



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

(CORAM: OMOLO, GITHINJI & AGANYANYA, JJ.A)

CIVIL APPEAL NO. 138 OF 2008

BETWEEN

JAFRED MAKHAKHA APPELLANT

AND

PAN AFRICAN PAPER MILLS (E.A.) LTD. RESPONDENT

(Appeal from the judgment and Decree of the High Court of Kenya at Kakamega (Kariuki, J) dated 8th November, 2007

In

H.C. C. C. No. 53 of 2004)

JUDGMENT OF THE COURT

Jafred Makhakha, the appellant herein, used to be an employee of Pan African Paper Mills, the respondent herein. The respondent is apparently under receivership and on 17th December, 2010, the appellant obtained an order from the High Court at Kakamega which gave him leave:-

“-----to continue with proceedings against the said PAN AFRICAN PAPER MILLS (EA) LIMITED (In receivership) in Kakamega High Court Civil Suit No. 53 of 2004 and Civil Appeal No. 138 of 2008 (Court of Appeal of Kenya).”

The appellant was first employed by the respondent on 5th May, 1978, his designation on his appointment was a supervisor trainee in the engineering section of the respondent. The appellant did not produce his letter of appointment saying in his evidence in the superior court that he had lost it. His academic qualification at the time of employment was an Advanced Certificate of Education obtained at the Alliance High School. On 1st January, 1989, the appellant was promoted to the position of an assistant engineer and in the course of his employment he had been given a certificate of long service in 1988.

On 8th March, 1995, the appellant received a letter dated 27th February, 1995 from the respondent terminating his employment. By then the appellant had worked for the respondent for nearly 17 years and his salary and emoluments as at the date of his dismissal was **K.shs.10,475.85/-** gross and **K.shs.9,400/-** net. The appellant then sued his former employer for unlawful and wrongful termination of employment. The claims he made in his plaint dated the 24th October, 2000 were that:-

“As a result of the wrongful and unlawful termination aforesaid, the plaintiff suffered loss of:-

- (a) Stable repayment of loan of K.shs.150,000/- from Pan Paper Savings and Credit.**
- (b) K.shs.51,400/- worth shares with Pan Paper Savings and Credit Society.**
- (c) Medical benefit for the family until retirement at 60 years.**
- (d) Loss of Life Insurance Policy worth K.shs.50,000/- with Kenindia Assurance Co. Ltd. plus its compounded (sic) interest.**
- (e) Accrual contribution to the National Social Security Fund (NSSF).**
- (f) Loss of pension accrual to the requisite age of 60 years.**
- (g) 15 years service award.**
- (h) 83 compensatory days (at double rate) at reviewed current salary.**
- (i) Annual dividends of K.shs.5000/- up to 60 years retirement.**
- (j) Notice pay and unpaid leave days earned and house allowance cost.**

The plaintiff also wishes to claim for general damages and costs of this suit.”

The prayers made at the end of the plaint were:-

- “(a) unpaid special terminal benefits above.**
- (b) General damages**
- (c) Costs of this suit.**
- (d) Interest on (a), (b) and (c).**
- (e) Any other relief.”**

The appellant himself testified about the circumstances which had led to his dismissal. He told the learned trial Judge (G.B.M. Kariuki, J) that he thought he (appellant) was entitled to a notice period of six months if his services were to be terminated. He did not receive any such notice. The appellant then called one Peter Kabuga Ondari (PW2) as a witness. Peter said he was a certified public accountant and according to that witness the total loss which the appellant had suffered as a consequence of the termination of his employment was **Kshs.133,680,285/-**. Naturally, the witness did not say what he thought the profit margins of the respondent would be.

The respondent also called one witness Stanley Andika Mukoko who was its personnel manager. Stanley contended that the appellant’s services with the respondent had been lawfully terminated and that the appellant had been paid one month salary in lieu of notice.

Having heard the parties, the Judge held that the respondent had unlawfully terminated the service of the appellant, but he went on to hold that as the respondent had paid to the appellant one-month salary in lieu of notice, the appellant was not entitled to any of the claims he had made in his plaint. He, therefore, dismissed the appellant’s suit but without ordering the appellant to pay the costs.

The appellant was naturally dissatisfied with the Judge’s order and hence his appeal to the Court. He listed a total of ten grounds of appeal in his memorandum of appeal and since he argued his appeal in person he did not deal with the grounds in any order. He insisted on repeating before us the circumstances which had led to his dismissal. We pointed out to him the fact that the Judge had found as a fact that he had been wrongfully dismissed and that there was no cross-appeal on that issue. We asked him to tell us what he thought he was entitled to as a result of his wrongful dismissal and that is when he told us that he

thought he was entitled to a notice period of six months and that he would be a very happy man if the Court were to allow his appeal and award to him a total of K.shs.10 million. The respondent was not represented before us during the hearing of the appeal.

We have considered the submissions of the appellant before us, but we do not see the basis on which he could have been awarded K.shs.133,680,285/- as had been claimed on his behalf by his witness or even the K.shs.10 million which he told us would make him a very happy man. No doubt he would be a happy man if the money was awarded to him, but there has to be a lawful basis upon which the award, whether it be Kshs.10 million or any other sum, is to be made. It may be that the appellant had taken a loan of K.shs.150,000/- from his co-operative society but we do not see what that had got to do with his employer; there was no evidence that prior to the taking of the loan, the employer had agreed that during the pendency of the loan the appellant would not be dismissed. The value of his shares in the co-operative society were all irrelevant as were virtually all the listed items set out in paragraph six of the plaint. The learned Judge was clearly right in rejecting those claims as they were simply untenable.

The only thing which had worried us a bit is that the Judge said the appellant was only entitled to a notice period of one month. As we have seen, the appellant himself said he was entitled to a notice period of six months. Stanley (DW1) only referred to the notice period in an oblique way, when he stated:-

“----- The dismissal of the plaintiff should have been summary but he got one month’s salary in lieu of notice.”

The witness himself, being the deputy personnel manager of the respondent company, would be expected to be in custody of documents such as the contracts of service of the company’s employees. He did not produce any such documents and it is not to be forgotten that at the time of his dismissal the appellant had served the respondent for nearly seventeen years. In those circumstances, there was no reason for rejecting the appellant’s contention that he was entitled to six months’ notice. He was paid for one month. We allow his appeal to the extent that he shall be paid a further salary for five more months on top of the one month which he was awarded by the superior court.

The appellant has succeeded to some extent in the appeal and that being so, we award to him one-third of the costs of the appeal. Those shall be the orders of the Court.

Dated and delivered at Kisumu this 13th day of April, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.