IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Hancox & Kneller JJA

CIVIL APPEAL NO. 56 OF 1981

BETWEEN

CHARLES OLOO...APPELLANT

AND

KENYA POSTS & TELECOMMUNICATIONS

CORPORATION..RESPONDENT

(Appeal from the High Court at Nairobi, Nyarangi J)

JUDGMENT

The appellant was engaged by the former East African Posts and Telecommunications Corporation ("the Corporation") from February 1, 1961. In early 1977, when he had attained the age of thirty seven, it was desired to post him to Kakamega. He then produced a letter from Mr Kodwavwala, his surgeon, which stated as follows:-

"HH THE AGA KHAN PLATINUM JUBILEE HOSPITAL

P O BOX 33270

NAIROBI

KENYA TELEPHONE 45301
26TH January, 1977

Ref. YK/RV/18 TO

WHOM IT MAY CONCERN

This is to certify that Mr Charles Oloo has been a patient of mine for the last ten years twice admitted in desperate medical condition which needed major operations. Since then he has had further surgery and is under our constant outpatient care. His daughter also has been treated here for a heart condition and she also needs constant care.

On the basis of this I feel that Mr Oloo should stay in Nairobi where he can get expert medical care if and when required. In view of his own condition and his daughter's

condition he will need urgent professional advice and hospital facilities in an emergency.

YUSUF KODWAVWALA , MBBS, FRCS, FICS

EXECUTIVE DIRECTOR,

CONSULTANT SURGEON"

Unfortunately this letter did not state the nature of the appellant's , as opposed to his young daughter's, illness, and it was forwarded to the Director-General of the corporation by the appellant, in a letter explaining his circumstances and difficulties, on February 24, 1977. However, in June 1970, the surgeon had, for a different purpose, stated that he had performed a major abdominal operation on the appellant in December 1966.

Two minutes produced presumably by the corporation, written in March 1977, indicated that the appellant had wilfully, that is to say on grounds that were not valid, refused to accept his posting to Kakamega, and he was warned that his "persistent insubordination" would lead to his dismissal with the loss of all privileges.

Notwithstanding this, and the alleged medical condition, the appellant was retired in the public interest, and not on medical grounds, by a letter dated March 21, 1977, with effect from that date. The letter referred to a memorandum written by his counsel, which I presume, had the effect of translating the situation from one of dismissal without rights to one of retirement in the public interest. The assessment of his reduced pension and retirement gratuity, consequent thereon, proceeded apace, and matters remained quiescent until someone saw in the Sunday Nation of June 5, 1977, a report of the appellant's appointment as resident representative of the Credit Finance Corporation in Nakuru. The terms of this appointment were set out in a letter from them to him dated April 26, 1977.

The corporation reacted by recalling the appellant to duty purporting to do so under section 10 of the former East African Community's Pensions Act (cap 11), subsection (1) of which stated:

> "Every pension granted under this Act shall be subject to the condition that unless or until the officer attains the age of fifty years, he may, if physically fit for service be called upon by the authority to accept an office in the service of the community or theCorporation, as the case may be, not less in value than the office which he held at the date of his retirement, and where a pensioner so called upon declines to accept such office the payment of his pension may be suspended until he has attained the age of fifty years."

Its letter, dated June 15, 1977, then continued:-

> "It is intended to invoke the above provision by recalling you back to duty in a post of the same rank and salary as you held on the date of retirement. You are required to confirm your willingness to accept such an appointment by June 30, 1977 so that the relevant posting instructions can be issued to you. Failure to confirm such willingness within this time limit will be regarded as refusal to accept such appointment and such refusal will result in the application of the above quoted section of the Pensions Act ie payment of pension will be suspended until August 8, 1989 when you will attain the age of fifty years."

And added a postscript in a copy to his lawyers, Messrs Khaminwa & Khaminwa, as follows:-

> "You may wish to see these developments. Your passionate submission dated March 17, 1977 has been rendered void by the developments quoted in paragraph 1 of this letter wherein it shows that your client has of his own volition accepted employment in Nakuru."

The point which the corporation was making was, of course, that the appellant, having been allegedly

unfit to work elsewhere than in Nairobi, and because of the distance from his doctor, had almost immediately accepted a position, which, if not as far as Kakamega, was at least an appreciable distance from Nairobi. Thus the *bona fides* of the appellant's claim in this respect were seriously in question. The corporation's letter was followed up by another one of July 1st in which it stated that neither the appellant nor his advocates had indicated whether and when he would be willing to accept further office from the corporation, and gave him that which can only be described as an ultimatum, that unless he communicated his acceptance thereof by July 14, 1977, his pension would be suspended until it would normally have become payable on the appellant's attainment of the age of fifty on August 8, 1989.

Although the memorandum of appeal contains six grounds, Mr Khaminwa compressed them into one short point when arguing the appeal, namely whether the corporation should have acted under section 10 (which he conceded the corporation had power to do) without affording the appellant an opportunity of an explanation, or of showing cause against his recall to duty. Mrs Onyango, for the respondent, the Kenya Posts & Telecommunications Corporation, as the successor to the corporation conceded that the appellant was entitled to an opportunity to show cause (which Mr Khaminwa, from his experience, assured us was the procedure adopted in his day) but contended that, on proper construction, the letters of June 15th and July 1st did amount to an invitation for representations and an explanation from the appellant. In other words the Corporation had given the appellant an opportunity to show cause against the course they proposed. Unfortunately an indication of how the appellant and his advisers would have interpreted those letters might have been found in Messrs Khaminwa and Khaminwa's letter of June 27, 1977 but that was neither produced at the hearing, nor, despite our invitation to do so, in this court. Under paragraph (k) of rule 85(1) of this court's rules that letter was a necessary document for the proper determination of the appeal and should have been included in the record.

While the appellant was, at that stage, no longer the employee of the corporation, he was nevertheless subject to its general control by reason of the fact that he was entitled to a pension for his service, whether that pension was payable from May 6, 1977, as stated in the letter setting out his retirement benefits of June 15th (the same date as the first letter recalling the appellant to duty), or from August 8, 1989. The corporation was aware of the general requirement of natural justice that before action, in the civil service at least, is taken against an officer, he must be afforded a fair opportunity of explanation and of putting his case, because it said so in the relation to the proposed dismissal of the appellant in its letter of March 14, 1977. As Sir Kenneth O'Connor, P said in *De Souza v Tanga Town Council* (1961) EA 377 at page 389, in which the facts were, admittedly rather different:-

> "Regulation 10 was not complied with and, in my opinion, <u>the principle of natural justice that a fair opportunity must be given to contradict any statement prejudicial to the view of the defendant was contravened also</u>, since the appellant did not sufficiently know what was the case against him at that stage."

The underlining is mine, and I have done so because the regulation there being considered did not in terms say that an opportunity of showing cause should be given.

In my judgment the requirement of natural justice that the appellant should be given a fair opportunity of giving an explanation, or of showing cause, whichever way it is put, continued after the appellant had been retired in the public interest. It may be that he could not have shown cause, or the explanation put forward would not be satisfactory. He may have had numerous good, or bad, reasons for accepting the CFC appointment. The whole arrangement may have amounted to a device for getting his pension early and continuing in remunerative employment. But in my judgment neither of the letters to which I have referred can fairly be construed as inviting the appellant to give an explanation for his acceptance of the new appointment, or of showing cause why he should not be required to accept further office, with the consequence of losing his pension, at least until 1989, if he did not do so.

For these reasons, I would allow the appeal, set aside the order of the High Court dismissing the suit and grant the declarations sought in prayers (a) and (b) of the plaint. I would award the costs of this appeal and of the proceedings in the High Court to the appellant.

Madan JA. The factual background to this case is related in the judgment of Hancox JA which I had the advantage of reading in advance.

The appellant was peremptorily called upon to accept office after retirement in the public interest without being afforded a reasonable opportunity of meeting the demand on the ground that he was not physically fit as stated in section 10(1) of the East African Community's Pensions Act (cap 11). This was a breach of the requirements of natural justice which imperatively impose the obligation so to act. Our system of law is bound by the salient requirements of natural justice. The appellant may or may not have been physically fit, he may also have had other reasons, valid or otherwise, why he should not be called upon to accept office, for example, that his employment by the Credit Finance Corporation Limited did not necessarily require him to live in Nakuru.

The fair and reasonable opportunity to meet a prejudicial demand must be afforded in clear terms without it having to be gleaned from or read into correspondence, which itself is silent on the subject as the corporation's letter of June 15, 1977 was. That letter was really an ultimatum to the appellant to accept office without objection, failing which the dire consequences set out in section 10(1) would be meted out.

The reasons for the need actually to comply with the rules of natural justice were well put by Megarry J in *John v Rees* (1970) Ch 345, 402.

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious, they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not, of unanswerable charges, which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

The appellant's case was not argued before the learned judge as it has been before us, ie whether the corporation correctly acted by dictatorially demanding timid acquiescence from the appellant without affording him an opportunity to present his case.

I agree with the conclusion reached by Hancox JA. The only way to rectify the wrong done to the appellant is to give effect to the orders proposed by Hancox JA. As Kneller JA also agrees it is ordered.

Kneller JA. I concur. There are these points which, in my view, should also be made before this litigation ends. Assuming the Corporation was right to retire Oloo in the public interest from March 21, 1977, then I can find nothing on the record in this appeal that it was in the public interest to call upon him to accept an office of the same rank and salary in the service of the Corporation within three months of that retirement, unless of course, the phrase 'retirement in the public interest' is to have no meaning at all, or, at any rate, one different from its usual and obvious meaning. And, if that recall was to punish Oloo for evading his duty to serve the Corporation and the public anywhere within the Republic, save for cogent reasons, and even then, it might behove him to resign and see the sort of job which ensures a sheltered continued existence in the place of his choice, and because he had the temerity not only to collect a reduced pension and a commuted pension gratuity by his unjustified obduracy and, even more maddeningly, within a month of that retirement, land a better paid job with most sought after perquisites such as a company car not only for his work but also for his after office hours recreation or recreations, which bounty no postal superintendent in the Corporation in Nairobi, Kakamega or Nakuru enjoys yet, or so I think, then, I fear, the Corporation used section 10(i) for a purpose which, I believe, it was not supposed to use it for and so the Corporation was wrong to use it in that way. There may be valid answers to these strictures but, if there are, I cannot form them from anything in the record of this appeal, I regret,

therefore, that I must differ from the finding of the learned trial judge that the Corporation lawfully suspended Oloo's pension but I must do so not only for the reasons set out in the other judgments and this necessarily short one.

I must also add now that the Corporation is the only begetter of this result because had it dismissed Oloo for refusing a transfer in 1977 to Kakamega, at the same rank and salary, and so forth, and he was aggrieved, then he would have had to litigate for damages for unlawful dismissal and to prove it was unlawful, producing the documents about the health of his daughter, and his own, and the need to be right here in Nairobi next door to their irreplaceable medical experts, and then, by the time the action came for trial, which without unique celebrity, would have assuredly been of after he had accepted his next job ostensibly based in or radiating from Nakuru might well have been an uphill task or even an insurmountable one. I cannot, for the moment, fathom how anyone unable to work as a postal superintendent in Kakamega in 1977 for these reasons can work as anything else in Nakuru in 1977 and certainly not because his daughter had a heart condition and Oloo had three major operations (for some stomach troubles?) and must remain here in Nairobi until retirement and beyond, unless, there were no-one competent to deal with those maladies in Kakamega or Kisumu or Kitale in 1977. I doubt that any commercial organisation would for a moment accept such a reason for not serving where the one it employs him requires him to work in this country. Very shortly afterwards, Oloo is, so to speak, 'raring to go' in Nakuru —"CFC's man in Nakuru" – which is, to my mind, and experience bordering on the inexplicable.

Dated and delivered at Nairobi this 24th day of January , 1985.

C.B MADAN

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JUDGE OF APPEAL

A.R.W HANCOX

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JUDGE OF APPEAL

A.A KNELLER

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.