



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: BOSIRE, GITHINJI & RAWAL, JJ.A.)

CIVIL APPEAL NO. 11 OF 2006

BETWEEN

RICHARD MOMANYI OSORO.....APPELLANT

AND

PERMANENT SECRETARY MINISTRY OF CO-OP DEVELOPMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Bungoma (K. Sergon, J.) dated 16th September 2005

in

H.C.C.C. No. 49 of 1999)

JUDGMENT OF GITHINJI, J.A

This is an appeal from the judgment and decree of the High Court, (**Sergon, J.**) dismissing the appellant's suit for various reliefs against the respondent, arising allegedly from wrongful dismissal from employment.

In 1993, the appellant was working as an Assistant Co-operative Officer in the office of the District Co-operative Officer, Nakuru. In February 1993, he applied for 30 days leave from 1st March, 1993 to 14th April 1993. The leave was approved by a letter dated 5th April 1993. However, by Gazette Notice No. 1113 of 19th March, 1993 the Commissioner for Co-operative Development appointed the appellant and one N. K. Arap Rop to be liquidators of Mararsoi Farmers Co-operative Society Limited pursuant to **Section 61(1)** of the Co-operative Societies Act-Cap 490 (now repealed), which society was based in Rumuruti in Laikipia District. The appellant pleaded and also testified that following the appointment as a Liquidator, he took up the special assignment which involved traveling between Laikipia, Trans-Nzoia, Nandi and Uasin-Gishu Districts from which districts the members of the society were drawn.

By an application dated 28th October 1993, the appellant again applied to the Permanent Secretary through the District Co-operative Officer for 40 days leave with effect from 28th October, 1993. The

appellant claimed that the earlier approved leave was cancelled by his appointment as a liquidator and that he did not proceed on leave as approved. The second application for leave was forwarded by the District Co-operative Officer by a letter dated 5th November 1993 but noted that the leave application was forwarded to him by registered letter from Kitale on 1st November 1993, and that there was no letter in the appellant's file cancelling the earlier approved leave. By a letter dated 24th January 1994, the appellant informed the District Co-operative Officer that after the expiry of leave, he resumed liquidation duties after the expiry of leave, and was now based at District Co-operative Offices at Uasin-Gishu District.

The salary of the appellant was stopped from January 1994. In February 1994, the appellant went to permanent secretary's office in Nairobi to inquire why his salary was stopped. According to his evidence, he was informed by Mr. Nyaga who was in charge of personnel that the Provincial Co-operative Officer had complained that he had absconded from duty. The appellant testified that thereafter he met the Commissioner of Co-operatives who told him to go back to Eldoret and complete liquidation duties.

By a letter dated 4th May 1994 the appellant informed the District Co-operative Auditor that he had reported on duty with effect from date of the letter after completing the report on liquidation but the letter was not copied to the District Co-operative Officer.

By a letter dated 5th May 1994, the District Co-operative Officer asked the Permanent Secretary for guidance in view of the appellant's "*long desertion from duty*" and advised the appellant to stay away until a decision is made. The Permanent Secretary by a letter dated 24th May 1994, accused the appellant of absence from duty from 4th October 1993 to 3rd May 1994 without permission and disobedience of instructions and asked him to show cause why he should not be dismissed from the civil service.

The letter stated in part:

“ABSENCE FROM DUTY WITHOUT PERMISSION

You are aware that you were appointed a liquidator of Mararsoi Farmers Co-operative Society Ltd. and that in October 1993 you were instructed to hand over the remaining liquidation exercises and proceed to your duty station, Nakuru and resume your normal duties. You were supposed to report at Nakuru on 4th October, 1993 but you chose to remain at Eldoret for reasons you never cared to give.

You are also aware that on 28th October 1993 you applied for Annual Leave and posted your application from Kitale to Nakuru. Your request was to be allowed to take leave from the same day, 28th October 1993 to 28th December, 1993. Since normal approval was not conveyed to you, your continued absence from your duty station remained unauthorised.

In your letter of 24th January, 1994 addressed to the District Co-operative Auditor Nakuru, you stated that on expiry of your 'unauthorised' leave you resumed the liquidation exercise of Mararsoi Farmers Co-operative Society Ltd. Since you had earlier instructions to hand over the liquidation duties to other officers, your continued absence from your duty station, Nakuru remained unauthorised. In fact your co-liquidator Mr. Rop handed over the liquidation duties as instructed and your alleged continued handling of the exercise alone is rather unbelievable.

It is in the above circumstances, that payment of your salary was stopped. You called in this office on 8th February, 1994 in pursuit of your withheld salary and the facts of your absence from duty without permission were explained to you verbally by the undersigned. You argued that the facts were false and left Nairobi without the salary apparently for Eldoret and never cared to go back to your duty station, Nakuru. Thus you blatantly perpetuated your unauthorised absence from Nakuru until 4th May 1994 when you re-appeared there. You did this even after this Head Office had reminded you in February, 1994 of the urgent need to be at your duty station.”

The appellant replied by a letter dated 14th June 1994. He denied that he had been instructed to hand over liquidation exercise and return to his duty station. He admitted that he proceeded on leave before leave was approved but explained that he did so because his elder sister had died. He admitted that he resumed liquidation exercise but denied that he was doing liquidation exercise alone. He explained that as **Mr. N. K. Rop** was busy at his Baringo Office, they had made a special arrangement whereby the appellant would remain at Eldoret while **Mr. Rop** would go there to sign any necessary documents on every Friday.

Lastly, the appellant explained that he reported for duty at Nakuru after leaving Nairobi after which he was given permission by **Mr. Nyang'wara** - the District Co-operative Auditor to return to Eldoret to finalise liquidation.

By a letter dated 22nd November, 1995 the Permanent Secretary wrote to the appellant partly as follows:

“DISMISSAL

I am conveying the decision of the Public Service Commission of Kenya that you should be dismissed from the government service with effect from 4th October 1993 on account of absence from duty without permission and blatant disobedience.”

The appellant appealed against dismissal to the Public Service Commission claiming that the commission had relied on false information in dismissing him and that normal procedures were not followed. The appellant averred that his appeal was never considered nor did the Public Service Commission communicate with him until he received a letter dated 4th March 1998 informing him that the second appeal had been rejected as there were no convincing grounds for allowing it. The appellant maintained he had not filed a second appeal.

The appellant pleaded the foregoing matters in the plaint and sought judgment against the respondent for a declaration that the purported dismissal was illegal and unwarranted; an order that he should be paid his full salary and allowances from January 1994, and an order for reinstatement or alternatively payment of full terminal dues.

The respondent filed a defence but there was no appearance for the respondent at the trial and as a result, the trial proceeded exparte. Nevertheless, the High Court dismissed the suit saying in part:

“I find that the government followed the laid down procedures in arriving at a decision to dismiss the plaintiff. The plaintiff was given a right of hearing and a fair hearing for that matter. It is evident from the numerous correspondences produced in evidence before this court that the plaintiff absented himself from duty without authority from his superior. It is also evident that appellant had little regard for his immediate bosses who included the Provincial and District Co-operative Officers. He never sought their permission or prior consent for him to be out of Nakuru, his duty station. He has clearly stated that he was only answerable to the Commissioner of Co-operative Development and no one else.”

The main ground of appeal is that the trial Judge erred in law and in fact in holding that the appellant had not proved his case on a balance of probabilities.

Although the appellant did not specifically plead the grounds on the basis of which he claimed that the dismissal was unlawful, it is apparent that his case was that the grounds on which he was dismissed had no factual basis. In other words, his claim was that he had not absented himself from duty without permission and was not guilty of blatant disobedience as alleged both in the letter dated 24th May 1994 and in the letter dismissing him from government service dated 22nd November 1995.

There was no dispute that a public officer could be summarily dismissed from government service for absence from duty without leave. Indeed **Regulation No. 28** of the Public Service Commission Regulations made under Service Commission Act, (Cap 185) provides:

“Where a public officer is absent without leave or reasonable cause for a period exceeding twenty four hours and the public officer cannot be traced within a period of ten days from the commencement of such absence or if traced no reply to a charge of absence without leave is received from him in writing within ten days after the dispatch of the charge to him, the authority empowered to dismiss him may summarily dismiss him.”

The appellant was accused of absence from duty without leave from 4th October 1993 to 3rd May 1994 – a period of 7 months. The letter dated 24th May, 1994 appreciates that the appellant had been appointed as a liquidator but states that the appellant was instructed to hand over the remaining liquidation exercise and resume duty on 4th October, 1993. The appellant is accused of having failed to comply with the instructions. The appellant denied receiving such instructions. The same letter indicates that Mr. Rop the Co-liquidator also received similar instructions and complied with them.

The appellant indicated in his reply to the letter dated 24th May 1994 that he and Mr. Rop made special arrangement where Rop would work at his station in Baringo and only go to Eldoret for liquidation duties on Fridays. That is a confirmation of the contents of the letter of 24th May, 1994, that Rop had resumed duties at his station. Furthermore, by a letter dated 22nd February, 1995 the Permanent Secretary had asked Rop to confirm, among other things, that he and the appellant had had written communication to stop liquidation exercise.

By a letter dated 3rd March, 1995 Rop replied stating among other things, that he received a written communication from Provincial Co-operative Officer, which directed him and the appellant to hand over the remaining payments to respective District Co-operative Offices. However, he stated that he did not understand the letter as directing them to stop the liquidation exercise. In the same letter, Rop confirms that he resumed duty at his station.

The two letters were produced by the appellant at the trial. They however do not support his case. Rather, they support the Permanent Secretary's letter that the applicant and Rop had written instructions to hand over the remaining liquidation exercise to respective District Co-operative Officers. It is clear from Rop's letter dated 3rd March 1995 that he and the appellant are relying on the mere failure to de-gazette them as liquidators for the assertion that the written instructions did not stop the liquidation exercise. It is apparent from the letter of Rop that the Provincial Co-operative Officer had for all intents and purposes, relieved the appellant and Rop of their duties as liquidators and directed that the remaining liquidation be handled by District Co-operative Officers. It follows that if the appellant returned to Eldoret to continue with the liquidation exercise from 29th December, 1993 to 4th May, 1994, he was away from his station without permission and contrary to instructions of his superiors.

Moreover, it is clear from the letter dated 24th February, 1994 that when appellant went to Permanent Secretary's office on 8th February, 1994 to inquire why his salary had been stopped, he was informed that his salary had been stopped because of his absence from duty without permission and was instructed to be at his station. The appellant instead of going back to Nakuru, returned to Eldoret.

The appellant claimed that Nyang'wara gave him permission to return to Eldoret to complete liquidation. That explanation is not credible. The appellant already knew that he had problems for having failed to report at Nakuru. He also knew that he had already been instructed to hand over the remaining work to respective District Co-operative Officers. Moreover, Mr. Nyang'wara as shown by his letter dated 5th January, 1994 knew that the appellant was required to resume duty at Nakuru after expiry of his leave. In that letter, Nyang'wara reports to the Provincial Co-operative Officer thus:

“According to Mr. Osoro's leave application form, his annual leave started on 28th October, 1993 and ended on 28th November, 1993. He has not reported up to date (5th January, 1994) and we have no any information as to why he has not reported on duty.”

It is not credible that Nyangwara would subsequently allow the appellant to return to Eldoret and remain

there for over two months without consulting the Provincial Co-operative Officer. The appellant raised the issue whether any person, apart from the Commissioner for Co-operatives, could legally recall him from the liquidation exercise without consulting the Commissioner.

There cannot be any dispute that the appellant, the Commissioner of Co-operatives, the Provincial Co-operative Officer, District Co-operative Officer and the District Co-operative Auditor, are all under the Permanent Secretary administratively, in the Ministry of Co-operative Development. Any superior officer exercising delegated authority from the Permanent Secretary could give the appellant any lawful instructions. In any case, the instructions that the appellant should hand over the remaining liquidation exercise was not inconsistent with his appointment as a liquidator, as he could still complete the report while still working at Nakuru, just as Rop was doing.

The appellant admitted that he went on leave before it was authorised. It seems from the record that his leave was not formally approved by the Permanent Secretary thus rendering his absence without permission. Lastly, his explanation is inconsistent with his oral evidence that he met the Commissioner of Co-operative when he was in Nairobi who told him to go back to Eldoret.

The appellant was given an opportunity to respond to the accusations against him but the appeal was ultimately rejected and the appeal dismissed. He says that his appeal was not heard and that he did not file a second appeal. If so, then the letter dated 4th March 1998 logically refers to the dismissal of the first appeal.

The appellant further contended that no proper procedure was followed and that he should have been given a warning three times, followed by interdiction, and ultimately by dismissal. This was however a summary dismissal which is authorised by **Regulation 28**.

There is no provision in the Public Service Commission Regulations for oral hearing of appeals. From the nature of the complaints against the appellant, it was sufficient if he was informed of the grounds on which he was dismissed and given an opportunity to file an appeal. This was done and the appellant indeed filed an appeal. The Public Service Commission is a master of its own procedure as a statutory body. It need not hold a hearing and it can do everything in writing. The Public Service Commission ultimately communicated its decision to the appellant, that there was no convincing grounds for allowing the appeal although it erroneously referred to the appeal as the second appeal.

From the foregoing, I am satisfied that the grounds on which the appellant was dismissed were supported by ample documentary evidence, and that the High Court quite correctly dismissed the appellant's suit.

Thus I find no merit in this appeal which I would dismiss with no orders as to costs. As **Rawal, JA** agrees, the appeal is dismissed with no orders as to costs.

This judgment has been delivered under **Rule 32(3)** as Bosire, JA. is not currently performing judicial functions.

Dated and delivered at Eldoret this 20th day of September, 2012.

E.M. GITHINJI

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JUDGE OF APPEAL

JUDGMENT OF RAWAL, JA.

I have had the advantage of reading the judgment of **Githinji, JA** in draft. I concur with it entirely and I have nothing useful to add.

I agree that the appeal be dismissed with no orders as to costs.

Dated and delivered at Eldoret this 20th day of September, 2012.

K. H. RAWAL

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JUDGE OF APPEAL

I certify that this is a true copy of the original