



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 717 of 1995

GITURO KAHUGI ..... PLAINTIFF

VERSUS

K.P.A. .... DEFENDANT

J U D G E M E N T

The plaintiff contended in his plaint filed on 2.10.95 that his contract of employment with the defendant was breached and consequently he is entitled to damages and other remedies set out in the plaint.

His argument is that his employment and conditions of employment forming the contract were not followed the defendant should not have terminated his employment on his attaining the age of 49 years but at the age of 55 years.

There is no dispute that the plaintiff was an employee of the defendant. This issue is admitted.

Issues agreed for determination were framed by the plaintiff. Of the suit issue what laws, regulations and/or documents governed the terms and conditions of the employment of the plaintiff by the defendant? There is sufficient clear and uncontroverted evidence that the letter of appointment and KPA Pensions Regulations 1983 and KPA Staff Regulations 1992 govern the relationship between the plaintiff and the defendant and therefore the defendant was bound to observe the same.

The second issue is whether under the said terms and conditions of service what was the plaintiff's lawful compulsory retirement age? The plaintiff was a pensionable and permanent employee.

Under rule 6(1) of the KPA Regulations of 1983 provides that **“the authority (KPA) may require an officer to retire from the service of the authority at any time after he attains the age of fifty (50) years.”**

Subrule (2) proves that “an officer shall be called upon to retire from the service of the authority

- a) At any time after he attains the age of 55 years.
- b) In accordance with the terms of any approved scheme.”

The meaning of the above provisions is that the authority may ask an officer to retire from service after

attaining 50 years of age and the officer has a right to accept the offer or reject the request. The authority has no power to compel the officer to retire under the provisions of Rule 6(1) but has power to compulsorily retire an officer under the provisions of Rule 6(2). This rule 6(2) is concluded in mandatory form as is manifested in the statement “**shall be called upon to retire**” on attaining 55 years. Before the happening of that event, it is clear then that before attaining that age the defendant could only request the plaintiff to retire at his option. The lawful age for compulsory retirement of the plaintiff from the services of the defendant is 55 years.

The evidence available on the plaintiffs age is the subject of issue No. 3. What was the age of plaintiff at the time he was compulsorily retired?

The plaintiff states that in October 1994 he was aged 49 years and he had not reached 50 years. This was stated in his reply of statement of defence and affidavit sworn and filed in court on 16<sup>th</sup> November 1995. the plaintiff also produced his identity and birth certificate showing that the plaintiff was born in 1944. The defendants contention was that the plaintiff had given his birth date as 30<sup>th</sup> march 1944, in some statistics forms relating to defendant statistical records are weak evidence being photocopies and not being the authentic communication as opposed to statutory documents exhibited by the plaintiff. The statistics documents were in the possession of the defendant but he was not able to produce the same and are contrary to Section 35 and 67 of the Evidence Act Cap 80.

The fourth issue is whether the said retirement of plaintiff by the defendant was unlawful.

The said retirement was unlawful and in breach of terms and conditions of employment between the parties. It also contravened the principles of natural justice. The defendant was not accorded opportunity to make representation to the body commanding his retirement under the provisions of KPA staff regulation B11 which lays down the procedure of retiring employees before they attain the age of 55 years.

In the KPA (Pensions) regulations 1983 deemed to have come into force on the first January 1978, the marginal note at Rule 6 reads (optional and compulsory retirement) 6(1) states “**the authority may require an officer to retire from the service of the authority at anytime after he attains the age of fifty years.**” In this case the plaintiff admits in his evidence that infact at the time he received his termination letter he was aged 49 years and 10 months. Therefore, the termination does not fall under the provisions of regulations 6(1) aforesaid.

The staff regulation B11 (a) sets out the procedure to be followed thus: if it appears to the Managing Director that there is a reason why an employee who holds a permanent office in Grade PA4 should be called upon to retire from the service on the ground that he has reached the age at which he can lawfully be retired under the provisions of the appropriate pension legislation, the Managing Director will advise the employee that compulsory retirement is under consideration and ask employee if he wishes to make any representations of a personal nature on such a step. The MD will forward such representation to the board will decide whether such officer should be called upon to retire.

Instead of following the above procedure, the Defendant by letter dated 28.10.94 purported to terminate the plaintiff’s employment. The retirement was unlawful because the plaintiff had not attained at the age of 50 years. If the defendant thought the said age had been attained he failed to follow staff regulations which required the plaintiff to be informed of the proposed retirement and to be given an opportunity to make representation for consideration by the board and the board would decide whether the plaintiff should be retired or not. This chance was denied to the plaintiff and he will never know what decision the board would have made.

It is submitted by plaintiff that infact no board was constituted to deal with his retirement as required by staff regulation B11(a). No evidence was adduced by the defendant that there was a board meeting on the material date or any other date when the retirement of the plaintiff was discussed. Furthermore the plaintiff had not been notified of the proposed retirement not less than three months prior to the retirement date.

The letter dated 28.10.04 purported to communicate information that there was a committee which met on 24.10.99 which decided that the employment of the plaintiff should be terminated with immediate effect.

The defendant's contention that plaintiff was retired in accordance with Regulation 6(1) KPA (Pensions) regulations 1983 is not supported by evidence and therefore the action was void ab initio. The interpretation of regulation is clear. Retirement after reaching the age of 50 is optional – that is clearly stated in the marginal note. Retirement is compulsory after attainment of 55 years. This is not the plaintiff's case.

The counsel for plaintiff relies on several authorities regarding the powers given by legislature by the use of word “**may.**” It is my view that in this case the rules make it compulsory to request an employee to retire after attaining the age of 55 years not earlier. But retirement before that date must be voluntary or for a reason. And the employee has a right to be heard on that reason. But B11 is clear “**The Managing Director shall forward such representation to the board who will decide whether such an officer shall be called upon to retire.**” Counsel for the plaintiff relies on the authority and judgment of the **HCC NO. 2013 OF 1989 CHARLES KARIUKI WAMBUGU – VS - THE KENYA NATIONAL LIBRARY SERVICE BOARD** where the issue of rules of natural justice arose. A.M. Akiwumi (as he then was) had this to say

**“it is common ground that the plaintiff was not heard before his dismissal. The plaintiff says this was contrary to the rules of natural justice and I think that it would be convenient to consider this at this state for if the rules of natural justice were breached by the defendant, the judgment must be entered for the plaintiff.”**

In the said judgment is guided by the judgment of late Justice Nyarangi in **CIVIL APPEAL NO. 152 OF 1986** (unreported) where the learned Judge said:

**“I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly.”** In this case, judgment was entered for the plaintiff. In the present case, the decision is said to have been taken on 24.10.94 and on 28.10.94. It was executed giving the plaintiff no chance of making representation as provided the Staff Regulations. Plaintiff's counsel quoted the Court of Appeal decision in **RIFT VALLEY TEXTILES – VS – EDWARD ONYANGO OGANDA CIVIL APPEAL NO. 27 OF 1992** at page 6 where the court considered the application of the rules of natural justice in cases of contract. **“The rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in their contract that such Rules shall apply.”**

Here the parties had resolved that Rules of natural justice shall apply. The Plaintiff had a right to make representations for consideration by the decision making body and it is clear there was the possibility that such representations could affect the decision of the board on whether or not to retire the Plaintiff. This step is in favour of the plaintiff. This factor gives rise to a cause of action in damages. The plaintiff after receiving the termination letter protested. See Exhibit 2, and explained his circumstances. He had obtained a loan payable by installments and now it had to be recovered all at once. This act was to his detriment. The plaintiff had six children of school going age and it would be a burden to educate them on his pension alone. And most important he could have explained that his age was not 50 years yet. These are some of representations he was entitled to put forward to the board deciding on his retirement. The opportunity was not granted.

The defendant's witnesses did not produce all relevant information to court giving excuse that the relevant information was kept in another file which was not in court with the witnesses. It is proper here to point out that the defendant was keeping away from the eyes of the court evidence and information which may have been adverse to its case.

The case of **Peter Onyango Onyiego – Vs – K.P.A. HCC No. 496 of 1995** was cited. Where the court made a declaration that the retirement was illegal and that the plaintiff was entitled to payment of a

sum equivalent to the months he should have been in employment to date of compulsory retirement age.

On the 5<sup>th</sup> issue set out, the plaintiff suffered loss and damage. Damages should assume the proportion of the plaintiff's entitlement had the wrong act not occurred meaning that he should have earned his salary upto the age of 55 years, together with pension, house allowance and on the last day be provided with transport to carry him to his home in Kiambu.

It is the plaintiff's contention that he would have attained his 55 years on 31.12.99. There is no evidence to the contrary. At the time of retirement the plaintiff stated that he was Assistant Superintendent Grade PA4 in which case Staff Regulations B11(a) is applicable. However the defendant states that he was under PA5 and therefore the powers to terminate his services by retirement was in the hands of Managing Director under B11 (b). There is no dispute here except that **"powers to retire on the grounds described in paragraph (a) above will be exercised by Managing Director. The head of division will, in such cases initiate action."**

It is clear therefore in both cases the procedure is the same. The action is either initiated by the Managing Director or in (b) by Head of Division and instead of the board in (a) it is the Managing Director at (b). It is to be noted here that the plaintiff's case for retirement was decided by "Staff and Establishment Committee" not the "Board of Directors." Therefore, it is not clear which body really exercised the power of retiring the plaintiff as on 28.10.94. Therefore, the contention of the defendant is vague and not in accordance with the staff regulations.

Counsel for defendant cites the **HCC No. 3264/93 Michie Gituma – Vs – NSSF** the decision of Justice S E Bosire (as he then was) where it was held that certain employees rights are not claimable until they arise such as leave allowance, medical benefit, house allowance and other related benefits are rightly available to those still in employment. In **C.A. 120/97 KPA – vs – Edward Otieno**, the Court of Appeal held the benefits were to be calculated at the age of 51 not as if he had been retired at the age of 55.

Defendant submits that to pay benefits as if the plaintiff had worked upto the age of 55 would be tantamount to reinstating the plaintiff which he is not entitled to.

However it is to be noted that in the present case the act of retirement was void ab initio and the plaintiff is to be placed as if the wrong act was never committed. Therefore, he has to be treated as if he worked all the period remaining until retirement age of 55 years.

However, on the compulsory date of retirement at 55 the plaintiff is entitled to transport allowance to return to his home of origin which is Kiambu together with his goods acquired on the long term of his employment by the defendant's establishment in Mombasa. This figure is sh. 200,000/= item (m) in the plaint. He is entitled to compensation for salary lost were it not for the wrongful Act. It is 62 months the period which is not disputed. This is calculated by plaintiff as sh. 654,730/- On the house allowance claim the plaintiff was no longer required to perform his duties at the premises of the defendant and he did relocate to his home. The claim of house allowance is not payable.

On the issue of shift allowance Section E17 states that "shift allowance is payable to operation staff in grades PA2 to PA5 inclusive and must be authorized by the Managing Director on recommendations of the head of department. This is a right that is inchoate. The right to payment accrues upon the happening of an event. The same applies to call allowance which is paid to staff who by nature of their specific posts are liable to be called out for duty at any time outside their normal working hours.

Strangely, for all the period worked the plaintiff did not point to any time these allowances have been made to him.

Item (f) car allowance is set out under Regulation E12 payable to an employee specifically authorized to use his personal vehicle while actually performing the defendant's duties and the conditions of employment are explained under that regulation. In this case, it has not been proved, again this is an inchoate claim.

On item (g) the provision as to entitlement of leave and medicals are set out under Section D Staff Regulation.

D9 concerns the medical treatment. Free medical entitlement is given at the defendant's clinic and dispensaries. In-patients will be accorded free treatment when admitted in relevant hospitals. There is a right for refund of money incurred in medical treatment after the event. It is not possible to see into the future when the plaintiff would require medical treatments for example since filing this suit, there is no evidence that the plaintiff has required any medical treatment. I would say this claim is not proved.

On item (h) in the plaint the progress in service is promotions (C7) and increment of salaries. (C8) states that increments is not a right. It appears it is in discretion of the defendant. There is evidence here that the plaintiff was called to act in capacity of Assistant Superintendent grade PA4. It would be speculation to assume that he would be called upon in the future before attaining the year 55. The right accrues upon happening of an event in this case authorized by the Managing Director.

The next claim is loss of leave, travel warrants, children vacation tickets. Leave is provided for under Section D Staff Regulations. D1 (a) states all leave is at the discretion of the Managing Director and subject to exigencies of the service. The MD or any person authorized by him in that behalf may decline, vary or cancel leave of any description at any time or may grant it subject to such conditions as he may think fit. Further provision is that leave salary is an entitlement to the employee to whom the leave is granted and is payable. In the circumstances of this case, it is my finding that leave, though not a right, is payable to all employees and in case of the plaintiff was entitled to 30 working days annual leave. The manner of calculating leave is explained in D2. Therefore, on consideration of all facts this item of last leave is allowed and the sum claimed sh. 56,475/- is awarded. However, the reality of this case is that he will not need to travel on leave. His children shall not need to travel to Mombasa on vacation. These allowances are not payable and are not awarded. Item on pension sh. 286,959.50/- is already admitted to have been paid. As for the balance as calculated from 31.12.99, it is calculated at sh. 1,739,397 would amount to sh. 1,452,437.50 is payable under the previous regulations. No dispute has been raised in this regard. And the same is awarded.

There is the issue of denial of promotion after serving in acting capacity PA4 for 10 months. He should have been promoted to that grade after 6 months and therefore the retirement benefits should have been calculated at Grade PA4 instead PA5. This is also a breach of employment by the defendant. After considering the above factors, it is my finding that the plaintiff is entitled to declaration prayed for in the plaintiff.

It is also my finding that the plaintiff suffered financial loss by reason of the breach of terms of employment which was premature and he is entitled to certain compensation as follows:

- 1) Loss of salaries sh. 654,730/=
- 2) Loss of leave sh. 56,475/=
- 3) Transport for himself and his personal effects being calculated at Sh. 200,000/=
- 4) Pension less paid sh. 1,452,437.50/=

All totaling to sh. 2,363,642.50/=

Judgment is entered for plaintiff against the defendant as prayed in the plaint. Thus prayer (a) declaration that the purported retirement or termination is null and void, prayer (b) Sh. 2,363,642.50/= plus costs of this suit together with interest at court rates.

Orders accordingly.

Dated the 15<sup>th</sup> September 2006.

**J KHAMINWA**

**JUDGE**