R. v. KANYAMA COFFEE.

CRIMINAL APPEAL CASE No. 6 OF 1939.

Careless performance of work by servant—insulting behaviour by servant—termination of contract by employer—whether court has power to deal with wages when contract of service already terminated.

The Employment of Natives Ordinance is now Cap. 171 of the Laws. Subsections 74 (4) and 74 (6) of the Ordinance have now been repealed but no point on these subsections arose on the appeal. An employer terminated the contract of service summarily and it was held on appeal that the Court could not invoke subsections 72 (1) (*c*) or 72 (4) of the Ordinance to deal with the question of wages in such a case as these subsections envisage a contract existing at the time the parties are before the Court.

Robinson, A.C.J.: In this case, the appellant was charged on 22nd February, 1939, before the learned Magistrate at Lusaka with two offences: (1) *contra* section 74 (4) Cap. 62 carelessly perform work, and (2) *contra* section 74 (6) Cap. 62 behave in an insulting manner calculated to provoke a breach of the peace.

The accused person, the appellant, is a cook and was employed at the Lusaka Hotel at a wage of £7 10*s*. per month. On the 22nd January he had been given a month's notice and had been paid up to 31st January. On 11th February, he overboiled some beef and when told about it he became insulting. He was dismissed.

I gather from the accused's evidence that he was offered £2 15*s*. 0*d*. being his wages from 1st to 11th February, but he refused this—saying he had not been given proper notice and wanted wages for a month. Then the complainant went to the police who brought the case.

The learned Magistrate fined the accused 5*s*. on the first charge and 20*s*. on the second charge which fines were subsequently paid. He was also asked to deal with the question of wages and the accused agreed to submit to the Court on the point. The order which the Magistrate made was " Contract terminated. As accused has been paid up to 31st January, 1939, I find no wages are due to him on the ground that he was summarily dismissed for good and lawful cause."

In the undated notice of appeal I gather the appellant has no quarrel with the two convictions as charged but is appealing against the Magistrate's order saying that no wages are due to him. He wants £2 15*s*. 0*d*. for the days he worked, the sum which he had previously refused.

In my opinion the learned Magistrate in these proceedings had no jurisdiction to make the order. The employers had, rightly or wrongly, terminated the contract on the 11th February when they summarily dismissed him. When the case came before the Magistrate therefore on

the 22nd February there was no subsisting contract, but only a possible action for damages for wrongful dismissal. It is that cause of action which the Magistrate has summarily dealt with and purported to make an order of Court.

Cap. 62, section 72 (1) (*c*) is no authority. That subsection envisages a subsisting contract—section 72 (4) relates to the following of civil procedure in certain circumstances, *inter alia*, when the ends of justice may be defeated by forcing the complainant to follow the criminal procedure. But even if this could be called "procedure" who is the complainant (or plaintiff) in this civil cause of action? It is the appellant. In other words the parties have been reversed.

I think probably that the learned Magistrate's short cut represents the final answer but I do not think he was entitled to take it in these proceedings and therefore the appeal is allowed to this extent—the order as cited above must be struck out, which means that the accused is left to his civil remedy. He should be told to think well and take advice before involving himself in a civil action for damages which may incur serious costs.

The notice of appeal should always be dated. It may well be that it was out of time.