

REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 408 OF 2014

WALTER OLANDE ODHIAMBO OCHOLAH.....CLAIMANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant filed the suit seeking relief for the illegal and unlawful retirement from service. In his Claim filed on 18th March 2014 he averred that he was retired before his due date of retirement which was February 2016 after a 43 days forced leave. He averred that the Respondent failed to give the Claimant any reasons for the decision to send him on early retirement. He submitted in his claim that he had commitments amounting to over 1.4 million and sought declarations that his dues be paid up to and including February 2016. He prayed for orders for a declaration that the early retirement is wrongful, illegal, biased and malicious; reinstatement to employment with full pay and benefits, declaration that he be retired under normal retirement due in February 2016, full pensions contributions upto February 2016, salary from March 2014 to February 2016, and in the alternative early retirement with full payment of severance pay for each year worked. He also sought costs and interest on the suit.

2. The Respondent was opposed and filed a Memorandum of Response on 18th July 2014. The Respondent averred that the Claimant was dismissed for just cause and specifically that on or around 5th November 2013 a routine email was generated informing the staff that the General Manager ICT was proceeding on leave and that during his absence Rose Macharia in ICT would handle the affairs of the Department. The Respondent stated that on 6th November the Claimant who was at all times the Manager Employee Relations used an email sent to all staff of the Respondent questioning the decision of the officer in ICT Department as this was not standard procedure under similar circumstances. The email was viewed as casting aspersions and challenging the authority of the office of the General Manager ICT Department. The Respondent issued the Claimant with a notice to show cause. Internal investigations revealed that rather than raise the issue with the relevant managers the Claimant had deliberately sent the mail to all the staff. He admitted it was an error of judgment and was asked to take a 43-day leave of absence due to the ripple effect his email had caused. It was averred that the Claimant had not shown any reasonable cause of action against the Respondent in the case in Court. The Respondent thus sought dismissal of the Claimant's suit with costs.

3. There was an interlocutory application dealt with and upon which the Claimant obtained certain injunctive relief against the Respondent.

4. The Claimant testified on 22nd July 2014. He stated that he was a former employee of the Respondent working as a Manager Employee Relations. He stated that he was given early retirement in March 2014 and did not really understand the circumstances. He stated that his position was after his retirement advertised and he was not aware if it was filled. He testified that the practice is for one to get 3 months in lieu of notice, pension notice and severance pay which is 3 months for each year worked. He stated that he would have left in February 2016. He stated that he was earning 375,000/- a month plus house allowance of 30,000/-, he had a medical cover, group life and accident cover which he lost on retirement. He testified that preparation of retirement starts 3 years before one retires and 3 months before the date of retirement one is informed of the impending retirement and then proceed on terminal leave.

5. In cross-examination he testified that the early retirement was occasioned by the Respondent. He stated that the procedures for the retirement he had given are only applicable to instances where there is a programme for retrenchment. He testified that he knew the General Manager ICT and that he received the communication that the GM was proceeding on leave and had left Rose Macharia to act while away. He testified that the most senior, the most experienced is picked for acting duty and in his opinion Rose Macharia was not the most senior and he wrote the email on 6th November 2013 to all the employees. He stated that procedure is not a reserve to only some people. He testified that it was his duty to inform the employees. He admitted receiving an email from the Managing Director defending Ole Partet the General Manager ICT. He confirmed receiving a letter headed 'malicious communication' and he replied to it and explained why he did what he did. He maintained that what he did was justified and it was not an error of judgment.

6. In re-examination he testified that he was not told the reason for the early retirement and he did not see the connection with the malicious communication. He stated there was no notice to show cause. He testified that there was no disciplinary process. He stated that what he did was within the scope of his duty and employee had a duty to know who was to act.

7. The Respondent called Kenneth Vincent Kaunda and he testified on 17th November 2014. He stated that he was the General Manager HR in the Respondent. He testified that the Claimant was a former employee who had issued an email communication to all employee about an issue of a decision made by General Manager Information & Technology (ICT). He testified that it was not the first time an acting manager had been appointed and the email by the Claimant questioned the appointment. He stated that the email caused excitement and incitement to staff. The effect of the email was that it showed that management was in disarray and there was a lot of anxiety. He called the Claimant who told him that the reason for sending the email was that the ICT manager had acted improperly and he asked the Claimant why he (claimant) had not raised the issue with the General Manager ICT and he did not a satisfactory answer from the Claimant. The Claimant reduced his error of judgment in writing. He testified that he asked the Claimant to show cause and a response was received from the Claimant. He asked the Claimant to proceed on leave and the Claimant's response was shared with management and since it was serious misconduct it was felt that it warranted being taken to the Board. The Board decided that because the Claimant had worked for 18 years and was in his twilight years the Claimant ought to be given early retirement instead of summary dismissal. He testified that the terms in the retirements undertaken in 2006 were due to restructuring and the Board made a decision to give specific payments to retrenched.

8. In cross exam he testified that the Board issued a letter for early retirement to the Claimant and the reasons for the retirement was not stated on the letter. He testified that the person who was asked to send the email was forced by the Claimant to do so. He testified that there was voluntary early retirement in 2006. He stated that when a person is being retired there is no need to give reason but for termination there was reason to be given. He testified that the circumstances of the Claimant were different from the ones on retirement and the option would have been to summarily dismiss the Claimant.

9. In re-examination he testified that the Respondent had no obligation to give reasons for an employee sent on compulsory leave. The parties made written submissions and on mention on 22nd January 2015 it was indicated the parties submissions were filed. Only the Respondent's submissions are on file as at the time of writing this judgment.

10. The Claimant sought remedies for the retirement he was given by the Respondent. The services of the Claimant were terminated on account of an email he sent out to all staff of the Respondent. In the email, the Claimant challenged the decision to have Rose Macharia act in the absence of Mr. Ole Partet the General Manager ICT. The Claimant was asked by Mr. Kaunda the defence witness to account for his actions and he responded in writing. I am in agreement with Rika J. and Abuodha J. that retirement is a mode of termination of the services of an employee and some degree of fairness in meting it applies. The Claimant was given an opportunity to respond to the letter on malicious communication. He was retired and by all accounts the reason was to avoid a summary dismissal. In my view, the retirement was a soft landing for the Claimant whose actions on 6th November 2013 had warranted a summary dismissal.

11. In the premises I find and hold that he has not proved his claim on a balance of probabilities. I dismiss his suit but make no order as to costs. Purely on humanitarian grounds, as he has retired and has no employment with the Respondent he is to vacate the house owned by the Respondent by the end of March 2015. This is to allow him to make alternative accommodation arrangements as his spouse is ailing and in need of some mercy.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of February 2015

Nzioki wa Makau

JUDGE