



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: GICHERU, OMOLO & LAKHA, JJ.A.)**  
**CIVIL APPEAL NO. 120 OF 1997**

**BETWEEN**

**KENYA PORTS AUTHORITY ..... APPELLANT**

**AND**

**EDWARD OTIENO ..... RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Mombasa  
(Justice Oguk) dated 27th day of July, 1995  
in  
H.C.C.C. NO. 673 OF 1994)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal arises out of a suit tried in the superior court (Oguk, J.) in which the appellant (hereinafter referred to as "KPA") was the defendant and the respondent (to whom we shall refer as "Mr. Otieno") was the plaintiff.

By his plaint, Mr. Otieno stated that he was employed by KPA pursuant to a letter of appointment dated September 25, 1971 as amended by the Kenya Ports Authority Revised Staff Regulations read with the Kenya Ports Authority (Pensions) Regulations 1983; that it was a term of his contract that he could only be made to retire on attainment of the age of 55 years; and that by a letter dated August 23, 1994 the KPA purported to retire him. The plaint went on to claim that thereupon he "suffered loss and damage". He gave particulars of loss of salary, pension, medical allowance, housing allowance, leave allowance, mileage claim, telephone allowance and security services.

The defence denied that Mr. Otieno could only retire on attaining the age of 55 years as alleged and averred that he could be retired on attaining the age of 50 years in accordance with Regulation 6(1) of the Kenya Ports Authority (Pensions) Regulations, 1983. KPA further maintained that Mr. Otieno was paid his dues upto the time of his retirement and the several claims made were denied. The facts leading to this litigation are not seriously in dispute and can be briefly stated. At all material times, Mr. Otieno was employed by KPA and at the time the cause of action herein arose he was serving as Manager, Management Accounting Grade PE3. Whilst on leave, he was served with a retirement letter dated August 23, 1994 signed by the Managing Director retiring him from the service of KPA with immediate effect in accordance with regulation 6(1) of the Kenya Ports Authority (Revised) Regulations 1983 which states that:-

"The Authority may require an officer to retire from the service of the Authority at any time after he attains the age of fifty years."

It is not in dispute that at the time he was retired Mr. Otieno was 51 years of age and liable to be retired. He was handed a cheque dated August 24, 1994 for K.Shs.60,780/= being 3 months' salary in lieu of notice which he received under protest. At that time his salary was K.Shs.20,260/=. This cheque was followed by another cheque dated November 10, 1994 for payment to him of K.Shs.424,446/= as his pension benefits which he also received under protest. He then instituted proceedings in the superior court by a plaint filed on November 2, 1994.

At the trial Mr. Otieno gave evidence in support of his case while KPA called as its only witness its Assistant Accountant in charge of Pension payment.

The learned judge held that Mr. Otieno's retirement from the service of KPA was wrongful and the letter of retirement served on him dated August 23, 1994 was null and void. This was not because he could not have been lawfully retired at the age of 51 but because the rules of natural justice had been violated by the Board of KPA in failing to comply with the clear provisions of Regulation B11 of the Revised Staff Regulations, 1992 in not having given Mr. Otieno an opportunity to be heard. In this regard the KPA concede in its submission that it had thus erred. Consequently, the learned judge held that Mr. Otieno was entitled to damages based on what would have been his earnings for a period of 6 months. He awarded Mr. Otieno general damages for shock and distress in the sum of K.Shs.100,000/= and his benefits such as loss of medical cover, loss of leave allowance, loss of mileage claim, loss of telephone allowance and loss of security service for the period of 6 months. He also ordered him to be entitled to transport of personal effects to his home of origin.

KPA's main thrust on this appeal against the awards made by the learned judge is two-fold. It is contended, first, that the award of K.Shs.100,000/= for shock and distress is untenable. Secondly, it is argued that the only damages payable must be calculated at the contractual period of notice of 3 months and none of the benefits awarded by the learned judge is payable.

The award for shock and distress is one head of damage to which a good deal of consideration has been given. In the leading case of **Addis v. Gramophone Company** (1909) A.C. 488 the House of Lords decisively rejected such a claim. The plaintiff there had been dismissed in a harsh and humiliating manner, and it was held that the manner of the dismissal could in no way affect the damages. The headnote states:-

"Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment."

Lord Loreburn, L.C. put it admirably at p.490 as follows:-

"A further controversy ensued, whether the 600l. was intended to include salary for the six months, or merely damages because of the abrupt and oppressive way in which the plaintiff's services were discontinued, and the loss he sustained from the discredit thus thrown upon him. And, finally, a question of law was argued, whether or not such damages could be recovered in law.

My Lords, it is difficult to imagine a better illustration of the way in which litigation between exasperated litigants can breed barren controversies and increase costs in a matter of itself simple enough.

To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the salary to which the plaintiff was entitled for the six

months between October, 1905 and April, 1906, together with the commission which 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. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge C.J., has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did I cannot agree with him.

If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

**Addis vs Gramophone Company (supra) was applied in Shore v Downs Surgical** (1984) 1 ALL ER 7 to refuse damages for distress caused by a brusque and uncivilised dismissal. We think the same position must apply in Kenya, as we can find nothing in our Employment Act, Cap 226, which would abrogate or modify these general principles in respect of the law relating to contracts of employment.

We are, therefore, satisfied with respect that the learned judge erred in making the award of K.Shs.100,000/= as general damages for shock and distress. This ground of appeal succeeds and this award is accordingly set aside.

The other ground of appeal is whether Mr. Otieno was, in law, entitled to be awarded by way of damages for the loss of salary, medical allowance, housing allowance, leave allowance, mileage claim, telephone allowance and services as claimed by him. In our judgment, 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 which his normal notice would have been correct. In the case of **Rift Valley Textiles Limited vs. Edward Onyango Oganda** Civil Appeal No. 27 of 1992 (unreported) the contract of service provided that it could be terminated by a three months' notice by either party. The judge awarded the respondent twelve months' gross salary as general damages in addition to the three months' salary in lieu of notice already paid. This Court stated as follows:-

"We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. The contract of employment between the Appellant and the Respondent specifically provided for a notice period and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the Respondent's dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the Appellant."

We respectfully agree. 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 learned judge:-

"I also consider that to pay the plaintiff his full salary and other emoluments till he attains the age of 55, as he claimed, would, on proper analysis, be tantamount as if he was being re-instated to his employment, to which he is not entitled."

We fully agree. Furthermore, in our view, Mr. Otieno was no longer entitled to these claimed allowances since they are to be enjoyed by those in actual employment, and not those who have been retired. It, therefore, follows that the learned judge, with respect, erred in his award of these emoluments which are hereby set aside.

The final matter related to the pension which is the subject of both the appeal and cross-appeal. In view of the foregoing, in our judgment, the learned judge erred in computing Mr. Otieno's retirement benefits as if he had been retired at the age of 55. He would be entitled to have retirement benefits computed at the age of 51 so that he would be entitled to a monthly pension sum of K.Shs.8,737.85.

subject to review of pensions in accordance with the provisions of the Kenya Ports Authority Act and Pension Regulations.

On a careful consideration of the matter as a whole and the material before us we are satisfied that Mr. Otieno was paid his dues upto the time of the retirement.

Accordingly and, for the reasons above stated, the appeal is allowed with costs (but with no order as to costs of the cross-appeal); the decree of the superior court appealed against and given on September 27, 1995 is set aside and we substitute therefor a decree

(a)entering judgment for the plaintiff in the sum of K.Shs.200,000/= being loss of transport of personal effects to home of origin;

(b)ordering that the plaintiff will now draw monthly pension at the rate of K.Shs.8,737.85 till he dies and thereafter his family would continue to draw the same for 5 years in accordance with the pension regulation but subject to review, if any, of pension in accordance with the provision of the Kenya Ports Authority Act and Pension Regulations; and

(c)ordering that the Plaintiff shall pay to the Defendant the costs of the suit.

Dated and delivered at Nairobi this 19th day of September, 1997.

J. E. GICHERU

.....

JUDGE OF APPEAL

R. S. C. OMOLO

.....

JUDGE OF APPEAL

A. A. LAKHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR