



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 209 OF 2015 (consolidated with ELRCC No. 210 and 493/15)

**KENNEDY ONYANGO OKUMU.....1ST
CLAIMANT**

**JOHNSON NYAMAWI GAMBO.....2ND
CLAIMANT**

**ELIAS NYALE KAMBI.....3RD
CLAIMANT**

VERSUS

**MOMBASA PORT COOPERATIVE SAVINGS AND CREDIT SOCIETY
LIMITED.....RESPONDENT**

J U D G M E N T

INTRODUCTION

1. The claimants were employed by the respondent until 2013 when they were interdicted for misconduct and/or financial embarrassment before being retired in the public interest on 18/4/14. Thereafter they filed the said separate suits in 2015 challenging their retirement on ground that it was substantively and procedurally unfair. The respondent as denied that the retirement was procedurally and substantively unfair and prayed for the suits to be dismissed. The suits were later consolidated under this file and disposed of by written submissions on the basis of the pleadings, witness statements and documentary evidence filed.

CLAIMANTS CASE

2. The first claimant, Mr. Kennedy Onyango Okumu, was employed by the respondent in November 2010 as internal Auditor and later got promoted to the position of Accountant earning ksh.105,000 per month among other benefits. On 25/11/2013 he was interdicted for obtaining car loan and failing to use the funds to buy any car, and secondly for using the respondent’s funds to offset his loan of ksh.1,000,000. He was invited to a disciplinary committee to defend himself of the said charges plus other integrity issues related to his former employment which arose during the hearing. After the hearing, the committee found him guilty as charged but recommended for his retirement in the public interest. He appealed against the retirement but after the hearing, the appeal was dismissed.

3. The second claimant, Mr. Johnson Nyamawi Gambo was employed by the respondent on 15/12/2009

as Fosa Supervisor Accountant earning ksh.70195 per month plus other benefits. On 5/11/2013, he was interdicted for being financially embarrassed and was invited to defend himself before a disciplinary committee. During the hearing, other offences emerged including illegal approval of leave travelling allowance in favour of the acting CEO. After the hearing the committee found him guilty as charged but recommended that he be retired in the public interest. He appealed against the decision but the appeal was unsuccessful.

4. The third claimant, Mr. Elias Nyale Kambi was employed by the respondent on 1/11/2011 as a Loan Supervisor and later became Accountant earning Ksh.65095 per month plus other benefits. On 19/11/2013, he was interdicted for being financially embarrassed, and secondly for illegally utilizing the respondent's funds to offset his loans.

5. The claimants are unanimous that the retirement in the public interest amounted to unfair termination because the reasons for termination were not true and the procedure followed was not fair. They are further unanimous that their retirement was an act of discrimination because most of the other employees of the respondent had committed the same acts but they were not charged or retired. They abandoned the prayer for reinstatement and prayed for compensation for unfair termination plus terminal benefits under their employment contract.

DEFENCE CASE

6. The respondent admits that all the claimants were her employees. She further admits that the claimants were interdicted for the said offences and later given an opportunity to defend themselves before disciplinary committee. It is further defence case that the claimants were found guilty of the said offences plus others which emerged during the hearing but the committee recommended that they be retired in the public interest. The claimants appealed and they were given another hearing but the appeals were unsuccessful.

7. According to the respondent, the retirement of the claimants was fair because the claimants were found guilty of gross misconduct and financial embarrassment after a fair hearing. It is further defence case that the claimants indeed admitted the offences and the financial embarrassment as charged and described their suit as frivolous and vexatious.

ANALYSIS AND DETERMINATION

8. After careful consideration of all the material evidence presented to the court, the issues for determination are:

- (a) Whether the termination of the claimant's employment contract through retirement in the public interest was unfair.
- (b) Whether the reliefs sought should be granted.

UNFAIR TERMINATION

9. There is no dispute that the claimant's services were terminated through retirement in the public interest. There is also no dispute that the claimants were charged with misconduct and financial embarrassment and they were found guilty on their own admission. The first claimant admitted to obtaining car loan and failing to buy the car and register it jointly with the respondent. He also admitted that he failed to pay Ksh.184600 offset levy in respect of his loan balance. He further admitted that he was unable to service a loan of ksh.520,186 with his former employer, Kisumu Teachers Sacco and further that he had assisted an illiterate lady to withdraw money using ATM Card from a deceased person's Account at the Kisumu Teachers Sacco.

10. The second and the third claimants admitted before the disciplinary committee that applied and obtained loans beyond their ability to repay and thereby rendering themselves financially embarrassed.

They also admitted the offence of failing to pay offset levy in respect of their loans.

11. Section 10.7.5 of the Respondent's HR manual, permits the respondent to terminate her employees in the public interest. The section provides that an officer may be terminated in the interest of the Sacco on grounds such as financial embarrassment or any other grounds which cannot suitably be dealt with by the procedure laid down in any other provision of the Regulations. That section further provides that before the termination, officer shall be notified in writing the specific complaint for which termination is contemplated together with the substance of any respect or part thereof that is detrimental to him and thereafter be given a chance to defend himself.

12. The foregoing Regulations is on all fours with Section 45(2) and Section 41 of the Employment Act in so far as fair termination of employment is concerned. Section 45(2) of the Act provides that termination of employment of an employee is unfair unless the employer fails to prove that the termination was grounded on a valid and fair reason and that it was done after following a fair procedure. On the other hand, Section 41 of the Act provides that before terminating the contract of employment on ground of misconduct, physical incapacity or poor performance, the employer shall first explain to the employee the reason for the intended termination in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter accord the employee and his chosen companion a chance to air their defence for consideration before the termination is decided.

13. In this case, there is no dispute that the second and the third claimants were notified of the employers problems with their financial embarrassment vide their respective interdiction letters. The particulars of the financial embarrassment were given to the said claimants and they admitted the same in addition to the offence of failure to pay offset levy on their loans. The said claimants were then found guilty and retired in the public interest and they were offered terminal dues. They appealed against the said decision, but after the hearing their appeals were dismissed.

14. As regards the first claimant, the offences he faces included gross misconduct in addition to financial embarrassment which emerged during the hearing and on his appeal. He was invited to defend himself before the disciplinary committee where he admitted the offences charged plus the financial embarrassment. After the hearing the committee also found him guilty but instead of recommending summary dismissal they went for retirement in the public interest just like the case for the second and the third claimant.

15. After careful consideration of the evidence before the court, and the provision of Section 41 and 45 of the Act, and Section 10.7.5 of the Respondent's HR manual, I find and hold that the termination of the claimants' contract of service was fair. The reason for the foregoing finding is that the claimants admitted the offences charged and were found guilty after a fair hearing.

16. As regards the sentence metted of retirement in the public interest instead of summary dismissal, I find on a balance of probability that the employer exercised her own discretion in favour of the claimant. The claimants cited my decision in PATRICK LUMUMBA VS KENYA PORTS AUTHORITY [2013] eKLR where I faulted the employer for retiring the employee on ground of public interest. The facts in that case are however distinguishable from the facts herein because in this case the claimant were found guilty of the misconduct charged after which the employer exercised her discretion by meting out a more lenient sentence than summary dismissal. In the other case, however the employee was only suspected of theft but he was never found culpable by both police investigators and disciplinary committee which heard his case. It was therefore unfair for the employer to retire him in the public interest without any lawful cause and without giving him any chance to defend himself. For the reasons that in this case there existed a valid and fair reason for dismissal and that the claimants were given a fair hearing, I find and hold that their retirement in public interest did not amount to unfair termination.

RELIEFS

17. In view of the finding herein above that the termination of the claimant's employment was fair, the prayer for compensation and exemplary damages for unfair termination is dismissed. They will however

get all the benefits available to them under a normal termination under Clause 10.7.4 of the HR Manual. The reason for the foregoing finding, is that there is no provision for retirement in the public interest in the HR Manual. Retirement in the public interest should not be confused with termination in the public interest under clause 10.7.5 of the HR manual which does not attract any benefits to the employee.

NOTICE

18. The termination letter dated 18/4/2014 stated as follows in part:

“you are therefore directed to report to the chief Executive officer who will facilitate processing of your terminal dues less whatever debts you owe the society”.

19. Under the said Clause 10.7.4, (a) (ii) of the HR Manual, an officer of the rank of HOD above is entitled to a notice of 3 months before termination or salary in lieu of such notice. The claimants prayed for the same and the respondent has admitted the same in her written submissions. I therefore award to each claimant three months salary in lieu of notice.

GRATUITY

20. The claimants allege that they worked for the respondent for 3 to 5 years and prays for gratuity pay at the rate of 15 days pay per year of service. The basis of the said claim was however not given in evidence. My keen perusal of the HR Manual did not reveal any right to service gratuity. The burden of proving the right to service gratuity was on the claimants, but they did not discharge it on a balance of probability. However the respondent has admitted in her submissions that she will pay them one month salary per year of service.

UNPAID HALF SALARY

21. The claimant alleged that while on interdiction, they were entitled to half salary plus house allowance but they were never paid the same for six months. The respondent admitted the claim in her written submissions. Consequently, the claimants will get the unpaid half salary and house allowance for six months.

BONUS AND DIVIDEND

22. The claimants pray for their annual bonus and dividends for the year 2013 and 2014. No basis has been laid by the claimants to warrant granting of the said relief. I therefore dismiss the claim for bonus and dividends for lack of particulars and supporting evidence

UNPAID LEAVE ALLOWANCES.

23. No particulars were pleaded or evidence presented to the court by the claimants to support the claim for unpaid allowances. However the defence admitted in her submissions 32,12 and 7 leave days outstanding in favour of the first, second and third claimants respectively. I therefore award each claimant the admitted leave days.

24. The said awards will be based on the claimants' monthly salary which seems to be in dispute. According to the claimants their salary was ksh.105000, 51180 and 104635 respectively. No evidence was produced by them to prove the alleged salary. The respondent has however admitted the said salary in paragraph 3 of the defence. She has further admitted that as at the time of retirement the second claimant was earning ksh.70195 basic salary. I therefore proceed to assess the individual awards as follows:

1ST CLAIMANT KENNEDY ONYANGO OKUMU

Notice ksh.10500 X 3.....315,000

Half salary X 6 months.....315,000
Leave 32 days admitted103,692.56
Service 3years315,000.00
1,048,692.56

2ND CLAIMANT JOHNSON NYAMAWI GAMBO

Notice Ksh.70195 X3210,585
Half salary 6 months210,585
Leave (12 days)32,397.70
Service (4 years)280,780.00
734,347.70

3RD CLAIMANT ELIAS NYALE KAMBI

Notice ksh.104,635 X 3.....313,905
Half salary (6 months)313,905
Leave (7 days)28,170.96
Service pay (2 years)313,905.00
969,885.96

DISPOSITION

25. I enter judgment for the claimants in terms of the individual awards above plus half costs and interest from the date of filing this suit. In the absence of any counter claim by the respondent am not able to enter judgment for her against the claimants. I however direct that the awards made herein shall be subject to the statutory deductions under Section 19 of the Employment Act.

Dated, signed and delivered this 28th April 2017

O. N. Makau

Judge