



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Shah, O’Kubasu & Keiwua JJ A)

CIVIL APPEAL NO 164 OF 2000

NELSON MWANGI KIBE APPELLANT

VERSUS

ATTORNEY GENERAL..... RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya

at Nairobi (Githinji J) dated 4th day of April 2001 in

HCCC No 355 of 1999)

JUDGMENT

The plaintiff, (hereinafter called “the appellant”), sued the defendant, (hereinafter called “the respondent”), for having been dismissed in retrospect by a letter dated November 13, 1997 which dismissal was effective February 26, 1996. The main complaint made in the plaint is with regard to the retrospection of the dismissal letter and its unlawfulness, it being against the rules of natural justice in that the appellant was not given the right of hearing before his employment was terminated.

The appellant contends that the denial of opportunity to be heard was against the rules of natural justice. In a notice of intention to sue the Attorney General dated October 9, 1998 he says the termination of his employment was arbitrary and capricious, as he has never been suspended before his salary was stopped without being accorded an opportunity to contest the stoppage of salary. The appellant in the same notice complains the dismissal letter was unlawful for being retrospective in effect as he should have been served with the letter immediately the decision to dismiss him was made.

The appellant’s appeal to the Public Service Commission was also dismissed. He says unless the dismissal letter is reversed he would lose his terminal benefits which is the basis upon which he seeks to have the dismissal declared wrongful and therefore claiming reinstatement and or compensation, with an order for the payment of salary arrears, damages for wrongful dismissal and costs of the suit.

The letter of interdiction addressed to the appellant on January 31, 1996 by the respondent informed him that he would be on half salary during the period of interdiction. Surely the appellant ought to have intimated in his plaint that this was the position in order that the half balance which would, subject to the respondent’s liability being established, be payable.

The whole salary ought to have been quantified because claim for nonpayment of salary is in the nature of special damage.

The respondent filed a defence and counterclaim in which he denied the claim made in the plaint that the appellant was not heard before his dismissal or that the dismissal letter was retrospective or was unlawful or against the rules of natural justice and counterclaimed for an amount of Kshs 600,000/= stolen on January 24, 1996 from the Ministry of Agriculture, Kilimo House offices, through what the respondent says was the negligence of the appellant (then employed in the cash office) who along with other two suspects, was charged with the offence of theft in Criminal Case No 1526 of 1996 but he was on January 30, 1997 acquitted by the Magistrate Court. The respondent has also contested the right of the appellant to be reinstated since the appellant was lawfully dismissed from that employment.

The appellant in his reply to defence, has denied that he was responsible for the loss of the said sum of Kshs 600,000/= or that he was liable to pay it to the respondent. He contends that because he had been acquitted he was not liable to make the sum good to the respondent. However, the counterclaim was dismissed when the defendant failed to attend its hearing.

The appellant in his letter dated November 25, 1997, which was an appeal to the Public Service Commission stated that Damaris Wanjiru Kimani the first accused in the criminal case tried to accuse him falsely saying he had not locked the door behind him. The appellant said that that was the responsibility of the cashier and assistant who had the key all the time. Pausing and assuming this to be the position regarding the custody of the keys and since the appellant seemed to agree that the cash office and the main area of the hall which surrounds that office must always be under lock and key, does it not require any other person (including the appellant who left the office after 5 pm and before the robbery occurred), leaving the cash office after 3:30 pm (the time after which that office is supposed to be locked according to a witness in the criminal trial) to ensure it is locked behind by whoever has the key?

For that requirement to make sense as a safeguard, obviously the appellant, if he had to leave after the door had been locked at 3:30 pm was duty bound being one of the occupants of the surrounds of the cash office to tell the key custodian to lock the door behind him. The appellant in failing to alert the cashier or assistant to lock the door had neglected the duty he had been employed to perform. Notwithstanding the acquittal in the criminal trial an award of punishment including dismissal as had happened may still be imposed to discipline him.

We so observe because it is in evidence, in the criminal trial whose record had been produced in the superior court, that a great deal of effort had been expended by the Government to secure the cash office by it being metal grilled all round with a door reinforced with metal as well. Surely this was a clear message to all working in the cash office that extra care was needed all the time while in or out of that office.

There is a submission made before the superior court on behalf of the appellant that because the dismissal letter went to him long before the judgment in the criminal case that made the dismissal unlawful. We do not take this to be the correct way to view the matter because the dismissal was not founded on the criminal culpability of the appellant. It was based on his being liable for neglect of duty. The decision to dismiss the appellant for negligence did not have to await the verdict in the criminal trial and accordingly nothing attaches to the fact that the letter of dismissal preceded the judgment in that case.

In his appeal the appellant complains that the learned judge declined to inquire into the reason for the dismissal. We do not think that this contention is sound in as much as the judge did in his judgment consider what the appellant's cause of action was and what his complaints before that court were. For instance he said:

"I have considered the evidence, the submissions and the averments in the plaint. In the plaint, plaintiff refers to the fact of acquittal and the fact that he was dismissed without affording him a chance to be heard. He also refers to the fact that the dismissal letter as being retrospective. Those are the only facts he refers to in the plaint as showing that the dismissal was unlawful. Plaintiff denied in his evidence that he

was guilty of negligence of duty”.

The appellant has raised the issue that the judge was wrong in not entering judgment for the plaintiff since the respondent did not offer contrary evidence. We have elsewhere in this judgment referred to the fact that the appellant had in evidence tendered some letters, which dealt with his dismissal from the defendant’s employment.

He had also tendered his own replies to those letters and it appears to us that all the relevant facts were before the learned judge and he was entitled on the face of those facts to come to the conclusion he did even without any other evidence as the judge had before him all he needed for his decision in the matter.

There is another complaint to the effect that the learned judge was wrong in seeking to draw a difference between dismissal for loss of money due to negligence and loss due to theft. For the latter accusation it has been submitted that the pleadings in the case show the appellant was being accused of having participated in a robbery.

We do not take this as the correct view of the matter because it is quite clear from the judgment that the appellant was dismissed because the Government lost the money through his negligence and that is the purport of the letters of January 31, 1996 and January 13, 1997. That was also the reason why the dismissal letter went to the appellant before the verdict in the criminal case.

Since the dismissal was not based on the criminal case there was no reason why the learned judge should have dealt with the evidence in the criminal case as such save where as in this judgment the appellant had himself referred to the evidence in his letter of appeal to the Public Service Commission. It suffices to mention that the evidence in the criminal case only exonerated the appellant from criminal as opposed to civil liability, which his dismissal is all about.

There is a strange contention made that the judge ought not to have adverted in his judgment to the Public Service Commission’s Regulations because neither party did cite these to him. To begin with, the Regulations were brought into the case when the appellant tendered his letter of appointment as evidence in the superior court.

Unfortunately for the appellant the letter is itself based on these Regulations and even if the letter had not been tendered in evidence there is absolutely nothing wrong in the learned judge making reference to the regulations, which are the basis of the appellant’s employment. We also agree with the learned judge that the appellant had not proved any breach or breaches of those Regulations, which are the only basis of his employment.

We accordingly dismiss this appeal with costs.

Dated and delivered at Nairobi this 4th day of April, 2003

A.B.SHAH

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR