



REPUBLIC OF KENYA



KENYA LAW
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Kirundi v National Industrial Training Authority & another (Cause E411 of 2021) [2025] KEELRC 1651 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1651 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E411 OF 2021

B ONGAYA, J

JUNE 5, 2025

BETWEEN

ELKANAH MAGU KIRUNDI CLAIMANT

AND

NATIONAL INDUSTRIAL TRAINING AUTHORITY 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

JUDGMENT

1. The claimant initially filed the memorandum of claim on 18.05.2021 and subsequently filed the Amended Memorandum of Claim dated 28.09.2023 through M'njau & Mageeto Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the respondent's action of refusing/neglecting and or failing to implement the Public Service Commission's decision dated 26.08.2020 by re-instating the claimant into employment with full pay is illegal, unlawful, unprocedural, unfair, unconstitutional and null and void.
 - b. A mandatory injunction to compel the respondent and or its agents and or servants and or employees and or representatives to fully implement the decision of Public Service Commission dated 26.08.2020 by re-instating the claimant into employment as a centre manager with full pay and without any loss of benefits.
 - c. The 2nd respondent's decision dated 13.10.2021 rescinding its earlier decision of 26.08.2020 reinstating the claimant into employment on account of procedural flaws in handling the disciplinary case by the 1st respondent be set aside.
 - d. In the alternative the respondents be ordered to pay the claimant's terminal dues amounting to Kshs 35,541.936.00



- e. Costs and interest of this cause at court rates
 - f. Any other relief which the court deems fit, just and expedient to grant.
2. The 1st Respondent Reply to the Amended Memorandum of Claim was dated 30.11.2023 and filed through the office of the Hon Attorney General. The respondent prayed that the amended memorandum of claim be dismissed with costs to the 1st respondent.
 3. The 2nd Respondent filed a Reply to the Claim dated 17.04.2024 made through Selina Iseme Advocate for Public Service Commission.
 4. The claimant's case was that he was initially employed by the Public Service Commission on 20.12.1991 and deployed to the Ministry of Public Works as an Artisan 1 on a salary of Kshs 1,734/= per month.
 5. On 10.10.2014 he was appointed as a centre manager by the 1st respondent, at a gross salary of Kshs 298,612/=.
 6. On 31.05.2017 the claimant was indefinitely suspended from service on account of petty cash withdrawals and on 03.06.2017 he appealed against the suspension to the Director General of the respondent.
 7. Subsequently, on 11.06.2017 the claimant filed an appeal against the suspension to the chairman of the Public Service Commission (PSC).
 8. On 31.01.2018 the board of the 1st respondent held a meeting whose agenda was the claimant's suspension and upon considering the recommendations of the disciplinary committee, resolved that the claimant exits the respondent service by way of early retirement or resignation.
 9. The claimant states that he was forced to and did resign on 05.03.2018.
 10. On 26.08.2020 the claimant received a letter indicating that the 2nd respondent had considered his appeal and decided that his appeal be allowed and that his resignation be set aside and he be reinstated with full pay as per section 74(6) of the PSC Act, 2017.
 11. The claimant states that on 09.09.2020 he received a letter from the 1st respondent confirming receipt of the letter from the 2nd respondent dated 26.08.2020, wherein the 1st respondent requested for stay in implementation of the decision, pending the process of constituting the respondent board.
 12. On 16.09.2020 the claimant was copied in a letter by the 2nd respondent addressed to the 1st respondent, advising it to comply with the Commission's decision communicated in its letter dated 26.08.2020.
 13. On 22.09.2020 the 1st respondent wrote and confirmed to the claimant that a new board had been constituted and indicated that it would comply with the directives of the 2nd respondent.
 14. On 09.12.2020 the claimant wrote to the 1st respondent requesting an update on the compliance with the 2nd respondent's decision to reinstate him, but did not receive a response to the same.
 15. On 11.01.2021 the claimant wrote to the 2nd respondent regarding the non-compliance of the 1st respondent with its directive of 26.08.2020. However, the 2nd respondent did not reply to said letter.
 16. By a letter dated 30.06.2021 the claimant wrote to the 2nd respondent and informed it of these proceedings, to which the 2nd respondent replied by its letter of 05.07.2021 and confirmed that it was aware of these proceedings and urged the claimant to bring section 74 of the PSC Act to the court's attention.



17. The claimant states that the 2nd respondent heard a review application filed by the 1st respondent, which it determined in its decision of 13.10.2021 - where it reversed its decision of 26.08.2020.
18. The claimant states that the decision of 13.10.2021 made by the 2nd respondent was arbitrary and made with intention to defeat justice since the 2nd respondent had in a separate case involving a different employee of the 1st respondent, deferred a review application on account of a pending court case.
19. By a letter dated 09.11.2022 the claimant wrote to the 2nd respondent seeking interpretation of the decision of 13.10.2021, to which the 2nd respondent replied through its letter of 13.12.2022 indicating that the decision of 13.10.2021 was made based on new evidence presented by the 1st respondent, resulting in rescission of the earlier decision made on 26.08.2020.
20. On the part of the 1st respondent, it is stated that the claimant was suspended from duty on grounds of gross misconduct vide a letter dated 31.05.2017 with effect from 02.06.2017 after investigations by internal audit revealed that there was misappropriation of funds and procurement irregularities among other irregularities at NITA Mombasa where the claimant was the centre manager. The claimant was sent on compulsory leave pending investigations and thereafter subjected to a disciplinary process.
21. The 1st respondent states that the claimant was given opportunity to respond to the charges preferred against him in the suspension letter and on 03.06.2017 the claimant submitted his response.
22. By a letter dated 04.10.2017 the claimant was invited to attend the disciplinary hearing of his case on 10.10.2017. On which day the claimant appeared before the disciplinary committee and defended himself against the allegations of gross misconduct levelled against him.
23. The claimant was found guilty of the offence after the disciplinary proceedings concluded. On 31.01.2018 the board held a special meeting with the agenda being “Staff discipline management report”, where it was resolved that all employees found guilty be treated equally as per the authority’s human resource policy.
24. The 1st respondent states that the board was lenient on the claimant given that he had been in service for 50 years and that dismissal from service would have been detrimental to his career.
25. The board therefore gave the claimant a lenient option of taking an early retirement based on its 50 year rule or resignation in place of dismissal from the authority.
26. The 1st respondent states that on 05.03.2018 the claimant wrote and tendered his resignation letter giving notice of resignation with effect from 05.04.2018.
27. The 1st respondent denies the allegations by the claimant that he was forced to resign.
28. By a letter dated 06.03.2018 the director general of the authority accepted the claimant’s resignation, which the claimant acknowledged receipt of and signed the [Official Secrets Act](#) (cap 187 of the Laws of Kenya) declaration for the employees leaving the service of the authority on 08.03.2018.
29. On 30.03.2018 the claimant wrote a letter revoking his earlier resignation and indicated that he had opted to take early retirement from service.
30. The 1st respondent replied vide a letter dated 17.04.2018 and advised the claimant that his decision to retire from the authority was accepted and he was urged to clear with the authority to facilitate processing of his employment benefits for the period of his service.



31. The claimant thereafter lodged an appeal to the 2nd respondent claiming he was forced to resign, to which the 2nd respondent made a determination to have him reinstated to the position of centre manager vide its decision of 26.08.2020.
32. The 1st respondent states that the decision was obtained through deceit and concealment of material facts, and the respondent urges the court not to grant the orders sought herein, since the claimant has come to the Court with unclean hands and the orders sought from this court should be denied as they are equitable remedies.
33. The 1st respondent dissatisfied with the decision of the 2nd respondent filed an application for review. The 1st respondent states that upon consideration of its application for review, the 2nd respondent found merit and allowed the same.
34. The 2nd respondent in its letter dated 13.10.2021 conveyed its decision to the 1st respondent and copied the claimant.
35. The 1st respondent states that the claimant cleared and his retirement benefits were paid to him in full and therefore there is no pending claim between him and the 1st respondent.
36. The 1st respondent states that it recruited a centre manager to replace the claimant in the year 2018 and therefore the authority has no budgetary allocation for additional staff in the same capacity.
37. On the part of the 2nd respondent it was stated that on 13.10.2021 the 2nd respondent allowed an application for review filed by the 1st respondent against a decision it had made earlier.
38. The claimant copied the 2nd respondent in his letter to the 1st respondent dated 18.11.2021, giving notice of his intention to retire under the 50 year rule.
39. The 1st respondent by a letter dated 21.06.2022 accepted the claimant's request and computed the claimant's final dues which it communicated in its letter dated 26.09.2022.
40. On 09.11.2022 the claimant wrote to the 2nd respondent stating that he had retired and cleared with the 1st respondent but there was a delay in processing his dues.
41. The 2nd respondent on 24.04.2023 wrote to the 1st respondent to expedite payment of the claimant's final dues.
42. The 2nd respondent maintains that having retired at 50 years and having been paid his final dues in full there is no further claim between the claimant and the respondents.
43. Additionally, the 2nd respondent states that the claimant cannot be reinstated to a position he retired from.
44. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows:
 - a. The main issue for determination is whether the claimant's retirement from public service should stand as valid and lawful or it was unfair.
 - b. The claimant testified and confirmed the correspondence surrounding his retirement. While he initially resigned and the resignation accepted by the 1st respondent, the claimant subsequently changed his mind and requested to retire early. The 1st respondent accepted the request and the claimant testified confirming that he retired on 30.03.2018. He further testified



that after retirement he was paid full retirement benefits. The Court finds that the retirement has not been vitiated at all.

- c. The 2nd respondent has confirmed that it rescinded its decision that had reinstated the claimant into public service. The Court considers that the reason for rescinding the reinstatement decision as made in error has not been challenged and shown to have been unfair. It was that the claimant had retired and with full payment of retirement benefits. In such circumstances the claimant has not shown any basis to attack and set aside the valid decisions of the 2nd respondent which in the conclusive effect, upheld the claimant's retirement.
- d. The Court returns that the 1st and 2nd respondents as parties to their contract of service were free to contract and they enjoyed the autonomy to as well terminate the contract of service by way of an agreement. In the instant case the parties agreed to terminate the contract by way of early retirement effective 30.03.2018 and with full payment of the retirement benefits. The Court returns that the parties are fully bound by the agreement to end the contract of service by early retirement of the claimant. As urged and submitted for the respondents, the Court finds that the claimant has not established coercion
- e. The Court considers that the claimant cannot be allowed to approbate and reprobate concurrently, by relying on 2nd respondent's erroneous decision to reinstate him and then without justification, attacking the decision by the 2nd respondent rescinding the reinstatement decision. Thus, the Court returns that the letter by the 2nd respondent Ref. No. PSC.PAP/K1/1(29) dated 13.12.2022 addressed to the claimant conclusively and correctly set out the circumstances of the claimant's retirement from public service, thus,

INTERPRETATION OF COMMISSION DECISION

Reference is made to your letter dated 9th November, 2022 in regard to the referenced subject matter.

The Director General, National Industrial Training Authority (NITA) vide letter dated 22nd April 2021 requested the Commission to review its decision in regard to your appeal.

Pursuant to Section 75(1) (a) of the *Public Service Commission Act* 2017, the Commission on 13th October, 2021, considered and allowed NITA's application for review since there was fresh material facts not presented when the initial decision was being made. This means the decision communicated vide letter ref. No. PSC/PAP/K1/1/(17) OF 26th August 2020, which was copied to you was rescinded.

In view of the above, computation of your terminal dues by NITA on the basis that you ceased working from 30th March, 2018 when you submitted the retirement notice was proper. It is also noted that you were paid three months' salary from April to June 2018 in lieu of notice.

Dr. Simon K. Rotich, CBS

Secretary/CEO

PUBLIC SERVICE COMMISSION"

- f. The Court further returns that the reliefs prayed for are unjustified and are declined. The evidence is that the 2nd respondent rescinded its decision of 26.08.2020 and reinstatement in the rescinded decision is not available. The amount of Kshs.35, 541,936.00 for the period



April 2018 to April 2025 is unjustified. Over that period the claimant did not work for the respondents and nothing has been shown attributable to the respondents' that could have stopped the claimant from gainful employment or engagement after the retirement on 30.03.2018, the last day the claimant actually worked for the respondents. The certificate of service is due per section 51 of the *Employment Act*, 2007. The Court has considered the margins of success, the administrative processes the case underwent, and the retirement agreement and each party to bear own costs of the suit.

45. In conclusion the suit is hereby determined with orders as follows:

- a. The 1st respondent to deliver the certificate of service by 01.07.2025.
- b. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 5TH JUNE, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

