



REPUBLIC OF KENYA

Anyona v Kenya Airways Limited

High Court, at Nairobi July 17, 1985

Butler Sloss J

Civil Suit No 3259 of 1982

Cases

Criminal Case No 81 of 1981

Statutes

Prevention of Corruption Act (cap 65) section 4(1)

Criminal Procedure Code (cap 75) section 210

Conditions of Service clause 6

July 17, 1985, Butler Sloss J delivered the following Judgment.

In this action, High Court Civil Suit No 3259 of 1982, the plaintiff, Kisley Ouko Anyona claims damages for breach of contract of employment.

In paragraph 4 of his plaint, which was filed in court on October 15, 1982, he alleges that on October 23, 1980 he was suspended from his duties, and, in paragraph 8 he alleges that he has never been formally dismissed. He claims back pay from October 23, 1980 until September 30, 1982, and general damages.

In their defence, which was filed in court on November 22, 1982, the defendants admit that the plaintiff was their employee, and that he is entitled to be paid a sum of Kshs 5,408.25. In paragraph 10 of the defence, the defendants aver that the plaintiff was dismissed by letter dated February 24, 1981, and that the defendants were entitled to dismiss him. In his Reply to the defence, which was filed on November 20, 1982, the plaintiff denies breach of his contract of service with the defendants, and denies that the defendants were entitled to dismiss him, and denies receiving the letter dated February 24, 1981 by which the defendants purported to dismiss him.

The trial of the action was begun before me on Tuesday June 18, 1985, when Mr Masese appeared for the plaintiff and Miss Onyango appeared for the defendants. It was adjourned part heard to Wednesday, July 3, 1985 but on that day, on the application of the defendant sit was adjourned to Wednesday July 17 1985, the defendants agreeing to pay the costs of the adjournment in any event.

On Wednesday, July 17, 1985, Miss Achapa, on behalf of the defendants, made a further application for an adjournment upon the ground that Miss Onyango, advocate for the defendants, was engaged elsewhere. Mr Masese opposed this application which, for reasons already recorded, I refused.

Accordingly, the trial was resumed on Wednesday, July 17, 1985, and it was concluded on the same day.

The plaintiff, Kisley Ouko Anyona, was the only witness called to give evidence. He said that he entered the employment of the defendants as stores supervisor at the end of 1978 and, by letter exhibited as P2, his employment was confirmed with effect from July 15, 1979. His net pay, after allowing for statutory deductions, was Kshs 3,316.65 per month, a figure which was admitted by Miss Onyango on behalf of defendants.

On or about October 17, 1980, the plaintiff, together with a purchasing manager named Paul Ndegwa Thige, was arrested by the police. He was charged with four offences of corruption contrary to section 4(1) of the Prevention of Corruption Act (cap 65) of the Laws of Kenya. He pleaded not guilty to those charges, and on January 28, 1982, stood trial on them in Criminal Case No 81 of 1981, before Mrs Aluoch, senior resident magistrate as she then was. On the February 3, 1982, the learned senior resident magistrate dismissed the charges under provisions of section 210 of the Criminal Procedure Code (cap 75) for lack of evidence, and the plaintiff was acquitted.

Miss Onyango conceded that these facts in themselves would not have justified the summary dismissal of the plaintiff. No evidence was called to justify dismissal on any grounds. Nevertheless, by letter dated October 23, 1980, the defendants purported to suspend the plaintiff on half pay because of his recently being arrested by the police. The terms of the plaintiff's contract of employment, which were marked 'A' in and agreed bundle, do not appear to provide for circumstances in which the employers would have the right to suspend an employee on half pay but the point is not material to the plaintiff's claim since, notwithstanding the defendants undertaking to give the plaintiff, which I accept, is that the defendants, in breach of contract, gave him no pay whatsoever after the month of October, 1980. Thereafter, the plaintiff remained able and willing to fulfil his part of the contract of employment, which was to work as a stores supervisor for the defendants. The defendants, however in breach of clause 6 of the Conditions of Service, failed or refused to pay the plaintiff his wages.

Eventually, the plaintiff consulted advocates who wrote a letter to defendants dated March 5, 1982. By the final paragraph of this letter, the defendants were given the option, to be exercised within seven days of the date of the letter, ie on or before March 12, 1982, of fulfilling their part of the contract of employment by paying the plaintiff arrears of wages due to him or else of paying damages for breach of contract.

By letter dated April 22, 1982, the defendants denied liability either for arrears of wages or for damages in lieu thereof.

In paragraph 10 of the defence, to which I have already referred, defendants alleged that they had dismissed the plaintiff by letter Ref. IZ/58/PF, dated February 24, 1981. In a request for particulars, which was filed in court on January 13, 1983, the plaintiffs sought a copy of this letter. This was supplied by the defendants in their answer to the plaintiff's request for particulars which was filed in court on March 9, 1983.

In evidence, the plaintiff said that he never received this letter, and that the first time he became aware of it was when, at the office of his advocate he saw the copy which had been supplied by the defendants. I accept the plaintiff's evidence on this point, especially in the absence of any evidence to the contrary, and hold that notice of termination of his contract of employment was never given to plaintiff, or served upon the plaintiff. Accordingly, I further hold that the contract never was terminated until the March 12, 1982, when by letter dated March 5, 1982, the plaintiff offered the defendants the option of fulfilling the contract or paying damages.

I am therefore satisfied that the plaintiff has made out his claim to damages for loss of earnings, and that the measure or quantum of damages is to be calculated by taking his net monthly pay of Kshs 13,316.65 and multiplying it by the number of payments due to him in the period beginning in November 1980 and ending in March, 1982, both months included. He was entitled to receive 17 payments in this period and the damages he is entitled to under this heading are therefore 17 x Kshs 3,316.65. This amounts to Kshs

56,383.05.

The plaintiff, in evidence, claims to have lost the value of money which he paid into a Provident Fund. He contends that, on quitting his employment, he would have been entitled to be refunded not only the money which he had paid into it but also the matching money which he defendants paid into the fund to equal the payments made by the plaintiff. This claim, which is obviously a liquidated claim, nowhere appears in the plaint, and no application has been made on behalf of the plaintiff to include the claim by amending the plaint. Moreover, it is doubtful that the plaintiff is in a position to prove his loss under this heading. Accordingly, this claim to loss of funds allegedly accumulated in the Provident fund is disallowed.

In paragraph 11 of the plaint, the plaintiff claims damages for mental anguish, degradation and great hardship which he has suffered as result of the defendant's wrongful action. In evidence, he said that he has been unable to secure employment because the defendants have not provided satisfactory references. The terms and conditions of employment do not contain any provision which would entitle an employee to a reference on quitting employment though it may be customary for employers to supply such references. It follows that where an employer refuses to give a reference, or gives a bad reference, no action in contract will lie though another remedy might be available. There being here no breach of contract on the part of the defendants, no damages can be awarded, and it is to be noted that this particular claim, based on the difficulty of getting new employment through not having the appropriate references, does not appear in the plaint.

As far as a claim for mental anguish, degradation and great hardship is concerned, it is, I find, impossible to award the plaintiff damages under this heading. There is no evidence to support such a claim, and the vindication which the plaintiff now obtains as a result of judgement being given in his favour against the defendants is a vindication which, had he chosen to do so, he could have obtained at any time after October 1980, when the defendants wrongly withheld his pay. It was the plaintiff who chose to keep his contract of employment open until the March 12, 1982, and to put off the day when he would be found to have been in the right and his employers to have been in the wrong. In my judgement, the arrears of wages which are to be awarded to the plaintiff for work which the plaintiff did not perform must be considered adequate compensation.

There will be judgement for the plaintiff in the sum of Kshs 56,383.05, together with interest thereon at court rates from the date of filing the plaint herein, viz. October 15, 1982 until the same are paid by the defendants to the plaintiff, and it is ordered that defendants do pay to the plaintiff the cost of this suit, such costs to be taxed if not agreed and to bear interest thereon at court rates from the date of such taxation or agreement until the same are paid by the defendants to the plaintiff.

And it is further ordered that there be immediate payment out to the plaintiff of the sum of Kshs 5,408.25, paid into court by the defendants on January 18, 1983, and that such payment be accepted by the plaintiff in part satisfaction of the judgement herein.