



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 136 OF 2010

BETWEEN

PETER OTIENO OPOLLO APPELLANT

AND

THE BOARD OF GOVERNORS

KISUMU POLYTECHNIC COLLEGE 1ST RESPONDENT

MR. FRANCIS IMBO AWUOR THE PRINCIPAL/BOG

SECRETARY KISUMU P. COLLEGE 2ND RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Kisumu

Ali-Aroni J.) dated 12th March, 2010

in

H.C.C.A. NO. 25 OF 2009)

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the High Court (*Aroni J.*) dated 12th March, 2010. The appellant, *Peter Otieno Opollo*, was the unsuccessful party in the Chief Magistrate's Court in Kisumu in a suit which he commenced before that court by way of a plaint against the *Board of Governors Kisumu Polytechnic College (1st respondent)* and *Francis Imbo Awuor (2nd respondent)* claiming reinstatement and/or general damages for unlawful and wrongful termination. The Chief Magistrate's Court (*C.M. Oluoch RM*) dismissed his claim for the reason that his termination was not wrongful or unlawful. The learned trial Magistrate further held that if he had found that the termination was wrongful he would have awarded the appellant three months' salary in lieu of notice which he found to be Kshs.28,470/=.

The appellant was aggrieved and therefore lodged an appeal to the High Court. The High Court agreed with him that his termination was unlawful. However, it further found that the 1st respondent had nonetheless paid him his lawful dues within the provisions of the governing Collective Agreement being

three months salary in lieu of notice. The learned Judge of the High Court was of the view that the appellant could not be reinstated. She therefore ordered that since a cheque in the sum of Kshs.136,697/= which had been issued in payment of the appellant's dues had become stale, another cheque for the same amount be issued to the appellant in replacement. She also awarded costs to him.

The appellant was still dissatisfied. He has now come before this Court citing four grounds of appeal expressed as follows:-

- “1. The Judge of the superior court erred in finding that the sum of Kshs.136,697/= being pay in lieu of notice was settled by the respondents in the year 2006. Where there was the evidence to the contrary to show that appellant was not paid the set (sic) sum of money in the year 2006.*
- 2. The Judge of superior court erred in not setting aside the appellant's termination dated 24th November, 2006 after the Court found that the said termination was unlawful, but upholds it in her judgment by relying on authority of a retiree.*
- 3. The Judge of the superior court erred in not taking into consideration that appellant was entitled to reinstatement back to his employment and in the alternative damages as a result of unlawful termination.*
- 4. The Judge of the superior court mis-directed herself in awarding a sum of Kshs.136,697/= taking into consideration the alleged respondents' terminal benefit computation and not giving the appellant chance to respond to the same as it does not capture the appellant's interest.”*

There was a cross appeal filed by the respondents on 23rd June, 2010.

The main issue in this appeal as can be gleaned from the grounds of appeal, is whether the appellant having been paid salary in lieu of notice, gratuity and bonus, was entitled to reinstatement or general damages. In his oral submissions before us, the appellant claimed salary for the remainder of the period he would have worked until the then compulsory age of retirement of 55 years. He contended that the High Court having found that his termination was wrongful, he should have been awarded salary for the said period. For that proposition, he relied upon the case of ***C.P.C. Industrial Products (Kenya) Limited -Vs- Omweria Ngima [Nakuru C.A. No. 197 of 1992] (UR)***.

In his oral submissions in opposition to the appellant's appeal **Mr. Njoga**, learned counsel for the respondents, abandoned the cross appeal and in response to the appeal contended that the decision of the High Court could not be faulted. In his view, after finding the termination of the appellant wrongful the High Court awarded the appellant the only remedy he was entitled to. Counsel further expressed the view that the appellant could not be reinstated on established authority nor could he be awarded general damages.

In the case of ***C.P.C. Industrial Products (Kenya) Limited -Vs- Omweria Ngima (supra) Kwach JA (as he then was)*** held that where an employer in terminating the services of an employee is prompted by ulterior motives and acts with malice and without good faith, the employee may recover damages beyond the period of notice. In that case the High Court had found that the employer, who was the appellant, had in terminating the employment of the respondent acted maliciously, oppressively and callously. The decision in that case is therefore peculiar to the facts of that case and are clearly distinguishable from the facts herein. In the same case it is illustrative that Kwach JA also said:

“Aggarwal submitted that if the Judge found that the respondent had suffered wrongful dismissal, the damages he could recover was (sic) limited to what he would have earned if the employer had brought the contract of employment to an end according to its terms. In the present case he said the termination clause provided that the appointment could be terminated by 3 months notice and the appellant had satisfied this by paying the respondent terminal benefits on that basis. He said this is the general rule in master and servant cases. In support of this submission Mr. Aggarwal cited a number of cases including

the decision of this Court in **Rift Valley Textiles Ltd -Vs- Edward Onyango Oganda (Civil Appeal No. 27 of 1992)** (unreported). I do not dispute the correctness of those decisions.....” (underlining ours).

The learned Judge gave a further reason why he thought, in that case, damages would not be limited to the period of notice agreed between the parties. He stated as follows:-

“The second reason why this submission must fail is because the way the termination clause in this particular case is worded left the matter of notice at large. It simply says 3 months notice of cessation of employment should be given once the probationary period has been successfully completed. If it was intended to be obligatory the word “shall” would have been used.....

My conclusion is that the termination clause was utterly useless and I must approach the case as if the contract contained no provision at all regarding termination.”

So, unlike in this case, Kwach JA found that there was no termination clause which the employer would resort to in determining what was due to the employee on termination. This case does not suffer from such a defect. The provisions on termination in this case were as follows:-

“6 **TERMINATION OF EMPLOYMENT**

(a) In the normal circumstances, it shall be a condition that employment shall be terminated by either party by giving written notice or pay in lieu of such notice as follows:-

(i)

(ii) For any employee who has completed five years' continuous service or more – three month's notice or three months' pay in lieu of notice.”

In the same case **C.P.C. Industrial Products (Kenya) Limited Vs Omweria Ngima, Muli and Gicheru, JJ.A** (as they then were), agreed with Kwach JA. Gicheru, JA agreed with the Judgment of Kwach entirely but Muli JA had different views on some matters which are not relevant in this case. Kwach, JA considered 15 months as reasonable period of notice and Muli, JA considered 12 months as a reasonable period of notice. The case did not therefore in our view establish a principle that general damages are awardable where an employee's employment is not terminated in accordance with the termination clause.

There is a plethora of authorities on how damages for wrongful termination are computed. Put another way, the law as to what an employee is entitled, on termination of his services, is settled. In **Rift Valley Textiles Limited -Vs- Edward Onyango Ogando [Civil Appeal No.27 of 1992 (UR)**, this Court, differently constituted, said:

“The Respondent had been paid damages according to the terms of his contract. He had worked for seven days in the month before he was wrongfully dismissed; he was paid shs.1,495/= for that period. He had a notice of three months and he was paid 19,230/= for that. Again he was entitled to a leave allowance of Kshs.600/= per year and he had not gone on leave for three years. He was paid Kshs.1,800/= for that.

Finally he was entitled to gratuity payment upon termination of his contract and on that head he was paid a total of Shs.32,050/=. In our view, even though the Respondent's summary dismissal was unlawful he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with, the appellants.” (underlining ours).

The Court further stated as follows:-

“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 all that he was entitled to be paid under and in accordance with the terms of his contract with the appellant.

In **Ronald Kimatu Ngeli -Vs- Ukulima Sacco Society Ltd [Nairobi C.A. No.277 of 2009] (2011) e KLR) (UR)**, this Court, differently constituted, said :-

“.. even if the contract was wrongfully terminated there is a wealth of authorities by this Court that the measure of damages would be the salary in lieu of notice, and not the millions claimed by the appellant.”(underlining ours).

In the matter before us, the learned Judge of the High Court applied the above principles and, in our view, properly held that the appellant was entitled to what he would have been paid if his services had been lawfully terminated. It was the further view of the Judge that the appellant had been paid all his dues vide a cheque which, by the time of her judgment, had become stale. She therefore directed the issuance of a fresh cheque for the sums she found lawfully payable to the appellant.

With regard to the prayer for reinstatement, the learned Judge, in our view, would not make such an order after agreeing with the Chief Magistrate's court that the 1st respondent was under the contract of employment between it and the appellant, entitled to terminate the latter's services. Her conclusion that the appellant was paid all that was due to him, on termination, determined the issue of re-instatement.

In our view, the learned Judge was plainly right. In **Kenneth Karisa Kasemo -Vs- Kenya Bureau of Standards [Mombasa CA No.19 of 2012] (UR)**, this Court held:

“We have carefully considered the law and the facts surrounding this case, suffice to say that the law on employment does not normally envisage a situation where an employee is “forced” upon an employer (and vice versa) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between the parties.”

The appellant, in our case, has not demonstrated that there is any basis upon which we should depart from the position we have taken in previous decisions.

We have said enough to show that this appeal cannot succeed. It is dismissed. The cheque which was ordered made to the appellant must since have become stale. We order that the 1st respondent issues a fresh one in replacement thereof.

With regard to costs, given the circumstances of this case and the previous relationship between the parties, we order that each party bears his/its own costs of this and the withdrawn cross appeal. The order on costs of the appeal to the High Court is not disturbed.

For the avoidance of doubt we also order that the 1st respondent bears the appellant's costs before the Chief Magistrate's Court.

Orders accordingly.

Dated and Delivered at Kisumu this 20th Day of December, 2013

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR