THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

Civil Suit No. 214 OF 2005

REUBEN KAJWARIRE ::PLAINTIFF

VERSUS

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The plaintiff's claim against the defendant is for a declaration that he is entitled to pension, an order that he be paid his pension dues and arrears since March 1993; interest on the pension arrears from the date of termination till payment in full and interest on the aggregate sum from the date of filing the suit till judgment. He also prays for the costs of the suit.

At the scheduling conference there were no agreed facts.

Issues:

1. Whether the plaintiff was an employee of the defendant.
2. Whether the plaintiff was a pensionable officer.
3. Whether he is entitled to the reliefs sought.

I will handle them in the same order.

Issue No. 1: Whether the plaintiff was an employee of the defendant.

It is not disputed by the defendant that the plaintiff was appointed to the post of clerical officer vide his appointment letter dated 15th September, 1978, Exh. P1, by Soroti Flying School just after the college of the East African Community in 1977. Soroti Flying School then fell under Ministry of Aviation and Communication.

It is, however, argued on behalf of the defendant that the school, after the collapse of the East African Community was a self-accounting institution, implying that it would receive lump sums of funds from Government to fund its programs and also meet the wage demands of its employees. The import of this argument is that it was a separate entity from Government and their employees were not Civil servants.

I do not think that the alleged self-accounting status of the School in any way defeats the plaintiff's claim against the defendant. The fact of the School being self-accounting is contained in the evidence of the plaintiff. He testified:

> ***"The School was self-accounting, getting funds from Ministry of Finance and paying workers directly.***
>
> ***In 1982 the School was taken over by Public Service. So Public Service started paying us."***

This is evidence provided by the plaintiff himself. That Public Service was paying him salary at the time of retrenchment appears to me to be undisputed. The sole witness for the defence, DW1 Joseph Nanseera, stated that he did not have any proof that the plaintiff was not being paid by Public Service. If he was being paid by Public Service, in the absence of evidence that he accessed the pay roll illegally, the presumption is that he was an employee of the defendant. In any case, the plaintiff's letter of retrenchment, Exh. P2, is in my view further proof that he was an employee of the defendant at the time of retrenchment. It was written by the Head of the Civil Service, one Martin Orech, and it was not even copied to the Director of Soroti Flying School where he worked. No

evidence has been presented to court that the appointment letter, Exh. P1, was invalid or that the letter of retrenchment, Exh. P2, was issued in error. If anything, DW1 Nanseera, confirmed that the plaintiff was retrenched by Government. I would find it surprising that Government could retrench anyone not in its employment.

From the evidence, it would appear to me that the plaintiff was indeed appointed by East African Civil Flying School in 1978 as a Clerical Officer on probation of two years but under permanent and pensionable terms. The probationary appointment was subject to confirmation. The two years expired and therefore the probationary period lapsed. Even then the defendant continued employing and recognizing him as an employee and paid him salary.

There is no evidence that the retrenchment came at a time when the plaintiff's probationary appointment was under review, to raise inference that the probation period had been extended for any valid reason. I'm cutely aware that confirmation in Civil Service is dependent upon the employee's performance and that this is assessed through confidential appraisals. A probationary employee is one whose employment may or may not be confirmed after a specified period. If the employee does not show suitability for the job, he/she may not be confirmed in service. This implies in my view that to be denied confirmation, the employee must of necessity show non-suitability for the job.

In the instant case, the plaintiff joined service on September 15th, 1978. He was shown the exit on March 23rd, 1993, after a period of 15 years in service. No evidence has been presented to court of any wilful default on his part to warrant non-confirmation in the service of the defendant. I am of the considered opinion that the plaintiff became a permanent employee of the defendant upon the lapse of the two year period. I so find.

I would accordingly answer the first issue in the affirmative and I do so.

Issue No. 2: Whether the plaintiff was a pensionable officer.

I have already indicated that the appointment was on permanent and pensionable terms. According to DW1 Mr. Nanseera, the plaintiff was not paid pension not because the appointment was not pensionable but because certain formalities of appointment had not been completed by the Public Service Commission.

Learned Counsel for the defendant has cited to me ***Arakit Mary Margaret vs Attorney General HCCS No. 699 of 2003*** (Unreported) in which this court agreed with the defence contention that pension, gratuity and/or terminal benefits only apply to persons who are properly appointed, confirmed and have worked for a number of years. I consider that to be the correct legal position. However, it does not apply to the instant case in the sense that unlike Ms. Arakit Mary Margaret whom court found that she had accessed the Civil Service illegally, the plaintiff herein entered the service legally. His non-confirmation could not be blamed on him. I have already indicated that in his evidence, DW1 Mr. Nanseera, did not dispute the fact of the plaintiff's employment relationship with the defendant. His evidence is that he was not paid pension because of certain formalities which Public Service Commission was still working on retrospectively, implying that once those formalities are completed, he will be paid his pension. The fact in my view remains that he was a pensionable officer.

I would accordingly also answer the second issue in the affirmative and I do so.

Issue No. 3: Whether the plaintiff is entitled to the reliefs sought.

His first prayer is for a declaration that he is entitled to pension.

Learned Counsel for the plaintiff, Mr. John Matovu, has submitted that under the Pensions Act, once an officer has served for a period of 10 years in Public Service and is pensionable, upon retrenchment any one taken out of service on that account is pensionable. He has referred me to ***Abola & Others vs Attorney General HCCS No. 1029 of 1998*** (Unreported) in which over 6339 retrenchees were awarded pension upon retrenchment. My understanding of the court's decision in that case is that persons who

were retrenched in the manner similar to the plaintiff's herein, when they already qualified for pension were entitled to their pension rights. The plaintiff herein had clocked 15 years in service. From the evidence, his retrenchment letter provided as follows:

> ***"In addition, Government has decided that you should receive a severance payment calculated at the rate of three months salary for each completed year of pensionable service upto the maximum of 20 years qualifying service."***

Learned Counsel for the defendant has submitted that this was an entitlement and not pension, as the plaintiff alleges, and he ought to have claimed for his severance payment, if he did not receive it then. This of course has been the problem from the time the plaintiff was retrenched, him arguing that he was entitled to pension on retrenchment which the defendant disputes.

As in the instant case, the defendant had in the Abola case, supra, denied liability to pay pension to retrenched staff. At the hearing, documents were presented to court in which the defendant admitted liability. On the basis of that evidence, judgment on admission was entered against the defendant. The case was therefore not determined on merits. Be that as it is, the plaintiffs were in that case cleared by court for payment to them of commuted Pension Gratuity and monthly pension including arrears. It has not been indicated to me that the decision in the Abola case was wrong or made in error. No attempts have been made to distinguish the facts herein from those in the Abola case. Section 10 of the Pensions Act, Cap. 286, gives instances in which pension may be granted. Those instances include:

> ***"(d) on compulsory retirement for the purpose of facilitating improvement in the organization of the department to which he/she belongs, by which greater efficiency or economy may be effected."***

I consider this to have been the context in which the retrenchment was carried out in the instant case. In all these circumstances, I have seen no good reason or at all to deny the plaintiff the order sought or to depart from the principle in the Abola case. I would therefore declare that the plaintiff is entitled to pension dues and arrears since March 26th, 1993.

The plaintiff also sought general damages.

The original prayer was for breach of contract. He appears to have abandoned that in view of his failure to indicate to court that the retrenchment amounted to wrongful dismissal. It would appear to me that the delay to process his pension dues has been circumstantial in the sense that upon embarking on the exercise by the employer it was discovered that the employee had not been confirmed in service.

It is not disputed that by the time he was retrenched, he had not been confirmed in service. Evidence provided by the defendant indicates that the process of confirmation is underway although in all fairness the delay cannot be defended, justified or excused. In these circumstances, while it is evident that the process of confirming him retrospectively is taking rather too long, I have not found this a proper case for a substantive award of general damages. I would therefore find the figure of Shs.7,000,000/= proposed to court to be on the higher side. I consider an award of Shs.2,000,000/= (two million only) appropriate as general damages and I do so.

He has prayed for interest on the pension arrears from the date of retrenchment till payment in full at the rate of 24% per annum and 20% interest on the aggregate of sum from the date of filing the suit till judgment.

I am in full agreement with the plaintiff that interest be awarded to him on the terms proposed in the plaint. It shall be so.

The plaintiff shall also have the costs of the suit.

In the result, judgment is entered for the plaintiff against the defendant on the following terms:

(a) Declaration that he is entitled to pension.

(b) An order that he be paid his pension dues and arrears since March 26th, 1993.

(c) Shs.2,000,000/= as general damages.

(d) Interest on the pension arrears from the date of retrenchment till payment in full at the rate of 24% per annum and 20% on the aggregate sum from the date of filing the suit till judgment.

(e) Costs of the suit.

Yorokamu Bamwine
JUDGE
22/06/09

22/06/09:
Adrole Richard for defendant
Angwella Emmanuel holding brief for John Matovu, Counsel for plaintiff.

Court:
Judgment delivered.

Yorokamu Bamwine
JUDGE

22/06/2009