



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & KIAGE, J.J.A.)

CIVIL APPEAL NO. 77 OF 2014

BETWEEN

JOSEPH ILELI KIKUMBU.....APPELLANT

AND

CENTRAL BANK OF KENYA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi

(Odunga, J.) dated 28th May, 2012 in H.C.C.C. No. 1384 of 2002)

JUDGMENT OF THE COURT

1. The facts that gave rise to this appeal are simple and undisputed. The appellant was employed by the respondent on or about 2nd April, 1981 as a Messenger Grade II. His employment was subsequently confirmed on permanent and pensionable terms by a letter dated 5th July, 1982.
2. On 15th August, 1996 the appellant was retired from his employment on health grounds in accordance with the **Respondent's Staff Rules and Regulations 6.6, 6.7, 6.8 and 6.9** as well as **rule 9(g)** of the **Central Bank of Kenya Staff Pension Fund**.
3. Contrary to the said Rules and Regulations, the appellant alleged, prior to the termination of his employment, the respondent did not constitute a medical board to determine the appellant's fitness to discharge his duties. As a result, the appellant filed a suit against the respondent in the High Court of Kenya at Nairobi, HCCC No. 1384 of 2002. In the plaint that was severally amended, the appellant sought the following orders:

“(a) A declaratory order that the retirement of the plaintiff by the defendant on health grounds was unlawful, wrongful, contrary to the rules of natural justice and in breach of the Central Bank of Kenya staff rules and regulations and therefore the plaintiff is entitled to compensation for lost years.

aa) Lost income as aforesaid.

aaa) The sum of Kshs.4,232,403 terminal dues or service gratuity all totals to Kshs. 23,513.35 x 15 x 12+4,232,403.00 plus interest.

aaaa) The sum of Kshs.189,696.40 being withheld pension plus interest.

aaaaa) Interest on aaa and aaaa above from date of default till payment in full. bb) Damages for fraud/illegalities, misrepresentations, breach of contract and warranties, embarrassment, distress, injurious falsehood, loss of reputation, also for unlawful/unfair and malicious.

b) Costs of the suit.

c) Any other or further relief that the court may deem fit to grant.”

4. In his judgment, Odunga, J. found, *inter alia*, that the appellant's employment was terminated on health grounds; that no damages were payable for alleged mistreatment or injured feelings; that the damages payable to the appellant for wrongful dismissal are limited to the amount the employer would have been obliged to pay if he had terminated the employment contract in accordance with the agreed terms; there was no evidence of underpayment of pension; and that the appellant was entitled to 4 months' notice or salary in lieu thereof. All the claims were disallowed.

5. The appellant, being aggrieved by the said decision, preferred an appeal to this Court that raises three grounds as follows:

“1. THAT the learned judge erred in law in concluding the Appellant’s employment was terminated on health grounds without first establishing whether the procedure for terminating of appointment on health grounds in accordance with the Defendant’s Staff Rules and Regulations had been adhered to and also despite finding that the Plaintiff’s retirement from the Defendant’s employment was unprocedural.

2. THAT the learned Judge erred in law in finding that the Plaintiff was entitled to 4 months’ notice or salary in lieu thereof which he was paid and hence was not entitled to damages sought.

3. THAT the learned Judge erred in law in failing to assess and award damages for fraud/illegalities, misrepresentations, breach of contract and warranties, embarrassment, distress, injurious falsehood, loss of reputation and unlawful termination in accordance with the Employment Act Cap. 226 (now repealed) as prayed for in the Further Amended Plaintiff.”

6. The appellant urged the Court to set aside the trial court's judgment and enter judgment as sought in the amended plaintiff.

7. The appeal was canvassed by way of written submissions. On the first ground of appeal, the appellant faulted the learned judge for holding that his employment was terminated on health grounds on the basis of the appellant's admission in his testimony before court that he was unwell. According to the appellant, such as assertion was wrong for the reason that there was no finding to that effect by a medical board under **Regulation 6.6** of the **Respondent's Staff Rules and Regulations**. Accordingly, the appellant's counsel submitted, there was substantive and procedural unfairness in the termination of the appellant's employment.

8. Responding to the ground of appeal, the respondent's counsel submitted that the learned judge took into consideration the relevant provisions of the Respondent's Staff Rules and Regulations and concluded that no proper proceedings were carried out in compliance with the same, hence the finding that the appellant's retirement was unlawful.

9. We think this ground can easily be disposed of by quoting verbatim what the learned judge said with regard to termination of the appellant's employment. Having stated that his employment was terminated on health grounds, the learned judge went on to state:

“It is however contended by the plaintiff that no proper proceedings were carried out in accordance with the defendant’s Staff Rules and Regulations. The procedure for compulsory retirement is provided under Clause 6 of the said provisions. No evidence was adduced to controvert the plaintiff’s contention that this procedure was not followed. In the absence of any such evidence the court has no otherwise but to believe the plaintiff and hold that the retirement of the plaintiff from the defendant’s employment was un-procedural.”

10. In effect, the learned judge agreed with the appellant that the procedure for termination of employment on health grounds as stipulated in the Respondent's Staff Rules and Regulations was not adhered to, in that no recommendation to that effect had been made by a medical board. And having so found, the Court held that the appellant was entitled to 4 months' salary in lieu of notice, which was paid. It was however not disputable that the appellant had suffered ill health over a long period of time. We find no merit in this ground of appeal and dismiss it accordingly.

11. Turning to the second ground of appeal, his contention is that it was in error for the learned judge to decline to award general damages as the case at hand was a claim for unfair termination where substantive justification and procedural fairness were required to be observed by the respondent. The appellant's contention was that it was not enough to give notice, the notice should have stated the reasons for the intended termination of his employment. Counsel therefore submitted that the appellant was entitled to damages of upto 12 months' gross salary.

12. Since the cause of action arose before enactment of the **Employment Act, 2007**, we agree with the respondent's submissions that the applicable law was the repealed **Employment Act, Cap 226**, which provided at **Section 16** thereof that in case of termination without notice an employer was required to pay wages or salary equivalent to the period of notice required to be given in the contract. In marking orders for compensation for unlawful termination of employment, the Court cannot apply the provisions of the **Employment Act, 2007** retrospectively. See **MARY WAKHABUBI WAFULA v BRITISH AIRWAYS PLC [2015] eKLR**.

We therefore dismiss the second ground of appeal.

13. Lastly, on the ground that the learned judge erred in law in failing to assess and award damages for fraud/illegalities, misrepresentations, breach of contract and warranties, embarrassment, distress, injurious falsehood, loss of reputation and unlawful termination in accordance with the **Employment Act Cap. 226** (now repealed) as prayed for in the Further Amended Plaintiff, it is trite law that the applicable law at the time of termination of the appellant's employment was that no such damages were awardable. See **SONYE v SIAYA TEACHERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY & ANOTHER [1992] 2 E.A. 310**. The learned judge did not therefore err in failing to award such damages.

14. All in all, we find this appeal devoid of merit and dismiss it with no orders as to costs.

Dated and Delivered at Nairobi this 10th day of May, 2019.

M. WARSAME

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR