



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MALINDI**

**Civil Appeal 38 of 2005**

**KENYA PORTS AUTHORITY ..... APPELLANT**

**AND**

**SILAS OBENGELE ..... RESPONDENT**

**(Appeal from a judgment and decree of the High Court of Kenya**

**at Mombasa (Khaminwa J.) dated 24<sup>th</sup> October, 2003**

**In**

**H.C.C.C. NO.654 OF 1995)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment and decree of the superior court dated 24<sup>th</sup> October 2003. The appellant, Kenya Ports Authority, was the unsuccessful party in a suit which was commenced by plaintiff by Silas Obengele, the respondent in this appeal, in which he claimed damages, special and general, and a declaration relating to what he termed as wrongful retirement or termination of his employment with the appellant. He wanted the superior court to declare that termination of service null and void for failing to accord with the law.

The respondent's employment with the appellant was communicated to him by letter dated 30<sup>th</sup> January 1987. He was appointed Senior Internal Auditor a position he held until 30<sup>th</sup> October, 1989, when he was elevated to the position of Pensions and Properties Officer PA.1, which he held until his purported retirement on 31<sup>st</sup> October, 1994. The respondent's case as pleaded and according to his oral testimony was that in his position the provisions of the Kenya Ports Authority Revised Staff Regulations and The Kenya Ports Authority (Pensions) Regulations 1983, both of which documents were subject to amendments from time to time, applied to him.

The relevant provisions of the former are regulations B.11 and 15 while those of the latter are **rule 6** of Legal Notice No.77 of 20<sup>th</sup> May 1983.

The respondent's case was that the appellant did not adhere to the foregoing provisions when it retired him. Regulation B15 provides in the marginal note as follows:

*"Retirement of pensionable employees."*

It was common ground that the respondent was a pensionable employee and therefore the regulation applied to him. The regulation as material, provides:

***"B 15 (a) A pensionable employee will be permitted, and may be required, subject to the provisions of Staff Regulation B.111 to retire from the service of the Authority in the circumstances set out in the Kenya Ports Authority (Pensions) Regulations 1983 conferring retiring benefits. Notice of retirement of a pensionable employee must be given by either party not less than three months prior to the date on which the employee is to cease duty."***

Our reading of that regulation reveals that it permits both the employee and the employer to exercise the right of retirement. As regards the employee he has the right to notify the employer of his desire to retire. Conversely, the employer is at liberty to ask the employee to retire. In both cases, the retirement is subject to the provisions of regulation B.11 of the Staff Regulations which as material, provides that:

***"B 11 (a)" if it appears to the Managing Director that there is a reason why an employee who holds a pensionable office in Grade PA 4 and above should be called upon to retire from the service of the Authority on the grounds that he has reached the age at which he can lawfully be retired to retire from the public service under the provisions of the appropriate pensions legislation, the Managing Director will advise the employee that compulsory retirement is under consideration and ask the employee if he wishes to make any representations of a personal nature on such a step. This paragraph does not apply to officers called upon to retire on attaining full retiring age of 55 years"***

***(b) ....***

***(c) Any pensionable employee may elect to retire from the services of the Authority at any time after such employee attains the age of 50 years upon giving the appropriate notice.***

***In addition any pensionable officer in Grades PA3 and above can retire on completion of ten years of pensionable service."***

It is quite clear that regulation B 11 restricts the exercise of the right of ceasing to work for the Authority. The Authority can only require a pensionable employee to retire for good reason and not otherwise. The employee may not also exercise that right unless, first he has served as a pensionable employee for a minimum of ten years. Two, unless he in addition gives a three months notice of his intention to retire after attaining the age of 50 years.

**Rule 6(1) and (2) of The Kenya Ports Authority (Pensions) Regulations 1983, provide thus:**

***"6 (1) The Authority may require an officer to retire from the service of the Authority at any time after he attains the age of fifty years.***

***2) An officer shall be called upon to retire from the service of the Authority:-***

**(a) at any time after he attains the age of fifty years**

**(b) in accordance with the terms of any approved special retirement scheme”**

The background facts are short and are not in dispute. The respondent, a former employee of the E.A. Cargo Handling Services between 1961 and 1977, was taken up by the Kenya Cargo Handling Services when the East African Community broke. In 1987, Kenya Cargo Handling Services merged with Kenya Ports Authority and the respondent as a result became an employee of the appellant. His appointment was formalized by the letter of 30<sup>th</sup> January, 1987, which we referred to earlier. By its letter dated 31<sup>st</sup> October 1994, the appellant notified the respondent that the appellant’s Board of Directors had decided that “*You be retired from services by the Authority with immediate effect.*” The body of that letter read as follows:

**“RE RETIREMENT**

***I wish to inform you that at its staff and Establishment Committee meeting held on 24<sup>th</sup> October, 1994, the Board of Directors decided that you be retired from services of the Authority with immediate effect.***

***This is in accordance with regulations 6(1) of the Kenya Ports Authority (Pension) Regulations, 1983; which states that:-***

***‘The Authority may require an officer to retire from the services of the Authority at anytime after he attains the age of fifty years.’***

***I wish to take this opportunity to express our sincere appreciation for the period of time that you have served this Authority.***

***By copy of this letter, the General Manager (Finance) is being advised to pay your three months salary in lieu of notice and to compute all your retirement benefits.***

***Please be advised that you are required to surrender all K.P.A. property in your possession.***

***Finally, I wish you success in all your future endeavours***

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**(S.M. MKALLA)**

**MANAGING DIRECTOR”**

From the wording of the letter it is quite clear that the appellant did not make reference to regulation B 11 (a) earlier on reproduced in this judgment, which restricts the retirement of a certain category of the staff of the appellant. It then means that the respondent was not heard before that decision was made. Be that as it may the respondent accepted the three months salary in lieu of notice and pension but on a without prejudice basis. At the time of his retirement the respondent was 51 years of age. He was then earning Kshs.18,010/= per month and was entitled to a house allowance of Kshs.6,500/= . At his request he was paid in cash a quarter of the total pension which was calculated to be 7,277/56 and the balance was spread out to be paid monthly at the rate of Kshs.9096/30. Joel

Musese Kisembe (DW2), a witness called by the appellant, computed the total pension and in his evidence he testified that he took into account the value of housing of "6000 per annum.

The respondent was aggrieved and commenced civil proceedings as earlier on stated in this judgment claiming the salary he would have earned had he worked until he attained the age of 55 years, the age he would have been liable to compulsorily retire from the appellant's service. He also claimed loss of telephone facilities, loss of annual leave pay, loss of insurance cover and loss of traveling warrants. These are the benefits he was enjoying while serving the appellant.

The appellant denied the claim and averred in its written statement of defence that the respondent's retirement was regular and that it paid to the respondent all monies due to him.

Lady Justice Khaminwa, who was then a Commissioner of Assize, heard the respondent's case, and in her judgment expressed the view that the respondent had proved his case on a balance of probabilities and gave him judgment as prayed in the plaint and thus provoked this appeal.

The main issue in this appeal is whether, the respondent having been paid salary in lieu of notice and his pension entitlement, the learned trial Judge was right in holding that the respondent was entitled to be paid the salary he would have earned had he been allowed to work until he attained the age of 55 years, the compulsory retirement age for staff of the appellant. But before dealing with that issue, we think we should first consider whether in a case where a person has been wrongly retired or dismissed, the measure of damages should include loss of house allowance, telephone facility, travelling allowance and other related benefits normally enjoyed by staff while still in employment. These benefits are paid to serving employees not as payment to services rendered or to be rendered but to enable the officer concerned perform his work more conveniently and therefore more efficiently. It is a facilitation payment. That being the case there is or there would be no basis for making payment of those allowances if an employee has ceased to work unless the contract of employment treats any of those payments as remunerative. For instance for what reason will say, a payment for transport to and from work be made, if the officer is not going to work" Or why would an officer demand telephone facilities if he is not using the same for the benefit of the employer. Not being remunerative these allowances save for housing which we will talk about later were improperly included in the computation.

There are, in some cases, allowances which are remunerative in nature. No evidence was adduced by the respondent to show that any of these allowances he claimed save house allowance were remunerative in nature. In absence of such evidence it is our view that the trial court had no proper basis for awarding the same to the respondent.

We now turn to the issue of salary. As we stated earlier the superior court awarded the respondent salary for the remainder of the period he would have worked until the age for compulsory retirement. Hayanga J. made such an award in Peter Onyango Onyiego v. Kenya Ports Authority Msa H.C.C.C. No. 496 of 1995 and in doing so he relied upon the House of Lords decision in the case of Addis v. Gramophone Co. [1909] AC 488. In Nyaga Kabute v. Kirinyaga County Council **Civil Appeal No. 29 of 1985**, this Court held that even where the termination of employment is wrongful, what flows from the breach of conditions of service, is damages according to the terms of the contract. That decision was followed in the case of Rift Valley Textiles Limited VS. Edward Onyango Oganda. **Civil Appeal No.27 of 1992**, in which the Court as material rendered itself thus:

***"The Respondent had been paid damages according to the terms of his contract. He had worked for seven days in the month before he was wrongfully dismissed; he was paid shs.1,495/= for that period. He had a notice period of three months and he was paid shs.19, 230/=***

**for that. Again, he was entitled to a leave allowance of shs.600/= per year and he had not gone on leave for three years. He was paid shs.1,800/= for that. \_\_\_\_\_**

**Finally he was entitled to gratuity payment upon the termination of his contract and on that head he was paid a total of shs.32,050/=. In our view, even though the Respondent's summary dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the Appellant."**

Miss Malik counsel for the appellant cited this authority in support of the appellant's case, and urged the view that there was no guarantee the respondent would have worked until he attained 55 years. But Mr. Obura, Counsel on record for the respondent submitted that the appellant having been denied a hearing and since his case has a statutory underpinning, it mattered not whether or not eventually the respondent would have worked until the age of 55 years. In his view the case of Rift Valley Textiles Limited VS. Edward Onyango Oganda (supra) should not be followed. He submitted that it is distinguishable upon its own facts.

The respondent's major complaint is that he was retired without being afforded a hearing. In the Edward Onyango Oganda, case (supra) this Court held that a breach of rules of natural justice would have no application to a simple contract of employment, unless parties themselves have specifically provided in their contract that such rules shall apply. The Court further held that where a notice period is provided in the contract of employment, then an employer needs not assign any reason for giving the notice to terminate the contract and therefore the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise.

In our case here, the need for hearing was entrenched not in the contract of employment but a Statutory Regulation. The appellant clearly flagrantly ignored it. We say flagrantly, because in the letter retiring the respondent it quoted the relevant regulation. Such a breach makes the termination of a contract of employment malicious, and motivated by spite. It is conduct meant to hurt the employee. The need for a hearing, we think is to prevent the employer from acting capriciously and whimsically. The need for a hearing appears to us to be available to employees who, under the regulations may opt to retire. The regulations appear to be silent on the consequences of breach. It is our view that such cases are different from other cases of termination of the contract of employment. Special protection is given to the category of employees who have attained the age of voluntary retirement.

We think that the respondent was entitled to damages. True he was paid his retirement benefits. For those benefits, he had already qualified to get the same. He had not however, decided to retire as at the date the appellant terminated his employment. Had he been given a hearing he would have perhaps convinced the Board of the appellant not to retire him at the time they did. In these circumstances what would have been the measure of damages" Certainly not the money he would have earned had he worked until he attained the compulsory retirement age of 55 years. There are several imponderables which affect an award of damages in such cases. We derive guidance from the case of Southern Highlands Tobacco v. McQueen [1960] EA 490, in which the predecessor of this Court rendered itself, thus:

**"A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation."**

The above case was cited with approval in a later decision by the same Court, of East African Airways VS. Knight [1975] EA 165. Law Ag. P who delivered the leading judgment in that case to which the other two members of the court agreed with, rendered himself in this manner:

***“In assessing the damages to be awarded, the Judge used, as a basis for his calculations, the difference between Mr. Knight’s probable earnings from the corporation, had he not been dismissed, and his earnings from Cassman Brown Ltd. He then deducted a substantial proportion on account of accelerated receipt of damages, and such contingencies as sickness, death and redundancy. In my opinion the Judge proceeded on a correct principle in this respect, and in accordance with what was said by this Court in Southern Highlands Tobacco v. McQueen [1960] EA 490”***

The respondent was paid Kshs.54,030/= being three months salary in lieu of notice. In addition a token of Kshs.10,000/= was paid in appreciation of his long exemplary service with the appellant.

This latter payment is not part of what an employee would normally be paid. As we stated earlier the respondent’s service with the appellant spanned a long time. He rose through the ranks and his service was exemplary. At the time his case was heard he had already attained the age which if he had continued with his employment he would not have been compulsorily retired. He was retired when he was 51 years old. He therefore lost about 4 years of service. That being the case no allowance would have been taken of death or sickness as he was healthy when his matter was heard. However, the issue of accelerated payment should have been considered and taken into account. It would also appear from the evidence of Joel Musese Kisembe (DW1) who was called by the appellant, that housing allowance was regarded as remunerative as it was taken into account in computing pension. In our view therefore, considering the facts and circumstances of this case the trial court should have discounted a percentage of the award made on salary for accelerated payment. However, considering that the respondent’s salary would probably have been adjusted upwards through annual increments or promotion the trial court should have but did not take that into account. Such an increment would probably have affected the total pension. Bearing the foregoing in mind we interfere with the award on the head of salary by increasing it by a conservative 5%. We would then discount the total award by 3% to allow for the accelerated payment with the net result that the award on loss of salary is increased by two per cent.

As regards pension, we think that the respondent would be entitled to the difference between what he should have been paid had he retired normally, and what he was paid by the appellant. In his plaint the respondent claimed shs.876,988.20 as loss of pension.

In his evidence he stated that had he retired normally he would have been paid Kshs.5,013,635.80.

The appellant worked the pension on the basis of an annual salary of K"10,806 and added "600 housing, and multiplied the total figure by 319 months to get K"7277 as pension. They divided by 500 to get ¼ of the pension, which was paid in cash. After the payment "5457, shs.15 and 42 cents remained. They then added a gratuity of "27288 Kshs.17 and 10 cents to bring the total to "22,7460, Kshs.12 cents 52, which is equivalent to a rounded sum of Kshs.700,000/=.

The respondent did not explain how he arrived at the figure of Kshs.5,013,635.80. In our view therefore the pension loss by the respondent should be worked out on the basis of the number of months he would have worked had he retired at the age of 55 years less what he was paid. As we do not have the figures with us the Deputy Registrar of the superior court with the assistance of the parties to work out the exact sum due on this head.

We set aside the awards on loss of telephone facilities, loss of annual leave, loss of insurance cover and loss of travelling warrants. The superior court judgment is varied to the extent we have indicated above.

The appellant has succeeded in part. However, in view of that and the fact that it provoked the litigation, the order which commends itself to us on the issue of costs is that each party shall bear own costs in this appeal.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of July 2008**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

**J. ALUOCH**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**



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