitated the circumstances which they then subsequently used to justify the dismissal of the plaintiff. It seems clear that the defendant's officers

had not relished or countenanced the plaintiff's presence in their establishment. In this view, I am fortified by the following evidence of the DW:1:

"It is; the plaintiff who had started the Mombasa office. No transfer had ever taken place before that time. I have no evidence that we had the right to transfer the plaintiff."

The plaintiff's evidence is that he was enticed and induced by many terms by the defendant's managing director into joining them. He creates an impression that his presence in his former employer's establishment had posed a stiff challenge or threat to the survival or flourishing of the defendant's business in Mombasa. But after they had secured their position, they did not find the plaintiff any longer necessary and so they calculatingly frustrated him and pushed him into a situation where they would justifiably get rid of him.

The plaintiff was thus entitled to notice of termination of the contract of employment: he was not in breach of the employment terms and conditions which warranted the summary dismissal. Consequently, I award him 3 months' salary in lieu of notice claimed at shs.14,400/-. Also, for reasons which I have discussed above I hold that the plaintiff was on duty in the months of April and May 1988 and consequently, non-payment of his salary for that period was unjustified. I allow his claim and award him shs.9,200/- on that score. Tea allowance and laundry allowance

The plaintiff has not proved on the balance of probabilities that although these "allowances were available they were specifically denied to him". He did not even adduce evidence that he lodged his claim for these allowances. Since his was a meticulously negotiated agreement it would be expected that he should have been explicitly informed" or that he should have fully acquainted himself with the exact terms and conditions upon which he was joining the defendant before doing so. The letter (Exh.1) says that he was to be entitled to MBC staff benefit. It follows "that he' should have acquainted himself with the details regarding the "staff benefit" either before joining or as soon, he arrived there. So he would or should have submitted his claims for these allowances as they fell due or promptly raised the issue; regarding non-payment. I find this belated claim untenable 'disallow it..'

It is for the similar reasons that I disallow the claim -for "unpaid salary for August 1984."

Leave allowance for- the period of April to September 1988 was not proved and the claim is disallowed.

Guaranteed commission: On the basis of the letter (Exh.2) this claim can not be justified or be said to have been proved. This letter is dated 10th April 1985. It said that the guaranteed commission had "ceased to be paid to you as at the end of March 1985." The plaintiff must be taken to have abided by that letter since he continued in employment for the next 3 years.

General damages: I have already held that the defendant deliberately created difficult conditions for the plaintiff and turned round and used them to dismiss him. It is the defendant who was in breach of the contract of employment. The measured damages in this regard is the amount which the employee would have received if he had continued in accordance with the contract. See Halbury's Laws of England 4th Edition Vol. 12 paragraph 1178. But the employee is under duty to mitigate his loss by taking other employment which is suitable and available. At paragraph 11 of same volume of Halbury's I read the following statement:

"In action for breach of contract of employment a plaintiff who has been wrongfully dismissed must take reasonable steps to obtain other suitable employment. He is not entitled to remain idle at the defendant's expense simply because no precisely similar employment can be found, but must accept employment having regard to his standing, experience and personal history he can reasonably be expected to accept It is true that the plaintiff was in a specialised position; but there is no evidence that he would not have found an alternative employment as soon as he was wrongfully dismissed.

Upon all the foregoing reasons I award the plaintiff shs.,53,275/= being equivalent to salary for about 10 months within which he would reasonably have obtained another employment. His net salary was Shs.

5,327/50 per month at the time he was dismissed (See Exh, 10).

Ultimately, I have awarded the plaintiff the following figures:

- (1) 3 month salary in lieu of notice with interest from the date of the plaint .. Shs.14,400/-
- (2) Salary for April and May 1988 with Interest from the date of the plaint .. Shs. 9,200/
- (3) General damages..... Shs.53, 275/-

With interest from the date of this judgment/

There will be judgment for those figures and costs of the suit.

Dated and delivered on the 13th October, 1994.

I.C.C WAMBILYANGAH

JUDGE