



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 827 OF 1995**

MALEBA SOLOMON RIUNGU PLAINTIFF

V E R S U S

KENYA PORTS AUTHORITY DEFENDANT

J U D G M E N T

This suit was filed on 22/11/1995. The plaintiff pleads that he was in the employment of the defendant and that his service started in 1961 with the defendants predecessors and his services were terminated in November, 1994, three years short of contractual retirement period. Also that his retirement benefits were not properly calculated or paid in full. And that the decision to retire him was discriminatory and against the rules of natural justice.

In its defence it was admitted that the plaintiff was its employee and that his services were terminated in accordance with the provisions of the Kenya Ports Authority (pension) Regulations 1993 LN. 77/85 which states:-

“6(1) the authority may require an officer to retire from the service of the authority at any time after he attains the age of fifty years.”

The defendant denies loss and damages as claimed. No issues agreed upon but as seen from the pleadings much is conceded by the defendant. The issue to be decided therefore is :-

1. whether the plaintiff was due for retirement as provided under rule 6 (1) relied upon.
2. and if so did The defendant act in a discriminatory manner and contrary to the rules of natural justice in retiring the plaintiff in other words did the defendant breach the employment contract?
3. has the plaintiff suffered loss of salary as a result?
4. did the defendant pay correct retirement benefits o the purported retirement.

In support of his case the plaintiff testified in court. He said he was born in 1942 and showed exhibit 1 in support. and birth certificate. He started his employment as a casual laborer raising to Clerical Staff and Senior Clerk and Supervisor. His retirement age was to be at 55 years of age. There is no dispute on this one. However on 21.11.94 the plaintiff received a letter on 21/11/94 backdated to 31/10/1994 (exhibit 18).

Exhibit No. 5 is headed “Clerical and Employees on Staff Terms Conditions of Service.”

Paragraph 6 thereof states – RETIREMENT AGE.

“The normal retiring age for employees is 55 years”

Upon receipt of retirement letter and after consideration of the whole matter he wrote to the defendant challenging the retirement as he had not attained age 55 he demanded full pay up to that age and full pension. He calculated the amount to shs. 2.439.269/- this calculation is for the pay to retirement date which should have been 31.12.97 being 37 months of employment. He swore that there was discrimination in his being retired. There were 4 officers in the office of the same age but he is the only one who was retired. Further he says that he was not given a chance to be heard.

Upon perusal of Legal Notice No. 77 of 1983 regulation 6 (1) gives the authority to retire an employee at any time after attaining the age of 50 years. This is admitted by the defendant. But it is to be noted that 6(2) provides that an “officer shall be called upon to retire from the services of authority at any time after attaining the 55 years.” The marginal note to this regulation is “optional and compulsory retirement” Obviously paragraph 6 (1) applied to the optional as opposed to 6 (2) compulsory retirement.

The defendant has regulations known as K.P.A. Staff Regulations. Some 3 pages of which has been produced in defendants bundle of documents. Para.B11 (a) and (b) termination of permanent and pensionable appointment provides that:-

“if it appears to the Managing Director that there is reasons why an employee who holds a pensionable office ----- should be called upon to retire on the grounds that he has reached the age at which he can lawfully be required to retire (here 50) The Managing Director will advise the employee that compulsory retirements under consideration and ask the employee if he wishes to make any representations of a personal nature on such a step. The Managing Director will forward such representatives to the board who will decide whether such an officer should be called upon to retire.”

This provision is supplemental to pension regulations 6(1) which clearly gives discretion to the Board of Directors to exercise the power of retirement after attainment of employees of 50 years. As it is the letter of retirement aforementioned refers to a meeting of staff and establishment committee and states that the Board of Directors “**decided**”. This shows that the procedure was not complied with. Plaintiff states that he was not given opportunity to make his representation. And although it must have been known that the plaintiff’s son was undertaking education in India and that the Managing Director knew as he was a party to application forms for the sons admittance to the university and although the plaintiff did request extension of his retirement until his son returned, the Board had no opportunity to consider these personal representation because it had already “**decided**”. The manner in which the decision was made and communicated was harsh and unreasonable – the decision was taken on 24/10/94, the letter was written on 31/10/94 and delivered on 21/11./94. It shows a blatant disregard of contractual rights and obligations of defendant.. Discretion such as given to the defendant under B11 and regulation 6(1) of Pension Regulations has to be exercised in a reasonable and just manner and it is granted so that such a decision shall not cause harm to the employee. The right to employment is a basic human right in modern international jurisprudence and like all fundamental human rights that right must be protected. Let it be noted that unless the discretion is exercised fairly the contract of employment remains breached and an employee is entitled to damages for the breach. There is no place here for giving of notice the contract continues until terminated by retirement at the age of 55. In the circumstance I enter judgment in favour of plaintiff as follows: _

- a) declarations that termination of the plaintiff from employment was unlawful and illegal.**
- b) full pension less already paid.**
- c) Salary..... shs. 208.980/-**
- d) Leave payments..... shs. 45,314/-**

e) Unpaid salary in lieu of notice shs. 6,375/-

f) Housing shs. 57,375/-

A deduction from advance salary for 3 months to be made from the total amount shall carry interest at court rates from the date of filing the plaint. The costs shall be to the plaintiff.

Dated this 25th day of November, 2004.

J. KHAMINWA

JUDGE

25.11.04

Khaminwa – Judge

Cege – Court Clerk

Ms. Ngugi – holding brief for Kioko advocates.

Non appearance for other side.

Judgment read in open court.

J. KHAMINWA

JUDGE