



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial Suit 94 of 2006

JOSEPH SITATI NATO PLAINTIFF

VERSUS

KENYA PORTS

AUTHORITY.....DEFENDANT

JUDGEMENT

The Plaintiff herein **JOSEPH SITATI NATO** filed this suit on 27th May 2005 against the Defendants **KENYA PORTS AUTHORITY** seeking the following orders:-

- a) *A declaration that the dismissal of the Plaintiff from service by the Defendant was wrongful and/or unlawful*
- b) *Kshs.2,910,218.80*
- c) *Damages for wrongful dismissal*
- d) *A permanent injunction restraining the Defendant by itself, its agents and/or servants from repossessing, divesting and/or in any other manner whatsoever interfering with the Plaintiff's possession of motor vehicle registration No. KAQ 297 SUBARU LEGACY*

- e) *Costs of this suit*
- f) *Interest on (b) (c) and (e) above at court rates*
- g) *Any other and/or further relief this honourable court may deem fit and just to grant.”*

The Defendant on their part having been duly served did enter appearance on 16th June 2005 and proceeded to file their defence dated 30th June 2005 on instant date in which defence, the Defendant prayed for the dismissal of the Plaintiff's suit against them in its entirety.

The brief facts of this case are as follows. The Plaintiff was an employee of the Defendant having been appointed as a clerk in the substantive grade of **PA10**. He remained in the employment of the Defendant authority, and rose through the ranks to the position of Assistant Superintendent Grade **HM4**. On 10th February, 2004 the Defendants served on the Plaintiff a letter of dismissal effectively terminating his services with them. About two (2) months later on 29th April 2004 the Defendants served upon the Plaintiff a letter of interdiction. This was in my own view strange as the normal sequence of events is that one is served with a letter of interdiction followed by a dismissal letter not the other way round. Nevertheless there can be no doubt whatsoever that the clear intent of the Defendant was to terminate the Plaintiff's services with them. The Plaintiff who was represented in this suit by Mr. Oguk advocate gave evidence on his own behalf and called no witnesses. The Defendants who were represented by Mr. Sangoro called two witnesses in support of their defence. The Plaintiff did make a number of prayers in his plaint dated 26th May 2005 as have been earlier alluded to in this judgement. However at the hearing of the suit the Plaintiff did indicate through his advocate that he was abandoning prayer (d) of the plaint, seeking a permanent injunction with respect to the motor vehicle registration No. **KAQ 297Q** as issues pertaining the said vehicle had been settled by the parties before the suit came up for hearing. As such I will not deal with prayer (d) of the plaint. In prayer (a) the Plaintiff seeks from this court –

“a declaration that the dismissal of the Plaintiff from services by the Defendant was wrongful and/or unlawful.”

The fact that the Plaintiff was a bona fide employee of the Defendant Authority is not in any doubt at all. In his testimony the Plaintiff told the court that he was first employed by Kenya Cargo Handling Services on 15th January 1983 by way of a letter of appointment dated 3rd February 1983. He produces a copy of this letter as an exhibit **Pexb1**. Later the Kenya Cargo Handling Services Limited was merged with Kenya Ports Authority and the Plaintiff 's services were duly transferred to the latter who issued him with an appointment letter dated 29th December 1987. This letter is also produced before court by the Plaintiff as an exhibit **Pexb2**. The fact that the Plaintiff was indeed an employee of the Defendant is confirmed by **DW1 MARCO MULWA NGOLIA** who works as a Personnel Officer with the Defendant Authority. He confirms that the Plaintiff **“used to work”** for the Defendant. Therefore I find as a fact that indeed the Plaintiff was a bona fide employee of the Defendant Authority during the material time and I find further that as the Plaintiff informed the court in his evidence he was engaged on **“permanent and pensionable terms”**.

The bone of contention between the parties which led to the institution of this suit by the Plaintiff against the Defendant was the dismissal of the Plaintiff from the Defendant Authority as per the terms of the dismissal letter dated 10th February 2004 which was served on the Plaintiff. The Plaintiff confirms having received this dismissal letter. The said dismissal letter was produced as an exhibit in court **Pexb3** and it reads in part:-

“You will recall that you were interdicted from duty following a report that you wrongly issued a Transshipment Permit for container No. ITLU-7224851 to Somalia vide Shipping Order No. 16. You irregularly issued transshipment permit for entire container containing 29 pallets instead of 3 pallets as indicated on the manifest.

The committee investigating your case established that you were guilty of gross misconduct as charged. Consequently, management is of the opinion that you have lost interest in your work and have become more of a liability than an asset to the Authority.

Accordingly, and pursuant to section G. 8 of the Revised Staff Regulations 2002 and CAP 226, Section 17(c), it has been decided that

*you be **DISMISSED** from the services of the authority with immediate effect.”*

At the outset I do note that this dismissal letter refers to an earlier interdiction. In actual fact by the date of this dismissal letter i.e. 10th February 2004 no letter of interdiction had been served on the Plaintiff. The letter of interdiction exhibited in court **Pexb4** was dated 29th April 2004 a full two and a half months **AFTER** his dismissal from service. I will comment more on this later on.

The reason given for the dismissal of the Plaintiff was the irregular issuance of a transshipment permit which resulted in the release of a whole container with 29 pallets from the port as opposed to the release of only 3 pallets which ought to have been the case. On his part the Plaintiff terms his dismissal unlawful and/or wrongful and strenuously denies having irregularly issued such a transshipment permit as claimed. The transshipment permit in question was produced before court as an exhibit **Pexb5**. It is dated 22nd **January 2004** bearing serial number **22/01/061** and is addressed to **M/S OCEANFREIGHT E.A. LTD**. The permit refers to Bill of Lading **MSCUD3514710**. The Plaintiff readily accepts having signed this document for and on behalf of one S.O. Achola the Superintendent Exports who was away on leave. He identifies his signature on the document **Pexb5**. The Plaintiff explained to the court that what he did was correct and procedural. He further explained that it is not the transshipment permit that authorizes release of the goods from the port. The release of the goods is facilitated by the shipping order. In this case the shipping order was prepared by the agent **ISSA TRADING & PROVISIONS LIMITED** bearing serial number **0389** and refers to the same container as that in the transshipment permit signed by the Plaintiff i.e. container No. **ITLU 7224851**. The shipping order was also produced as an exhibit in this case **Pexb8**. A look at this shipping order clearly indicates that the cargo to be released to the agent consisted of **“three pallets of soft drinks.”** The Plaintiff further testifies that the error which led to the release of the whole container consisting of 29 pallets, occurred not in his section, which was the container terminal, but that the said error was made by one Rose Khisa a clerk in the Export Section. The Standard Shipping Order **Pexb9** allegedly prepared by Rose Khisa indicated that the entire container No. ITLU 7224851 and all its

contents 29 pallets were to be released. This document is clearly contrary to the transshipment permit signed by the Plaintiff **Pexb5** and the standard shipping document **Pexb8** both of which correctly indicated that only three (3) pallets were to be offloaded.

All these relevant documents have been produced in court and have been identified by the Plaintiff. I have carefully perused the same. It is clear to me that the cause of the error which led to the release of the 29 pallets as opposed to three was the erroneous entry made in the Standard Shipping Order **Pexb9**. Was it the Plaintiff who made this erroneous entry? He insists that it was not. On their part the Defendant Authority have not called any evidence to rebut the Plaintiff's testimony in this regard. Both defence witnesses only gave evidence on the procedures to be used in dismissing an employee. None of them was able to shed any light on the process used to release cargo from the port. More to the point the Defendant Authority have not called even one witness to testify that the erroneous entry was actually made by the Plaintiff. Further neither **DW1** nor **DW2** denied that the said Rose Khisa mentioned by the Plaintiff was actually the export tally clerk who had prepared the misleading document **Pexb9**, which led to the stripping of the entire container instead of the removal of only three pallets. The document which the Plaintiff did actually sign **Pexb5** made no mention of 29 pallets – it only referred to the container. The very loud silence by the Defendant Authority on this point is very telling. How did they finger the Plaintiff for blame and ultimate dismissal yet it was not he who prepared the offending document. The Plaintiff confirms that the said Rose Khisa is still an employee of the Defendant Authority. No action was taken against her. By an internal memo dated 5th February 2004 [No. 16A in the Plaintiff's bundle of documents] the superintendent remarks that –

“Due to unclear circumstances [my emphasis] the whole cargo from the container was stripped and loaded in full instead of loading only the 3 pallets as indicated in both the shipping order”

This memo was written only five days before the Plaintiff was dismissed. At what point and how did the matter move from being “**unclear**” to pin-pointing the Plaintiff as the cause of the error. The Defendant Authority have made absolutely no attempt to controvert the Plaintiff's testimony as to what had occurred with respect to this container. Indeed the

Committee of Appeal set up to hear the Plaintiff's appeal against his dismissal which committee was set up by the Defendant Authority itself, gave its report dated 19th August 2008. This Committee of Appeal exonerated the Plaintiff from any wrongdoing with respect to this incident. At page 3 of their report the Committee of Appeal states thus:-

“In view of the above observations and owing to the fact that the Committee of Appeal has exonerated Mr. Nato of any wrongdoing in the matter of wrong transmission permit for container No. TTLU 7224851, it is our opinion that there is no justifiable reasons to retire him in the public interest.”

If a committee constituted by the Defendant Authority itself found no evidence of wrongdoing on the part of the Plaintiff then how can his dismissal be said to be proper? To my mind it would appear that the Plaintiff was chosen as a scapegoat for this error when in actual fact he was totally innocent of the same. Whilst I do concede that an employer may dismiss an employee at any time, based on the reasons given by the Defendant Authority in their dismissal letter addressed to the Plaintiff I find their dismissal of the Plaintiff to have been totally unsubstantiated, unfair and therefore wrongful.

The fact that the Plaintiff's dismissal was not bona fide is further evidenced by the manner in which it was done. As stated earlier the Plaintiff was served with a dismissal letter dated 10th February 2004. This letter referred to his earlier interdiction yet the letter of interdiction was dated 29th April 2004 two and a half months **after** his dismissal. There clearly was some unholy haste to get rid of the Plaintiff so much so that the ridiculous situation of his being served with a letter of interdiction well after his letter of dismissal was left to occur. There was clearly a very poor attempt to legitimize the Plaintiff's dismissal long after it had occurred.

The Defendant Authority could well argue that the Plaintiff was accorded due process before he was eventually dismissed. He appealed against his dismissal and the Authority constituted a committee to hear his appeal. This Committee of Appeal heard the matter and finally exonerated the Plaintiff of all wrong-doing and made in addition the following recommendations –

- “(i) The approval to retire Mr. Nato [the Plaintiff] be lifted**
(ii) That Mr. Nato be reinstated with effect from the current date
(iii) That the period of dismissal be treat as unpaid leave”

However despite this finding by the Committee of Appeal and even despite their exoneration of the Plaintiff, their decision was overruled by the Managing Director who said he found no merit in the appeal and proceeded to uphold the dismissal of the Plaintiff. One wonders why the Managing Director bothered to set up a Committee of Appeal only to later ignore its findings. No basis is given for this decision of the Managing Director. The reason given for the Plaintiffs dismissal was wrongdoing with respect to the release of the 29 pallets. A Committee of Appeal found no wrong-doing on his part. No other charge was laid against the Plaintiff’s door. Whilst it is true that the Managing Director may have had the authority to overrule the Committee of Appeals decision, he should not act arbitrarily in doing so. Once the reason given for dismissal fell through then unless there was another reason to dismiss the Plaintiff then he ought to have been reinstated as recommended. The Managing Director should not be allowed to act arbitrarily to dismiss employees. I find that the decision of the Managing Director to uphold the Plaintiffs dismissal, even despite the Committee of Appeal recommending his reinstatement to be baseless, unfounded and arbitrary. The court will not support such actions. In my view the dismissal of the Plaintiff was in the circumstances wrongful and as a court I so declare.

By prayer (b) of his plaint the Plaintiff seeks the sum of Kshs.2,910,218.80 as his rightful and lawful terminal benefits. This claim is broken down by the Plaintiff as follows:-

- | | | |
|---|---|------------------|
| (a) Unpaid salary for the month of February 2005 | - | Kshs. 35,690.00 |
| (b) Unpaid House Allowance for The month of February 2005 | - | Kshs. 15,000.00 |
| (c) Three months salary in lieu of Notice | - | Kshs. 101,550.00 |

(d) Outstanding leave for 18 days	-	Kshs. 20,310.00
(e) Leave allowance	-	Kshs. 1,800.00
(f) Cost of transport for personal Effects to home of origin	-	Kshs. 80,000.00
(g) Outstanding Pension [Employers contribution]	-	Kshs.2,465,698.80
(h) Outstanding salary arrears	-	Kshs. 170,170.00
(i) Gratuity	-	<u>Kshs. 20,000.00</u>
Total Claim		<u>Kshs.2,910,218.00</u>

I will proceed to deal with each claim individually

Unpaid salary

The Plaintiff was dismissed with effect from 10th February 2004. He was therefore not paid a salary for the month of February 2004. In his evidence the Plaintiff told the court that at the time of his dismissal his monthly salary was Kshs.35,690/-. He produces his pay advice slip as proof of this fact **Pexb24**. This fact is not challenged at all by the Defendant. I therefore find this claim to have been proved and I do award the Plaintiff the sum of Kshs.35,690/- as unpaid salary for February 2004.

Unpaid House Allowance and Leave Allowance

The amounts claimed by the Plaintiff under these two headings are Kshs.15,000/- and Kshs.1,800/- respectively. In the case of **Silas Obengele –vs- Kenya Ports Authority Civil Appeal No. 38 of 2005** the Court of Appeal did consider the question as to whether the measure of damages due for a person who had been wrongfully dismissed would include allowances and other benefits. The Court of Appeal held that such allowances and benefits are paid to enable an officer to perform his work more efficiently. Such payments are not made for services rendered to the employer. The Court of Appeal termed such allowances and benefits as **“facilitation payments”**. As such once an employee has ceased to work there would be no further basis for making such payments any more. Being bound by the ruling in this case I do hereby disallow the Plaintiff’s claim for allowances and

benefits under (b) (d) and (e) above.

Three months salary in lieu of Notice

The Plaintiff was as I have found earlier, wrongfully dismissed from service. He was not given any notice before his dismissal. Indeed as I have pointed out earlier the Plaintiff was served with an interdiction letter **after** his dismissal. This interdiction letter dated 29th April 2009 cannot be said to amount to notice. I find this claim for three months salary in lieu of notice is merited and I do award the Plaintiff the sum of Kshs.101,550.00 under this claim.

Transport of Personal Effects

The Plaintiff has claimed Kshs.80,000/- as the cost of transporting his personal effects to his rural home. I find no basis for this particular claim. The Plaintiff has not produced any proof e.g. receipts to prove that he did in fact expend this amount on transport. I therefore disallow this claim for Kshs.80,000/-.

Outstanding pension

Under this heading the Plaintiff is claiming a sum of Kshs.2,465,698/- as the employer's contribution towards his pension. In his evidence to the court the Plaintiff conceded that he was paid his own pension contribution of Kshs.1.2 million. He is therefore claiming Kshs.1,265,698/80 million as his employer's contribution towards his pension. **DW2** Mr. Bernard Munyao told the court that the Defendant Authority cannot legally release this sum to the Plaintiff as he is yet to reach the statutory retirement age of 55 years. Indeed the Plaintiff admitted in his evidence-in-chief that he is now only 47 years old. He therefore has to wait another eight (8) years before this amount may be legally released to him. As such I find this claim to be pre-mature and I do hereby dismiss the same.

Outstanding salary arrears

The Plaintiff did in his evidence accept that he collected a sum of Kshs.170,000/- from the

Defendant Authority in respect of his salary arrears. As such I find that this claim has been satisfied and I dismiss the same.

Gratuity

The Plaintiff claims that the Defendant Authority owes him Kshs.20,000/- as a gratuity. A gratuity payment in my view is not a right. It is a sign of appreciation given to an employee for a job well done. One cannot **demand** to be thanked. Thus gratuity payment lies at the sole discretion of the giver in this case the Defendant. The Plaintiff cannot claim such payment as of right. This claim has no merit and the same is hereby dismissed.

Therefore based on the foregoing I find that the Plaintiff has only proved and is only entitled to items (a) and (c) of his claim amounting to **Kshs.137,240/-**. Under prayer (b) of the plaint I do hereby award to the Plaintiff the sum of **Kshs.137,240/-** only.

Lastly the Plaintiff has made a claim for Damages for wrongful dismissal. At paragraph 10 of his plaint, the Plaintiff claims that as a result of the wrongful dismissal he has **“been denied the right to work and earn until the compulsory retirement age and he has suffered loss and loss of salary and house allowance to the total tune of Kshs.7,034,400...”** exactly how this figure was computed has not been explained to the court. I do not however agree with the defence counsel who in their submissions stated that this amounts to a claim for special damages which being unsupported remain unproved and must therefore be disallowed. The Plaintiff has made a claim for general damages for his wrongful dismissal. This was a question which did occupy the Court of Appeal in the case of **KENYA PORTS AUTHORITY –VS- SILAS OBENGELE** wherein at page 10 it was held –

“We think that the Respondent was entitled to damages. True he was paid his retirement benefits. For those benefits, he had already qualified to get the same. He had not however, decided to retire as at the date the appellant terminated his employment”

Likewise in this case despite my earlier award of **Kshs.137,240/-** to the Plaintiff this sum merely represents the Plaintiff’s due entitlement by virtue of services which he had already rendered to the Defendant Authority. Like in the cited case the Plaintiff did not voluntarily

leave his job. The Defendant terminated his services. The Plaintiff's reasonable expectation was that he would have worked and continued to earn a salary upto the mandatory retirement age of 55 years. His wrongful dismissal put paid to such expectations. The question then arises as to how is this compensation for wrongful dismissal to be computed. Will a sum equal to his expected pay package upto the date of retirement suffice? What about the vicissitudes of life like, death, injury etc. In the case of **Southern Highlands Tobacco –vs- MC Queen [1960] E.A. 490** the East Africa Court of Appeal held –

“A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of loss is not necessarily the sum of the emoluments which the Plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation”

In other words the dismissed employee should not just sit on his hands and do nothing to better his lot. The basis for the compensation would be expected emoluments but contingencies such as sickness, death, redundancy etc ought to be taken into account.

The Plaintiff in this case retired at the age of 47 years. All things being equal he expected to work for another eight years to the mandatory retirement age of 55 years. At his stated salary of Kshs.35,690/- he would have expected total emoluments of **Kshs.3,426,240/-**. I find it prudent, fair and just to discount 15% from this figure to cater for the contingencies mentioned above. This brings down the figure to **Kshs.2,912,304/-**. This in my view is what the Plaintiff is entitled to receive as compensation for his wrongful dismissal by the Defendant Authority. I therefore award general damages in the sum of **Kshs.2,912,304.**

In conclusion therefore based on the foregoing I allow the Plaintiff's claim and enter judgement in his favour against the Defendant Authority in the sum of **Kshs.3,049,544/-**. I further award to the Plaintiff the costs of this suit plus interest on the above at court rates from the date of this judgement until payment in full.

Dated and Delivered in Mombasa this 22nd day of February 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Plaintiff in person

No appearance by Respondent

M. ODERO

JUDGE

22ND FEBRUARY 2010