



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 6264 of 1992

FANUEL AYORO.....PLAINTIFF

VERSUS

NAIROBI CITY COMMISSION.....DEFENDANT

JUDGMENT

A. Background

The Plaintiff was an Employee of the Defendant having been employed in 1960 as a road foreman – Trainee. In 1963 he was promoted to District Road Foreman. Later he was promoted to the position of High District Superintendent in charge of Karen-Langata a position he served up to his retirement. The Plaintiff was retired early on allegations of having diverted the Defendant’s materials, equipment and Labour force to construct an unauthorized private road which act amounted to gross misconduct.

The Plaintiff challenged the retirement. He filed a plaint in court on the 29th of November, 1992 where he claimed

- (a) **General damages**
- (b) **Special damages of Kshs. 342,221.40/=**
- (c) **Costs of the suit**
- (d) **Interest on a (b) and (c) above**

The Defendant filed its defence on the 19th of February 1993 denying that the Plaintiff was unlawfully retired. The Defendant stated in the defence that the Plaintiff was found guilty of gross misconduct and was retired at the age of 54 in the public interest further that the Plaintiff received 18% of his pension benefits.

B. Plaintiff’s Evidence and Submissions

The Plaintiff stated in evidence that he had worked for the Defendant for 32 years before being retired prematurely on 3rd June 1991. He conceded that he was not guilty of the allegations made against him by the Defendant. He stated that if not prematurely retired he would have worked for another 3 years up to the age 55 years. Although paid 6 months salary on lieu of notice, the Plaintiff wanted damages and

payment of allowances annual leave. On cross examination by the defence counsel he admitted that if he were terminated under the Collective Bargaining Agreement he would have been paid 3 months in lieu of notice.

The Plaintiff's counsel in his submissions contended that the termination was unlawful as it was done unilaterally, illegally and unlawfully and as such urged the court to find that the Plaintiff lost 3 years of Service thus losing earning for three years and computed the lost years as follows:-

$$3 \text{ years} \times 12 \times \text{Kshs.}5,390 = 194,040/=.$$

The Plaintiff's counsel also submitted that the Plaintiff deserves damages for loss of Employment since the prospects of getting alternative Employed at the Plaintiff's age was nil. The counsel computed the said damages using the proposal of 18 months salary as follows:-

$$18 \times 5,394 = 97,020/=$$

He further submitted that the Plaintiff deserved general damages at the rate of **Kshs.350, 000/=** for breach of contract.

Plaintiff's counsel cited the authority of Peter M. Omaera vs Emaso Ngure South River Basin and another HCCC (Nku) No. 174 of 2001.

C. Defence Evidence and Submissions

The defence called 2 witnesses from its Human Resource Department. They contended that on the 3rd of June, 1991 the then Town Clerk a **Mr. J.N. Thairu** retired the Plaintiff following recommendations of the Finance Committee which recommended immediate retirement and payment of 6 months salary in lieu of notice on the ground that the Plaintiff was found carrying out private work using the Defendants materials. That the Defendant paid the sum of **Kshs.37, 524/=** to the Plaintiff. That the Defendant was also paid his pension benefits.

The Defendant's counsel in his submission made reference To the provisions of the Terms and Conditions of Employment between the parties which require only 1 months notice or 1 month's pay in lieu of notice. Secondly, he referred to the Collective Bargain Agreement (CBA) that provided for 3 months notice or 3 months pay in lieu of notice.

The defence contends that the 6 months salary in lieu of notice paid was generous that this was done having considered that the Plaintiff had 1 year to go before retirement. The defence counsel cited the **Kenya Ports Authority vs. Edward Otieno – Mombasa Civil Appeal No. 120 of 1997.**

C. Analysis

The Plaintiff filed issues on the 8th of November, 2005 as follows:-

- 1. Was the Plaintiff, wrongfully prematurely retired by the Defendant and if so by how many years was the retirement prematurely done?**
- 2. Did the Plaintiff suffer loss, special damages or any loss at all and if so to what extent.**
- 3. Was demand notice given to the Defendant?**
- 4. Who is entitled to the cost of this suit? (sic)**

I will adopt the issues as drafted by the Plaintiff save for issue No. 3 which did not arise at the time of

hearing.

There is no dispute that the Plaintiff worked for the Defendant for 32 years. The parties are not in agreement as to the age of the Plaintiff as at the time of his retirement. I am of the view the age of the Plaintiff is not relevant for purpose of this judgment and will not dwell further on the issue. It is also not disputed that the Defendant retired the Plaintiff through a letter dated 3rd June, 1991 on allegation of misconduct. The Plaintiff was paid salary in lieu of notice.

The Plaintiff now claims lost years of service, loss of job opportunity and general damages for unlawful retirement which the Defendant denies. The Defendant maintains that it was generous in offering 6 months pay above the 1 month in the terms and conditions of Employment, and the 3 months is the Collective Bargaining Agreement.

It is trite law that an Employee who is retired/terminated ought to be terminated or retired in accordance with the provisions of the Contract between the parties. If the Employee is retired contrary to the provisions he is then entitled to the sum that would have been paid if he were terminated lawfully.

In Central Bank of Kenya vs. Nkabu (2002)1 E.A. at 34 the Court of Appeal held

“When the Contract of Employment is terminated by giving notice according to the contract, damages should be restricted to the period of notice.”

In a similar case **Kenya Ports Authority & Edward Atieno (MSA) CA No. 120 of 1997** the Court of Appeal, where the Respondent had filed suit for loss and damage suffered due to Early retirement the court stated:-

“In our view where, as in the instant case, a contract of service includes a period of termination of the employment, the damages suffered are the wages for the period during his normal notice would have been correct.

As a retiree he would not have been entitled to any such claims apart from his normal monthly retirement benefits ----

In our view Mr. Otieno was no longer entitled to these claimed allowances since they are to be enjoyed by those in actual employment, not these who are retired.”

Guided by the above authorities I find that the Plaintiff was not entitled to the claim set forth, he was not entitled to any lost years of service, loss of job opportunity nor general damages. I do agree with the defence counsel that indeed the Defendant was generous in awarding 6 months pay in lieu of notice as opposed to the 3 months stipulated in the Collective Bargaining Agreement.

It is also trite law that if the termination is lawful which I find to be the case no general damages is payable. The plaintiff was paid in lieu of notice.

D. Findings

Having carefully considered the matter and the evidence before the court, I find that the Plaintiff was paid adequately for the salary in lieu of

notice, secondly that his pension benefit which he did not pursue at the hearing was also settled.

Accordingly and for the reasons stated above I dismiss the case with costs to Defendant.

Dated and delivered at Nairobi this 2nd day of November, 2009.

ALI-ARONI

JUDGE