



IN THE COURT OF APPEAL

AT NYERI

(CORAM: W. KARANJA, KOOME & GATEMBU, J.J.A)

CIVIL APPEAL NO. 35 OF 2016

BETWEEN

TEACHERS SERVICE COMMISSION.....APPELLANT

AND

HENRY KAMAU NGARI.....1ST RESPONDENT

DIRECTOR OF PENSIONS.....2ND RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court

at Nyeri (Ongaya, J.) delivered on 11th March, 2016 in ELRC Cause No. 47 of 2013)

JUDGMENT OF THE COURT

1. Teachers Service Commission (TSC), the appellant, employed Henry Kamau Ngari (*Mr. Ngari*), the 1st respondent as a teacher in 1983. His employment was subject to the TSC Code of Regulations for Teachers. He was confirmed in employment on 7th August 1997. He worked as a teacher for 21 years. His last posting was Koimbi Primary School situated in present day Muranga County.

2. By a letter dated 26th March 2004, TSC notified Mr. Ngari of his impending “*compulsory retirement on age grounds*”. In the letter, TSC stated:

“The records held in this office indicate that you were born 1950. Therefore, you will have attained 55 years the age for compulsory retirement on 1st September 2005. You will also have completed the required period for qualifying service for payment of pension. Your last day of service will be 31st August 2005 up to and including which date you will be paid.”

Alas! That was not to be.

3. Following a complaint that Mr. Ngari had sometime between 9th and 19th July 2004 defiled one of his students, JW, a class five pupil in his school, TSC interdicted him on 10th September 2004. Investigations followed. A disciplinary process was initiated in accordance with TSC Code of Regulations for Teachers. After due process in accordance with those regulations, Mr. Ngari was dismissed from service with effect from 1st March 2005. The grounds for his dismissal were that he had breached Section 3b of the Teachers Service Commission Act (TSC Act) and Regulation 70(2) of the Code of Regulation for Teachers in that he “had carnal knowledge of [his] own pupil [JW] a class five pupil at Koimbi Primary School.”

4. On 19th January 2007, Mr. Ngari filed suit against TSC before the Magistrates Court at Muranga complaining that TSC had

“unilaterally and for no apparent, right or reasonable ground(s) *terminated*” his services; that prior to the termination TSC had given him notice of compulsory retirement; and that he was entitled to “*his legal terminal benefits on retirement*” withheld by TSC. He prayed for judgment against TSC for an order to compel it to compute, declare and produce an account of his terminal retirement benefits and a declaration that he is entitled to the same. That suit was subsequently transferred to the then

Industrial Court where TSC and the Director of Pensions, the 2nd respondent who was later joined in the suit, defended the suit.

5. At the trial, Mr. Ngari did not offer any oral testimony. He relied entirely on his pleadings, statements and documents. TSC and the 2nd respondent on the other hand called two witnesses. After considering the evidence and submissions presented to him, the learned Judge delivered the impugned judgment on 11th March 2016 in which he ordered as follows:

a. "...the dismissal with the consequence that the claimant forfeits pension benefits is hereby set aside and substituted with retirement in public interest effective 1st March 2005 and the claimant to be paid the pensions benefits under the Pensions Act Cap. 189.

b. The Respondents are hereby compelled to compute, declare and file in court an account of the claimant's legal terminal (retirement) benefits and the schedule thereof, payment of the claimant's terminal (retirement) benefits as computed in 7 (A) and (B) of the amended Complaint (being Kshs. 4,539.00 claimant's monthly pension and Kshs.363,195 as the claimant's commuted lump sum gratuity) or such other due computation under the Pensions Act Cap. 189 consequential to order (a) above and file in court by 1st July, 2016.

c. The declaration that the Claimant is entitled to his legal terminal benefits as in (a) above and the respondents shall pay the dues by 1st July, 2016 failing interest at court rates shall be payable thereon from the date of this judgment till full and final payment.

d. The 1st Respondent to pay the Claimant's costs of the suit."

6. TSC is aggrieved and complains in its memorandum of appeal that: the Judge had no mandate to substitute the decision of TSC to terminate Mr. Ngari's employment with his own decision that he be retired in public interest; that having correctly found that the termination of Mr. Ngari's employment was justified and procedural, the Judge erred in ordering payment of pension; that the Judge erred in declaring that payment of pension is an absolute proprietary right; that the holding by the Judge that a teacher engaged by TSC is automatically entitled to pension benefits contravenes the provisions of the Pensions Act; that the Judge embarked on determination of issues not pleaded or raised by the parties, in particular the question of constitutionality of the provisions of the Pensions Act, the TSC Act and TSC Code of Regulations was not a matter before the Judge.

7. During the hearing of the appeal conducted via video link, learned counsel **Mr. Anyour** and **Mr. Ben Mwangi** appeared for TSC and for Mr. Ngari respectively. There was no appearance for the 2nd respondent.

8. Counsel for TSC submitted that Mr. Ngari was validly dismissed from employment and was therefore not entitled to pension under Section 5(2) and (6) of the Pensions Act and Regulation 82 of the Code of Regulation for Teachers; that the Judge misconstrued those provisions as well as the decision of this Court in **Abdul Majid Cocker vs. Director of Pensions, Civil Appeal No. 50 of 1999**. It was submitted that having been dismissed from employment, Mr. Ngari did not qualify for pension; that Section 6 of the Pensions Act sets out the modes of exit from employment on the basis of which one would qualify for pension and dismissal is not one of them.

9. It was submitted that contrary to the finding by the Judge, pension benefit is not an absolute right; that pension is earned after service and is only payable in accordance with the Pensions Act; and that the Judge failed to consider and appreciate that Mr. Ngari was not eligible for pension before declaring that he had a proprietary right over the same.

10. Counsel submitted further that Mr. Ngari did not challenge the constitutional validity of Regulation 82 of the Code of Regulations for Teachers which provides that a teacher who is dismissed from service is not eligible for pension and neither was the constitutionality Section 5(2) of the Pensions Act pleaded.

11. Furthermore, it was submitted, Mr. Ngari did not pray for substitution of the decision by TSC to dismiss him with an order for retirement from service in public interest. To that extent, the Judge acted in excess of his jurisdiction and violated TSC's right to fair hearing. It was submitted that the trial court was bound by the pleadings of the parties and should not have veered outside the dispute as presented and awarded reliefs that were not sought. For that proposition, the decision of this Court in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** and the case of **Caltex Oil (Kenya) Limited vs. Rono Limited [2016] eKLR** were cited.

12. It was submitted that the Judge in effect re-wrote the contract between the parties by failing to heed the provisions on pensions as set out in the Code of Regulations for Teachers. It was not open to the court to re-write the contract. The case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Limited & another [2001] eKLR** was cited.

13. Moreover, counsel submitted, the Judge erred in invoking provisions of the Constitution of Kenya, 2010 which was not applicable; that having been dismissed on 1st March 2005, the applicable law was the Employment Act, Cap 226 which was repealed when the Employment Act, 2007 came into force on 2nd June 2008 which was during the currency of the repealed Constitution. Consequently, the reference by the Judge to Articles 41 and 43 of the Constitution of Kenya, 2010 and to Sections 35 and 40 of the Employment Act, 2007 was erroneous. Citing the decision of the Supreme Court of Kenya in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR**, it was submitted that the provisions on which the Judge relied could not have retrospective effect.

14. In his brief submissions, Mr. Mwangi for Mr. Ngari after setting out the background to the appeal stressed that his client was dismissed

from employment at the age of 54, “*shy of only one year to retirement.*”; that although the learned Judge concluded that the termination of Mr. Ngari’s employment was “*valid and fair*”, the Judge’s analysis and pronouncement on the law applicable law in considering pension benefits cannot be faulted; that his analysis of the rationale for payment of pension benefits and the remedies was correct and in conformity with “*applicable laws and in particular Regulation 73 of the TSC Code of Regulation for teachers*” which are explicit on the circumstances when a teacher is eligible for pension or gratuity.

15. It was submitted for Mr. Ngari that the Judge rightly found that there were clear constitutional provisions that applied to the protection of pension benefits “*which the parties did not make submissions*”; that the parties were bound by the retired Constitution and the Judge rightly invoked Section 113(1) thereof on the exercise of discretion; that the Judge was also right in holding that contractual or statutory provisions that attach disciplinary action depriving an employee pension benefits is unconstitutional.

16. Having considered the appeal and the submissions, the numerous grounds of appeal coalesce into the principal question whether a teacher who is employed by TSC and whose employment is terminated for gross misconduct is nonetheless entitled to pension under the Pensions Act. There is a secondary question whether the Judge determined matters that had not been pleaded or raised and if so, whether he erred in doing so.

17. We will first address the question whether a teacher who is employed by TSC and whose employment is terminated for gross misconduct is nonetheless entitled to pension. Mr. Ngari’s letter of appointment stipulated that his employment was subject to the Code of Regulations for Teachers compiled and published by TSC under Section 6 of the TSC Act and any amendments that may be made thereto from time to time.

18. Regulation 73 of the Code of Regulations for Teacher relates to

“eligibility for retirement with benefits from the teaching service”.

Regulation 73(1) provides that:

“A teacher on permanent and pensionable terms of service is eligible for pension or gratuity in accordance with Pensions Act (Cap.189) only if he retires in any of the following circumstances:

- a. On completion of 10 years qualifying continuous service and attainment of 50 years of age-such teacher may retire or the commission may require him to retire from the service.**
- b. Age limit (55 years)-a teacher shall be required to retire on attaining the age of 55 year.**
- c. On grounds of ill health-...**
- d. On retirement from employment in the public interest-a teacher may be retired if, in light of the usefulness of the teacher to the teaching service and all other circumstances of the case, such retirement is desirable in the public interest.”**

19. Clearly, under that regulation, retirement is an indispensable condition for eligibility for pension. It is a *sine qua non* or *conditio sine qua non* for eligibility for pension. Mr. Ngari did not retire from service. He was one year short of retiring when he brought upon himself matters that led to his dismissal. The trial court correctly found that his employment was terminated and that his dismissal from employment was justified, valid and fair. That finding by the trial court has not been challenged. Therefore, under Regulation 73(1), he was not eligible for pension.

20. Furthermore, Regulation 82 of the same regulations relating to

“forfeiture of pension rights on resignation or dismissal” provides that “a teacher who is dismissed from service forfeits all claims to pension.”

Based on the express terms under which Mr. Ngari was employed, we hold that having lawfully been dismissed from employment for gross misconduct, he is not eligible for pension.

21. The case of **Abdul Majid Cocker vs. Director of Pensions** on which the learned Judge relied does not aid Mr. Ngari’s cause in our view. In that case the Court was clear that a “*person who is eligible for pension*” cannot be deprived of it. In the circumstances of the present case, and as already stated, Mr. Ngari was not eligible for pension given the circumstances under which he left teaching service. There is merit therefore in the complaint by TSC that the Judge erred in holding that Mr. Ngari was eligible for pension.

22. What we have stated thus far is sufficient for us to allow this appeal. There is however the complaint by TSC that the Judge veered off from the dispute the parties framed and went on to pronounce on matters that were not properly before him. In the case of **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3** this Court stated that parties are bound by their pleadings and that an issue that is not pleaded can only be put on record by amendment of the pleadings. The same decision supports the proposition that that a party is not entitled to a relief not specified in his claim.

23. Mr. Ngari's case as pleaded was that his services as a teacher were terminated "in the year 2004 unilaterally and for no apparent right, and or reasonable grounds"; that prior to the termination he had been issued with a letter notifying him of his impending compulsory retirement on age grounds; but that he was

"dismissed from employment before such retirement." It was on that basis that Mr. Ngari sought an order to compel TSC to compute and pay him "the legal terminal benefit (retirement dues)". His claim, in effect, was that his dismissal was wrongful. Without a finding by the court that that his employment was wrongful, his claim for retirement benefits could not be sustained.

24. It was not Mr. Ngari's case that the terms of his employment that provided for forfeiture of pension in the event of dismissal were or are unconstitutional. That was a matter which the Judge raised and determined without being invited by any of the parties to do so. It was also not open to the Judge to substitute the decision of TSC with that of his own by substituting the decision of the TSC to terminate Mr. Ngari's services with a decision to retire him in public interest. As stated by the Court recently in the case of

Samuel Kalomit Murkomen vs. Telkom Kenya Limited [2017] eKLR:

"In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer."

25. Moreover, the decision by the Judge to substitute the decision of TSC terminating the employment with his own decision to retire Mr. Ngari in public interest is inconsistent with his finding that the termination was justified and procedural.

26. For those reasons, we hereby allow the appeal and set aside the judgment of the ELRC given on 11th March 2016 in Nyeri case No. 47 of 2013 in its entirety.

27. TSC (the appellant) shall have the costs of the appeal and of the proceedings in the lower court.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify this is a true copy of the original.

Signed

DEPUTY REGISTRAR