



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, M'INOTI & J. MOHAMMED J.J.A.

CIVIL APPEAL NO. 247 OF 2009

BETWEEN

PETER AMOLO AKUMU GOULD ..... APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiero, J) dated 19<sup>th</sup> June, 2009

in

HCCC NO. 616 OF 1999)

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**JUDGMENT OF THE COURT**

This appeal arises from a decision of the High Court of Kenya made on 19<sup>th</sup> June, 2009, which dismissed the appellant's suit for damages for unlawful termination of his employment by the respondent.

**Background**

The appellant, **PETER AMOLO AKUMU GOULD**, was employed by the respondent, **KENYA COMMERCIAL BANK LIMITED** on 6<sup>th</sup> November, 1989, as a Senior Assistant Manager and rose through the ranks to the position of Assistant

Manager Trustee and Investment Services. It was a term of the letter of appointment dated 11<sup>th</sup> October, 1989, that:

***“Subject to satisfactory completion of your probation, you will be confirmed as an officer and you will be requested to sign Articles of Agreement in terms of which the required notice period will be three months on either side.”***

The appellant successfully completed his probation period and was confirmed as an officer of the respondent and signed Articles of Agreement.

**Clause 4 of the Articles of Agreement** provided as follows:

***“The Bank may at any time terminate this agreement for cause. Otherwise, this agreement may be determined by either party giving to the other three months written notice in that behalf expiring on any day of the month or by the Bank at any time giving to the Officer three months’ salary in lieu of notice.”*** [Emphasis added]

By a letter dated 6<sup>th</sup> February, 1999, the respondent sought to terminate the employment contract with the appellant on grounds ***inter alia*** of negligence and the resultant monetary loss to the respondent. Aggrieved by the termination, the appellant filed a suit, vide a plaint dated 2<sup>nd</sup> March, 1999 and amended on

12<sup>th</sup> August, 2008, claiming ***inter alia*** breach of contract. The respondent filed a defence on 20<sup>th</sup> May, 1999, which was amended on 22<sup>nd</sup> September, 2004, claiming breach of the contract of employment on the part of the appellant and thereby justifying its termination of the appellant’s contract. The High Court dismissed the appellant’s claim for damages for wrongful termination.

Aggrieved by the decision of the High Court, the appellant preferred an appeal to this Court vide a Memorandum of Appeal dated 8<sup>th</sup> October, 2009, on the grounds ***inter alia*** that the judge had erred in law and in fact in: holding that the measure of compensation for unlawful dismissal is the period specified in the termination clause or notice to terminate the employment; failing to appreciate that the evidence tendered proved malice on the part of the respondent towards the appellant; entering judgment which was diametrically opposed to the evidence tendered; finding that it was not a fundamental term of the employment contract that the appellant was to serve the respondent until the retirement age of 55 years; holding that the disciplinary committee meeting which was convened in the appellant’s absence to discuss his conduct was not constituted irregularly and maliciously; failing to make a finding on the legality of the respondent’s withholding the appellant’s pension cheque; failing to appreciate and correctly interpret the relevant provisions of the employment agreement between the appellant and the respondent in relation to the termination of the contract; and holding that the principles of natural justice do not apply in service contracts.

The appellant further claimed that the learned trial Judge misdirected himself in failing to draw a relevant correlation between the evidence of the appellant and the finding of this Court in ***KENYA PORTS AUTHORITY V EDWARD OTIENO, CA NO. 120 OF 1997***; failing to make reference to the appellant’s submissions with specific reference to the emerging jurisprudence in relation to service contracts; and in entering judgment not supported by the evidence adduced.

The appellant prayed this Court to set aside the judgment of the High Court and make a final determination on the issues raised in the appeal or in the alternative to remit the matter back to the High Court for re-trial with costs of this appeal and of the High Court to be provided for.

### **Submissions by learned counsel**

When the matter came up for hearing before this Court on 23<sup>rd</sup> October, 2014, both parties were represented by learned counsel. Mr Ham Lagat represented the appellant whereas Mr W.A. Amoko holding brief for Mr Kiragu Kimani represented the respondent.

Mr Lagat, counsel for the appellant, relied on the written submissions made before the trial court and submitted that the termination clause in the employment contract provided for the termination of the contract for cause yet the respondent proceeded to terminate the contract without cause; Counsel argued that the appellant was contracted to work for the respondent until the retirement age of 55 years and his termination before that time could only be with cause, which in this case was lacking and that the appellant’s termination was done through letters and memoranda instead of proper due process; that the allegations against the appellant of negligence that was the basis for his dismissal were never proved. In view of failure to follow proper procedure for the appellant’s termination, counsel argued that the action

of terminating the appellant's services was accentuated by malice. In support of his cause, counsel cited the case of **SARAH WANYANGA MUCHIRI V HENRY KATHII & ANOTHER, [2014] eKLR.**

Counsel further submitted that the respondent unlawfully constituted a disciplinary committee on 6<sup>th</sup> January, 1999, to discuss the conduct of the appellant which led to his dismissal. Counsel pointed out that a memorandum by the respondent was issued on 18<sup>th</sup> August, 1997, to the effect that the appellant's loan application was considered in accordance with the respondent bank's staff loan scheme. In counsel's view, therefore, this memorandum absolved the appellant from the allegations made against him. It was submitted that the respondent wrongfully recovered a loan advanced to the appellant from his pension instead of instituting a separate suit for recovery of amounts due.

Counsel urged the court to re-evaluate the evidence adduced before the trial court afresh and make a final determination. Finally, counsel urged the Court to allow the appeal and set aside the judgment of the High Court.

In opposing the appeal, Mr Amoko relied on the respondent's bundle of authorities filed on 22<sup>nd</sup> October, 2014 and on submissions made before the trial court. Counsel submitted that the appellant had failed to demonstrate how the learned trial Judge had erred in dismissing the appellant's claim; that the learned trial Judge was satisfied that the respondent had properly terminated the services of the appellant with payment of 3 months' salary in lieu of notice; that the letter of termination dated 6<sup>th</sup> February, 1999, set out matters of concern regarding the conduct of the appellant and the termination was, therefore, lawful since the respondent had complied with the terms of termination of the employment contract. Counsel argued that since the contract provided for termination of the appellant's services, it was not guaranteed that the appellant would work until the retirement age of 55 years and urged the Court to dismiss the appeal with costs.

### **Analysis and Determination**

We have carefully evaluated the entire evidence on record and considered the submissions by learned counsel and the law. We bear in mind that the judgment of the High Court was rendered on the basis of the law on employment in Kenya before the changes introduced in 2007.

This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. See **SELLE V ASSOCIATED MOTOR BOAT CO LTD, (1968) EA 123, 126 PARAS H-I, KENYA PORTS AUTHORITY V KUSTON, (KENYA) LTD, (2009) 2 EA 212** and **PIL KENYA LTD V OPPONG,**

***(2009 KLR 442).***

The appellant's appeal is based on two main grounds: that the High Court

Judge erred in finding that it was not a fundamental term of the employment contract that the appellant was to serve the respondent until the retirement age of 55 years; and in finding that the rules of natural justice were followed by the disciplinary committee when it convened on 6<sup>th</sup> January, 1999 in the absence of the appellant.

The appellant contended that the respondent terminated the contract of employment without cause prior to the contractual age of 55 years. In the recent decision in **KENNETH KARISA KASEMO V KENYA BUREAU OF STANDARDS,**

***CA NO. 19 OF 2012 [2013] eKLR,*** this Court stated:

***“Suffice to state that the law on employment does not normally envisage a situation where an employee is “forced” upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between parties.”***

In the case of **RIFT VALLEY TEXTILES V EDWARD ONYANGO OGONDA**,

**CA NO. 27 OF 1982 (UR)** this Court stated:

***“... the contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the respondent’s dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant.”***

In the instant appeal, the appellant was accused of, *inter alia*, gross misconduct and negligence as well as not acting in the best interests of the respondent. There were complaints against the appellant of having insulted his superiors as well as his subordinates. The record indicates that the appellant was informed of the allegations against him and was given an opportunity to explain his acts and omissions which resulted in loss to the respondent. The record further indicates that the respondent expressed its dissatisfaction with the appellant’s explanations.

In the circumstances of this case, we find that the appellant’s employment was terminated with cause. On the appellant’s claim that as a result of his unlawful or wrongful termination, he is entitled to general and special damages; we are guided by the case of **CPC INDUSTRIAL PRODUCTS (KENYA) LTD V OMWERI ANGIMA, CIV APP NO. 197 OF 1992** where this Court cited Lord Brightman L.J in the case of **GUNTON V LONDON BOROUGH OF RICHMOND UPON THAME, [1980] 3 ALL ER 577** at page 592(g):

***“An employee’s remedy, if he is unlawfully dismissed by his employer is damages. He cannot get an order for specific performance because it is not available to compel performance of a contract of service against an unwilling employer. He cannot sue for his salary or wages as such. By necessity his remedy is confined to damages. An unlawful dismissal is ex hypothesi a premature dismissal. The damages recoverable, having regard to the plaintiff’s duty to mitigate his damages, are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period for which the defendant was bound by his contract to employ the plaintiff. In the case of a fixed term contract, the assessment will extend over that fixed term. In the case of a contract terminable by notice, the assessment will extend over the period which would have had to elapse, before the defendant could lawfully have dismissed the plaintiff.”***

(Emphasis added).

Further, the case of **ADDIS GRAMOPHONE CO LTD, [1909] AC 488** reiterated that where the appellant is wrongfully dismissed, damages will not include compensation for the manner of dismissal, injured feelings or loss sustained from the dismissal.

Similarly, in **RONALD KIMATU NGELI V UKULIMA SACCO SOCIETY LTD NAIROBI, CA NO. 277 OF 2009 [2011] eKLR** where the appellant claimed against the respondent on the basis that he was forced to retire prematurely thus causing him loss and damages, this Court held:

***“...even if the contract was wrongfully terminated there is a wealth of authorities by this Court that the measure of damages would be the salary in lieu of notice and not the millions claimed by the appellant.”***

Stating the principle to be applied in similar circumstances, this Court held in the case of **KENYA PORTS AUTHORITY V EDWARD OTIENO, CA NO. 120 OF 1997** as follows:

***“To pay the plaintiff his full salary and other emoluments till he attains the age of 55, as he claimed, would, on proper analysis, be tantamount as if he was being reinstated to his employment, to which he is not entitled. ... The other ground of appeal is whether Mr Otieno was in law entitled to be awarded by way of damages for the loss of salary, medical allowance, housing allowance, leave allowance,***

***mileage claim, telephone allowance and services as claimed by him. In our judgment, where, as in the instant case, a contract of service includes a period of termination of the employment, the damages suffered are the wages for the period which is normal notice would have been correct. We find that Mr Otieno was not entitled in law to any of the benefits and/or emoluments claimed.***”

Applying the principles in these authorities, the appellant was entitled to three months’ payment in lieu of notice as stipulated in his letter of employment. We so hold.

On the ground that the rules of natural justice were not followed by the respondent when it convened a disciplinary committee in his absence, we are guided by the case of ***Rift Valley Textiles v Edward Onyango Ogonda (supra)*** where this Court held:

***“The rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in their contract that such rules shall apply. Further that where a notice period is provided in the contract of employment .... then an employer needs not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise likewise if the employee were to leave the employment for a better job he needs not give reasons as it would be ridiculous for the employer to insist that the employee does assign a reason for leaving the employment.”***

In the circumstances of this appeal, we find that the appellant’s employment was terminated in accordance with his contract of employment and the law as it then stood, and that the learned trial Judge arrived at the correct decision. We accordingly, dismiss this appeal with costs to the respondent both on appeal and in the High Court.

**Dated and delivered at Nairobi this 11<sup>th</sup> day of December, 2014.**

G. B. M. KARIUKI

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR