



**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM:OMOLO, SHAH & BOSIRE JJ A )**

**CIVIL APPEAL NO 81 OF 2000**

**BETWEEN**

**CENTRAL BANK OF KENYA.....APPELLANT**

**AND**

**JULIUS NKONGE NKABU.....RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (The Honourable Mr Justice Mitey) dated the 22nd day February, 2000*

*in*

*HCCC No 1750 of 1995)*

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**JUDGMENT OF THE COURT**

Paragraph 6.20 of the Central Bank of Kenya Staff Rules and Regulations, purportedly made under section 13(1) of the Central Bank of Kenya Act Cap 491 of the Laws of Kenya, provides as follows:-

“An employee who is on permanent and pensionable terms may only be dismissed from the service of the Bank on grounds of misconduct or gross misconduct”. (Emphasis supplied).

Julius Nkonge Nkabu, the respondent in the present appeal contends that on the basis of the foregoing paragraph, an employee of the Central Bank of Kenya who is on permanent and pensionable terms is irremovable from his employment for any reason other than misconduct or gross misconduct. In a suit he commenced by a plaint dated 6th June, 1995, the respondent challenged his dismissal by the Central Bank of Kenya, the appellant, on the grounds that the dismissal was unlawful, as in his view, it was contrary to the aforesaid regulations and also, that it was in breach of the rules of natural justice. He also challenged the appellant’s action in advertising for sale property known as LR No 209/196/75, Harambee Estate Phase I Nairobi, on the grounds that the appellant’s action was illegal.

The Superior Court (Mitey J) after a full fledged trial found for the respondent and held that the respondent was entitled to general damages for wrongful dismissal, and assessed damages at Kshs 17,700/= per month, which upon computation from October, 1993, the effective date of the dismissal, to the date of the judgment, namely 22nd February, 2000, worked out to Kshs 1,840,800/=. He also held that because the appellant had wrongfully dismissed the respondent he did not have any income with which he

would service a loan he had obtained from the said bank to purchase the property above. Consequently, he said, the respondent was only obliged to pay instalments of the loan up to 30th September, 1993. Any charges and interest after that date were not recoverable. The Central Bank of Kenya, was aggrieved and hence the present appeal. But before we set out the grounds of appeal, it is essential to set out the background facts.

The respondent joined the employment of the appellant bank as a clerk in or about November, 1980. His engagement was initially on probationary terms. He was eventually confirmed in that appointment by a letter to him dated 2nd February, 1982. Following the confirmation the respondent became eligible, among other things, to a loan to purchase a house; and on 16th August, 1989, the respondent executed a charge in favour of the appellant over property known as LR No 209/7196/71 to secure repayment by him to the appellant of a sum of Kshs 536,000. We understood that to mean that the appellant advanced the money for the purchase of that property which property was immediately charged to it by the respondent as purchaser. The charge was duly registered at the Lands Office on 17th August 1989. Thereafter the respondent serviced the loan regularly in terms of the charge. It would also appear to us from the evidence on record, that the respondent performed his duties as a clerk satisfactorily until about end of April, 1992.

Between 8th May 1992, and 15th September of the same year, four bearer bond certificates worth Kshs 500,000/= each, the property of the appellant, got lost. The respondent and another person were suspected as having stolen them. They were arrested and charged in the Chief Magistrate's Court Nairobi, with the offence of stealing by servant contrary to section 281 of the Penal Code. But before the prosecution terminated the respondent was interdicted and later on 23rd September, 1993, he was served with a dismissal letter of the same date which, in pertinent part, reads as follows:-

“DISMISSAL

Further to our letter of December 4, 1992, we now write to inform you that the Bank has decided to dismiss you from its service with effect from September 21, 1993 and with loss of all benefits for gross misconduct in accordance with rule 6.23 of the Bank's Staff Rules and Regulations.

The Bank will advise you, under separate cover, of your liabilities, if any, as soon as these have been worked out.”

It was not until January, 1998, that the respondent was advised about those liabilities. The respondent was given a breakdown of his outstanding debts to the Bank. He was given his salary and all allowances up to the 21st September 1993, but which was credited into his house and development loan account with the appellant. After that credit the respondent was still owing the appellant Kshs 635,418.75 as at 11th November, 1997.

By the time the account was given to the respondent, he had already filed the suit from which the present appeal arises. The suit was provoked when the appellant took steps to realise its security over LR No 209/7196/71. His prayers in the suit included, prayers that his dismissal be declared null and void and that an order be made reinstating him to the appellant's employment, that he be paid his salary arrears to be assessed at the trial, that a permanent injunction do issue restraining the appellant, by itself, its agents or servants from selling or in any other manner disposing of his property, and general damages for breach of his contract of employment.

The appellant upon being served with summons to enter appearance and the plaint, filed a defence denying the respondent's claim *in toto*.

The respondent's prosecution for theft terminated, on 13th April 1993, in an acquittal. That was long before he filed his aforesaid suit. At the hearing of his said suit his contention was that having been acquitted he could not be said to have been guilty of gross misconduct. The trial judge agreed with him, and relying on clause 6.42 of the Central Bank of Kenya Staff Rules and Regulations, held that an employee acquitted of a criminal charge, may not be dismissed on the basis of the charge. He then proceeded to hold that the respondent's dismissal was unlawful. He concluded his judgment in that regard

as follows:-

“If the dismissal was in compliance with the regulations the plaintiff would have been entitled to 3 months salary in lieu of notice and no more.”

But having thus held, he proceeded to assess damages as we stated earlier in this judgment. The learned judge did not however, state the basis for confining the award of damages to the period between the date of dismissal and the date of judgment.

The appellant has preferred four grounds of appeal, but at the hearing of the appeal its counsel, Mr Ougo, confined his submissions to only two aspects. First, whether the respondent could properly be awarded damages for a period longer than three months, the period of the notice of termination stipulated in the contract of employment. Second, whether in absence of a specific averment in the plaint on interest and other charges the trial judge could properly hold that the respondent was not obliged to pay interest on the loan advanced to him after 30th September, 1993.

Mr Ougo submitted before us, citing several decisions of this Court, that as the contract of employment of the respondent could be terminated by the giving of three months notice or three months salary in lieu, damages should have been restricted to the period of the notice. Among the cases Mr Ougo cited are: *Alfred J Githinji v Mumias Sugar Company Limited* Civil Appeal No 194 of 1991 (unreported); *Kenya Commercial Bank Limited v Jackson O Omambia* Civil Appeal No 166 of 1991 (unreported); *Dalmas B Ogoye v KNTC Ltd* Civil Appeal No 125 of 1996 (unreported) and *Charles C Sande v Kenya Co-operative Creameries Limited*, Civil Appeal No 154 of 1992 (unreported). Those cases deal in great detail with the common law position with regard to termination of employment.

In the *Githinji case (supra)*, the Court said:

“The most recent and authoritative decision of this Court which applies the common law principles is the case of *Rift Valley Textiles Limited v Edward Onyango Oganda* Civil Appeal No 27 of 1992 (unreported). In that case the contract of service of the respondent therein, provided that it could be terminated by either party giving a notice of three months to the other or paying salary in lieu of notice. When the matter came before the High Court, the learned judge having found that the dismissal was unlawful, and despite the respondent’s admission that he had been paid three month’s salary in lieu of notice, proceeded to award the respondent twelve months gross salary as general damages. On appeal to this Court, this Court had no difficulty in holding that the learned judge’s decision was wrong. This Court’s view was curtly and shortly, put this way.

We have no doubt whatsoever that the law did not entitle the judge to do any of these things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the respondent’s dismissal was unlawful, he had been paid under and in accordance with the terms of his contract with the appellant.’

On the basis of those authorities one would have thought that since the respondent was later paid three months salary in lieu of notice, no issue would arise about his dismissal, but nay. Both before the trial court and before us it was urged on his behalf, that the Staff Rules and Regulations governing his employment gave him security of tenure, and he could only be dismissed if it was shown that he had been guilty of misconduct or gross misconduct. Mr Muthaura for the respondent submitted before us that as the only misconduct which was alleged against the respondent related to the loss of the bearer bond certificates for which he was prosecuted but was acquitted, no case of misconduct was made out against him. Consequently, he urged, in view of the wording of clauses 6.20, earlier on reproduced, and 6.34, which defines what amounts to gross misconduct, the respondent’s dismissal was unlawful. He further urged that by reason of the said two clauses the respondent’s case was distinguishable from those covered by the authorities, and he was therefore entitled to be paid damages for the period up to the date he would

have retired normally. Mr Muthaura made heavy weather of the phrase in clause 6.20, above, namely, “May only be dismissed.” In his view it meant that unless misconduct was established against the respondent he was irremovable from the appellant’s employment. Clause 6.34, above, provides that:

“Gross misconduct includes such misconduct as theft, forgery, assault, a conviction on a criminal charge relevant to employment by the Bank, breach of secrecy or other offences of a similarly serious nature.”

That clause and clause 6.20 must have made the trial judge to think that the respondent’s case was distinguishable and that by reason of those paragraphs he was entitled to more than the salary for the notice period. With due respect to the learned judge, he erred. The respondent’s letter of appointment was made subject to the appellant’s Staff Terms and Conditions of Service, Rules and Regulations. But those Regulations do not stipulate that the appellant can, for a reason other than misconduct, terminate the employment of an employee who is on permanent and pensionable terms by giving notice or salary in lieu of such notice. Although that is so it does not mean, as Mr Muthaura seems to think, that it cannot happen. Section 14(5) of the Employment Act, Cap 226 of the Laws of Kenya, provides, as is material, that:

“14.(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 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.

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this sub-section which would otherwise be applicable thereto.”

It follows that notwithstanding the absence of a provision in the Staff Regulations giving the appellant the right to terminate the employment of an employee on permanent and pensionable terms by giving notice, the right is available by reason of the above section. That right which is a statutory right, cannot be taken away by a mere stipulation in Staff Rules and Regulations. True, the above provision, on the face of it appears not to cover the situation of the appellant. However when the parties agreed that the respondent could terminate his employment with the appellant by notice, it is our view that the appellant would also have a reciprocal right. The proviso must be read to mean that the period of the notice agreed upon between the parties would override the twenty-eight day period.

Although Section 13 of the Central Bank of Kenya Act empowers the Management Board of the Bank to make rules and regulations to govern employment of staff and related matters, such regulations are not in the nature of subsidiary legislation. If that were so they would have been made part of the Act, but they are not. Besides, we have looked at the said Rules and Regulations and they do not seem to us to have been made as provided for under sections 27 and 34 of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya. Moreover, by dint of the provisions of section 31(b) thereof, paragraph 6.20, above would be inconsistent with the Employment Act. That being our view of the matter, we hold that the respondent’s case is not different from those covered by the authorities which Mr Ougo cited to us. It then follows that in absence of any other proper basis for departing from those authorities, some which were cited to the trial judge, the learned trial judge erred by computing damages beyond the notice period.

As for the second point which Mr Ougo submitted on, the respondent’s suit was based on two causes of action. The first one related to termination of his employment which we have just dealt with. The second, related to the threatened sale of his property due to non-payment of money which the appellant lent to him before the termination of his employment with it. The respondent pleaded his second cause of action thus:

“10. The defendant has illegally advertised the sale of the plaintiff’s parcel of land known as LR No 209/196/ 75 Harambee Estate Phase 1, being House No HG 14 by public auction on 7th June, 1995.” T

he respondent did not make any averment in his plaint as to why he thought the intended sale was illegal. In his evidence he admitted that he had not fully repaid the loan he got from the appellant, and that he had not made any attempts to repay the same, arguing that he did not have any income. He also admitted that the appellant had duly served him with the requisite statutory notice and that he did not comply with it. By reason of that evidence the learned judge in the Court below had no basis whatsoever for interfering with the exercise of a statutory right of sale. He could only properly interfere, if evidence was placed before him to show either that the statutory right of sale had not arisen, or that it was being exercised oppressively. No such evidence was placed before him, and it was therefore improper for him to have declared that the respondent was not obliged to pay interest and other charges to the appellant after the date of his dismissal from its employment. Besides, as rightly pointed out by Mr Ougo, there was neither an averment in the plaint, nor prayer therein, that an order be made stopping the payment of interest and other charges.

Mr Muthaura submitted before us that interest and other charges were matters flowing from the statute. By statute we understand him to mean the Central Bank of Kenya Act. His submission, we think, must have been based on the mistaken belief that the Staff Rules and Regulations, were part of the Act. Even if they were, there is nothing in them to suggest that the appellant had no right of taking steps to realise its security.

In view of the conclusions we have come to, above, we are of the view and so hold that, on the assumption that the respondent’s dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of the notice, namely three months, and that the trial judge erred in awarding him more. The learned trial judge also erred in interfering with the exercise of a statutory right of sale.

In the result the order that commends itself to us to make is that we allow the appeal, set aside the judgment of the Superior Court in its Civil Case No 750 of 1995, and substitute it with an order dismissing the appellant’s suit with costs in view of the fact that the three months salary had been credited into his loan account before the date of the suit. The appellant shall also have the costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2002**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**A.B SHAH**

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**JUDGE OF APPEAL**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**