



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT 329 OF 1997**

**CHARLES KIMANI NG'ANG'A.....PLAINTIFF**

**VERSUS**

**TELKOM KENYA LIMITED..... DEFENDANT**

**JUDGEMENT**

The plaintiff's original plaint dated 22nd August, 1996 was filed on 13th February, 1997. Amended versions were subsequently filed on 5th July, 2001 and then again on 23rd May, 2002. The plaintiff's purpose in this suit was to claim general damages for wrongful dismissal.

In the statement of defence, dated 7th April, 1997 the defendant denied that it had dismissed the plaintiff without according him a chance to be heard. The defendant also denied that a notice of intention to sue had been given in accordance with s.109(a) of the Kenya Posts and Telecommunications Corporation Act (Cap. 411 of the Laws of Kenya).

The defendant disputed the plaintiff's claims for general damages.

On 19th June, 1998 the parties agreed on the issues for resolution, and their agreement was filed in Court. These issues were as follows: (i) Was the plaintiff lawfully employed by the defendant between 5th March, 1982 and 24th November, 1993"

(ii) Did the plaintiff serve on permanent and pensionable terms while in the employ of the defendant"

(iii) Was the plaintiff's employment lawfully terminated by the defendant on 24th November, 1993"

(iv) Was the plaintiff given a chance to defend himself as required by principles of natural justice"

(v) Was the plaintiff entitled to notice and other benefits at the time of dismissal"

(vi) Was notice of intention to sue given to the defendant by the plaintiff in accordance with the provisions of s.109(a) of the Kenya Posts and Telecommunications Corporation Act (Cap.411)"

(vii) Has the suit been instituted in contravention of the provisions of s.109(b) of the governing statute"

(viii) What orders should be made as regards claims in respect of unlawful dismissal, liquidated damages, general damages, costs and interest"

This matter came up for hearing before me on 13th June, 2005 when the plaintiff was represented by learned counsel, Mr. Kimani while the defendant was represented by learned counsel, Mrs. Mbabu.

Mrs. Mbabu drew the Court's attention to two consent orders made earlier, one on 2nd July, 2003 and the other on 8th April, 2005. I believe the first consent is the one recorded by the Deputy Registrar on 7th July, 2003, as there does not appear on record a consent order of 2nd July, 2003. The Deputy Registrar's orders are in the following terms: "Upon reading a consent letter Ref: JK/057/03 dated 12th June, 2003 filed herein on 3rd July, 2003 and signed by Messrs. Joseph Karanja & Associates Advocates for the plaintiff and C.M. Njagi Advocate for the defendant, the following order is hereby recorded:

1. That the plaintiff be and is hereby treated as having retired in the public interest.
2. That benefits payable to him be agreed upon and in the event that no agreement is reached, the Court do assess the same."

The record shows that a further consent order was made on 8th February, 2005 when Mr. Justice Kihara Kariuki thus ordered:

"By consent the Court to determine the effective date of the plaintiff's retirement as between the 25th November, 1993 and the 30th April, 2003 contended by the defendant and the plaintiff respectively."

On 14th March, 2005 a further order was recorded by Kihara Kariuki, J:

"On the 8th of February, 2005 the parties recorded a consent order before me that prior to submissions being made as to the effective date of retirement of the plaintiff, the parties shall have filed a consent letter detailing the other terms of settlement. That consent order was duly signed by Ms. Barno for the defendant.

"As no plausible reason has been advanced by learned counsel for the defendant as to why the defendant wishes to resile from that position, it is ordered that the terms of the consent order be duly complied with..."

Learned counsel, Mr. Kimani, stated that while there was agreement that the plaintiff be retired in the public interest, there remained one unresolved question: the effective date of that retirement. The date was important because whatever it was determined to be, this would have implications for the monetary figures payable to the plaintiff, by the defendant.

According to the defendant, the effective date was 24th November, 1993; and the defendant's reason for termination of the plaintiff's employment at that time, was that the plaintiff had become unproductive and burdensome. The plaintiff had challenged the termination of his employment by this suit, but during the pendency of the suit, negotiations had taken place leading to a consent order. The terms of the consent as filed were, however, silent on whether the dismissal of 24th November, 1993 was the one now substituted with retirement, or the retirement was independent of the earlier dismissal and bore its own date. The latter is the position taken by the plaintiff; and the implication would be that the date of retirement is 30th April, 2003.

How does the plaintiff arrive at the inference that he is to be taken to have retired on 30th April, 2003 when he knows that he had not rendered services to the defendant as an employee for more than 9 years, since 24th November, 1993"

The plaintiff's reasoning is unrelated to the fact of having delivered any services at all during that long period. He does not claim he delivered any services to the defendant at all, during that period. In this manner, I think, the plaintiff proclaims that he is not an imposter, but has a claim with a different basis of validity.

This means the plaintiff is basing his claim on form and on legal fictions. He says that it is on 2nd May, 2003 that he handed in his retirement form to the defendant; and it is on that date that the defendant accepted the same. The inference the plaintiff draws is that he must, given that date of receipt by the defendant of the retirement form, be deemed to have retired at the end of April, 2003.

The plaintiff's position must be that, retirement is a function formally and legally regulated by a processing of forms; and at no time since he came into and then left the employ of the defendant, had the defendant ever processed forms relating to his retirement, and only on 2nd May, 2003 did the defendant accept his retirement forms. Therefore, the defendant must have retired him not earlier than the end of the preceding complete month of April, 2003.

It is like a wits contest between the defendant and the plaintiff. It is common ground that the defendant had dismissed the plaintiff on 24th November, 1993 for being unproductive as personnel resource. There is no evidence on record that such a ground as having been the basis for dismissal was contested; and so I must assume that unproductiveness was the true reason for the dismissal in question. Indeed, even the plaintiff does not challenge the bona fides of the dismissal, except that it asserts that the plaintiff had not been accorded a hearing before being dismissed. Therefore I take it that the possible wrong to the plaintiff which the defendant could have committed, was dismissing him without a hearing — even though this is denied in the statement of defence.

If it is acknowledged that there was indeed a dismissal of the plaintiff on 24th November, 1993 then this will show "retirement" as more notional than real; more tactical and formal than substantive, or based on merits.

Learned counsel, Mr. Kimani, submitted that the dismissal of 24th November, 1993 could not be substituted with a retirement; because, in the words of counsel, "if there was a substitution intention, this would have been expressed." He submitted that as from 24th November, 1993 to 30th April, 2003 the plaintiff "must have been deemed to be an employee of the defendant, and his salary and benefits must be calculated for that period."

Counsel submitted that the crucial timing signal that should determine the plaintiff's period of employment with the defendant was the acceptance of the retirement form.

Learned counsel for the defendant, Mrs. Mbabu submitted that the suit was about dismissal of the plaintiff, and the consent on record was that the act of dismissal be converted into retirement in the public interest. Counsel urged that the plaintiff be seen as a motion challenging dismissal, and that dismissal took place on 24th November, 1993; and so retirement as agreed to can only be as at that date, and in the consent the defendant had made its concession, by converting a dismissal into a retirement. In the words of learned counsel: "the claim for wrongful dismissal has been substituted with retirement in the public interest." Mrs. Mbabu urged that the parties, at the time of reaching consent, could not have had any other date in mind; and besides, the retirement form now being urged as the

determinant of effective dates of service (or compensation), was not before the Court and was not part of the pleadings or evidence. The Court ought to be guided, learned counsel submitted, by the pleadings and the consent orders only.

Appreciating the significance which had now enveloped the retirement form as a support for the plaintiff's case, learned counsel, Mr. Kimani, urged that this was "in the list of documents that we intended to produce before the Court." To this point, Mrs. Mbabu remarked, I believe quite properly:

"This case has not gone for hearing. The Court cannot decide a matter on the basis of documents contained in a list. It was not an agreed bundle of documents. It is a rule of evidence that the Court cannot go outside what is before it. [The retirement form] is not evidence."

Mr. Kimani maintained that the consent reached by the parties was silent on the effective date, and did not speak of a substitution of dismissal with retirement. He was also not in agreement with the evidentiary point made by Mrs. Mbabu, in relation to the retirement form; in his words: "We came for submissions, having reached a consent. We have not come for a trial...."

What is expected of this Court is to render justice as between the parties, being guided by the law, and taking into account the questions of merit brought forth by the parties. As already noted above the defendant may very well have had good cause to dismiss the plaintiff on 24th November, 1993. There is no pleading or claim to the contrary; so that the outstanding grievance is that the plaintiff had not been accorded a hearing. The merits of that claim could only have been raised if a normal hearing had taken place. However, the parties have in their own interests and quite legitimately, arrived at a consent: that the dismissal be converted into retirement in the public interest. The only question left for the Court is to determine the effective date of that conversion.

From the standpoint of the defendant, the matter is obvious: what is being converted is the dismissal of 24th November, 1993 — and therefore the effective date of retirement is that very date. On the face of it, this looks like a quite logical proposition. It also carries more merits than the position taken by the plaintiff — (i) that the defendant should pay-up for more than nine years during which he rendered no services; (ii) that the consent order under which the defendant ceded some ground and would retire rather than dismiss the plaintiff, entailed that the plaintiff must be treated as having been in employment for nearly a decade after the date of dismissal; (iii) that the submission of retirement form by the plaintiff in the wake of the consent order, on 2nd May, 2003 must imply that the plaintiff was in service on 30th April, 2003. The Court should not uphold such a fiction because it leads to injustice. It would place an undue burden upon the defendant, even as it unjustly enriches the plaintiff. This is a Court of equity and it cannot countenance an extravagant claim such as that being made by the plaintiff.

I now find and hold that the several consents between the parties, did mean that the plaintiff is to be treated as having retired on the date when he had been dismissed, namely 24th November, 1993. It is on that basis that any payment due from the defendant to the plaintiff must be worked out. By their letter of 30th March, 2005 addressed to the Deputy Registrar, filed on 8th April, 2005 the firm of Kiptui Mbabu & Co. Advocates for the defendant, and the firm of Joseph Karanja & Associates Advocates for the plaintiff recorded their consent as follows:

"The parties herein wish to record the following consent.

(i) By consent the Court to determine the effective date of retirement of the plaintiff.

(ii) That if the Court rules that the plaintiff retired on 25th November 1993 then the benefits payable to

the plaintiff is agreed to be Kshs.156,979/80 together with interest at Court rate from 25th November 1993 till payment in full and the plaintiff to continue receiving a monthly pension of Kshs.788/95.

(iii) That if the Court rules that the plaintiff retired on 30th April 2003 then the benefits payable to the plaintiff is agreed to be Kshs.1,806,435/40 less all statutory deductions and the plaintiff to continue receiving the monthly pension of Kshs.5,150/=.

(iv) That the defendant to pay costs of the suit.”

In my judgement, the plaintiff did retire on 25th November, 1993 and the benefits payable to him will be the sum of Kshs.156,979/80 together with interest at Court rates from 25th November, 1993 till payment in full; and the plaintiff is to receive a monthly pension of Kshs.788/95 with effect from that date. The costs of the suit shall be borne by the defendant.

Orders accordingly.

**DATED and DELIVERED at Nairobi this 15th day of July, 2005.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff: Mr. Kimani, instructed by M/s. Joseph Karanja & Associates, Advocates**

**For the Defendant: Mrs. Mbabu, instructed by M/s. Kiptui Mbabu & Co. Advocates.**



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