



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 19 OF 2012

BETWEEN

KENNETH KARISA KASEMOAPPELLANT

AND

KENYA BUREAU OF STANDARDSRESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Mombasa (Ojwang, J.) dated 22nd July, 2011

in

H.C.C.A. No. 13 of 2010)

JUDGMENT OF THE COURT

The appellant ***Kenneth Karisa Kasemo*** was the plaintiff in a suit commenced by a plaintiff before the Chief Magistrate's Court at Mombasa. In the suit, the appellant sought *inter alia*:-

“ A Declaration that the defendant unlawfully and/or illegally retired the plaintiff on the 8th day of April, 2005 instead of the 20th day of January, 2006 and as such the Plaintiff is entitled to all his dues and benefits from the Defendant upto and including the 20th day of January, 2006 amounting to Kshs.1,553,221.75.”

The learned trial Magistrate dismissed the then Plaintiff's suit (*now appellant*) who filed an appeal in the superior court. On 22nd July, 2011 **Ojwang J.** (*as he then was*) dismissed the appellant's suit and hence this appeal.

During the hearing of the appeal **Mr. Kinyanjui**, the learned counsel for the appellant urged us to find that the appellant was wrongfully retired after he had been given a notice that he would serve upto to the age of 55 years. The learned counsel argued that inspite of having given the appellant the notice that he would retire upon attainment of 55 years, the respondent arbitrarily retired the appellant at age 50 and without rescinding the earlier notice. Mr. Kinyanjui's contention was that having given the appellant an assurance that he would work until the age of 55 years, the appellant had a reasonable expectation that he would work until then. However according to the learned counsel, the appellant was terminated prematurely. He drew a distinction between retirement and termination as the latter would call for a month's notice unlike retirement where the appellant had categorically been advised that he would serve until attaining 55 years.

Mr. Nyende, the learned counsel for the respondent opposed the appeal. According to him the letter of 29th March, 2005 advising the appellant on retirement did not alter the appellant's terms of service. His further argument was that the appellant had failed to prove his case. He requested us to dismiss the appeal with costs.

The facts of this case are fairly simple and uncontroverted. It is not in dispute that the appellant was employed by the respondent in 1982 as a Quality Control Officer and that at the time he was relieved of his duties, he held the position of Senior Principal Quality Assurance Officer. It is also not in dispute that whilst in the respondent's employment, the appellant received the letter of 29-03-05 from the respondent The said letter stated as follows:-

“Our ref: BS/PER/374/2/230

Date: 2005-03-29

Mr. Kenneth Karisa

Kenya Bureau of Standards

P.O. Box 99376

MOMBASA

Dear Sir,

RE: RETIREMENT

According to the records held in this office, you will attain the mandatory retirement period of fifty five (55) years on 21st January 2006. This is as stipulated by our Staff Pension Scheme.

You are therefore, as required, given a notice of one year to retire from the service of Kenya Bureau of Standards. This notice is with effect from 21st January 2005.

You will be paid salary upto and including 20th January 2006. You will also be entitled to the NSSF benefits as contributed by you upto the last month of retirement. As far as your pension is concerned, please get in touch with HOA.

Find enclosed the Official Secret Declaration Form for officers leaving service for you to sign and return for our record purposes. You are also required to surrender your Bureau identification documents on your last day of service.

I take this opportunity on behalf of myself and the Management of Kenya Bureau of Standards to thank you for the service you rendered while in the Bureau's employment and to wish you a happy retirement.

Yours faithfully,

Eng. John M. Masila

MANAGING DIRECTOR

Enc.”

Whilst still serving in the respondent's employment and with an expectation that he was to be in the respondent's employment upto 21st January, 2006 the appellant received another letter dated 8th April, 2005 whose contents were as follows:

“Our ref: BS/PER/CONF/374/1

Date: 2005-04-08

Mr. Kenneth Karisa

Kebs – Coast Region

P.O. Box 99376

MOMBASA

Thro' GM OP

Dear Sir,

REF: RETIREMENT UNDER THE 50 YEARS RULE

This is to inform you that Board has decided to retire you with immediate effect pursuant to the Kenya Government Code of Regulations G44 read along with G46.

Your benefits will be paid according to Kenya Bureau of Standards Staff Regulations. Please get in touch with the personnel department for clearance purposes.

Yours faithfully,

Eng. J. M. Masila

MANAGING DIRECTOR

It was this letter of 8th April, 2005 that the appellant took exception of and formed the basis of this suit. It was the appellant's contention that having been advised in the letter of 29th March, 2005, that he would serve upto 21st January, 2006, the respondent divested itself of the right of issuing any other notice terminating his services. He was of the view that any such notice was premature. Moreover, the appellant argued, that the letter of 8th April, 2005 did not make reference to the earlier letter of 24th March, 2005 which gave him a year's notice. The appellant's claim was based on what he would have been entitled to had he served from the time he was wrongfully terminated to the date of retirement that is from 9th April, 2005 upto and including 20th January, 2006. Hence, the appellant's claim of Kshs.1,553,221.75 was largely based on the fact that his employment was terminated on 9th April, 2005 as opposed to being retired on 20th January, 2006. He admitted having been paid six months' salary in lieu of notice.

The question of law for the determination by this Court is whether the High Court erred in law in contracting the effect of the two letters.

In the letter of employment, dated 30th November, 1982 the appellant had been given a letter to the effect that:-

“Except on disciplinary matter in the Staff Regulations that may call for summary dismissal from the service of the Bureau, the Director shall give a month's notice or one month's salary in lieu of notice on wishing to terminate your service ...”

The letter of confirmation of 20th June, 1984 reiterated the above provision thus:-

“Except on disciplinary matter on the Staff Regulations that may call for summary dismissal from the service of the [respondent], the Director shall give a month's notice

or one month's salary in lieu of notice on wishing to terminate your services; you shall give the Director one month's notice of such intention or one month's salary in lieu of notice.”

We have carefully considered the law and the facts surrounding this case. Suffice to state that the law on employment does not normally envisage a situation where an employee is “***forced***” upon an employer (*and vice versa*) and case law is rife on this subject and indeed this Court has time without number honoured the contract existing between parties.

In the case of ***Rift Valley Textiles Limited vs Edward Onyango Ogonda, C.A. No. 27 of 1982 (UR)*** the Court of Appeal delivered itself thus:-

“... 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.”

Similarly in the case of ***Shimba Tourist Services Ltd vs Wilson Mise Kigani C.A. No. 135 of 1994(UR)*** this Court stated as follows on wrongful dismissal:

“The law on the point in issue is well settled. In claim by an employee against his employer for damages for wrongful dismissal, such damages are limited to the amount the employer would have been obliged to pay if he had brought the contract to an end in accordance with its terms by giving either the proper notice or salary in lieu thereof.”

This position was reiterated by this Court in ***Civil Appeal No. 120 of 1997 Kenya Ports Authority v Edward Otieno*** thus:-

“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 which is normal notice would have been correct. We find that Mr. Otieno was not entitled in law to any of the benefits and/or emoluments claimed.”

By a more recent decision in the case of ***Ronald Kimatu Ngeli v Ukulima Sacco Society Ltd Nairobi C.A. No. 277 of 2009 [2011] eKLR*** where the appellant was an employee of the respondent and made a claim based on the fact that he was forced to retire prematurely, which according to him made him suffer loss and damages, this Court found that:

“... even if the contract was wrongfully terminated there is a wealth of authorities by this Court that the measure of damages would be the salary in lieu of notice and not the millions claimed by the appellant.”

By parity of reasoning, the appellant is entitled to one month's salary in lieu of notice as stipulated in his letter of employment. He admitted having been paid 6 months salary in lieu of notice. In our view this was much more than he deserved.

If we were to agree with the appellant that the employer could not terminate his services upto and including 21st January, 2006, then this would be tantamount to rewriting the contract between an employee on an employer. Besides, by the letter of employment dated 30th November, 1982 the appellant agreed that his employment would be terminated by one month's notice. This situation applied to both parties. The employee was also at liberty to disengage from the respondent by giving one month's

notice. To argue to the contrary that both parties were bound to each other upto 21st January, 2006 would lead to absurdities. Supposing the appellant wanted to disengage prematurely? Would the respondent have insisted on the appellant being in their employment upto 21st January, 2006? In any event, the appellant cannot term the letter of 30th November, 2006 as a “**Notice of Retirement.**” When if at all, does one get a Notice of Retirement? And supposing the “**Notice of Retirement**” is not issued? Is one to insist that they would continue to serve inspite of the mandatory retirement age as they did not get a Notice of Retirement?

In our view, the letter of 29th March, 2005 was simply reminding the appellant of his date of retirement. This letter did not divest the respondent of the power of terminating the services of the appellant before 21st January, 2006. In our view the appellant was bound by the terms contained in his letter of employment and of his letter of confirmation dated 30th November, 1982 and 20th June, 1884 respectively. He is not entitled to a salary and benefits from 9th April, 2005 upto 21st January, 2006 as whatever he was claiming is to be enjoyed by those in actual employment and not those whose services have been terminated by being given the requisite notice or salary in lieu of notice.

Accordingly, we have no hesitation in dismissing the appellant’s appeal with costs to the respondent.

Dated and delivered at Malindi this 10th day of July, 2013

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

