



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**

**AT MOMBASA**

**CAUSE 605 OF 2015**

RUFUS KAIMENYI JOSEPH.....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY SPORTS

CLUB MBARAKI ..... RESPONDENT

**JUDGMENT**

**Introduction**

1) The Claimant brings this Suit seeking terminal dues plus compensation for unfair termination of his employment contract by the Respondent on 15.10.2014 when he was retired in the public interest. The Respondent has however denied liability for the alleged unfair termination and orders that the Claimant was fairly and lawfully retired in the public of interest in accordance with clause 49(g) of the Clubs Disciplinary Handbook. In that respect the Respondent avers that the Claimant had misconducted himself and did not relate well with the other staff member and being given a hearing he was retired in public interest and the Respondent offered to pay his accrued dues of kshs. 252,000 less taxes. In addition the Claimant was entitled to a refund of his pension contribution totaling to kshs. 38484.

2) The Suit was disposed of by way of written submission on the basis of the pleading, documents and witness statements filed.

**Claimant's Case**

3) The Claimant stated in his written statement that he was employed by the Respondent in December 1993 as Waiter later became the Head Waiter in 1997. That he served in that capacity until 1.4.2005 when he was suspended for alleged misconduct but was reinstated on 27.2.2008. That on 1.2.2013, he was charged in court with assaulting a fellow employee while on duty vide criminal case No. 1024 of 2013 but he was later acquitted on 20.6.2014. That he immediately took copies of the proceedings and judgment to the Respondent's manager Madam Freshier Wakonyo who promised to forward the same to the Executive Committee for determination. That no word came to him from the Respondent and he served a demand letter to KPA (the Club Patron) on 4.8.2014. That on the same day he was invited to a hearing by a committee of the Respondent and he attended in the company of his lawyer. That according to him and his counsel, the hearing was fair and he was found innocent. On 15.10.2014, the Claimant was served with letter retiring him in public interest. He contended that the said retirement was

premature by 16 years and that it amounted to unfair termination. He therefore prayed for 12 months' salary as compensation for unfair termination at the rate of his monthly salary of kshs. 28,465 being kshs. 341580. He also prayed for kshs. 5,465,280 being the salary for the 16 years before his retirement.

### **Defence Case**

4) The Respondent filed witness statements for Francis M. Musyoka, Daniel Dacha Achayo, David Odhiambo Omware and Charles Kisewa. All the four witnesses stated that the Claimant was not in good working relationship with the other workers and that whenever he drank beer he would become troublesome. That on the night of 26/27<sup>th</sup> April 2013, the Claimant drunk beer leftovers and started creating disturbance by threatening to kill Mr. David Omware with a knife. That the Claimant was over powered by other workers including security guards and was arrested and taken to the police. That after the police investigations the Claimant was charged in court with assaulting Mr. Omware but after the hearing, the trial court acquitted him of the offence. That on 6.8.2014 the Claimant was heard by the Respondent's committee on his misconduct at the club on 27.4.2014 and subsequently he was dismissed. That it was not the first time the Claimant had misconducted himself in that manner because in 2005 had to be suspended and later dismissed for insulting the club manager Mr. Charles Anyumba. That he was however re-employed in 2008 at a lower grade and given a new personal employment number.

5) Mr. Kisewa, the Honorary Secretary of the Respondent's executive committee further stated that the committee kept the Claimant under suspension pending the conclusion of the criminal charges he was facing. That after the Claimant was acquitted, he was invited for disciplinary hearing under the provision of KI of the disciplinary Handbook 2014. That after the hearing of the Claimant who was accompanied by his counsel, the committee decided to dismiss him in public interest. That the Respondent calculated the Claimant's dues based on his salary of kshs. 14000 and wrote a cheque for kshs. 230544. That the Claimant was also free to access his pension calculated at kshs. 38484. That the said dues were only in respect of the period after re-employment in 2008.

### **Analysis and Determination**

6) After careful consideration of the pleadings, witness statements documents and the written submissions filed, the court finds no dispute in the fact that the Claimant was employed by the Respondent between 1993 and 15.10.2014 when he was retired in the public interest under Clause K9(g) of the Respondent's Disciplinary Handbook 2014. The issues for determination are:-

- a) Whether there was a valid and fair reason to warrant the retirement of the Claimant in the public interest.
- b) Whether the said retirement of the Claimant was done after following a fair procedure.
- c) Whether the reliefs sought ought to be ordered.

### **Reasons for the Retirement**

7) The reasons cited for the termination of the Claimant's services were contained in paragraph 2 of the retirement letter dated 15.10.2014 which stated thus:

***“The committee observed that circumstantial evidence exists confirming that indeed there was a fight between you and another staff member as reported. The committee further established that you do not have a good interpersonal working relationship with other members of staff which has created mistrust and disunity that has affected the delivery of service. Reference to your personal file has been established that your service had previously been terminated due to similar cases of misconduct although your reinstatement did not have any justification”***

8) The Claimant has denied the alleged misconduct and contended that he was acquitted of the alleged

criminal offence of assault of a fellow employee. This Court however finds on a balance of probability that the Claimant fought with or created disturbance by threatening a colleague Mr. Omware at the work place on the night of 26/27<sup>th</sup> April 2013. The offence is confirmed by the 4 defence witnesses who recorded statements herein and the court proceeding in criminal case No. 1024 of 2013 filed by the Claimant. The Court is also satisfied from the evidence that the Claimant had poor interpersonal working relationship which became worse when he took beer. The said statements by the defence witnesses, the judgment of this court in ICC NO. 164 of 2012 produced by the Claimant and the Respondent's letters dated 1.4.2005 and 2.10.2005 confirm that the Claimant had previously been involved in similar misconduct of creating disturbance at the work place by shouting and uttering obscene words to fellow workers. In that respect, the court finds and hold that there existed a valid and fair reason to warrant the termination of the Claimant's services under section 44 (g) of the Employment Act (EA) which entitles an employer to dismiss an employee who commits criminal offence or is reasonably suspected of committing a crime against the employer. Creating disturbance and threatening to kill fellow employees while on duty was also a misconduct against the employer.

### **Procedure**

9) The Claimant alleges that his termination was done without following a fair procedure. He contended that he was not availed the procedural fairness provided for under section 41 of the EA. The said Provision of the Law requires that before terminating the employment of his employee on ground of misconduct, the employer shall explain the offence to the employee in the presence of another employee of the accused employee's choice, in a language they understand and thereafter accord them a chance to air their representations for consideration before the dismissal is decided. In this case, the court finds that the procedure followed to terminate the Claimant's services was fair and in consonance with the provisions of the section 41 aforesaid.

10) There is no doubt that the Claimant was invited to a personal hearing by the committee of the Respondent on 6.8.2014. The invitation to the hearing was vide letter dated 4.8.2014 which stated as follows:-

#### **"RE: NOTICE OF PERSONAL HEARING**

***Please note that your hearing has been arranged to take place on Wednesday 6<sup>th</sup> August 2014 at 9.00 am. You may be accompanied by a colleague if you wish. Please attend without fail.***

***Charles Kesewa***

***Secretary to the Committee".***

11) The Court has been provided with the typed proceedings of the Committee hearing dated 6.8.2014. The proceeding shows that the Claimant chose not to be accompanied by fellow employee to the proceeding and instead brought his lawyer. The court therefore sees no basis for finding in favour of the Claimant that his termination was procedurally unfair. In this court's view the Respondent was fair and lenient to the Claimant by choosing to retire him instead of summarily dismissing him for the serious misconduct he had committed.

### **Reliefs**

#### **Compensation**

12) In view of the finding above that there was valid and fair reasons for terminating the Claimant and further that the procedure followed was fair, the court dismisses the Claim for compensation for unfair dismissal.

#### **Lost Salary**

13) Likewise, the Claim for the salary the Claimant would have earned in 16 years before his normal retirement is dismissed for lack of any legal or contracted basis. Salary is only paid for work done unless the contract terminated prematurely was for fixed term.

### **Under Paid Salary**

14) The Claimant did not prove that his salary per month was ksh. 28465 and as such the claim for under payment was not proved and is dismissed. The Court is satisfied by the bundle of payslips filed by the Respondent that the Claimant's salary was kshs. 14000 per month.

### **Salary in Lieu of Notice**

15) The claim for salary in lieu of notice is granted as prayed being kshs. 28465. Under clause K12 (c), of the said Handbook an employee who is terminated in the public interest is entitled to 3 months' salary in lieu of notice. Three months' salary at the rate of kshs 14000 totals to kshs. 42000. However, the Claimant prayed for kshs. 28465.

### **Leave**

16) The prayer for accumulated leave was not proved and it is dismissed.

### **Overtime**

17) Likewise the claim for overtime was not proved and it is dismissed.

### **Service for 20 Years**

18) The Claimant contends that he was employed in 1993 and worked up to 2005 when he was suspended and reinstated on 27.2.2008. That he served up to 2014 when he was retired in public interest. He seeks for declaration that he served for a total of 20 years. The Respondent has however disputed that contention and maintained that the Claimant was dismissed in 2005 and re-engaged in 2008 under new Personal Identification Number (PIN).

19) The court made a determination in ICC 164 of 2012 that the Claimant was reinstated to employment under a lower grade and was therefore not re-employed. No evidence has been adduced to prove that the said decisions has been overturned by a higher Court. The effect of reinstating an employee is to continue service as if there was no break. Consequently, the court makes declaration that the Claimant served the Respondent for 20 years between 1993 and 2014 as prayed.

### **Certificate of Service**

20) Each employee is entitled to a Certificate of Service from his employer after termination of his contract as provided under section 51 of the EA. The Respondent is therefore directed to issue one to the Claimant forthwith.

### **Disposition**

21) For the reasons stated above, judgment is entered declaring that the Claimant served the Respondent for 20 years and awarding him kshs. 28465 plus half costs and interests.

Signed, Dated and Delivered at Mombasa this 24th day of June 2016.

**ONESMUS MAKAU**

**JUDGE**