REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO 29 OF 1985

CYRUS NYAGA KABUTE ……APPELLANTS

VERSUS

KIRINYAGA COUNTY COUNCIL……RESPONDENT

JUDGMENT

November 11, 1987, **Nyarangi, Platt & Apaloo JJA** delivered the following Judgment.

The appellant, Cyrus Nyaga Kabute, appeals against the decision of the High Court whereby his claim was dismissed.

The plaintiff had claimed-

(i)A declaration that the plaintiff's dismissal and / or termination of his services is null and void;

(ii)arrears of salary from July 17, 1980 to the date of judgment;

(iii)general damages for loss of employment and retirement benefits from the date of judgment to the attainment of the plaintiff 60th birthday;

(iv)aggravated damages and general damages for breach of contract; and

(v)costs of this suit.

On appeal to this the plaintiff prayed that the judgement of the high court be set aside and that the judgment be entered for the appellant as prayed in the plaint.

The appellant has only argued one ground of appeal, namely that the learned judge erred in law and in fact in not coming to a finding upon the evidence presented to the court and laying emphasis on the finding of Mr Macharia in Exhibit 10.

The Exhibit is a document from the office of the permanent secretary of the ministry of labour relating that there had been trade dispute which had been referred to Mr A G Macharia of the Nyeri labour office to investigate. The dispute was mentioned as dismissal of Mr Cyrus Kabute, Internal auditor. The

purpose of Exhibit 10 was to set forth the minister's findings and recommendations after setting out the case of each side. The findings concluded that Mr Kabute did not report as required, which led to his dismissal. Therefore the dismissal found to have been justified. The recommendation was that the facts contained in the report and consideration of Mr Kabute's length of service, it was recommended that his dismissal be reduced to normal termination and that he be paid all his terminal dues. The parties were requested to accept the recommendation as a basis of setting their trade dispute.

It is not dispute that both parties eventually accepted the recommendations and the appellants terminal dues have been worked out, in the Trade Dispute Act (Cap 234) part II contains the provisions for the reporting of trade disputes, the consideration of what action is to be taken by the minister and methods of conciliation. Section 7 of the act provides that the Minister is satisfied that any trade dispute exists or is apprehended whether reported to him or not the minister may investigate any matter appearing to him to be relevant to the dispute and refer such matter for investigation by an investigator appointed by him for the purpose. That is the course taken by the minister in this case. He appointed Mr AG Macharia as investigator. The investigator completed his work, but section 7(4) permits the minister to make recommendations of his own to all of the parties to the dispute. If the matter is settled then no further action is necessary; but if it is not settled then by section 8 of the Act, the Minister may refer the matter to the industrial court, the matter then proceeds under part IV of the Act. The Minister did not refer to this matter to the Industrial court, there being a settlement and that raises the question whether the appellant was entitled to take a suit in the High Court.

It is clear that the purpose of the Trade Disputes Act, is to provide a special machinery for the settlement of such disputes, and if an employee sets in motion the procedures under the act through his Trade Union then he must abide by the result of those processes. If he wishes to bring the case in the courts that is also open to him; but he cannot have it both ways, Once an employee has accepted the recommendations of the Investigator, or the Ministry, then he is bound by them. If he does not wish to accept them then he may go to the Industrial Court.

In this case the appellant has argued, that the learned judge was wrong in finding that the appellant absented himself from duty, when there was no evidence on that point. It is very peculiar that this argument put forward, in view of the fact that was the basis upon which dismissal was justified.Thereafter that matter could not be opened, once it was accepted.

Apart from that, even if the appellant were able to reopen that matter, and supposing that he had shown that this dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint even though the dismissal may be wrongful it stands, and what flows from the breach of the conditions of service, is damages according to the terms of the contract. Those damages would not have been aggravated damages and would not have given him benefits up to his 60th birth-day, nor arrears of salary from July 1980. In fact the appellant was given all his dues on normal retirement; arrears of salary upto June 1980, gratuity and payment in lieu of leave. Had the appellant wanted the matter to be reviewed by the industrial court he should have asked for that course to be adopted.

In our view the appeal is without merit and indeed whether the learned judge had any jurisdiction to investigate the complaint put before him. We would dismiss the appeal with costs.

November 11, 1987

NYARANGI, PLATT & APALOO JJA