



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 208 OF 2012

BETWEEN

PHILEMON MUSEMBI MUHINDI..... APPELLANT

AND

**CHAIRMAN BOARD OF MANAGEMENT KEVEYE YOUTH
POLYTECHNIC.....RESPONDENT**

***(An appeal from the judgment and decree of High Court at Kakamega of Kimaru, J. delivered by
Chitembwe, J.) dated 21st March 2012 in Industrial Cause No. 42 of 2009)***

JUDGMENT OF THE COURT

The appeal before us arises from a judgment of the High Court, where the appellant, **Philemon Musembi Muhindi (Philemon)** claimed that the respondent unlawfully terminated his employment contract and refused to pay his terminal dues.

On 16th October 2003, Philemon was employed as a project manager by the respondent. A few months later he was suspended from employment on 5th April 2004, after he was charged with various criminal offences of stealing by a public servant in criminal case no. 380 of 2004, pending the outcome of the case. He was subsequently tried and acquitted of all the charges by the Senior Resident Magistrate's Court at Vihiga on 27th May 2007, where the court found that the prosecution had failed to establish a case against Philemon.

On 5th June 2007 through his advocates, Staussi & Asunah Advocates, Philemon wrote to the respondent demanding payment of his salary for the period that he was suspended from employment. He further demanded that he be reinstated to his former employment, which the respondent was unwilling to do. As a consequence, Philemon filed a suit against the respondent demanding unpaid salary of Ksh.10,200/- per month from 2004 together with interest at the rate of 14% per annum, until full and final determination of this matter.

In its defence the respondent did not deny that it had suspended Philemon from employment, but only stated that his having been acquitted of a criminal did not warrant or entitle him to be reinstated. It denied owing him any salary at all, and put Philemon to strict proof.

The trial court found that Philemon had been suspended from his duties on account of the criminal case pending its hearing and determination, and that following his acquittal, he had not been paid his salary for the period of suspension to the date that he was acquitted. The trial court assessed his dues at Kshs. 734,400/-, the interest was computed as Kshs. 308,448/- and costs at Kshs.72,190/-.

The respondent was aggrieved by the decision and appealed to the High Court which found that he had been summarily dismissed from employment, and as such was not entitled to the sums awarded. As a result the court set aside the judgment and decree of the trial court and instead awarded him three (3) months' salary in lieu of notice of an amount of Kshs. 30,600/- following his summary dismissal, together with the costs of the trial court as well as the costs of the appeal.

Philemon was aggrieved by the decision of the High Court and appealed to this Court on the grounds that the learned judge wrongly interpreted the Employment Act thereby arriving at the wrong findings that Philemon had been summarily dismissed; and that the High Court was wrong in interfering with the award of damages by the trial court.

At the hearing before us, **Ms. Asunah**, learned counsel for Philemon, submitted that the High Court was wrong in finding that Philemon had been summarily dismissed, as there was no evidence in existence his having been summarily dismissed. That according to the letter of 5th April, 2004, Philemon had been suspended pending the outcome of the criminal case. Counsel further argued that since there was no formal letter of dismissal, Philemon was entitled to his salary from the period of his suspension to the date of acquittal in the criminal case.

Learned counsel **Mr. Kinyanjui**, holding brief for Mr. Musiega for the respondent, opposed the appeal and submitted that he would rely on the pleadings and evidence adduced in the lower court. Counsel further submitted that on the issue of whether the Philemon was dismissed from employment, it was clear from **section 44 (4) (g)** of the **Employment Act** that an employee may be dismissed summarily without notice where he is found to have committed a criminal offence or is suspected of committing a criminal offence.

We have carefully considered the pleadings and the evidence before the trial court and consider that the main issues are whether the Philemon was summarily dismissed from employment, and whether he was entitled to the sums awarded by the trial court.

In his judgment, the learned judge found as a fact that Philemon had been summarily dismissed from employment, and on this account set aside the award of the trial court and instead awarded him payment of three months' salary in lieu of notice.

By a letter dated 5th April 2004 Philemon was suspended from employment, after he was charged with various criminal offences of stealing by servant. The letter of suspension read thus;

“MR. PHILEMON MUHINDI

THE MANAGER

K.Y.P

P.O.BOX 177

VIHIGA

5th April 2004

Dear Sir

RE: SUSPENSION

This is to inform your that at a full management Committee meeting today in which you personally

attended, it was decided that you be suspended from the Polytechnic and from carrying out any official duties on behalf of the Polytechnic with effect from today until your case is decided.

This is in accordance with Min 5c/2004.

Yours faithfully

Bishop Peter Asava

CHAIRMAN

Cc Director Industrial & Vocational Training (Youth Programme)

Ministry of Labour & Human resources Development

P.O. Box 74494, NAIROBI

PATO- Western Province, P.O. Box 2441, KAKAMEGA

PTTO- Western Province, P.O. Box 2441, KAKAMEGA

DO VIHIGA

PAG Education Secretary Nyang'ori Mission"

There is no doubt from the contents of the letter that Philemon was placed on suspension pending the decision of the Court in the criminal case. In our view, the respondent identified a definite period during which Philemon was to remain on suspension, and having done so, we take it that, the respondent at that time intended to retain him as an employee, and was prepared to await the outcome of the criminal proceedings irrespective of the time it would take. Otherwise, it had the option to dismiss him or terminate his employment during the intervening period. Consequently, we are satisfied and find that, by the time he was suspended, the respondent did not intend to dismiss him summarily, but to instead await the outcome of the case before determining the fate of Philemon's employment.

With regard to the period following his acquittal some three years later, there seems not to have been any further communication from the respondent, and no further instructions were issued regarding the fate of his employment. No steps were taken by the respondent to lift the suspension, or to issue a notice of summary dismissal or indeed to otherwise terminate the contract of employment. Evidently, at this point, the position with respect to Philemon's employment had changed. However, by not reinstating the appellant to employment at the conclusion of the criminal case on which the suspension was pegged, the respondent in our view thereby evinced an intention to no longer be bound by the employment contract thereby bringing the employment relationship to an end. As a result, no further salary accrued to him beyond the suspension period.

The next issue is whether the learned judge was correct in interfering with the award of the trial court. In his plaint, Philemon prayed for unpaid salary together with interest and costs at the rate of 14% per annum from April 2004 until full and final determination of this matter.

Given the circumstances of his suspension, the question for our consideration is whether Philemon was entitled to a salary for the period of suspension upto determination of the suit in the trial court.

The letter of suspension specifically stated that Philemon would not carry out any official duties until his case was decided. He was subsequently acquitted of the charges on 27th May 2007. During that period he did not receive any remuneration.

Likewise in the case of Donald C. Avude vs Kenya Forest Service [2015] eKLR the Employment and

Labour Relations Court citing the *Supreme Court of Canada* in the case of ***Cabiakman vs Industrial Alliance Life Assurance Co. [2004] 3SCR 195 SCC 55*** where there were similar facts as the instant case stated thus;

“Gilbert Cabiakman (“Cabiakman”) was a sales manager at Industrial Alliance Life Insurance Co. (“Industrial Alliance”). Three months after Cabiakman was hired, he was arrested and charged with conspiracy to extort money. Once Industrial Alliance got wind of these charges, it suspended Cabiakman because of the connection between the nature of the charges and Cabiakman’s position.

Cabiakman had been on an indefinite suspension without pay for two years while the charge was pending. After Cabiakman was acquitted of all charges, he was reinstated in his position at Industrial Alliance. Cabiakman commenced proceedings against Industrial Alliance for lost wages during the period of suspension and for moral and punitive damages.

The Supreme Court of Canada (“SCC” or “Court”) upheld the decision of the Quebec Court of Appeal that ruled that Industrial Alliance was not justified in suspending Cabiakman without pay and awarded him \$200,000 in damages. However, the SCC affirmed the employer’s right to suspend an employee for administrative reasons. The court stated that employer conducted itself properly, however, since the suspension remained administrative in nature at all times, there was no reason to refuse Cabiakman’s salary as he remained available to work.”

Whilst in ***Transport Workers Union vs African Safari Diani Adventure [2013] eKLR*** it was stated thus;

“Unless there is a contractual or statutory basis for withholding salary during a period of suspension it is not open to an employer to suspend an employee without pay. The legal obligation at common law on an employer is to pay wages not to provide work. Unless it is varied by statute or contract the obligation continues even during suspension.”

The period of suspension in this case was from 5th April 2004 to 27th May 2007. No contractual or statutory basis for withholding Philemon’s salary during that period was evident from the record. As such, from the aforesaid excerpts, the findings of which we adopt, there was no reason why Philemon could not have received his salary for the period of suspension which was three years. Accordingly, we find that Philemon was entitled to his salary for the period of suspension stipulated in the suspension letter which commenced from the date of suspension, upto the date when the case was decided.

In so saying, we find that we must interfere with the decision of the High Court. Accordingly we set aside the award of the High Court, and make the following orders in favour of the appellant:

1. Unpaid salary for the period of suspension from 5th April 2004 to 27th May 2007 at Kshs. 10,200/- per month together with interest at Court rates for the aforesaid period;
2. Costs in the courts below as well as the cost of this appeal.

Dated and delivered at Kisumu this 17th day of December, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR