



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 496 of 1995

PETER ONYANGO ONYIEGO PLAINTIFF

- versus -

KENYA PORTS AUTHORITY DEFENDANT

J U D G E M E N T

This case was filed on 3-7-95 by the Plaintiff here who was previously an employee of the Defendant Authority for damages for wrongful retirement. It also sought a declaration, and special damages together with costs and interest.

In his evidence in Chief the Plaintiff Peter Onyango Onyiego said that he was employed by the E.A. Cargo Handling Services on 1-9-70 as a checker. He was born in 1944. The letter of appointment said he would retire at the age of 55 years. He earned several promotions and climbed the ladder until he became clerical Grade 13. In 1987 Cargo Handling Services merged with Kenya Ports Authority and he transferred to the new body with his terms. In 1991 he was promoted (appointed) to work as Yard Supervisor. Then he says that on 21-12-94 he was retired. When he received the letter of retirement he collapsed. He says that although he was made yard supervisor he was made to act in the job for 3 years without being confirmed so he claims damages for being denied promotion or confirmation yet he had acted for 3 years and premature retirement at 50 years of age and not 55 yet he had 62 months to serve. In cross examination he said that he received the letter on 21-12-94 but the letter was back-dated to 31-10-94. His letter of appointment was misplaced, however he said he was not given any representation. He said he was paid 3 months in lieu of Notice and paid KShs.239,000/- in a lump sum. He said in re-examination that he was not given any representation. The procedure would have been that the K.P.A. Departmental Head would inform the Managing Director who in turn would decide finally after hearing the Plaintiff's representation. He said he would have given representations like highlighting the human conveniences the state of children, the capacity of the family to cope with immediate notice etc. He said 55 years was compulsory retirement age but 50 years was optional. If he had stayed in employment he would have got the specials he claimed:-

- | | | |
|----|---------------------------|-----------------|
| 1. | Salary | KShs.635,810.00 |
| 2. | Home allowance | “ 236,630.00 |
| 3. | Tickets for 5 years | “ 37,500.00 |
| 4. | Loss of Leave for 5 years | “ 54,600.00 |

5.	Loss of call allowance	“ 82,350.00
6.	Loss of Shift allowance	“ 116,250.00
7.	Loss of fixed element	“ 14,725.20
8.	Transportation for Luggage	“ 200.00
9.	Medical benefit	“ 519,722.00
10.	Pension	“ 1,592,659.20
	Less Pension advance	“ 229,830.05
	Total Claim	“ <u>3,267,463.05</u>

There was no Evidence from defence to contradict the testimony of the plaintiff so I take it that his evidence was NOT controverted, but Mr. Mwanyumba, Learned Counsel for the authority quoted the Court of Appeal Decision in Civil appeal No.120 of 1997 KPA Vs. Edward Otieno and Said all his case is answered by that judgement in fact and in law. That was a case where facts were as in this particular one but Mr. Waiyaki for the Plaintiff does not agree that it governs this case in fact and in law. He quoted the East African Court of Appeal decision in the case of HYPO LITO CASSIANO DE SOUZA V CHARIMAN AND MEMBERS OF THE TANGA TOWN COUNCIL [1961] EA 372.

Where the court held that natural justice was flouted by not giving the employee an opportunity to put up his case.

Secondly he submitted that where the employer has created an expectation in the employee such right envisaged cannot be withdrawn unilaterally without consultation he quoted Council of Civil Service Unions & Others Vs. Minister for Civil Service 1984 3 All ER 935 Ex Parte Rule.

Mr. Waiyaki tried to distinguish the Otieno case from the present case he said the two cases differed in that in this case the Defendant did not give evidence, the Plaintiff in this case worked for cargo Handling Services whereas that was not the case in Otieno case. Further in Otieno case that court of appeal interpreted Reg.6(1) but there they had evidence whereas here they have not. In Otieno case KPA gave 3 months notice whereas here KPA did not give 3 months notice. Retirement was immediate. 1983 Pension Regulation of KPA came into force when Plaintiff worked with Cargo Handling and to say that they applied is to accord RETROSPECTIVE effect for the period 1978-1987 when Plaintiff was already working elsewhere. Otieno's post was executive office whereas here the Plaintiff is a mere clerk. Here there is no evidence of pension. These were points relied on by Mr. Waiyaki to distinguish the judgement in Otieno Case.

Having read the Court of Appeal judgement and listening to counsel I agree that to some extent the case of Otieno may not be in fours with the case here, but there are certain pronouncement of law there that are of general application and bind on this court. That in case of wrongful dismissal damages for dismissal cannot include compensation for the manner of the dismissal. So that uncivilized and brusque dismissal cannot attract damages because of that style of dismissal. The Honourable Court declined to allow an award of KShs.100,000/- as general damages for shock and distress occasioned by such uncivilized dismissal.

But other than this I do not think the Otieno case and House of Lords leading case **ADDIS V. GRAMAPHONE CO. [1909] A.C. 488** which their Lordships of appeal followed is for proposition that in a wrongful dismissal case damages are not payable. Damages are payable in case of wrongful dismissal the House of Lords said in that case those damages are:—

“the salary to which the Plaintiff was entitled for the six months between October 1905 and April 1906

together with the Commission the jury think he would have earned had he been allowed to manage the business himself --- I cannot agree that the manner of dismissal affects these damages”

I THEREFORE DO NOT AGREE WITH Mr. Mwanyumba that no damages are payable on that authority. Mr. Mwanyumba also said that the Otieno case held that even if the employer breached its own terms and retires employee in breach of those terms still that breach does not vitiate the act of the employer so as to make it wrongful.

I think however each case is to be decided on its own facts, and in this case the plaintiff wants a declaration that the termination was null and void. The Plaintiff says it was done against the terms of the contract and Reading B II of the Revised Staff Regulations it says “the MD will advise the employee that compulsory retirement is under consideration and ask the employee if he wishes to make any representation of a personal nature on such a step, the Managing Director will forward such representation to the Board who will decide whether such officer should be called upon to retire.”

This is staff regulation. It is in my view a term that regulates the contractual relations here. It provides what happens when employee attains 50 years of age and also what happens when he reaches 55. I agree with Mr. Waiyaki that after creating that expectation a party to the contract cannot just resile from it and still reap benefit from his own wrong by saying that the acts of employer are not wrongful.

Secondly, failure to give a party opportunity to be heard is against Natural Justice.

Whether Reg. 6 of the Kenya Ports Authority (Pensions) Regulations 1983 (LN.No.77 of 1983 regulates this retirement instead of Staff Regulations 1992) was not argued before me but I would hold that the Staff Regulations 1992 regulate the relationship between the parties inter se and one cannot just whittle them away. But even if L.No.77/83 was to be considered where it says at 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 50 years”

This is merely permissive, and where there is a dispute on the exercise of this power, the employee ought to be heard by the Minister as is provided in Regulation 37 thereof which says that:-

“Where any dispute relating to the interpretation or application of these Regulations arises it may be determined by the Minister.”

This opportunity was not accorded the Plaintiff.

In the case of **DAVID OLOO VS. ATTORNEY GENERAL** Civil Appeal No.152 of 1986 (unreported) Nyarangi J.A. said:-

“I would say that the principle of Natural Justice applies where ordinary people would reasonably expect those making decisions which will affect other to act fairly.”

In this case I am of the opinion that the employee did not act fairly nor did he apply the principle of natural justice. In the case of **WAMBUGU VS. KENYA NATIONAL LIBRARY SERVICES BOARD H.C.C. C. No.2013 of 1989** Akiwumi J (as he then was) followed this and said that applying S.17 of the Employment Act Cap 226 the employer is required to act fairly and apply principles of natural justice. In this case it is one where ordinary people would expect the employer to act fairly through its MD and the Board, to follow those terms that are part of the agreement of service between it and the employee.

Otieno’s case is different. In that case Otieno claimed that he was retired wrongly or before 55 years. Here the argument is that the Plaintiff was retired at 50 without subjecting him to the modes of retirement provided for retirees under 50 years of age.

I think the retirement was illegal and I so declare.

As for damages, Court of Appeal has said that the measure of damages is the period of Notice which the employee would have been otherwise entitled to and that emotional distress arising from the manner of dismissal is not compensated.

In this case I find that the Defendant's attempt to terminate the Plaintiff at 50 years was void and useless so he should have worked to the next stage of compulsory retirement which is 55 years. He had 62 months to reach 55 year stage. I take it therefore that he should have earned that salary up to that period when he would be 55 years of age.

$(KShs4,155 \times 62) = 257,610/-$.

He should also be paid he pension to that period and I direct hat the same be worked out by the parties and be certified by the Deputy Registrar of this Court. From this be deducted KShs.229,833.05 paid in advance, Leave pay for 5 years KShs.54,600/-, Transportation of luggage KShs.20,000/-.

There are claims of house allowance, ticket for 5 years, call allowance, weekly benefits, loss of fixed claims. These claims are not proved so I find they cannot be granted.

There is therefore judgement to the Plaintiff for-

- i) KShs.257,610/- representing salary not paid for 62 months,
- ii) Pension to be worked out by parties and certified by Deputy Registrar as aforesaid less KShs.229,833.05 paid.
- iii) Transport allowance.
- iv) Leave pay

Together with cost and interest.

Damages for the harsh treatment and hard feelings, evoked cannot be compensated in law.

Delivered at Mombasa this 19th Day of December, 2000.

A.I. HAYANGA

JUDGE

Delivered in the presence of:

Mr. Waiyaki for the Plaintiff

Mr. Kabuki h/b for Mr. Mwanyumba for Defendant

A.I. HAYANGA

19/12/00