



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Suit 83 of 2005

JORAM JOTHAM WALUSESHE..... PLAINTIFF

~VRS~

MUMIAS SUGAR CO. LTD..... DEFENDANT

JUDGMENT

In his plaint dated 22nd September 2005 and filed in court on the 9th November 2005, the Plaintiff Jared Jotham Walusetshe claims for damages of unlawful retirement, breach of contract and loss of earnings against the Defendant. The Defendant Mumias Sugar Company Limited in its defence dated 5th December, 2005 and filed in court the same date denies the claim and puts the Plaintiff to strict proof thereof.

The Plaintiff testified that he was employed by the Defendant in 1980 as a supervisor in the Electrical Section of the Factory Department. According to the terms of the written contract of employment, the Plaintiff was to retire at the age of 55 years which was the compulsory retirement age in the Civil Service in Kenya. On 11th October, 2000, the Plaintiff was attacked by thugs as he cycled to work around 9.00 p.m. His left hand was badly mutilated leading to amputation. Due to this disability the Plaintiff became subject to the application of the Persons with Disabilities Act, 2003. The Act provided that all persons with disabilities shall retire at the age of sixty (60) years. The commencement date of the act was

2nd July 2004. On attainment of 55 years the Defendant gave the Plaintiff a retirement notice. Despite bringing the provisions of the act to the attention of his employer, the Plaintiff was retired. The Plaintiff therefore claims loss of earnings for five (5) years from the date of retirement up to the attainment of sixty (60) years, damages for breach of contract and for unlawful retirement.

The Defendant called its Industrial Relations Manager to testify. He said that the Plaintiff was an employee of the company from 31/12/1979 as an electric technician. He was promoted through the ranks and he was in grade P4 at the time of retirement. He retired at 55 years in accordance with the employment contract. He was paid his retirement benefits of Ksh.234,697.39 ct and pension dues of Ksh.1,290,862.20. DW1 said that the Plaintiff never raised the issue of disability during his working period until 25/01/2005 which was four months after retirement. The Plaintiff wrote a letter dated 12/04/2005 seeking reinstatement on the strength that he was disabled. DW1 testified that he was not aware of the provisions of the persons with Disabilities Act as regards retirement age.

It is not disputed that the Plaintiff was an employee of the Defendant since 1980 and that he retired on 22/08/2004 at the rank of an electrical supervisor earning a monthly basic salary of Ksh.60,309.70 ct. This is clear from the evidence of both parties. The issues for determination are as follows:

- a) **Whether the Plaintiff is a disabled person within the provisions of the Persons With Disabilities (PWD) Act no.14 of 2003;**
- b) **Whether the PWD Act was in force at the time of Plaintiff's retirement on 22/8/2004;**
- c) **Whether the Plaintiff's retirement by the Defendant at the age of 55 years was lawful or not;**
- d) **Whether the Plaintiff is entitled to the reliefs sought.**

The PWD Act was enacted in the year 2003 and was to come into force by notice. It is the case of the Plaintiff that the act came into force on the 16th June 2004. I have looked at Legal Notice no.64 of 16th June, 2004 which brought the act into force except for sections 22, 23, 24, 35 (1) 35 (2), 39 and 40. these sections came into force on 24th November 2009 through L.N. No.182 of the same date. The Plaintiff relies on section 15 (6) which came into force on 16th June 2004. Section 15 (6) provides that the minimum retirement age for a person with disability is sixty years.

The Defendant's defence was that the Plaintiff never raised the issue of retirement age for disabled persons when he was working. A letter dated 25/01/2005 was produced by the defence to show that the matter was raised four (4) months after retirement. The letter seeks for payment of five (5) years salary based on the retirement age of sixty (60) years under the PWD Act.

The Defendant acknowledged receipt of the letter in its letter dated 07/04/2005 in which its legal officer referred the matter to the Ministry of Labour for interpretation. The Defendant did not communicate further to the Plaintiff on the subject. The Plaintiff then wrote a letter dated 12/04/2005 seeking for reinstatement of employment. When an Act of Parliament is enacted regarding issues of employment, every employer has a duty to comply with the provisions of that Act. It is not the duty of the employee to bring any provisions affecting him to the attention of his employer. The provisions in question were of general application to all Kenyans with disabilities. The employer can not plead ignorance of the law as goes the maxim that **"ignorance of the law is no defence."** The Defendant cannot fault the Plaintiff for not bringing the matter to its attention before he was retired. It was the Defendant's duty to keep abreast of the law and implement it accordingly.

The Plaintiff was given the notice to retire on 10/3/2004. The effective retirement date was 22/8/2004. The Act came into force on the 16/06/2004 two months before the retirement date. The case of the Plaintiff falls within the provisions of the Act and ought to have been dealt with in accordance with the relevant provisions of the law. What matters is the effective date of retirement and not the date of the retirement notice. The Plaintiff produced a letter dated 4/10/2005 from the Permanent Secretary of the Ministry of Education, Science and Technology notifying all the department heads of the enactment of the Act and calling upon them to compile a list of all persons with disabilities in their establishment. The letter was forwarding a circular from the Director of Personnel Management dated 8th September, 2005 giving directions on the application of the Act. In my view, it is immaterial whether the Defendant received the letter and the circular. The Defendant was duty bound to comply with the provisions of the new law.

The Defendant submitted that this court can not declare the Plaintiff as a person with disability without a medical examination report. It is not disputed that the Plaintiff's left hand was amputated at the wrist joint. The court observed this as the Plaintiff testified and the Defendant admitted it through its witness DW1. The Act defines **"disability"** to mean **"physical, sensory, mental or other impairment including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation."**

After the Plaintiff lost his left hand, he filled in Workmen Compensation Form LD 104/1 on the 19/12/2000 which was produced in evidence. The form was received and stamped by the Defendant. Part II of that form is the medical report done by Dr. F.O. Nyanyuki of St. Mary's Hospital, Mumias. It bears the signature of the doctor and the hospital stamp bearing the date of 19/01/2000. The nature of injury is described as **"loss of left hand through wrist joint."** The incapacity is described as permanent and the degree assessed as 50% to last a lifetime. The qualifications of the doctor are given as bachelor of medicine and bachelor of surgery (M.B. CH.B.). The patient Jared

Walutseche was referred to the doctor by the company through a note dated 17/01/2000. This record was not disputed or denied by the Defendant. The Defendant's contention that no medical report was availed to them is not true. This one was done on the Defendant's request and contains all the requisite medical examination findings of a competent medical practitioner as defined in the interpretation section of the act. The Defendant had the option of requesting for a second medical opinion if there was need to do so. Such an option was not chosen.

This court is therefore in a position to make its finding relying on the medical certificate of Dr. Nyanyuki. It is my finding therefore that the disability of the Plaintiff at the time he was retired falls within the meaning of disability as defined in the Act. It follows that the Plaintiff was by law entitled to retire at the age of sixty (60) years as provided for by section 15 (6) of the act. By retiring him at the age of 55 years, the Defendant violated the Plaintiff's legal rights. The retirement was therefore unlawful. The contract of employment was by virtue of the new law updated. Enactment of any law supersedes any contracts made before the law came into force. There was therefore no need to sign a fresh employment contract between the parties. It is my finding that the Plaintiff has proved his case on the balance of probabilities. I enter judgment in his favour against the Defendant.

Section of the Act provides that any person with disability may apply to the Minister through the council for exemption of tax. The section came into force on 24/11/2009 long after the Plaintiff had reached 60 years. The Plaintiff was therefore still subject to taxation and this fact will be taken into consideration in assessing damages.

Having found that the Plaintiff was unlawfully retired, it follows that he suffered loss and is entitled to damages. He earned a monthly salary of Ksh.65,439.70 ct at the time of retirement. The Plaintiff paid tax and was subject to the compulsory statutory deductions. The court will therefore work with a figure of Ksh.50,000/= a month for five (5) years which the Plaintiff would have worked and earned before attaining the minimum retirement age under the Act. The amount will be reduced by 1/3 because it will be paid in a lumpsum.

$$Ksh.50,000 \times 12 \times 5 \times \frac{2}{3} = Ksh.2,000,000/=.$$

I hereby award general damages of Ksh.2,000,000/= to the Plaintiff plus costs of the suit.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 9th day of June, 2010 in the presence of Mr. Situma for Sichangi for the Plaintiff and Mr. Makokha for the Defendant.

F. N. MUCHEMI
JUDGE