



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL  
AT NAIROBI**

**CORAM: TUNOI, O'KUBASU & GITHINJI, J.J.A**

**CIVIL APPEAL NO. 239 OF 2001**

**BETWEEN**

**PARAMOUNT BANK LIMITED.....APPELLANT**

**AND**

**MOHAMMED GHIAS QUREISHI.....1ST RESPONDENT**

**LEXINGTON LIMITED.....2ND RESPONDENT**

**(Appeal from the decision of the High Court of Kenya at Nairobi (Mulwa, J)**

**dated 5th December, 2000**

**in**

**H.C.C.C. NO. 1557 1997)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal by the unsuccessful defendant, **PARAMOUNT BANK LIMITED** hereinafter referred to as the appellant, against the judgment and decree of the High Court of Kenya at Nairobi (Mulwa, J) given on 5th December, 2000, whereby the learned Judge awarded **MOHAMED GHIAS QUREISHI**, the 1st respondent, a total sum of Shs.6,215, 255.00 in respect of unpaid salary, costs of air tickets, medical bills and accommodation pursuant to an unlawful termination of employment. The details of the award are as follows:-

- (a) Salary at 40,000 p.m. x 36 = Kshs.1,440,000**
- (b) Annual Leave of 30 days for 3 years 3 x 40,000 = Kshs.120,000**
- (c) Accommodation Monthly rent of shs.110,000 x 36 = Kshs.3,960,000**
- (d) 5 return air fares to Karachi = Kshs.679,320**
- (e) Medical Bills = Kshs.15,935**

**TOTAL = KSHS.6,215,255**

The 1st respondent was employed by **Combined Finance Limited** as its Executive Director/General Manager with effect from 1st August, 1993 under an Agreement of Employment. **Combined Finance Limited** was later, however, converted into Paramount Bank Limited, the present appellant. The pertinent parts of the Agreement provided that the employment of the 1st respondent with the appellant may be terminated on the happening of the following events:-

**(a) The death of the employee;**

**(b) Sickness or incapacity that prevents the employee from performing his functions;**

**And**

**(c) Any gross default, misconduct or breach or non-observance of any of the conditions herein contained by the employee.**

In his plaint dated 24th June, 1997, the 1st respondent pleaded that his services with the appellant were verbally terminated without notice nor cause and prayed for the following reliefs:-

**(a) A permanent injunction to restrain the appellant from taking any action whatsoever or howsoever either by itself or through its advocates or agents in respect of the loans borrowed until this suit has been heard and determined;**

**(b) Special damages in the sum of Kshs.11,100,935/- with interest at 33% per annum;**

**(c) General damages to be assessed by the court for loss of career with interest at 33% per annum;**

**And,**

**(d) Costs of the action.**

The defence lodged by the appellant to say the least, is interesting. The 1st respondent resigned on his own accord and the appellant duly accepted his resignation.

During the trial of the suit the 1st respondent testified that his "official salary" per month was Shs.40,00/= less taxes but unofficially he was being paid Shs.200,000/= cash. His services were abruptly terminated verbally and without notice on 31st March, 1997, when he was told by the Chairman of the appellant not to report to work the following day on 1st April, 1997. He protested but to no avail. In the meanwhile, the appellant with the assistance of some thugs physically threw the 1st respondent out of the company house and repossessed the car that had been assigned to him for official duties. The chairman of the appellant Bank physically pushed him out of the office and ordered him off the premises. In order to further embarrass and humiliate him the appellant gave the 1st respondent 10 days' notice to repay a loan it had advanced him otherwise it would resort to "whatever measures it deems necessary in order to recover the outstanding loan".

In a carefully considered judgment the trial Judge did not believe the defence. He deemed it inconceivable that the 1st respondent at his position and age would resign without any other employment. The trial Judge held that the 1st respondent's appointment and services were wrongly terminated. He found that the official salary per month in accordance with the contract of employment was Shs.40,000/= but another Shs.200,000/= was being paid "under the table" so as to avoid income tax. He held:

***"Although I found that he was being paid this amount in addition to the Kshs.40,000/- such a contract where he was being paid Kshs.200,000/= in a manner to enable him avoid the payment of taxes would be against public policy. Such a contract is not enforceable when***

***challenged. The 1st plaintiff cannot therefore enforce this part of the payment.”***

The learned Judge then held that the appellant was only entitled to enforce the payment of the salary as contained in the Contract of Employment. As no notice was given to terminate the 1st respondent's employment, the learned judge thought that 36 months would constitute reasonable notice in the circumstances.

The appellant had some ten grounds of appeal, most of them merely controverting evidence that was tendered and accepted by the trial Judge. However, in our view, the only substantial complaint is whether or not the trial Judge erred in law by finding 36 months as reasonable period of notice for the termination of the employment contract.

Before we determine this issue we will first deal with other grounds of appeal raised by the appellant.

*Mr. Kaluma*, for the appellant, submitted that the 1st respondent resigned voluntarily from his own position and that the trial Judge was wrong to hold otherwise. Our own consideration of the evidence on record establishes that the 1st respondent was crudely and in utter disregard of the contract forced out of office by the appellant. We find no fault with the careful consideration by the trial judge as regards this issue. There is no merit in this contention.

It has also been argued on behalf of the appellant that the trial Judge was wrong to hold that the 1st respondent was in receipt of an unofficial monthly sum of Shs. 200,000/=. The trial Judge found, and it was not contended otherwise before us, that the 1st respondent had an experience of over 35 years as a banker. The appellant provided him with a company car and accommodation at a monthly rental of Shs.110,000/=. He had also easy access to various loans. We agree with the trial Judge that these privileges would not in the business world be available to a person earning Shs.40,000/= per month. It is reasonable in the circumstances to hold that there is convincing evidence that the 1st respondent earned quite a lot more than the “official” salary. This ground of appeal is definitely misconceived and we reject it, also.

We now turn to consider whether the learned Judge was right in his determination of what he thought was a reasonable period of notice.

It is not in dispute that the Contract of Employment executed by the parties did not specify the notice necessary to terminate the services of the 1st respondent with the appellant. The 1st respondent proved that he was verbally and summarily dismissed without notice. He was also inhumanly mistreated. Despite the high positions he held in the appellant Bank these were conveniently disregarded by the appellant. It is unfortunate the law does not permit compensation for the injured feelings.

In ***LUKENYA RANCHING V. KAVOLOTO [E.A.] 416*** the predecessor of this Court stated that when a court has to decide what is “***reasonable notice***” one of the factors to be taken into account is the nature of the employment and the availability of other posts of suitable nature. The respondent in that case was a manager of a large cooperative society farm. There was no notice clause in the oral contract of service and no evidence was led to show the availability of any other alternative job of a suitable nature or indeed of any other job at all. The appellate court agreed with the trial court that a reasonable notice in the circumstances was three months.

In ***KYOBE V. EAST AFRICA AIRWAYS [1970] E.A. 403***, the plaintiff claimed payment of his salary for a period of two years (reduced to one year) following wrongful termination of his service by the defendant. There was no termination clause by notice in his terms and conditions of employment. It was held that the plaintiff was only entitled to a reasonable notice of six months. In ***EAST AFRICA AIRWAYS V. KNIGHT [1975] E.A. 165***, a notice of 18 months was considered reasonable for a pilot, and in ***SOUTHERN HIGHLANDS TOBACCO UNION LIMITED V. DAVID MCQUEEN [1960] E.A. 70*** the Court said:-

***“..... the plaintiff is fifty eight years of age. At that age, it is not easy for a man to***

***find employment, however healthy and able he may be.”***

Having considered the authorities in employment contracts and decisions cited to us by counsel, we would re-state the principle as follows. A contract of service must be terminated by notice, unless the hiring is for a definite period. If the contract is silent as to the length of such notice the courts will not construe this as meaning that no notice on either side is required – ***PAYZU V. HANNAFORE***, [1918] 2 K.B. 345. The length of notice will be determined by usage (***HAMILTON V. BRYANT*** 30 T.L.R. 408.) If there is no usage, then the Court will find that reasonable notice must be given on either side –

**CREDITON GAS COMPANY V. CREDITON U.D.C.**, [1928] Ch. 174. See also **OMBANYA V. GAILEY & ROBERTS LTD** [1974] EA 522.

The 1st respondent was about 60 years old when he was summarily dismissed. It would appear that the appellants Bank was to have been his final place of work and that is why the Contract of Employment provided only for termination in the event of gross misconduct, incapacity through sickness or his death. The 1st respondent was guilty of none of these. Instant dismissal without cause was not available. We think therefore that the likelihood of the 1st respondent obtaining another employment, having in view his age, is well nigh impossible, however hard he might try. It would be difficult for him therefore to minimize or mitigate damages.

In the particular circumstances of this case and drawing support from the decisions of the predecessor of this Court, we deem a notice of 12 months reasonable. This shall be the multiplicand in quantifying what the 1st respondent is entitled to. To this limited extent is the appeal allowed. The notice period of 36 months is vacated and substituted therefor with the notice of 12 months. The rest of the awards and entitlements made by the trial Judge shall stand.

In the Notice of Cross Appeal the 1st respondent contended that the learned Judge was wrong in not finding that his salary stood at Shs.240,000/= per month having held that some Shs.200,000 was being paid “under the table”. In our view, this ground is devoid of merit. We reject it. Courts do not sanction illegality. The cross Appeal is dismissed with costs.

As the appellant has been partly successful, it shall be entitled to one third ( ) of the costs of the appeal.

**DATED and DELIVERED at NAIROBI this 10th day of June, 2005.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**