IN THE COURT OF APPEAL
AT NAKURU

CORAM: OMOLO, OWUOR & KEIWUA, JJ.A.

CIVIL APPEAL NO. 281 OF 1998
BETWEEN
DANIEL N. NGUNIA .....APPELLANT
AND
K.G.G.C.U. LIMITED .....RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nakuru (Tanui J) dated 17th September, 1991

in

NKR. H.C.C.C. NO. 110 OF 1989)
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JUDGMENT OF THE COURT

Until the 26th October, 1988, Daniel M. Ngunia , the appellant herein, was an employee of the Kenya Grain Growers Co-operative Union Limited, the respondent herein. The appellant was the respondent's credit controller. But on the 26th October, 1988, the respondent wrote a letter to the appellant, suspending the appellant from his position as the credit controller. That letter was in these terms:-

"Dear Sir,

RE: SUSPENSION :

We write to advise you that you are suspended from the employ of the Union with immediate effect, pending investigations into the loss of files of debtors who are being sued for payment and over -payment to certain farmers to a tune of over Shillings 2.5 million.

Please note that during the period of suspension you are required to be reporting to the Financial Controller every Tuesday and Thursday until you are advised otherwise. You are not, however, expected to transact any business on behalf of the Unio n while on suspension.

You will be paid 50% of your salary while on suspension. You are required to hand over the Division to Mr Paul Ngochoch before you leave.

Yours faithfully,

(R.C. BUTAKI)

GENERAL MANAGER ".

Matters rested there until 14th March, 1989, when the respondent wrote another letter to the appellant, this time dismissing the appellant from its employment. The letter of dismissal read thus:-

"Dear Sir,

RE: DISMISSAL :

Further to our letter of 26th October, 1988, suspending you from duty, this is to advise you that the report of the investigating team was tabled before the Board on 1st March, 1989, and after considerable discussion, it was resolved that you be dismissed from the employment of this Un ion with immediate effect for gross misconduct.

Please be advised that this does not prejudice any other action the Union may be contemplating against you on matters raised in the investigation report. You will be advised of your terminal dues in a s eparate letter.

Yours faithfully, (R.C. BUTAKI) GENERAL MANAGER ".

The appellant's reaction to the letter of dismissal was to file ***Civil Suit No. 110 of 1989*** at the High Court at Nakuru. In paragraph 7 of the plaint the appellant alleged against the respondent that:-

> *"In the premises the Plaintiff avers that his dismissal was unjustified as no investigations or proper investigations were done on the allegati ons made against him and any decision reached against him with reference to those allegations is null and void as the same was reached in contravention of the precepts of natural justice.".*

There were also allegations that the letters written to the appellant by the respondent and whose contents we have already set out in full, were defamatory of the appellant. The appellant, therefore, claimed general damages from the respondent on account of wrongful dismissal from employment and on account of defamation. The respondent denied the appellant's allegations, contending that the dismissal of the appellant was lawful and that there was nothing defamatory in the two letters written to the appellant.

These contending versions came for trial before Mr Justice Tanui and by a reserved judgment dated 17th September, 1991, the learned Judge dismissed with costs the entire suit brought by the appellant. That is what has now brought the appellant before us.

A total of seven grounds of appeal were brought before us but Mr Mirugi Kariuki who argued the appellant's appeal told us when he opened the appeal that they would abandon ground five which had been to the effect:-

"THAT the learned trial Judge erred in law and in fact in holding that communication was covered b y the defence of qualified privilege.".

We assume that ground concerned the appellant's claim for damages for defamation. Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege. Mr Kariuki was, in our view, perfectly right in abandoning the claim based on defamation. That left only the grounds dealing with the issue of contract of employment between the appellant and the respondent. The learned trial Judge found as fact that there was in fact no specific agreement between the appellant and the respondent dealing with the contract of employment between them, but that like the respondent's other employees, the terms of the appellant's employment were contained in the respondent's "Scheme of Service", a copy of which was produced before the Judge. The appellant agreed with that finding and did not seek to challenge it before us. That scheme provided that if an employee was to be disciplined for a misdemeanour, the rules of natural justice would apply and we understand that to mean that such an employee would be entitled to have a

charge or charges drawn against him, that he would be entitled to know the evidence brought against him in support of the charge or charges and that the employee would in turn be entitled to place before the employer such evidence as may be available to him to rebut the charge or charges. But it is equally agreed that the Scheme of Service specifically provided for what we may call "summary dismissal" for gross misconduct.

The learned Judge found as a fact that the appellant was not entitled to a hearing because he was guilty of gross misconduct. Mr Kariuki sought to persuade us that the Judge was wrong on this point and that the allegations made against the appellant in the letter of 26th October,

1988, suspending the appellant from duty could only amount to a misdemeanour. We have already set out those allegations. They were two, namely:-

(i)loss of files for debtors who were being sued for payment;

and(ii)overpayment to certain farmers to the tune of over Shillings 2.5 million.

These were matters directly under the appellant in his capacity as credit controller. The Judge thought that they could not be designated as misdemeanours and in his view, they entitled the respondent to summarily dismiss the appellant. That the appellant was first suspended to facilitate investigations into the allegations did not and could not detract from the fact that the allegations, if true, were serious and would amount to gross misconduct entitling the respondent to summarily dismiss the appellant. The submissions of Mr Chacha Odera, for the respondent, before us were also to the same effect.

We have not been persuaded by anything which was said before us by Mr Kariuki that the conclusion of the trial Judge on this aspect of the matter was wrong. We think he was fully justified, on the material placed before him, to conclude as he did that the appellant was guilty of gross misconduct and the respondent was entitled to dismiss him summarily.

That being our view of the matter, this appeal must fail and it is not necessary to consider other issues such as what damages would have been payable to the appellant. However, trial judges ought to assess such damages so that in the event of a successful appeal, this Court does not have to send the matter back to them for an assessment. This appeal fails and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of March,

2000.

R. S. C. OMOLO

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

M. KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR