cannot conveniently or with propriety, be exercised in public. If the jurisdiction over practitioners is ancillary to the litigious jurisdiction, the judge may exercise it instead of the court. In either case, it is a jurisdiction which may lawfully be exercised by the judge, and in my opinion the rules of court regulating its exercise are intra vires when they provide for its exercise by the judge.

Freetown
Nov. 2,
1960

Ames P
Benka-Coker
Ag. C.J.
Wiseham C.J.

[COURT OF APPEAL]

THE UNITED AFRICA COMPANY . . . . . *Appellant*

v.

MUKTARR KALLAY . . . . . *Respondent*

[Civ.App. 37/60]

Contract of employment—Damages for dismissal—Yearly hiring—Right to receive commission.

Respondent was a storekeeper of the appellant at Makeni under a written agreement of service which provided, inter alia, that respondent should receive a salary of £6 per month and a commission on cash sales and produce bought (if any) and that the contract was terminable at any time by one month's notice on either side. When in December 1955 there was a shortage of appellant's stock in the hands of respondent, he was instructed to hand over the shop and proceed to Freetown. In Freetown, he continued to receive his monthly wages of £6 until October 1956 when, without prior notice, his services were terminated. Respondent brought an action for damages for wrongful dismissal in the Sierra Leone Supreme Court. The trial judge found (1) that the contract was a yearly hiring, that respondent was entitled to six months' notice, and, therefore, that respondent was entitled to £786 damages in lieu of notice based on £6 salary and £125 commission per month; (2) that respondent was entitled to £1,250 damages to compensate him for loss of commission during the ten months prior to his dismissal; and (3) that, by way of general damages respondent should be awarded three months remuneration, which, on the basis of £6 salary and £125 commission per month, came to £393. Against this judgment, the company appealed.

Held, (1) that the contract was not a yearly hiring, and, therefore, respondent was not entitled to six months' notice;

(2) that the company had a right to transfer respondent to a position where he did not make any sales, and, therefore, that respondent did not have any right to receive a commission while in such a position;

(3) that, since the contract expressly provided that it was terminable on a month's notice, respondent was entitled to a month's wages as damages, i.e., £6.

Cases referred to: *The King* v. *Inhabitants of Sandhurst* (1827) 108 E.R. 831; *Jackson* v. *Hayes Candy & Co., Ltd.* [1938] 4 All E.R. 587; *De Stempel* v. *Dunkels* [1938] 1 All E.R. 238; *Fairman* v. *Oakford* (1860) 157 E.R. 1334; *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105; *Addis* v. *Gramophone Company Ltd.* [1909] A.C. 488; *Hartley* v. *Harman* (1840) 11 A. & E. 798, 113 E.R. 617.

Miss Frances C. Wright for the appellant.
Cyrus Rogers-Wright for the respondent.

WISEHAM C.J. In an action for damages for wrongful dismissal before the Supreme Court, Sierra Leone, the respondent obtained judgment against the appellant company.

The respondent was a storekeeper of the company. An agreement of service was admitted by consent of both parties as being similar to the one between the parties, the original having been lost. In December 1955, at Makeni, there was a shortage of the company's stock in the hands of respondent and he was consequently instructed to hand over the shop and proceed to Freetown. He continued at Freetown to receive his monthly wages of £6 till October 1956, when without prior notice his services were terminated.

The learned trial judge found: first, that the contract was a yearly hiring and that respondent was entitled to notice of six months. On a basis of £6 salary and £125 commission per month, the damages in lieu of notice were assessed at £786.

Secondly, that the respondent was deprived from earning commission when he was brought down to Freetown, for ten months prior to dismissal. At £125 a month the damages were assessed at £1,250.

Thirdly, that by way of general damages, the respondent should be awarded three months' remuneration. On the basis of £6 salary and £125 commission per month the damages were assessed at £393.

The company now appeals against this judgment.

It is urged that the trial judge was wrong in holding that the plaintiff's engagement was a yearly hiring requiring six months' notice of termination. The learned judge relied on the cases of *The King* v. *Inhabitants of Sandhurst* (1827) 108 E.R. 831 and *Jackson* v. *Hayes Candy & Co., Ltd.* [1938] 4 All E.R. 587. On the facts in both these cases the contracts of service were held to be yearly hirings. In the latter case the commission was payable yearly. In the former case, the appeal arose out of an order of removal of the appellant, his wife and children from one parish to another and the question was whether he had acquired a settlement right which in turn depended on whether he had a yearly hiring. The appellant lived and slept on the premises of his employment, afterwards married and had children there and on those facts the sessions found a general hiring and the decision was confirmed as not being inconsistent with the power of summary dismissal.

In *De Stempel* v. *Dunkels* [1938] 1 All E.R. 238 it was said that it is no longer the rule applicable to all cases that an indefinite hiring is a hiring for a year only. This was a Court of Appeal decision approving the decision of Pollock C.B. in *Fairman* v. *Oakford* (1860) 157 E.R. 1334 that " there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances." It is true that the mere mode of payment of salary does not destroy a presumption of yearly hiring but all the circumstances must be judged together.

In the present case the parties stipulated by clause 14 that the contract was terminable at any time by one month's notice on either side. By clause 9 the salary was payable monthly. By clauses 10 and 11, commission on cash sales and produce bought, if any, were to be paid on accounts made up monthly. Again the company's stock was taken monthly, in fact 10 days before the end of each calendar month. On all these facts of the present case the presumption of a yearly hiring, if any, was clearly rebutted and with respect to the learned judge, his finding and order for damages of £786 is set aside.

Counsel for appellant next submitted that no commission for 10 months was payable. The learned judge relied on the case, in "The Times" newspaper of March 3, 1960, of *Orman* v. *Saville Sportswear Ltd.* where the question was what was the remuneration of the plaintiff in that case. Was he entitled to the bonus which he would have earned had he continued to work? It was held that he was. In the present case the learned judge says that there is nothing in the agreement to deprive the respondent of commission when absent from illness or otherwise. On the other hand, there is nothing to say it is payable.

Under clause 1 of the agreement the respondent was liable to serve the company anywhere. If he was transferred to Freetown and made no sales he would not be entitled to any commission. That was what happened. The fact that in 1952, when the respondent worked in Freetown for six months, he was paid £27 a month as he was not earning any commission was purely an ex gratia payment.

Counsel for respondent asks "What was respondent's remuneration then?" The answer is his monthly salary of £6. If he made any cash sales or if he was asked to buy produce he was entitled to a commission. If, on the other hand, he had no opportunity to sell, and he could per clause 1 be deprived of that opportunity by posting or transfer as a clerk or general assistant to anywhere, how then can he insist on a commission. He was thus paid his salary and no more while stationed in Freetown. In *Addis* v. *Gramophone Company Ltd.* [1909] A.C. 488 the plaintiff manager was given six months' notice of termination of contract and was prevented from earning any commission. It was held he was entitled to the commission he would have earned had he been allowed to work and earn it. In the present case, however, the respondent was transferable to a non-commission earning position anywhere and was so instructed to proceed to Freetown.

For these reasons the order for payment of £1,250 as commission is set aside.

Lastly, it is submitted that damages of three months' remuneration is not payable. The respondent's counsel reading from Chitty on Contract, Vol. 2, p. 559, 21st ed., says that damages must be assessed by references to the time likely to elapse before the servant obtains another post for which he is fitted. The passage, however, goes on. "If the contract expressly provides that it is terminable upon, e.g., a months' notice, the damages will ordinarily be a month's wages."

Hartley v. *Harman* (1840) 11 A. & E. 798 or 113 E.R. 617.

It is clear that where a servant is wrongfully dismissed the damages cannot include compensation for the manner of dismissal or injured feelings or that the dismissal makes it more difficult to obtain fresh employment. *Addis* v. *Gramophone Company Ltd.* (one dissenting judgment) [1909] A.C. 488.

The order for damages of £393 awarded is therefore set aside.

In the circumstances of this case and the written agreement between the parties the respondent is entitled to judgment of £6 in lieu of one month's notice.

The judgment of the trial court is set aside. The appeal is allowed with costs to the appellant company in both courts.

AMES P. I agree with the judgment which has been read by my brother the learned Chief Justice of the Gambia. I would add only this:

The agreement, by which the respondent was employed by the appellants, which sets out the terms and conditions of his employment and so on is in what

is common form throughout West Africa for the employment by mercantile companies of their storekeepers, clerks and produce buyers. Such agreements have often been put in evidence before the courts. I cannot recollect any case, in my many years upon the Bench, in which a court has held, or in which it was suggested that a court should hold, that such an agreement constituted a yearly hiring. On the contrary they have been held to be terminable on the giving of the notice specified therein.

[COURT OF APPEAL]

FREETOWN COLD STORAGE CO. LTD . . . . *Appellants*

v.

BRIGHT'S CONSTRUCTION AND FLOWER GARDEN CONTRACTORS . . . . . *Respondent*

[Civil Appeal 27/60]

Contract—Breach of contract—measure of damages—Multiplicity of actions.

Appellants and respondent entered into a written contract whereby respondent agreed to do certain work for appellants for the sum of £535 4s. 0d. to be paid in four equal instalments of £133 16s. 0d. each. After respondent had commenced work and received two instalments totalling £267 12s. 0d. appellants discharged him in breach of the contract. Respondent brought suit in the Supreme Court, which gave judgment for them in the amount of £405 11s. 6d. Appellants appealed on the ground, inter alia, that the damages were excessive.

Held, (1) that respondent's damages for breach of the contract should be arrived at by taking the last two instalments of the contract price (£267 12s. 0d.) and subtracting therefrom the cost of hiring 12 labourers at 6s. 4d. each per day for 52 days (£197 12s. 0d.), leaving a total of £70 0s. 0d.;

(2) that, though respondent's claim for £37 9s. 6d. for missing tools was a claim in tort, the trial judge acted properly in entertaining it in order to avoid multiplicity of actions; and

(3) that the trial judge was correct in awarding respondent £50 10s. 0d. for the supply of 101 bags of grass.

Edward J. McCormack for the appellants.
Respondent in person.

BENKA-COKER AG. C.J. In an action instituted in the Supreme Court of Sierra Leone by the above-named respondent, Bright Construction and Flower Garden Contractors (in fact Rowland Mansfield Bright), against the appellants claiming damages for breach of contract the Supreme Court gave judgment for the respondent and awarded the respondent £50 general damages and £355 11s. 6d. special damages, making in all £405 11s. 6d.

The appellants appealed against the said judgment on the following grounds: (i) that the decision is against the weight of evidence; (ii) that the damages are excessive.

On the hearing of the appeal counsel for the appellants by leave of the court added and argued the following ground: *Particulars of misdirection.* The learned trial judge did not award damages on the basis of a quantum meruit as he should have done.

On August 14, 1958, the appellants and the respondent entered into a written agreement whereby the appellants agreed to employ the respondent to carry