



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO 424 OF 2006

JOHN DANSON KIBINDA.....
PLAINTIFF
VERSUS
UNIVERSITY OF NAIROBI.....
.....DEFENDANT

JUDGMENT

The Plaintiff herein was employed by the Defendant in the Department of Chemistry since 1973. The Plaintiff's claim is specified in paragraph 4 of the Plaintiff dated 26th April, 2006; namely

4. The Plaintiff aver (sic) that according to the Defendants letter dated 5th January, 2004, the Plaintiff attained the retirement age of 60 years on the 19th September, 2004 when the Defendants terminated the Plaintiff from employment contrary to clause 20 (b) of the terms and conditions of service which stipulates that "a member of staff who reaches retirement age will be required to cease duty on the next 30th June following the date that he attains retirement age".

As per paragraph 5 of the plaintiff, the Plaintiff has claimed for 'salaries arrears and allowances and any other benefits which accrued from 19th September, 2004'.

With the above averments the Plaintiff has asked for the following prayers:

- i. A declaration that termination/retirement of the plaintiff's employment on the 19th September 2004 was illegal null and void and in flagrant violations of clause 20 (b) of the agreed terms and conditions of service duly executed by the Defendant and the Plaintiff.**
- ii. A declaration that the Plaintiff is entitled to be paid salary arrears and allowances and terminal benefits which were omitted and any benefit which accrued after or before 19th day of September 2004 and not yet paid.**
- iii. Interests on (ii) above from the date of filing suit.**
- iv. Costs of the suit and interests thereon.**
- v. Any other or further relief which the Honourable Court deems just to give in the circumstances of this court.**

The Defendant's Defence having admitted the contents of paragraph 4 of the Plaintiff, an interlocutory judgment was entered against it and the suit came for formal proof before this court.

The Plaintiff testified that as a result of unlawful termination of his employment, he suffered in terms of loss of salaries, housing allowances, medical support, leave, opportunity of progression of his children (sic), had undergone stress and frustrations, shortening of his life, suffering from blood sugar and high blood pressure. He further testified that he was unable to pay his debts due to the abrupt stoppage of his salary.

In further support of his claim, he testified that at the time of termination of his service, he was earning monthly salary of Ksh.106,000/= which included house allowance, medical, dental and optical cover for the whole family. He then rectified and stated that he was paid ksh.105,123/= per month inclusive of house allowance. He further claimed that he was supposed to be working till he attained the age of 70 years and calculated his dues against the Defendant in the sum of Ksh.32,282,150/= as loss of earnings, Kshs.1,000,000/= for suffering and inability to meet daily needs (sic) and pension as per the pension scheme of the Defendant. He admitted that he was paid Kshs.1,300,000/= but stated that he was supposed to be paid Ksh.4,000,000/=.

The above was the evidence adduced by the Plaintiff. The Defendant neither cross-examined the Plaintiff, nor adduced any evidence.

I may note at this stage that the Plaintiff did not produce any documents to substantiate the claims made by him in his evidence. I can also mention that the claim of the Plaintiff is averred in paragraph 5 of the Plaintiff and the prayers have been made. I have specified the same in earlier part of this judgment. I may reiterate that prayer no. 1 was granted as per admission by the Defendant's contents of paragraph 4 of the Plaintiff.

Both the counsel filed written submissions. Mr. Ngoge, the learned counsel for the Plaintiff relied on the evidence, the economic, social and culture rights granted to humanity under the Universal Declaration of Human Rights which *aims* at giving all people "*freedom from fear and want*". Chapter IV of our Constitution was also relied upon, which directs the State to make provisions for such rights of the people of Kenya. According to him the law of employment developed by our courts including the Court of Appeal are overtaken by the aforesaid provisions. He emphasized that as the Defendant has admitted liability the compensatory damages as per those rights have become equitable rights and the court cannot but accept that a wrong follows the remedy. He urged that Ksh.1,000,000/= be accordingly granted.

Mr. Kipkorir, the learned counsel for the Defendant submitted that the Plaintiff has specified the claims and prayers in the Plaintiff and as per the trite law of evidence the burden of proof for the claims lies on the Plaintiff. Similarly the law of proof of special damages has been very well established and has become trite which stipulates that the special damages must be pleaded specifically and must be strictly proved.

It was emphasized that the claim of Ksh.32, 282,150/= has neither been pleaded nor proved. The claim of the Plaintiff was that he was unlawfully retired on 19th Sept, 2004 (when he attained the age of 60) instead of on 30th June, 2005. But in his evidence he is claiming the dues upto the age of 70. He cannot amend the Plaintiff either in evidence or in submissions it was contended.

Lastly the well established law of damages for unlawful termination of contractual employment was reiterated by the counsel for the Defendant.

Several authorities to substantiate the above submissions proffered were cited. I do not think that the same be mentioned as they reiterate the well established principles of law.

I do note and find that this is the claim arising out of a private contract of employment. The Defendant has admitted the contents of the Plaintiff as averred in paragraph 4 thereof. The interlocutory judgment accordingly was entered. The parties thus are bound by their respective pleadings, unless amended. I shall accordingly proceed to determine this suit.

The evidence from the Plaintiff though not controverted by the Defendant cannot be allowed to become wider than what is pleaded in the Plaintiff. The defendant, having admitted paragraph 4 of the Plaintiff, it is liable to pay the dues of the Plaintiff upto and including 30th June, 2005. The Plaintiff has testified that his total salary as at the time of retirement letter, was Ksh.105,123/=. This figure was not disputed.

The Plaintiff has not substantiated his claim of extension of his service period till 70 years, as well as his other damages testified in his testimony. This court cannot consider the same or grant them even if, the emotional submissions on the human rights of the Plaintiff be taken into account. I may however place my view on record that the contractual obligations have to be considered within the ambit of the specific contract unless there are stipulated and proved facts before the court. Unfortunately I do not have them.

Doing my best, I find that the Defendant is liable to pay the undisputed sum of Ksh.105,123/= per month from October 2004 to 30th June, 2005 making the total of Ksh.946,107/= the defendant having admitted paragraph 4 of the Plaintiff.

The Plaintiff has conceded the payment of Kshs.1,300,000/= and without any evidence from either side, I cannot surmise the details thereof. Let it be recorded as paid sum for dues. I must admit that the matter became confused due to the admission and Interlocutory Judgment entered which was not upset.

I enter the judgment for the Plaintiff in the said sum of Kshs.946,107/=. The Plaintiff shall have the cost and interest thereon.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of **October, 2011**

K. H. RAWAL
JUDGE
28.10.2011