**Ombanya v Gailey & Roberts Ltd**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 2 December 1971

**Case Number:** 358/1971 (14/75)

**Before:** Muli J

**Sourced by:** LawAfrica

*[1] Damages – Master and servant – Wrongful dismissal – Wages for period during which notice would*

*run only recoverable – General damages not awarded.*

**JUDGMENT**

**Muli J:** This is a claim by the plaintiff, Michael Ombonya against the defendants, Gailey and Roberts Ltd. for damages suffered by the plaintiff as a result of his alleged wrongful dismissal by the defendant. The plaint recites that at all material times the plaintiff was an employee of the defendant as a wages clerk at a salary of Shs. 945/- per month and that he had been so employed for 10 years and 10 months. That under the terms and conditions of employment the plaintiff was entitled to:

(*a*) One month’s notice or one month’s salary in lieu of notice;

(*b*) Severance pay at the rate of 2 weeks’ pay for each year of service completed;

(*c*) Pay in lieu of leave;

(*d*) Pro rata leave/travelling allowance.

The total liquidated claim in the plaint stands at Shs. 6,939/60. There is also a claim for unliquidated damages for loss of employment.

[The judge set out and considered the evidence and continued.]

The defendant, having failed to establish gross misconduct or conduct which is incompatible with faithful discharge of his duties, termination of his services was, therefore, wrongful.

I will now deal with the damages.

The plaintiff claims damages alleged to have been suffered as a result of his wrongful dismissal.

These are as follows and I will deal with them in the following order:

Pay in lieu of notice

Severance Pay

Pay in lieu of 18 days’ leave

Pay in lieu of leave/travelling leave allowance

Damages suffered for loss of employment.

With regard to pay in lieu of notice, the plaintiff claims Shs 945/-. It is not disputed that the plaintiff was entitled to one month’s notice or one month’s salary in lieu of notice under his terms and conditions of his service unless his services were terminated on grounds of misconduct. I have found that the plaintiff’s termination of his services by the defendant was wrongful in that the defendant failed to establish an act of misconduct, gross misconduct or any conduct which may rank as serious misconduct. I allow this item of the claim in the sum of Shs. 945/- less normal statutory deduction of Shs. 110/- leaving a balance of Shs. 835/-. The plaintiff also claims severance pay at the rate of two weeks’ pay for each year of service completed. As I have found that the plaintiff’s termination of service was wrongful, the question of severance pay does not arise. In any event, I am not satisfied that the plaintiff made out a case that his services were terminated on grounds of redundancy to entitle him to severance pay. I disallow this claim in the sum of Shs. 4,725/-. Then there is the claim for pay in lieu of 18 days’ earned leave as well as pay in lieu of leave/travelling allowance. The defendant admitted that the plaintiff was entitled to earned leave pay and pay in lieu of leave/travelling allowance. I allow these items of claim in the total sum of Shs. 1,269/60. Then there is the claim for unliquidated damages for loss of employment. The plaintiff’s services were terminated on 31 March 1969 and I have allowed his claim of one month’s salary in lieu of notice. He was employed elsewhere on 4 February 1970 at a salary of Shs. 700/- which was raised to Shs. 800/- on 1 September 1971. Mr. Otieno who appeared for the plaintiff urged the Court to have regard to the present social and employment conditions prevailing in the country and that the principles laid down in the English authorities should be taken as a guide only. It is clear that on determining whether an act of misconduct has been committed each case must be considered on its own merit. In so doing, prevailing circumstances must be taken into account. Similarly I cannot accept that the Court should disregard well-established principles which this Court has applied for many years. As I understand it, the principle is that the measure of damages for wrongful dismissal is the amount the plaintiff would have expected to earn had the employment continued subject to a deduction in respect of any amount earned from any other employment which the plaintiff had obtained or should reasonably have obtained. The onus is on the defendant to show that the plaintiff should have obtained alternative employment earlier than he did. This would go to mitigate the plaintiff’s loss of earnings. There is no evidence to show that the plaintiff had or should have had alternative employment earlier. Indeed there is evidence from the plaintiff that he looked for employment but was unable to secure one until 4 February 1970 – a period of some 9 months and 3 days from 30 April 1969 when his one month’s notice should have expired. Mr. Otieno, as I understand him, urged the court that the defendant should compensate the plaintiff by paying his salary for the period the plaintiff was out of employment on the ground that the plaintiff would have expected to work for the defendant until he retired normally on medical grounds or age, in which case he would be entitled to medical or old age benefits. If I were to so hold, it would create a precedent that where an employee is employed for an indefinite period, should his services be terminated otherwise than by stipulated notice, he would be entitled to his pre-termination salary until he obtains another employment whether or not he makes efforts to obtain alternative employment. I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. In the instant case, the plaintiff would have been legally dismissed by one month’s notice and the defendant could have dispensed with his services on that period of notice. In this respect the plaintiff would have had no cause of action. In *Addis v. Gramophone Company*, [1909] A.C. 488 at p. 491, Lord Loreburn held that: “If there is a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.” In the recent decision of this court in *Kyobe v. East African Airways*, H.C.C.C. 268 of 1970), the plaintiff claimed payment of his salary for a period of two years (reduced to one year) following wrongful termination of his service by the defendant. There was no termination clause by notice in his terms and conditions of employment. It was held that the plaintiff was only entitled to a reasonable notice of six months. Having found that the plaintiff had been wrongfully dismissed and that wrongful dismissal meant no more than dismissal in breach of the contract of service without notice, Chanan Singh, J. had this to say: “I now come to the main point in issue namely whether the plaintiff’s services could be terminated without notice. It is well known that a contract of service must be terminated by notice, unless the hiring is for a definite period. If the contract is silent as to the length of such notice the courts will not construe this as meaning that no notice on either side is required – *Payzu v. Hannafore*, [1918] 2 K.B. 345. The length of notice will be determined by usage (*Hamilton v. Bryant* 30 T.L.R. 408). If there is no usage, then the Court will find that a reasonable notice must be given on either side – *Crediton Gas Company v. Crediton U.D.C*., [1928] Ch. 174. In the present case no notice is expressly laid down in the agreed terms of contract contained in the correspondence and no usage is alleged to exist. Therefore, I have to determine what the length of notice should have been. The plaintiff claimed two years’ salary in lieu of notice in the plaint, but during the hearing he reduced his claim in this respect to one year’s salary, the reason being that he was able to get other suitable employment within a year of termination of his employment . . . I think six months’ notice would be reasonable for a man in the plaintiff’s position. I regard the Corporation’s practice in this matter as reasonable and I think six months’ notice would apply to all senior staff including the General Manager.” Accordingly the plaintiff was awarded salary in lieu of six months’ notice. He could not recover more than six months’ salary which period of notice was) determined in accordance with the practice or usage applied to other officers holding comparable positions in the Corporation. In the recent decision of the Court of Appeal in *Lukenya Ranching v. Kavoloto*, [1970] E.A. 414 it was held that the respondent could recover compensation for three months in lieu of reasonable notice where there was no notice clause in his oral contract of service. On the strength of these persuasive authorities, the plaintiff in this suit can recover compensation equivalent to one month’s salary being the salary for the period of notice provided under his terms and conditions of employment. There is no evidence of practice or usage to the effect that other officers in the service of the Department and whose services are terminated otherwise than on grounds of redundancy, old age, or on medical grounds would be entitled to severance pay or other terminal benefits. In the result the plaintiff is entitled to one month’s salary under the item of damages for loss of employment. As I have allowed this item elsewhere there will be no award on this item. I accordingly enter judgment for the plaintiff against the defendant in the sum of Shs. 2,104/60. The defendants tendered over half this sum and paid it in Court. Mr. Fraser urged the Court to award costs in the Subordinate Court Scale. I do not think so. The suit was filed in this court for recovery of a sum beyond the jurisdiction of a subordinate court. As there has been a tender of over a half of the award, the plaintiff is entitled to half the costs of the suit together with costs and interest as prayed.

*Order accordingly*.

For the plaintiff:

*SM Otieno*

For the defendant:

*KA Fraser* (instructed by *Hamilton Harrison & Mathews*, Nairobi)