



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Civil Case 1382 of 1998

YAHUMA OKOKO PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

THE KENYA REVENUE AUTHORITY 2ND DEFENDANT

JUDGMENT

A. Background

On the 25th of June, 1998 the Plaintiff filed a suit against the Attorney General as the Defendant. On the 20th of January, 2000 he filed an amended defence and enjoined the Kenya Revenue Authority as a 2nd Defendant on the 9th of October, 2008, the Plaintiff discontinued the suit against the Attorney General as the 1st Defendant leaving the Kenya Ports Authority as the only defendant in the suit.

The Plaintiff's claims as against the Defendant was for wrongful promotion and termination without any reasonable and justification. He claimed to have suffered and therefore claimed for general and special damages. He tabulated his special damaged at **Kshs.6,272,187/=** and claimed general damages for unlawful and premature termination costs and interest.

The Defendant filed its defence on the 26th October, 2009 denying that it wrongfully and premature retired the Plaintiff. It further denied the damaged claimed.

B. Plaintiff's Evidence and Submissions

The Plaintiff stated that he was employed as a civil servant in March, 1969 and seconded to the Kenya Revenue Authority in 1995 and his terms of service transferred. He was absorbed by the Defendant in 1995 as a permanent and pensionable employee. That in November 1997 he was retired in the public interest vide a letter dated 25th March, 1997. Prior to the dismissal he had been suspended. He claimed that he was never given an opportunity to be heard on the accession of bribery neither was charged in a court of law. He was claiming a sum of **Kshs.6,272,88/=** being a tabulation of salary, radical allowance, house allowance and pensions contribution. He also wanted the court to declare his termination unlawful, damages for suffering and costs.

In the Plaintiff's submissions dated of July, 2009 if was argued that the Defendant had an elaborate

procedure on retiring an employees yet the same was not followed that the retirement was premature as the Plaintiff had not attained the retirement age of 55 years. That the defendant in retiring the Plaintiff did into follow the rules of natural justice and committed the tort of misfeasance and therefore the Plaintiff ought to receive general damages.

In support of the Plaintiff's counsel cited several authorities

C. The Defence Evidence and Submissions

The defence called one service whose testimony was that the Defendant had lost confidence in the Plaintiff leaving to his early retirement. Title witness maintained that the termination was lawful in accordance with the Defendant's code of conduct. He told the court that the Plaintiff's early retirement was sanctioned by the Commissioner General who is not bound by the recommendation of the disciplinary committee.

The witness testified to the effect that upon retirement the Plaintiff was entitled to the following terminal benefits.

- (a) **3 months salary in lieu of notice**
- (b) **Leave payment**
- (c) **Transport from Nairobi to rural home**
- (d) **The Plaintiff's pension in tabulations.**

The Defendants was really to pay the above benefits after the Plaintiff completed the clearing form.

The Defendant submitted that general damages and not payable save for the benefits payable if proper laid down procedures were followed. The defendant referred to the case of **Dalmas B. Oyaye vs. Kenya National Trading Corporation Ltd C.A No.25 of 1996**. Where the court held that in a case of unlawful determination the only damages one is entitled to in law is the amount one would have been paid if his employment had been brought to an end in the stipulated manner.

The same principle was stated in **Rift Valley Textile Ltd vs. Edward Onyango Oganda C.A No. 27 of 1992**.

The above was adopted in **Central Bank of Kenya vs. Nkabo [2002] E.A 34 (CAK)**.

D. Analysis

I have considered the evidence on record, pleading and the submissions and authorities cited by each side.

After considering the matter the issues as I see than are as follows

- 1. Whether or not the termination was unlawful**
- 2. If so what is the Plaintiff entitled to in term of terminal letters.**
- 3. Costs and interest.**

E. Termination

It is not in disputed that the Plaintiff was employed as a civil servant in March, 1969. And on 1st July,

1995 he was seconded to the Defendant who in 1996 absorbed him as a permanent and pensionable employee. That the 11th of November, 1997 the Plaintiff was suspended from his duties. The said letter was produced as Plaintiff's exhibit 2. It reads in part:-

“It has been alleged that on 18th September, 1997 you visited Gatham Ltd, along Homa bay Road, Industrial Area and conspired to help this Company evade tax amounting to Kshs.8,152,707/= after being induced with a bribe amounting to Kshs.500,000/=.

“It is not further alleged that on the same day you without permission you visited three other companies not located within the jurisdiction of your districts operations nor had the cases been aside to you.

All these are serious allegations which contravene our regulation ...”

The Plaintiff was required to response to the said allegations by the 21st of November, 1997 which he did on the 19th of November, 1997. In his letter the Plaintiff denied the allegations paste. He stated:-

“Please note from the above explanation that I was performing my above mentioned duties as per the requirements of the authority's duties assigned to me. If I had bad motives, I could not have included all the firms I visited in my report.” (sic). On the 25th of March, 1997 the Defendant wrote a letter to the Plaintiff terminating his services with effect from 11th November, 1997. The letter read in part:-

“After careful consideration of your representation of your representations, the authority has decided to retire you in the public interest as it has lost confidence in your ability to meet it challenged and obligations.”

The code of conduct of the Defendant allows in clause 3.6 (2) under suspension for an employee to be suspended when the question of his dismissal is being contemplated. The code of conduct under clause 3.6 (3) provides for compulsory retirement. The said clause 3.6 (3) provides:-

“The Authority may compulsory retire the employees who is on permanent and pensionable terms on grounds of the Authority's interest and such an employees shall be eligible for payment of his retirement dues in accordance with the retirement regulations. Compulsory retirement must be sanctioned by the Appointments, Promotions and Disciplinary Committee, Commissioner General, Staff Committee or the Board of Directors.” (emphasize mine)

From the provisions above two things stand out

1. The retirement must be sanctioned by the 4 organs namely
 - (a) Appointments, Promotion and Disciplinary Committee
 - (b) Commissioner General
 - (c) Staff Committee or
 - (d) The Board of Directors
2. The Employee will be retired in accordance with the retirement regulation.

Notable is that the said regulations were not produced by either of the parties. It can only be assumed that the offer by the Defendant is based on the same.

From the evidence on record the recommendation by the Appointments, Promotion and Disciplinary

Committee was that the Plaintiff be warned. There is no indication whether the other two organs that could be considered in the alternative i.e. the Staff Committee or the Board of Directors sanctioned the retirement what is clear is that the Commissioner General sanctioned the same. This means, that not all the relevant organs were involved as it should.

With the above analysis it is obvious to that the termination in this regard was unlawful. Having said that, the next issue for consideration is the amount payable to the Plaintiff due to this unlawful termination.

Benefits Payable

It is trite law that in case of unlawful termination the employee is entitled to that which he would have been paid if lawfully terminated, in case of a contract, within the provisions of his contract. There is no payment for damages for failure to observe rules of natural justice.

The Plaintiff is seeking for his salary from November, 1997 to December, 2007. This is salary for the remainder of the years before his retirement age, he is also seeking leave allowance, medical allowance to house allowance.

On the other hand the Defendant has offered subject to the Plaintiff's clearance. What was due to him upon retirement namely:-

- (a) 3 months salary in lieu of notice
- (b) Leave payment
- (c) Transport from Nairobi to rural home
- (d) The Plaintiff's pension contribution

In Dalmas B. Ogonye vs. Kenya National Trading Corporation Ltd C.A No. 25 of 1996 the court held:-

“Since the Appellant's appointment was unlawfully terminated, the only damages he is entitled to in law is the amount he would have been paid if his employment had been brought to an end in the manner stipulated in the contract of service and no more.”

In Kenya Ports Authority vs. Edward Otieno C.A. No.120 of 1997 the Court of Appeal

“We find that Mr. Otieno was not entitled in Law to any of the benefits and/or emoluments claimed as above set out. As a retiree he would not be entitled to any such claims apart from his normal monthly retirement benefits. As was held by the teamed Judge

I also consider that to pay the Plaintiff his full salary and other emoluments till he attain the age of 55, as he claimed, would on proper analysis, be tantamount as if he was being reinstated to his employment, to which he is not entitled.”

Guided by the above 2 authorities by the Court of Appeal I find that indeed the Plaintiff was unlawfully terminated not because the defendant could not retire him early but because his retirement was not properly sanctioned as set out in the code of conduct was not observed. It therefore follows that the plaintiff ought to be paid his normal retirement benefits I do not agree with the Plaintiff that he is entitled to the amount he has claimed for the 8 years he would have worked if not retired, as to do so would be tantamount to reinstating him which ought not to be the case. As held by the Court of Appeal in the case above quoted **Kenya Port Authority vs. .Edward Otieno (supra)** the was not entitled either, to the leave allowance, medical allowance and house allowance since the same are only payable to those in actual employment.

The code of conduct does not stipulate the notice to be issued. The Defendant's have proposed 3 month's notice I find that the 3 months notice is too short. I am of the considered opinion that 6 months would be more reasonable.

Findings:

Having stated the above I accordingly enter Judgment as follows:-

1. 6 Months pay in lieu of Notice Kshs.230,000.00/=
2. Leave payment Kshs. 23,300.90/=
3. Transport to Siaya
435 Km @50 per Km Kshs. 22,250.00/=
4. Pension to be calculated and be payable

In accordance with the Pension Scheme Regulations

5. Costs of the suit
6. Payment of 1-4 be done upon the Plaintiff completing the clearance form.

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

ALI-ARONI

JUDGE