



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 1808 of 1999

JOHNSON KIMUU KARANI.....PLAINTIFF

VERSUS

E. A. PORTLAND CEMENT COMPANY LTD.....DEFENDANT

J U D G E M E N T

Delay in the preparation and delivery of this judgment has been occasioned by my recent illness and hospitalization. The delay is regretted.

This suit was part-heard before Ringera, J. (as he then was). He was elevated to the Court of Appeal but was unable to complete the hearing for the reasons he recorded on 26th July 2004. The Plaintiff had closed his case. The Defendant had called one witness who testified in-chief and was partly cross-examined. The learned counsels appearing agreed that the hearing could proceed before me from where it had reached. When the matter came up for further hearing on 1st March, 2005 the Defendant was unable to call his witness then on the stand, PHILLIP MONGONY (DW1), and a last adjournment was granted. The Defendant was in the same predicament on 21st April, 2005, and further adjournment was refused. The Defendant then closed its case. The parties filed written submissions.

The Plaintiff claims in his amended plaint dated 14th June, 2001 the following reliefs:-

- (a) *Special damages of KShs.3,329,000/00 (as particularized).***
- (b) *In the alternative, KShs.419,980/00, being severance pay.***
- (c) *Interest on (a) above.***
- (d) *Costs of the suit.***

His case as set out in the amended plaint is that by a contract dated 20th March, 1974 he was employed by the Defendant as a trainee electrical engineer; that it was a term of the said contract that either party could terminate the employment by giving the other party one month notice; that on or about the 22nd June, 1977 the Plaintiff was promoted by the Defendant to the post of electrical engineer, and by an agreement dated 28th June, 1977 the parties entered into a new contract which provided, *inter alia*, that the Plaintiff could only be retired upon attaining the age of sixty (60) years. The Plaintiff further pleads

that on or about the 19th December, 1977 the Defendant retired the him alleging, *inter alia*, that he had attained the retirement age of fifty- five (55) years, and gave him notice until the 31st day of December, 1977 as his last working day. It is the Plaintiff's case, as pleaded, that by retiring him at the age of fifty- five (55) years the Defendant was in breach of the contract between them, and that therefore the retirement was unlawful, unjust and has caused the Plaintiff suffering, loss and damage. Particulars of the breach of contract and special damages are given.

In an amended defence dated 25th June, 2001 the Defendant denies the Plaintiff's claim. More specifically, the Defendant denies that the parties entered into a new contract. The Defendant further pleads that the Plaintiff was retired after due notice in accordance with the law with all his full benefits and terminal dues paid, and after he had been given a hearing on the issue. The particulars of breach of contract and special damages are denied. An agreed statement of issues dated 12th May, 2000 was filed. An agreed supplementary statement of issues dated 11th September, 2001 was also filed. The following are the issues to be determined as set out in those agreed statements of issues:-

1. ***Subsequent to his employment as a trainee electrical engineer on 20th March, 1974, was the Plaintiff promoted to the post of electrical engineer? If yes, was a new contract of employment entered into by the parties and if so, what were its terms?***
2. ***a) Did the Defendant compulsorily retire the Plaintiff? If so, was such retirement in breach of the contract of employment between the parties?***
 - b) ***Did the Defendant give the Plaintiff due notice before the retirement?***
 - c) ***Was the Defendant's action in retiring the Plaintiff lawful and just?***
3. ***a) What was the status of the Defendant at the time of employment of the Plaintiff?***
 - b) ***Did the Defendant's status change in 1984 and if so, how did the changes affect the terms of employment of the Plaintiff?***
4. ***Has the Plaintiff suffered loss and damage as a result of the termination of his employment? If so, what are the damages due to him?***
 - 4A. ***In the alternative, is the Plaintiff entitled to severance pay? If so, how much?***
5. ***Has the Plaintiff been paid his terminal benefits by the Defendant upon his retirement and if so, how much was he paid?***
 - 5A. ***Are the particulars of special damages as pleaded in the plaint proper and maintainable in law?***
6. ***Is the suit properly before the court and does the plaint disclose a reasonable cause of action?***
 - 6A. ***Are the Plaintiff's prayers bad in law? If not, is the Plaintiff entitled to the reliefs sought?***
7. ***Who shall bear the costs of this suit?***

I have read the evidence recorded by Ringera, J. I have also considered the written submissions of the parties. In the cause of his testimony, the Plaintiff produced in evidence the following documents, *inter alia*:-

- o ***Exhibit P1: Letter dated 20th March, 1974 by which the Defendant employed the Plaintiff as an Assistant Electrical Engineer.***
- o ***Exhibit P2: Letter dated 22nd June, 1977 by which the Defendant promoted the Plaintiff to the***

post of Electrical Engineer with effect from 1st July, 1977.

- *Exhibit P3a: Internal Memo dated 3rd November, 1977 by which the Defendant informed the Plaintiff that he would be retired at the end of 1997 at the age of 55 years.*
- *Exhibit P3b: An internal memo dated 11th November, 1977 by which the Plaintiff responded to Exhibit P3a and pointed out that his retirement age had been reduced by five (5) years and sought to know how that five (5) years would be treated.*
- *Exhibit P3d: Another internal memo dated 28th November, 1997 by which the Plaintiff stated his unwillingness to retire at the age of 55 years.*
- *Exhibit P4: A letter dated 19th December, 1997 by which the Defendant retired the Plaintiff as at 31st December, 1997.*
- *Exhibit P5: A letter dated 8th January, 1998 by which the Plaintiff's Advocates demanded from the Defendant five (5) years salary on account of the Plaintiff's forced early retirement.*
- *Exhibit P6: Reply dated 21st January, 1998 by the Defendant's Advocates denying liability.*
- *Exhibit P7a: The Plaintiff's payslip for December 1997.*
- *Exhibit P8: Another letter of demand dated 2nd June, 1999 addressed to the Defendant by the Plaintiff's Advocate.*
- *Exhibit P9: Reply dated 12th July, 1999 by the Defendant's advocate denying liability, inter alia,.*
- *Exhibit P10: Letter dated 16th August, 1999 by the Plaintiff's advocates conceding that the Defendant was entitled to deduct from the Plaintiff's terminal benefits an advance of KShs.600,000/00 and company furniture in the sum of KShs.57,000/=.*

In the course of his testimony in-chief, DW1 produced in evidence the following documents, *inter alia*:-

- **Exhibit D1: The Management Standing Rules,**

Regulations and Policies of the Defendant.

- **Exhibit D2: An internal memo dated 6th November, 1998 in which the Plaintiff's benefits and deductions there from are shown.**

I shall now examine the issues as framed and give my findings thereon. The first issue is, Subsequent to his employment as a trainee electrical engineer on 20th March, 1974, was the Plaintiff promoted to the post of electrical engineer? If yes, was a new contract of employment entered into by the parties, and if so, what were its terms? Indeed the Plaintiff was promoted to the post of Electrical Engineer. Exhibit P2 shows this clearly. In that document there were some new terms and conditions of employment set out. There was a new salary of £4,000 per annum, and use of a company car. A new retirement age of sixty (60) years was also given. All other terms and conditions of service were stated to remain the same as set out in Exhibit P1. Now, did Exhibit P2 constitute a new contract of employment entered into by the parties? At the very least the original contract of employment as set out in Exhibit P1 was materially and significantly amended. There cannot be any doubt that Exhibit P2 constituted a new contract of employment between the parties after promotion of the Plaintiff from the post of Assistant Electrical Engineer to Electrical Engineer. I therefore hold that indeed a new contract was entered into by the parties whose additional terms (over and above what was provided for in Exhibit P1) were:-

(i) *a new salary of £4,000 per annum;*

(ii) *use of a company car; and*

(iii) *retirement age of 60 years.*

The second issue is, Did the Defendant compulsorily retire the Plaintiff? If so, was such retirement in breach of the contract of employment between the parties? Did the Defendant give the Plaintiff due notice before the retirement? Was the Defendant's action in retiring the Plaintiff lawful and just? Indeed the Defendant compulsorily retired the Plaintiff at the age of 55 years. This was in breach of the contract of employment between the parties contained in Exhibit P2. No provision of law or regulation requiring notice of retirement was brought to the attention of the court. However, Exhibit P3a was such notice. I have already found that the Plaintiff's forced early retirement was in contravention of the contract between the parties. The Defendant's justification for this was that mandatory retirement at the age of 55 years was what was provided for in the law or regulations governing Government "parastatals". No such law or regulation was brought to the attention of the court apart from Exhibit D1 from whose text it can be inferred, though not expressly provided, that the mandatory retirement age is 55 years. Furthermore, DW1, in his testimony under cross-examination, stated that retirement was within the discretion of the Defendant, and that in the case of the Plaintiff it was decided to retire him. He gave no reason why it was decided to retire the Plaintiff at 55 years when his contract of employment provided for retirement at 60 years. To his credit, though, DW1 conceded that the Plaintiff's forced early retirement was contrary to Exhibit P2. He further stated that the Plaintiff was not retired pursuant to any reorganization of the Defendant. In these circumstances, the Plaintiff's forced retirement was unlawful and unjust. I so find.

The third issue is, What was the status of the Defendant at

the time of employment of the Plaintiff? Did the Defendant's status change in 1984, and if so, how did the changes affect the terms of employment of the Plaintiff? It appears from the testimony of DW1 that at the time the Plaintiff was employed the Defendant was a public company incorporated under the Companies Act. It also appears that in 1994 or thereabout the Government acquired majority shares in the Defendant. The Defendant contends that it thereby became a "**parastatal**". What is a "**parastatal**"? It appears from common usage that a "**parastatal**" is a "state corporation" under the State Corporations Act, Cap. 446. That Act provides for the control and regulation of state corporations. The term "state corporation" is defined in section 2 of the Act. That definition includes a body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law but not, *inter alia*, a company incorporated under the Companies Act which is not wholly owned or controlled by the Government or by a state corporation. There was no evidence tendered that the Defendant, which, from the material placed before the court, was a company incorporated under the Companies Act, became wholly owned or controlled by the Government or by a state corporation in 1984 or at any other time. In other words there is not sufficient evidence tendered to the effect that the Defendant became a state corporation (**commonly known as a parastatal**) in 1984 or at any other time. At any rate, whatever change to the Defendant's status there may have been in 1984, the Plaintiff's contract of employment with it was not affected. I so hold. There was no material placed before the court as would lead to the conclusion that the change of status from public company to state corporation, if indeed there was such change, meant the abrogation of the Defendant's previous contracts.

Issue no. 4 is, Has the Plaintiff suffered loss and damage as a result of the termination of his employment? If so, what are the damages due to him? The Plaintiff was due to work for five more years and earn a salary for that time, possibly with increments. There were other benefits that would have accrued to him in the course, and by virtue, of his employment. He lost all that when he was prematurely retired. Indeed he has suffered loss and is entitled to damages.

What has he claimed? He has claimed special damages of Kshs.3,329,000/00 made up as follows:-

(a) Five years salary from January, 1998 to

December, 2002 (60months) @

KShs.36,520/00 net KShs.2,193,200.00

(b) House allowance for 60 months @ KShs. 445,800.00

(c) Benefits on tax for 60 months @..... KShs. 132,000.00

(d) Relief on tax for 60 months @ KShs.600..... KShs. 18,000.00

(e) Car allowance for 60 months

@ KShs.7,000.00..... KShs. 420,000.00

(f) Gardener's allowance for 60

months @ Kshs.2,000.00..... KShs. 120,000.00

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Total KShs.3,329,000.00

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I hold that the Plaintiff is entitled to the net salary that he would have earned in the five years he would have worked were he not retired early. This forced early retirement must not be construed to have been unlawful or wrongful dismissal or termination of employment as was submitted for the Defendant. The Plaintiff's course of employment was simply brought to an end five years too early in purported effluxion of time when he attained the age of 55 years. The submission by the Defendant that the Plaintiff is entitled only to pay in lieu of notice is wrong, and the cases cited in support of that proposition have no relevance to this present case, as this was not a case of unlawful or wrongful dismissal or termination of employment *per se*. The Plaintiff is therefore entitled to the net salary that he would have earned for the five years.

His last payslip (Exhibit P7a) shows that his net monthly salary was KShs.36,520/00 after deduction of P.A.Y.E., N.H.I.F. and N.S.S.F. contributions and service charge. The Plaintiff is thus entitled to $KShs.36,520/00 \times 12 \times 5 = KShs.2,191,200/00$. But it must be appreciated that had he continued to work for the five years he would not, for that period, have received the monthly pension of KShs.17,207/00. So, the monthly pension earned in the five years must be deducted from the net salary that he would have earned in the same period, otherwise he shall have been paid both salary and pension, and that would be unjust enrichment. That pension is $KShs. 17,207/00 \times 12 \times 5 = KShs.1,032,420/00$. Deducting the same from KShs. 2,191,200/00 leaves a balance of KShs. 1,158,780/00. The Plaintiff is entitled to that sum for the lost net salary for five years.

Is the Plaintiff entitled to the other special damages claimed? These are house allowance, benefits on tax, relief on tax, car allowance and gardener's allowance, each for 60 months. House, car and gardener's allowances are paid to an employee on account of him/her being in actual employment. They are allowances attaching upon the employment. Once an employee is no longer in employment, however terminated, he/she should not get these allowances as it would amount to unjust enrichment. I therefore hold that the Plaintiff is not entitled to these allowances. With regard to benefits and relief on tax, these accrue when an employee is paying tax. Since the Plaintiff's employment was terminated, he has not been paying tax on his salary and other emoluments. It would thus be unjust enrichment if he were to be paid benefits and relief on tax when he has not paid any tax on salary and emoluments for the five years as he has not been earning such salary and emoluments. It is to be noted that the salary awarded to him elsewhere above is net of taxes and other deductions. In the result, therefore, the Plaintiff's claim for

house allowance, benefits and relief on tax, car and gardener's allowances must fail.

Issue no. 4A is, In the alternative, is the Plaintiff entitled to severance pay? If so, how much? Severance pay is payable to an employee who is declared redundant. See section 16A. (1) (f) of the Employment Act, Cap.226 which provides that an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay. Under subsection (2) of the same section, the term "redundancy" is assigned the same meaning for the purposes of the section as that to be found in section 2 of the Trade Disputes Act, Cap. 234. That meaning is as follows:-

' "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly know as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant.'

Was the Plaintiff declared redundant? There is no evidence of such declaration. He was simply retired at what his employer thought was his proper age of retirement. I have already held that this forced early retirement was unlawful and not in accordance with his contract of employment. But it was retirement nevertheless. It was not redundancy. So, his alternative claim for severance pay cannot lie.

Issue no. 5 is, Was the Plaintiff paid his terminal benefits by the Defendant upon his retirement and if so, how much was he paid? The Plaintiff himself admitted in his testimony during cross-examination that he received from the Defendant his terminal benefits of KShs.821,147/40 as set out in Exhibit P9.

Issue no. 5A is, Are the particulars of special damages as pleaded in the plaint proper and maintainable in law? This issue has been answered in issue no. 4 above. The special damages claimed were proper and maintainable in law. One of them, the lost net salary for five years, was proved. The rest were not proved.

Issue no. 6 is, Is the suit properly before the court and does the plaint disclose a reasonable cause of action? This is a non-issue. The fact that the suit has been fully heard means that the plaint discloses a reasonable cause of action, otherwise the trial would not have been permitted to go on.

Issue no. 6A is, Are the Plaintiff's prayers bad in law? If not, is the Plaintiff entitled to the reliefs sought? This issue has been answered in the course of dealing with issues nos. 1 to 5.

In the result therefore, I will enter judgment for the Plaintiff in the sum of KShs. 1,158,780/00 as set out elsewhere above, plus interest thereon at court rates from the date of filing suit until payment in full. All his other claims fail. He will also have the costs of this suit. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 10TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE