



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1384 OF 2002

JOSEPH ILELI KIKUMBU.....PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA.....DEFENDANT

JUDGEMENT

The plaintiff, **Joseph Ileli Kikumbu**, has instituted this suit by way of a plaint dated 19th August 2002 and further amended on 27th July 2009, in which he seeks compensation for lost years as a result of unlawful and wrongful dismissal in breach of the rules of natural justice and Central Bank of Kenya's Staff rules and regulations, loss of income, Kshs. 4,232,403.00 in form of service gratuity, Kshs. 189,696.40 as withheld pension plus interest, damages and costs.

The defendant filed a defence on 6th November 2002 in which it stated that the contract of employment between the plaintiff and the defendant provided for termination of the employment on medical grounds and that during the course of the said employment the plaintiff was frequently indisposed under the care of a psychiatrist resulting in his inability to perform his duties to the satisfaction of the defendant. Accordingly in the exercise of the powers under the said contract the defendant retired the plaintiff and paid him 3 months' salary in lieu of notice together with his pension which the plaintiff accepted. Accordingly the defendant denied allegations of wrongful dismissal as well as the loss claimed to have been suffered by the plaintiff and further pleaded that the claim was time barred under the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

According to the plaintiff he was employed by the defendant in 1981 and worked with the defendant for 15 years and 4 months during which time their relationship was guided by Staff Rules and Regulations. According to him on being transferred to Banking Fraud and Investigation Department of the defendant, the police officers posted thereat instilled fear in him by threatening him with death. It was during this period that according to him people started spreading malicious propaganda and as a result of all these he became sick and had to be hospitalised for 17 days in June 1996 after he was diagnosed with TB. According to him on resumption of his duties, he was placed on inappropriate medication until August 1996 when his services were terminated by retirement on medical grounds. He was thereby given 6 months' notice with half a salary pay which he confirms was pursuant to the said Rules and Regulations. He, however, states that he was not given 3 months' notice without salary payment and that no Board meeting was held to deliberate on his termination. According to him the termination was malicious and breached the said rules and regulations as well as the rules of natural justice since he was not afforded a

representation before the decision was taken. According to him, he was forced to sign a letter by the defendant's Chief Security Officer. He therefore claims service gratuity in the sum of Kshs. 4,232,403.00 with interest for 16 years plus Kshs. 233,548.80 being underpayment on the pension for the said period. As a result of losing his job he lost his wife, children, respect, prospect of employment, income for which compensation he seeks from the defendant. In support of his case the plaintiff produced as exhibits excerpts from the defendant's Staff Rules and Regulations, Letter of Appointment, Letter of Confirmation, Medical Cards, Retirement/Termination letter, Certificate of Long Service and a raft of other correspondences.

In cross examination the plaintiff admitted that the nature of his job as a messenger entailed frequent movements in and out of the office. He further admitted that the police officers who were harassing him were under the Kenya Police.

At the close of the plaintiff's case, **Mr. Chacha Odera** learned counsel for the defendant, informed the court that the defence did not wish to call any evidence. He, however, submitted that whether or not the plaintiff's termination was wrongful the only claim he could make was payment in lieu of notice and would not be entitled to damages for injured feelings and relied on **Wanjohi vs. Mitchell Cotts Kenya Ltd [2002] 2 KLR 462**; **Ombanya vs. Gailey & Roberts Ltd [1974] EA 522**; **Central Bank of Kenya vs. Nkabu [2002] 1 EA 34** and **Sonye vs. Siaya Teachers Co-operative Savings and Credit Society and Another [1999] 2 EA 310**.

According to me the issues for determination in this suit are as follows:

- 1. Whether the plaintiff's employment was unlawfully terminated.**
- 2. What was the plaintiff entitled to as a result of the said termination whether lawful or not.**
- 3. Whether the plaintiff is entitled to any damages.**
- 4. Who should bear the costs of the suit?**

On the first issue, it is clear that the plaintiff was not dismissed from employment but his employment was terminated on health grounds. It is admitted by the plaintiff that he became unwell although he attributes his illness to the treatment meted to him at his place of employment. That may be so. However, the case before me is not a case for damages for mistreatment assuming there is a tort in that nature. In any case as admitted by the plaintiff the mistreatment emanated from persons in the employment of Kenya Police who are not parties to this suit. It is however, contended by the plaintiff that no proper proceedings were carried out in accordance with the defendant's Staff Rules and Regulations. The procedure for compulsory retirement is provided for under Clause 6 of the said provisions. No evidence was adduced to controvert the plaintiff's contention that this procedure was not followed. In the absence of any such evidence the court has no other choice but to believe the plaintiff and hold that the retirement of the plaintiff from the defendant's employment was un-procedural.

The next issue is what is the plaintiff entitled to as a result thereof? The law with respect to the quantum of damages payable to an employee who is wrongfully dismissed is now well settled in this jurisdiction. When the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause regardless of the nature of the employment. Following the unlawful termination of such service contract there is then breach of that contract and the measure of compensation or indemnity or general damages or special damages is the loss the employee would incur during the stipulated period of the termination clause or Notice. No account is ever taken of injured feelings of the employee by the nature of the termination of his employment nor that the termination renders it difficult for the employee to obtain alternative employment since the overriding principle in such contracts as in compensation claims generally is that a party should mitigate his losses. In other words damages for wrongful dismissal are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with the terms by giving either the proper notice or salary in lieu thereof. General damages, in the strict sense, is never recoverable in such

matters. See **Wanjohi vs. Mitchell Cotts** (Supra).

The foregoing principles may appear to be unjust when it is taken into account that in most developing countries the bargaining power between the employer and the employee is never quite equal. In most cases the employee does not have the ability to hammer out the terms which he deems satisfactory to him and takes the contract as presented by the employer since he has little choice and say in the matter any way. These principles were developed at the time of the coming of the free market economy or *laissez faire*. Before this period (the serfdom era) an employee was deemed as the property of the employer and hence the idea of contracts of employment as opposed to contracts for employment were largely non-existent. With the coming of the free market economy it was necessary that labour be not only freed from serfdom but similarly be liberalised just like in other sectors of the economy so that the employees would be free to offer their services to the employers as and when they felt with an option of terminating the resulting relationship. It was a further recognition of the fact that in the event of breakdown in relationship between an employer and an employee especially in contracts of personal service, it may not be possible for courts to enforce the same. Just as the Courts would not force an employee to render his services to an employer he does not like, similarly courts would not compel an employer to retain in his service an employee against his wishes. Therefore parties were left to hammer out terms suitable to them with a minimal regulation by way of legislation.

In the present case the defendant's Staff Rules and Regulations at clause 6.8 stated as follows:

“In all cases where it is decided to retire an employee in public interest or on grounds of ill health, the Bank shall endeavour to give the employee concerned as much notice as practicable but in all cases the Bank shall give a notice of not more than six months and not less than four months”.

In the instant case the letter of retirement on health grounds dated 15th August 1996 clearly indicated that on termination the plaintiff would be paid four months' salary in lieu of notice. I have not heard the plaintiff complain that he was not so paid. In fact there is no claim in the further amended plaint for salary in lieu of notice. The defendant was enjoined to give a maximum of 6 months' notice and a minimum of four months' notice. That it decided to apply the minimum period of notice stipulated cannot render the notice unlawful since that was an exercise of discretion.

The plaintiff has also claimed a sum in respect of underpayment in form of pension. Regrettably no evidence was adduced in form of documents to prove what the plaintiff was earning *vis a vis* what he was actually entitled to earn. The burden in this kind of cases rests on the plaintiff on a balance of probabilities.

I, accordingly find that the plaintiff was entitled to 4 months' notice or salary in lieu thereof which he was paid and hence is not entitled to damages sought.

In the foregoing premises, the plaintiff's case fails and is dismissed but, in the circumstances of this case, with no order as to costs.

Judgment read, signed and delivered in court this 28th day of May 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Plaintiff present in person

No appearance for Defendant