



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 74 OF 2015

(Previously Mombasa Cause No. 22 of 2013)

(Originally Nairobi Cause No. 1601 of 2012)

GIBSON D. MWANJALA.....CLAIMANT

v

KENYA REVENUE AUTHORITY..... RESPONDENT

JUDGMENT

1. Gibson D. Mwanjala (Claimant) was employed by Kenya Revenue Authority (Respondent) through a letter dated 23 September 1996 as Executive Officer 1. The Claimant eventually rose to the position of Assistant Commissioner. Previously, the Claimant had served with the Customs and Excise Department from 1973.
2. On 11 September 2012, the Claimant commenced legal proceedings in Nairobi against the Respondent alleging unfair/unlawful retirement and seeking various reliefs including reinstatement or pay until retirement at age 60.
3. On 30 January 2013, Nduma J ordered the Cause be transferred to Mombasa for hearing and determination. This was because the cause of action arose in Mombasa and Judges had been deployed to the station.
4. The Respondent filed a Response on 11 June 2013 through Ado Moses, Advocate (after grant of leave on 25 April 2013 and extension on 13 May 2013). On 12 September 2013, the Respondent filed its List of Documents.
5. On 22 April 2013, Makau J had directed that this Cause be heard on 25 April 2013, together with Cause No. 26 of 2013, which raised related questions.
6. After several false starts due to the parties unpreparedness, hearing commenced on 16 December 2013. The hearing proceeded on 17 December 2013, 18 December 2013 (when Claimant closed his case), 18 March 2014, 20 May 2014, 24 June 2014 and 3 March 2015 when the Respondent closed its case.
7. Because of my transfer to Nakuru, Rika J directed, with the consent of the parties that the Cause be transferred to Nakuru for final determination.
8. Because of the similarity of questions arising for determination, on 20 May 2014, the Court directed that the evidence of the Respondent's witnesses herein would form part of the proceedings in Mombasa Cause No. 26 of 2013 (cross reference had earlier been made in the proceedings in this other Cause on 25 March 2014- for a complete record therefore reference must be made to proceedings in Mombasa Cause No. 26 of 2013, *John Joel Muchura & 8 Ors v Kenya Revenue Authority*).
9. At the close of the hearing, the Court directed with the agreement of the parties the filing of submissions. The Claimant filed his submissions on 16 March 2015, while the Respondent filed its

- submissions on 14 May 2015- the submissions relate to Cause 26 of 2013 as well).
10. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as (despite Court directing parties to agree and file issues, the directive was not complied with), *whether the retirement of the Claimant in public interest was fair/lawful and appropriate remedies.*

Whether retirement in public interest was fair/lawful

11. It is not disputed that the retirement of the Claimant was before the retirement age and therefore premature. The retirement was essentially a termination of employment and therefore the protections available to employees in the Employment Act, 2007 became implicated alongside the agreed contractual provisions.

Procedural fairness

12. The Respondent interdicted the Claimant through a letter dated 2 February 2011. The interdiction letter informed the Claimant that he had while responding to letters from an entity known as Strategic Tax Services requesting for withdrawal of a demand of Kshs 124,720,037/-, addressed a different issue of bond cancellation, surrender of original bonds and de-bonding of warehouse No. 204 (the letters written by the Claimant were dated 8 March 2010 and 15 April 2010 respectively).
13. The letter also informed the Claimant that his action was contrary to instructions from the Respondent's Investigations and Enforcement Department that the cancellation of bonds be suspended pending investigations.
14. The Respondent further informed the Claimant in the interdiction letter that his action amounted to gross misconduct which could attract summary dismissal and therefore he should show cause in writing why disciplinary action should not be taken against him within 14 days.
15. The Claimant duly responded to the show cause through his letter of 10 February 2011. In his response, the Claimant also made references to explanations he had tendered on 11 November 2010 and 6 December 2010.
16. On 20 May 2011, the Respondent invited the Claimant to appear before its Disciplinary Committee meeting on 25 May 2011.
17. The Claimant appeared before the Committee, and according to the minutes of the hearing, he made representations.
18. After the hearing, the Respondent informed the Claimant through a letter dated 23 June 2013 of his retirement in the authority's interest on pay in lieu of notice, pension and travel allowances.
19. The Claimant in the joint submissions attacked the procedure followed as not being fair.
20. The procedure was challenged on four fronts. Firstly, that no investigations or proper/meaningful investigations were carried out.
21. Secondly, the Claimant asserted during cross examination that the disciplinary process was not conducted in compliance with the Respondent's Code of Conduct.
22. Thirdly, the Claimant also referred to the fact that he was deprived of the right to be accompanied by a colleague.
23. Lastly, it was submitted that the Respondent's Disciplinary Committee, Commissioner General, Staff Committee or Board did not sanction the Claimant's retirement in the authority's interest.
24. The Claimant was interdicted through letter dated 2 February 2011. The interdiction letter informed the Claimant of the allegations to respond to within 14 days. These were that on 8 March 2010 and 15 April 2010 he responded to letters from Strategic Tax Services addressed to the Commissioner, Customs Services Department requesting withdrawal of the demand for Kshs 124,720,037. You, instead of addressing the request for withdrawal of the demand, addressed a different issue of bond cancellation, surrender of the original bonds and de-bonding of the Warehouse No. 24. Your above action was contrary to the instructions from the Investigations and Enforcement Department that cancellation of bonds be suspended pending investigations and the determination of Doshi Iron Mongers case in court.

These are serious allegations which amount to gross misconduct and may render you liable to serious disciplinary action including summary dismissal as provided for under the following

provision of the KRA Code of Conduct.

Section 4.1.3: Failure by an employee to use the best judgment in performance of official duties or in the exercise of powers conferred upon him.

25. The interdiction letter further advised the Claimant of intended disciplinary action.
26. Section 41 of the Employment Act, 2007 has made procedural fairness before termination of employment part of the employment relationship in Kenya.
27. To my mind, the essential ingredients of procedural fairness are that the employee should be informed of the allegations or charges, the employer should afford the employee sufficient time to prepare and also hear the employee's side of the story on the allegations before making the decision to dismiss. The employee is also entitled to be accompanied by a colleague or union representative.
28. Section 41 of the Employment Act, 2007 however only provides the minimum protections. In the case at hand the Respondent's Code of Conduct is also material and relevant.
29. In my view the interdiction letter was in consonance with the contractual, statutory and *audi alteram partem* requirement of informing an employee of the reasons contemplated for taking disciplinary action.
30. The letter was not general or vague. It had sufficient particulars to put the Claimant on notice as to what to respond to.
31. The letter also required the Claimant to make written representations within 14 days.
32. The Claimant made a written response through his letter dated 10 February 2011. In the written response he made reference to earlier statements he had made on 11 November 2010 and 6 December 2010.
33. Clearly, the Claimant had prior information as to the allegations as outlined in the interdiction letter.
34. As far as the correspondence was concerned the same was in substantial compliance with the dictates of contractual and statutory procedural fairness.
35. The authorities suggest that a disciplinary hearing can be conducted through correspondence (see decision of Ojwang J (as he was then) in *Menginya Salim Murgani v Kenya Revenue Authority*).
36. After the correspondence, the Claimant was invited to a face to face disciplinary hearing through a letter dated 20 May 2011. He appeared and made representations. The Code of Conduct expressly provided for a hearing before the Disciplinary Committee.
37. But, the Claimant also faulted the process because he was not accompanied by a colleague. The invitation letter did not inform the Claimant of a right to be accompanied by a colleague.
38. I have perused the Memorandum of Claim. The Claimant did not assert at all that he was prejudiced or suffered an injustice because of the failure to be accompanied.
39. The Claimant did also not suggest that he raised the issue of having a colleague during the hearing. He has not demonstrated any prejudice or injustice. It is also significant that in examination in chief he did not refer at all to any prejudice or injustice.
40. The retirement letter informed the Claimant of a right of appeal within 30 days. In cross examination, the Claimant stated that he appealed through his Advocate. This letter of appeal was not produced. The Court is unable to determine whether the appeal was in consonance with the provisions of the Code of Conduct.
41. The Court therefore finds that the Respondent complied with both the contractual and statutory requirements of procedural fairness.
42. Because of the conclusion, the Court deems it not necessary to discuss whether it was mandatory for the Disciplinary Committee, Commissioner General and Respondent's Board to sanction the retirement and the legal implications of such failure or whether it is open to challenge/(legal implications) a disciplinary process on the basis of failure to carry out proper or meaningful investigations in a situation where the employer fails to prove the reasons for termination of employment.

Substantive fairness

43. Pursuant to section 43 of the Employment Act, 2007, an employer has a duty to prove the reasons

- for dismissing an employee. But the statute does not leave it at that. Under section 45 of the Act, the employer has the added burden of showing that the reasons were fair and valid.
44. The burden on the employer is an onerous one and it is unlike what obtains under the Civil procedure regime and/ or normal evidential provisions where defendants do not have to do so much. In fact so onerous is the burden, that by dint of section 45(4) of the Act, an employer should demonstrate its action to dismiss an employee was in accord with justice and equity, considering the circumstances of the particular case.
 45. The reasons given in the Claimant's letter of retirement is gross misconduct leading to loss of confidence and it is anchored on clause 7.2 of the Code of Conduct. It also referred to the interdiction letter.
 46. The Court has already made reference to the allegations the Respondent put against the Claimant. The discussion now turns as to whether the Respondent has proved those reasons and that they were fair and valid reasons.
 47. Strategic Tax Services wrote an undated letter to the Commissioner, Customs Services Department and the subject was Doshi Ironmongers Limited-Demand Notice for Taxes-Kshs 124,720,037/-. It was in response to a demand notice dated 30 May 2007.
 48. The letter sought confirmation from the Commissioner that the demand notice for Kshs 124,720,037/- had been withdrawn in full. It appears from a stamp that this letter was received on 25 January 2010.
 49. Significantly, the letter also made reference to cancellation and surrender of original insurance bonds on 5th and 16th November 2009 and debonding of warehouse BMSA204 and requested for return of records which had been taken away by the Respondent.
 50. The Claimant responded to the letter from Strategic Tax Services through a letter dated 8 March 2010. The subject remained the same. It also mentioned bonded warehouse no. 204 and Doshi Ironmongers.
 51. But the Claimant went further to address and confirm that Doshi Ironmongers Ltd had accounted for transactions relating to General Bonds
 1. PCSB 06438/08 Kshs 1,815,000/-
 2. PCSB 04962/08 Kshs 4,250,000/-
 3. GB 11812/05 Kshs 35,000,000/-
 4. GB 11811/05 Kshs 65,000,000/-
 5. GB 11934/05 Kshs 40,000,000/-
 6. GB 11935/05 Kshs 20,000,000/-
 7. GB 11933/05 Kshs 110,000,000/- and that the originals of the Bonds had been cancelled and returned to the guarantors but that reconciliation of the books was not yet complete.
 52. On 12 March 2010, Strategic Tax Services fired another missive to the Commissioner and the subject remained the same and it acknowledged receipt of the letter authored by the Claimant. It was requesting the return of the books which had been taken away on 26 March 2007. A reminder was sent to the Commissioner on 13 April 2010.
 53. This letter must have prompted the Claimant's letter dated 15 April 2010 reiterating the contents of his letter dated 8 March 2010 and advising that the Respondent's Investigation and Enforcement Department at head office was carrying out reconciliation and Strategic Tax Services should get in touch with the Investigations and Enforcement Department.
 54. Did the Claimant address a different subject substantially from what Strategic Tax Services Ltd had made enquiries on? Was the Claimant aware of a freeze by the Investigations and Enforcement Department on the cancellations?
 55. It is unfortunate that the demand letter dated 30 May 2007 was not produced. It could have helped unravel the mystery concerning these related Causes.

56. But what is clear from the material placed before Court is that an officer I. G. Mwangi, Senior Assistant Commissioner-RRIS had through a letter dated 5 November 2009 returned the following bonds to Concord Insurance

PCSB 06438/08 Kshs 1,815,000/-

PCSB 04962/08 Kshs 4,250,000/-

GB 11812/05 Kshs 35,000,000/-

GB 11811/05 Kshs 65,000,000/-

GB 11934/05 Kshs 40,000,000/- and

GB 11935/05 Kshs 20,000,000/-.

57. On 16 November 2009, the same Mr. Mwangi informed Concord Insurance Co Ltd of the cancellation of Bond

GB 11933/05 Kshs 110,000,000/-

58. These are the 7 bonds referred to in the Claimant's letter of 8 March 2010.

59. The Claimant had also directly addressed Doshi Ironmongers Ltd through a letter dated 3 December 2009 about the debonding of warehouse BMSA 204 after clearance by the Kenya National Audit Office and an inspection carried out by the Respondent's Southern Regional office.

60. From the documents produced by the Respondent it appears the inspection was carried out by a S. O. Juma, for Assistant Commissioner-MBF and he gave his seniors a report dated 22 October 2009. The report was faxed to the Claimant.

61. It is clear to the Court that the letter from Strategic Tax Services Ltd was primarily seeking confirmation that because the insurance bonds had been cancelled and the warehouse debonded, the tax demand notice for Kshs 124,720,037/- stood withdrawn.

62. It is not and cannot be disputed that the cancellation and surrender of the original bonds to Concord Insurance Co. Ltd was carried out by a Mr. I. G. Mwangi through his letters dated 5 November 2009 and 16 November 2009.

63. It is also clear that it is S.O. Juma who recommended the debonding to the Commissioner Customs Services department through his letter dated 22 October 2009.

64. Therefore when the Claimant was writing to Strategic Tax Services on 8 March 2010 and 15 April 2010, it was in respect of what had happened in late 2009. The cancellation of the bonds and debonding was already a *fait accompli*, one process having been carried out by Mr. Mwangi. The contents of the 2 letters by the Claimant were therefore only stating facts/events which had occurred the previous year.

65. The Respondent did not prove the role the Claimant played in the cancellation and return of the bonds. The culprits who should have been asked to explain were I.G. Mwangi and S.O. Juma.

66. Although the reference of the letters by the Claimant was Doshi Ironmongers Ltd- Demand Notice for Taxes Ksh. 124,720,037/-, the substance or content of the letters was the accounting for the transactions related to the cancelled bonds and the rendering of advise to Strategic Tax Services to liaise with the Commissioner of Investigations and Enforcement on the release of withheld books.

67. There was no suggestion in the letters by the Claimant that he was releasing or clearing Doshi Ironmongers Ltd of the tax demand. The letters could not have exposed the Respondent to any damage or injury.

68. In the view of the Court the response by the Respondent to retire the Claimant was an overreaction. It was responding to a mosquito bite with a hammer. The action was not in accord with equity and justice in the circumstances.

69. The Respondent has therefore failed to prove that the reasons for retiring the Claimant were fair and valid. The retirement was substantively unfair and the Court so finds.

Appropriate remedies

Reinstatement

70. The Claimant sought reinstatement in his pleadings. He is now past retirement age. In testimony, the Claimant admitted that it would be difficult to reinstate him. Reinstatement would not be an appropriate remedy.

Salary withheld during interdiction

71. The Claimant stated in examination in chief that he was paid the withheld salary during interdiction. This relief is therefore inapplicable.

Lost income to retirement

72. The Claimant also sought salaries he would have earned up to retirement at 60 years.

73. In his submissions, the Claimant cited the cases of *Beatrice Achieng Osir v Board of Trustees of Teleposta Pension Scheme* (2012) eKLR, *Silas Njiru & Catholic Diocese of Meru v Andrew Kiruja* (2010) eKLR and *James Mwathi Nguri v Egerton University* (2013) eKLR.

74. Although the authorities cited in one way or the other awarded lost prospective income, I am hesitant to follow that path.

75. I have had occasion to discuss this question in *Mary Mutanu Mwendwa v Ayuda Ninos de Afrika-Kenya (Anidan K)* (2013) eKLR and I would quote what I stated therein 106. Section 49 of the Employment Act has provided remedies for wrongful dismissal and unfair termination. The three main remedies are the equivalent of a number of months' wages not exceeding twelve months based on the gross wages, reinstatement and reengagement. The Act has not made reference as to whether the equivalent of wages not exceeding twelve months is compensation or damages. By practice the award is usually referred to as compensation but technically it would still qualify as damages.

107. The question arising is whether the remedies set out in section 49 of the Employment Act are exhaustive of the remedies the Court can grant for wrongful dismissal and/or unfair termination. And if these remedies are not exhaustive can the Court relying on section 12(3)(viii) of the Industrial Court Act award other remedies such as loss of earnings/income.

108. Or to put it another way is loss of earnings/income a remedy contemplated under any written law.

109. My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently. Of course, parties in exercising their party autonomy can make provision for payment of such agreed sums for wrongful dismissal or unfair termination where fixed term contracts have been agreed on and the Court would be able to enforce such contractual terms.

75. The Claimant has not convinced me to hold otherwise.

Full retirement benefits

76. In my view, this head of claim is legally untenable. Section 49(4) of the Employment Act, 2007 requires the Court to factor in any other amounts paid to an employee. Whatever compensation

awarded will take into consideration of the terminal benefits the Claimant missed because of the premature retirement.

Compensation

77.The Court has concluded that the retirement was unfair. Pursuant to section 49 of the Employment Act, 2007, compensation of a sum not more than the equivalent of 12 months gross wages is one of the primary remedies for unfair termination of employment.

78.The remedy is discretionary and section 49(4) of the Act has set out the factors the Court ought to consider. The Claimant was paid pension. He had served the Respondent for a long time and had 3 years to retirement.

79.Considering these factors, the Court would award him the maximum 12 months gross wages equivalent as compensation of Kshs 2,904,000/- (based on the pleaded gross wage of Kshs 242,000/-).

Conclusion and Orders

80.From the foregoing discussion, the Court finds and holds that though the procedure followed by the Respondent before retiring the Claimant was fair, it has failed to prove that the reasons for retirement were fair and valid or that the retirement accorded with justice and equity.

81.The Court awards the Claimant and orders the Respondent to pay him

a. 12 months gross wages compensation Kshs 2,904,000/-.

82.Claimant to have costs.

83.This file should be transferred to Mombasa after delivery of this judgment

Delivered, dated and signed in Nakuru on this 19th day of June 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mogaka instructed by Mogaka Omwenga & Mabeya Advocates

For Respondent Mr. Ado/ Mr. Munyalo instructed by Waweru Gatonye & Co. Advocates

Court Assistants Mugao, Ms. Midian & Nixon