



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAKURU
CAUSE NO. 91 OF 2014

(Formerly High Court Civil Suit No. 327 of 2001 at Nakuru)

GEDEON K. MUTINDI.....1ST PLAINTIFF
ARTHUR OMONDI WATTS.....2ND PLAINTIFF
DEBUSSY N. ONCHIRI.....3RD PLAINTIFF

-VERSUS-

KENYA RAILWAYS CORPORATION.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 26th September, 2014)

JUDGMENT

The plaintiffs filed the plaint dated 19.09.2001 through Gekong'a & Momanyi Advocates. The plaintiffs prayed for judgment against the defendant for:

- a. A declaration that the purported termination of the plaintiff with the defendant is unlawful and wrongful.
- b. Payment of the plaintiffs' retirement benefits, years of service benefits, salary, house allowance and leave allowance and annual increments from the date of termination of employment up to commencement of retirement period as follows:
 - i. 1st plaintiff Kshs.5,386,100.00.
 - ii. 2nd plaintiff Kshs.3,217,650.00.
 - iii. 3rd plaintiff Kshs.7,097,487.60.
- c. General damages for unlawful termination of the plaintiffs' services.
- d. Costs of this suit and interest thereon at court rate and V.A.T.
- e. Any other relief that the honourable court may deem fit to grant.

The statement of defence was filed on 24.10. 2001 through K.I. Mbito Advocate. The defendant prayed that the plaintiffs' suit be dismissed with costs. The reply to the defence was filed on 05.11.2001.

The plaintiffs testified to support their respective claims and prayers. The defendant's witness was Nemuel Ademba (DW), the defendant's human resource officer.

It is not disputed that the plaintiffs were employed by the defendant effective diverse dates. The plaintiffs worked in the defendant's finance department at Nakuru. The defendant leveled allegations of misconduct against the plaintiffs.

The 1st plaintiff was interdicted by the letter dated 28.01.1998 on alleged misappropriation of Kshs.89,409.95. The interdiction was subsequently lifted on 10.2.1998 and the 1st plaintiff resumed duty. On 11.2.1998, he received a notice of misconduct alleging that he had falsely received Kshs.89,409.95, from 1996 to 1997, in form of overtime and subsistence allowances. He was required to make representation in self defense within 72 hours. He replied and nothing happened until January 2001 when he received the termination letter dated 29.01.2001 finding his explanation was not acceptable. The plaintiff was terminated in the public interest as per Personnel Regulation 13 (a) (i). The 1st plaintiff's explanation was that the allowances had been claimed by the plaintiff on the prescribed forms, approved in accordance with the respondent's district accountant, were justified in view of the pressure of work and the field assignments so that the allegations as leveled were unfounded. The plaintiff urged that having been interdicted, his case was not concluded in 3 months as provided for under clause 56.3 of the staff and general notice No.10 of 1991.

The 2nd plaintiff was an assistant clerk in charge of the pay section. His duties entailed recommendation of payment to the respondent's staff. His recommendations were to the regional accountant one Peter Nduati (PW4). The 2nd plaintiff received the letter dated 11.02.1998 from the defendant alleging that the plaintiff had improperly authorized payment of Kshs.520,000.00 to staff. It was the plaintiff's case that he only recommended payment and authorization or approval of payments was by Peter Nduati (PW4). The plaintiff received the letter dated 29.01.2001 being termination on account of public interest and in view of the allegations.

The 3rd plaintiff was an accounts clerk. He was in charge of revenue collection. The 2nd respondent was the 3rd plaintiff's immediate supervisor. The 2nd plaintiff was assigned field duties by the district accountant who also authorized the travel. Accordingly, he qualified for subsistence allowance while on field duties. The allowance was claimed by the claimant on the prescribed forms, verified by internal audit department and taken to the district accountant for approval. On 11.2.1998, the claimant received a notice alleging that he had made false claims of Kshs.209,130.00 being subsistence allowance, overtime and bus fare but the plaintiff denied the allegations because he was entitled to all claims he had made. The plaintiff explained that he had been assigned field duties attracting subsistence allowance and he had worked during weekends therefore justifying the overtime he had claimed. Prior to his termination, the plaintiff continued to work and was given salary increments and was appointed to act at a higher position. The 3rd plaintiff was sent on compulsory leave in October 2000 and he received the letter dated 22.01.2001 terminating his employment in the public interest.

PW4 was Peter Nduati the defendant's district accountant. His testimony was that he was not aware of misconduct by the plaintiffs and any alleged misconduct had to be investigated by the Chief Auditor. The plaintiffs worked directly under PW4 and he testified that all claims would be verified before payment was made to the plaintiffs. PW4 also testified that it was a requirement that audit is done by the internal and external auditors and not the traffic department as was purportedly done in the present case.

DW testified that the retirement of the plaintiffs in the public interest was in accordance with the findings of the inspection of regional accountant's office at Nakuru also known as the Traffic Audit Inspection Report dated 23.12.1997. The report alleged that staff in the regional accountant's office paid themselves very big subsistence allowances, overtime and salary advances as the staff wished. The report alleged that the staff had claimed bus fare to travel out in circumstances whereby the travel was not authorized. It

was further stated that the Financial Controller's authority was required for accounts clerks to work overtime. The report recommended disciplinary action against the plaintiffs and that an auditor be sent to Nakuru Regional Accountant's Section and audit all payment pertaining to the staff for the last two years. DW testified that upon the plaintiffs' retirement in public interest, they were paid lump sum and monthly pension benefits.

The **1st issue** for determination is whether the termination was fair. Regulation G12 (a) of the respondent's Personnel Regulations 1988 provides for circumstances under which termination of service on grounds of public interest is justified. The regulation provides thus, **"If it is considered, having regard to every report available with regard to an employee, that it is desirable in the public interest that the service of such employee should be terminated on grounds which cannot suitably be dealt with by the procedures laid down in any provision of this section of the Regulations, the employee will be notified in writing of the specific complaints by reason of which the termination of his service is contemplated together with the substance of any report or part thereof that is detrimental to him. If after the employee has been given the opportunity of showing cause why his services should not be terminated, it is still considered that his service should be so terminated, action will be taken to terminate his service or recommend to the appropriate authority that it be terminated as the case may be."**

The court has considered the evidence against the provisions of the regulation. The court finds that it has not been established on the part of the defendant that at the time of the retirement, the other disciplinary provisions under the section did not apply to the plaintiffs' cases. The evidence showed that the defendant did not serve the plaintiffs with any notice of contemplated retirement in public interest as envisaged in the regulation. The court finds that the defendant did not comply and did not demonstrate compliance with the regulation. The court further finds that the retirement in the public interest was not procedural and the termination was unfair.

The court has considered the reason for termination. First, the Traffic Audit Inspection Report dated 23.12.1997 on record was not signed and its probative value is open to doubt. Secondly, the report recommended a financial audit but which was not shown to have taken place. Thirdly, the plaintiffs replied in self exculpation and it is not shown how the defendant evaluated and arrived to the resolution that the plaintiffs were culpable as conveyed in the termination letters. Fourthly, the plaintiffs showed that all payments were approved by the relevant authorities and conspiracy or fraud was not established. Finally, the defendant did not undertake a financial audit to establish the alleged losses in a professional manner. Accordingly, the court finds that the reasons for the terminations were not valid.

The court finds that the termination was unfair for want of compliance with the stipulated procedure for retirement in public interest and for want of valid reasons to justify the terminations.

The **2nd issue** for determination is whether the plaintiffs are entitled to the remedies as prayed for. The plaintiffs relied on the decision of the Court of Appeal in **Kenya Ports Authority –Versus- Silas Obengele (2008) eKLR** where it was held as follows:

1. If the employee is terminated in breach of applicable regulations and the employee is so terminated with retirement benefits, the employee is nevertheless entitled to damages because of the expectation that the employee holds to continue in employment but for the offending termination.
2. The measure of the damages is certainly not the pay the employee would have earned until he attained the compulsory retirement age; it could be that pay or more or less than that pay.
3. The employee who is so dismissed is entitled to be compensated fully for the financial loss he suffers as a result of the dismissal but subject to the qualification that it is the employee's duty to do what he can to mitigate his loss and the amount of loss may be the amount the employee would have earned or less or more and the amount the employee would have earned will necessarily form the basis of the loss (per **Southern Highlands Tobacco V. McQueen [1960]EA 490** and

Airways V. Knight [1975]EA 165).

The court has considered the guiding principles as considered in the cited cases. It was submitted for the plaintiffs that they could not get alternative employment because of the negative stigma associated with retirement in the public interest. All the plaintiffs were energetic, did not present evidence of failed attempts to get alternative employment, and each testified that they were engaged in farming but the levels of income from that gainful self-engagement was not disclosed. The gainful engagement shows that the plaintiffs mitigated their losses to some degree and the court finds that after the retirement in public interest, the plaintiffs mitigated their losses significantly.

The pay for the loss suffered after the unfair termination, in the opinion of the court, will sufficiently be covered if each of the plaintiffs is paid all lost gross salaries at the rate of the last monthly pay and less 50% taking into account the mitigating gainful engagement for each of the plaintiffs.

The plaintiffs were to retire upon attaining 55 years of age. The 1st plaintiff was 37 years and 2 months at termination so that he had 214 months of pending service and he earned a gross salary of Kshs.16,540.00 making Kshs.3,539,560.00 less 50% being **Kshs.1,769,780.00** as the entitlement. The 2nd plaintiff was 45 years old at termination so that he had 120 months of pending service and he earned a gross salary of Kshs.16,540.00 making Kshs.1,984,800.00 less 50% being **Kshs.992,400.00** as the entitlement. The 3rd plaintiff was 36 years old at termination so that he had 228 months of pending service and he earned a gross salary of Kshs.18,808.30 making Kshs.4,288,292.40 less 50% being **Kshs.2,144,146.20** as the entitlement. The court has excluded the leave allowance because it was not remunerative and the plaintiffs would not have taken the leave after the termination because they were not at work.

In conclusion, judgment is entered for the plaintiffs against the defendant for:

1. The defendant to pay the 1st plaintiff **Kshs.1,769,780.00**, 2nd plaintiff **Kshs.992,400.00**, and the 3rd plaintiff **Kshs.2,144,146.20** by 1.11.2014 and failing, interest to be payable at court rates from the date of the judgment till full payment.
2. The defendant to pay the plaintiffs' costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 26th September, 2014.**

BYRAM ONGAYA

JUDGE