



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Kwach & Cockar JJ A)

CIVIL APPEAL NO. 37 OF 1991

BETWEEN

SHARMA.....APPELLANT

AND

HANDA T/A K.A.HANDA SECONDARY SCHOOLS.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Mr Justice Samuel Odhiambo Oguk) dated 26th November 1990,

in

Civil Case No 42 of 1986)

JUDGMENT

Briefly the facts according to the appellant are that he was an Indian national and a science teacher who was in the employment of the Government of Kenya until 14th August, 1985 when he was retired on his attainment of 55 years of age. Thereafter following verbal negotiations he was taken into employment as a teacher by the respondent in his Thai Secondary School, Meru, at a salary and house allowance of Shs 4,000/= and Shs 1,500/= per month respectively with effect from 15th September, 1985, on which day he also commenced work. The respondent also undertook personally to arrange for the necessary work permit for him from the Immigration Department which was to expire on 30th November, 1985. As the respondent did not appear to be interested in obtaining the necessary work permit the appellant had to make several trips to Nairobi during December, 1985. He eventually managed to have his visitor's pass renewed. But in January, 1986, the respondent verbally terminated his services. He remained unemployed until August, 1986. He had not been paid salary for December, 1985, and house allowance for the months of November and December, 1985.

The appellant had claimed judgment for a sum of Shs 48,640/= made up as follows:

Loss of salary for December, 1985, and for further 7 months from January, 1986, to July, 1986 – total for 8 months @ Shs 4,000/= pm..... Shs 32,000/=

House allowance for 9 months from November, 85 to July 86 @ Shs 1,500/= pm Shs
13,500/=

Expenses incurred in travelling from Meru to Nairobi

and back in connection with arranging of work permitShs
3,140/=

Total.....Shs 48,640/=

In addition the appellant had also claimed general damages for mental anguish and apprehension of possible arrest for being illegally in Kenya or working without a work permit.

The respondent's evidence was that when he transferred the headmaster of Thai School on 30th November, 1985, to Naivasha, the appellant refused to work under the new headmaster and deserted the school on 1st December, 1985. He wrote to the appellant at the Thai School on 6th January, 1986, to come and discuss his case with him at Nairobi. Thereafter, he verbally terminated the appellant's services and withdrew the application he had made to the Immigration Department for the appellant's work permit.

The learned judge accepted the evidence of the appellant and gave judgment for the salary for December, 1985, and the house - allowance for the months of November and December, 1985. He dismissed all the rest of his claims. The judgment sum therefore came to Shs 7,000/=. Each party was ordered to bear its own costs.

There are sixteen grounds of appeal. In his submissions the appellant repeated his contentions made in the superior court in respect of salary for 8 months, house allowance for 9 months and expenses incurred in travelling in connection with his work permit all of which we have detailed above. He also made submissions for an award of general damages for mental anguish and apprehension of possible arrest. As far as grounds of appeal relating to claims in respect of travelling expenses and general damages are concerned we are satisfied that the learned judge did not err in disallowing these claims. With regard to the claim for salary and house allowance for the period the appellant was unemployed we agree with the finding of the learned judge that the appellant had not deserted his employment. It is, therefore, evident that there was no reasonable cause for a summary termination.

It appears that the learned trial judge in awarding salary upto the time of termination of service did not consider the question of the period of notice of termination.

Before the High Court Mr Rimita, who was then representing the respondent, had relied on provisions of section 14(1) of the Employment

Act (cap 226) which had provided that every contract for service for a duration of six months or over shall be in writing. We agree with that submission. However, the position here, in our view, is somewhat different. There is uncontroverted evidence of the appellant that his appointment as a teacher was for a period of 2 years in the 1st instance if the respondent obtained a work permit for him. Now this uncontroverted evidence relating to the appellant's employment is further confirmed in writing by the respondent in his application for a work permit for the appellant to the Immigration Department (Ex A) in which he stated that the reason for the application was that he wished to employ the appellant as a teacher. This application was subsequently recommended by the Ministry of Education on 17th October, 1985. We are satisfied that there was a contract of appointment for a period of 2 years. The fact that the

Immigration Department refused to renew the work permit has no bearing on this issue because the refusal was caused by the respondent withdrawing the application. The appellant later had no difficulty in getting a work-permit when he obtained new employment.

Having been appointed for a period of 2 years with no provision relating to termination of appointment, the position would be that the appointment would be considered as terminated at the expiry of 2 years – barring of course, causes giving rise to summary dismissal. The appellant however took steps to mitigate damages and obtained employment in August, 86. Apart from the judgment sum awarded by the High Court he is therefore also entitled to salary for the months he had remained unemployed. In our view the appellant has proved his claim for 7 months salary and house-allowance amounting to Shs 28,000/= and Shs 10,500/= respectively totaling to Shs 38,500/= in addition to Shs 7,000/= awarded by the learned judge. We, therefore, allow the appeal and substitute the sum of Shs 7,000/= by the High Court with the sum of Shs 45,500/= as the judgment sum with interest thereon at court rates from the date of the judgment in the High Court. We also award costs of this appeal to the appellant which we assess at Shs 5,000/=.

Dated and Delivered at Nairobi this 19th day of December 1994.

J.E.GICHERU

.....

JUDGE OF APPEAL

R.O.KWACH

.....

JUDGE OF APPEAL

A.M.COCKAR

.....

JUDGE OF APPEAL

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

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