REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2745 OF 1984

HABIL E. IMENJE ……..…….....PLAINTIFF

VERSUS

KENYA NATIONAL CO LTD ……..... DEFENDANT

JUDGMENT

The facts of this case are straight forward. Indeed there is no issue joined on the facts. To determine the only question on which my decision has been sought, it is necessary to relate the facts briefly.

The plaintiff who was born in August 1936, is employed as a senior underwriter by the Cannon Insurance Company in Nairobi. He was employed there on November 1, 1984. But before then, he saw service with the defendant company, (which I shall hereafter refer to as the company). The company employed him as a clerk in its motor department on April 15, 1971 on a salary of Kshs 1,100 per month. He remained in the service of the company continuously until October 22, 1982. On that day, he was suspended from duty.

The reason for his suspension was not directly connected with his office with the company. The plaintiff himself told me that on September 22, 1982, he was picked up by the police and taken to the CID. He was apparently suspected of committing a criminal offence. Within three days of his arrest, he was brought before the chief magistrate and charged with four others with the offence of conspiracy to commit a felony. They were tried of this offence on divers days between November 1982 and February 24, 1984. On that day, the plaintiff was acquitted.

When the criminal matter was *sub-judice* before the court, the company learnt of the plaintiff's involvement in the alleged crime. So by a letter dated October 22, 1982, he was suspended from duty without pay with immediate effect. It was believed then that the case would be concluded by November 16, 1982. So the letter of suspension indicated that his suspension would be reviewed after the conclusion of the criminal trial. The company misjudged the length that criminal trials take to reach a finality. On February 2, 1984, nearly fifteen months after his suspension and just three weeks before the delivery of judgment in the criminal case, the company terminated the plaintiff's employment. It said it was doing so with retroactive effect from October 22, 1982.

The company professed to be determining the plaintiff's engagement in accordance with the terms of his letter of appointment dated April 15, 1971. As no notice was given him in accordance with the contract of employment, the company offered to pay him three months salary in lieu of notice.

The contractual provision for determination of the plaintiff's hiring is stated in these words:

Determination of Engagement

"At any time after the satisfactory completion of your probationary service, the company will be entitled to determine this agreement by giving one calendar month's notice in writing without assigning reasons thereto, such notice to expire on the last day of the month. Alternatively, the company may pay you one month's salary in lieu of such notice. This is without prejudice to the company's right to terminate the employment summarily for misconduct."

The plaintiff said since this contract was signed, he gained promotion into the management and on that account, the length of notice required to determine the agreement was enlarged to three months on either side. Although he produced nothing in writing to substantiate this variation, it is plain to me that his evidence was true because the company itself said it was paying the plaintiff three months salary in lieu of notice and this was said to conform with the terms of the contract.

If I appreciate the rights and obligations which flow from the terms of the contract in so far as it relates to termination aright, the company is entitled without assigning reasons to bring the agreement to an end by giving the plaintiff three months prior notice of its intention to do so. Or it may choose without giving such notice, to pay the plaintiff three months salary and thus bring the contract of employment to an end. The plaintiff for his part, may sever his association from the company by giving notice of like duration. So the right of parties on this score are mutual.

On February 2, 1984, the company wrote to the plaintiff and said it was terminating his appointment with retroactive effect from October 22, 1982. It then offered to pay him three months salary in accordance with the terms of the contract. The plaintiff was suspended without pay. But he was technically in the employment of the company unless and until either party brought the contract of employment to an end. It seems to me the company would find difficulty in justifying its position that it could validly give notice in February 1984 and claim that it determined the contract of employment fifteen months earlier. But that fact is not the subject of a live complaint before me.

Apparently, the company acting on clearly correct legal advice, went back on its stand of determining the contract with retroactive effect. So it paid the whole salary that was due to the plaintiff during the period of his suspension, that is, September 1982 to February 1984. The upshot of this, was that the plaintiff remained in the company's employment until February 1984. The latter then exercised its rights of termination and offered to pay the plaintiff three months salary in lieu of notice. The latter did not agree. He says, he is entitled to much more.

What the plaintiff claims to be entitled to were itemized in his advocate's letter of June 25, addressed to the managing director of the company. In its reply of July 12, 1984, the company conceded to certain of the claims eg. (1) 3 months salary in lieu of notice, (2) leave pay, (3) commission earned and against these, the company set off loans and other debts owed to the company by the plaintiff. The only item it rejects is the plaintiff's claim for general damages for wrongful dismissal.

The plaintiff's reaction to this was to bring a plaint in this court for damages against the company for wrongful dismissal and malicious prosecution. The company answered that the termination of the plaintiff's employment was in accordance with the contract and was lawful but denied that it prosecuted the plaintiff or was liable to him in damages for malicious prosecution.

When this suit came for hearing before me on the 14th instant, counsel for the parties informed me that they had narrowed the issues and agreed that

I try three questions namely:-

1. Did the defendant falsely and maliciously prosecute the plaintiff?

2. Was the termination of the plaintiff's employment by the defendant wrongful?

3. If the answers to the questions 1 and 2 are in the affirmative, what is the quantum of damages to which the plaintiff is entitled?

On the evidence, there can be no doubt that the first question admits of nothing but a negative answer. Not only is there no evidence that the company had any hand in the plaintiff's prosecution, but that it learnt of it after it was launched. Indeed, counsel for the plaintiff himself said he was withdrawing that question from my consideration.

So the only issue that was left for my decision, is whether the termination of the plaintiff's employment was wrongful. The plaintiff was employed under a written contract in which there were clearly spelt out stipulations as to the mode of the termination by either side. The termination of the contract can only be said to be wrongful if it was made in breach of its terms. I have already set out the termination provisions. Under it, the company is entitled, without assigning reasons, to terminate the contract by either giving three months notice or by paying three months salary to the plaintiff. It did exactly that. In what sense can the exercise of this legal right expressly conferred by the contract be said to be wrongful?

In paragraph 8 of the plaint, it was averred:

"that the aforesaid termination of his employment was wrongful in law and a gross breach of the principles of natural justice .. and accordingly the plaintiff claims general damages for wrongful termination" …

The plaintiff did not pinpoint what law the exercise of this contractual right by the company infringed or what principle of natural justice was breached thereby. For my part, I cannot see it.

It was submitted by counsel for the plaintiff that at the date of the alleged wrongful termination of his employment the plaintiff was 48 years old and had a working life of 7 years before reaching the retirement age of 55 years and that he should be paid damages computed on the basis of his income for that period less the reduced salary he earned in his new employment at Cannon Insurance. There is no warrant for awarding the plaintiff damages assessed on that basis.

It should be borne in mind that the plaintiff's right, if any, against the company arises ex contractu and not ex delicto. Even if I have found that the contract of employment had been broken by the company, the quantum of damages the plaintiff would have recovered would be the total income he would have received during the period of notice, that is, three months' salary. See *Lukenya Ranching v Kavoloto* [1970] EA 414 and *Ombanya v Gailey & Roberts Ltd* [1974] EA 522 at 525. See also *Addis v Gramaphone Co Ltd* [1909] AC 488. To suggest that the company incurred an obligation to provide compensation for the plaintiff on the basis of his "lost years" is to confuse damages awardable in tort for that which is properly awardable in contract.

It seems to me manifest that the plaintiff has not been disabled from earning his living for the remainder of his working life because the company exercised its right of determination. Indeed, the plaintiff himself said shortly afterwards, he obtained a comparable job with reduced salary. Even if he had remained unemployed till this day, the company's liability would have been discharged once it paid or offered to pay him three month's salary as stipulated in the contract of employment.

Accordingly, my answer to the only question namely, whether the termination of the plaintiff's employment was wrongful, is in the negative. That being so, *cadit qauestio*. There must be an end of this case. In my opinion, the plaintiff must fail in this action and I hold he has. I dismiss the plaint and enter judgment for the defendant with costs.

Dated and delivered this 21st day of October, 1986.

F K APALOO

JUDGE