IN THE COURT OF APPEAL

AT ELDORET

(CORAM: BOSIRE, WAKI & ONYANGO OTIENO JJ.A)

CIVIL APPEAL NO. 211 OF 2005

BETWEEN

JAMES KOSKEI CHIRCHIR ....APPELLANT

AND

THE CHAIRMAN – BOARD OF GOVERNORS ELDORET POLYTECHNIC........................RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Gacheche J.) dated and delivered on 16th day of June 2005

in

H.C.C.A. NO. 32 OF 2003

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JUDGMENT OF THE COURT

By his amended plaint, dated 15th July, 2002, James Koskei Chirchir, the appellant, prayed for a declaration that the termination of his employment by the Board of Governors, Eldoret Polytechnic, the respondent in this appeal, was wrongful and void; damages for wrongful dismissal and breach of the contract of employment and payment of his terminal dues, which he particularized. The suit was filed in the Chief Magistrate's Court, at Eldoret. By its amended written statement of defence the respondent denied the claim and prayed for the dismissal of the suit with costs to it.

After pleadings closed, the suit was set down for hearing and was eventually heard by Mr. Wamwayi, a Chief Magistrate. In his judgment the learned Chief Magistrate found as fact that the appellant's employment was governed by a Collective Bargaining Agreement between unionizable employees of the respondent and the respondent, but because the appellant did not appear before the Board of Governors for a final decision on whether or not he would be summarily dismissed, the dismissal was premature. avHaving not been served with the appropriate notice before dismissal, the learned Magistrate held, he was entitled to two months salary in lieu of notice and unpaid leave. The learned trial magistrate did not however think the appellant was entitled to gratuity, loss of future earnings and alleged underpaid house allowance. He then gave judgment in terms and thus provoked an appeal to the superior court.

The main reason why the trial magistrate rejected some of the appellant's claims was that as at the date of

his dismissal the appellant had ceased to be a unionisable member. Unionisable staff of the respondent were governed by a Collective Bargaining Agreement between the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers and the respondent. The appellant was a member when he was engaged by the respondent, and infact according to his letter of appointment dated 29th March 1989 his appointment was:-
"… subject to the terms of any agreement between the Ministry of Education, Science and Technology and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers for the time being in force, and on the terms and conditions of service of persons employed by the Board of Governors established under the Education (Board of Governors) Order or any other order establishing any other Board or Governing body of any institution established under the Education Act (Cap 211)."

The main issue in this appeal is, therefore, whether notwithstanding the fact that the appellant had resigned from membership of his union, the Collective Bargaining Agreement was still applicable to him as would entitle him to rely on it as the basis for his claims in his suit. The issue is really one of mixed law and fact. Before we deal with that issue, a resume of the background facts is essential.

The appellant was employed by the respondent as a plumber. On 7th September 2001, a water heater, fans and tubes belonging to the respondent had been dumped in a dust bin within the compound of the Eldoret Polytechinic. Investigations revealed that it was the appellant who had dumped them there. The appellant in a memo dated 24th September 2001 admitted he did so but explained that he did so at the request of the electrician pursuant to a maintenance section memorandum in which the supplies department had authorized the disposal of the items. The matter was referred to the Disciplinary Committee comprising of the Principal, the Registrar, and the supplies officer. The Committee heard, among other people, the appellant and in the end, after deliberations, it came to the conclusion that the appellant had "illegally" disposed off the employer's equipment without following the correct procedure. That committee recommended that action be taken against the appellant. That decision was however, subject to ratification by the Board of Governors of the Institution. The Minutes of that Committee, as material, read as follows:

"MIN. 7/10/2001 CONCLUSION AND RECOMMENDATION

It was decided that Mr. Kosgei Chirchir knowingly and deliberately removed the electrical items from W/6 and so deserved disciplinary action.

It was decided that the matter be forwarded to the Full Board of Governors meeting for discussion and action".

The minutes are dated 4th October, 2001. The meeting to which they relate was held on 1st October, 2001. However, before the full board could meet, the appellant was served with a dismissal letter dated 8th October 2001 signed by the Principal, summarily terminating his employment. The letter states, in part, thus:-
"Please refer to page 10 of the agreement between the Union and the Ministry subsection (iv and vii) for further details.
From the foregoing please note that your services have been terminated summarily, pursuant to the regulations and terms of employment between yourself and the institution. Accordingly you shall not be entitled to any terminal dues."

In his judgment the trial magistrate held that the failure by the respondent to seek ratification by the full Board of the decision of the disciplinary committee made the dismissal of the appellant wrongful and therefore entitled him to some terminal dues, to wit salary in lieu of notice and unpaid leave. He did not think the appellant could benefit from the Collective Bargaining Agreement, aforesaid. The learned Magistrate then decreed that the appellant be paid, *inter alia*, two months salary in lieu of notice. The Superior Court on first appeal affirmed the decision but varied the period upwards to three months and in doing so it relied on the Employment Act, Cap 226 of the Laws of Kenya. The respondent cross-appealed and its appeal was dismissed.

This is a second appeal. Only issues of law fall for consideration. We have no doubt in our minds that both courts below came to the right conclusion that the termination of the appellant's employment was wrongful. Both courts did not however think that the Collective Bargaining Agreement applied. That, as we stated earlier, is the central issue in this appeal.

In submissions before us by Mr. Omwenga for the appellant and Mr. Andambi for the respondent, there was variance as to the interpretation to give to **clause 7** of the Collective Bargain Agreement. That clause provides as follows:
"The Union undertakes that no employee shall be compelled to become a member of the Union and each Board of Governors undertakes that no employee shall be penalized on account of his Union membership. Similarly the Union undertakes that no non-Union Worker shall be penalized, provided that nothing stipulated in this or any other clause of this Agreement, shall preclude the introduction of a closed shop-system if jointly agreed upon by the parties to this agreement to be in the interest of both parties."

On the basis of the above clause it is clear that membership to the Union was voluntary, and whoever was a member, was obligated to pay a monthly subscription to the Union, pursuant to the declaration at the end of the agreement which required each employee to be a contributor to the Union. We have gone through the agreement, but find no clause which specifically provides for those who opted not to be members. Both courts below did not think the appellant was entitled to benefit from it having resigned as a member of the Union before his dismissal. The superior court was of the view that the Employment Act, and not the Collective Bargaining Agreement applied to non members of the labour union.

Mr. Omwenga for the appellant, relying on the appellant's letter of appointment, submitted that it did not matter whether or not the appellant was a member of the Union. His terms of employment had been spelled out as those contained in the collective agreement. Besides, he said, the appellant's letter of dismissal was based on the collective Bargaining Agreement.

Mr. Andambi for the respondent was of a contrary view. However, in view of the wording of the last paragraph of the appellant's letter of appointment, it is clear that the appellant' s terms of employment were governed by that part of the Collective Bargaining Agreement relating to the terms of service of staff in his cadre. The respondent understood that to be the position and hence worded the dismissal letter making it referable to the terms of employment. It is our view that the Collective Bargaining Agreement was applicable to the appellant.

The appellant's main claim was under the head *"SERVICE GRATUITY"*. Payment under this head is to those employees who retire. Clause 31 of the Collective Bargaining Agreement provides thus:

"31. SERVICE GRATUITY
Payment of service gratuity for the employees employed by Board of Governors Institutions who retire/retired, shall be paid at the rate of one twelfth of each completed month of service based on his/her current salary."

The appellant's employment did not terminate with retirement. He was dismissed. The trial and first appellate courts found as fact that the appellant was guilty of misconduct. That being so he would not be entitled to claim service gratuity. The mere fact that the termination procedures were not properly followed would not *per se* entitle him to claim service gratuity as if he had been retired.

Likewise the appellant was not entitled to claim loss of future earnings as that claim presupposes that the appellant would have worked until retirement.

As for the alleged under paid house allowance, the appellant did not adduce evidence to show why and when the house allowance was underpaid. His counsel tried to explain to us from the bar that after the appellant's dismissal house allowance for all staff was adjusted upwards and back dated to a date before his dismissal. He was in effect claiming what he considered to be arrears arising from that adjustment. It is however, our view that he was not entitled to those arrears as by then he had ceased to be an employee of the respondent.

All in all, this appeal lacks merit.

As regards costs, the appellant was awarded costs and interest by the trial magistrate. The superior court on first appeal ordered that each party would bear its own costs both before that court and also those before the trial court. The appellant was aggrieved, in his advocate's words, because under **section 27** of the Civil Procedure Act costs follow the event. The appellant's appeal largely failed. The respondent's cross-appeal also failed. Notwithstanding the provisions of **section 27**, above, costs are generally a matter within the discretion of the court. The court did not, however, explain why it denied the appellant his costs before the trial court. In absence of any explanation in that regard we think that the learned Judge of the superior court erred in denying the appellant the costs of the suit before the trial court. We would therefore set aside the order on costs and in place thereof order that the appellant shall have his costs before the trial court, but make no order as to costs both before the superior court and this Court.

It is so ordered.

Dated and delivered at Eldoret this 25th day of March 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR