



IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM, J.J.A.)

CIVIL APPEAL NO. 156 OF 2007

BETWEEN

LEONARD ODINDI APPELLANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Sergon, J.) dated 25th October, 2006

in

H.C.C.C. NO. 128 OF 2003)

JUDGMENT OF THE COURT

In this first and probably last appeal, **Leonard Odindi**, the appellant, challenges the decision of the High Court at Mombasa (*Sergon, J.*) given on 25th October, 2006, in its **Civil Case No. 128 of 2003**, in which the learned Judge disallowed a claim for salary, leave allowance, house and medical allowances following the termination of the appellant's employment with Kenya Ports Authority, the respondent, allegedly on medical grounds.

The appellant was engaged by the respondent on 18th August, 1977 as a trainee clerk and was confirmed in that position with effect from 1st January, 1978. He was, over the years subsequently promoted to higher clerical cadres.

By a letter dated 4th November, 2002, the respondent notified the appellant that he had been retired on medical grounds and he was advised to cease work with effect from 2nd December, 2002. The opening paragraph of the letter read thus:-

“You will recall that you recently appeared before a Medical Board. In this respect, I wish to inform you that the Medical Board which examined you on 28th October, 2002, has declared that you are unfit for continued employment in the services of this authority.”

By the same letter the appellant was notified, that he would be paid two months' salary in lieu of

notice and other terminal benefits but which benefits were not specified, and which the Financial Controller of the respondent was instructed to pay by cheque. There is no indication on record how much money was paid ever to the appellant. At the hearing of this appeal, upon inquiry by the Court Mr. Kassim Shah for the respondent informed us that the total amount of money the appellant had received was K.Shs. 1.98 million, which was inclusive of pension benefits. Mr. Shah also stated from the bar that the appellant has been receiving a monthly sum of KShs.18,000/= as pension. The appellant confirmed before us that he received the KShs.1.98 million, aforesaid, but stated that he was not informed what it was for. He also admitted he has been receiving KShs.18,000/= monthly.

The appellant impleaded the respondent in the High Court for wrongful termination of employment. In his amended plaint filed in Court on 20th August, 2003, he sought a declaration that he was prematurely retired; and he also claimed payment of salary in lieu of notice, house allowance, leave allowance and medical allowance, all for the period from the date he was retired until the date he would have retired upon attaining the retirement age. He did not however, particularize the amounts of money he was claiming. The appellant also claimed general damages for premature retirement, costs and interest.

The respondent denied the claim in an amended defence it filed on 29th August, 2003 and at **paragraph 12** thereof it averred that the suit was bad in law for contravening the provisions of the **Kenya Ports Authority Act, Cap 391** of the Laws of Kenya as regards the issuance of notice of intention to sue. In the same paragraph, the respondent also raised the issue of limitation. The two issues were not covered in the respondent's written submissions dated 2nd June, 2006 and filed in Court on the same day. The learned trial judge did not also cover the issues in his aforesaid judgment. As neither party raised the issues before us, the matter is not before us for consideration.

At the trial of the suit two doctors testified, one on behalf of the appellant and the other for the respondent. **Dr. Charles Mwangombe (PW2)** testified that he examined the appellant on his mental state on 11th March, 2003, as also on 13th, 14th and 17th March, 2003 respectively, and formed the opinion that he was of sound mind and discretion. He did not agree with the conclusion in a medical report on the appellant made on 28th October, 2002, in which the finding on the issues was to the contrary. That report was signed by among other doctors, **Dr. Yusuf Karim (DW1)** who was the second of the two doctors to testify. He testified that he signed the above medical report. The conclusions in the said report according to him, were based on the appellant's medical history in the appellant's confidential file. He conceded that the report was false to the extent that there was no Medical Board meeting held to consider the appellant's medical state.

In his evidence the appellant set out what he was claiming, namely salary for 9 years at the rate of KShs.27,850/= per month, leave allowance at KShs.45,000/= per annum for 9 years, House allowance at the rate of KShs.9,070/= per month for 9 years, and medical allowance at KShs.11,800/= per annum for 9 years.

In his judgment, Serгон J. found as fact that the appellant had prematurely retired; he was not medically examined by a Medical Board as had been alleged by the respondent and that the doctors who signed the medical report in which it was recorded that the appellant was medically unfit to continue in his employment with the respondent, acted unprofessionally and their conduct led to a miscarriage of justice against the appellant.

Relying on this Court's decisions in the cases of **Kenya Ports Authority vs. Edward Otieno Civil Appeal No. 120 of 1997** and **Dalmas Ogoye vs. K.N.T.C. Ltd., Civil Appeal No. 125 of 1996**, the learned judge rendered himself regarding the appellant's claim, thus:-

"It is trite law that in such disputes, the plaintiff is only entitled to all that was due to him under and in accordance with his contract of service. I have already set out the kind of prayers the plaintiff sought from this Court

It is not clear beyond peradventure that the plaintiff cannot get what he has prayed for. The plaintiff

has further prayed for damages for premature retirement

In this case it is admitted that the plaintiff was paid two months' pay in lieu of notice. I have found that since the notice given falls short of that under the contract, then the defendant should pay the balance of one month's pay in lieu of notice. In my view that is the only award I can give the plaintiff which I hereby do, otherwise the rest of his prayers are dismissed. Costs of the suit is given to the plaintiff."

In his memorandum of appeal, the appellant has raised three main grounds as follows:-

- (1) *The learned trial judge erred when he disallowed the claim of salary; leave, house and medical allowances*
- (2) *He erred when he relied on the case of Kenya Ports Authority vs. Edward Otieno (Supra).*
- (3) *He erred when he held that the appellant had not made out a case for salary for 9 years, leave, house and medical allowances for the same period.*

He therefore prayed that we set aside the decision of the High Court and in place thereof substitute a judgment for KShs.3,007,800/= as salary for 9 years, house allowance, leave allowance and medical allowance, all for nine years. He, in addition asked this Court to award him general damages for premature retirement.

The appellant's claim was essentially one for special damages. It was quantifiable and as rightly submitted by Mr. Kassim Shah, for the respondent, the claim should have, but was not specifically pleaded in the appellant's Memorandum of Appeal. Had the trial court allowed it there would have been no room or basis for seeking general damages. Besides, as a general rule, no general damages are payable in cases between a master and servant whose relationship is generally contractual.

At the hearing of this appeal, Mr. Kassim Shah challenged the competence of the appeal. He submitted that the notice of appeal was filed by a firm of advocates known as Ong'era Adembesa & Co. In his view that firm is no longer in existence. One of the partners, Mr. Adembesa, allegedly died over 15 years ago. The other partner, one Mr. Ong'era, had not allegedly taken out a practicing certificate for the year 2003 when the notice of appeal was filed. On this Mr. Shah was relying on information given to him by the Law Society of Kenya.

In the case of *Kenya Power and Lighting Co., vs. Mahinda and Another [2005] E.A. 102* this Court, differently constituted, held that when an advocate signs a process on behalf of a litigant he must be competent to practice as an advocate as required by **Section 9** of the Advocates Act.

Whether or not Mr. Ong'era who allegedly signed the record of appeal held a practicing certificate as at the date of filing in Court of the said record of appeal, is a question of fact. The respondent did not file an application for an order striking out the appeal as being incompetent. Having not done so, it is doubtful whether this Court can properly act on the issue as supposed merely on a statement from the bar. Even assuming that Mr. Ong'era did not hold a current practicing certificate as an advocate at the material time, as he was not a sole practitioner in that firm, it cannot be said that the firm was non-existent. We do not know how many advocates were in the firm of Ong'era Adembesa and Co., Advocates. We note that this appeal was listed for hearing on priority basis upon request by the said firm. The person who signed the letter requesting a priority hearing bears a signature different from the one on the Memorandum of Appeal.

This appeal came for hearing on 27th July, 2011. On 21st July, 2011 the appellant filed a Notice of Intention to Act in person. Mr. Shah relying on that fact submitted that the appellant by filing that notice was pre-empting a possible application to strike out the appeal on the aforesaid ground that it was lodged

by an unqualified advocate. That is mere conjecture and we do not want to rely on conjecture to strike out an appeal. Striking out an appeal is a draconian measure which in our view, should be resorted to in clear cases.

We do not lose sight of the copy of the letter dated 14th July, 2011 addressed to Mr. Kassim Shah indicating that Mr. David Ong'era, did not hold a practicing certificate as at the date of the letter and that he last held a practicing certificate in 2003. It may well be that Mr. Ong'era did not hold a valid practicing certificate on 9th July, 2007, when this appeal was filed. However, there is no evidence before us that the signature on the Memorandum of appeal is his and not of any other advocate in the firm. Besides, the Law Society of Kenya has not stated in its aforesaid letter that the firm of Ong'era Adembesa and Co. Advocates, had, ceased to exist. It is in situations like this that the provisions of **sections 3A and 3B** of the Appellate Jurisdiction Act and **Act 159(1)(d)** of the Constitution of Kenya 2010 came into play. The position is not clear though to lead to the conclusion that an unqualified person filed this appeal on behalf of the appellant.

The main argument in the appellant's appeal is that he was entitled to be paid salary for the years he should have worked before reaching the retirement age. It was his submission that he had a legitimate expectation that he would be allowed to work until retirement age, which expectation was thwarted when he was prematurely retired on the false assertion that he was medically unfit to continue working. There is no doubt that the respondent irregularly retired the appellant on medical grounds. No Medical Board examined him to claim to the conclusion that he was medically unfit to continue working. It is also clear that the appellant was not given an opportunity to show that the allegation that he was medically unfit to continue working was not abuse on medical evidence. As the matter stands the appellant was justified in complaining that his dismissal was without any legal or factual basis.

The position in law in such a case is that the dismissal of the appellant was wrongful and lacked any legal basis. That is the decision the trial Judge came to and we cannot fault him on that. What would the legal consequences be in such a case?

The respondent's Staff Regulations were revised in 2002, by its Board of Directors pursuant to **Section 58 of The Kenya Ports Authority Act, Cap. 391** of the Laws of Kenya, Termination of employment on Medical grounds is covered under the head of Termination of Service (Part B p. 3(d) which provides thus:-

“An employee whose services are terminated on the ground of ill health not caused by his neglect or misconduct will be given one month notice and two months' salary in addition to all leave and other privileges due to him. This paragraph should be read in conjunction with Section D.8(e) of these Regulations.”

Section D8(e) deals with medical services and sick leave, which is not relevant for purposes of this judgment.

The regulations do not cover the situation in which, as here, an employee is relieved of his employment on the false ground that he is medically unfit to continue working. Clearly the respondent did not reserve to itself the general power of dismissing a person without valid grounds for termination. No misconduct was alleged against the appellant, and the only ground which was given for the termination was ill-health, which, the doctors who allegedly signed the Medical report on the appellant admitted on oath that it was false. The doctors did not meet as a Medical Board or otherwise to consider the appellant's medical condition. That being the case, the appellant's case, contrary to what the learned trial judge held could not be based merely on absence of or inadequacy of notice of termination. The dismissal was not summary in nature but was based on falsehood.

In those circumstances, the notice of termination which would normally be given on account of ill health or some misconduct did not apply. In view of the foregoing, it would appear to us that there was some element of malice in dismissing the appellant and that would, in the peculiar circumstances of this

case have attracted general damages, the quantum of which would depend on proven loss. (East African Airways v. Knight) [1975] EA. 165.

The appellant's employment was terminated nine years before the normal retirement age. The appellant admitted before us that he received a lump sum of money, which, according to the respondent, was his provision paid according to the respondent's pension regulations.

In view of that what the appellant may have lost is not easily quantifiable in absence of clear evidence in that regard and because of several imponderables, for instance had he stayed on his monthly income would probably have been increased, there is also the possibility of illness or other unforeseeable reason or losing his income or losing his job, and so on. Consideration must also be given to the fact that he got a lump sum payment of money albeit prematurely, and which he did not disclose in both his pleadings and evidence thus showing some element of bad faith. When we asked the appellant whether some payments had been made to him by the respondent, he answered in the affirmative but curiously, he stated that he did not know what the payments were for. That cannot possibly be true, because it was not an isolated payment. Besides a payment of at least KShs.1 million must have been accompanied by an explanation either by way of a voucher or a forwarding letter. Had that fact been brought to the attention of the trial judge that would have been a ground for dismissing the appellant's case. As it happened the respondent confined its case to trying to show that the appellant's retirement was proper.

A claim of house allowance, medical and other allowances are claims which would best be made by serving employees. These are payments made, as this Court stated in the case of Kenya Ports Authority vs. Silas Obengele Civil Appeal No. 38 of 2005 to serving employees to enable them perform their work more conveniently and more efficiently. These were improperly claimed by the appellant since he had ceased working for the respondent. As stated earlier, had he adduced evidence of loss arising from his wrongful termination arising from the malicious nature of his termination, this Court would have been inclined to award some damages.

In Kenya Ports Authority vs. Edward Otieno Civil Appeal No. 120 of 1997 and Dalmas Ogoye vs. Kenya National Trading Co. Ltd. Civil Appeal No. 125 of 1996 this Court reiterated the principle that a person whose services have been wrongfully or unlawfully terminated would only be entitled to payment of such sums as he would have been paid had the termination been done in accordance with his contract of service. That is the decision the High Court came to and we have no basis for faulting the trial Judge on that decision regarding the facts and circumstances of this case.

In view of the foregoing, we have no basis for allowing this appeal, and in view of the circumstances of the case we dismiss the appeal but with no order as to costs.

Dated and delivered at Mombasa this 2nd Day of December, 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR