



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAL, JJ.A) CIVIL APPEAL NO. 279 OF 2015

BETWEEN

GEORGE KURIA KAMANDA MWAURA.....APPELLANT

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

He expressed his apprehension that the pegging of his retirement age at 55 years would adversely affect his pension calculation and payment, and then prayed for, among others, a declaration that his last day of service and retirement was 31st August, 2013, and that his pension be calculated and paid on the basis of the last payslip of that date.

The Teachers Service Commission's response to those claims has consistently been that it originally inherited a Government Information Technology Systems (GITS) for the management of its payroll but the system was fraught with many errors which it embarked on cleansing with a view to obtaining an error-free mass of data for the Integrated Payroll Personal Data (IPPD) System it acquired in 2006. It turned out that the appellant's data which referred to the date of birth had been erroneously captured resulting in his being retained in the service beyond the date he attained 55 years and being transitioned to 60 years retirement when he did not qualify having already attained 55 years by the time the mandatory retirement age was being increased. The Teachers Service Commission received guidance from the Directorate of Public Service Management that some 139 teachers, including the appellant, who should have retired at 55 years but had worked up to the age of 60 years were to be paid pension for the period up to 55 years and service gratuity for the 5 extra years. The learned Judge agreed with the Teachers Service Commission's position to the appellants' dissatisfaction.

In his memorandum of appeal the appellant complains, which we paraphrase, that the learned Judge erred by:

(i) declaring that the appellant retired in June, 2008 and that the period served thereafter could only be deemed as a contract thereby unfairly or drastically reducing the appellant's pension;

(ii) failing to appreciate that the Teachers Service Commission lawfully expressly extended the appellant's retirement to 60 years which the appellant complied with and could not be reversed after the event;

(iii) failing to acknowledge that the appellant was not at fault and should not have been retrospectively prejudiced by the Teachers Service Commission's receiving a poor record keeping system.

He thus prays that the learned Judge be reversed and the orders he sought before him be granted.

The parties filed written submissions which were orally highlighted before us by **Mrs. Kamau** and **Mr. Sitima**, respective learned counsel for the appellant and the Teachers Service Commission. There was no appearance by or on behalf of the Attorney General for the Director of Pensions though served.

Mrs. Kamau reiterated the appellant's position as she consistently maintained and repudiated the Teachers Service Commission's position that the appellant was a contract employee after attaining the age of 55 years. Rather, he remained in service on the same terms up to the age of 60 years upon the Teachers Service Commission's own assurance. His pension therefore became due on 31st August, 2008, and not 5 years later. She cited the case of **DIRECTOR OF PENSIONS -VS- ABDUL MAJID COCKAR**, Civil Appeal No. 50 of 1999 and **NATIONAL BANK OF KENYA -VS- PIPE PLASTIC SAMKOLIT LIMITED**, Civil Appeal No. 95 of 1999 in support of her criticism that the learned Judge essentially and improperly re-wrote the contract between the parties herein.

On his part, **Mr. Sitima** extolled the learned Judge's judgment as sound and deserving of affirmation. He stated that the Teachers Service Commission as a public body regulated by the Constitution and Statutes concerned with the payment of pensions was duty bound to give effect to the mandatory retirement age of 55 years which was embedded in the law as the appellant did not benefit from the revision of the mandatory retirement age which became operational on 1st April, 2009, after he had attained the operative retirement age and ought to already have retired. Nor could he benefit from any mistake or representation made to him to the effect that he was to retire at the age of 60 years as no expectation, legitimate or otherwise, could override the law. He concluded by contending that the appellant was fully remunerated for the 5 extra years he worked and was also paid service gratuity at the end of that period so he has been fully compensated for the extra 5 years which the learned Judge properly treated as contractual.

Having considered the record of this appeal, the submissions made by the parties and the law cited, the issue before us appears to be quite straight forward: did the learned Judge err in finding that the appellant's retirement date was June, 2008 and any period he served thereafter was contractual? In resolving that issue, we begin from the uncontested point that the appellant was born on 28th June, 1953. By simple arithmetic, he turned 55 years old on 28th June, 2008.

The confusion that led to this litigation emanated from the rather sorry state of the Teachers Service Commission's record keeping though it seems to blame the system it inherited which had contaminated data. In its letter dated 22nd November, 2008, for instance, it wrote to the appellant under the hand of one J. M. Mutavi for its secretary advising him as follows;

"The records held in this office indicate that you were born 28th June, 1953. Therefore you will have attained 55 years the age for compulsory retirement on 1st May, 2009. You will also have completed the required period for qualifying service for payment of pension. Your last day of service will be 30th April, 2009 up to and including which date you will be paid."

With respect, that statement contained rather elementary errors of simple computation because the date of retirement ought to have been 27th June, 2008 when the appellant turned 55 years. It is baffling that the Teachers Service Commission spoke of 1st May, 2009 which was nearly 10 months later. There is no indication that the appellant, who must surely have noticed that error in calculation, made any effort to have it corrected. He was happy to anticipate that undeserved benefit and thus continued working beyond the mandatory retirement age of 55 years.

He was still working when Francis K. Muthaura, the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service issued Circular Ref. OP. CAB.2/7A dated 20th March, 2009, directing the enhancement of the mandatory age of retirement to 60 years in conformity with Kenya's treaty obligations under the East African Community Treaty. The new retirement age was to be with effect from 1st April, 2009.

The Teachers Service Commission in the meantime discovered its mistake regarding the appellant's retirement age and addressed a letter to him dated 26th August, 2014 advising that he was deemed to have retired with effect from 1st September, 2008, at the age of 55 years, and that the records were being amended accordingly.

It seems to us that the appellant is attempting to derive a benefit from a patent mistake. He is essentially trying on the basis of Teachers Service Commission's letters steeped in arithmetic errors, to sidestep the mandatory retirement age of 55 years. He was asking the court below and this Court to hoist those erroneous letters above the circular and the statute governing mandatory retirement age. Such an invitation is one that the courts must decline as having no foundation in law. The letter advising the appellant that his age of retirement was 60 years was not only mistaken in fact but amounted to a nullity in law. It therefore cannot be the basis for the making of the claims presented by the appellant. The Teachers Service Commission had no authority to extend the age of retirement for the appellant and did not, in fact, consciously do so. It acted under the mistaken belief that he had not yet attained the age of 55 years at which he had to retire mandatorily. And he had.

We think it mischievous for the appellant to claim loss or prejudice having in fact been compensated by salary for the extra five years he worked, and having also received service gratuity for the same. The learned Judge in holding that the extra years of service were deemed to be contractual was in no way re-writing the contract between the appellant and Teachers Service Commission. He was in fact validating the extra service he rendered and the compensation he received therefor. This was also in full consistency with **Regulation 58** of the **Code of Regulations for Teachers**.

We do not see the learned Judge's fair finding as in any way derogating from the appellants entitlement to pension protection. Indeed, pension is a proprietary right as stated in the authority cited for the appellant but it must be pension lawfully arrived at. There can be no right of pension where the employee has already attained and passed the mandatory age of retirement. Thus, while we agree with the dictum of Shah, JA in the **COCKAR** case (supra) that the pension of a retiree is not a matter of fun and games, we add that it is not a matter of greed and speculative wager either.

Ultimately, we find no merit in this appeal and it is accordingly dismissed.

Given that it is the Teachers Service Commission's record-keeping and epistolary that brought this situation about in the first place, we deny it costs, and order that each party bear its own.

Dated and delivered at Nairobi this 21st day of June, 2019.

M. K. KOOME

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JUDGE OF APPEAL

P O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR