REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 312 OF 2004

BETWEEN

RT. REV. SILAS NJIRU CATHOLIC DIOCESE OF MERU ....APPELLANT

AND

ANDREW KIRUJA...RESPONDENT

(An appeal from the decree of the High Court of Kenya at Meru (Sitati J)

dated 21st October, 2004

in

H.C.C.C. NO. 2 OF 2000)
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JUDGMENT OF THE COURT

By his re-amended plaint dated *27th April 2001*, **Andrew Kiruja,** the respondent, in this first and last appeal, impleaded the **Rt. Rev. Silas Njiru**, and **the Catholic Diocese of Meru**, the 1st and 2nd appellants respectively, jointly and severally for pension benefits, gratuity, post retirement monthly benefits and salary lost for the period *May 1999* to *April 2009* at the rate of Kshs.**9,140**/= per month.

By their amended joint defence the appellants denied the claim and prayed that the suit be dismissed with costs.

The respondent's suit was heard fully by Mulwa J. He received evidence from the respondent and two witnesses who testified on behalf of the appellants, but for reasons which are not apparent on the record he did not prepare the judgment in the case. Instead, with the consent of counsel for the parties, Sitati J. prepared the judgment on the basis of the evidence on record. That approach is permissible pursuant to the provisions of **O.XVII rule 10** of the Civil Procedure Rules.

In her judgment Sitati J. was satisfied that the appellants unlawfully terminated the services of the respondent with the 2nd appellant as a result of which the respondent lost benefits which she quantified at **Kshs. 5,731,026/=.** She then gave judgment to the respondent for that sum less Kshs**.122,756/90** which had already been paid by 2nd appellant.

The appellants were aggrieved by that decision and hence this appeal. There are five grounds of appeal in the appellants' joint memorandum of appeal, but before we deal with them it is essential to set out, in brief, the background facts.

The respondent, a teacher by profession was initially working for the **Teachers Service Commission (TSC)**. However, at his request, he was seconded to the **Catholic Diocese of Meru**, where he was engaged on contract as a water co-ordinator. The contract was for a renewable period of 3 years. After the first renewal of his contract, TSC by its letter dated *19th November, 1998* through its Secretary, advised the respondent that TSC had stopped the policy of seconding its teachers to private schools, and gave him several options. He could decide to return to TSC in which case he would be expected to return not later than *31st January, 1999*. In the alternative, he could decide to remain within the Meru Diocese in which case the Diocese would be expected to remit monthly, 31% of his salary to TSC to maintain his pension. The respondent was also advised through the aforesaid letter that in the event that he ceased to work for the diocese before attaining the age of 50 years, he would forfeit his rights and privileges under the Teachers Service Commission including the pension benefits.

The TSC asked the respondent to communicate his decision to it not later than *31st January, 1999*. The respondent, through a standard Form which the TSC provided indicated that he would remain with the 2nd appellant. He dated the form *25th January, 1999*. Curiously, however, the 2nd appellant also did a letter to the TSC, the body of which read as follows:

"RE: ANDREW KIRUJAH WAKIBWI TSC NO. 140011:

The above named teacher has been working for the Diocese of Meru since 1994 after he was released from the T.S.C.

According to your circular letter to all teachers working in private institutions, which requires them to take an option by end of this month, I wish to inform you that Mr. Kirunjah will continue working for the Diocese and we shall continue remitting 31% of his monthly salary for the maintenance of his pension until he attains the age of 50 years when he qualifies for pension benefits.

Thanks for your continued co-operation.

Yours Sincerely,

Fr. Andrew Mbiko

DIOCESIAN ADMINISTRATOR"

It should be recalled that when the above letter was written, the respondent was working on contractual terms. The contract was for three years. His earlier contract for a similar period had expired and the current one commenced on *28th October, 1998*. It had run for about 3 months when the above letter was written. Mr. Kariuki for the respondent, who had conduct of the respondent's case in the appeal, submitted that the aforesaid letter varied the terms of the appellant's contract which otherwise would have been for a fixed term of three years. In his view the term of the contract was varied to expire when the respondent would attain the age of 50 years.

Mr. Kaburu for the appellant was however of a different view. He submitted that the contract of employment provided for salary in lieu of notice upon termination of the respondent's employment before the expiry of its full term. In his view what the respondent was entitled to, was either a month's written termination notice or one month's salary in lieu of notice. We will revert to this aspect later on in this judgment.

It did not take long after the letter reproduced earlier before the 2nd appellant evinced an intention to terminate the respondent's employment with it. By its letter dated *10th April 1999*, the 2nd appellant notified the TSC as follows:

"REDEPLOYMENT OF MR. ANDREW KIRUJAH WAKIBWI TSC NO. 140011 (PRIMARY)

This is to inform you that Mr. Andrew Kirujah Wakibwi TSC No. 140011 who has been working with the Diocese of Meru will not be working for us with effect from 30/4/99.

Please reinstate him so that he continues working for the Teachers Service Commission as a teacher.

We thank you most sincerely for having allowed Mr. Kirujah to work for the Diocese of Meru where he has been doing a good job.

Thank you very much and may God bless you.

Yours faithfully

Silas S. Njiru

BISHOP OF MERU"

The letter was copied to, among other people, the respondent. If we pause there, the 2nd appellant had notice that TSC would not accept the respondent after *31st January, 1999*. He had exercised the option to remain with the Diocese of Meru and this he did before the deadline of *31st January 1999*. The circular letter to the respondent, among other people, notified him and the Diocese of Meru that in the event he ceased to work for the Diocese of Meru, after *31st January 1999*, and before attaining 50 years of age, he would not be accepted back. As at the date of the Diocese's letter asking TSC to accept the respondent back, he was about 45 years old. He had 5 years to go before the age of 50 years upto which age the 2nd appellant had undertaken to remit 31% of the respondent's salary for purposes of maintaining his pension..

As expected TSC declined to accept the respondent back into its employment. The respondent therefore lost not only his job, but also his pension benefits. He then decided to sue the appellants.

In his re-amended plaint the respondent averred, *inter alia*, that the Diocese of Meru prevailed upon him to remain working for it and undertook to remit part of the respondent's salary to TSC to maintain his pension but later knowingly discontinued the payments and terminated his employment with it. When doing so it was well aware that its action would not only deprive him of employment but also pension benefits.

In his computation the respondent presumed he would have worked until the age of 55 years and he therefore used a multiplier of 10 years to arrive at loss of earnings. He arrived at a total figure of **kshs.5,731,026/=** as loss of salary and other allowances.

In his evidence the respondent testified that he would have worked for the 2nd appellant for 10 years after exercising the option to remain with it, but we do not think that would have been the case. By its letter dated *25th January 1999*, it undertook to remit 31% of the respondent's salary until he attained 50 years of age.

On their part the appellants called two witnesses. The crux of their evidence was that the 2nd appellant successfully took steps to have the respondent redeployed back to TSC, and as a result of that effort he got a posting letter to Meru North. It was dated *16th May 2000* signed by C.N. Simiyu (Mrs). It is a standard form type of letter which letter omits certain particulars. That letter is however in conflict with earlier letters from TSC. For instance the letter dated *21st September, 1999* from TSC to the Bishop of Meru is categorical that the respondent would not be accepted back. There was another letter to the respondent dated *17th February 2000* in which the TSC, as material, penned as follows:

"You are given upto 6th March 2000 to let the commission know your decision. Please make sure that your pension contribution have been made by the Diocese of Meru. The Commission also expects a refund of Kshs. 18,228/= by the same date. Kindly note that if you have not complied with this letter by that date you will be deemed to have taken option 2.

Yours faithfully,

S.N. Kinyua (MRS)

For: SECRETARY,

TEACHERS SERVICE COMMISSION"

The respondent's advocate on record sought clarification whether the deadline for exercising the option had been extended from *31st January 1999* and whether the respondent would fill another option form in place of the one he had filled dated 25th *January, 1999*. The advocate's letter was dated *28th February 2000*. In an apparent response to that letter TSC addressed a letter to the respondent dated *8th March 2000* which, as material stated, as follows:

"REQUEST FOR REINSTATEMENT

Further to our letter TSC/140011/91 dated *17th February, 2000*, I wish to reiterate that it is not possible to offer you employment. This is because you opted to remain with the Diocese of Meru. You could not revoke the option.

It was expected that you would remain with the Diocese until you attain the age of 50 years, to qualify for pensions. If you leave before attaining the age of 50 years, you would forfeit your previous teaching service with all terminal benefits attached to it.

Yours faithfully

C.M. Kariuki

For: SECRETARY
TEACHERS SERVICE COMMISSION."

In view of that correspondence the posting letter to Meru North is of no effect.

Sitati J. considered all the relevant evidence, and after analyzing it came to the conclusion that the appellants made a representation to the respondent , that they would retain him until the age of 50 years, and by terminating his services with the 2nd appellant before he attained that age the action was unlawful and entitled the respondent to be compensated for the loss.
The appellants' joint grounds of appeal are as follows:
(1) The learned trial judge erred in law and fact on solely relying on the Appellants' letter of 25th January 1999 and describing it as 'trickery' even on the face of subsequent correspondence between the Appellants and the Teachers Service Commission on the one hand and the Teachers Service Commission and the Respondent on the other which correspondence actually led to the re-deployment of the Respondent in Meru North District which re-deployment the Respondent "cleverly'' declined.

(2) The learned trial judge erred in law and fact in finding and holding that the Appellants letter of 25th January 1999 was an unequivocal misrepresentation which led to the Respondent suffering loss when subsequent events and correspondence show it was not and indeed the Respondent could have, if he so wished, resumed his former position.

(3) The learned trial judge erred in law and fact in awarding the Respondent the sum of Kshs.5,608,269.10 in that:

a) The claim was speculative
b) There was no proof of the age of the Respondent.
c) There was no proof of the salary and/or the benefits the Respondent was entitled to or could have been entitled to by the time he would be fifty years hence the gratuity and pensions.

d) There was not even an attempt to prove or explain the figures pleaded vide paragraph 9A of the re-amended plaint.

4) The learned trial judge erred in law in dismissing the Appellants' defence and authorities as irrelevant yet the relationship between the Appellant and the Respondent was based on a contract of employment which terms and conditions bound the parties and over which contract the Respondent confirmed he had no claim from the Appellants whatsoever.

5) The judgment was against the weight of evidence and the law.

We propose to deal with them seriatim. On the first ground the appellants appear to base their complaint on the alleged letter of posting, which we discussed earlier. As we stated earlier the other correspondence from TSC were categorical that TSC could not revoke the respondent's option made on *25th January, 1999*. The respondent through his advocate on record sought clarification of the contents of another letter but the answer he got was that he could not be reinstated. In one letter TSC appears to have been prepared to reinstate the respondent upon the condition that he remits arrears of part of his salary which was not paid by the Diocese of Meru to maintain his pension. In another letter he categorically rejected the respondent. All in all the import of the correspondence from TSC taken as a whole is that they declined to reinstate the appellant. Sitati J. cannot properly be faulted for coming to that conclusion.
There is a remark the Judge made that the letter of *25th January 1999*, from the Diocese was a trickery to make the respondent opt to remain with the 2nd appellant. It may not have been written to trick the respondent in to making his election. However, it is curious that the Diocese terminated the services of the respondent only three or so months after he made his election. There was no explanation given for the 2nd appellant's action. Nor did the first appellant who had authored the letter of *25th January 1999*, explain the sudden change of mind against the appellant. It must be such unexplained conduct on the part of the appellants which led Sitati J. to wonder whether the conduct was in good faith or trickery.

Regarding the second ground, the appellants made a representation. There is no doubt about that. They were going to retain the respondent until he attained the age of 50 years. They undertook to remit 31% of his salary to TSC to maintain his pension. By the respondent choosing the option to remain and by the 2nd appellant writing the letter undertaking to make the remittances as stated above, it cannot be said that the appellants did not understand the full implication of their action. The respondent stood to lose all his terminal benefits if his services were terminated before he attained the age of 50 years. The letter of *25th January, 1999* from the Diocese to TSC drastically changed the terms of the respondent's employment with the 2nd appellant.

The respondent relied on the doctrine of promissory estoppel. That doctrine is succinctly explained in Halbury's Laws of England 3rd Ed. Vol. 15 at paragraph 344, thus:

"When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

Evenden v. Guildford City Association Football Club, Ltd [1975] 3 ALL ER 269 illustrates the doctrine. Like in the present case, a person who was employed by a third party was working for Guildford City Association Football Ltd. The club, with his consent took him up as its employee to continue doing the same work he was doing for it. He was later declared redundant because the club merged with another club.

The issue which arose was whether he would be paid redundancy benefit limited to the period he had worked as an employee of the club or for the whole period he had worked for the club inclusive of the period before he became such employee. It was held that computation would include even the period before he became an employee of the club, because there had been a representation that change of the employer would not prejudice him.

In our case both appellants on the one hand and the respondent on the other, understood the full implications of a decision by the respondent to remain with the 2nd appellant. He would lose both his employment and pension benefits in the event his services with the 2nd appellant were to be terminated before he attained the age of 50 years. The 2nd appellant is the one which needed the respondent's continued service and it assured him that it would continue remitting part of his salary to TSC, which was his former employer, to maintain his pension. The termination of the respondent's services with the 2nd appellant clearly affected his legal relations not only with his former employer but also with the 2nd appellant and was prejudicial to him. The representation made in the letter of *25th January 1999*, was unequivocal. As stated earlier, it had the effect of changing and did in actual fact change his contractual relations with the 2nd appellant. Consequently an *estoppel* arose against the 2nd appellant.

The authorities cited by Mr. Kaburu, namely**, David Chege Mwangi v. University of Nairobi,** Civil Appeal No. 144 of 1995, **Dalmas B. Ogoye v. K.N.T.A. Ltd**; Civil Appeal No. 125 of 1996; **Rift Valley Textiles Ltd v. Edward Onyango Oganda** Civil Appeal No. 27 of 1992, and **Abubakar Mohamed Alnmin v. Standard Chartered Bank Ltd**, Civil Appeal No. 298 of 2003, are all distinguishable. The first, second and 4th authorities, above, all concerned termination of employment on the basis of alleged misconduct; and as regards the third authority it was a case of summary dismissal on the basis of the existing terms of employment. It was not strictly a case where any representation was made which would give rise to an *estoppel.*

In the case before us there was a clear representation, and we are, as a result satisfied that the superior court came to the correct conclusion that an *estoppe*l arose against the appellants. That being our view of the matter, grounds 4 and 5 of the grounds of appeal have no basis.

The third ground of appeal relates to quantum of the sums the superior court awarded to the respondent. Mr. Kaburu urged the view that on termination of his employment the respondent would only be entitled to salary in lieu of notice, and that there was no evidence adduced by the respondent to prove he was entitled to the sums of money pleaded in the re-amended plaint. In his view the Ksh.5 million awarded to the respondent had no proper basis.

Mr. Kariuki for the respondent, on other hand, submitted that the respondent was not challenged on figures he gave in his evidence. The main issue at the trial, he said, was whether the respondent had

proved *estoppel.*

Sitati J. after considering the evidence before her, held that the respondent was entitled to be paid the sums he claimed less **Kshs.122,756/90** which the 2nd appellant had paid to TSC to maintain his pension. The respondent was awarded **Kshs.5,731,026/=** less the pension contribution; giving a net amount of **Kshs.5,608,269/10**. But how was the figure of **Kshs.5,731,026/=** arrived at?. The respondent in his evidence stated that it was arrived at on the basis of what he would have earned had his services with the 2nd appellant not been terminated. In his re-amended plaint he had computed the figure on the basis of a multipler of 10 years and a monthly salary of **Kshs.12,500/=** as pleaded. Whether that was the respondent's salary per month was a matter especially within the knowledge of the 2nd respondent and the onus was on it by dint of the provisions of **section 11l** of the Evidence Act to show otherwise. It did not do so. Sitati J. does not seem to have considered the issue of the multiplier and we think she fell into error. The letter of *25th January 1999*, the respondent relied upon, assured him of employment until he attained the age of 50 years which would work out to 5 years as he was then, as stated by him, about 45 years old. Thus a multiplier of 5 years would have been proper. As stated earlier, his contract was for three years but the aforesaid letter varied the period to be until he attained 50 years. That being our view of the matter the respondent was improperly awarded damages using a multipler of 10 years. We are constrained to interfere. We reduce the sum awarded to **Kshs.2,804,134.60** based on a multiplier of 5 years.

In the result the appellant's joint appeal succeeds to that limited extent. With regard to costs, the respondent shall have the costs of the suit in the High Court, but as regards this appeal the appellant shall have a half the costs of the appeal.

Dated and delivered at Nairobi this 10th day of December 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR