



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, TUNOI & SHAH, JJ.A.)

CIVIL APPEAL NO. 329 OF 2000

BETWEEN

KENYATTA UNIVERSITY APPELLANT

AND

JULIUS MURUNGI MURIANKI RESPONDENT

(Appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi (Mitey, J.) dated 13th January,

2000

in

H.C.C.C. NO. 2947 OF 1994)

JUDGMENT OF THE COURT

This is an appeal by the defendant, Kenyatta University, now the appellant, from the decision of Mitey J given on 13th January, 2000 by which he awarded the plaintiff, now the respondent, Shs.560,000/= in respect of damages for wrongful termination of services at the rate Shs.10,000/= per month for the period November, 1989 to June, 1994, the date the suit in the superior court was commenced.

The facts giving rise to the suit are largely not in dispute and are briefly as follows. The respondent was employed by Kenyatta University on 10th January, 1976 as a storeman. The contract of service stipulated, inter alia, that the respondent would participate in the Retirement Benefit Scheme and would be entitled to leave allowance and free medical services for himself and his family. Of utmost relevance to this appeal was the condition that each party might terminate the agreement upon giving a three months notice, or alternatively, either party pay the other three months salary in lieu of notice.

In 1984, the appellant seconded the respondent to the University Students Accommodation Board (USAB) but he continued drawing a salary from the appellant till 1987 when USAB started paying him. However, in 1989 USAB was dissolved by the Government and the respondent was directed to report back to the appellant for further instructions. The respondent did report as directed but was asked to go

back home as they would communicate with him later. What he received in return was a letter from the appellant calling him for dTihsec ilpelairnnaerdy Jpurdogcee efdoiunnngds .and rightly so, in our view, that the respondent and others who were employees of the appellant did not cease to be so on their secondment to USAB. They remained the employees of the institution even after USAB was dissolved. This being the position, the respondent's services could only be terminated under Clause 6 (b) of the then Kenyatta University College terms of service for Staff which stipulated termination of service upon notice. In the absence of such notice the termination of the respondent's services by the appellant was wrongful.

The gravamen of this appeal is that the learned Judge having held that the termination was wrongful erred in failing to hold that the damages awarded was only three months salary in lieu of the notice as expressly provided for in the contract of employment between the parties. The appellant further argues that the retirement benefits were in the nature of special damages which ought to have been expressly pleaded and specifically or strictly proved and the respondent having failed to do so, the same were not recoverable.

It is well settled that in a claim by an employee against his employer for damages for wrongful dismissal, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with its terms by giving either the proper notice or salary in lieu of notice. General damages are not recoverable.

We agree with Mr. Owuor, counsel for the appellant, that arrears of salary and retirement benefits are in the nature of special damages and must be expressly pleaded and strictly proved. But, in the matter before us though the actual amount of arrears of salary was not mentioned, nevertheless, they were pleaded and proved. Their amount was not in dispute. They were known to both parties. We need not reiterate that salaries are not speculative items like loss of earnings or profits.

The appellant prevaricated on the status of the respondent's services until 14th January, 1992 when it wrote him as follows:

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KENYATTA UNIVERSITY

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14th Jan., 1992

Mr. Julius M. Murianki,

P. O. Box 70309,

NAIROBI

Dear Mr. Murianki,

RE: EMPLOYMENT

I am writing in reference to a copy of a letter dated 27th November, 1989 on the above subject.

Following your acceptance of employment with EXUSAB, your services with then Kenyatta University College were considered terminated. If you are interested in joining this University, please submit your application for consideration.

Thanks.

Prof. E. R. Maritim

AG. UNIVERSITY SECRETARY"

The above letter was followed by a futile exchange of correspondence between counsel for the parties which resulted in the institution of the suit before the superior court.

It is indeed ironical that the appellant which had in the past recognised the respondent's existence of contract of service was in 1992 making an about turn by purporting to terminate his services retrospectively. The respondent could not have known that his services were dispensed with three years ago. Moreover, the said letter was devoid of the requisite notice. We think that the respondent is entitled to his salary up to January, 1992 and not until he instituted suit. He is also entitled to three months' salary in lieu of notice. We would therefore adjust the decree by making the following orders:-

1.The appellant shall pay the respondent's salary correctly assessed by the learned Judge at Shs.10,000/= per month from November, 1989 to January, 1992 (27 months x Shs.10,000/= Shs.270,000/=).

2.The appellant shall further pay the respondent Shs.30,000/= being salary for three months in lieu of notice.

3.The appellant shall pay the respondent's contributions to the Benefit Scheme as ordered by the learned Judge.

4.These payments shall bear interest at Court rates. 5.The appellant shall also pay the costs of the suit in the superior court.

6.We make no order as to costs in this appeal.

Dated and delivered at Nairobi this 16th November, 2001.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR