IN THE COURT OF APPEAL

AT NAIROBI

CIVIL CASE NO. 125 OF 1996

DALMAS B. OGOYE……..…….....……APPELLANT

AND

K.N.T.C. LTD…….....…….…….RESPONDENT

(Appeal from a judgement of the High Court of Kenya at Nairobi (Justice Githinji) dated 16th October, 1991

in

H.C.C.C. NO. 2687 OF 1989)

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JUDGMENT OF THE COURT

Dalmas Ogoye (the appellant), filed a suit against Kenya National Trading Corporation (KNTC) in the Resident Magistrate's Court at Sheria House claiming damages for alleged wrongful dismissal and an order for reinstatement. KNTC filed a defence denying the appellant's claim and counter-claimed for the loss of it had suffered. That suit was eventually transferred to the superior court because KNTC's counter-claim against the appellant at that time, exceeded the pecuniary jurisdiction of the subordinate court.

The appellant was KNTC's Depot Manager at Mombasa. On 22nd May, 1987, he received a letter from the Managing Director terminating his appointment on the ground that he had been involved in serious malpractice by selling sugar below the authorised prices thereby occasioning financial loss to KNTC to the tune of SHS. 213.192/-.

The case was heard by Githinji J who found that the appellant had indeed been unlawfully dismissed and gave him judgment for salary from 24th May, 1987 to 15th July, 1987; three months' salary in lieu of notice; salary for earned leave; and the surrender value of the appellant's own contribution to the pension fund. These sums carried interest at court rates from the date which the Judge determined the appellant was effectively dismissed. The appellant was also awarded costs of the suit. It is against that decision that the appellant has now appealed to this court.

In his memorandum of appeal, the appellant, who is appearing in person, has raised 7 grounds of appeal, but a careful consideration of those grounds shows that his complaints are simply that the learned judge erred in not making an order for his reinstatement, and secondly, in not awarding him damages for mental anguish and distress. The Judge found as a fact that under the terms of engagement of the appellant by KNTC, the Managing Director of KNTC did not the power to terminate the appointment of the appellant.

He could only suspend him and then make a report to the Board which would then decide the fate of the appellant. So the purported dismissal of the appellant by the Managing Director on 22nd May, 1987, was null and void and of no legal effect whatsoever. The termination of the appellant's appointment was reported to KNTC's Board on 16th July, 1987 which considered evidence from the Internal Auditor prejudicial to the appellant, in his absence, and without giving him an opportunity of rebuttal. The Board after some discussion, ratified the termination of the appellant's appointment, but at the same time pointed out the action taken by the Managing Director was irregular, as the power to dismiss an officer of the rank of the appellant had not been delegated to him.

As it turned, out the termination of the appellant's appointment by the board on 16th July, 1987, was also unlawful because under the terms and conditions governing his appointment, it could only be validly terminated by three months notice or salary in lieu of such notice. So the effective date of termination of the appellant's appointment must be 16th July, 1987, as the Judge correctly found, which means that notwithstanding his purported dismissal by the Managing Director on 22nd May, 1987, the appellant continued to be an employee of KNTC upto and including 16th July, 1987, with full benefits. Since the Board terminated the appointment of the appellant without giving him notice, he was entitled to be paid 3 months salary in lieu of such notice, which at the rate of Shs. 9190/- p.m., adds up to Shs. 27,570/-.

Since the appellant's appointment was unlawfully terminated, the only damages he is entitled to in law is the amount he would have been brought to an end in the manner stipulated in his contract of service and no more. We were told by Mr. Kantai, for the respondent, that the appellant's terminal benefits up to 16th July, 1987, amounted to Shs. 48,079.75, out of which he has already been paid Shs. 21,023.65, leaving a balance of Shs. 27,074.10. in arriving at the total figure, the amount payable to the appellant in lieu of notice was based on his basic monthly salary of Shs. 5,514/-, instead of his net salary of Shs. 9,190/-. It is agreed that this item should have been paid a the higher figure giving a total of Shs. 27,520/-. So the appellant was underpaid by Shs.11,028/- under this head. The balance owing to the appellant of Shs.27,074.10 must be increased by the underpayment of Shs. 11,028/-, giving a total of Shs. 38,102.10. This amount should have been paid to the appellant on 16th July, 1987, when his appointment was unlawfully terminated by the Board, but since it was not so paid, it is now payable with interest at 14% p.a. from that date. We are satisfied that the Judge's decision to award the appellant damages in lieu of reinstatement was correct and must be upheld. The only remedy in a claim for wrongful dismissal is damages. Courts do not order reinstatement in such cases because such an order would be difficult to enforce. Beside, it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer.

The appellant's other complaint was that the Judge had declined to award him damages for mental anguish and distress. There is no doubt that the appellant must have been distressed by what happened, but he cannot recover damages for this because such damages are not recoverable in action for unlawful dismissal.

The appellant still maintains that he has not been paid his full benefits under the pension fund but this complaint lacks substance as evidence of full payment has been produced by the respondent. Except for the minor variation regarding the amount payable to the appellant in lieu of notice, this appeal fails and is dismissed with no order as to costs. Although costs normally follow the event, we have decided not to make an order for the costs against the appellant because he appeared in person and did in fact suffer wrongful dismissal at the hands of the respondent.

Finally, we hereby order the respondent to pay the appellant the balance of Shs. 38,102.10 together with interest at 14% p.a. from 16th July, 1987, on or before 22nd October, 1996, and in default execution to issue. We are grateful for the invaluable assistance which Mr. Kantai has given us in this case.

Dated and delivered at Nairobi this 8th day of October 1996.

R.O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

…….…….

JUDGE OF APPEAL

A.B. SHAH

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR