



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 02 OF 2006

IN THE MATTER OF: SECTIONS 70(A) 74(1), 77, 82(2) AND 84 AND IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70(A), 74(1), 77, 82(2) AND 84

BETWEEN

GABRIEL MUTAVA.....CLAIMANT

=AND=

MANAGING DIRECTOR KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners herein were employees of the 2nd Respondent (KPA) while the 1st Respondent was the Managing Director (MD) for the K.P.A. On 5/7/2005 both Petitioners were “retired in Public Interest” under **Section G 12 (a)** of the KPA Revised Staff Regulations 2002. The basis for such retirement was that investigations had been done in their departments by a Committee of Inquiry and established that the Petitioners were guilty of Gross Negligence of duty in that they failed to execute their supervisory duties which led to loss of money through irregular overtime payments. The Petitioners were however paid 3 months salary in lieu of notice plus all other benefits. The main issue for determination herein is whether the termination of the Petitioners employment was unconstitutional and therefore null and void for breaching of the KPA Revised Staff Regulations (2002) and the Rules of Natural Justice. After considering pleadings and the supporting submissions, the court is of the view that the decision by the Respondent to retire the Petitioners in the Public Interest was in breach of the KPA Revised Staff Regulation (2002) and the Rules of Natural Justice.

BACKGROUND

2. The Petitioners filed separate cases before the High Court on 18/10/2006 being Petition No. 1 of 2006 and Petition No. 2 of 2006. The Petitioner in Petition No. 1 of 2006 died in 2007 and was substituted on 25/9/2012 through an application filed on 1/7/2011. The two files were then transferred to this court on 17/2/2014 for determination and were allocated new case numbers. On 16/3/2015, the counsel for both parties sought the courts direction that the Petition be disposed of by written submissions under this file. The written Submissions had already been filed before the suits were transferred from the High Court. The counsel then highlighted their respective written submissions on 6/5/2015 and agreed that the ruling herein binds the Petition No. 3 of 2015.

PETITIONERS' CASE.

3. **Miss Murage**, learned counsel submitted on behalf of the Petitioners that the facts in the two Petitions were the same. The Petitioners were employees of the 2nd Respondent. They both had served for many years without any disciplinary issue or even being served with any warning. They had both been promoted to Grade HM 4 due to their good performance and discipline.
4. In April 2005 they were both summoned to appear before a committee of Inquiry which was investigating irregular payment of Overtime Allowances in their Departments. The Petitioners were not the suspects but only summoned as witnesses. The summons was verbal and they both complied and attended the inquiry. After giving their evidence, they went back to work but they were shocked later to received letter dated 5/7/2005 terminating their services. The reason for the termination was “*retirement in Public Interest.*” The basis of the decision being that the committee of inquiry had found them guilty of Gross Negligence of duty. **Miss Murage** submitted that the procedure followed to terminate the Petitioners' services was wrong and it violated **Section 77** of the repealed constitution and Article 50 of the current constitution. That the Petitioners were never served with any charges and allowed a chance to defend themselves. Consequently according to the counsel, the Petitioners were condemned unheard, in breach of the Rules of Natural Justice. The counsel submitted that the Respondents contravened **Section G8** and **G12** of the said Staff Regulations which entitled the Petitioners to a fair hearing before termination.
5. On the other hand the counsel submitted that by condemning the Petitioners unheard, the Respondent's also violated the Petitioners' right to Human dignity. She cited Court of Appeal decisions in **Nyongesa & 4 Others Vs. Egerton University [1990] KLR page 26** and **Kadamas Vs. Municipality of Kisumu [1998] KLR page 954** where it was held that a decision that is arrived at in breach of the rulers of Natural Justice is null and void. The counsel urged the court to declare the termination of the Petitioners services *null* and *void* and award them salary arrears for the years they would have served before retirement at the age of 55 years. She concluded by stating that dismissal in public interest brought the dispute under the sphere of public law.

RESPONDENTS' CASE

6. The Respondents submissions **Mr. Kiadi** learned counsel. He admitted that the Petitioners were employees of the 2nd Respondents until 5/7/2005 when they were retired in Public interest. He submitted that the retirement was a result of an inquiry into irregular payment of overtime in the Harbour Inspectorate and Bunkery Section, which found both Petitioners guilty of gross negligence of duty. That both the Petitioners were called before the committee of inquiry and they casually admitted that they had *erroneously* authorised the payment of overtime without work done. That the offence of gross negligence warranted summary dismissal under **Section G 2(a) (17)** of the Staff Regulations. The counsel admitted that the Petitioners were summoned only to shed light on the alleged fraud but when they admitted that they authorised the payment of overtime without work done, the Respondents was justified to dismiss them under the said **Section G 2(a) (17)** and **Section 17** of the Employment Act Cap 226 (now repealed). The counsel confirmed that retirement in the Public interest was provided for under **Section G12** of the KPA Staff Regulation (2002) were suitable procedure is not provided for to handle the material case.

He therefore submitted that the retirement was lawful and fair in the circumstances.

7. As regards the reliefs sought, the counsel for the defence contended that the prayer for reinstatement was over taken by events since the Petitioners reached their mandatory retirement in November 2007. In addition he submitted that the prayer for salary arrears for the years before mandatory retirement in 2007 was untenable because one cannot be paid for work not done. On the other hand, the counsel contended that the Petitioners have moved the court through a wrong procedure. He submitted that the Petitioners should have come to court by way of a normal Plaint because the dispute herein involved private law. He cited *HC MISC, No. 413 of 2005 Kenya Bus Services Vs Attorney General and Others, Teitwanga Vs. Ariong [1986] LRC page 518 and HC Misc. 1520 of 1999 Rashid Odhiambo Vs Haco Industries* where it was held that individuals cases are cases under private law and are invariably redressed as such. The counsel concluded by submitting that the Petitioners should only have moved the court in a normal suit under the KPA Revised Staff Regulations (2002) and not Petition under the constitution.

ANALYSIS & DETERMINATION

8. After perusing and considering the Pleadings, evidence and the submissions made by both Parties, there no dispute that the Petitioners were employed by the Kenya Ports Authority until 5/7/2005 when they were retired in public interest under **Section G12** of the KPA Revised Staff Regulation (2002). There is also no dispute that the petitioners were paid 3 months salary in *lieu* of notice plus all other benefits. The issues for determination are:

(a) whether the retirement of the Petitioners was in breach of the KPA Revised Staff Regulation (2002)

(b) whether the said retirement violated the Petitioners right to fair hearing and right to human dignity as enshrined in the constitution.

(c) whether the reliefs sought should issue.

BREACH OF THE STAFF REGULATION

9. The letter for termination of employment for the 2 Petitioners read as follows:

“RE: RETIREMENT IN PUBLIC INTEREST.

You will recall that you appeared before the Committee of Inquiry investigating the case of Irregular Payment of Overtime in the Harbour Inspectorate and Bunkering Sections between July and December 2004.

*The Committee investigating the case established that you were guilty of **Gross Negligence of Duty** in that you were found incapable of executing the supervisory duties bestowed upon you by the Authority. Had you been more alert, the reported irregularities would have been stopped.*

*In view of the above and in accordance with Section G 12 (a) of the Revised Staff Regulations (2002), it has been decided that your services be **TERMINATED IN PUBLIC INTEREST** with immediate effect.*

You will be paid three months salary in lieu of notice plus all other benefits due to you less any debts you may owe the Authority.

You are required to surrender all the Authority's property in your possession to the Assistant Harbour Master within 48 hours on receipt of this letter.

By a copy of this letter, the Financial Controller is advised to arrange for your payment.

Please acknowledge receipt of this letter by signing a duplicate copy provided.

V.M.Wa-Kayanda

The Human Resources & Administration Manager

For: MANAGING DIRECTOR

10. It is clear from the foregoing that, the Respondents alleged that the Petitioners were found guilty of Gross Negligence of Duty for failing to execute supervisory duty as a result of which they failed to stop irregular payment of overtime in the Harbour Inspectorate and Bunkering Section between July and December 2004. The defence counsel submitted that retirement in public interest is done where there is no suitable procedure for handling the case. That sounds a bit contradictory because the termination letter stated that the Petitioners were guilty of Gross Negligence of Duty of which the defence counsel submitted that **Section G2 (a) (17)** of the Staff Regulation warranted summary dismissal. If at all the Petitioners were suspected to be culpable of Gross Negligence of duty, the Respondent should have accorded them hearing under **Section G8** of the Staff Regulations which provided for the disciplinary procedure for employees of grade HM4 like the Petitioners. The court finds on a balance of probability that the Respondents did not have a good cause under **Section G2** of the Staff Regulation to warrant dismissal of the Petitioners and that is why they resorted to retirement in public interest under **Section G12** of the Staff Regulations. It is therefore not true as submitted by the defence counsel that, the petitioners were guilty of Gross Negligence of Duty but there was no suitable procedure for dealing with offence.
11. Assuming that the defence counsel was right, which is not the case, that the Petitioners' alleged Gross Negligence of Duty was an offence falling under the provisions of **Section G12** of the Staff Regulations, the question that arises is whether the procedure under the said Section was followed. **Section G12 (a)** outlines the procedure for terminating employment through retirement in Public interest. First the employer must have received a report complaining against the employee of which the employer considers desirable in the public interest to terminate the employees services. Second there must be no suitable procedure provided else where in the KPA Staff Regulation for dealing with the issue. Third, the employer must notify the employee in writing of the specific complaints by reason of which termination is contemplated together with substance of the report or part thereof that is detrimental to him. Fourth, the employees must be given the opportunity to show cause why his services should not be so terminated. Fifth, the decision to terminate or not to terminate is made by the Managing Director if the employee is in Grade HM 3 and below like in this case. Lastly if termination is ordered, the employee is entitled to 3 months salary in lieu of notice plus other entitlements provided under **Section B 13** of the Regulations.
12. After carefully considering the evidence herein, the foregoing procedure was not followed before retiring the Petitioners in public interest. In his own words, the defence counsel submitted that the Petitioners were invited as witnesses to shed light on the issue of irregular payment of over-time that was under inquiry by the committee but they casually admitted that they are the ones who authorised the said payments and promised to be take certain measures to stop a repeat of such offence in future. In other words, the defence is submitting that it is the Petitioners who incriminated themselves in proceedings where they were not charged leading to their retirement in public interest. That Procedure was not within the provisions of **Section G 12 (a)** of the Regulations. The Managing Director who made the decisions to retire the Petitioners in Public interest under **Section G(a) 12, supra**, did not comply with the procedure stipulated there under. Having received the report from the inquiry committee, he should have first notified the petitioners of the specific parts of the report which implicated them which were the reason for the contemplated termination of their services and then invite them to show cause why the termination should not be done. Having found that the Respondents so breached the provision of the Revised

Staff Regulation 2002 as demonstrated above, the court answers the first issue for determination in the affirmative.

VIOLATION OF THE RIGHT TO HEARING AND HUMAN DIGNITY

13. In view of the finding above later the Petitioners were retired in public interest without being accorded a hearing within the provisions of **Section G8** and **G12** of the KPA Revised Staff Regulations (2002), it is obvious that their dismissal was in breach of the rules of Natural Justice. Such right of being heard before termination of employment was however not protected under the bill of rights as enshrined in the repealed constitution. It was a contractual right negotiated and agreed by the employees and employer under the province of the private law. It is immaterial that the employer is a public body sustained by public funds. In that regard the court agrees with the defence and the cited precedents that the court was not properly moved because the dispute herein was not founded in Public Law. In this court's view the Petitioners should have filed a normal Complaint to enforce their rights under the contract which was basically codified in the KPA Revised Staff Regulation (2002). Consequently the court answers the second issue for determination in the negative

RELIEFS.

14. In view of the finding above that the dispute was not governed by the Public Law, the court declines to declare the termination of the Petitioners' employment *null* and *void* as it contravenes only a contractual right and not **Section 70 (a) 74 (I), 77, 82 (2) and 84** of the repealed constitution. Likewise the court declines to order reinstatement of the petitioners to work because it is impracticable to do so for a couple of reasons. First, of all the Petitioners have since reached their mandatory retirement age. Secondly, one of the Petitioners **Mr. Joseph M. Indo** is now deceased. Third, the claim for the deceased Petitioner has since abated because, he was not substituted by the administrator of his estate within 12 months after his demise and no leave for revival of the cause of action was sought after it abated. Lastly, **Section 12(3) (vii)** of the Industrial Court Act bars this court from reinstating an employee after 3 years of termination. As regards the alternative prayer for salary for the years they would have served before the age of mandatory retirement, that is, 55 years is also dismissed. The said prayer is not tenable for being out of context with both the law then and public policy. The Employment Act Cap 226 (now repealed) did not provide for compensation for unfair or unjustified dismissal. It only provided for salary in *lieu* of notice which is not prayed for herein. In the upshot therefore, the court rejects the Petitioners' respective petitions.

DISPOSITION

15. For the reasons stated above this Petitions and Petition No. 3 of 2015 are dismissed. Each party to bear his or her own costs.

It is so ordered.

Dated, signed and delivered at Mombasa this 17th day of July, 2015.

O. N. Makau

JUDGE