



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 289 OF 2014**

**BETWEEN**

**JOHN MUIRURI KURIA .....CLAIMANT**

**VERSUS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Lumatete Muchai & Company Advocates for the Claimant*

*Addraya Dena Advocate for the Respondent*

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**JUDGMENT**

1. The Claimant was employed by the Respondent State Corporation as a Mechanic Grade PA9, on 19<sup>th</sup> June 1991. He was retired in the interest of the Public, on 1<sup>st</sup> March 2004.
2. He appealed against the decision through his Trade Union, the Dock Workers' Union, on 22<sup>nd</sup> January 2007.
3. The Joint Industrial Council of the Respondent and the Dock Workers' Union deliberated on the Appeal in the year 2014. It was recommended the Claimant is reinstated, with the 10 - year period the Claimant was out of work, being treated as a period of unpaid leave.
4. The Respondent wrote to the Claimant on 6<sup>th</sup> May 2014, asking the Claimant to report to the Head Office for posting.
5. The Claimant did not report to the Respondent's Head Office as instructed. He wrote to the Respondent requesting for extension of the 10 year-period of unpaid leave, saying he needed to take care of his ailing Mother and Wife.
6. In subsequent communication, the Respondent realized the Claimant was using an e-mail address belonging to another State Corporation, Kengen. This aroused the suspicion of the Respondent that the Claimant was employed by Kengen, hence his dithering in committing to reinstatement at the Port.

7. The Respondent wrote to Kengen on 25<sup>th</sup> July 2014, enquiring if the Claimant was employed by Kengen. Kengen wrote back on 25<sup>th</sup> August 2014, confirming that indeed the Claimant was its Employee. He held a 3 year-term contract, commencing 1<sup>st</sup> November 2012.

8. The Respondent wrote to the Claimant on 17<sup>th</sup> November 2014, withdrawing the offer for reinstatement.

9. Against this background, the Claimant filed his Statement of Claim on 4<sup>th</sup> July 2014, seeking the following orders against the Respondent:-

a) Salary arrears for the period 2004 to 2014 at Kshs. 1,841,570.

b) Gratuity for 23 years at Kshs. 176,483.

c) Annual leave pay of 210 days at Kshs. 107,424.

d) 1 month salary in lieu of notice at Kshs. 15,346.

e) Damages for unfair termination at Kshs. 184,157

Total .... Kshs. 2,324,982

f) Certificate of Service to issue.

g) Costs.

h) Interest.

i) Any other suitable relief.

10. The Respondent filed its Statement of Reply on 6<sup>th</sup> August 2014. It is agreed the Claimant was employed by the Respondent. It was agreed between the Dock Workers' Union and the Respondent, through their Joint Industrial Council, that the Claimant is reinstated. The Respondent wrote to him asking him to report for deployment. He asked for extension of unpaid leave. The Respondent realized the Claimant wrote through an e-mail address belonging to Kengen. Upon enquiry, it confirmed the Claimant was an Employee of Kengen. The Claimant had at the outset been paid notice pay of 3 months' salary. His Claim is unfounded, as the proceedings of the Joint Industrial Council, resulted in resolution of the dispute. The Respondent prays the Court to dismiss the Claim.

11. Parties consented in Court on 7<sup>th</sup> October 2016 to have the dispute determined on the strength of the record. They confirmed the filing of their Closing Submissions at the last mention in Court on 18<sup>th</sup> November 2016.

### **The Court Finds:-**

12. The Claimant appealed against the decision retiring him from service in the interest of the Public, taken by the Respondent. He appealed through his Trade Union, the Dock Workers Union.

13. The Joint Industrial Council [JIC] recommended the Claimant is reinstated. The terms of reinstatement are given in the recommendation of the JIC. He was to be reinstated, with the 10 years he was out of work, deemed, a period of unpaid leave.

14. The Dock Workers Union fully represented the Claimant, and prosecuted his Appeal. The outcome of the Appeal was binding on the Respondent, the Union and its Member.

15. The Respondent wrote to the Claimant on 6<sup>th</sup> May 2014 asking him to report to work. He asked for the period of unpaid leave of 10 years, to be extended, to allow him attend to his sick Mother and Wife. The Claimant filed this Claim on 4<sup>th</sup> July 2014, even as he was in communication with the Respondent over his return to work.

16. The Court is of the view that he filed this Claim because he was not satisfied with the terms of reinstatement, and secondly, he was still serving Kengen under a 3 year contract. This Claim is essentially a rejection of the outcome of the JIC proceedings.

17. The Claimant should have presented all the relevant facts that would affect a resolution reinstating him, at the JIC platform. He should have disclosed to his Trade Union that he was already serving Kengen under contract, and perhaps seek to defer the date of reinstatement with KPA. If he preferred to be compensated rather than reinstated, he should have given an indication through his Trade Union, at the JIC. Why go on with the Appeal if he felt reinstatement would not be practicable to him?

18. The filing of the Claim, and in particular the pursuit of damages for unfair and unlawful retirement, is a wrong approach. The dispute before the Court is grounded on the retirement of the Claimant, which took place on 1<sup>st</sup> March 2004. He exercised his right of appeal, under the industrial relations machinery available to him. The dispute was resolved in his favour, but because he had since found another job, implicitly rejected reinstatement.

19. The Court has no reason to reconsider what was considered, and validly determined, by the JIC.

20. The Claimant cannot be paid salary arrears from 2004 to 2014, because it was agreed by the JIC, that the period he was out of work, is treated as a period of unpaid leave. He has not worked for KPA, in any event, for those 10 years, and payment of such arrears would not amount to fair remuneration. Thirdly, he moved on after being retired as the law demands of an Employee who has lost his job, and mitigated his economic injury by securing gainful employment with Kengen. To grant that he is paid arrears of salary for 10 years, would have the effect of granting the Claimant salaries from 2 State Corporations, while rendering service to only one Corporation at a time.

21. There is similarly no merit in the prayer for notice pay. There is a letter dated 28<sup>th</sup> June 2006, where Respondent approved payment of 3 months' salary in lieu of notice to the Claimant.

22. Pending annual leave days are given to be 210 in the Statement of Claim, and 150 in the Closing Submissions. The Claimant submits annual leave pay, whatever the number of days, is for the period of 10 years he was out of employment. The recommendation of the JIC as indicated above was that the period of absence would be treated as a period of unpaid leave. As such there are no annual leave days, capable of being translated into money.

23. The Court does not think it would be proper to grant the Claimant damages for unfair retirement, as an alternative and suitable remedy was availed to him. The dispute over unfair termination was resolved by the Parties at their own level.

24. The prayer for gratuity is based on clause 5 of the Claimant's letter of appointment dated 19<sup>th</sup> June 1991. An Employee leaving service on, among other grounds, termination of service in the interest of the Public, was entitled to "pension, gratuity, or other allowance." The prayer is based on 23 years of service, from 1991 to 2014.

25. The Court has not come across any material indicating that the Claimant was paid pension, gratuity or other allowance. It is not proper however to include the 10 years the Claimant was out of employment, as part of his period of years of service. Once he rejected reinstatement, 10 years of absence could not be credited to his period of service.

26. The creditable years should be from June 1991 to March 2004- a period of 12 complete years of

service. He is allowed gratuity based on his last monthly salary of Kshs. 15,326 divide by 26 working days = Kshs. 589 daily x 15 days = Kshs. 8,841 x 12 complete years of service = Kshs. 70,735. **He is granted gratuity at 15 days' salary for every complete year of service, at Kshs. 70,735.**

27. Considering that gratuity should have been paid in 2004, or at the very least when notice was paid in 2006, the Claimant should have the prayer for **interest on gratuity, which the Court grants at 14% per annum from March 2004, till payment is made in full.** Terminal benefits must always be paid promptly upon termination. Employers should not withhold Employees' dues unreasonably, particularly at the end of service, when Employees need to plan for their hereafter.

28. **The Respondent shall release the Certificate of Service to the Claimant forthwith.**

29. **No order on the costs.**

IN SUM, IT IS ORDERED:-

**a) The Respondent shall pay to the Claimant gratuity at Kshs. 70,735.**

**b) Interest on this amount granted at 14% per annum from March 2004, till payment is made in full.**

**c) Respondent shall release Claimant's Certificate of Service forthwith.**

**d) No order on the costs.**

Dated and delivered at Mombasa this 24<sup>th</sup> day of February 2017.

James Rika

Judge