



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 3 OF 2012

PATRICK LUMUMBA MAIKUVA .....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY .....RESPONDENT

**J U D G M E N T**

The claimant has sued the respondent claiming compensation for wrongful termination on 23/5/2011 through what was described as retirement on public interest.

The respondent has denied liability and maintained that the termination was justified and that the claimant was paid all his dues. The respondent also averred that the suit was filed without statutory notice and was also filed out of time. The suit was heard on 29/5/2013 and 24/6/2013 when the claimant testified as CW1 and Noah Nkanai, Gedeon Gona Barak and Stanslaus Angira defence witnesses RW1,2 and 3 respectively.

CW1 told the court that he was employed by the respondent in June 1991 as a casual and worked until march 1995 when he was permanently employed. He was promoted to the position of leading Artisan with a basic salary of ksh.54,000/ housing allowance of ksh.20,000 and Car allowance of ksh.16000 per month. On 10/9/2009 he left at 3.00 pm and passed through a scrap metal dealer and bought 2 pieces of metal and was given a receipt. On reaching home he told his servant to remove the metal and keep the receipts and then load water jerricans so that he could go fetch water.

The servant only loaded the jerricans and never removed the pieces of metal. That while the claimant and a colleague were driving at the respondent's compound they were stopped and his case searched. The two pieces of metal were found in the car and he was arrested and detained in the nearby police station. That he denied ever stealing the metals from the respondents and was able to prove purchase by a receipt for payment. That the police found no offence committed by the claimant after investigations and he was released to resume his work. That the police wrote an investigation report to the respondent exonerating the claimant.

However, after working for about a week the claimant was suspended on 29/9/2009. that on 18/11/2011 he was invited to a disciplinary hearing but the same was adjourned and his suspension reduced to an interdiction backdated to the date of suspension. He was also paid a half salary backdated to the date of suspension. According to him even the interdiction was wrong and unjustified because police investigations had found him innocent and notified the respondent vide a report dated 21/5/2010 (exhibit 5) even before the conversion of the suspension to interdiction.

That the police report showed that the respondents representative was unable to prove that the metals belonged to the respondent. The disciplinary hearing was heard on 26/11/2011 and the claimant was present and represented by his union official. Although he was not explained his rights at the hearing he was asked questions and was also allowed to ask questions to the witnesses called. That the alleged stolen metals were left at the police and were therefore never brought as exhibits at the disciplinary hearing or even in this court.

That after the hearing he was served with a letter for retirement on public interest. That he did not receive any copy of the proceedings or decisions made by the disciplinary committee. That due to pressure of financial needs he accepted to take his terminal dues. According to him the termination through retirement was unfair just as was the suspension and the interdiction. That the suspension ought to have been done by the Managing Director (MD) and not Personnel Manager as per clause K7(d) and k12(c) of the KPA Handbook.

The claimant produced the receipt for the purchase of the metals as exhibit 10 despite the objection raised by the respondent that the receipt ought to have been produced by the scrap metal dealer because it lacked an ETR receipt. On cross examination he confirmed that he served for 22 years without any disciplinary issue with the respondent. That the metals were seen at the back of his car when it was opened but he did not have the receipt then having left it at home. That after a long argument between the respondents security men, he was handed over to the police and locked up until the following day when his cousin brought the receipt for the purchase of the metals.

He also confirmed that he was wrongfully suspended for one year 2 months before the suspension was reduced to interdiction. He also confirmed that he wrote a statement while under police custody confessing that he stole the metal plates from the respondent to cover manholes in his compound. He however retracted the said statement on ground that he did not record it freely but after arrest by the police for the first time in his lie. He admitted that he was paid his goods allowance but qualified that he did so due to financial problems.

RW1 is a security officer for the respondent for the last 18 years. He recalled that on 10/9/2009 at 4 pm he was called to the office of the respondents head of Security (PFSO) together with his colleagues Ali and Rajab. They were notified of Motor Vehicle sighted at Kapenguria in KPA and they planned how to intercept them.

At 5 pm RW1 stopped one of the motor vehicle near gate 5. The driver said they were looking for water and they were carrying jerricans. That RW1 informed them that they were required at the control room and they drove there where a search was conducted on the motor vehicle. That two metal plates for manhole covers were found under the car mart in addition to water jerricans.

That the claimant said that the metals were for Mwamburi who was with him while Mwamburi said he was given a lift in the car. They then took the two to the police and recorded statement.

On cross examination he confirmed that after stopping the claimant's motor vehicle he searched it but he never saw any metals but at the control room they found the metals under the car mart. That the metals did not have any mark for KPA as it is the case for all KPA property. The jerricans also did not have KPA marks. He also confirmed that the incident took place on 10/9/2009 and he did not record statement that day with the police but he admitted that he wrote one after one year in November 2010 with the respondent's security office. That the reason for not recording a statement with the police is because he was never called to do so.

RW2 is a security officer with the respondent. He conducted search at the companies registry to verify whether or not Frecher Scrap Metals Dealers existed as a company or not. He was issued with a certificate showing that the dealer did not exist as a company. The certificate was produced as exhibit 2 for the defence.

On cross examination the RW2 admitted that he did not pay any fees for the search at the registry.

RW3 is also a security officer for the respondent for the last 23 years. On 10/9/2009 he received a call from an anonymous informer telling him that there was theft of metal plates involving motor vehicle KAH and KAL 586U. That he reported the matter to PFSO and that was all he did, but later he was given the security file containing various statements and correspondences which he produced as Exhibit D.3(a) -(o). that among the said documents was his statements which he recorded on 9/10.2009 and that of Mr. Mwamburi who was driving the car.

On cross examination the RW3 admitted that he did not know the claimant. That the unanimous call about the metal theft was through a land line which he did not keep record of. He also confirmed that he did not investigate the matter but the statements were taken from his office. The RW3 also confirmed that he claimant was never charged with theft. RW3 did not know what items were found in the car but the information he had talked of jerricans and 2 metal plates. He agreed that all KPA properties are labelled but he did not know about the two metal pieces recovered because he never saw them.

After the close of the hearing both parties agreed to file submissions on or before 22/7/2013 but no party filed them and the court retired to write this judgment . The court is satisfied that it is seized of the jurisdiction to determine the dispute before it because it concern employer and labour relations. The employment relationship between the parties to the suit is also not in dispute. The issued for determination are:

- a. **whether the retirement of the claimant by the respondent on public interest amounted to wrongful and unfair termination of employment.**
- b. **Whether the claimant is entitled to any remedy**

In answer to the first issue, the factors to consider are substantive and procedural fairness as required under Section 41, 43,44 and 45 of the Employment Act. The substantive fairness deals with the reason for the termination. Section 43 of the Employment Act provides that in a dispute like the one before the court, the employer has the burden of proving the reason for termination of employment while Section 41,45 and 47 extends the employer's burden to cover prove the procedural fairness.

The reason for termination was cited as retirement on the ground of public interest under clause K12(a) of the Handbook. That was a departure from the original reason for his suspension and the subsequent interdiction. It was also different from the reason for the disciplinary hearing. In the opinion of the court, the retirement on the ground of public interest was uncalled for and was informed by the failure by the respondent to prove theft of her property by the claimant.

There was never any evidence to sustain the alleged offence as earlier advised by the investigation report dated 21/5/2010 which must have led respondent to reduce the suspension of claimant to an interdiction. The report had clearly advised the respondent that her witnesses could not confirm whether the alleged metal plates belonged to the respondent. The respondent never made any effort to prove ownership of the plates afterwards even to this court. Indeed the plates were never produced as evidence and the court never saw them.

RW1 in his testimony on oath admitted that the metal plates did not have any identification mark for the respondent. There was no proceedings or written minutes for the disciplinary hearing produced by the defence to show the basis for the termination of the claimants services on the ground of public interest.

The question in my mind is what public interest was involved in the termination and if at all any interest existed, whether the same was justifiable. In my view the nature and the circumstances of the claimants services were private in nature and no public interest conflict ever arose. There was indeed no complaint or detrimental report served on the claimant before the alleged disciplinary hearing or even in the trial of this case.

Consequently the court finds that the respondent did not prove a valid reason to warrant termination of the claimant's services and that alone is a ground enough for the court to find which it hereby does, that the retirement of the claimant on public interest was indeed an unfair termination of his employment. It was

uncalled for and not justifiable.

As regards the procedural unfairness, a few facts have to be considered. These includes who and how the process was initiated and also whether a fair hearing was given to the claimant before termination. In the present case, claimant was notified in writing of the reason for which dismissal was contemplated which was stealing 2 metal plates and was indeed given an opportunity to show cause in writing why dismissal should be done and was further given a disciplinary hearing. To that extent the hearing was fair in accordance with Section 41 and 45 of the Employment Act.

The reason given for the termination later as retirement in public interest however invalidated the whole process and rendered it unfair in view of the respondents disciplinary Handbook clause K12(a). It is the court's view that if the respondent wished to terminate the claimant's services on ground of public interest she should have notified him on the same and invited him to defend himself. In my view the claimant was terminated on a different reason from the one originally charged. Clause K12 of the Handbook provides that;

*“ if it is considered , having regard to an employee, that it is desirable in the public interest that the services of such employee be terminated on such grounds which cannot suitably be dealt with by the procedure laid down in any other provisions of these regulations, the employee will be notified in writing the specific complaint by reason of which termination of his services is contemplated together with the substance of any report or part thereof that is detrimental to him”.*

From the foregoing, the retirement on ground of public interest can only arise firstly if the termination is based upon a ground for which no procedure for suitable dealing with it is provided for in the Handbook and secondly, if the employee is given a prior notice in writing of the specific complaints by reason of which his services are to be terminated and the notice to be accompanied by any report or part thereof which is detrimental to him. This is meant to give him a good opportunity to defend himself before a decision is made.

That procedure was not followed. The claimant was charged with stealing metals as the reason for termination and not notice of intended retirement in public interest and further no detrimental report was served on him. In addition no evidence was adduced to show that the claimant was given a disciplinary hearing in any case for intended retirement on ground of public interest. There is also no evidence to show that the Managing Director considered the claimant's case and decided to retire him in the public interest.

The letter for retirement dated 23/5/2011 was by J.W. Kamau the personnel Manager on behalf of the Human Resource and Administrative Manager. The correct person to decide on the matter ought to have been the Managing director as per clause K8(v) and K12(c) of the Handbook. Under clause K8(v) the matter is to be considered by the managing Director or board if a report by the inquiry committee is dealing with a misconduct under clause K4.

Likewise the decision is to be made by the Managing Director under clause K12(c) if the report by the inquiry committee is on retirement in public interest. Under clause K12(a) there is no room left for any other person to act on his behalf. It is surprisingly that in the present case, that the retirement letter was never copied to the Managing Director or even made any reference to him anywhere as having been the person behind the decision to retire the claimant.

Consequently, the court finds that the decision to retire the claimant on the ground of public interest was not reached in accordance with fair procedure as contemplated under Section 41 and 45 of the Employment Act and clause K12 of the respondents disciplinary Handbook.

I will therefore proceed to answer the last issue for determination which is about the remedy sought. The claimant has prayed for lost income for the unexpired period of his service before his normal retirement age of 60 years. He was retired at the age of 50 years and as such his claim is based on the remainder of the 10 years before his normal retirement age. I decline to award him the aforesaid relief because there is

no legal basis for such a relief which is only available where subject to the doctrine of mitigation of losses, the employee was employed on a fixed term contract of service and where the employer terminated the contract before the lapse of the term fixed by the contract.

I will however in exercise of the powers granted under Section 12(3) (iv) (v), (vii) and (viii) of the Industrial Court Act make the orders herein below. In view of the earlier findings on the status of the claimants non-normal retirement, I hereby declare the said retirement as amounting to an unfair termination within the meaning of Section 45 of the Employment Act and proceed to assess the claimant's compensation under Section 49 of the Act.

I award him notice pay in terms of clause 12(c) of the respondents Disciplinary Handbook which is 3 months salary in lieu of notice. The claimant is also entitled to all the unpaid salaries accruing from the date of suspension to the date of termination. The claimant is also entitled to cash payment in lieu of any accrued leave days up to the date of the termination. The claimant is also awarded twelve months gross salary for unfair termination. According to the claimant his basic salary at the time of termination was ksh.54,000, house allowance of ksh.20,000 and commuter allowance of ksh.16000 which totalled to ksh.90000/ per month. The respondent did not produce any record to disprove the alleged gross pay for the claimant. No competent witness was also called to contest alleged salary.

The only documents which was produced was a payslip for May 2011 which was not supported by any other evidence as to whether or not it was the pay for the whole month. The court could not make any presumption in favour of the defence that the payslip was for a whole month especially when the termination was done before the end of the month.

Consequently I will adopt the ksh.90000/ alleged by the claimant as his salary for lack of any other evidence to the contrary. The burden to disprove an alleged term of contract is on the employer who is duty bound to prepare a contract of employment and keep custody employment records of his employees including records of their salaries.

For avoidance of any doubt if the employer has already paid to the claimant notice pay, leave pay, accrued salary and pension, the same need not be repeated by virtue of this judgment. In that case therefore the claimant will only be entitled to compensation for unfair termination of ksh.90000x12 months which add up to ksh.1,080,000/-. The claimant will also have costs and interest.

Orders accordingly.

**Signed dated and delivered this 26th August 2013.**

**ONESMUS MAKAU**

**JUDGE**