



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 674 OF 1993

CAPTAIN J.N. WAFUBWA.....PLAINTIFF

V E R S U S

HON. THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

The Plaintiff was a retired Captain in the Kenya Air Force and sued the Attorney General on behalf of the Government, the Chief of the General Staff of Kenya Armed Forces. He sued the Defendant by Plaint dated 12.2.93 and amended on 24.3.93 and filed on 24.9.93, for damages for unlawful termination of employment and for many other remedies namely:

- a) a declaration that notice to retire given to the Plaintiff is unlawful, invalid of no legal effect and is null and void.
- b) That 82 Air force does not exist in law
- c) A declaration that the Plaintiff is entitled to be promoted to the next and give reasons for failure to promote him.

2 alternatively judgement for; -

- a) general damages for illegal and unlawful termination of employment.
- b) An injunction to stop the use of the air manouver displays designed by the Plaintiff until there are properly qualified and trained personnel to execute the manouver.
- c) Compensation to the Plaintiff at 6% of the Standard Puma Helicopter Aircraft account.
- d) Compensation of 6% of the value of the equipment the proposed held with full responsibility for the months he had worked

3) Costs of this suit.

4) Interest on (a) and (b)

5) Any further relief that the Court may deem fit.

The Defendants in their defence denied the allegations but admitted that the Plaintiff was recruited into the Kenya Air force as a Pilot in 1978, but that according to the terms of service if he had not been

promoted to the rank of Major he should be retired upon attaining the age of 39 years, that promotion was not automatic and that retirement was in accordance with the Regulations governing the Plaintiff's terms of service. It was also averred that 2nd and 3rd Defendants were wrongly joined.

The case has been subject to several interlocutory applications which characterized its progress. Hearing started on 19.7.2001 before Hon. Justice Visram. In his evidence, the Plaintiff said that he was enlisted in the Kenya Armed Forces on 12.5.79 to be a Pilot but he had to go through military course until 1980. In 1983 he became a regular that is to say he became permanent, but he never produced letters of appointment so he did not have terms of employment shown to Court but he said terms of retirement were general terms.

He says his problems started in 1984 when it was noticed that he was very generous in harambee donations and the commander ordered that his mortgage repayments with Housing Finance Company of Kenya (HFCK) be slashed by Kshs.2000/-. It was however, in evidence that on 14.11.90, Base Commander withdrew former conviction against the Plaintiff saying:

“The above named officer was charged for not accounting for Kshs.18,806.20 being cellar sales FOB Mombasa for 23 rd May 1988 and 3 rd to 6th June 1988. You listened to the charge on 18 th April 1990 and found the officer not guilty. According to the board of enquiry proceedings convened vide part I orders Serial No. 119/88 of Tuesday 13.12.88 the officer was blamed for the same amount.

2) For the above reasons and the powers conferred under Section 83(2) of the AFA 1968, I have reviewed your findings. I feel that there was a mistake of law in the proceedings hence the verdict of not guilty is withdrawn and I will hear the charge once again.

J.K. TUWEI COL. BASE COMMANDER”

His certificate of service was withdrawn on 26.10.92. He said he could not after that get clearance certificate. The certificate was for 24.9.90 but he was out in Somalia until 26.10.92. Exh.14 authority for retirement from service dated 24.9.92. It says the officer whose retirement has been approved will retire from the service on 21.5.93. His last day of para service will be 21.5.93 after 15 years. It says the officer was entitled to a service pension funding and payment would be made by the pension branch of the Treasury to assess his benefits and notify the Treasury accordingly. It also said that authority was further granted for the officer to be posted to Department of Defence super pool on proceeding on retirement. He said he needed certificate to retire. How he was retired was not the correct procedure hence on 16.12.92 he gave notice to the Attorney General for intention to sue, Exh.14, authority for retirement was not proper so he did not comply with it. On 26.8.92 a private scheme of flying sent to him a contract. On 8.9.92, he applied to the Defence Council for leave to travel outside Kenya i.e. to France while he would be on leave awaiting his retirement age; on age limit on 22.5.93 to enable him to sign a contract with a French Helicopter Training School. At that time, he had 3 years accumulated leave.

On 2.10.92 he was handed over civilian ID card and retirement certificate, Officer Secret Act 1968, Authority letter for retirement dated 2.4.92 but then on 23.10.92 Major Kamau for commanding officer demanded the documents back alleging that they were erroneously issued. He said they refused to give him certificate that meant he could not be allowed to hand over. He said Department of Defence stopped his salary unfairly and made him lose his contract with the French Company. The Defence called one witness Lt. Patrick Titus Kathigo, staff officer recorder who produced service record of the Plaintiff. He said Plaintiff was born on 22.5.54 was recruited into KAF on 22.5.79, commissioned on 2.2.80 promoted to second Lt. on 9.2.79. Ag. Captain on 9.10.84. He had 3 offences for which he got disciplinary conviction, the last one was under Section 27(b) and 34 of Cap 199 causing him to get severe reprimand. He said he retired from service on 21.5.93 on attaining 39 years of age. The witness said that Plaintiff was never cleared up till now. He has never passed through clearance. He says the Plaintiff was invited by Base Commander by letter of 17.8.93 to come and clear himself but he refused.

The witness also said the Plaintiff could not go to France to take new appointment before he was

cleared by KAF, but he could not take up the employment while his KAF contract was still existing. His request was refused. He said that is no entry about his political involvement. In cross-examination, the witness said he was not able to talk about attachment of Plaintiff's salary. Plaintiff had not been issued with UNIT CLEARANCE CERTIFICATE. He agreed that Colonel was empowered to give Plaintiff certificate to clear from unit after receiving Exh.14. authority to retire. One needed Exh.14 a retirement certificate to go and clear himself. The issue here is whether withholding retirement certificate from Plaintiff was proper and justified. From this evidence it is proved to my satisfaction that Plaintiff was to retire at 39 years of age which would be 1993. By the time he was given authority to retire he was about to reach that age and he had accumulated leave. It is also not disputed that he needed certificate of retirement after receiving authority to retire. I also find that Plaintiff had secured a contract of service which would take effect 3 months before his retirement but when he would or could be in his terminal leave. I find that he was given his authority to retire correctly but then withdrawn again without any reason.

The claim is wrongful retirement. The Plaintiff claims that he was wrongly retired but on this, I would repeat what DW1 said in his evidence that GSO who are not recommended for further promotions will normally be compulsorily retired when they reach their retirement age of whom Captains would retire at 39 years of age, so 39 years retirement age applied to him so retirement of the Plaintiff as Captain at that age would have been in order. I also find that the Armed Forces Act Cap 199 of the Kenya Laws governs military matters under Kenyan law and not Kings African Rifle Order 1958. The question whether the Plaintiff should have been promoted by Defence Council is a question to be answered. Defence says that it is prerogative of the Defence Council under Section 225 of the Armed Forces Act Cap 199 read together with Section 5 of the Act but I do not think the High Court is excluded besides it is my view that whatever the Defence Council does in relation to employment of any person must not flout the principles of natural justice and PW1 said that on completion of 7 years a Captain automatically gets the rank of Major.

DW1 said that the Plaintiff was enlisted on 22.5.78 and granted a commission on 9.10.80 with his security back dated as if he was employed on 9.2.79. He started getting pay of the rank of Lieutenant passing the rank of second Lieutenant after 7 years as Captain, he should have automatically become Major. I agree that he was not subject to infantry regulations. I find that denying the Plaintiff this promotion was wrongful. DW1 said that Plaintiff had 3 regimental entries and was punished, but the witness said: - "The Plaintiff did well and even became an instructor. He had to be retired at 39 years of age. Regimental entries did not cause his retirement. His retirement was only occasioned by age." If this did not cause his retirement then what is it that barred him from being promoted to Major and causing his retirement. The Plaintiff said it could have been politics but DW1 denied this saying it was not reflected in his record. I find that Plaintiff deserved being promoted to the rank of Major and if he had been so promoted at the time of his being retired he should have earned Major's salary up to the age of 44 years. I, therefore, decide that Plaintiff is entitled to salary of Major for the 5 years from date of retirement to the time he attained 44 years.

The next last issue is the issue of discharge. There is evidence that the Plaintiff obtained a contract to take up a job in France to be Helicopter instructor. He had worked out that he would take his 3 years accumulated leave up to the date of retirement for which he had been given notice. He would then clear off from the Air force and complete his retirement early by joining the French School. His division had no objection so he was issued with certificate of service but then the Commanding officer demanded the document back alleging that they were erroneously given. With this withholding of certificate, he could not hand over. It is, therefore, not realistic for the army commander to claim that Plaintiff has refused to retire. When DW1 was asked about this he said that the unit clearance certificate is what you obtain when you clear and one is supposed to retain his retirement certificate of service and retirement certificate so as to go and retire and be given discharge.

In her forceful submissions, Mrs. Onyango the Chief Litigation Counsel says that the Defence Council issued discharge instructions for the Plaintiff in September 1992. She said the Plaintiff declined to go through the procedure, but this with respect is not quite accurate. The Defence Council withdrew the certificate which should have started the process without assigning any reason. It appears they did so to

bar his way from joining the French contract. Then now instead of returning the certificate, they wanted him to start without that certificate. I agree with Plaintiff that one would even be arrested to go ahead without that certificate. I think I must quote the Plaintiff in his submissions.

“That upon the KAF Commander receiving the Minister’s order he prepares and signs Plaintiff’s certificate of service as a replacement for the military ID Card, then the (Plaintiff) retains the certificate of service for the rest of his life. Upon the (Plaintiff) receiving his civilian ID Card and the certificate of service, he travels to all military camps to get clearance..KAF issues clearance certificate to Income Tax.. it is only then that (Plaintiff’s) final benefits can be processed.. on 26.10.92 the Plaintiff was ordered to surrender back the certificate of service together with his civilian ID Card.. and ordered to proceed on retirement..”

This is draconian and clear injustice. It means that the Plaintiff has been kept out of his retirement benefits, his gratuity and pension for over 10 years and for no reason expressed to him or known by anybody. The Defence blames him for not clearing but that blame is not genuine and to me amounts to passing the buck. I have read the cases quoted by Mrs Onyango and I do not think they are relevant. I find that Plaintiff has proved his case on the balance of probabilities and grant him judgment. Some prayers however, are at variance with evidence and do not make relevant sense in the event. I grant prayer 1(a) & (b) and (c) Of prayer; “2(a) I grant General damages for wrongful termination of service assessed at 10 months salary as at the date of retirement. Of prayer;

5. I grant Payment to Plaintiff of the salaries for 5 years from the time he was retired as Captain at 39 years to when after 5 years when he would have been Major at 44 years.

ii) Payment of all his terminal benefits pension and gratuity calculated at the time he would retire as Major at the age of 44 years

iii) Payment of costs of this suit.

iv) Interest on all these monies up to the time he will be paid.

v) The defence to supply Plaintiff with the ID Card and requisite certificates

vi) Cost of the suit.

DELIVERED at Nairobi this 26th day of June 2003

A.I. HAYANGA

JUDGE

Read to -

Mrs. Onyango

Captain Wafubwa

A.I. HAYANGA

JUDGE