



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 79 OF 2014

BETWEEN

STEPHEN O. ODHIAMBO.....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company Advocates for the Claimant

Addraya Dena Advocate for the Respondent

JUDGMENT

1. This is an ancient Claim, initially filed at the High Court in Mombasa, through a Complaint dated 27th September 1995. The Claim was registered as Civil Claim Number 778 of 1995. It is 22 years from the date of inception of the Claim.
2. After years of inactivity at the High Court, it was ordered the file is transferred to the present Court for disposal, through an order of the High Court made on 6th March 2014.
3. The dispute was registered as Cause Number 79 of 2014 at the Industrial Court. In the original Claim there were 2 Plaintiffs: Shem Y. Otieno; and the current Claimant Stephen O. Odhiambo. Otieno is deceased, and the surviving Claim pits Odhiambo only, against his former Employer.
4. The Claimant filed his Amended Statement of Claim at the Industrial Court on 31st October 2014. He also filed a comprehensive Witness Statement on the same date.
5. The Respondent filed a Statement of Defence dated 28th December 1995, and an Amended Statement of Response on transfer, filed on 18th November 2014.
6. The Claimant gave his evidence-in-chief in part, on 30th June 2015. Thereafter, Parties indicated to the Court they were negotiating out of Court. They were not able to record settlement.

7. On 9th November 2016, they agreed that the Claimant would not give further evidence; the Respondent would not call any Witnesses; Witness Statements are adopted as their evidence; Documents filed by the Parties are adopted as their exhibits; proceedings are closed; and Parties to subsequently file their Closing Submission, and give highlights of those Submissions. They confirmed the filing of the Submissions 7th February 2017. The Claimant gave a highlight on 13th March 2017, while the Respondent adopted its Written Submissions in their entirety.

The Claimant's position

8. He states he was employed by the Respondent State Corporation on 1st October 1985, as a Mechanical Technician. He was confirmed to permanent and pensionable terms on 18th December 1987.

9. The Respondent terminated his contract through a letter dated 19th January 1995. Termination was made on the basis of public interest.

10. The Claimant testified the Respondent alleged he stole Respondent's brake discs. He used to maintain and repair cranes. He had done brake servicing many times. There was a crane which required brake servicing. There were locally manufactured discs in Respondent's store. His Supervisor, the late Otieno, instructed the Claimant to inspect the discs. The Claimant did so, and declared them good and usable. His Supervisor therefore instructed the Claimant to install the locally manufactured discs in the crane.

11. There was vibration after the Claimant fixed the discs. He found out vibration was occasioned by a bent shaft. He replaced this and vibration ended.

12. The Respondent alleged the locally manufactured discs installed by the Claimant were inferior and caused the vibration. The Claimant maintained vibration was caused by a bent shaft. This shaft also caused the damage to the original discs. Vibration ended when the shaft itself was replaced. The locally manufactured discs were not inferior as they have been working satisfactorily in the crane since the year 2003. The Claimant was absolved by Respondent's own Technical Services Manager Engineer Joseph Atonga.

13. The Claimant was taken through a disciplinary process in a Committee of Inquiry. No charges had been served upon the Claimant. No Witnesses were called in his presence. He was not served with a record of the Committee's proceedings and decision. He was 47 years at the time of termination, and expected to go on working until retirement at the age of 55 years. He had 8 years left to retirement.

14. He asks the Court to find termination was wrongful and accord him the following Orders:-

- a) It is declared termination was wrongful.
- b) Payment of salaries and allowances withheld by the Respondent for the period between February 1995 and October 2003.
- c) Payment of terminal and pension benefits.
- e) Interest at the rate of 12% per annum from February 1995 till payment is made in full.
- f) Costs.
- g) Any other relief.

Respondent's position.

15. The Respondent accepts it employed the Claimant for the period, and on the terms and conditions of service, stated in the Claim. It is conceded that the Claimant was eligible for payment of pension on

termination. He was retired in public interest on reasonable and justifiable grounds. He is not entitled to salaries and allowances he has not worked for.

16. David Wanyama, a Mechanical Technician working for the Respondent, filed a Witness Statement on 3rd March 2015. He confirms the locally manufactured discs fitted on the crane SSG1701 were still “*giving us the much needed services,*” as of the year 2003.

17. Human Resources Officer [Discipline], Marco M. Ngolia, filed his Witness Statement on 3rd October 2014. He states that on the weekend of 22nd and 23rd May 1993, the Claimant was instructed by his Supervisor to inspect locally manufactured hoist brake discs, with a view to determine if they could be used to replace the original ones on crane SSG 1802 which had cracked. He inspected the discs, concluded they were usable and fitted them on SSG 1802. There was vibration after the discs were fitted, which led the Respondent to conclude the Claimant, with the approval of his Supervisor, the late Otieno, had installed inferior brake discs. The two Officers were taken through a disciplinary process in the Committee of Inquiry. They were found guilty and it was decided by the Respondent, that the two Officers are retired on the ground of public interest.

The Court Finds:-

18. The employment history of the Claimant with the Respondent, and his terms and conditions of employment are not disputed. The significant dates in his employment history are undisputed. It is not disputed that termination was at the instance of the Respondent. It is common ground the Claimant’s contract was terminated on the ground that he fitted poor quality and inferior hoist brake discs, to Respondent’s crane. He and his Supervisor, the late Otieno, were taken through a disciplinary hearing, found culpable of an employment offence and retired in the interest of the public.

19. There are two documents which are central in resolving this dispute. **First if the letter of Respondent’s Technical Services Manager Engineer Joseph O. Atonga, addressed to Respondent’s Human Resources & Administration Manager dated 25th May 2004.**

20. This letter explains the technical aspects of the dispute in clear details. In May 1993, original hoist brake discs cracked. The Claimant was instructed by his Supervisor Otieno, to inspect locally manufactured discs, to determine if they were fit for use, to replace the faulty ones. He confirmed they were fit and went on to replace the faulty ones with the local ones. There was vibration after the Claimant fixed the local brake discs. It was thought vibration was caused by the freshly fitted local discs. The Claimant’s contract was terminated.

21. Subsequently, Engineer Atonga goes on, it was discovered vibration was caused by a bent shaft. The shaft was replaced and vibration ended. Another locally manufactured disc was removed from the stores, and fitted on SSG 1701 on 23rd October 2003. It continued to work satisfactorily without showing any signs of failure.

22. Engineer Atonga concludes the decision to terminate the Claimant’s contract was not based on valid ground. The locally manufactured brake discs had not been tested over a period of time to be declared inferior. Vibration was not caused by the discs installed by the Claimant, but by a bent shaft. Vibration ended when the shaft was replaced.

23. **The second document is the Internal Memo from Respondent’s Personnel Manager S.J.Chingabwi, to the Human Resources & Administration Manager, dated 18th February 2005.**

24. Chingabwi advises the Respondent, that if the Claimant decided to sue the Respondent, the Claimant’s Suit would be time barred, as the 6 year period prescribed under the Limitations of Actions Act Cap 22 the Laws of Kenya, on the filing of contractual claims, expired in the year 2000. The proceedings of the Committee of Inquiry were missing and it was therefore not possible to ascertain the correctness of the decision to retire the Claimant on public interest. The Respondent could not vary the

decision of the Committee of Inquiry which had the advantage of evaluating evidence. However, if the brake discs installed by the Claimant were usable as opined by Engineer Atonga, the Claimant appeared to have a case against the Respondent. But as his claim was time barred, Chingabwi advised against reinstating the Claimant.

25. The Claimant's contract was terminated on 19th January 1995. He filed H.C.C. Number 778 of 1995 in the year his contract was terminated. It is not therefore correct that he would be time-barred as was advised by Chingabwi. There was already a Claim filed by the Claimant against the Respondent on the issue. It was filed within the time limit. It is similarly not correct that the present Claim is time barred as submitted by the Respondent, in its Closing Submissions filed on 21st November 2016. The Claimant initiated the dispute at the High Court, which was then transferred to the industrial Court on jurisdictional ground. The Claim before the Industrial Court is not a new dispute; it is merely a continuation of the Claim instituted at the High Court.

26. There are two conclusions to be drawn from the foregoing: first is that the Respondent declined reinstatement of the Claimant, on the wrong advice of its Personnel Manager and the Legal Department, on limitation of time; and second, the submission by the Respondent that the Claim is time-barred is incorrect and rejected.

27. The substantive question was answered in the expert opinion of Respondent's own Engineer Atonga. The Claimant did no wrong in installing the locally manufactured hoist discs. The Respondent misunderstood what occasioned vibration, and even after receiving expert advice from Engineer Atonga, declined to correct the injustice visited upon the Claimant. Refusal to take remedial action was based on misapprehension of the facts relating to the initiation of the Claim, and lack of proper interpretation of the law of limitation of time. Termination was wrongful.

28. On remedies, the Court does not think the Claimant is entitled to salaries and allowances he would have earned, between February 1995 and October 2003 when he expected he would retire. The Authority cited by the Claimant in pursuing this item, ***Kenya Ports Authority v. Silas Obengele [2008] e-KLR***, has been rethought, by the Court of Appeal in its own latter day decisions such as ***Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR***. Majority of decisions even at the Employment and Labour Relations Court, hold that an Employee is not entitled to anticipatory salaries and allowances to the date of retirement.

29. This position was explained by the Industrial Court in the case of ***Engineer Francis N. Gachuri v. Energy Regulatory Commission [Industrial Court Cause 203 of 2011]***: There is no provision for payment of anticipated salaries and allowances. Employment, like any other contract, provides for exit from the contract. It does not mean that because employment contract is referred to as permanent and pensionable, it cannot be terminated. The Court of Appeal in the case of ***Elizabeth Wakanyi Kibe*** emphasized the obligation of Employees to move on, on termination, and mitigate the economic injury occasioned through wrongful termination. Courts have also stated that salaries and allowances are paid for actual work done, and payment of anticipated salaries and allowances, to the date of retirement, would not amount to fair remuneration. While the Claimant does not merit what he anticipated he would earn to the date of retirement, he is entitled to damages. The period he expected he would go on earning is part of the aspects the Court takes into account, in assessing the level of damages to be availed to the Claimant.

30. Termination took place before the advent of the Employment Act 2007. The procedural and substantive requirements under the Act would not apply to the Claimant. The employment relationship between him and the Respondent was however regulated by the Kenya Ports Authority Revised Staff Regulations 1992. These Regulations required the Respondent to justify termination, and accord the Claimant a fair procedure before termination. When it was considered an Employee should be retired on public interest, there was an obligation on the Employer to invite the Employee to make representations before the Managing Director, who would then forward the representations to the Board. The Board would decide whether to retire the Employee compulsorily. The Staff Regulations were part of the Claimant's contract of employment. They required termination is justified, and fair procedure followed in executing termination. If there was breach, the Claimant would be entitled to damages. The Respondent

did not show fair procedure was adopted, in retiring the Claimant. The Claimant was taken through the Committee of Inquiry, whose proceedings and decision were not availed to him. He complains no Witnesses were called in his presence. He appealed as allowed under the Regulations. The expert evidence of Engineer Atonga was available to the Respondent on appeal. There was no change of heart. The Respondent instead opted to rely of the pedestrian advice of other Officers in sustaining its flawed decision.

31. Employees whose contracts were wrongfully terminated at the time the Claimant's was, had access to compensation of up to 12 months' salary, under the Trade Disputes Act Cap 234, the laws of Kenya. They could be reinstated or re-engaged, through the orders of the Industrial Court. Although the Claim was not initiated under the Trade Disputes regime, the Court can draw guidance from that regime, in granting the Claimant damages based on his gross earnings at the time of termination. ***He is granted 12 months' gross salary based on the rate applicable to him, in January 1995.***

32. ***It is declared termination was wrongful.***

33. Clause 5 of the Claimant's letter of appointment states the Claimant would be eligible for pension, gratuity, or other allowances if he left employment on among other things, retirement on public interest. There should have been no dispute on his right to be paid these benefits. The Claimant has not been paid pension, gratuity or other allowance for 22 years. ***The Claimant shall be treated as having left employment on regular termination, under Clause B.15 of the Staff Regulations, and shall be paid all retirement benefits of Pensionable Employees applicable under the Staff Regulations, Clause B.15 and C.15, and Clause 5 of his letter of appointment.***

34. ***Costs to the Claimant.***

35. The Court is of the view that the Respondent should have redressed the Claimant's grievance, and either reinstated him, or offered him full terminal benefits in the year 2004, if it was felt he was too old for reinstatement, upon receiving the advice of Engineer Atonga. The Claimant prays for interest from the date of termination. The Court has no hesitation in granting him the prayer, but the most reasonable date from when the interest should accrue, is when the Respondent, with the benefit of the advice of its Technical Services Manager, failed to bring the Claimant's grievance to a closure. ***Interest is granted from 25th May 2004 until Judgment is satisfied in full.***

IN SUM, IT IS ORDERED:-

a) It is declared termination of the Claimant's contract was wrongful.

b) The Respondent shall pay the Claimant damages for wrongful termination, the equivalent of his 12 months' gross monthly salary lastly earned.

c) The Claimant shall be treated as having left employment under Clause B.15 of the Staff Regulations 1992, and shall be paid all retirement benefits of Pensionable Employees applicable under the Staff Regulations Clause B.15 and C.15, and under Clause 5 of the letter of appointment.

d) Costs to the Claimant.

e) Interest granted from 25th May 2004 until Judgment is satisfied in full.

Dated and delivered at Mombasa this 28th day of June 2017.

James Rika

Judge