



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 1157 of 2006

JOSEPH KARANJA WAINAINA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

The Plaintiff filed a claim by way of a plaint against the defendant on the 7th October, 2006 where he seeks for the following:-

- a) A declaration that he is entitled to payment of 2 months salary for each completed year of service.**
- b) Payment of full emolument up the age of 55 years.**
- c) Special damages of Kshs. 9,464, 567.94/=.**
- d) General damages for loss of career service.**
- e) General damages for defamation and loss of dignitas.**

f) Costs of the suit and interest.

g) Any further relief that the court may deem just.

The defendant filed its defence on 15th November, 2006 which was amended on 24th May, 2007. The defendant denied the plaintiff claims and stated that upon termination, the plaintiff was paid all his terminal dues. It is also the defence case that the rules of natural justice were not incorporated or implied under the terms of contract between itself and the Plaintiff.

(a) Background

The plaintiff was employed by the defendant on 14th June, 1976 as a clerk. During the course of his employment he rose through the ranks in-charge of cash department and customer care desk. By the time he left employment on the 7th May, 2006 he had served the defendant for nearly 30 years. He had worked in more than one branch while in Nairobi and was transferred to the Karatina branch where he served until his termination. While at Karatina the plaintiff appeared not to have had a good relation with Branch Managers, culminating to the decision by the defendant to terminate the plaintiff due to among the things allegations of insubordination and use of abusive language to his superior. The plaintiff was terminated through a letter dated the 2nd May, 2006.

The defendant paid three months salary in lieu of notice. The plaintiff unsuccessfully appealed against the decision culminating in his filing suit.

(b) Plaintiff's Evidence and Submissions

The plaintiff stated in evidence that he had worked diligently with the defendant for nearly 30 years. That, his duration of service, is supported by the long service award given to him by the defendant dated 20th December, 2002. He started his work at Harambee Avenue as a clerk; thereafter he was promoted to the position of section head. He worked at Harambee Avenue branch for 12 years and was later transferred to Kenyatta Avenue branch. He stated further that while in Nairobi he had good working relation with the Defendant. He produced document 6, 15, 16, 17, and 20 in his list of documents which were recognition and appreciation of service. His problems began after being transferred to the Karatina branch, where according to him, the working condition was inhuman. He found the manager hostile to him and others. The said hostile manager resigned and another took over. Although the plaintiff's evidence is that the new manager at first appreciated him, at some point there was fallout between the two and the said manager wrote to the head office complaining. The plaintiff also wrote a letter to the Human Resource and thereafter to the Managing Director. The Plaintiff did not receive any a response as expected or arbitration between them instead on the 2nd May, 2006 the Accountant at the Karatina Branch handed the termination letter. Which he declined to sign upon receipt. He signed the same much later on 23rd May, 2006.

The Plaintiff stated further that his attempts to meet the Human Resource Manager and the Managing Director were not successful. However he was later to meet with the General Manager and Human Resource Manager who advised him to write an appeal, which he did.

On termination the plaintiff received salary for the months May, June, July, 2006 in lieu of notice but states that he did not receive his terminal dues. He also claims that he was dismissed without being given a hearing. In cross examination the plaintiff admitted that his letter of appointment provided for a months notice or one month's salary in lieu of notice. He also admitted having collected his pension from the Pension Scheme. The plaintiff claimed further that he had been defamed by the letter of termination as the letter was read by every body at the Bank.

In his submission **Mr. Koceyo** for the plaintiff submitted that the defendant did not offer the Plaintiff an opportunity to be heard and to explain his case but prematurely ended the plaintiff's employment that indeed this was done without waiting for the appeals committee to consider the plaintiff's appeal. That, the defendant did not provide the plaintiff with a good working environment and dismissed him on flimsy grounds. The Plaintiff's Counsel relied on following authorities:-

1. **Eric Esau Amwayi vs. Attorney General NBI HCCC 2691 of 1994.**
2. **Oloo vs. Kenya Post Telecommunication [1982- 88]1 K.A.R**
3. **Kenya Ports Authority vs. Cyrus Obengele, Court of Appeal at Mombasa Civil Appeal No.38 of 2005.**

The Plaintiff's counsel relied on the above said authorities in persuading the court to find that his client was denied a hearing in violation of the rule of natural justices and that the plaintiff is entitled to be paid his benefits for the remainder of the period to retirement age.

(c) Defendant's Evidence and Submissions

The defence called a witness **Shirley Ncharo** a Manager Employee Relations in the Human Resource and Administration Department as its sole witness. The witness stated that she was employed by the defendant on the 30th January, 1989 and has worked in the current department since January, 2000. She confirmed that she knew the plaintiff as an employee of the defendant. In regard to the plaintiff She testified that on the 15th September, 1999 the plaintiff was promoted to the management level and from then on his terms of services were governed by a document referred to as "**career path**". That the said document provided in case of termination for a notice of 3 months period for an employee who has served for 3 years or more. It was her evidence that the plaintiff was not summarily dismissed as alleged but was terminated in accordance with the "**career path**". She stated further that the termination was not based on malice or discrimination, but on the ground that the plaintiff used abusive language to the Branch Manager in Karatina. and for threatening physical violence against his superior. That he had a long history of such cases. In reference to the plaintiff's appeal, she informed the court that the same was considered and the defendant felt that there was no good reason to reinstate the plaintiff. The witness further stated that the plaintiff was paid the following upon termination;-

1. **3 months pay in lieu of notice**
2. **Leave**
3. **4 days worked in the month of May &**
4. **Pension**

The defence Mr. Ojiambo submitted that the plaintiff was not dismissed as alleged. That the letter issued to the plaintiff on the 2nd of May, 2006, clearly stated that the plaintiff's service was being terminated. That It was evident from the various documents produced in court that the plaintiff had several cases of in subordination. The defence counsel also submitted that the letter of appointment and the "**carrier path**" gave the defendant the right to terminate the plaintiff's service upon notice or payment in lieu, that the rules of natural justice did not form part of the employment contract. It was argued that it was not an express or an implied term of the contract of employment that the plaintiff would remain in permanent and pensionable service until age of retirement. And that the Plaintiff's continued service was pegged upon his observance of the terms and conditions of service including being of good conduct, further that both parties were at liberty to terminate the service contract based on the said terms. In regard to

special damages the defence submitted that the claim of **Kshs.9,464,567.94/=** has not been proved. On defamation, the defence submitted that the letter was addressed by the defendant to the Plaintiff and that no third party read the content and that in any event no witness was called to prove that the content of the said letter were defamatory. Further that the interpretation afforded those words by the plaintiff are false and far fetched, The defence relied on several authorities some of which include

1. **Rift Valley Textile Ltd vs. Edward Onyango Oganga H.CC C. NO. 27 of 1992 (unreported)**
2. **Oloo vs. Kenya Post Telecommunication [1982- 88]1 K.A.R**
3. **Kenya Ports Authority vs. Cyrus Obengele Court of Appeal at Mombasa Civil Appeal No.38 of 2005.**
4. **East African Airways vs. Knight (1975) E.A**
5. **Gitau vs. East Africa Power and Lighting Company (1996) K.A.R**
6. **Obonyo vs Gailey & Roberts Ltd (1974) E.A.**

(d) Analysis & findings.

On the 13th of May the parties agreed on issues as follows;-

1. **What is the applicable date of the plaintiff's employment?**
2. **Whether the Plaintiff was terminated or wrongly dismissed from the employment;**
3. **Whether the rules of natural justice apply to the Plaintiff's contract of employment;**
4. **Whether the letter of termination dated 2nd May, 2006 was defamatory of the plaintiff;**
5. **Whether the plaintiff is entitled to the relief sought;**
6. **Who should pay the costs?**

In determining the issues raised, I have considered the evidence on record, the submissions by learned counsel and authorities cited.

The letter of employment is acknowledged by both sides. The plaintiff was employed on the 14th June 1976. There is an allegation that he was dismissed along other employees on the 5th of August 1998 and was re-employed on the 26th August 1998. This in my view was not seriously canvassed by the defence. Further more for purposes of this judgment as will be seen later this date is not quite relevant and I shall not dwell much on the issue.

The letter of appointment stated that upon confirmation the contract will be terminable by either side giving a month's notice in writing or a months pay in lieu of notice. On being promoted to the management level the terms and conditions stipulated in the "**Career Path**" applied to the parties. The same provides for 3 months notice in writing or 3 months pay in lieu of notice if either side is to terminate the contract. I will consider the said provision in determining whether the termination was lawful or not.

It is trite law that where parties have entered in to a contract, their relationship is governed by the terms and conditions thereof. Termination of a contract cannot be unlawful if the same is based upon the terms of contract. In **Koech vs. African Highlands & Produce Company Ltd and Another [2006] 2 E. A** Musinga J held:-

“Where a contract of employment provides that either party may terminate the same by giving to the other party notice or salary in lieu thereof none of the parties is obligated to assign any reason for terminating the contract as long as he gave the requisite notice or paid in lieu of notice.

A termination of the contract of Employment in accordance with terms of the said contract cannot be unlawful.”

I do concur with the sentiments of Musinga J, above that where a Contract of Employment is specific and unambiguous it is binding on the parties concerned and if termination is in compliance, it is not unlawful. The **“career path”** provided for three months notice or three months pay in lieu of notice. The plaintiff admitted having been paid three months salary in lieu of notice. This I find to be in line with the contract between the parties in which case I find that the termination was not unlawful as such.

The plaintiff’s other claim is that he was not given a fair hearing contrary to the rules of Natural Justice. I am of the view that the authorities cited by the plaintiff’s counsel are distinguishable from the case before me. The said authorities referred to employment in the public service where some of the contracts provided for the employees to be heard before termination. The contract and terms of employment in the current case do not provide for the application of natural justice nor in my view can the same be implied. As long as the notice is issued or payment in lieu of notice is effected in accordance with the terms, the party is not obligated to give a reason or even hear out the other party.

In **Rift Valley Textile Limited v Edward Onyango Ogonda Civil Suit No. 27 of 1992 (unreported)** It was held:-

“...the rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in the contract that such rules should apply. Where a notice is provided in the contract of employment as the case here, then an employer need not assign any reason for giving notice to terminate the contract of employment, and if the employer need not assign any reason the question for the offering the employee a chance to be heard before giving notice does not arise.”

The conditions and terms of reference in this case did not make provision for the application of Rules of Natural Justice; it had clear terms which are simple and clear. It is my considered opinion that we need not look outside the contract. And I find therefore, that the said rules are not applicable.

The fourth issue for consideration is whether the termination letter is defamatory. The termination Letter was written by the defendant to the plaintiff. It was not for circulation to third parties. Indeed from the evidence on record it is the plaintiff who engaged several other people within the bank in the process of appealing. Again from the letters produced as evidence the reason given for termination was factual. I find that no evidence of the alleged defamation was adduced in court and no proof that the contents of the said letter were false and malicious. In the circumstances this ground must fail.

The other issue for consideration is whether the plaintiff’s claim for special damages is sustainable which includes payments of his salary and pension up to the age of 55. The position in law is very clear that where an employee has been wrongfully terminated in a situation where there is a contract of employment he is only entitled to be paid for the duration of the notice period.

Rift valley Textile Ltd vs. Edward Onyango Ogondo (Supra) the Court of Appeal stated as follow as:-

“We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. The contract of employment between the Plaintiff and the respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period....

.....

In our view even though the respondent’s dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contracts with the appellant.”

In Cyrus Nyanga Kabute vs. Kirinyanga County Council Civil Appeal No. 29 of 1985 (Unreported)

In rejecting the claims, the Court of Appeal said:-

“Apart from that, even if the appellant were able to re-open that matter and supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint. Even though the dismissal may be wrongful, it stands and what flows from the breach of the conditions of service, is damages according to the terms of contracts. Those damages would not have been aggravated damages and would not have given him benefits upto his 60th birth-day, not arrears of salary from July, 1980. In fact appellant was given on normal retirement – arrears of salary upto June, 1980, gratuity and payment in lieu of leave”

Guided by the above authorities, it is clear to me that the defendant discharged its obligations in terms of the terms of service and did not have to pay any salary above what it paid or benefits to the age of 55 years as claimed.

Is the plaintiff entitled to the reliefs sought?

- (a) Declaration that the plaintiff is entitled to two months salary for each completed year of service.

The answer is in the negative. The terms of contract referred to earlier in the Judgment do not provide for such entitlement. Further more this is not a case for redundancy and therefore the plaintiff is not entitled to severance pay.

- (b) Payment of full emolument of up to age to 55 years

This amount is not payable in view of the fact that termination was based on the terms of contract.

- (c) Special damages of Kshs.9,464,567.94/=

The answer is in the negative for the following reasons

1. The pension benefit being claimed was paid to the plaintiff a fact he admitted in evidence. Loss of salary is only payable in terms of the contract of employment in this case the same provided for three months notice or 3 months salary in lieu of notice. The defendant paid 3 months salary in lieu of notice which is admitted by the plaintiff. Annual leave, medical insurance NSSF contribution, and NHF

contributions are not payable in the circumstances as the same are to be enjoyed only by those in actual employment.

(d) General damages for loss career service

This is also not payable. Although the plaintiff was on permanent and pensionable employment the said employment in law and in fact was terminable under the terms of service. This claim therefore does not lie.

(e) General damages for defamation and loss of dignitas

This claim must fail as the plaintiff failed to prove this claim.

The total sum of the Judgment therefore is that the plaintiff's case fails with costs to the defendant.

Dated and delivered at Nairobi this 6th day of November, 2009.

ALI- ARONI

JUDGE