



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 1 OF 2015

(Originally Nakuru High Court Civil Appeal No. 36 of 2010)

JOSEPH GITONGA NDEGWA

APPELLANT

v

RIFT VALLEY SPORTS CLUB

RESPONDENT

(Being an appeal arising from the decree and judgment of the Honourable W. Juma Chief Magistrate issued on 22nd January 2010 in Nakuru CMCC No. 2470 of 2001 between Joseph Gitonga Ndegwa and Rift Valley Sports Club)

JUDGMENT

1. Joseph Gitonga Ndegwa (Appellant) sued Rift Valley Sports Club (Respondent) before the Nakuru Chief Magistrates Court sometime in December 2001 alleging unfair dismissal.
2. In a judgment delivered on 22 January 2010, the learned Magistrate dismissed the Appellant's claim on the ground that he had not proved his case on a balance of probabilities.
3. The appellant being dissatisfied with the judgment lodged an appeal before the High Court sitting in Nakuru on 22 February 2010. A record of appeal was filed on 26 November 2010.
4. On 6 July 2011, the Respondent filed a motion seeking to have the Appeal struck out.
5. When the appeal was placed before Ouko J, (as he then was) the parties informed him that the appeal had been admitted and the matter was stood over generally.
6. Ouko J gave directions on the appeal on 20 July 2012, that the record was proper and that the appeal be heard before a single judge. Parties were directed to file and exchange submissions.
7. The appellant filed his submissions on 21 September 2012 while the Respondent filed its submissions on 29 October 2012 (the submissions were to be highlighted on 26 October 2012 but it appears this could not be because the Respondent had not filed its submissions).
8. On 13 February 2015, Mshila J directed that the appeal be placed before this Court for directions, and on 21 April 2015 when the appeal was placed before me, I directed that it be heard on 9 July 2015.
9. When the Appeal was called out for hearing on 9 July 2015, the parties counsel informed the Court that they would rely on the submissions already filed.
10. The Memorandum of Appeal set out some 9 grounds of appeal. In the submissions, the Appellant collapsed the grounds into 3 and these were
 - i. whether the trial magistrate erred in disregarding the Appellant's right under section 17 of Cap. 226
 - ii. whether the appellant's dismissal was unlawful and
 - iii. whether Appellant was entitled to gratuity.
11. The Court will discuss the grounds as collapsed by the Appellant in the submissions.

Whether trial court disregarded Appellant's section 17 of cap 226 rights

12. The primary statute governing employment relationships at the material time was the Employment Act, cap. 226 which has since been repealed by the Employment Act, 2007.

13. Section 17 of the repealed Act provided that

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal –

(a).....

14. In my view, the right given to an employee under the cited provision was the right to challenge the lawfulness or justifiability of the grounds for dismissal.

15. The Appellant was therefore properly well advised to challenge the dismissal before the lower Court.

16. And his complaints on appeal are that the *Respondent did not explain under what circumstances he was dismissed, he was not accorded an opportunity to defend himself before dismissal and the lower Court did not make a finding on the issue on whether the Appellant took part in the alleged fraud.*

17. The Appellant cited the authority of Nairobi High Court Civil Case No. 3264 of 1993, *Michie Gitau v NSSF Board of Trustees*, for the proposition that he was entitled to a hearing before dismissal.

18. The question of a right to a hearing before dismissal under the repealed Employment Act (cap. 226) keeps coming up every now and then (it is now a statutory right flowing directly from the right to fair labour practices in Article 41 of the Constitution). But the earlier authorities seem inconsistent.

19. But for myself I would consider the holding in *Rift Valley Textiles Ltd v Edward Onyango Oganda*, Nakuru Civil Appeal No. 27 of 1992 as stating the correct legal position then. The Court of Appeal held in the case that with respect to the learned judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise.....As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action.

20. This authority is in tandem with the position under the common law as set out in the case of *Malloch v Aberdeen Corporation* [1971] 1 W.L.R. 1578 that

At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. *The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract.*

21. In my view, the authorities cited answer the question of a right to natural justice under the repealed Employment Act but still leaves open the related twin questions of whether the lower Court erred in not considering the circumstances of dismissal and whether the Appellant took part in the fraud.

22. The relevance of these two questions was towards determining whether the plea for 2 months wages in notice was merited.

23. The trial Court in the impugned judgment rightly pointed out that the Appellant was seeking a

- declaratory order that the dismissal was unlawful.
24. But I have keenly perused the judgment and it leaves no doubt in my mind that the Court did not address the issue.
25. In his testimony the Appellant stated that

I blame the defendant for wrongful dismissal because I had not committed any offence, since I was just doing my work....the defendants mere allegations that I wanted to defraud the defendant of money is not true because my work was not on accounts section....I have claimed 2 months' salary in lieu of notice as I was not given any notice yet it is included in my terms and conditions vide clause 9 of exhibit 4.... I was not receiving payments for food.

26. Clearly, the Appellant raised pertinent issues which required the Respondent to bring forth facts so as to justify the dismissal or show it was lawful.
27. According to the record, the Respondent's witness stated that the dismissal was for a lawful cause, i.e. gross misconduct and that the money paid by one Mrs. Mary Jananga, member's wife never reached the cashier. The appellant allegedly did not hand over chits to facilitate payment to Accounts Department.
28. It is the Respondent who dismissed the Appellant and therefore it is the one who knew the reasons and grounds for the dismissal.
29. I have evaluated and analysed the evidence. The Respondent's witness was categorical that the members wife paid Kshs 2,549/-. But what is curious, is that the person to whom the money was paid was not disclosed. The Appellant was not mentioned by the witness as the person who received the money from the member's wife.
30. According to the Respondent's exhibit 6 (investigations report by the Club Secretary) the money was paid to the receptionist who even gave back change.
31. In an attempt to address the question of the circumstances of dismissal and Appellant's role in the attempted fraud, the lower Court jumbled the question with the appropriateness of the remedy of reinstatement and service gratuity. The Court did not adequately address the facts as presented and whether the same were justifiable.
32. In my view, the summary dismissal was not justifiable and the Appellant should have been given notice if the Respondent had lost trust and confidence in him.
33. This finding answers ground 2 as well.

Gratuity

34. The Appellant sought gratuity. Gratuity must either have a contractual or statutory basis. The Appellant founded his claim for gratuity on contract.
35. Clause 13 of the Terms and Conditions of Service entitled administrative staff to payment of gratuity. The Appellant did not prove that he was part of the Administrative staff and rightfully the head of claim was rejected.

Conclusion and Orders

36. Arising from the above, the Court finds and holds that the lower Court erred by not evaluating the facts leading to the dismissal.
37. The Court therefore overturns the lower Court dismissal of the Appellant's case and substitutes a finding that the summary dismissal was unjustified and awards the Appellant 2 months wages in lieu of notice assessed as Kshs 16,474/-.
38. Appellant to have costs of the lower Court and of the appeal.

Delivered, dated and signed in Nakuru on this 17th day of December 2015.

Radido Stephen

Judge

Appearances

For Appellant
Advocates

Mr. Kibet instructed by Mirugi Kariuki & Co.

For Respondent
Advocates

Mr. Terer instructed by Mukite Musangi & Co.

Court Assistant

Nixon