



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 44 OF 1982

SELINE OWAGA PLAINTIFF

VERSUS

TRANSOCEAN (UGANDA) LIMITEDDEFENDANT

JUDGMENT

The plaintiff Seline Owaga, a Ugandan by nationality and a secretary by training, impleaded Transocean (Uganda) Limited, a Ugandan Company which in 1974 and during all material times was carrying on business in among other places, Mombasa, for damages, special and general, retirement benefits, interest, and costs. The claim was based on an allegation that she had been summarily and wrongfully dismissed from her employment with the defendant company as a secretary.

In her plaint, dated 19th January, 1982, she has averred that she was taken by the defendant on 4th April, 1974 as secretary/stenographer at a salary of Kshs 1500/- per month, which salary was increased from time to time and was KShs 2665/- per month at the time of her dismissal; that she was subsequently served with a letter by the defendant which informed her that her employment with it had been summarily terminated; that as a result of that dismissal she suffered loss and damage which she particularized; that demand had been made for the payment of the particularized sums and terminal benefits but that the defendant had neglected and or refused to pay, with the result that this action was provoked, and that the cause of action arose at Mombasa, Kenya, within this Court's jurisdiction. It is noteworthy that the plaint did not set out the date of dismissal.

Furthermore the prayers include one for general damages, but the plaint does not spell out basis for the prayer.

The defendant was served with the summons to enter appearance and the plaint. It appeared by a firm of advocates in Mombasa, Kiambo and Company Advocates, and through them filed defence. In it, it admitted the plaintiff had been its employee, that it had summarily dismissed her but for good cause and in accordance with the law; in the alternative, that the plaintiff had voluntarily resigned after refusing to go to Kampala on transfer.

The background facts of this action are simple. Upon application and subsequent interviews by the defendant, the plaintiff was taken by the defendant as stenographer/ typist with effect from 5th April, 1974, and was straightaway posted at Mombasa. The defendant's head office was then and still is at Kampala, Uganda. The plaintiff's letter of appointment was dated 25th March, 1974, (Exht A) and sets out the initial basic terms of her appointment.

The plaintiff commenced work at Mombasa, on 5th April, 1974. Initially she was taken on probationary terms. She was confirmed later in that grade, and later still she rose to the rank of personal secretary grade II, a grade which she was confirmed in November, 1979. Her salary was fixed at KShs 2200/- per month. There were other benefits which were not set out in her letter of confirmation dated 13th November, 1979 (Exht B), but which could be ascertained from the Staff Regulations "A copy of which is available in this office for your scrutiny." The author of the letter was the personnel manager, at Kampala.

The plaintiff continued her work and appears to have received a further promotion subsequently, judging from the contents of the letter which advised her to move to the head office, at Kampala. The letter, dated 28th September, 1981, (Exht 1), describes her as Personal Secretary grade I, and was signed by one Eli Nathan Bisamunyu, designated as managing director. That letter provoked the events that culminated in the termination of the plaintiff's employment with the defendant. The body of the letter is short, and I consider it proper to reproduce it:

"RE: Transfer to Uganda

Management of Transocean (Uganda) Limited has decided to transfer you to the headquarters, Kampala, with immediate effect. You will be required to hand over your office, etc, by 2nd October, 1981, so that arrangements can be made for your travel to Uganda. You will be required to report at the company headquarters by 15th October, 1981, where you will get your posting instructions. The company will do all in its power to make your travel arrangements as smooth as possible.

Eli Nathan Bisamunyu

Managing Director."

The plaintiff received the letter a day after it was written. She responded by hers of 29th September, 1981 in which she indicated, that she had no objection to move on transfer to Kampala, but proceeded to make a request for a delay in effecting the transfer in order to allow time for her daughter to complete the last of the three annual school terms in Kenya. It is common knowledge in Kenya that the third school term in any given year ends either at the end of November, or in early December. That in effect meant that the plaintiff was requesting that the transfer be deferred until December, 1981.

It would appear to me that contemporaneously with the handing over to the plaintiff of the letter of transfer she was also handed another letter from the Branch Manager, at Mombasa, advising her to hand over to a Mrs Joyce Mwandoro before 2nd October, 1981. The letter was dated 28th September, 1981. In its penultimate paragraph the letter stated as under:

"Any personal problems you may wish to discuss with management about the transfer will be presented to the Transfer Committee consisting of the Chief Accountant, Senior Work Study Officer, and the Assistant Personnel Manager who will be available in the board room from Tuesday, 29th September, 1981 to Thursday, 1st October, 1981, between the hours of 2 pm to 7 pm."

The Branch Manager was then called KB Muge. The letter appears to have crossed with that of the plaintiff which was requesting that her transfer be deferred, contrary to the plaintiff's oral testimony that it was written in response to hers. The letter makes no reference to the plaintiff's letter. Be that as it may the plaintiff construed it to mean her request had been refused. She then proceeded to write her letter of resignation. The letter was dated 19th October, 1981, four days after the date when she was required to report at the headquarters, at Kampala. She gave her reasons as follows:

"Transfer was not genuine-

(a) I was given three days to leave the office, which is not the case when one is transferred.

(b) I would have been given at least a certain period to wind up as was done to other people who were transferred from this office to Head Office.

(c) I was asked to put in writing to why I think I cannot go immediately. I stated my reasons to why I wanted to be given time, at least up to December. The reason being that my kid is still in school, I asked for time until she finishes her exams, giving proofs, in case you may doubt me. Because I know without the exam results a kid cannot go to the next class next year, and it would be more expensive for me to make her repeat the same class the whole of next year. I have nobody to leave to look after her. Nobody could see the importance of my reasons, so I was refused all the same. You could not even sympathise with such a case.

(d) I produced a receipt (medical) from Pandya Memorial Clinic (Laboratory) I was refused a refund.

(e) With salary I am suppose(d) to sign certain papers, which is not always the case with those who have been transferred from Mombasa office to Head office. With all the above mishandling one is bound to feel one is not treated in the normal manner. In this respect I would like to ask you to pay all my dues.”

Just to disgress abit, the plaintiff was at the time of her employment by the defendant single and without any child or children. In the course of her stay in Mombasa she had a sibling, a daughter. It is that daughter whom she talks about in the letter above, who was learning at Loreto Convent, Mombasa, a primary school.

The plaintiff's resignation was left at large. The Branch Manager, Mombasa, wrote back on 21st October, 1981, (Exht 6 refers) to say, in effect, that he was not competent to accept or reject the resignation. His reason was that the letter was written long after the plaintiff's transfer had taken effect. He stated that he had referred the matter to the appropriate office for action. He added that the plaintiff's refusal to proceed on transfer was conduct amounting to "gross insubordination." and was punishable by summary dismissal. He also asked the plaintiff to vacate and deliver vacant possession a house which the defendant had leased for her use. She was allowed up to 23rd October, 1981, to do so, but she did not do so within that period. She vacated the house sometimes in April, 1982. The plaintiff testified that rent for December 1981, March, April and May 1982 was paid by her, but not that November, 1981, January and February, 1982. The rent payable per month was KShs 1800/-.

In the meantime the plaintiff received an internal memo dated 22nd October, 1981, advising her of a salary rise from what she was then earning to KShs 2,665/- per month back-dated to August 1980, which then meant she was entitled to arrears of salary. One Michael Lalim signed it on behalf of the Branch Manager. The plaintiff has not made any specific claim for arrears of salary in terms of that memo. Mr Paul Kiambo took issue with the authenticity of the memo, but his objection has no basis as I shall demonstrate shortly hereunder.

The defendant refused to accept the plaintiff's resignation and preferred to summarily dismiss her. By its letter dated 2nd November, 1981, it notified the plaintiff that she had been summarily dismissed for gross insubordination due to her refusal to proceed on transfer to Kampala. Her resignation was treated as a refusal. The defendant having dismissed the plaintiff summarily it in effect meant that it had refused to accept her resignation.

I earlier alluded to the particulars of the defendant's defence, in summary form. It did not counterclaim anything. It must, however, have later reconsidered its position because on 26th August, 1983 it brought a separate action (MSA High Court Civil Case No 894 of 1983) based on the facts I have outlined above. In its plaint dated 25th August, 1983, it avered, that the plaintiff had resigned without notice and was liable to it for 3 months salary in lieu of notice at the rate of KShs 2,665/- per month, that she had received from the company financial accommodation but had not by the time of her resignation paid a balance of KShs 3,657/70; that upon her resignation she held over her occupation of company premises for 6 months for which period it claimed rent at the rate of KShs 1800/- per month, and that it had unsuccessfully demanded the money from her. As expected the plaintiff as defendant in that suit denied she had resigned, that she owed the company any money, and that she had received from the defendant any financial accommodation. She also denied any demand had been made for any money from her.

Both this and the defendant's suit, viz Mombasa High Court Civil Case No 892 of 1983, were

consolidated by an order of this court dated 2nd May 1984, made, presumably, with the consent of both counsel then on record for the parties.

The issues were not agreed, nor were they settled before the trial commenced. It was by oversight, I must say, that they were not. The crucial question for determination of which the disputes between the parties depend is whether the plaintiff resigned or was summarily dismissed. The contention of the plaintiff and her evidence is that she was summarily dismissed. The defendant's averments in the plaintiff's case is that she was summarily dismissed due to misconduct on her part. In its case however it contends that the plaintiff resigned without giving due notice. The plaintiff could not have resigned and be summarily dismissed at the same time.

There is clear distinction between resignation and dismissal. The former relates to conduct on the part of an employee in which he voluntarily decides to terminate his employment with his employer either with or without notice. It is an act by a servant or employee. Dismissal on the other hand is a move by an employer or master terminating the services or employment of his employee or servant, summarily or with notice. In law termination of services with due notice does not ordinarily give rise to legal liabilities except as may be stipulated in the contract of employment where there is one, or as provided by any relevant statute, where one does exist in that regard. Summary dismissal is a power an employer may exercise without incurring any legal liabilities if an employee has been guilty of conduct, of a wilful nature, which amounts to a repudiation of the contract of service. It must be misconduct of a serious nature, otherwise ordinarily the employee is entitled to notice. (*Oloche & Kanja -v- County Council of Nyandarua* [1966] EA 467).

What were the circumstances of the plaintiff? She was told to shift from her place of work at Mombasa and report at Kampala within a specified period of time. She had worked at Mombasa for approximately 8 years. Obviously she needed quite some time to wind up her stay in Mombasa. She was allowed precisely 3 days to hand over, and 11 days to pack up and travel to Kampala to be able to be on duty there (at Kampala) on the 12th day. She could be forgiven for feeling that her transfer was ill motivated. Her petition to her employer for more time was not responded to. Out of sheer frustration she was forced to tender her resignation which was rejected by the defendant. The letter dismissing her from the defendant's employment made reference to her resignation letter which in effect meant that it was written with the sole object of denying the plaintiff any benefits which would have fallen due to her on resignation, or so I think. Otherwise it is not clear why the defendant adopted that course if it was not going to incur any expense on the plaintiff consequent upon the intended resignation. I hold that the plaintiff did not resign, although that is what she had decided to do, but was dismissed. The defendant's conduct in the whole matter was tainted with *mala fides*, and, to my mind, it will be an affront to equity to hold that the plaintiff had resigned. In any case had the plaintiff resigned the defendant would not have worded the dismissal letter the way they did. The effective date of the plaintiff's intended resignation was 20th October, 1981. The letter of dismissal was written on 2nd November, 1981. It did not state that the plaintiff's dismissal was with effect from 20th October, 1981. It merely notified the plaintiff that she had been summarily dismissed without stating the effective date. My own impression is that the dismissal took effect on 2nd November, 1981, the date of the letter.

Was the summary dismissal justified? The reason for the defendant dismissing the plaintiff was because she had tendered her resignation which conduct was regarded by it as gross insubordination. I earlier stated that the defendant's conduct in the matter was tainted with *mala fides*. I now so hold. They allowed the defendant inordinately insufficient time to wind up her stay in Kenya. From that it may be inferred that they intended to frustrate her to such an extent that she would be forced to behave the way she did and thus provide them with a ground for laying her off without benefits. The plaintiff was not guilty of any wilful act of disobedience to have been summarily dismissed. The defendant pushed her to the wall, so to speak, that she appears to have had no choice in the matter. She had a daughter whose welfare she could not overlook.

The defendant's position would have not been any better had they accepted the plaintiff's resignation. I say so because, in my view, the defendant did not give the plaintiff reasonable notice to wind up her affairs, personal and official, before she would move to Kampala to where she was transferred. She wrote

to the defendant to request for more time and explained why more time was necessary. The defendant did not give her a hearing. Had it done so it would have responded to her petition for more time. That it did not respond is clear evidence that it wanted to force her out of her employment, though not directly. I hold that the defendant wrongfully summarily dismissed the plaintiff.

The plaintiff's salary on the last month she was on duty was disputed. She testified that it was Shs 2,665/-. I find that was her salary. She adduced evidence, which I accept, that her salary had been increased to that figure on 22nd October, 1981, and was backdated to August, 1980. The defendant in its claim worked out salary in lieu of notice on the basis of KShs 2,665/-, which in effect means that it admitted the plaintiff was actually given a rise in salary to that figure.

The plaintiff had worked for the defendant for upwards of 7 years. She claimed gratuity for 7 years at the rate of KShs 2,665/-. It was her evidence that computation of gratuity was done by taking the salary of the last month worked multiplied by the number of complete years served. In her case the figure would be KShs 18,665/-. The defendant did not call evidence to controvert that. I allow it because I have no basis to doubt the plaintiff's testimony in that regard.

The plaintiff also claimed 3 months salary in lieu of notice. She did not call documentary evidence to show she was entitled to 3 months' notice before her services could be terminated by the defendant. The averment with regard to notice was not traversed in the defendant's written statement of defence. It was therefore not an issue at the trial. In any case in its plaint the defendant used the same period to base its claim for salary in lieu of notice. Pleadings are however not evidence, but they may lend assurance to evidence adduced. The plaintiff having been summarily dismissed she is entitled to be paid 3 months salary in lieu of notice. I allow her claim on that head totalling KShs 7,995/-.

The plaintiff had earned one month leave for 1981, which she did not take. I hold that the defendant is liable to pay her KShs 2665/- representing one month's salary.

As for travelling expenses she claimed KShs 4,025/- for 3 adults and one child. The three adults were herself, her father and mother. It would appear from the evidence, and in particular exhibit 6, that the defendant company was meeting travelling expenses of relatives of its employees. If that was so, and the plaintiff testified that her parents were living with her here at Mombasa, she is, therefore entitled to be reimbursed the money she spent in her travel to and in returning them to Uganda. The figure claimed was not disputed in the written statement of defence. I have no basis for refusing to allow it. I allow it in full.

There was also a claim for contributions towards the retirement benefit scheme, but no evidence was adduced on sums contributed. The claim fails.

As for the claim for general damages, I hold that it does not lie. The plaintiff's employment was for an unspecified period and was terminable on notice of a designated period. The remarks by Law Ag P in the case of *E. A. Airways v. Knight* [1975] EA 165, at P. 167 are instructive. He said:

"If a plaintiff has been wrongfully dismissed from employment which was for a fixed term at a fixed salary his loss can be precisely calculated and should be claimed as special damages. The same applies to a claim based on failure to give agreed or reasonable notice."

I adopt those remarks in the instant case. The plaintiff's claim was based on summary dismissal. It was basically a claim for a liquidated sum. No general damages were claimable as her loss could be precisely quantified. The upshot of the foregoing is that there shall be judgment for the plaintiff for KShs 33,340/- with costs and interest at court rates. Costs to be on High Court scale.

The defendant having not called evidence to establish its case and or to controvert the plaintiff's contentions and allegations, I have no basis for finding for it. Its case is dismissed with costs.

Dated and delivered at Mombasa this 23rd Day of June, 1989

S.E.O BOSIRE

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JUDGE