



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO 10 OF 1991**

**MAYFAIR HOLDINGS LIMITED.....APPELLANT**

**VERSU**

**WALTER OKECH ODWAR.....RESPONDENT**

**JUDGMENT**

One witness testified for the plaintiff - that was the plaintiff himself. Nobody was called to testify on the defendant's side. It is clear one at least had intended to be called but because of foot-dragging - that stage was not reached.

The appellant has been the employer of the respondent since about 1984 as stated in paragraph 3 of the respondent's plaint in the lower court. Paragraph 5 of the same plaint stated as follows: -

“On or about 16-2-89, the defendant purported to terminate the services of the plaintiff ostensibly due to a slack on business without paying him for the period worked in February 1989, 3 month's pay in *lieu* of notice, 4 years leave pay, 5 years severance pay and general damages for a destroyed career.”

Paragraph 6 states: -

“The said action was high handed, unjustified and insensitive and the plaintiff had suffered special and general damages as a result thereof for which we hold the defendant liable in respect of the said termination of service.”

The prayers were for:

- “(a) Special and general damages
- (b) Costs and interest”.

In his evidence, the respondent testified that he joined the defendant was paying as a clerical officer on 1st February 1983 at a salary of Kshs 916/55 or between 1350/= and 1400/= if he did some overtime.

On 16/2/89 he received a letter of termination. The letter gave him a month's notice. Respondent said:

“I complained about the termination and being a disabled person, getting another job would not be easy for me. Gilani refused to listen to my pleas saying business had gone down.”

He then stated that he was asking the Court for general damages for unlawful termination of services, leave pay for the four years plus costs and interests.

In his re-examination, the respondent said that he had not been given a letter of appointment. The significance of this of course is that the terms of that contract between the appellant and the respondent were not spelt out. Mr Wasuna for the appellant says that in that case resort should be had to the Employment Act cap 226 of the Laws of Kenya with regard, I believe to such things like termination notices and so forth. That is doubtlessly correct. The learned magistrate gave judgment to the respondent and hence this appeal. She said this: -

“In the result, judgment is hereby entered for the plaintiff as hereunder: -

(1) Kshs 916/55 being his pay for February, 1989

(2) Kshs 916/55 x 4 years being his pay in *lieu* of leave ie Kshs 3,664/20.

(3) Kshs 50,000/= being general damages for unfair dismissal together with costs...”

The basis of the judgment was therefore that the Court had found that the respondent had been wrongfully dismissed. Mr Wasuna states that this finding must have been based on promise that no reasons for the termination were given.

The learned magistrate has been attacked from all corners by the appellant.

The facts that respondent was an employee of the appellant and that he was subsequently terminated are not disputed. If he was employed on 1st February 1983 and terminated on 16th February 1989, he had worked for six years and not for four years as he stated.

Heavy weather has been made of the fact that the respondent was invited for an admission into the disabled rehabilitation center in Kisii where he would stay for one and a half years for a rehabilitation course. This was in 1985. The respondent says he was persuaded not to go by his employer. The learned magistrate took this into consideration in reaching her award of general damages and she said: -

“I am satisfied that had the plaintiff gone for that course his general condition would have been thereby improved.”

I would not wholly agree with that statement unless of course it was known what the appellant was going to be rehabilitated for. In any case I doubt that the respondent should have been condemned in damages for dissuading the appellant from going to be rehabilitated if he did.

Accused had a job for which he continued to be paid and as Mr Wasuna points out he offered no consideration for the dissuasion. That point ought not to have been considered in awarding damages or at all.

The main issue is: was the respondent wrongfully terminated?

The learned magistrate found that he was and in doing so stated *inter-alia* this:

“It is my view that an employer is under duty to observe the terms of their contract with the employee and to give full effect to the rights thereby conferred. Once an employer has agreed to employ a worker, he can only terminate the services of that employee in accordance with the acceptable procedure, and in particular in accordance with the terms of their contract.”

It is refreshing to realize that the learned magistrate appreciated that an employee and employer cannot be tied to each other forever, for as one would say, what has a beginning must have an end.

The terms of the contract, as I have stated, were not forthcoming and so regard would have to be made of the Employment Act. Section 14(5) (iii) states:-

“Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya be deemed to be: - (iii) Where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty - eight days next following the giving of notice in writing.”

If however, the contract provides for a longer period of notice, then that longer period will apply.

The position is that the respondent herein was entitled to be given at least 28 days notice. He was given one month. Once the terms are complied with, then the employer is not bound to give reasons for the termination and it would be wrong to say that he did not give reasons and therefore the termination was unlawful.

It may be that getting another job by the respondent herein would be difficult because he was disabled as he says. That hardly should have been the bother of the employer as long as he complied with the terms of the contract.

The lower court was wrong to find that the termination was unlawful or unfair or unjustified. General damages were therefore not awardable and even claim for special damages was because:

“The said action was high handed, unjustified and insensitive.”-Paragraph 6 of the plaint. I have found that that action was not met and this suit should have been dismissed.

The pay for February 1989 should not have been awarded by the Court because there was notice given of a month with full salary. Why didn't he collect his salary? He says:

“I tried to go for the salary as stated in the dismissal letter but what they wanted to give me was less...” and so he did not collect it. It is not correct therefore to say that respondent refused to pay him his February 1989 salary.

The basis for the amount awarded for the leave period by the learned magistrate is not shown save stating: “It is therefore my finding that he is entitled to be paid the equivalent of one month's salary per year for those four years he worked.” I will accordingly not allow the award in this respect to stand because I see no agreement to support this and the leave under the Employment Act is 21 days per year.

The upshot is this: - The appeal is allowed. The lower court's judgment and attended orders are accordingly set-aside with costs to the respondent.

**Dated and delivered at Kisumu this 16th day of December 1992.**

**J.A MANGO**

**JUDGE**