IN THE COURT OF APPEAL

AT KISUMU

(Coram: Platt, Apaloo JJA & Masime Ag JA)

CIVIL APPEAL NO. 170 OF 1986

BETWEEN

OKONG'O.....APPELLANT

AND

ATTORNEY-GENERAL & ANOTHER.....RESPONDENT

JUDGMENT

(Appeal from the Judgment and Decree of the High Court at Kisumu, Butler-Sloss J)

May 11, 1988, **Platt, Apaloo JJA & Masime Ag JA** delivered the following Judgment.

The appellant had sued the Attorney-General, representing the Minister of Labour, claiming that although he had been interdicted and finally dismissed from his post as Labour Inspector Grade II, he had never been reinstated. He prayed for an order of reinstatement or alternatively the payment of his full terminal benefits. What had caused the refusal to reinstate the appellant, was, the fact that the appellant had been convicted of the theft of Kshs 540 and placed on probation for two years. In January, 1981, the Advisory Committee of the Ministry of Labour recommended that the appellant be reinstated. But the interdiction continued until he was dismissed with effect from November 21 1980, with the loss of all terminal benefits. The Attorney-General admitted all these facts, but contended that the Minister was justified in his refusal to reinstate the appellant.

The learned judge in the High Court agreed with the Minister. He construed section 9(1) of the Probation of Offenders Act (cap 64) as merely providing that when the conviction of an offender entailed disqualification or disability, those consequences should not obtain when a person convicted is placed on probation. In the instant case there was no question of disqualification or disability. It was, in the learned judge's view, a question whether the Public Service Commission had the right to engage and retain employees who are trustworthy, and to dismiss those who are not. In fact the appellant had stolen the money of his employer, the Government.

Having been convicted of theft he had forfeited his terminal benefits. Behind the scenes, there had grown up a view of the government as an employer, which was both high minded and conciliatory to those placed on probation for offences they had committed. Employers generally were being encouraged to retain their employees, when, though guilty they had been placed on probation by a court.

It was a view of the probation order, that its general aim lay towards rehabilitation rather than punishment. This view coloured an attitude to regulation 25 of the Public Service Regulations, so much

so that a probation order came to be seen as tantamount to an acquittal. Therefore regulation 25(3), which deals with persons acquitted, and which contains a warning that a person acquitted should not be dismissed for the very same matter on which he was acquitted, was held to apply to persons placed on probation, or more or less to so apply. Hence the appellant wrote on March 11, 1982 that he understood that a person who had been placed on probation could not be punished twice by being dismissed.

Whilst we appreciate the liberal attitude towards probation and the need for the rehabilitation of offenders, which involves finding employment for them, it is unfortunate that there are two major misconceptions, which destroy any legal basis for the liberal approach, and leave it merely as a matter of policy or discretion in the employer.

The first is that at common law, by which this Court is guided on contract, (see the Law of Contract Act (cap 23) specific performance of a contract of service has never been ordered. The reason is that the Court felt it impossible to force the services of an employee on to an employer, when the latter had lost all confidence and trust in the employee. How would the Court supervise a contract, it was asked, which involved so personal a relationship? So far this approach has been maintained, although in the Industrial Court specific performance in the nature of re-instatement can be ordered. But as a matter of the contract between the parties, in this Court re-instatement cannot be ordered. Indeed, even under the Employment Act (cap 226) an employer may summarily dismiss a servant who is guilty of a criminal offence, (see sec 17(g)). An employer does not have to harbour a thief if he judges that that is not beneficial to him.

It follows that once an employee has been dismissed, whether rightly or wrongly, the dismissal stands, and if the contract has been broken by the employer, damages for breach of contract is the remedy to which the employee is entitled. (See *Lulume v Coffee Marketing Board* [1970] EA 155; *Kyobe v East African Airways* [1972] EA 403).

Mr. Wasuna, in arguing the appeal, recognized this principle, and he asked for the alternative prayer to be granted, in the event that we held that reinstatement could not be ordered, namely that the appellant be given his terminal benefits under the contract. We have no need to go into that doubtful inquiry, and we will pass on to the second consideration.

It is necessary to observe precisely what section 9(1) of the Probation of Offenders Act (cap 64) provides. It says:-

> "9.(1) Where a person is convicted of an offence and is released under a probation order, his conviction for that offence shall be disregarded for the purposes of any enactment by or under which any disqualification or disability is imposed upon convicted persons or by or under which provision is made for a different penalty in respect of a second or subsequent offence, or in respect of an offence committed after a previous conviction."

Then follows a provision that if a probationer is sentenced later on for the original offence the disqualification or disability will apply on the date that the sentence is passed.

The second sub-section deals with the case when the probationer was released on probation without the court having proceeded to conviction, then if he is subsequently convicted and sentenced, the disqualification or disability will apply on the date of that conviction and sentence.

It will be seen from section 4 of the Act (cap 64) that a probationer may be released on probation with or without a conviction. That would appear to have a fortuitous effect on regulation 25. The latter regulation is the enactment chosen by Mr. Wasuna which carries the so-called disqualification or disability. While regulation 25 deals with public servants charged in sub-regulations (1) and (2), it deals with acquitted persons in sub-regulation (3). Presumably it does not apply at all when there is neither conviction nor acquittal; but it will certainly not apply when there has been a conviction. A probation order does not therefore strictly apply to sub-regulation (3).

But the argument is that it applies by inference; or perhaps interpretation, of sub-regulation (3), because

the conviction leads to dismissal under sub-regulations (1) & (2), as well as regulation 24 and other regulations and so the enactment "disqualifies" or "disables," the convicted person from holding his post. The problem with this interpretation is that dismissal is neither automatic on conviction, nor is re-instatement automatic on acquittal under the regulations. There is an area of discretion on each side of the line. If dismissal were imposed in cases of conviction, regulation 25 could come that much nearer to section 9(1) of the Act, (cap 64). The possibility of a termination of the contract of service on conviction is not the same thing as the imposition of a disqualification or disability.

Section 9(1) of the Act (cap 64) is in the same terms as section 13 of the Powers of the Criminal Courts Act 1973 in England. The legislation in Kenya and England have the same purpose, and it is therefore of interest to observe how the courts have dealt with the problem, as well as the opinions of the commentators in *Halsbury's Laws of England*.

In *Republic v Akan* [1972] 3 All ER 285, the appellant in that case pleaded guilty to an offence of being an alien and failing to comply with a landing condition. She was conditionally discharged. However, the judge made a recommendation for her deportation. It was argued that the deportation order was a disqualification or disability. In section 12 of the Criminal Justice Act 1948 a conviction of an offender followed by an order placing the offender on probation or discharging him absolutely or conditionally, had to be deemed to be no conviction, except for the purposes of those proceedings. Under the proviso, the conviction had to be disregarded for the purpose of any enactment which imposed any disqualification or disability on convicted persons. The appellant's argument was described as follows. A recommendation for deportation had to be treated as if it were something done under an enactment imposing a disqualification or a disability on a convicted person, or as something which authorized the Secretary of State to impose a disability or disqualification. But the Court of Appeal refused to accept that submission. The situation was, it seems, that the appellant had been granted the privilege of staying for a limited period in England. That had been withdrawn; so the withdrawal was not the imposition of a disqualification or disability.

By contrast real cases of disqualification or disability are listed in paragraph 570 of *Halsbury's Laws of England* Vol XI 4th edition. When convictions result from cases of treason, election offences, bribery, driving a motor vehicle, and misconduct of professional persons, to name only some examples, disqualifications follow. It will be seen that there is only a shade of difference, if any, between disqualification or disability.

Having considered direct cases of disqualification one can demonstrate the difference between those cases and the termination of employment. It is that the regulations provide the procedure by which a public servant may have his employment terminated after a breach by the public servant. It is not a case where the Public Service Commission Act or the regulations declare that on conviction for theft the public servant is disqualified from holding such office ever again or for a certain period. His contract is simply terminated if that is desired by his employer; and that is a different type of action to the one where the court or body concerned, must or may declare a disqualification on conviction. In *Akan's* case a qualification was not imposed but another discretion granted. It is not the result of loss, but the method by which that loss has been occasioned, that is important. Parliament chose a limited course.

In those circumstances we are of the opinion that the learned judge came to the right conclusion. Accordingly, the appeal is dismissed with costs to the respondent.

Dated and delivered at Kisumu this 11th day of May , 1988

H.G PLATT

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

Ag. JUDGE OF APPEAL