



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CIVIL APPEAL NO. 9 OF 2015

BETWEEN

PATRICK NYAKONU OMBATI APPELLANT

AND

CREDIT BANK LIMITED RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kisumu (Wasilwa, J.) dated 27th November, 2014

in

INDUSTRIAL COURT CLAIM NO. 105 OF 2013)

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of **Wasilwa, J.** in **Industrial Cause No. 105 of 2013** where **Patrick Nyakonu Ombati**, the appellant herein, was the claimant against Credit Bank Limited, the respondent. The appellant stated that on 1st August, 1997 he was employed by the respondent as a clerk/cashier at a monthly salary of **Kshs.16,733/=**. After six months' probation, he was confirmed in that position and his monthly salary was raised to **Kshs.20,080/=** with a house allowance of **Kshs.2,001/=**. Over time the appellant rose in rank and as at 31st January, 2004 he had become an Acting Accountant, which is in the same rank as an Assistant Manager. He was confirmed as an Accountant on 28th June, 2004 and his salary was accordingly reviewed.

2. In January, 2006 the appellant was sent on compulsory leave because of his alleged fraudulent issuance of a banker's cheque. On 2nd February, 2006, the appellant was arrested and charged with 10 counts of stealing by servant in **Criminal Case No. 84 of 2006** at Kisumu. Following his arraignment in court his services were terminated on 6th February, 2006.

3. On 19th November, 2010 the appellant was acquitted of the aforesaid charges under **section 210** of the **Criminal Procedure Code**. Following the acquittal, the appellant filed a suit against this employer.

4. The appellant contended that the termination of his employment was unlawful and sought the following reliefs:

- (a) Salary in lieu of reasonable notice - Kshs.1,661,148/=.
- (b) Unpaid salary of February, 2006 - Kshs.17,959/=.
- (c) Loss of salary of Kshs.92,286/= for the period the criminal case was pending in court - (58months) Kshs.5,352,588/=.
- (d) Special damages for wrongful termination of employment equivalent to 24 months' salary at Kshs.92,286/= per month ... Kshs.2,214,864/=.
- (e) Pension from Kenindia Assurance Company Ltd. Kshs.399,234/=.
- (f) Loss of employment upto retirement age of 60 years at a monthly salary of Kshs.92,286/=Kshs.27,685,800/=.
- (g) Damages for racial discrimination in prosecution of the criminal case ... Kshs.2,000,000/=
- (h) Damages for malicious prosecution and attendant legal fees ... Kshs.700,000/=
- (i) Punitive or exemplary damages for unlawful termination of employment.
- (j) Damages for loss of salary upto retirement age at the rate of Kshs.92,286/= per month.

Total ... Kshs.40,031,593/=.

5. Apart from the computed claims as above, the appellant also sought an order for issuance of a certificate of service for eight years' work.

6. The respondent denied the appellant's claim and contended that the appellant was summarily dismissed from his employment on account of gross misconduct, being stealing by servant and misappropriation of funds.

7. As regards the appellant's allegation that the criminal case was maliciously instituted, the respondent averred that upon making a report to the police, the police conducted their own independent investigations, and being satisfied that there were reasonable grounds to prefer charges against the appellant, arraigned him in court.

8. The respondent further contended that the appellant's claim was statute barred.

9. After a full trial, the Industrial Court, in a brief judgment, dismissed the appellant's claim. The court had set out the issues for determination as follows:

“(i) Whether there were valid reasons to terminate the claimant's employment;

(ii) Whether the claimant was subjected to due process;

(iii) Whether the claimant is entitled to remedies sought.”

10. Regarding the first issue, the court observed that the termination letter that was issued to the appellant did not state the reasons for termination of the appellant's employment. The letter however indicated that his terminal benefits would be settled in due cause, *“subject to your surrendering bank assets, if any in your possession including bank's ID Card to the Branch Manager”*. The court ruled that the appellant was at liberty to collect any pending dues from the pension scheme.

11. The court went on to state that the law as it then stood did not require that reasons for termination of

employment be given before termination of employment could be effected, provided that one month's notice was given or salary in lieu thereof was paid.

12. Being aggrieved by the said decision, the appellant preferred an appeal to this Court. He faulted the learned judge for holding that his services were terminated as per the law of the land at the material time. He contended that the learned judge erred in law by failing to make any specific findings on his claim. **Mr. Gichaba**, learned counsel for the appellant, made brief submissions in respect of the aforesaid grounds of appeal.

13. **Mr. Odeny**, learned counsel of the respondent, opposed the appeal. He submitted that the appellant's suit before the Industrial Court was filed outside the statutory period as stipulated under **section 90** of the **Employment Act, 2007**.

14. In regard to the specific claims made by the appellant, Mr. Odeny submitted that only one month's salary in lieu of notice was payable. He dismissed all the other claims as unwarranted. He added that the respondent had informed the appellant that his terminal dues would only be paid upon his return of the respondent's assets in his possession but the appellant had failed to do so.

15. In response, Mr. Gichaba submitted that the appellant had nothing in his possession to be returned to the respondent. Regarding the respondent's contention that the suit before the Industrial Court was filed out of time, counsel submitted that the respondent had raised that issue as a preliminary objection and the trial court in its ruling delivered on 3rd October, 2013 had dismissed it. We agree with Mr. Gichaba that since no appeal was filed against that ruling, the issue does not fall for determination in this appeal.

16. In our view, the two main issues for determination in this appeal are whether the termination of the appellant's employment was wrongful, and if so, whether the claims as stipulated in the memorandum of claim are payable.

17. As per the letter of appointment dated 11th August, 1997, on appointment to permanent staff of the respondent, the appellant's employment could be terminated by either party by one month's notice and by the respondent upon payment of one month's salary in lieu of notice. The respondent, however, retained the right to dismiss the appellant from employment without notice or payment in lieu of notice for gross misconduct or for such other conduct that could give the respondent cause to exercise its right of summary dismissal. See **Kenya Revenue Authority v Murgani [2010] 2 KLR 125**.

18. On 21st January, 2006, the appellant was sent on compulsory leave to facilitate investigation into the issuance of a fraudulent banker's cheque to one of the respondent's customers. Shortly thereafter on 2nd February, 2006 the appellant was arrested and arraigned in court on charges of stealing by servant.

19. The respondent terminated the appellant's employment vide a letter dated 6th February, 2006 which stated as follows:

"RE:TERMINATION OF YOUR EMPLOYMENT WITH CREDIT BANK LIMITED

We refer to the Letter of Appointment Ref. CBL/0210/98 dated 21st July, 1998, accepted by you on 23rd July, 1998.

In terms of above letter of appointment, we hereby advise you the termination of your employment with immediate effect.

Your terminal benefits, if any, will be settled in due course subject to your surrendering Bank's assets, if any, in your possession including bank's ID Card to the Branch Manager, Kisumu.

Yours faithfully,

For: CREDIT BANK LIMITED

N. K. AGARWAL

MANAGING DIRECTOR”

20. The respondent did not state any reason for terminating the appellant’s employment, although under the **Employment Act, Cap 226 (now repealed)** it was not under any obligation to state the reason for taking such action. That notwithstanding, evidence was led by the respondent that before his employment was terminated the appellant was afforded the opportunity to show cause why his employer could not do so.

21. We agree with the learned trial judge that the appellant’s employment, having been terminated during the dispensation of the repealed Employment Act, the appellant was not entitled to any explanation by his employer. The employer was however, obliged to pay the appellant one month’s salary in lieu of notice since the termination of his employment was with immediate effect. See this Court’s decision in **Central Bank of Kenya v Martin King’ori [2009] eKLR.**

22. In view of the above finding, we hold that the respondent’s termination of the appellant’s employment was unlawful as it contravened the terms set out in his appointment letter. In the circumstances the appellant is entitled to Kshs.92,286/= being one month’s salary in lieu of notice.

23. Turning to the appellant’s pecuniary claims as set out under paragraph 35 of the statement of claim, the claim for “*salary in lieu of reasonable notice equivalent to 92,286/= x 18 = Kshs.1,661,148/=*” is not payable. There are several decisions by this Court that under the repealed Employment Act the remedy for wrongful dismissal is such salary as an employee would have earned for the period of notice as stipulated in the Appointment Letter. See **Central Bank of Kenya v Nkabu [2002] 1E.A. 34, Githinji v Mumias Sugar Company Limited [1991] LLR 1373, Rift Valley Textiles Limited v Oganda [1992] LLR 308.**

24. Likewise the appellant’s claims for loss of salary for the period when the criminal case was ongoing, special damages for wrongful termination of employment, loss of employment, punitive or exemplary damages for unlawful termination of employment as well as loss of salary upto retirement age had no basis in law and were therefore rightly rejected.

25. The appellant prayed for unpaid salary for February, 2006 amounting to Kshs.17,959/=. This claim was not proved. One of the documents produced by the appellant was a salary advice dated **25th February, 2006** for Kshs.17,959/=. The appellant contended that although he was given the pay advice, the money was not credited to his account. The appellant failed to produce his bank statement for February, 2006. The only bank statement that he produced was for March, 2006. That claim could not have been granted and was rightly rejected.

26. Turning to the claim for pension, the respondent’s letter dated 13th February, 1998 which was one of the exhibits produced by the appellant, showed that with effect from 1st March, 1998, the appellant was enrolled in the staff retirement benefit scheme. Kenindia Assurance Company Limited was the custodian of the said pension funds. Evidence was tendered that a sum of Kshs. 399,234/= being amount of funds received from Kenindia Assurance on account of the appellant’s pension benefits was credited to the appellant’s account with the respondent on 24th March, 2006. Consequently the appellant’s claim under that heading was without merit.

27. The appellant also claimed Kshs.2,000,000/= as general damages for racial discrimination in the prosecution of the criminal case. He also sought damages for malicious prosecution and attendant costs, all amounting to Kshs.700,000/=.

28. The appellant did not adduce sufficient evidence to prove that claim. The respondent merely reported

the alleged fraud to the Banking Fraud Investigations Unit which undertook appropriate investigations and preferred criminal charges against the appellant and one **Wahida Abdo Kaid**. It was not the respondent who determined the persons to be charged. Further, the respondent adduced evidence to show that there was no racial discrimination in its organization.

29. It is trite law that in proceedings for malicious prosecution the plaintiff must show:

- (i) that the prosecution was instituted by the defendant or by someone for whose acts the defendant is responsible,**
- (ii) that the prosecution terminated in the plaintiff's favour,**
- (iii) that the prosecution was instituted without any reasonable and probable cause, and,**
- (iv) that it was actuated by malice.**

See **Murunga v Attorney General [1979] KLR 138**. The appellant did not establish the last two tests.

30. The appellant had also prayed for an order to compel the respondent to issue him with a certificate of service. **Section 18 (1) of the Employment Act, Cap 226 (repealed)** states that:

“Every employee shall be given a certificate of service by his employer upon the termination of his employment unless the employment has continued for a period of less than four consecutive weeks.”

The trial court did not pronounce itself of this claim, which does not seem to have been opposed by the respondent. We find and hold that the appellant is entitled to a certificate of service and we order the respondent to issue the same forthwith.

31. Apart from the order for payment of one month's salary in lieu of notice, and issuance of certificate of service to the appellant, we find the rest of the grounds of appeal lacking in merit and dismiss them.

32. As regards costs of the suit and this appeal, we direct that each party bears its own costs.

DATED and delivered at Kisumu this 4th day of March, 2016

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR