



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO 3647 OF 1988**

**BERNARD PAUL DAWA.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

This is an action for general damages. The claim is based on alleged dismissal from Government service.

The plaintiff is Bernard Paul Dawa. He was formerly employed as a Supplies Officer II with the Ministry of Water Development, but his employment was terminated with effect from 22nd October, 1986.

The facts upon which his dismissal was based are not in dispute. On or about 24th September, 1985, some tyres valued at Kshs 4,800/- went missing from the workshop of the Ministry of Water Development, at Eastleigh. The plaintiff and two others were suspected of having stolen them. They were arrested, charged, tried but were acquitted of the charge of stealing by a person employed in the public service. The trial court held, *inter alia*, that there was no evidence of loss.

Subsequent to the acquittal, the plaintiff received a letter dated 14th May 1986 from his authorised officer, the Permanent Secretary of his Ministry accusing him and another of negligently occasioning the loss of six new tyres worth Kshs 4,800/=. The same had allegedly been entrusted to him as the officer in-charge of the drilling stores at Eastleigh workshop. It was common ground that the tyres were the subject matter of the theft charge respecting which the plaintiff had been acquitted.

The plaintiff was asked to and did give representations as to why disciplinary proceedings should not be instituted against him. His representations are not important here. So I do not need to state them here. Suffice it to say that the representations were unsatisfactory to his Permanent Secretary the Ministerial Advisory Committee and the Public Service Commission which then decided to dismiss him. That provoked this suit.

Determination of the question of liability largely depends on whether the issues in the theft charge were substantially the same as those of the negligence charge. Rule 25(3) of the Public Service Regulations made under the Services Commissions Act, cap 185, Laws of Kenya, states in pertinent part, as follows:-

“Where a public officer has been acquitted of a criminal charge such public officer shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, provided that nothing, in this regulation shall prevent an authorized officer from dismissing or otherwise punishing ..... such officer on any other charge arising out of his conduct in the matter unless the charge raises substantially the same issues as those on which he has been acquitted.”

The above regulation is grounded on the principle of double jeopardy entrenched in s 77(5) of the Constitution of Kenya, which provides as follows:-

“77 (5) No person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of superior court in the course of appeal or review proceedings relating to the conviction or acquittal.”

That safeguard is also provided for under s 138 of the Criminal Procedure Code cap 75 Laws of Kenya.

On the facts of this case what did the theft charge entail? The particulars of the charge alleged that the plaintiff and another (Jacob Okello) jointly stole six tyres valued at Kshs 4800/=, the property of the Republic of Kenya. So that the issues which were raised in the charge are, firstly, that there was a loss, the loss concerned six tyres, they were the property of the Government and that it was property which came into their possession by virtue of their employment.

The negligence charge raised precisely the same issues. The same tyres were the subject matter of the charge, the complaint was loss of those tyres that they were the property of the Republic of Kenya, and that the plaintiff was not able to explain their whereabouts. So that the plaintiff was being exposed to double jeopardy, a situation which the provisions I have alluded to above are designed to obviate.

Having come to the foregoing conclusion and considering that the law does not look at form but substance, I am of the view and so hold that the plaintiff's dismissal was in contravention of the provisions of rule 25 (3) of the Public Service Commission Regulations, and was unlawful. The plaintiff is entitled to damages.

The plaintiff has not quantified his loss. He has left it open. The law on damages for wrongful or unlawful dismissal is clear. A contract of service for an indeterminate duration does not mean the employment is indeterminable. Such a contract is liable to be determined (*East African Airways v Knight* [1975] EA 165).

The plaintiff claims salary for the whole of the lost years, namely the period he would have worked had his employment not been prematurely terminated. He reckons that he would have worked until the age of 55 years, the age for mandatory retirement. He also claims service dues and terminal benefits. There is no evidence before me that the plaintiff would have worked until the age of retirement. There are several imponderables. The plaintiff would most probably have lost his employment due to other causes, he would have died, or been incapacitated by illness or accident. So that it is not true to say the plaintiff would have worked until retirement. So what would be the measure of damages.

The plaintiff was receiving half pay from 2nd October, 1985, the date of his interdiction. Upon his acquittal he was entitled to payment of the remaining half salary, each month until the date of his dismissal. That works out to be 13 or so months. The plaintiff was earning Kshs 1555/= per month which I take was the half salary, considering that the letter of interdiction is dated 2nd October, 1985. His pay slip for August 1986, shows salary as Kshs 1555/= per month gross. So that if that figure is multiplied by 13 months, the total comes to Kshs 20,215/=. I allow that.

Then there is the claim for terminal benefits and service pay. The plaintiff having, in a way, been summarily dismissed, he would only be entitled to payment for a period which will in the circumstances, constitute reasonable notice. In the case I cited earlier of *E A Airways v Knight* [1975] EA, 165 Mustafa Ag VP said:

“I would normally consider that a contract of service between an employer and an employee for an indeterminate duration is intended to be determinable ..... such a contract is normally liable to be determined by reasonable notice, if no period is provided, in the absence of custom, legislative or provision expressed or implied to the contrary.”

The plaintiff's employment was governed, by the Public Service Commission Regulations. Those have no provision as to the period of the notice or as to notice. The Employment Act, cap 226 laws of Kenya, does not apply considering that separate regulations were promulgated to govern the relationship between the Government and its employees. In absence of such provision the common law applies. The Court has to consider what will constitute reasonable notice in the circumstances. The plaintiff has worked with the Government for 17 years. That was a relatively long time. He has a clean record. His dismissal appears to have been actuated by malice. In those circumstances, I consider twelve months to be a reasonable multiplier. His monthly salary was Kshs 3110/- for twelve months it comes to Kshs 37,320/=. I allow that.

The plaintiff is also entitled to his contributions under the Widows Children Pension Scheme.

The total allowed comes to Kshs 57,535/= which figure excludes contribution under the Widow Children Pension Scheme. I give judgment accordingly, with costs and interest from the date of this judgment.

Dated and delivered at Nairobi this 31st day of July 1992.

**S.E.O BOSIRE**

**JUDGE**