



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 307 OF 1998
(From the original Civil Suit SPM's 8516 of 1996 of PM's
Court at Nairobi)

HOWSE & MCGEORGE LTD.APPLICANT

VERSUS

J.G. KAGUARESPONDENT

J U D G M E N T

The respondent was employed by the appellant as a debt collector. He was retired in December 1994 after serving the appellant for 32 years. This means he had served the appellant since 1962.

On 1st September 1994 a letter addressed to the respondent by the appellant's Managing Director gave him notice of retirement from employment effective 31st December, 1994. The reason given was the reorganization being undertaken by the appellant which necessitated that some personnel, including the respondent, be retired.

Arrangements were then made and the respondent was paid his retirement dues and he retired.

However, on 26th November, 1996 the respondent filed a suit in the court of the Senior Principal Magistrate Nairobi (Sheria House) to pray for general damages, severance benefits, costs of the suit and interest on the above from the date of filing suit till the date of payment in full.

Paragraph 4 of the plaint which contained the respondents main claim against the appellant prayed for:-

“Severance benefit and/or handshake computed at the rate of 6 months for every worked year”.

After the appellant was served with the relevant summons, appearance and defence were filed on 8th and 17th February 1996. In the defence, the appellant stated that it lawfully terminated the respondent's employment by giving him four (4) months notice which the appellant was entitled to do and that no further payment was due from the appellant to the respondent.

The case was heard on 11th March 1998 when the respondent and defence witness testified.

The respondent complained that he was just sent home without applying for retirement. So he wanted to be paid general damages, severance pay costs of the suit and interest.

The defence witness testified that the respondent was lawfully retired and paid all his dues.

Counsel for the parties filed written submissions in court in April and June 1998 and judgment was

delivered on 17th August 1998.

In that judgment the respondent was awarded a sum of Kshs229,184/=, I think, in form of severance pay.

But this award did not find favour with the appellant who filed an appeal to this court on 28th August 1998; in a memorandum which listed seven (7) grounds of appeal. The first and second grounds were in the following manner.

(1) The learned magistrate erred in law and fact and went against the weight of the evidence given in finding that the respondent was declared redundant by the appellant despite the respondent's own evidence that he was not declared redundant.

(2) The learned magistrate erred in law and in fact in interpreting the letter terminating the respondent's employment as a letter declaring the respondent redundant.

The letter which relieved the respondent of his duties with the appellant was dated 1st September, 1994. Its heading was

“RETIREMENT NOTICE” and read:

“This letter is to give you notice that effective December, 31 st, 1994 you will be retired from employment. You are advised to proceed and exhaust all pending leave prior to that date.

You may probably have noticed the reorganization the company has undergone in the past one year and as part of that process, certain positions have been reviewed, and some personnel, including yourself, have been offered retirement.

Please be assured that your accrued benefits will be paid to you in full and we shall be grateful for your full understand of our position.

Should you wish to be re-employed after retirement, you may apply for any suitable position. Your application will be considered along with other suitable candidates and the outcome will be communicated to you. You can obviously court on us for a favourable recommendation to any prospective employer you may wish to join.

Every career must end sometime and everyone must leave employment sometimes. You have served the company for 32 years and on behalf of the Directors. I take this opportunity to thank you for the dedication you put in your work.

Please sign on the copy of this letter and return as soon as possible so that your benefits can be processed and be ready for your collection in time. We wish you the best of opportunities in your retirement and remain with kind and best regards.”

Before this letter, there was one dated 16th February 1994 to the respondent in which it was stated that the retirement age had been lowered to 50 years from 55 years effective January 1995 and that those who wished to retire earlier could then take advantage of the lower age.

In the same letter, it was intimated that the respondent would have attained the age of 50 years effective January 1995 and he was to inform the employer (appellant) of his retirement plans at the earliest opportunity so that this opportunity so that his benefits could be worked out or prepared in time.

When the respondent testified in the case he produced this letter exh. 1 along with the notice of retirement (exh 4) and stated in part:

“The defendant later in 1994 issued me a letter to the effect that anyone who reached 50

years could retire. I had by then reached 50 years and I opted to retire with all the benefits. I had worked for the employer for 32 years.”

During cross-examination, he testified that in 1994 he was 54 years of age and that he was eligible for retirement.

That he was given notice to be retired, he exhausted his leave and was paid salary. He stated further that he was not declared redundant.

When the respondent was handed the letter (exh. 1) in which it was stated that according to the appellant's record he would have attained 50 years effective January 1995, he did not dispute those facts.

In any case, when he testified in court and said he was born in 1940 (not telling the court the month), he was certainly over 54 years by the time he received the notice to retire.

When, therefore, the appellant gave the respondent notice of retirement (Exh 4), it was following on its letter (exh. 1) in which the retirement age for employees had been lowered from 55 to 50.

Even if it was to take into account the year the respondent was born in 1940, the latter would still have been within the limit of retirement age of 55 years.

When all these facts are taken into account, and the evidence of the respondent that he was never declared redundant, grounds 1 and 2 in the memorandum of appeal make a lot of sense and there is no way a reasonable court would interpret the notice of retirement dated 1st September 1994 as declaring the respondent redundant.

That the letter talked of reorganization of the firm and reviewing of various positions did not connote redundancy given that the notice of retirement of the respondent was based on age grounds.

The respondent admitted having exhausted his leave entitlement and was given 4 (four) month's notice of retirement. Then he was paid his benefits or what he called provident fund. What other benefits did he want paid to him? I see none.

He himself gave no evidence of these and if it was a question of being paid 6 months salary for every year worked, no evidence of this was adduced.

He was not supposed to be paid severance benefits under Section 16(A)(1) because there was no evidence to establish the conditions set out in that Section. Thus ground 3 and 5 of the memorandum of appeal succeed.

In face of the letters exhibits 1 and 4, it was clear the respondent was properly retired on age ground and that the notice of termination was legal. The learned magistrate should have found so. As regards grounds 6 and 7 the respondent did not adduce any evidence to prove on a balance of probabilities that he was entitled to any special damages from the appellant, leave alone a sum of Kshs.229,184/=; he having had his services with the former legally terminated whereupon he was paid his benefits in full.

In fact the case filed by the respondent against the appellant must have been an afterthought he having signed copy of the letter of retirement and received his benefits in full without any question.

He even took his leave after the notice of retirement (see Def. Exhibit 1) and wrote no letter to protest about his retirement. There was not even notice of his intention to sue the appellant over this matter, thus he laid no initial basis for this case.

I allow this appeal and set aside the lower court order and substitute it with one dismissing the respondents' suit with costs. Costs of this appeal to be paid by the respondent the appellant.

Delivered this 24th day of February, 2003.

D.K.S. AGANYANYA

JUDGE