



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, TUNOI & O’KUBASU, J.J.A.)

CIVIL APPEAL 50 OF 2004

BETWEEN

BROOKE BOND (K) LTD APPELLANT

AND

SAMUEL K. NGUTI RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the judgment of the learned Commissioner of Assize Khaminwa (as she then was) in which she gave judgment in favour of Samuel N. Nguti, the respondent herein, (the plaintiff in the superior court).

The respondent, as the plaintiff, filed a suit in the superior court seeking judgment against the appellant (Brooke Bond (K) Ltd). The relevant paragraphs of the plaint were as follows:-

“3. The plaintiff states that he was an employee of the Defendant Company from January 1970 to 18th May, 1994 wherein he worked in several positions in the Accounts Departments and his last position being an Assistant Finance Accountant.

4. The plaintiff states that on 18th May, 1994 the Defendant purported to dismiss the plaintiff from the said employment unlawfully but later the Defendant changed the said purported termination to normal termination where the plaintiff was to be entitled to normal retirement benefits in accordance with the regulations governing the retirement scheme in addition to three months salary in lieu of Notice.

5. By a letter dated 3rd October, 1994 and which letter indicated that the Plaintiff’s termination was normal the defendant requested the plaintiff to collect his termination dues and upon the said collection the plaintiff was supposed to sign a declaration indemnifying the Defendant Company from any action, claim or liability whatever arising from the plaintiff’s past

employment with the Defendant.

6. The plaintiff further states that when he went to collect his dues, the defendant refused to pay his said dues in accordance with the retirement scheme, and in spite of demand and notice of intention to sue in default thereof having been given, the defendant has refused to honour its obligations under the said termination of employment.

7. The plaintiff further states that the defendant is estopped from reverting its decision on 3rd October 1994 in which it bound itself to pay full retirement benefits to the plaintiff.

8. The plaintiff thus claims that he is entitled to his terminal benefits in accordance to the regulations governing the retirement scheme and which is made up as follows:-

(a) 36 months' salary in lieu of Notice

(b) Company's retirement contribution to retirement saving plan

(c) Pension fund due under retirement

9. AND the plaintiff claims:-

(a) 36 months salary

(b) Three months' salary in lieu of Notice

(c) Company's retirement contribution to retirement saving plan

(d) Pension Fund due under retirement

(e) Costs and interest from 3rd October 1994.

The appellant, as the defendant, filed a defence in which it stated:-

"2. Save that the defendant terminated the services of the plaintiff on the date stated for gross misconduct and negligence, the defendant is a stranger to all that is stated in paragraph 4 of the plaint and the plaintiff is hereby put to strict proof thereof.

3. The defendant denies all that is stated in paragraph 5 of the plaint and the plaintiff is hereby put to strict proof thereof.

4. The defendant denies that they refused to pay the plaintiff his dues and asserts that it was the plaintiff who had refused to collect his dues as was indicated in the defendant's letter dated 18th May, 1994 and the plaintiff is hereby put to strict proof thereof.

5. The defendant will aver that the plaintiff's dismissal was lawful and in accordance with their employment contract.

6. The defendant will also state that the plaintiff had admitted his misconduct and negligence in his apology letters dated 25th May, 1994 and 17th June, 1994 and the defendant will crave leave of the Court to refer to the same.

7. The defendant does not admit all that is stated in paragraph 7 of the plaint and the plaintiff is hereby put to strict proof thereof.

8. The defendant deny all that is stated in paragraph 8 of the plaintiff together with the particulars stated therein (a) and (d) inclusive and the plaintiff is put to strict proof thereof.

9.

10.”.

Pursuant to the foregoing, the defendant asked for the dismissal of the plaintiff’s suit.

The hearing of the suit had commenced before Waki, J. (as he then was) when the plaintiff (the respondent herein) gave evidence, closed his case, and the matter adjourned to a future date. When the hearing resumed the matter came up before the learned Commissioner of Assize Khaminwa (as she then was) who heard the evidence of **Michael Aringo Onyuka** on behalf of the defendant company. The defendant’s case was closed after hearing only that one witness.

In his evidence, the respondent testified how he was employed by the appellant as from 1st January, 1970 as an Accounts Clerk and rose through the ranks to the position of Assistant Financial Accountant. Trouble for the respondent started when he received a letter of 18th May, 1994 dismissing him from employment. Prior to that dismissal he had been suspended without being given any reason for the suspension. The respondent appealed against his dismissal which appeal was considered by the appellant but in the end the respondent received a letter dated 3rd October, 1994 terminating his services. In that letter of termination of service, the respondent was informed that he would be paid three months salary in lieu of notice and that he would be entitled to the retirement benefits in accordance with the regulations governing the retirement scheme.

Michael Aringo Onyuka (DW1) who testified on behalf of the appellant confirmed that the appellant company had dismissed the respondent but later changed the dismissal into termination of service. He explained that the respondent was paid all his dues as regards termination of service. As regards a document entitled “**Revised Early Retirement Policy**”, Onyuka stated that the document did not apply to the respondent.

The learned Commissioner of Assize considered the evidence, the submissions before her and gave judgment in favour of the respondent. In concluding her judgment the learned Commissioner of Assize stated:-

“In my view the termination of the plaintiff employment was forced upon the plaintiff. He was required to retire early. His services were no longer needed by the Defendant and therefore he falls under the early retirement scheme. I find he was entitled to full benefits as he claims in his plaint. Judgment is therefore entered for the plaintiff for:-

(a) Salary for a period of 36 months being $36 \times 55696 = 2,005,056$ per month.

(b) 3 months salary in lieu of notice Shs.167,057/=

(c) Company’s contribution to retirement saving scheme 643,628/=

(d) Pension and interest due”

The costs of this suit are awarded to the plaintiff with interest. The said sums are subject to tax where applicable.”

Being aggrieved by the foregoing the appellant preferred an appeal citing the following eight grounds of appeal:-

1. THAT the learned Commissioner of Assize erred in law and in fact in entering judgment for the Plaintiff against the Defendant in the sum of Kshs.2,815,741.00 while there was no sufficient or any evidence to support such decision.

2. THAT the learned Commissioner of Assize erred in law and fact in entering judgment for the

plaintiff against the defendant without giving sound or any reasons for doing so.

3. THAT the learned Commissioner of Assize erred in law and in fact in wholly believing the evidence of the Plaintiff while appearing to disbelieve the evidence adduced by the Defendant's witness and in relying wholly on such evidence of the plaintiff in support of the decision.

4. THAT the learned Commissioner of Assize erred in law and fact in failing to find that the Plaintiff had failed to prove his claim on a balance of probabilities and in entering judgment for the plaintiff against the Defendant notwithstanding failure by the Plaintiff to so prove his claim against the Defendant.

5. THAT the learned Commissioner of Assize erred in law and fact and in appearing to base her decision and unduly relying upon evidence and material which had not been placed before her at the trial and which were totally irrelevant to the matter and issues then before her for determination.

6. THAT the learned Commissioner of Assize erred in law and in fact in failing to consider the evidence and material placed before her in its totality so as to arrive at the correct decision or otherwise arriving at the wrong decision.

7. THAT the learned Commissioner of Assize erred in law and fact in entering judgment for the plaintiff against the Defendant in the liquidated sum of Kshs.2,815,741.00 which the plaintiff had not prayed for.”

Mr. Obura, (appearing with Mrs. Otieno) for the appellant, submitted that the judgment of the superior court was against the weight of evidence as the issue was whether the respondent was entitled to 36 months salary or not. It was further agreed that the learned Commissioner of Assize proceeded on the basis that the respondent was wrongfully dismissed. He submitted that the respondent declined to collect the employer's contribution as he was claiming more basing his claim on a scheme which did not cover him.

Mr. Obura explained that the respondent's contribution was Shs.529,974/10 and that of the Company (appellant) was 643,628/=. On top of this amount, the respondent was paid 3 months salary in lieu of notice which was Shs.780,062/80 making a grand total of Shs.1,309,986/90. Mr. Obura referred to the cheque of Shs.780,062/80 (at p.105 of the record of appeal) which the respondent should collect.

Mr. Mwangi Njenga, for the respondent, conceded that the respondent was retired but went on to argue that the respondent's termination was before his age of retirement. It was for this reason, according to Mr. Njenga, that the respondent was entitled to retirement benefits in accordance with the retirement scheme.

This being a first appeal we are bound to reconsider the evidence, evaluate it and draw our own conclusions but remembering that we have not seen or heard the witnesses – See **SELLE VS. ASSOCIATED MOTOR BOARD COMPANY LTD [1968] E.A. 123, WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A. 1 and JIVANJI V. SANYO ELECTRICAL COMPANY LTD [2003] KLR 425.**

We have considered the evidence adduced before the superior court and it would appear that the facts of the case were rather simple and straightforward. The respondent was an employee of the appellant as from 1st January, 1970. By a letter dated 29th April, 1994 the appellant suspended the respondent from his employment. In that letter, the respondent was informed as follows:-

“During our various discussions, we have pointed to you the irregularities involving purchasing at the Maintenance Section.

As these irregularities are of a serious nature, the Company is hereby suspending you with full pay pending the conclusion of the investigation.

Could you please ensure that you remain in Mombasa and that you can be called in at short notice in order to assist with these investigations.”

That letter was followed by another letter dated 18th May, 1994 in which the respondent was summarily dismissed. In that letter of summary dismissal the respondent was informed as follows:-

“I refer to my letter of suspension dated 29th April, 1994 and wish to advise you that, we have now concluded our detailed investigations of the situation.

Your actions constitute gross misconduct and gross negligence in the performance of your duties and the Company views this with great concern.

I am therefore, writing to advise you that the Company has decided to terminate your services summarily with effect from 18th May, 1994.

Your terminal dues will be as follows:-

- 1. Salary for days worked up to and including 18th May, 1994.***
- 2. Any leave earned but not taken as at 18th May, 1994. The above payment are subject to statutory deductions and/or any monies owing the Company.***
- 3. Your contribution under the existing retirement scheme as per rules of the retirement schemes.”***

When the respondent received that letter of dismissal he wrote back asking the company to reconsider his dismissal. In his letter of appeal dated 25th May, 1994 the respondent pleaded as follows:-

“I refer to your letter dated 18th May, 1994 in connection with my summary dismissal. I appeal to your good offices, if you would be kind enough to re-consider my case. Considering my life long services to the Company of 23¼ years without a warning, my age as I am 52 years, my contribution during Audit Investigations.

I am sorry for mistakes I made during my cause (sic) of my duties but these were not intentional and pray your good offices to forgive me.

Hope my appeal will meet with your favourable consideration.”

The company reconsidered the respondent’s summary dismissal and changed it to termination of service on humanitarian grounds. In the letter dated 3rd October, 1994 the respondent was informed as follows:-

“As pointed out to you at our meeting on the 15th September, the Company considers their decision on summary dismissal was justified and changing this to normal termination of service has been done purely on humanitarian grounds.

Your terminal dues arising from this gesture will be as follows:-

(a) Three months salary in lieu of notice

(b) Your entitlement of the retirement benefits in accordance with the regulations governing the retirement scheme.

You will be expected to sign a declaration which will follow shortly, through the Commercial Manager, reaffirming that on receipt of the terminal dues you will have no further claims against this company and that you will indemnify the Company from any

action by yourself or any other parties on your behalf, claims or any liabilities whatsoever arising from your past employment with us.

Your final dues are being calculated and you will be informed when the cheque is ready for collection.”

From the evidence on record it is clear that the respondent’s departure from his employment with the appellant was by way of termination of service. The respondent appreciated this fact as can be noted from paragraphs 4 and 5 of the plaint. In her judgment, the learned Commissioner of Assize stated inter alia:-

“In the present case the employer does not justify the dismissal. Some vague reasons are given which on reconsideration were reviewed. The plaintiff should have been reinstated at that stage but the defendant sought (sic) it better to get rid of the Defendant.”

With due respect to the learned Commissioner of Assize, here she was in error. The respondent was not dismissed from employment. He left via termination of service. The question of reinstatement did not arise since even the respondent himself never asked for such relief.

The respondent’s claim was that since his was a termination of service then he was entitled to all terminal benefits, which, according to him, should have included 36 months pay which he worked at Shs.2,005,056/=; 3 months salary in lieu of notice (Shs.167,157/=) company’s contribution to retirement saving scheme and pension. The respondent was basing his claim on a circular dated 13th July, 1992 from Head of Personnel to Heads of Departments and Group Managers entitled “***Revised Early Retirement Policy***”. The circular stated:-

“The revised Early Retirement policy has been agreed by the Board. A copy containing details is attached for your information and retention. Please note that the policy is to apply to all non-unionisable staff (management and supervisory)”.

The early retirement policy had two categories of retirement; ill health retirement and early retirement. It was also indicated on that document that early retirement would be granted at the company’s discretion. The respondent’s retirement was not under ill health retirement or early retirement. His was termination of service. Hence he was not entitled to rely on “***Revised Early Retirement Policy***”. And to make it worse that policy applied to “***non-unionisable staff (management and supervisory)***.” The respondent did not fall under that category of employees. The learned Commissioner of Assize stated as follows in her judgment:-

“His services were no longer needed by the Defendant and therefore he falls under the early retirement scheme. I find he was entitled to full benefits as he claims in his plaint.”

In our view the above was a grave error on the part of the learned Commissioner of Assize. The respondent’s departure was by way of termination of service. This was after his summary dismissal was reconsidered and turned into termination of service. Clearly the issue of early retirement did not arise. It must be remembered that termination of service was purely on humanitarian grounds. It was so because the respondent was originally dismissed summarily but after pleading with the company summary dismissal was turned into termination of service.

That being our view of the matter it follows that the respondent was not entitled to 36 months salary which was prayer (a) of the reliefs sought in the plaint. He was granted the other reliefs and in our view correctly so since he was entitled to those.

For the foregoing reasons, this appeal must be allowed by setting aside the award of Kshs.2,005,056/= to the respondent. The appellant paid to the respondent all his dues and we are of the view that the respondent’s suit in the superior court was, indeed, uncalled for. The respondent should now go and collect his cheque for Kshs.780,062/80 which is lying in the appellant’s offices. Considering the circumstances of this case in that it was a dispute between the appellant (employer) and its former

employee (respondent), we order that each party should bear its own costs of this appeal. The order of the superior court awarding costs to the respondent is set aside. Those shall be our orders.

Dated and delivered at Nairobi this 7th day of October, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR