



REPOUBLIC OF KENYA
IN THE COURT OF APPEAL AT KNAIROBI
CIVIL APPEAL 314 OF 2001

BARCLAYS BANK OF KENYA LTD.APPELLANT

AND

JOSEPH MWAURA NJAURESPONDENT

(An Appeal from a Judgment and Decree of the High Court of Kenya at Nairobi (Aganyanya, J) dated 19th June, 2001, limited to the trial judge's decision to award general damages and interest thereon

in

H.C.C.C. No. 2603 of 1994

JUDGMENT OF THE COURT

The question raised before us in this appeal is what an employee who is wrongfully dismissed by an employer is entitled to upon such dismissal. Joseph Mwaura Njau, the Respondent hereinafter, was first employed by Barclays Bank of Kenya Ltd., the appellant hereinafter, in 1969; the Respondent was employed as a clerk at a salary of Kshs.720/- or so per month. In the course of time, he rose through the ranks and by the time of his dismissal by the Appellant in 1993, the Respondent's designation was that of a Supervisor Category A and his monthly salary, inclusive of house allowance, was about Kshs.25,015/- per month. When the Respondent was first appointed a clerk by the Appellant on 16th April, 1969 Clause 13 in the letter of appointment provided that:-

“13. If, after you have served your probationary period, your appointment is confirmed it will be that of a monthly servant, provided that should you at any time either during your probationary period or afterwards commit any breach of the conditions herein contained or be guilty of unsatisfactory conduct inside or outside the Bank, the Bank reserves the right to dismiss you summarily.”

So that according to this clause the Respondent was to serve as a monthly servant after confirmation in his appointment. There was, however, no mention of how the Respondent's services were to be terminated outside the provision in Clause 13. There was, accordingly, no express provision for a notice period. By its letter of 6th March, 1993, the Appellant suspended the Respondent and this was followed by the letter of 12th March, 1993 which summarily dismissed the Respondent. The Respondent by his plaint dated 12th July, 1994 sued the Appellant for wrongful dismissal and the prayers the Respondent made in the plaint were:-

(a) One-month salary in lieu of notice - Kshs.25,015.00

- (b) 12 days worked upto 12th March 1993 - Kshs.9,999.00
- (c) Unpaid Local leave - Kshs.23,333.00
- (d) Leave allowance - Kshs.12,000.00
- (e) Terminal benefits for 24 years and/or early retirement benefits as per staff Circular No. 18 of 3.3.92.
- (f) Pension scheme funds as per staff Circular No. 18 of 3.3.92.
- (g) General damages for wrongful termination plus costs and interest at court rates plus any other relief.

The Appellant filed a defence denying that the dismissal was wrongful and further pleaded a set-off and counterclaim. Aganyanya, J. heard the dispute between the parties, concluded that the Appellant was malicious in dismissing the Respondent, and, therefore, that the dismissal was wrongful. Leaving aside the issue of malice, there was more than ample evidence from which the learned Judge was entitled to conclude that the Appellant had acted unlawfully in dismissing the Respondent. The Respondent testified on the circumstances leading to his dismissal; the Appellant, for its part, called no evidence in support of its claim that its dismissal of the Respondent was justified. We are satisfied the learned trial Judge was correct in concluding that the Respondent was wrongfully dismissed. That is why we say the question which we are called upon to determine is what should follow upon the finding of wrongful dismissal.

That question has been answered in a long line of cases and we think we should deal with some of them. Where the contract of employment embodies a notice period, then damages to a person dismissed unlawfully is to be worked out on the basis of the notice period. Where no such period is provided for in the contract of employment, as is the position in this appeal, then a reasonable period of notice is to be implied.

In the case of **KYOBE V. EAST AFRICAN AIRWAYS**, [1972] EA 403, Kyobe who was employed by the East African Airways as a general manager, was wrongfully dismissed by the airline. His contract of employment did not contain any period of notice. The trial judge, taking into account the position of Kyobe as general manager and such like factors, concluded that a notice period of six months would be sufficient. The Court of Appeal for East Africa refused to interfere with the judge's finding that six months was a reasonable notice period.

In **EAST AFRICAN AIRWAYS V. KNIGHT** [1975] EA 165, it was held, where relevant:-

- “(i)
- (ii) there was no provision in the contract for six months' notice of termination.
- (iii) The termination provisions in the contract were not exhaustive and the appellant [East African Airways] could give the respondent [Knight] reasonable notice of termination which in the circumstances would be 18 months.”

Knight was a pilot and his claim was based on loss of career which is different from loss of a particular employment. These decisions and the principles contained in them have been followed and applied in cases such as **ALFRED J. GITHINJI V. MUMIAS SUGAR COMPANY LTD**, Civil Appeal No. 194 of 2001 (unreported), **RIFT VALLEY TEXTILES LTD. V. EDWARD ONYANGO OGANDA**, Civil Appeal No. 27 of 1992 and **CENTRAL BANK OF KENYA LTD. V. NKABU** [2002] KLR 149. There have been other numerous decisions of the Court applying these principles. Even this Court's decision in **NATIONAL CEREALS & PRODUCE BOARD V. ALBERT ONGARO**, Civil Appeal No. 9 of 1999 (unreported) upon which the Respondent relied did not purport to dissent from the other decisions of the Court for the Court states at page seven (7) paragraph two (2) of its judgment: -

“As the respondent's appointment was terminable by three months' notice he was entitled only to such

damages as the employer would have been obliged to pay if it had dismissed the respondent in accordance with the provisions of the contract.”

We re-state that these are the principles applicable in cases of wrongful or unlawful dismissal of an employee by an employer. Mr. Justice Aganyanya appears not to be in agreement with these principles. The learned Judge is no doubt entitled to his view on such matters but as this Court recently said in the case of **ABU CHIABA MOHAMED V. MOHAMED BWANA BAKARI & TWO OTHERS**, Civil Appeal No. 238 of 2003 (unreported) while a judge of an inferior court is perfectly entitled to entertain doubts, even grave doubts, on the correctness of the decision of a court superior to his and whose decisions are binding on him, such a judge has no jurisdiction to over-rule the decision of the court superior to his. In the **ABU CHIABA MOHAMED** case, Omolo, J.A said in his Judgment with which the majority of the Court agreed:-

“..... Of course the learned Judge of the High Court would have no jurisdiction to over-rule a decision of this Court even if she disagrees with the decision and the comments in her judgment must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. I would respectfully point out to the learned Judge that like all other Judges in her position, under the doctrine of precedent, she is bound by the decisions of this Court even if she may not approve of a particular decision and any attempts to over-rule or side-step the Court’s decision can only result in unnecessary costs to the parties involved in the litigation.”

These remarks would bear repeating in this appeal for the learned trial Judge appears to have taken umbrage to the fact that the counsel who represented the Appellant before him

“..... cannot wave the Rift Valley Textile case and tell the court:

here, see this authority which excludes us from paying any damages to the plaintiff on account of his dismissal from employment.”

The learned Judge, of course correctly added that each case must be decided in accordance with its peculiar circumstances. That is undoubtedly correct but it is equally correct to say that established principles of law generally remain the same in each case and it is the application of those principles to the facts of the case in hand that might vary from case to case.

We have held, in agreement with the learned Judge that the contract of employment between the Appellant and the Respondent did not provide for an agreed period of notice. Mr. Imende, learned counsel for the appellant, told us that in the absence of an agreed period of notice, **section 14 (5)** of the Employment Act, **Chapter 226** Laws of Kenya, applies. We understood Mr. Imende to be referring particularly to **section 14 (5) (iii)** of the Act.

Section 14 (5) is in these terms:-

“13 (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 or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”

We do not understand that provision to mean that in all cases where no period of notice is provided, the courts must deem it that the period of notice must be one month. Such an interpretation would be unnecessarily restrictive and might well encourage employers not to provide for any period of notice in

employment contracts so that irrespective of the circumstances surrounding any employee, the period of notice would and must be one month. Such an argument has never been raised in any of the previously decided cases and we would go along with decided cases which give the court a discretion to decide what the reasonable period of notice ought to be in a particular case where such period is not provided for in the contract of employment between an employer and employee. We reject the contention by Mr. Imende to the contrary.

The learned trial Judge in this case thought that a period of twelve months would be a reasonable notice period. In 1972, Kyobe who was a general manager of East African Airways was awarded damages based on a notice period of six months which was thought to be reasonable. In 1975, Knight who was a pilot with the same airline was awarded damages based on a notice period of eighteen months. We are dealing with a matter which arose nearly twenty years down the line when getting alternative employment is virtually untenable if not impossible. It was not shown, for example, that the Respondent had secured alternative employment after his dismissal by the appellant. In these circumstances, we are constrained to agree with the learned trial Judge that the notice period of twelve months, in all the circumstances of the case, was reasonable and we see no reason to warrant our interfering.

That was really the substantial issue before us. There was a cross-appeal on the question of terminal benefits but we do not know what those terminal benefits were and if the Respondent is or was entitled to a pension from his contributory pension scheme, there is nothing to stop him claiming such contribution from the relevant body. The Respondent also brought in the question of an early retirement scheme, but the truth of the matter is that the Respondent was dismissed and did not retire under any scheme. In any case, retirement under that scheme was by invitation and the Respondent did not show anything indicating that he had been invited to retire under the scheme. The cross-appeal must accordingly fail.

Our final orders in the appeal shall be that the appeal of the Appellant be and is hereby dismissed with costs to the respondent. The Respondent's cross-appeal is also hereby dismissed but with no orders as to costs to the Appellant.

Dated and delivered at Nairobi this 31st day of March, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.