



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J)

CIVIL APPEAL NO. 13 OF 2010

-BETWEEN-

KENNETH KASEMO KARISA.....APPELLANT

-AND-

KENYA BUREAU OF STANDARDS.....RESPONDENT

(Being an appeal From the Judgment of Senior Principal Magistrate Ms. L. Mutende

dated 19th January, 2010 in Mombasa CMCCC NO. 13 of 2010)

JUDGMENT

In a labour dispute case, the plaintiff/appellant had sought a declaration that the defendant unlawfully and/or illegally retired him on **8th April, 2005** instead of **20th January, 2006** and as such, the plaintiff was entitled to all his dues and benefits from the defendant up to and including **20th January, 2006** amounting to Kshs.1,553,221/75.

The learned Senior Principal Magistrate recorded, from the evidence, that the plaintiff had been notified by the defendant's Managing Director that he would retire at the age of 55 years, in accordance with the terms of the staff pension scheme. The defendant, however, decided to retire the plaintiff earlier, in accordance with the Government Code of Regulations which provided that an officer could be required to retire at any time after attaining the age of 50 years, without any cause being assigned.

The plaintiff was subject to the Staff Regulations governing the staff of the Kenya Bureau of Standards,

which were silent on the issue of retirement under the 50-year rule.

The learned Magistrate held that the plaintiff had failed to prove his case on a balance of probabilities, and dismissed his suit.

Being dissatisfied, the plaintiff filed his memorandum of appeal on **27th January, 2010** asking that the Judgment of **19th January, 2010** and the decree, be set aside. The appellant asked for Judgment against the respondent, in the sum of Kshs.1,141,831/80 with costs and interest.

Learned counsel, **Mr. Mrima** who urged the appeal case, stated as background material, that the appellant had been employed by the respondent in 1982, as Quality Control Officer (Chemical), and had served under probation before being confirmed as an employee on permanent and pensionable terms. The appellant rose to the rank of Senior Principal Quality Assurance Officer, on a gross salary of Kshs.109,880/-, based at the Mombasa Regional Office. On **29th March, 2005** the respondent wrote a letter to the appellant, retiring him.

The letter of **29th March, 2005** reads (in part) as follows:

“According to the records held in this office, you will attain the mandatory retirement period of 55 years on 21st January, 2006. This is as stipulated by our Staff Pension Scheme.

“You are therefore, as required, given notice of one year to retire from the service of Kenya Bureau of Standards. This notice is with effect from 21st January, 2005.

“You will be paid salary up to and including 20th

January, 2006. You will also be entitled to the NSSF benefits as contributed by you up to the last month of retirement.”

Although the said letter was not withdrawn, the defendant decided to retire the appellant earlier, under a Government fifty-year rule; a letter to this effect, dated **8th April, 2005** was dispatched to the appellant:

“This is to inform you that the Board has decided to retire you with immediate effect, pursuant to the Kenya Government Code of Regulations”

It was the appellant’s evidence that, without any notice, the respondent proceeded to prepare final dues in his name: and he was given one-month’s salary in lieu of notice. Being dissatisfied, the appellant formulated his claim, by way of his Advocate’s letter of **28th June, 2005**; but as this claim went unanswered, the appellant proceeded to file suit.

Learned counsel submitted that the appeal is centered around the first letter regarding retirement, of **29th March, 2005**. Of this letter which had been addressed to the appellant, the learned Magistrate had held:

“The defendant had written to the plaintiff on 29th March, 2005 notifying him of the fact that he was due to retire. An interpretation of the letter clearly shows it was a reminder that his services [were] to be terminated in a year’s time. This cannot be viewed [as] a notice of retirement pursuant to the contract of service he had with the defendant”

Counsel submitted that there was no formal letter of employment; and therefore the terms of service are to be gleaned from the several letters and from the respondent’s Staff Regulations which provided for the Staff Pension Scheme.

Counsel submitted that the respondent’s witness (DW1) had, on cross-examination, admitted that there is a distinction between **termination** of employment, **dismissal**, and **retirement**, by the terms of the Staff Regulations (which the respondent failed to lay before the Court). In this scenario, what was the appellant’s position? DW1 said:

“There is a distinction between termination, dismissal and retirement. [The subject in this case] is retirement. It is different from summary dismissal.”

The said distinction is the basis of the appellant’s case – a question of **interpretation**. Counsel invoked the definition of this word in **Halsbury’s Laws of England**, 3rd ed. Vol. 36 (para. 585):

“If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning”.

In the same work (para. 582) the following passage appears:

“Where the main object and intention of a statute are clear, it should not be reduced to a nullity by a literal following of language which may be due to want of skill or knowledge on the part of the draftsman”

On the basis of such guide to interpretation, learned counsel urged that the defendant’s letter of **29th March, 2005** to the plaintiff was about **retirement**; the appellant, by the Staff Pension Scheme, was required to retire at the age of 55 years; the appellant was attaining retirement age on **21st January, 2006**; under the Staff Pension Scheme, the respondent was required to give a one-year retirement notice; the appellant was to continue working with the respondent while serving the notice period up to and including **20th January, 2006**.

It was the appellant’s grievance that the letter retiring him was unrelated to the one-year reminder; it was simply to retire the applicant. In so far as the letter only spoke of **retirement**, it was not a reminder; so ***“the Subordinate Court erred in holding that the said letter [of 8th April, 2005] was a reminder that the services of the appellant were to be terminated in a year’s time and not a notice of retirement”.***

Counsel urged that the trial Court misdirected itself, in going ***“out of the clear and obvious content of the said letter and [importing] the issue of termination”***

Counsel submitted that the trial Court ***“further erred in believing the evidence of DW1 ... whose evidence tended to amend and/or modify the plain and obvious language used in the letter.”***

Counsel urged that, as the trial Court had rightly held that the respondent could not purport to retire the appellant under the 50-year rule, that Court should have held that the appellant should have been retired in accordance with the Staff Pension Scheme under the Staff Regulations: and so he would be entitled to the earnings applicable to the *notice period*, up to **20th January, 2006**, in the sum of **Kshs.1,141,831/80**.

Learned counsel, **Mr. Nyende** for the respondent entered upon his submissions by declaring that “*the respondent vehemently opposes the appeal*”, and he went on to urge that:

(i) the Judgment, reasons and finding of the trial Court are to be upheld;

(ii) the evidence and submissions made in the trial Court are for sustaining;

(iii) the Judgment had upheld the contractual arrangements between the appellant and the respondent;

(iv) “it is trite law that damages in a contract of employment is restricted to the period of notice under the contract of employment”.

Counsel presented the issues for determination as follows:

(a) was the respondent’s “early retirement and termination of his contract of employment with the appellant” wrongful or illegal?

(b) what was the effect and import of the letter dated 29th March, 2005?

(c) What remedy in law accrues to an employee who has unlawfully been retired and/or terminated, in terms of damages?

Counsel urged that the respondent wrote to the appellant notifying him that he was due to retire in a year’s time (letter of **29th March, 2005**); but later on, the respondent decided to retire the appellant under the fifty-year rule (letter of **8th April, 2005**).

What was the import of the two letters from the respondent to the appellant? Counsel considered the two letters to have been consistent in every respect; in his words:

“We wholly agree with the finding of the trial Magistrate that the two letters dated 29th March, 2005 and 8th April, 2005 did not contradict each other or vary the terms of the contract of employment. The letter dated 29th March, 2005 was merely a reminder that the appellant’s employment was due to be terminated in a year’s time. This cannot be viewed as a notice of retirement pursuant to the contract of service as the appellant submits.”

Counsel urged that the appellant’s terms of employment (set out in the letters of appointment and confirmation) “*clearly stipulated that either party may terminate the contract of employment by payment*

of one (1) month's salary in lieu of notice". Counsel, on this point, cited with approval a passage in the learned Magistrate's Judgment:

"In this case since the staff regulations that were [binding] on both the plaintiff and the defendant were silent on retirement under [the fifty-year] Rule, we can only be guided by the terms of employment that the plaintiff accepted on being confirmed in employment. The confirmation letter states as follows:

'Except on disciplinary matters in the Staff Regulations that may call for summary dismissal from the service of the Bureau, the Director shall give a month's notice or one month's salary in lieu of notice on wishing to terminate your services with the Bureau'

The defendant in a mistaken belief that they were acting under the Government of Kenya Code of Regulations did give the plaintiff six (6) months' salary in lieu of notice.

"This was more than the mandatory one month's salary in lieu of notice. He, therefore, should not have had any claim whatsoever against the defendant."

Counsel submitted that the defendant's letter of **29th March, 2005** was "merely a notice of the appellant [pending] retirement and did not vary or affect the termination notice period of one month as **per** the contract of employment". Counsel's stand, it appears, is that the appellant's grievance is merely hypothetical, because "the appellant was paid six months' salary **in lieu** of notice which was more than one month's salary stipulated in the terms of the contract of employment."

Counsel urged that the appellant was not entitled to damages; because –

"The position in law is well settled that in contracts of employment quantum of damages is limited or equivalent to the notice period of termination (i.e., the payment in lieu of notice). In this case the period of notice was one (1) month whereas the appellant was paid [for] six months in lieu of notice"

Counsel cited as authority certain decisions of the Court of Appeal. One of these is **Kenya Ports Authority v. Edward Otieno**, Mombasa Civ. Appeal No. 120 of 1997, and here, counsel relied on the following passage:

"The other ground of appeal is whether Mr. Otieno was, in law, entitled to be awarded by way of damages for the loss of salary, medical allowance, housing allowance, leave allowance, mileage claim, telephone allowance and services as claimed by him. In our judgment, where, as in the instant case, a contract of service includes a period of termination of employment, the damages suffered are the wages for the period during which his normal notice would have been correct."

Counsel next relied on a recent decision of the Court of Appeal, **Kenya Revenue Authority v. Menginya Salim Murgani**, Civ. Appeal No. 108 of 2009; and from that decision on a tort and contract case, counsel invoked the following passages:

(i) ***"There are clear past decisions of this Court that even where dismissal or termination is wrongful, the damages payable to the employee is the salary which would have been paid in lieu of notice"***

(ii) ***"On the issue of ... quantum of damages awarded the superior court was not justified in awarding general damages in respect of an alleged breach of contract of service. By so doing, the***

superior court overlooked a long line of authorities cited to it by the appellant counsel touching on this well trodden area of law.”

Counsel urged the appellant’s case as a simple contract-of-employment case, just as the Court of Appeal perceived the employment condition in the ***Menginya Salim Murgani*** case, and consequently submitted that, that case carried a legal principle in support of the contention that “*even [assuming] the appellant was [wrongfully] retired/terminated he was entitled to only one ... month’s salary in lieu of notice as provided in the contract of employment*”.

Counsel submitted that the basis of the employment contract between the appellant and the respondent was set in ***two letters***: letter of ***appointment***, and letter of ***promotion***. It was not true as alleged by the appellant, counsel urged, that “*there was no formal letter of employment between the parties*”; and the appellant should not refer to the respondent’s Staff Regulations and Pension Scheme – for they were not produced in evidence. Learned counsel submitted that the distinction being drawn between “*termination*”, “*dismissal*” and “*retirement*” will not avail the appellant; for “*to terminate, dismiss or retire [each amounts] to bringing to an end a contract of employment in the circumstances*”.

The appellant’s case revolves around the contract of employment, the basic elements of which are to be found in certain documents brought before the Court as exhibits.

By a letter of ***10th August, 2000*** the respondent promoted the appellant to the rank of Senior Principal Quality Assurance Officer, and the letter sets out the basic terms of the contract of employment under the new grading:

“The salary attached to this position is BE4 in the scale K£14,520 x 414 – 15,348 x 465 – 17,208 x 585 – 19,548 x 602 – 20,151 p.a.”

These terms of service were additional to the terms set out in the original letter of appointment. The said letter of appointment which is dated ***30th November, 1982*** does not set out comprehensive terms of service, but ***refers to yet another set of arrangements*** which, therefore, is to be assumed to be part and parcel of the totality of the contract of employment; the relevant paragraph of the appointment letter thus reads:

“You will be subject to all regulations governing the staff of the [Kenya Bureau of Standards] which are in force at the time of your appointment and any amendments to those Regulations as may be made from time to time.”

It is noted that, even though a crucial aspect of the contract of employment is clearly embedded in “*all regulations governing the staff of the [respondent] which are in force*”, the appointment is silent on: the custodian of those regulations; whether these regulations have been availed to the employee; where these regulations are to be accessed.

The respondent had written to the appellant a letter of confirmation of appointment, dated ***20th June 1984*** which also made reference to the important element of the contract above-mentioned; the relevant paragraph reads:

“You will be eligible to the Staff Retirement Benefits as spelt out in the Staff Regulations.”

Again, the custody of the said Staff Retirement benefits, or of the Staff Regulations, is not indicated; and it is not stated that the appellant is possessed of copies. Thus, the exact format of such “*other*” contractual terms remain unclear to this Court.

The letter of confirmation carries yet another element of the contract as regards **termination of service**; the relevant paragraph may be set out here:

“Except on disciplinary matters in the Staff Regulations that may call for summary dismissal from the service of the [respondent], the Director shall give a month’s notice or one month’s salary in lieu of notice on wishing to terminate your services; you shall give the Director one month’s notice of such intention or one month’s salary in lieu of notice.”

Although counsel for the respondent urged that the appellant’s submissions founded on Staff Retirement Benefits and Staff Regulations should be excluded on the ground that **the appellant did not exhibit those instruments**, such a position should not be accepted. For the respondent is, as a matter of **judicial notice**, to be regarded as being the primary custodian of such employment- instruments. And as the respondent too has referred to such instruments as an element in the contract, this confirms that they indeed **are** part of the contract as submitted by the appellant. Besides, if there is a vagueness in the said contract, then, by the **contra proferentem** rule [*“The doctrine that, in interpreting documents, ambiguities are to be construed unfavourably to the drafter”*: **Black’s Law Dictionary**, 8th ed., p. 352], the valid perception on the documents forming the contract is that of the appellant.

The real dispute before the Court is whether the trial Court’s Judgment of **19th January, 2010** contained a misconstrual of contract-instruments which occasioned **financial loss** to the appellant. It is not, in my opinion, material whether there is a perception of the appellant’s cessation of employment as “retirement”, “termination” or anything else.

The appellant, by the applicable contractual documents, was due for retirement on **21st January, 2006** at the age of 55 years. The respondent’s letter of **29th March, 2005** stated as much: “You will be paid salary up to and including 20th January, 2006”

The appellant’s argument regarding the mode of cessation of employment, has struck this Court as rather unusual:

“... it is very clear ... that there exists a clear-cut distinction between termination, summary dismissal and retirement”

Counsel went on to contest the trial Court’s finding purely on the basis of the alleged distinction:

“... the Subordinate Court erred in holding that the said letter [of 29th March, 2005] was a reminder that the services of the appellant were to be terminated in a year’s time and not a notice of retirement”.

Although it is not shown how the statement by the respondent of the date of cessation of employment as **21st January, 2006** subtracted from the dues which would have been payable as at that date, the appellant has endeavoured to make a case for **damages**; and this is how counsel does it:

“... the appellant was to be retired as per the Staff Regulations and be entitled to the earnings he would have earned during the notice period, that is up to the 20th January, 2006 amounting to a total of Kshs.1,141,831/80. The court instead treated the matter as a normal termination and that is why we do seek the setting aside of the Judgment”

This is a rather interesting appeal in one aspect: it is founded purely on the crafting of one letter which recorded the cessation of employment by the appellant. The appellant has not claimed that he ceased to be

in employment before the due date; but he asserts that the **words** used in the letter occasioning cessation, had the effect of denying him some money.

But such a conclusion made by the appellant is not an obvious one, and its logic is unclear. Therefore, there was a substantial duty resting on the appellant to prove his case, and to show how such a case flowed from an **error of law** or **fact**, on the part of the trial Court. Without such proof, no good case is made for an appeal; and it becomes the duty of this Court to uphold the trial process in the trial Court.

As the justification for this appeal has not become manifest, I hereby dismiss the same, and uphold the outcome in the trial Court. The appellant shall bear the respondent's costs.

SIGNED AT MOMBASA

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J.B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 22nd day of July, 2011.

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M.A. ODERO

JUDGE