IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 269 OF 2003

WALTER MUSI ANYANJE .....APPELLANT

AND

1. HILTON INTERNATIONAL KENYA LTD .....1ST RESPONDENT

2. TOM NJIRI .....2ND RESPONDENT

(An appeal from the judgment and decree of the High Court of

Kenya at Nairobi (Visram, Commissioner of Assize) dated

1st March 2001

in

H.C.C.C. No. 3 of 1999)

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JUDGMENT OF THE COURT

The appellant had sued the respondents in the superior court at Nairobi for defamation and wrongful termination of his services. In a judgment delivered by the Commissioner of Assize (Alnashir Visram as he then was), on 1st March 2001 the learned Commissioner of Assize dismissed the appellants' suit with costs.

Being dissatisfied with that decision the appellant appealed to this Court and in a Memorandum of Appeal dated 21st day of October 2003 and lodged in the Court's Registry on 22nd day of October 2003, the appellant has six grounds of appeal; namely:

1. The learned Commissioner of Assize erred in law by mismanaging the trial to the point of denying both the plaintiff and the defendants proper justice by directing simultaneous filing of submissions from parties, he short circuited the rules of procedure and did not give parties opportunity to address court make rebuttals, then proceeding to make a decision/judgment on jumbled written submissions which do not have any sanction of the law.

2. The learned Commissioner of Assize erred in law by determining in his finding/decision statement of

issues raised by the defendants in their written submissions dated 31st January 2001 and failed to crystallize and determine agreed statement issues on record dated 28th March 2000 thereby gravely prejudicing the appellant.

3. The learned Commissioner of Assize erred by leaving the seat of justice as a Judge and became part of the litigants by cross-examining the plaintiff and witnesses at length and many times with such grossly (sic) thus jeopardizing the plaintiff.

4. The learned Commissioner of Assize was wrong in holding that "There is nothing to show that the plaintiff in the present case was wrongfully dismissed. I find that his employment was terminated in accordance with his contract of employment. He has refused to accept his dues in lieu of the notice but he cannot force the plaintiff to be his employer" without establishing his gross misconduct or conduct which is incompatible with plaintiffs' faithful discharge of his duties and failed to scrutinize the contract termination clause wording that had no specific termination notice period.

5. The learned Commissioner of Assize was wrong in holding "That even if it is assumed for a moment that the plaintiff was wrongfully dismissed he has lost his chance to his claim by withdrawing his claim for special damages since no general damages are available for breaches of contract;" failed to notice the appellant adduced no evidence to establish the appellant was precluded from bringing proceedings to recover damages for wrongful dismissal and also went beyond normal rules of pleading – plaintiff/appellant did not seek breaches of contract relief in the plaint.

6. The learned Commissioner of Assize misdirected himself by failing to evaluate the whole material evidence adduced at the trial contained in a Memorandum and Report dated 24th August 1998 tendered by the plaintiff witness (Jared Onyari) and wrongly held "The Work Committee cannot be said to have understood the 2nd defendant's allegation as being defamatory, they needed that information to do their duty. It was not shown that the witness who was called on behalf understood those words to be defamatory." Respondent pleaded justification and not privilege

The facts of the dispute which landed the parties in the superior court were that though the appellant was appointed by the 1st respondent as a waiter on 27th June 1994, he was suspended from duty on 26th June 1995 for levying charges on a guest verbally without presenting a receipt. This was considered as misconduct on his part. However, the works committee which investigated this incident cleared him of the misconduct and he was reinstated to his duties on 3rd July 1998.

But by letter dated and signed by the 2nd respondent on 24th August 1998 the appellant's services with the 1st respondent were again terminated. The letter stated *inter-alia*:

"It has been decided to terminate your services with the company. This decision takes effect immediately. Please arrange to collect your final dues from the accounts office ..."

The appellant considered this an act of dismissal by the 1st respondent but because the 2nd respondent had been called as a witness before the works committee where he testified that:

"I was in the Jockey Pub at around 7.00 p.m. on 25th June 1998 and saw Walter Anyanje serve a lady guest a whole chicken which was well cooked and later charged the guest verbally without a cheque",

he was enjoined to the suit as the 2nd defendant on a charge of defamation; hence the case subject of this appeal.

When counsel for the appellant (***Mr. Enonda)*** addressed us on 11th June 2008 he complained that the superior court did not put a proper record of what happened during the trial nor was the appellant properly directed as to what to respond to as he appeared in person. He also submitted that there was no indication that the parties' submissions were on record or properly thereon and as a result the appellant was

prejudiced in responding to the submissions.

According to counsel, a proper record of proceedings was not kept in that though submissions were filed they were not noted in the proceedings. Though there were several agreed issues in the statement of issues, the Commissioner of Assize only dealt with three issues. That there was no evidence of gross misconduct nor was there a defence of justification or privilege raised on the allegation of defamation.

Counsel for the respondents (***Miss Malik***) submitted that there was no evidence to show that the appellant was defamed and there was no necessity on the part of the respondents to raise a defence of justification or privilege either in the defence or submissions. That since the appellant abandoned his claim for special damages the only prayer was for damages for wrongful dismissal. But, according to Miss Malik, in the case of the appellant there was very clear termination provision; payment of two months' salary in lieu of notice which amount the 1st respondent offered the appellant and which offer still stands.

She submitted further that there was no provision in law for the payment of general damages in a case of termination of employment; That there was no evidence after the filing of submissions that the appellant wished to rebut anything.

Miss Malik finally submitted that no injustice was suffered by the appellant to necessitate this matter being taken to another court for retrial.

In his judgment, the learned Commissioner of Assize said this in respect to the allegation of wrongful dismissal:-

"There is nothing to show that the plaintiff in the present case was wrongfully dismissed. I find that his employment was terminated lawfully in accordance with his contract of employment. He has refused to accept his dues in lieu of the notice but he cannot force the defendant to be his employer."

And on the allegation of defamation the learned Commissioner of Assize had this to say:-

"... can it be said that the plaintiff has been defamed? It is most plainly hard to see how the plaintiff has been defamed. The 2nd defendant informed the working committee of the allegation against the plaintiff which he had to do to enable that committee do its function. Not every offending statement can be said to be defamatory. The court must consider what an ordinary man would understand by those words and whether the person to whom the words were published would understand them as defamatory.

The works committee cannot be said to have understood the 2nd defendant's allegations as being defamatory; they needed that information to do their duty. It was not shown that the witness who was called on behalf of the plaintiff understood those words to be defamatory. The plaintiff has not established a case for defamation."

When the appellant filed the plaint in the superior court, one of his prayers was for two months salary in lieu of notice, amounting to Kshs.24,000/=. This was in the nature of special damages. But on termination of his services with the 1st respondent on 26th August 1998, he had been offered Kshs.18,000/= which he declined to accept. However when the case came on for hearing before the superior court on 24th January 2001 and before he testified, the appellant informed the court that he was abandoning his claim for special damages of Kshs.24,000/= adding:-

"I do not wish to claim that."

Thus the appellant only remained with claims for general damages for wrongful dismissal and for slander. In the case of wrongful dismissal the question we pause is this:

Is an employee whose services have been terminated entitled to general damages?

This Court in *Kenya Ports Authority v. Edward Otieno (Civil Appeal No. 120 of 1997* (Unreported) drawing support from the case of **Addis v. Gramophone Company (1909) AC 488** emphatically stated that there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract. See also *Rift Valley Textiles Limited v. Edward Onyango Oganda*, *(Civil Appeal No. 21 of 1992* and *Ombanya v. Gailey & Roberts [1974] E. A. LR. 522,* where in the latter case it was stated by Muli, J (*as he then was*) that:-

"I think it is established that where a person is employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current."

In the appellants' letter of employment, it was provided in paragraph 13 thereof that:-

"*Your employment may at any time be terminated by:*

(b) either party paying the equivalent of your salary in lieu of notice required under sub-rule (a) of this clause."

*Sub-rule **(a)*** was for either party to give the other notice in writing of intention to terminate the employment. Though notice period was not specific in the letter, by the 1st respondent giving the appellant two months salary in lieu thereof in the termination letter, this was sufficient. But since the appellant abandoned this claim; that issue does not call for a decision.

As regards the allegation of defamation, we are of the view that the 2nd respondent was performing one of his duties of his employment to brief the works committee as to why the appellant had been suspended from his duties to enable it to decide whether the suspension was valid or not. This was in line with *the Memorandum of Agreement between The Kenya Association of Hotel Keepers and Caterers And The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA)***.** It is our view therefore that it was imprudent for the appellant to use part of the proceedings of the works committee to make out a case of defamation against the 2nd respondent.

As the Commissioner of Assize rightly put it, the workers committee needed this information to perform its duty. Even PW2 who was called to assist the appellant in this regard did not adduce any evidence to prove the allegation of defamation against the 2nd respondent on a balance of probabilities.

We are satisfied that the learned Commissioner of Assize arrived at a considered decision in the circumstances and that there is no merit in this appeal which we order dismissed.

And in view of the circumstances of this case we order that each party bears his/its own costs of this appeal.

Delivered and dated at NAIROBI this 11th day of July, 2008

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR