



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

Civil Case 395 of 2007

KEPHA OTWOMA.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITEDDEFENDANT

JUDGMENT

The Plaintiff started working for Defendant as a casual worker. On or about the 1st of December, 1987 the Plaintiff was employed as a clerk and rose through the ranks. On the 12th of November, 1992 he was promoted to the level of a supervisor within the Central Kenya region. He was issued with his terms of reference then. The Plaintiff's services were terminated on the 14th of August, 2004.

While working for the Defendant the Plaintiff contributed towards Pension Saving which was initially transferred to a Provident Fund Managed by Chancery Insurance Brokers. In 2004 the Defendant transferred the Pension Savings from Chancery Insurance to Liason Financial Services Limited.

The Plaintiff's case is that his services were terminated without reasonable cause, and in breach of the terms of service. The Plaintiff prayed for Judgment for:-

- (a) Damages for unlawful dismissal from duty**
- (b) Payment of terminal benefits**
- (c) The Defendant to disclose its contributions to the Pension Scheme of the Plaintiff and further Pension Scheme between December, 1987 and 2006.**
- (d) Costs of the suit.**

The Defendant filed a defence on 27th July, 2007, generally denying the allegations against it. The Defendant stated that a notice to terminate the Plaintiff's service was issued for two months in the in line with the letter of engagement given to the Plaintiff.

Having considered the pleadings and evidence, the issues before the court as I see them are:-

1. **Whether the termination was lawful or not;**
2. **Whether the Defendant is liable to pay terminal benefits;**
3. **Costs of the suit.**

There is no dispute that the Plaintiff had worked for the Defendants for 19 years. There is no dispute either that on the 12th November, 1991 the Defendant reduced the Plaintiff's terms in writing. Part of the said letter read:-

“5. Notice period: Two months notice period or two months salary will be required on either party.

9. Over time: You will not be eligible for any overtime payment.”

The Plaintiff in his evidence stated that he started working for the Defendant in 1987 and was confirmed in February, 1988. Prior to the said date he had worked for Defendant as casual worker. He started off as a clerk in the Management and rose to the position of a supervisor. His last station was in Nyeri. On 14th of August, 2006, his services were terminated. He stated in his evidence in chief:-

“They gave me a two month's notice terminating my service.”

From the evidence on record the Plaintiff was aggrieved because he was not given reasons for his termination and no terminal benefits for the 19 years he worked for the Defendant. He was affected psychologically and his family was affected due to change in his financial arrangement. He claims that he was not paid terminal benefits although he had worked for 19 years, he also claims damages for wrongful dismissal, gratuity, overtime, severance pay, certificate of service and costs.

I will not consider prayer c in the plaint as the Plaintiff in his evidence stated that he had received his pension from RBA (Retirement benefit Authority).

The defence called one witness **Susan Owuor** who is a Human Resource Officer. She stated that the terms of engagement provided for two months notice in the event of termination. Her evidence was that the notice of separation served as notice of termination. She deposed that gratuity is paid to employees on contract, that on termination a worker is paid salary, leave days if any and pension.

The Plaintiff's counsel in his submissions contends that the notice period in the letter of 12th November, 1991 is not clear on what notice period is being referred to. I do not agree with the Plaintiff's counsel. Within the context of the letter it's clear that either of the party could terminate the contract by either giving a two months notice or two months salary in lieu.

The question to ask is whether the notice of separation given to the Plaintiff dated the 11th of August, 2006 amounts to notice of termination of contract. The letter read in part as follows:-

“As per your letter of appointment inclusive of all the variations overtime, and the terms thereof, we hereby give you notice as provided of intend to disengage and separate with you effective 14th August, 2006.”

The Plaintiff's counsel terms the termination unfair as the Plaintiff was all along an obedient and hardworking employee. Reference is made to his promotions and salary increments. The counsel submitted further that the Plaintiff never received any verbal or written warnings and that the Defendant did not give any reasons for the termination. It is also argued that the notice of separation is not a notice of termination. The Plaintiff in urging this court to consider the termination unlawful relied on the case of **MALEBA SOLOMON RIUNGU vs. KENYA PORTS AUTHORITY HCCC No. 827 OF 1995**.

The defence on its part contends that the termination was lawful as it was done in accordance with the contract between the parties. In this regard they relied on the decision in **Koeh vs. African Highlands & Produce Company Ltd and Another [2006] 2 E.A** where Musinga J held:-

“Where a contract of employment provides that either party may terminate the same by giving to the other party notice or salary in lieu thereof none of the parties is obligated to assign any reason for terminating the contract as long as he gave the requisite notice or paid in lieu of notice.

A termination of the contract of Employment in accordance with terms of the said contract cannot be unlawful.”

I am of the view that the facts of authority relied upon by the Plaintiff are distinguishable from the current case. However, I do concur with the decision of Musinga J, above that where a Contract of Employment is specific and unambiguous it is binding on the parties concerned.

On the issue of terminal benefits, I have considered the holding in the case of **WALTER MUSI ANYANJE & HILTON INTERNATIONAL KENYA LTD & TOM NJIRI No.269 of 2003**. The Court of Appeal made reference to its decision in **Kenya Ports Authority vs. Edwards Otieno Civil appeal No.120 of 1997** (unreported) where it is stated:-

“.....there can be no general damages in respect of suits based on termination of Employment Contract since the relation of the parties to such contract is contractual and is terminable only under the terms of the same contract.”

The same principles had been considered earlier in **Sonye vs. Siaya Teachers Co-operative Savings and Credit Society & Another [1999] E.A** the Court held:-

“General damages cannot be awarded for wrongful termination of Employment. Even where there is distress, mental anguish and injured feelings general damages cannot be awarded.”

The question that begs an answer in my view is whether the notice of separation is the same as notice of termination? I would answer in the affirmative. This is a terminology mostly applied in the American system as opposed to the commonly used terminology of means “termination letter” Indeed the Plaintiff understood it to be so. He does not seem to have a quarrel with the notice this only arose in the submissions. The Plaintiff in his evidence acknowledged the notice and only deemed the notice unlawful as it gave no reason for his termination neither was he paid his benefits.

Guided by the above quoted authorities it is clear that where a contract or terms of Employment have a termination clause no reason or explanation is necessary when issuing a notice of termination. It is also clear that no damages are payable in the event of terminating such a contract even if there is emotional stress or mental anguish as such termination is in accordance with the agreed terms of engagement. Further it is also clear that gratuity is only payable where one is engaged on contract. The Plaintiff was not on contract and therefore no gratuity was payable.

The Plaintiff dropped prayer (c) and confirmed that he had concluded the issue of his pension with the retirement benefit authority in which case this matter is settled and not for consideration by the court.

Terminable Benefits

The Plaintiff has prayed for payment of terminal benefits but has not particularized the same. The Plaintiff's counsel in his submissions states that the Plaintiffs did not bother to pay terminal dues upon termination. The counsel makes reference to gratuity, severance pay, and leave allowance. First the particulars were not given. I am guided by the quotes by the defence **Provincial Insurance Co. East Africa Limited vs. Nandima** [1995 -1998] 2 E.A 288 where the court stated:-

“It is now settled Law that Special damages need to be specifically pleaded and strictly proved to be awarded. Accordingly none can be awarded for failure to plead.”

I find that the termination was lawful as the requisite notice of two months was issued.

Secondly gratuity is not payable in the circumstances of this case. The Plaintiff did not give details or particularize the leave allowance being claimed. Thirdly as this is not a case of redundancy severance pay, is not payable and as such this prayer must also collapse.

For the reasons given above I dismiss the case with costs.

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

ALI- ARONI

JUDGE