



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 128 of 2003

LEONARD ODINDI.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

JUDGMENT

By an amended Plaint dated 18th August 2003, Leonard Odindi (Plaintiff) sued Kenya Ports Authority (Defendant) and prayed for inter-alia:

- (a) Declaration that the Plaintiff was prematurely retired from his service by the Defendant, or its servants and or agents and for payment of salary in lieu thereof, House allowance, Leave days and medical allowance.
- (b) General damages for premature retirement
- (c) Costs of this suit and interest thereon.

The Defendant filed a defence to deny the Plaintiff's claim.

When the suit came up for hearing the Plaintiff and the Defendant each tendered the evidence of two witnesses. The first to testify on the Plaintiff's side was the Plaintiff himself (PW1). He told this court that he was employed as a casual labourer by East African Harbours Corporation in 1974 whose functions were later taken over by Kenya Ports Authority upon the break up of the East African Community. PW1 was then absorbed to the employment of the Defendant and in 1977 he was promoted to a trainee clerk. PW1 produced various documents showing his upward rise up to the level of Senior Clerical Assistant in 1993. At that level the Plaintiff earned a monthly sum of kshs. 27,850/=. The Plaintiff told this court that sometimes in the year 2002 he developed some ailment which became necessary that he be given days off duty by the doctor to enable him seek for treatment. On the 5th day of November 2002, the Plaintiff received a letter dated 4th November 2002 retiring him on medical grounds from the Defendant's employment. At that time the Plaintiff was aged 46 years and he was due for retirement at the age of 55 years. In other words he still had 9 years left of active service before retirement. The Plaintiff denied

having appeared before the Defendant's medical board comprising of Dr. Y.S. Karim, Dr. L. G. Gathua and Dr. Muyodi on the 28th day of October 2002. The Plaintiff produced the confidential report of 28th October 2002 in evidence. The Plaintiff called Dr. Charles Mwangome (PW2), a psychiatrist of mean repute to testify in support of his case. Dr. Mwangome (PW2) informed this court that he examined the Plaintiff on the 11th, 13th, 14th and 17th days of March 2003 and came to the conclusion that he was mentally sound. He produced a psychiatric report dated 24th April 2003 to establish his findings on Leonard Odindi. PW2 dismissed the medical report which was used to retire the Plaintiff from the employment of the Defendant to be untrue because according to him any person who suffers from severe psychosis loses the ability of judgment which was not the case with the Plaintiff. The Plaintiff urged this court to find that he was unlawfully dismissed and hence he is entitled to be paid:

- (i) Salary for 9 years at the monthly rate of kshs. 27,850 = Kshs. 3,007,800/=
 - (ii) House allowance of kshs. 9,070pm for 9 years = Kshs. 979,560/=
 - (iii) Leave allowance for 9 years at a rate of 45000/= per annum = kshs. 405,000/=
 - (iv) Medical allowance for 9 years at a rate of kshs. 11,800/- per annum = kshs 106,200/=
- Total = kshs.4,498,560/=

The Defendant summoned the evidence of Dr. Yusuf Karim (DW1), one of the doctors who is alleged in the confidential report of 28-10-2002 to have sat to examine the Plaintiff. Dr. Y. Karim (DW1) denied having examined the Plaintiff on 28-10-2002. In fact he said the three doctors who appended their signatures on the aforesaid never sat together as a medical board. DW1 said the report was made on the basis of the medical information contained in the Plaintiff's personal and confidential file kept by the Defendant. Marco Mulwa Ngolia (DW2), the Defendant's employee at the personnel department produced the internal memo on behalf of the Defendant showing that the Plaintiff was retired on medical grounds. This witness also told this court that the Plaintiff was paid his terminal benefits including two months' salary payment in lieu of notice.

At the end of the evidence learned counsels on both sides filed written submissions upon obtaining this court's leave. I have considered the evidence and these written submissions. As far as I am concerned there are only two issues which were left for me to decide namely; First, Whether or not the Plaintiff was unlawfully retired. Secondly if the answer to the first issue is in the affirmative what remedy is available to the Plaintiff.

Let me start with the first issue. After a careful consideration of the evidence and the submissions I am convinced that the Defendant was prematurely retired by the Plaintiff from its employment. There was no cogent evidence that the Plaintiff was examined by the Defendant's medical board. What the doctors comprising of the Defendant's medical board did was to write an opinion on the Plaintiff based on the medical records in possession of the Defendant. That was not a proper and objective medical opinion. The doctors concerned acted unprofessionally. Their conduct obviously led to a miscarriage of justice which cannot be permitted to occur by any employer which has the interest of its employees at heart.

Having come to the conclusion that the Defendant was prematurely retired the Plaintiff, let me now address the remaining issue as to what would be entitled to the Plaintiff. It is trite law that in such disputes, the Plaintiff is only entitled to all that was due to him under and in accordance with his contract of service. I have already set out the kind of prayers the Plaintiff sought from this court. Basically he has prayed for payment of salary, leave and house allowances and other incidental allowances for the remaining nine years before retirement. This issue can easily be disposed of by referring to the holding of the Court of Appeal in case of Kenya Ports Authority vs Edward Otieno C.A. No. 120 of 1997 in which the Court of Appeal adopted with approval the holding of Justice Oguk (as he then was) that is to say:

"I also consider that to pay the Plaintiff his full salary and other emoluments till he attains the age of 55 years, as he claimed, would, on proper analysis be tantamount as if he was being reinstated to his

employment, to which he is not entitled.”

It is now clear beyond peradventure that the Plaintiff cannot get what he has prayed for. The Plaintiff has further prayed for damages for premature retirement. The Court of Appeal restated the law in the case of Dalmas Ogoye =vs= K. N. T. C. Ltd. C..A. No. 125 of 1996 by saying:

“Since the appellant’s appointment was unlawfully terminated, the only damages he is entitled to in law is the amount he would have been paid if his employment had been brought to an end in the manner stipulated in the contract of service and no more.”

In this case it is admitted that the Plaintiff was paid two months’ pay in lieu of notice. The Defendant was required to pay such an employee three months’ pay in lieu of notice. I have found that since the notice given falls short of that under the contract, then the Defendant should pay the balance of one month’s pay in lieu notice. In my view that is the only award I can give the Plaintiff which I hereby do, otherwise the rest of his prayers are dismissed. Costs of the suit is given to the Plaintiff.

Dated and delivered this 25th day of October 2006

J. K. SERGON

JUDGE

In open court in absence of the parties.