



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2063 of 1999

WYCLIFFE WACHIRA MUGWERU
.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATIONDEFENDANT

J U D G M E N T

(1) Wycliffe Wachira Mugweru, the Plaintiff in this case, joined Kenya Railways Corporation, the Defendant, in 1968. He worked for the Defendant for thirty years until September 1998 when, according to him, the Defendant wrongly terminated his appointment and forced him to retire. At the time of his retirement, the Plaintiff was a Senior Controller in receipt of a gross monthly salary of K.Shs.18,870/=.

(2) In 1997, the Defendant established a retrenchment scheme for all grades of its employees under which an employee who was allowed to retire would, in addition to any other terminal benefits, be paid a severance pay equal to one month's salary for every year served.

(3) On the 22nd December 1997, the Plaintiff who was then fifty years old, and had another five years to go before reaching fifty-five, the age of compulsory retirement, applied to the Defendant to be retrenched. His application was turned down but he was nonetheless allowed to take early retirement. It is the Plaintiff's case that what the Defendant took as a notice of intention to retire early was in fact an appeal against the Defendant's refusal to retrench him. The Defendant on the other hand contends that the Plaintiff was regularly retired.

(4) On the 28th October 1999, the Plaintiff filed a suit against the Defendant alleging that he had been forced by the Defendant to retire prematurely and against his will. He sought a declaration that the retirement was null and void and that he was still an employee of the Defendant and continued to be one until he attained the age of fifty-five years. He also claimed general damages and unpaid salaries.

The Plaintiff was amended on the 9th February 2005, to introduce a claim for special damages in the sum of K.Shs.1,835,785.70 arrived at as follows:^{3/4}

(a) unpaid salaries from

September 1998 to 2.6.2002

(a total of 45 months) - K.Sh.636,705/=

- (b) Accrued leave not
taken for 119 days - K.Sh. 60,840/70
- (c) Reduced Pension
Arrears for 38 days - K.Sh.354,540/=
- (d) Commuted Pension - K.Sh.746,380/=
- (e) Pension on terminal leave
terminal leave - K.Sh. 37,320/=
- TOTAL - K.Sh.1,835,785/70

(5) The Defendant filed a Defence on the 1st March 2000 and denied the Plaintiff's claim in its entirety averring first, that the retrenchment scheme was purely a managerial discretion and was not based on an option by an employee to be retrenched and, secondly, that the Plaintiff opted to retire and was allowed to take normal retirement under regulation 6 of the Kenya Railways Corporation (Pensions) Regulations. The Defendant also denied the Plaintiff's charge that it had acted maliciously.

(6) The Plaintiff, who is now a Priest in the Anglican Church of Kenya, gave evidence on his own behalf. He joined the Defendant on the 15th October 1968, although he was not given a Letter of Appointment until the 22nd March 1969. He left on the 31st August 1998. On the 22nd December 1997, he applied to the Defendant to be retrenched but this was not accepted. At that point he had been in the service of the Defendant for thirty years. He said that after his application for retrenchment was rejected, the Defendant sent him on voluntary retirement before he reached fifty-five, which is the age of compulsory retirement.

(7) It was the Plaintiff's further evidence that after the Defendant had refused to retrench him, he went on three months leave from the 25th May 1998. While he was on leave, the Defendant wrote to him on the 3rd June 1998 advising him to go on early retirement. As that was not what he had asked for, the Plaintiff wrote two letters to the Defendant dated the 9th June 1998 and the 31st August 1998 respectively, appealing against that decision. Although the Plaintiff did not hear from the Defendant's Managing Director personally, he was informed by his Head of Department that the decision on his retirement was final. He was asked to vacate the house he was living in. He did not accept the contention by the Defendant that he had opted to retire early. He accepted that the Defendant had power to force him to retire but maintained that this could be done only with the sanction of the Board. He pointed out that the letter from the Defendant dated the 3rd June 1968 retiring him did not make any reference to the Board of Directors. He also said that voluntary retirement at fifty did not apply in his case because he did not opt to retire. By being forced to retire in 1998, he claimed he lost forty-five months by way of salary and other benefits. He asked for judgment in terms of the prayers in that behalf contained in the Amended Plaintiff.

(8) The Defendant did not call any evidence nor did it file an amended Defence after the Plaintiff had filed the Amended Plaintiff. Although I had granted leave to the Defendant to file an amended Defence upon service of the Amended Plaintiff, learned counsel for the Defendant informed me that he had looked at the Amended Plaintiff and did not find it necessary to amend the Defence.

(9) Learned counsel for both parties file written submissions, which I have read together with the authorities respectively referred to therein. I have also taken into consideration the oral submissions respectively made by both learned counsel on the 29th March 2006.

(10) On the 22nd December 1997, the Plaintiff applied to the Defendant to be included in the retirement

programme. He said^¾

“I wish to request humbly for inclusion in the programme subjected above as having clocked 50 years and above. I do not see the reason why I should not be retrenched honourably in order to fulfill my mission as a man of God called to proclaim the Kingdom of power and judgment eminent.” (Sic).

The Defendant replied to the Plaintiff’s letter on the 14th January 1998 in the following terms ^¾

“RETRENCHMENT

This has reference to your letter dated 22.12.97 in which you requested to be included in the forth coming retrenchment. Your case has been given careful consideration but declined as your services are still required.”

(11) The Plaintiff was not discouraged by the Defendant’s reply and wrote back on the 27th March 1998 under the heading “**RETIREMENT APPEAL**” as follows ^¾

“I applied for retirement having clocked fifty years of age on 02.06.97. My correspondence of 22.12.97 was replied with a decline with view that the Corporation still need my services. (Sic).

But I wish to lodge following points to support my case:

(1) On 31.12.97 I was effectively relieved off the post I had acted for two months. The Chief Controllers post handed over to Mr. John Malinda.

(2) It is natural when there is competition there are threats feelings and intimidation might ensue. My successor in the above post would not be spared by the feelings. My departure would clear such feelings; especially as I work under him.

(3) In view of the above conditions I opt to be retired normally if the Corporation cannot retrench me. Therefore, I request that I be served with three months’ Notice wef 01.04.98 to 30.06.98 when I shall be completing fifty-one years of age.

(Emphasis added).

(12) That letter elicited the following response from the Defendant which came in a letter dated the 17th April 1998:

“RETIREMENT APPEAL

I refer to your letter dated 27th March 1998 in which you appealed against my decision to decline your earlier request for retrenchment and have to advise you that the decision was made after careful consideration of all relevant factors and cannot be reversed.

Consequently, the appeal is declined.

However, I note that you have not made an early voluntary retirement request, if you so wish as implied in your above quoted letter, you are at liberty to do so.”

(13) On the 3rd June 1998, the Defendant wrote to the Plaintiff accepting his desire to retire from the Corporation by giving three months notice. He was told the request had been considered and accepted with regret. He was informed that on account of his long service, the Plaintiff would be allowed to retire in terms of regulation 6 of the Kenya Railways Corporation (Pensions) Regulations.

(14) Upon receiving that letter, the Plaintiff immediately wrote to the Managing Director on the 9th June

1998 denying that he had given notice of intention to retire in his letter of the 27th March 1998. He asked for the withdrawal of that letter or, if he had to go, he should be given the retirement package. He was informed that the decision regarding his retirement had been made and it could not be rescinded.

(15) I have read the Plaintiff's letter of the 27th March 1998 very carefully in the light of his evidence in court in conjunction with the submissions of his learned counsel. In that letter, the Plaintiff stated clearly that if the Defendant did not agree to retrench him, he would retire. He said:

“I opt to retire normally if the Corporation cannot retrench me.”

Whatever spin the Plaintiff may wish to put on that sentence, it was a clear notice to the Defendant of his intention to be given normal retirement by the Defendant. And since the Plaintiff's application for retrenchment had been rejected, the Defendant accepted the notice and decided, in view of the Plaintiff's long service, to retire him under regulation 6 of the Kenya Railways Corporation (Pensions) Regulations, which states in material part —

“6. The Corporation may require an officer to retire from the service of the Corporation —

(a) at any time after he attains the age of fifty years.”

(16) From the letters exchanged between the Plaintiff and the Defendant and also from the Plaintiff's evidence, one gets the clear impression that the Plaintiff would have been much happier if his request to be retrenched had been granted by the Defendant. It seems to me that the Plaintiff after serving for thirty years decided to take early retirement. Once he had taken that decision, he thought he could prevail upon the Defendant to allow him to retire under the retrenchment scheme which he believed carried more attractive benefits. In other words, the Plaintiff wanted to go but on his own terms. That, I think, explains his persistent reference to retrenchment even after the Defendant had rejected his application.

(17) After losing the battle for retrenchment, the Plaintiff threw in the towel and applied for normal retirement. Given that state of affairs, the Defendant, quite properly, decided to allow him to retire under regulation 6 of the Kenya Railways Corporation (Pensions) Regulations. There is no doubt at all that in doing so, the Defendant acted properly and within its powers. Accordingly, I find and hold that the Plaintiff's retirement was lawful and carried out in accordance with the Defendant's Regulations. I find no substance in the claim by the Plaintiff that his retirement was forced or premature. He gave notice of his intention to retire which the Defendant accepted by letter dated the 3rd June 1998. The Plaintiff's employment therefore came to an end on the 31st August 1998 upon the expiry of the three months notice given him in the Defendant's said letter. The result of this is that the Plaintiff has not made out a case to entitle him to any of the reliefs set out in the Amended Plaint dated the 9th February 2005 and filed on the 11th February 2005.

(18) For the reasons which I have given, the Plaintiff's suit against the Defendant fails and I order that it be and is hereby dismissed. In view of the Plaintiff's present circumstances (a small pension from the Defendant, and possibly a moderate stipend as a gentleman of the cloth), I will make no order as to costs.

Finally, it is self-evident that an unusual delay has been occasioned in the delivery of this judgment and the parties are entitled to an apology.

Dated and delivered at Nairobi this 25th day of July, 2006.

P. Kihara Kariuki

Judge