



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 2604 OF 1988

DAVID MUOLA PLAINTIFF

VERSUS

EAST AFRICAN PACKAGING LIMITEDRESPONDENT

JUDGMENT

The plaintiff David Muola has brought this action against his former employer East African Packaging Limited the defendant. He claims for amongst other things a two months salary in lieu of notice and general damages for wrongful dismissal.

He alleges that he was employed by the defendant on 1/6/76 as an assistant machine operator. Thereafter he was promoted to the post of machine operator a job he did until he was sacked on the 5/6/86. By then he was earning a salary of 1,290/95. According to him what led to his summary dismissal was an allegation which he had denied that he had been given by mistake the salary of another employee to the amount of 2,046/05. He had denied the allegation and infact resisted paying the amount back in two equal amounts by way of subtraction from his pay.

When he did not agree to this he received a letter Exh 2 dismissing him summarily in accordance with section 17(g) of Employment Act for misappropriating company money as well as absenting himself from work. He was to be paid one month's salary in lieu of notice.

The plaintiff denied the allegation leveled against him in Court. In the absence of any other evidence to the contrary I am inclined to agree with the plaintiff that the allegations were baseless. The defendants were served with summons in this suit. They did not enter appearance. The plaintiff has proved that his dismissal was unlawful and he is therefore entitled to damages.

Counsel for the plaintiff has put out a formula upon which he wants the damages due to the plaintiff assessed. It is as follows. Since the plaintiff has since then not got any other employment and is not likely to get any, he ought to be paid for all the time he has been without a job and for the future period he is going to be without a job. That would be upto the age of 55 years of retiring age. At the time the plaintiff was summarily dismissed he was earning the sum of 1290/95 with the expected promotion etc. So by now he would be earning roughly 3000/-.

When he was dismissed he was aged 36 years. He would have worked for a further 19 years. A multiple of 15 years should be used. In this regard the plaintiff is praying for 540,000/-. Plus 2 months salary in lieu of notice.

Total sum of 542,581/90 is prayed for. What is clear here is that there was no written contract of employment between the two not even a letter of offer. At least the Court has not been shown any. This would have obviously laid out what the plaintiff's benefits or entitlements would have been upon dismissal in whatever manner.

According to Mr Kitonga the answer lies in the case of *Southern Highland Tobacco Union Limited vs David Mequeen* (EALR) 1960. The facts of this case were different from the present situation. The issue in that case mainly revolved around what damages the Court should award in a situation where there is a contract or agreement. The issue in that case mainly revolved around what damages could be awarded during the subsistence of the agreement. As I have indicated before there was no contract of service between these people. What the plaintiff is merely saying is that I was dismissed when I was 36 years. Pay me for all that I should have earned till I reach retirement. I am not dealing with a case where the plaintiff was on permanent terms or where the agreement between him and the employer was that he must serve till he was 55 years. More important the plaintiff is a machine operator. There has been no evidence that he has genuinely looked for a job and has not been successful nor that due to the defendant's summary dismissal nobody can give him a job. He has suffered on account of loss of his career.

Secondly the plaintiff has not led any evidence as to what benefit terminal or otherwise he was denied by virtue of this summary dismissal. See *Knight vs East African Airways* EALR (1975) at page 165.

In the absence of any proof that the plaintiff has looked for a job and not found one. Secondly that there were any benefits due to him which the summary dismissal denied. I am of the view that the damages he is entitled to as claimed is the two months salary in lieu of notice which amounts to 2,581.95 shillings special damages plus a sum of 3572/85 worked out on a salary of three months when the plaintiff with diligence would have been able to get employment as general damages. He will also have costs of the suit and interest on the above from the date of filing of the suit till payment in full.

Dated and Delivered at Nairobi this 9th day of August, 1993

E. OWUOR

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JUDGE