THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0332 OF 2004

WILSON WANYAMA :::::::::::::::::::::::::::::::
PLAINTIFF

VERSUS

DEVELOPMENT & MANAGEMENT]
CONSULTANTS INTERNATIONAL] ::::::::::::::::
DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for special, general and punitive damages for unlawful termination of employment, interest and costs of the suit. He alleges that in February 2001 he entered into an oral contract of employment with the defendant and that this contract was for a duration of six years. The defendant denies existence of any such contract. The defendant contends, however, that he was engaged as a casual worker, subject to availability of work from time to time.

At the scheduling stage the parties agreed:

1. That the plaintiff was employed by the defendant.

2. That the plaintiff's employment with the defendant was summarily terminated.

There are four issues for determination:

1. What was the nature of the plaintiff's employment with the defendant?

2. Whether the termination of the plaintiff's employment with the defendant was lawful.

3. Whether the plaintiff is entitled to the reliefs sought.

4. Whether the defendant is entitled to the remedies set out in the counterclaim.

As a general principle, offers of appointment in this country are required to be in writing. Thus under S.11 (1) of the Employment Act, Cap. 219, a contract of service for six months or more, or for a number of working days totaling six months or more, shall be made in writing.

There may of course be instances like the instant one where parties co-exist in an undefined relationship. At the end of the day, the Court must define for them the nature of that relationship.

In the instant case, the parties agree that there existed some form of an employment relationship between them. The plaintiff contends that it was for a fixed period of 6 years while the defendant says that it was a casual

employment. From available literature, there are two main factors which identify a casual employee. First, he is not employed for more than twenty four hours at a time, and secondly, his contract provides for payment at the end of each day. See: THE RIGHTS OF AN EMPLOYEE IN KENYA by Okech Owiti, at page 15.

I have considered the plaintiff's evidence on this point vis-à-vis that of the defendant. The plaintiff's story is that he was employed by the defendant in August 2001 as a Business Development Manager and that the contract was to run for six years. He claims that at the time of termination, the employer was organizing a formal agreement but so far he had only issued an identity card, P. Exh. 1. According to him, his duties involved marketing, planning and liaison. That he was getting a gross pay of Shs.750,000-. He has tendered in evidence two pay slips, P. Exh. 11. The defence version is that the Plaintiff was offered a temporary appointment to do with town running, messenger tasks of sorts. That the organization used to pay him whenever it had money. The defendant's Managing Director had this to say:

> *"As consultants, we work on contracts. Whenever we got money from an assignment, we shared the little from it. He was not a permanent employee of the organization."*

He disputes both the identity card and the two pay slips presented by the plaintiff as evidence of their relationship.

From the above, the evidence on record supports existence of an oral contract of employment. In any case, both counsel for the plaintiff and for the defendant do agree that the plaintiff was employed by the defendant. It is the terms of the contract which are of course in dispute. The law is that where a term of contract has not been expressed, a Court will undertake to imply it where it is necessary to give effect to the intentions of the parties.

I have considered the issue of the impugned identity card, P. Exh. 1. The date of issue is given as 13/8/2001 and the expiry date as 12/8/2006. It bears a signature said to be the Managing Director's, one Dr. Sam Katabaazi.

For his part, Dr. Katabaazi denied knowledge of any such identity card. He said that they could not have issued him an identity card when he was not on appointment. But he admitted that the company issued identity cards to employees, especially consultants, and that he was the one signing those cards on behalf of the organization. He did not say how he expected the plaintiff to carry out the organization's messenger like errands without any form of identification. On being shown P. Exh. 1, he said:

> *"I never signed this card. I'm seeing it first time. It bears a signature which is not mine. I never authorized its issuance."*

Clearly, this is where the problem lies. The plaintiff says the signature thereon is Dr. Katabaazi's. Dr. Katabaazi denies it. Neither party made an attempt to offer expert evidence to confirm or destroy the assertion.

I have also addressed my mind to the evidence of both parties, especially an agreement between them, D. Exh. 1, concerning a motor vehicle, No. UAD 850A. In the agreement, the plaintiff is therein described throughout as an employee of the defendant. Dr. Katabaazi does not deny execution of that agreement. If anything, the defence claim for Shs.2,000,000- is based on this agreement. In the agreement, the parties agreed that the payment would be recovered from the employee's monthly salary and that the payment would be in 24 monthly instalments of Shs.150,000- each. By implication, the defendant expected to recover the cost of the car from the plaintiff's monthly earnings.

I have considered all this evidence and come to the conclusion that it cannot be true, as Dr. Katabaazi claims, that the first time he saw the identity card was when it was shown to him in Court. In the Written Statement of Defence, WSD in response to the plaintiff's averment in the plaint that the defendant had issued an identity card to him, it states:

> *"(a). .....*
>
> *(b). That the plaintiff was only issued with an identity card for identification purposes and not as a contract of employment for*

a fixed term. The expiration date on the identity card therefore does not in any way relate to a contractual period or expiration thereof."

In view of this averment in the defendant's own WSD, I have not found DW1 Katabaazi to have been a truthful witness on this point. The system of pleadings, held the Supreme Court in INTERFREIGHT FORWARDERS (U) LTD – VS- EADB [1994-95] HCB 54, is necessary in litigation. It operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called to adjucate between them. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings. The defendant did not apply to amend its WSD at any stage of the proceedings to retract the hitherto admitted issuance of the identity card.

From what I have already stated above, Dr. Katabaazi's evidence regarding the identity card is inconsistent with the defendant's defence on it as per its WSD. In the absence of an expert's evidence to tilt the balance in the defendant's favour, Court is inclined to accept the plaintiff's evidence that the card was issued by the defendant.

At the hearing, in an attempt to show that the pay slips (P. Exh. 11) are a forgery, Dr. Katabaazi undertook to produce a typical pay slip issued by the defendant. He did not do so. The re-payment schedule produced by the defendant as evidence that Shs.150,000- was being recovered from him monthly shows that Shs.150,000- was recovered from the plaintiff on 23/7/2002. The impugned pay slip indicates so as well.

Accordingly, Court accepts the plaintiff evidence that he was earning Shs.750,000- per month. In all these circumstances, Court is satisfied that there was an oral contract of employment between the parties. Under this oral contract, the plaintiff's salary per month was Shs.750,000-.

I so find.

As to whether the termination of this oral contract of employment was lawful, I have already held that the terms of the contract were never reduced in writing. In law, once an employee alleges unfair dismissal, it becomes incumbent upon the employer to show that the dismissal was fair.

In the instant case, the parties had been together between August 2001 and May 2003, a period of about one year and nine months. It was in my view fair for the plaintiff to expect the defendant to give him a sound reason for the termination of the relationship.

In matters of this nature, Courts invariably come into the picture after the event, that is, after the dismissal, when an employee is complaining that he was removed from the job for a reason which did not justify such action.

The general position is that a master may terminate the contract with his servant any time for any reason or even for no reason at all. See: OKORI – VS- UEB [1981] HCB 52. Where the contract has been reduced in writing, the parties are bound by its terms. In otherwords, the employee will expect to be dismissed in accordance with the procedure agreed upon by the parties. No such terms exist in this case.

According to the plaintiff, he was attending a meeting with KCC as part of his normal duties when his boss Sam Katabaazi called him. He asked him whether he had received some funds from a sister organization to the defendant based in Arua. The witness (the plaintiff) said no. He went to see him (the boss) and upon reaching there he was interrogated by the police and later arrested. It is the plaintiff's evidence that although he was not an employee of the Arua based organization, he had had some dealings with one Moses Jurua whom he had requested at personal level to lend him some money. He had lent him some Shs.2,380,000- in two instalments of Shs.1,080,000 and Shs.1,300,000- respectively. The Shs.1,080,000- was transferred to his (plaintiff's account) at Nile Bank. It is his evidence that he

was supposed to pay it back and that he did pay it back through Western Union at Nile Bank.

From the evidence, it is these an authorized borrowings on the part of the plaintiff and one Jurua which sparked off the controversy between the parties. According to DW1 Katabaazi, the defendant's concern was that the plaintiff had been given money by Mr. Jurua for delivery to the defendant and he never did so. He, Jurua, was the Project Manager in Arua in a sister organization to the defendant in which the witness, Dr. Katabaazi, also had a hand. Police detained the plaintiff for a day or so and he was then bailed out. The matter never went to Court. The next thing he saw was a letter from the plaintiff's lawyers warning that plaintiff was in the process of filing a suit for unlawful dismissal.

For his part, PW2 Jurua denied the alleged borrowing of funds from him by the plaintiff. According to him, the Arua office experienced some shortage of operational funds one time. They borrowed from the defendant company in Kampala. Since the plaintiff had been introduced to him as an employee of sorts in the organization, he (Jurua) started channeling the refunds through the plaintiff for on ward transmission to the defendant. In the end, he learnt that the funds were instead going to the plaintiff's personal account in Nile Bank.

From the evidence, whether the deal between the plaintiff and Jurua was genuine or not, the defendant thought that it was a fishy one. Indeed, Jurua has denied ever lending money to the plaintiff as alleged by him. A contract of employment is based on confidential relationship between the employer and the employee. Where the personal confidence has ceased, the Court will not enforce the contract. True the plaintiff has not been subjected to the criminal law of the land. There is therefore no conclusive evidence of embezzlement. The position in civil proceedings for wrongful dismissal is, however, that where a servant is guilty of a gross breach of good faith, his employer is entitled to dismiss him for dishonesty. Thus it was held in SINCLAIR –VS- NEIGHBOUR [1967] 2 QB 279 that even though the plaintiff's conduct might not have been dishonest, it was nevertheless conduct of such a grave and weighty character as to undermine the relationship of confidence which should exist between master and servant. Accordingly, Court upheld the defendant's dismissal of the plaintiff as justified. The plaintiff had in that case borrowed money from his employer, with knowledge that the employer would not approve of the borrowing and had repaid it into the till the following day.

Applying the same principle to the instant case, Court is satisfied that even if the borrowing from Jurua may have been honest, for as long as it involved the company funds and Dr. Katabaazi's approval had not been sought, he was entitled to treat it as a case of embezzlement of the company funds.

Court is also satisfied that as a result of transactions between the plaintiff and Jurua, the matter was reported to police and the plaintiff was arrested. He was later sent packing. Court is satisfied that the borrowing undermined, and/or was capable of undermining the trust relationship between the plaintiff and the defendant. It is that conduct of the plaintiff that resulted in the termination of the oral contract of employment. The defendant was in these circumstances justified to terminate the relationship. There was therefore nothing unlawful about it. I so hold.

As to whether the plaintiff is entitled to the remedies sought, his first prayer is for special damages of Shs.29,250,000- being salary for the unexpired period of the contract, that is, from 12/05/2003 to 12/08/2006. I have already made a finding that the contract was presumably for a fixed period, judging by the identity card issued to the plaintiff by the defendant. However, the terms were never reduced in writing. It is not known whether if they had been reduced to writing the parties intended to make provision for termination prior to expiry of the fixed period or whether they intended that either party be at liberty to terminate the contract upon a just cause. The law is that in the event of a wrongful termination by the employer, if the former course had been adopted, the plaintiff would have been entitled to recover as damages, the equivalent of remuneration for the balance of the contract period. If they had adopted the latter course, he would be entitled to recover as damages, the equivalent of remuneration for the period

stipulated in the contract for notice. In view of the Court's finding that the defendant was justified to terminate the plaintiff's services, implying that it was justified to terminate his services in a summary manner whereby he could be dismissed without notice and/or a right to be heard first, Court is satisfied that he is not entitled to anything beyond what had accrued to him during the period of employment with the defendant. His claim for Shs.29,250,000- is therefore baseless. It is dismissed.

As regards the claim for Shs.1,850,000-, there is evidence that he paid it through the police. There is also evidence that he paid it in an attempt to settle the matter with the defendant out of Court. In consideration of that payment, the defendant opted not to pursue the criminal case against him. By his own admission, the plaintiff had borrowed funds from Jurua. Jurua has denied the fact of borrowing. He says this was company money. The amount admitted by the plaintiff is Shs.2,380,000-. The amount paid by him through police assistance was Shs.1,850,000-, less than the amount which the defendant was demanding from him. Taking it, as I must, that this was payment in response to the defendant's claim against him, Court is unable to make an order that it be refunded to him. It was payment in acknowledgment of a debt.

All in all, Court is of the opinion that the plaintiff was entitled, under the oral contract of employment, to payments that he had worked for. He has not

made any claim for any unsettled payments. Therefore, he has no sustainable claim against the defendant.

I so hold.

As to whether the defendants are entitled to the reliefs claimed in the counterclaim, it has prayed for Shs.2,950,000- being the alleged outstanding balance on the embezzled funds and Shs.2,000,000- which is still outstanding against the plaintiff on the car loan scheme.

From the evidence, the defendant maintained that the plaintiff had embezzled Shs.4,800,000-. However, the defendant's evidence regarding that amount is, to say the least, wanting. Evidence in support of the claim for Shs.4.8m is sketchy. However, from the plaintiff's own evidence, the total amount he had so far received from Jurua was Shs.2,380,000-. Jurua has denied ever extending a personal loan to him, implying that all the money allegedly borrowed from Jurua was the defendant's money. I believe it was.

Plaintiff has adduced photocopies of alleged remittances of funds to Jurua, P. Exh. V. The first is dated 28/2/2003 for Shs.300,000-. The second is a clear replica of the first. In otherwords, the plaintiff has attempted to account for Shs.600,000- using the very copies of the same document. The 3rd is a remittance purportedly made in June, to be exact 18/6/2003. By then he had

already, been sacked. The 4th is dated 3/3/2003 for Shs.300,000-. Court is not convinced that the payments related to funds now claimed by the defendant from the plaintiff. If the plaintiff so wishes, he can recover it from Jurua as money had and received. As for the defendant, however, it s clear to me that after the payment of Shs.1,850,000- through the police, a balance of Shs.530,000- is still due and owing from the plaintiff to make it a total of Shs.2,380,000- which the plaintiff admits to have borrowed from Jurua. This amount, that is, Shs.2,380,000- is decreed to the defendant in the place of the Shs.4,800,000- claimed by them. Given that out of this amount Shs.1,850,000- has already been paid to the defendant, there shall be an order for the payment of the balance in the sum of Shs.530,000- to the counter – claimant. I order so.

As to the balance of Shs.2,000,000- on the car loan, the plaintiff has not denied this indebtedness to the defendant. He took the vehicle, it had not been fully paid for and Shs.2,000,000- is still owing on it. I would decree this amount to the counter-claimant and I do so. The two amounts put together shall attract interest of 20% per annum from the date of filing the counter claim (21/6/2004) till payment in full.

As regards general damages and costs, I note that the defendant was responsible for the uncertain state of affairs regarding the nature of the plaintiff's employment with it. It was within its means to appoint the plaintiff

on probationary terms or any other terms or else tell him when the going was still good that he had no place in the organization.

It earns no credit for keeping him in suspense for close to two years. While the usual result is that the loser pays the winner's costs, in the circumstances of this case I have seen no justification for an award of general damages or costs to the counter – claimant on the counter-claim or in the main suit. I therefore make no order as to damages. I order that each party bears its own costs.

In the result, the plaintiff's suit against the defendant is dismissed with an order that each party bears its own costs.

The defendant's claim in the counter-claim is allowed in part. A sum of Shs.2,530,000- is decreed to the counter-claimant as special damages as the balance on the car-loan scheme and the plaintiff's un authorized borrowing. The decretal amount shall earn interest at the rate of 20% per annum from the date of filing the counter-claim till payment in full.

I so order.

Yorokamu Bamwine

J U D G E

9/5/2006