REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 334 of 2002

CENTRAL BANK OF KENYA ……………………………………. APPELLANT

AND

MARTIN KING'ORI ……………………………………………… RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Githinji, J) dated 4th October, 2002

In

H.C.C.C. No. 928 OF 1994)

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JUDGMENT OF THE COURT

The Respondent herein, ***Martin Njori Kingori***, was employed by the Central Bank of Kenya (hereinafter "*the bank*") in 1981 as a Telephone Supervisor. His duties were to maintain telephones in all offices of the bank and to supervise telephone operators. Upon completion of his probation in 1984, he was confirmed as a permanent and pensionable employee from the date he joined the service of the bank. The Respondent believed he was doing a good job for the bank despite receiving two or three warning letters which he responded to, but the bank thought otherwise. After 14 years of service, he was served with a letter of dismissal on 4th August, 1993. The reason for dismissal as stated in the letter was "*Gross misconduct*" in that he was frequently absent from his place of work during official working hours. Upon dismissal he was paid three months basic salary in lieu of notice, which the bank stated was his only entitlement under the Staff Rules and Regulations. The Respondent was not satisfied with his dismissal and so appealed to higher authority under the bank's Rules and Regulations but his appeal was dismissed. He decided to go to court.

In the plaint filed on 9th March, 1994 and subsequently amended, he laid out his cause of action in paragraph (6) as follows:-

"***(6) The Plaintiff's dismissal was unlawful, unjustified and without any basis at all. Further the Plaintiff was not paid his terminal benefits, pension scheme, salary in lieu of notice and gratuity. The Plaintiff's claim against the Defendant is made up as follows:***

PARTIUCLARS OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANT

a. Retirement Benefits

b. Refund of Pension Contribution

c. 3 months salary in lieu of notice

d. Payment for leave due

e. Gratuity at 20 days for each year of service completed.

(Particulars of the amounts claimed in the items shown hereinabove shall be supplied at the hearing.)"

In the end he prayed for judgment for:-

"***a. General Damages for wrongful dismissal***

b. Terminal Benefits as pleaded in Paragraph 6 of the plaint due to the Plaintiff

c. Interest on (a) and (b) above at Court rates

c. Costs of this suit together with interest thereon at Court rates."

The suit fell for hearing and determination before Githinji, J (as he then was) who heard the Respondent testify on oath and produced several exhibits. Although the bank had filed a defence denying the claim, it offered no evidence at the hearing and instead chose to make submissions to the effect that the Respondent had not discharged the onus of proving his case. After analyzing the evidence on record and the submissions of both counsel, the learned Judge held that the Respondent was wrongfully dismissed from his employment. He reasoned that the bank, under the relevant Rules and Regulations, could only dismiss an employee for "*misconduct*" by giving him three months notice in writing or paying three months salary in lieu. The Respondent in this case, however, was purportedly dismissed for "*Gross Misconduct*" which was governed by a different rule admitting of no notice or payment of any benefits. The fact that the bank paid three months in lieu of notice meant that the Respondent could only have been dismissed for "*misconduct*" and the onus was on the bank to prove such misconduct. This onus the bank did not discharge, hence the wrongful termination of the contract of employment.

Having found for the Respondent on liability, the learned Judge proceeded to consider the Respondent's entitlement. He appreciated the wealth of authorities in respect of claims for damages in employment contracts in such cases as **Ombunya vs. Gailey & Roberts Ltd. [1974] EA 522**, which was followed in **Kenya Commercial Bank Ltd vs. Jackson Omambia, CA 136/88** and other cases. The principle is that where there is a period of termination of a contract of employment the damages suffered are the wages for the period during which normal notice would have been current. The learned Judge however distinguished those authorities on the ground that there was no provision in the contract of employment between the Respondent and the bank, allowing the bank to terminate the employee's contract by written notice although the employee may do so.

We may quote him verbatim:-

"***As I have already observed; there is no clause in the Rules giving the bank a right to terminate the employment merely by giving notice or paying salary in lieu of notice in the absence of a misconduct by an employee.***

The Bank can only terminate the employment if the employee is either guilty of misconduct or gross misconduct. Where the employee is guilty of misconduct, the bank has to terminate the employment by giving employee a three months notice or paying him 3 months salary in lieu of notice. I have found that plaintiff had not committed any misconduct. In that case the bank had no right to give a notice to terminate the employment. The plaintiff's employment could only have been terminated in accordance

with the staff Rules and Regulations. These Rules and Regulations were not followed. The termination clause in Rule 6.21 does not apply in this case."

With that finding the learned Judge proceeded to award general damages for wrongful termination of employment as the equivalent of six months basic salary of the respondent. In the end, judgment was entered for the respondent and the decree ensued for the following orders:-

"***1. The Defendant do pay to the Plaintiff all his terminal benefits including pension if payable, refund of pension contributions if refundable, payment for leave due if any, and gratuity in accordance with the terms and conditions of employment and the staff rules and regulations.***

2. The Defendant do pay to the Plaintiff six months basic salary as damages for wrongful termination of employment.

3. Either party do have liberty to apply in respect of 1 and 2 above.

4. ***The Defendant do pay to the Plaintiff the costs of this suit to be taxed and certified by the Deputy Registrar***."

The Bank was aggrieved and now comes before us on three grounds of appeal, namely:-

1. The learned Judge erred in awarding the respondent pension or a refund of pension contributions, payment for leave due and gratuity when particulars of the same were not pleaded and no evidence was led in proof thereof.

2. The learned Judge erred in failing to appreciate that even if the termination of the Respondent's employment was wrongful; the Respondent was only entitled to his salary for the contractual period of notice.

3. The learned Judge erred in law in awarding the Respondent general damages when there was no basis in law upon which he could properly do so."

As is apparent from those grounds, there is no challenge on the finding that the termination of the respondent's employment was wrongful. We think the appellant was well advised to abandon such challenge, particularly when no evidence was offered to contradict the respondent.

On the first ground of appeal, learned counsel, Mr. Chacha Odera submitted that the particulars of the claim as stated in paragraph (6) (reproduced above) were in the nature of special damages. Consequently, the law requires that the damages be specifically pleaded and also strictly proved, failing which they are not for grant. Apart from item 6 (e) on gratuity which the respondent applied orally to amend at the hearing and provided a figure of Shs.198,000, there was no other figure provided for the items the respondent sought judgment for. Indeed, he merely stated in his plaint that "*the figures shall be supplied at the hearing*" but never were. As relates to "*pension or refund of pension contirubion,*" Mr. Odera submitted that the respondent was entitled to pension as stated in the letter of appointment which the respondent produced in evidence, thus:-

"*You will now be eligible for benefits from the Bank's Pension Fund in accordance with the rules and regulations of the Pension Fund and the Widows' and Orphans" Scheme, a copy of which is attached. Please sign the attached certificate of acceptance and return it to this office as an acknowledgment that you have read and understood these regulations."*

The respondent therefore had full details of the scheme as contained in the rules and regulations which he had in his possession. The rules provided that the scheme would be operated by a board of trustees, which can be sued, and not the Bank. The respondent was also in a position to know what leave was due, if any, but failed to plead specifically. As for gratuity which was specifically pleaded at Shs.198,000, Mr. Odera referred to the finding by the superior court that the respondent provided no proof for that figure

and there was no basis therefore for granting it. A defendant, in Mr. Odera's submission, cannot be blamed for poor pleading by a plaintiff or be required to assist the plaintiff when no interrogatories or notice to produce documents were served. Finally, it was conceded by the respondent that he had been paid three months salary in lieu of notice and therefore the claim did not lie. In sum therefore, Mr. Odera submitted, there was no basis in fact or in law for giving judgment to the respondent under paragraph 6 of the amended plaint.

In response to those submissions, learned counsel for the respondent, Mr. Njoroge Wachira, submitted that the claim under paragraph 6 of the amended plaint was not a claim in special damages. It was perfectly in order to leave the figures out if the respondent did not have them. At any rate, it was the Appellant bank which had possession of the figures and ought to have provided them to the court, but chose not to. That is why the superior court, made an order for "*liberty to apply*" if the figures cannot be ascertained after the judgment. Mr. Wachira concluded that the respondent was right in suing the bank for pension refund, and not the Trustees, because it is the bank which had employed him.

We have considered the submissions of both counsel on this ground of appeal and we think, with respect, that the Appellant's complaint is meritorious. There can be no argument that the pleading particularized in paragraph 6 of the amended plaint was in the nature of special damages. These are damages relating to past pecuniary loss calculable at the date of trial. The law on pleading such damages is now trite. We take it from **Coast Bus Service Ltd. v. Sisco Murunga Ndanyi & 2 others**, Civil Appeal No. 192/92 (UR) which amongst other authorities was applied in **Charles C. Sande v. Kenya Co-operative Creameries Ltd**., Civil Appeal No. 154 of 1992 (UR). This Court stated:-

"**We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit, and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars …………..**"

For as long as the adversarial system of litigation continues to apply in our courts, those are the rules of pleadings in a claim for special damages. Fortunately, the Rules Committee has recently finalized reform proposals which will mitigate the rigours of the adversarial system. We find no reason why the respondent was unable to plead his claim specifically when he was represented by counsel and there were procedural provisions to aid him in obtaining the necessary particulars of his claim. Interrogatories, discovery and notice to produce are provided for in the current Rules of Procedure. The averment that the particulars would be supplied at the time of trial was not even complied with. Only one attempt was made in respect of gratuity where a figure of Shs.198,000/- was supplied but even then, the learned Judge stated:-

"***plaintiff has computed the gratuity payable as Shs.198,000. But he did not show the terms of the contract to support his claim.***"

Surprisingly, the learned Judge then shifted the burden of proof on that claim to the bank which had offered no evidence at the trial. With respect the bank had no onus of proof of the respondent's claim and the finding was therefore a misdirection. We agree with the learned Judge that the claim for gratuity was not proved and it follows therefore that it was not for grant. On the whole ground (1) of the appeal succeeds.

Grounds (2) and (3) may be taken together as they challenge the award of general damages for breach of contract and assert that the damages available for breach of a contract of employment is the salary for the contractual period of notice. Mr. Odera submitted that contractual relationships are governed by the terms between the parties and therefore no general damages were available for breach. He further submitted that there were numerous authorities, some of which he provided, to support the view that the

respondent was only entitled to three months salary as his measure of damages even if his dismissal was wrongful. Mr. Wachira on the other hand supported the decision of the learned Judge, stating that the issue was one of discretion which was properly exercised.

As we stated earlier, the superior court was alive to the principle that damages for wrongful termination of employment is equivalent to the period of notice provided in the contract for termination of the employment. It is the reasoning advanced by the learned Judge to distinguish that principle which causes us some concern. Simply put, the learned Judge found that under the Staff Rules and Regulations governing the contract, there was a provision for the respondent to terminate the contract. There was also a provision for the bank to terminate the contract on notice for "*misconduct"* or summarily for "*gross misconduct*". There was no other way the bank could terminate the contract. Since there was a finding that the respondent committed no misconduct and that the letter of termination, though referring to "*gross misconduct*", did not amount to one, then it followed that the provisions allowing the bank to terminate the contract were not available to it.

It seems to us, with respect, we that such reasoning would result in an absurdity. It would mean for one, that the bank never terminated the respondent's services and he has therefore remained as an employee who ought to be paid his salary until such time as the services are lawfully terminated. It would also mean that, although the employee can voluntarily walk out of their relationship, the employer shall remain shackled to the employee for as long as no misconduct or gross misconduct can be established. We do not think the law would countenance such relationship as it would be one of servitude. Happily for us, the selfsame issue was discussed by this court in a case which has uncanny resemblance to the one before us. We allude to **Central Bank of Kenya vs. Nkabu [2002] 1 EA 34**. The appeal was decided on 14th February, 2002 while the superior court decided the matter before us on 4th October, 2002 but the authority was not cited or considered.

In the ***Nkabu case***, the respondent, ***Julius Nkonge Nkabu***, was employed by the bank as a clerk in 1980 and the same Staff Rules and Regulations as in this case were applicable in 1993. There was a finding that his services were wrongfully terminated in 1993. He also contended, as in this case, that an employee who is on permanent and pensionable terms may only be dismissed from the service of the bank on grounds of "*misconduct*" or "*gross misconduct*", and for no other reason. There was no provision for the bank to terminate the services on notice which only an employee could do. Nkabu was then awarded general damages equivalent to his monthly salary for all the period between his dismissal and the date of judgment in excess of Shs.1.8 million. Allowing the appeal and reversing the judgment of the superior court, this Court restated the law and it is appropriate that we reproduce the relevant passage *in extenso thus*:-

"*In the Githinji case* **(Githinji vs. Mumias Sugar company Ltd, Civil app. No. 194/91),** *the Court said:*

"*The most recent and authoritative decision of this Court which applies the common law principles is the case of Rift Valley Textiles Ltd v. Oganda [1992] LLR 308 (CAK). In that case the contract of service of the Respondent therein, provided that it could be terminated by either party giving a notice of three months to the other or paying salary in lieu of notice. When the matter came before the High Court, the learned Judge having found that the dismissal was unlawful, and despite the Respondent's admission that the had been paid three month's salary in lieu of notice, proceeded to award the Respondent twelve months gross salary as general damages. On appeal to this Court, this Court had no difficulty in holding that the learned Judge's decision was wrong. This Court's view was curtly and shortly, put this way.*

'*We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. 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 under and in accordance with the terms of his contract with the Appellant'"*

On the basis of those authorities one would have thought that since the Respondent was later paid three

months salary in lieu of notice, no issue would arise about his dismissal, but nay. Both before the trial court and before us it was urged on his behalf, that the Staff Rules and Regulations governing his employment gave him security of tenure, and he could only be dismissed if it was shown that he had been guilty of misconduct or gross misconduct. Mr. Muthaura for the Respondent submitted before us that as the only misconduct which was alleged against the Respondent related to the loss of the bearer certificates for which he was prosecuted but was acquitted, no case of misconduct was made out against him. Consequently, he urged, in view of the wording of clauses 6.20 , earlier on reproduced, and 6.34, which defines what amounts to gross misconduct, the Respondent's dismissal was unlawful. He further argued that by reason of the said two clauses the Respondent's case was distinguishable from those covered by the authorities, and he was therefore entitled to be paid damages for the period up to the date he would have retired normally. Mr. Muthaura made heavy weather of the phrase in clause 6.20, above, namely, "may only be dismissed." In his view it meant that unless misconduct was established against the Respondent he was irremovable from the Appellant's employment.

Clause 6.34, above, provides that:

"*Gross misconduct includes such misconduct as theft, forgery, assault, a conviction on a criminal charge relevant to employment by the Bank, breach of secrecy or other offences of a similarly serious nature."*

That clause and clause 6.20 must have made the trial Judge to think that the Respondent's case was distinguishable and that by reason of those paragraphs he was entitled to more than the salary for the notice period. With due respect to the learned Judge, he erred. The respondent's letter of appointment was made subject to the Appellant's Staff Terms and Conditions of Service, Rules and Regulations. But those Regulations do not stipulate that the Appellant can, for a reason other than misconduct, terminate the employment of an employee who is on permanent and pensionable terms by giving notice of salary in lieu of such notice. Although that is s, it does not mean, as Mr. Muthaura seems to think, that it cannot happen. ***Section 14 (5)*** *of the Employment Act (Chapter 226) of the Laws of Kenya, provides, as is material, that:*

"*14 (5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:*

(i) …

(ii) …

(iii) Where the contract is to pay wages periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty eight day next following the giving of notice in writing.

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto."

It follows that notwithstanding the absence of a provision in the Staff Regulations giving the Appellant the right to terminate the employment of an employee on permanent and pensionable terms by giving notice, the right is available by reason of the above section. That right which is a statutory right, cannot be taken away by a mere stipulation in Staff Rules and Regulations. True, the above provision, on the face of it appears not to cover the situation of the Appellant. However, when the parties agreed that the Respondent could terminate his employment with the Appellant by notice, it is our view that the Appellant would also have a reciprocal right. The proviso must be read to mean that the period of the notice agreed upon between the parties could override the twenty eight day period."

We agree with that reasoning. It follows that the superior court erred in awarding general damages and in failing to appreciate that the Respondent had already been paid by the bank such amount as he was entitled to upon termination of his services. Grounds (2) and (3) of the appeal also succeed.

The upshot is that this appeal succeeds and we allow it. We set aside the judgment of the superior court and substitute therefore an order dismissing the respondent's suit. In view of the circumstances of the case, liability, the order that commends itself to us on costs is that each party shall bear its own costs, both here and in the court below.

Dated and delivered at Nairobi this 29th day of May, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

………………………

JUDGE OF APPEAL

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

DEPUTY REGISTRAR