



**Mumina v Director General, National Security Intelligence Service & 2 others
(Civil Appeal 174 of 2016) [2022] KECA 949 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KECA 949 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 174 OF 2016
DK MUSINGA, HM OKWENGU & J MOHAMMED, JJA
AUGUST 19, 2022**

BETWEEN

FIDEL JIMMI MUMINA APPELLANT

AND

PUBLIC SERVICE COMMISSION OF KENYA 1ST RESPONDENT

**DIRECTOR GENERAL, NATIONAL SECURITY INTELLIGENCE
SERVICE 2ND RESPONDENT**

NATIONAL SECURITY INTELLIGENCE SERVICE 3RD RESPONDENT

JUDGMENT

1. Before this court is an appeal against the judgment of Nyamu, J. delivered on March 20, 2009 in relation to Miscellaneous Civil Application No. 625 of 2007. The appellant challenged the decision by the 1st and 2nd respondents sending him on compulsory early retirement under the fifty (50) year rule commencing June 18, 2007.
2. The brief background of the appeal is that the appellant was employed in the 3rd respondent's service as Director of Economics on contractual basis on 22nd April 1999. On March 11, 2002 the appellant was appointed as a National Security Intelligence Service (NSIS) officer Level 14 of the 3rd respondent service with effect from July 1, 2001 on a permanent and pensionable terms. The appellant was later moved from the Economic Affairs Division and appointed Director of the Administrative Division.
3. Via a letter dated March 21, 2007 from the 2nd respondent addressed to the 1st respondent, it was recommended that the appellant be sent on compulsory retirement under the 50-year rule.
4. Aggrieved by the said decision, the appellant commenced judicial review proceedings against the respondents and sought several judicial review orders. He argued that: the 2nd respondent had no authority under the *National Security Intelligence Service (NSIS) Act* to compulsorily or otherwise



retire him under the fifty (50) year rule, thus it acted illegally and in excess of its jurisdiction; secondly, that the letter dated March 21, 2007 was never communicated to him in any manner and the decision to compulsory retire him before his due date was in clear breach of the rules of natural justice and manifestly unreasonable. Thirdly, that his compulsory retirement under the (50) year rule by the 1st respondent was malicious and intended to settle personal scores which arose

from his employment and further, that it was meant to deny him promotion in the 3rd respondent's service which was due to him in view of his rank and period of service. Lastly, that the NSIS Act is not subject to the Public Service Commission Act therefore, he is not subject to the conditions and terms of service.

5. Mr. Michael Gichangi, the 1st respondent and then the Director General of the 3rd respondent, filed his replying affidavits sworn on December 24, 2007 for both the 1st and 3rd respondents. He stated, *inter alia*, that he had been wrongly joined in the suit; that the 3rd respondent has a Scheme of Service that was made by the 2nd respondent pursuant to the powers conferred to them in section 13(1) of the NSIS Act hence, by virtue of that section the 2nd respondent has jurisdiction over the appellant and staff of the 3rd respondent.
6. Further, the 1st respondent stated that clause 148 (part 5.8.1) of the Scheme of Service provides, *inter alia*, that the retirement age of all the 3rd respondent's employees will be 50 years while the mandatory retirement age will be 55 years. In addition, the issue as to whether the applicant could be called upon to retire under the 50-year rule was carefully considered.
7. Lastly, that the appellant was given an opportunity to make representations in relation to the proposed retirement before it was effected.
8. The 2nd respondent also filed its replying affidavit sworn on August 7, 2007 by Bernadette Mwhaki Nzioki, its secretary. She stated that officers of the 3rd respondent are subject to the Constitutional powers of the 2nd respondent as provided for in article 107 of the repealed Constitution. It was further her averment that article 107(4) of the repealed Constitution lists Public Offices to which the power of the Public Service Commission ('the Commission') shall not apply and the offices in the 3rd respondent's service are not listed as such. In addition, section 13 of the NSIS Act, 1998 as read with section 13 of the Public Service Commission Act clearly amplifies the Commission's power over the officers of the 3rd respondent.
9. As relates to the communication of the 2nd respondent's decision, it was contended that regulation 39 of the Public Service Commission Regulations, 2005 provides that the Commission Secretary shall inform the concerned authorized officer of the Commission's decision for appropriate action and the same was adequately followed.
10. Lastly, the 2nd respondent drew the Court's attention to the finality of the Commissioner's decisions in terms of article 106 (12) of the repealed Constitution and stated that the said decisions by the Commission may be challenged only on whether the procedures, the Constitution or the appropriate law was followed. She said there was full compliance with law and therefore urged the court to dismiss the applicant's case.
11. The matter was canvassed by way of written submissions.
12. Nyamu, J. in dismissing the appellant's application by his judgment delivered on March 20, 2009 held; *inter alia*, that courts have in the recent past expanded the scope of judicial review to cover abuse of power, lack of proportionality, arbitrariness and threats to the rule of law; the case before him was



grounded on alleged lack of jurisdiction and alleged failure to comply with the rule of natural justice; and that the appellant did not establish any of those grounds.

13. Aggrieved by the said judgment, the appellant preferred an appeal to this Court. The appellant faulted the learned judge on ten (10) grounds set out on the face of the memorandum of appeal. In summary, the appellant stated that the learned trial judge erred and misdirected himself in law and fact: in finding that the tenets of the rules of natural justice had been complied with when the basis of the decision to retire him early under the (50) year rule was the letter dated 3rd April 2007 whose contents were not disclosed to him; by finding that the decision to retire him was in accordance with the contractual and statutory provisions, when the Director- General did not set up a disciplinary committee to inquire as per the regulations of the NSIS; in holding that the concept of a fair hearing is a constitutional principle and the right applies to trials and cannot be transplanted into the decision making process of all decision making tribunals or persons; by assuming that the remedy of certiorari even if granted would be unnecessary or futile when the Court repeatedly asserted that judicial review is concerned with the eventual outcome of the process; and by contradicting himself in holding that the respondent acquiesced in his unlawful retirement by accepting to receive his terminal dues on June 17, 2007 without realizing that the appellant had already instituted judicial review proceedings on June 12, 2007 even by the time he received his terminal dues.
14. The appellant prayed that the judgment of the High Court be set aside and an order of certiorari be issued quashing the decision of the respondents dated April 3, 2007 and April 10, 2007 to retire him under the '50-year rule'.
15. Before this court, the appellant was represented by Mr. Kyalo Mbobu, Mr. Fred Ngatia, Senior Counsel, appeared for the 1st respondent and Mr. Munene, State counsel, appeared for the 2nd and 3rd respondents.
16. In his submissions, Mr. Mbobu conceded that based on the appellant's contract of employment and the *Public Service Commission Act*, the appellant could be retired under the 50 (fifty) year rule. His only contention was whether the appellant's retirement by the respondents followed due procedure.
17. He submitted that the starting point of the appellant's argument begins at section 13 of the NSIS Act which provides for the scheme of service; that under clause 148 part 5.8.1 of the scheme that provides for retirement the appellant could be retired by the service without assigning any cause; that therefore, when the appellant was asked to show cause why he should not be retired, then the respondents ought to have given him the reason for his retirement, absence of which amounted to injustice. Counsel further submitted that once a senior officer is asked to show cause, the explanation given must be considered.
18. In his written submissions, the appellant argued that the termination of his employment was unfair because the procedures adopted by the 1st and 2nd respondents in compulsorily retiring him were unjust and unfair and thereby breached the rules of natural justice. In addition, he submitted, no disciplinary hearing was conducted to accord him a chance for fair hearing or otherwise grant him the right to be heard. To advance the argument on breach of natural justice, the appellant relied on the cases of *Judicial Service Commission v. Mbalu Mutava & another* [2015] eKLR.
19. In conclusion Mr. Mbobu urged the Court to quash the decision by the 2nd respondent to compulsorily retire the appellant and the appellant be retired honorably in accordance with the provisions of the terms of his contract. He also prayed for cost of the appeal.



20. Mr. Ngatia, SC submitted that the appellant's appeal was purely based on the issue that the 50-year rule did not apply to the appellant. Therefore, once he conceded that the rule applied, then the entire appeal collapses.
21. In response to the appellant's submission that his retirement was not in accordance with fair procedure, Mr. Ngatia submitted that the procedure was followed to the letter; that communication was done to the appellant that his retirement under the 50-year rule was under consideration; that the appellant was required to make a representation of "personal nature", but through his advocate's a letter dated March 7, 2007, the appellant termed his retirement as illegal, unjustified, extraneous and unmerited. Further, it was submitted that the 2nd respondent informed the 1st respondent that it had resolved to retire the appellant and the same information was transmitted to the appellant. In that regard, Mr. Ngatia submitted that due procedure was followed and that the appellant's retirement was in accordance with fair procedure.
22. It was further submitted that no hearing was required to be conducted. Relying on the case of *Kenya Revenue Authority v. Menginya Salim Murgani* [2010] eKLR, Mr. Ngatia submitted that exchange of letters is sufficient.
23. Regarding orders of certiorari that were sought by the appellant, Mr. Ngatia submitted that such orders are discretionary in nature, and the conduct of the applicant is crucial. He referred the court to the replying affidavit of Michael Gichangi which narrated several acts that amount to misconduct by the appellant, which were not disputed. Mr. Ngatia argued that the appellant's misconducts disentitled him from the relief sought.
24. Lastly, it was submitted that the appellant is about 65 years and the only remedy that is available to him is the retirement benefits and pension, which he had already collected. Mr. Ngatia further argued that the appellant has been out for over 15 years and therefore time could not be reversed. Mr. Ngatia urged this Court to dismiss the appeal with costs.
25. Mr. Munene adopted his submissions as filed and completely associated himself with the submissions of Mr. Ngatia. The gravamen of his submissions was that the appellant failed to demonstrate that the learned trial judge was wrong in the exercise of his discretion and occasioned injustice.
26. In his rejoinder, Mr. Mbobu submitted that the misconduct by the appellant should have been explained to him in his termination letter. He maintained that the appellant still suffers the injuries occasioned to him 15 years ago and urged this Court to find that there was no basis for the compulsory retirement that was imposed upon the appellant.
27. We have carefully considered the appeal before us together with the written and oral submissions by the learned counsel. In our view, the issues that fall for our determination are:
 - a. Whether the appellant's compulsory retirement was in accordance with fair procedure.
 - b. Whether the appellant was deserving of the orders of Certiorari as prayed for.
28. This being the first appellate court we are required to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence that was adduced before the trial court and arrive at our own independent conclusion.



29. On the first issue for determination, it is settled law that parties to a contract are bound by the terms of their contract. This court in [Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd](#) [2017] eKLR expressed itself as follows;

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.” See also *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited & another* (2001) eKLR.”

30. Section 13 of the [NSIS Act](#) provides for prescription of a scheme of service which should set the term of engagement between public service and its officers. Under the scheme of service by the 3rd respondent, clause 148 part 5.8.1 provides for retirement and provides as follows:

“Retirement shall be occasioned by attainment of 50 or 55 years ... Retirement age for all NSIS personnel will be 50 years while the mandatory retirement age will be 55 years. On attainment of 50 years an officer may opt to retire thereafter or be retired by the Service without assigning any cause...”

31. The appellant conceded that based on his contract of employment, the [Public Service Commission Act](#) and the 3rd respondent’s Scheme of Service he could be retired under the 50- years rule. The 1st respondent in response to this submitted that once that position was agreed upon by the appellant, it followed therefore that the entire appeal collapses.

32. We respectfully agree with that submission. The substratum of the appellant’s claim both in the High Court and before this Court was that there was no basis for compulsorily retiring him. However, Clause 148 part 5.8.1 of the 3rd respondent’s scheme of service expressly states that upon attainment of the age of 50- years an officer may be retired by the service without assigning any cause. From the wording of this clause, we find that it was not necessary for the notice to show cause to be issue and likewise, there was no need for the 2nd respondent to give reason as to why it decided to compulsorily retire the appellant. The failure to give reasons did not invalidate the 2nd respondent’s decision to retire the appellant under the 50 -years rule.

33. From the foregoing, we find that the compulsory retirement of the appellant was in accordance with the scheme of service of the 3rd respondent and in accordance with fair procedure. It is not in dispute that the appellant was paid his retirement benefits and pension.

34. This brings us to the second issue: whether the appellant was deserving of the orders of certiorari as sought. For the Court to grant that judicial review order it must be satisfied that the act or omission complained of was arrived at illegally, unreasonably, improperly, irrationally, or in bad faith, or otherwise ultra vires, hence there was breach of the principles of natural justice. In view of our finding that the decision by the 2nd respondent to compulsorily retire the appellant was proper and in accordance with the law and the scheme of service in place, we find and agree with the learned trial judge that the appellant failed to establish any of the grounds set forth in his application to warrant grant of the orders he sought. Further, we reiterate this court’s holding in [Kenya Revenue Authority & 2 others v. Darasa Investments Limited](#) [2018] eKLR that:

“... judicial review orders are still discretionary in nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enumerated in *Coffee Board of Kenya v Thika Coffee Mills Limited & 2*



others (2014) eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”

35. We have said enough to demonstrate that this appeal is for dismissal, which we hereby do. On the issue of costs, although it is settled law that costs follow the event, the award of costs is discretionary. The appellant is a 65 years old retiree. The first respondent was sued in his official capacity, while the second and third respondents are constitutional entities. Bearing that in mind, we order that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

D. K. MUSINGA, (P)

..... **JUDGE OF APPEAL**

HANNAH OKWENGU

..... **JUDGE OF APPEAL**

J. MOHAMMED

I certify that this is a true copy of the original

Signed

..... **JUDGE OF APPEAL**

DEPUTY REGISTRAR

