



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1695 of 2011**

**PATRICK K. MUASYA.....CLAIMANT**

**Versus**

**KENYA WILDLIFE SERVICE.....RESPONDENT**

**JUDGEMENT**

By a statement of claim dated 4th October, 2011, the claimant alleged that he was unlawfully and unfairly forced into early retirement which he claims has caused him a lot of hardship, embarrassment and psychological torture.

The respondent however refuted the claimant's allegations through what he described as “ submissions”. It may be apt to point out here that the previous court's rules lacked clarity as to the description, format and nature of pleadings to be filed in that court. However, unlike its predecessor, the current court as constituted is a superior court of record hence the practice and procedure of the High Court will hopefully in due course, be adopted with necessary modifications to create harmony and uniformity in courts of concurrent jurisdiction.

The background to the present claim was that the claimant had on 27th February, 1998 requested for early retirement but his request was denied since he had not reached the mandatory retirement age. He was thus required to continue serving in the employment of the respondent. Therefore between 21st and 25th January, 2007 and further between 14th and 21st April, 2007 the claimant in the course of his duties as employee of the respondent was tasked to repair houses at Tsavo River Gate. He was accordingly allocated a work ticket, a driver and a vehicle.

The claimant consequently filed a claim for breakfast, lunch and dinner for the period he was assigned duties at Tsavo River Gate. The respondent declined to pay the claimant's claim stating that the claimant was not entitled to make the claim. This refusal triggered a flurry of complaints from the claimant including a letter to the Permanent Secretary, Ministry of Tourism and to the Head of State.

The respondent disapproved of the claimant's mode of handling his complaints against the respondent and accordingly on 23rd Oct, 2007 sent to the claimant a letter to show cause why disciplinary action should not be taken against him over the letters he had written concerning non-payment of his claim. The claimant replied on 5th November, 2007.

Around 13th May, 2008, the claimant was allegedly verbally transferred to Tsavo East National Park from Tsavo West and he once again disputed that transfer describing it as illegal. It was after this refusal that the respondent by its letter dated 13th May, 2008 decided to retire the claimant in the interest of the Service (KWS).

During the hearing, the claimant reiterated most of the allegations contained in his statement of claim and further stated that the respondent had at the time of the trial not paid him hence he sought the Court's intervention in compelling the respondent to pay him.

The respondent on the other hand vehemently refuted the claimant's claim and reiterated that it was justified in retiring the claimant. It was the respondent's position that the claimant's work was unsatisfactory, his conduct towards superiors unbecoming and constituting a serious breach of discipline. It would seem according to the respondent the claimant was a candidate for summary dismissal however due to his age and length of service and the fact that he was approaching the mandatory retirement age, it was deemed fit to retire him in the interest of the service. The respondent produced letters and documents that sought to give a history of the relationship between the claimant and the respondent. The summary of these documents and letters was that the claimant was not truthful in his claim before the court and that the respondent was justified in terminating his services.

The questions for determination by the court are basically two. First was the respondent justified in its decision to retire the claimant in the interest of the Service? If the answer to the first question is in the negative then the second question would be: is the claimant entitled to any compensation and as a corollary, what is the quantum thereof?

As adumbrated above, according to the claimant, he was entitled to claim breakfast, lunch and dinner allowance yet the respondent maintains that this allowance was only payable to employees sent to work away from their home stations and would return the same day to their home stations. This according to the respondent was not the case with the claimant hence the refusal to pay. The letter dated 5th September, 2007 (annexture 18 of respondent's submissions) gives the reason for refusal to pay as follows:

“...Tsavo River Gate where Mr. Muasya was deployed is only 25Kms from his base at Mtito. It is also inside the park. During his stay he was accommodated at our premises and treated the same like all other staff of Tsavo West who are periodically deployed to the field. As is the custom and practice over the years Mr Muasya was eligible for payment of field allowance at the conclusion of his assignment. However, the complaint refused the field allowance and instead insisted that he must be paid breakfast, lunch and supper for all the 33 days...”

Assuming the respondent was justified in its refusal to honour the claimant's claim, was the reaction of the claimant justified and in accordance with practice and principles governing employer-employee relationship. That is to say was the claimant justified in writing the letter dated 17th September, 2007 (annx. 9 statement of claim) alleging the hiding of his voucher, letter dated 22nd October, 2007 addressed to the Permanent Secretary Ministry of Tourism (annex. 10 to statement of claim) describing the Senior Warden as unqualified? Letter dated 13th May, 2008 addressed to the Head of State (annex. 27 of respondent's submission) accusing the respondent's Senior Warden of colonialism and seeking the President's intervention to ensure “... this European must show KWS gates his back...”?

In seeking to understand the context of the claimant's behaviour with a view to determining whether they were justified or not, it would be essential to resort to some legal authority or policy that applies to employer-employee relationship.

However, most employment relationships are not governed exclusively by a written employment agreement. Furthermore, in many instances where there are documents between an employee and employer, the document does not include all of the terms of the employment relationship. In such cases and where there is no written contract or where the written contract is not complete, the common law will imply terms into the relationship and impose duties onto both the employer and the

employee. It is therefore not surprising that neither the Employment Act, 2007 nor the Labour Relations Act, 2007 do not define in detail the nature of employer-employee relationship. These statutes merely lay down broad principles that delimit employer-employee relationship leaving the detail to individual contracts of employment and general principles of common law.

Under the common law, the duties an employee owes to an employer include the duty to attend at work; to carry out the lawful orders of an employer; to perform his or her duties in a competent manner; to serve his or her employer honestly and faithfully; not to engage in a “conflict of interest”.

And on the part of the employer there is a duty not to dismiss an employee without cause or reasonable notice; and where the dismissal is to the option the employer must not act in bad faith. Further an employer must not force an employee to take a demotion, without notice.

Concerning the employee, the duty to carry lawful orders is a fundamental principle in any typical employer-employee relationship. It is intended to create order and respect between the employer and employee. In cases where the employer is an inanimate person such as a corporation, the orders are usually given by persons in authority over the employee concerned such as a supervisor or head of a department. These orders must however be lawful as an employee is under no obligation to obey an unlawful order. In the event that an order is lawful, an employee disobeying such an order runs the risk of summary dismissal for insubordination.

The rationale behind the duty on the part of an employee to obey a lawful order lies in the fact that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures provided they are lawful and not in contravention of any fundamental rights or principles of international law or convention. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him. It is not an answer for the employee to say: “I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it.”

The Court has had the benefit of listening to both parties' evidence and reviewed the documents tabled by either party in support of their respective positions. Whereas the documents in support of the claimant's claim were in most parts illegible thereby not giving the court a complete picture of the exchange between the claimant and the respondent, the documents submitted by the respondent were reasonably clear and shed more light on the relationship that existed between the claimant and the respondent at the material time.

The Court considers the following letters in the so-called respondent's submission of critical importance in unraveling the relationship between the claimant and the respondent. That is letter dated 7th April, 1983 (p1) stopping the claimant's salary for failure to report to work following an arrest, the letter dated 22nd November, 1991 (p2) accusing the claimant of idleness, indiscipline and insubordination, letter dated 15th February, 1992 (p4) together with the one dated 30th January, 1992 (p6) suspending the claimant from respondent's service, letter dated 15th January, 2004 (p14) giving the claimant ultimatum to vacate a house he had irregularly occupied, letter dated 24th July, 2006 (p15) asking the claimant to explain the loss of wooden shelves he removed from the personnel registry, letter dated 22nd October, 2007 (p23) written by the claimant referring to the Senior Warden as unqualified and finally letter dated 13th May, 2008 (p27) addressed to the head of State. Upon careful analysis of these letters, the Court is convinced that the claimant's behaviour was inconsistent with an employer-employee relationship. The claimant appears to the court to be having a problem with self-discipline and respect for authority. He emerges as someone who lacked respect for his own job and acted impulsively by using disrespectful language in reference to his seniors and writing unnecessary letters to higher authorities on issues that did not merit the attention of these authorities. The court is humbled by the level of restraint exercised by the respondent in the circumstances. To retire the claimant in the public interest of the service was more than lenient on the respondent's part.

In the Canadian case of [Walmart Canada Corporation v. Glenford Gray and Ministry of Labour](#), the Ontario Labour Relations Board stated that in order for misconduct to rise to the level of “wilful misconduct” as defined in the Employment Standards Act the employee's conduct must be deliberate and completely egregious as opposed to careless, thoughtless, or heedless. Having reviewed the letters outlined above, this court is satisfied that the conduct of the claimant was careless, thoughtless and

completely egregious which ought to have earned summary dismissal with loss of benefits. This court therefore finds the claimant's contention that his retirement in public interest of the service was illegal and unprocedural, without merit and is hereby rejected. It was in fact magnanimous on the part of the respondent to retire the claimant instead of dismissing him outright.

Concerning the claimant's claim for compensation for wrongful termination of service, this court having found that the respondent was justified in terminating the claimant's services in the public interest of the service is unable to accede to this prayer. In any event in its letter dated 13th May, 2008 the respondent has stated as follows:

“... In view of the foregoing, you will be paid salary and other applicable allowances up to and including 31st May, 2008 subject to satisfactory processing of your clearance certificate. You will also be paid two (2) month's basic salary in lieu of notice.

On retirement, you will be due for benefits under KWS Staff Superannuation Scheme and the Pensions Act Cap 189...”

The respondent, produced in court a copy of a cheque dated 21st July, 2008 for Kshs. 48,052/- and another cheque dated 26th June, 2008 for Kshs. 1,162,923/- both drawn in the name of the claimant. The respondent further produced in court a payment voucher dated 9th June, 2008 for Kshs. 39,000 payable to the claimant. These payments were not denied by the claimant and he conceded that they were paid to him as per his request contained in his letter dated 6th June, 2008 wherein he requested that he be paid his retirement benefits in full. In the circumstances the court rejects the claimant's claim for any additional compensation from the claimant.

In conclusion the court dismisses with costs the claimant's claim in its entirety.

And it is so ordered.

Dated at Nairobi this 18th day of October, 2012

**Aboudha J**

**Judge**

Delivered in open Court on 18th day of October, 2012

Muasya (in person)..... for Claimant.

Lutta..... for Respondent.