



**Bahola v Kenya National Union of Teachers Tana River Branch & 3 others
(Cause 1 of 2019) [2024] KEELRC 1484 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1484 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 1 OF 2019
M MBARŪ, J
APRIL 29, 2024**

BETWEEN

MICHAEL BABWOYA BAHOLA CLAIMANT

AND

**KENYA NATIONAL UNION OF TEACHERS TANA RIVER
BRANCH 1ST RESPONDENT**

KENYA NATIONAL UNION OF TEACHERS 2ND RESPONDENT

MAURICE MARO ADE 3RD RESPONDENT

BAKARI ALI BADESA 4TH RESPONDENT

JUDGMENT

1. The claimant is a male adult. The 1st respondent is a trade union. The 2nd respondent is a branch of the 1st respondent. The 3rd respondent is a male adult and a teacher at Hola and the chairman of the 2nd respondent. The 4th respondent is an adult male a teacher at Hola and an assistant secretary for the 2nd respondent.
2. The claim is that the claimant was employed as a teacher by the Teachers Service Commission (TSC) in the year 1980. On 19 February 2016, he was elected as branch executive secretary of the 2nd respondent for a term of 5 years subject to retirement on account of age or resignation or upon being voted out at a gross salary of Ksh.163, 627 per month.
3. On 23rd January 2019, the 1st respondent directed the 2nd and 3rd respondents to issue the claimant with a 6-month' notice of retirement effect 1st January 2019. The claimant was also set on 6 months of retirement leave effective 30 June 2019. Following this directive, the 2nd and 3rd respondents issued the claimant with notice dated 24 January 2019 pending retirement on 1st July 2019, and also called upon the claimant to hand over his office pending payment of his terminal dues.

4. On 13 February 2019, the 1st respondent rectified the earlier notice and informed the claimant that the retirement date would be on 31st August 2019 and the 6 months retirement notice and compulsory terminal leave should commence on 1st March 2019 and lapse on 31st August 2019.
5. The claim is the issuance of the retirement notices and terminal notices by the respondents were based on an erroneous date of birth in the initial employment records of the claimant with TSC. The initial employment records had indicated that the claimant was born in the year 1959 as shown in the national identity card and school leaving certificates. However, the date of birth is 26 December 1960 as indicated in the current Certificate of Birth and current national identity card.
6. The claim is that the notices issued were in error. The claimant supplied the respondents with the necessary documents to support his year and date of birth but refused to correct the date of retirement or change the compulsory terminal leave. The 3rd respondent immediately removed the claimant as a signatory to the 2nd respondent's bank account at Kenya Commercial Bank, Hola Branch while the 4th respondent took steps to take over his office. The respondents have taken steps to deregister the claimant as the branch executive secretary at the Registrar of Trade Unions.
7. The claim is that the date of retirement is 26 December 2020 and not 31 August 2019 but the respondents have failed to address this despite being served with the necessary documents. The claimant is entitled to retire at 60 years and continue to hold his office until such date.
8. The respondent has since July 2019 refused to pay the claimant his salary amounting to Ksh.109, 493.50 without any good cause. The claimant is seeking net monthly arrears of salary of Ksh.109, 493.50 per month from July 2019 up to the date the judgment will issue.
9. The claimant is seeking the following orders;

An order of permanent injunction restraining the respondents from obstructing the claimant from discharging his lawful duties as the 2nd respondent duly elected Branch Executive Secretary and from deregistering the claimant as the 2nd respondent as branch secretary with the Registrar of Trade Union until 26 December 2020 when he will attain the retirement age.

An order for payment of the claimant's monthly arrears of salary of Ksh.109, 493.50 per month from July 2019 until the date of the judgment.

Costs of the suit.
10. The claimant testified in support of his case that he is a teacher and employee of TSC but on 19 February 2016 he was elected the branch executive secretary of the 2nd respondent for a term of 5 years subject to retirement on account of age or resignation. However, on 23rd January 2019, the 1st respondent directed the 2nd and 3rd respondents to issue him with a 6-month retirement notice and compulsory terminal leave on 30 June 2019 on the mistaken belief that he had attained 60 years of mandatory retirement age. These notices were later changed to take effect on 31st August 2019 despite the claimant presenting his national identity card and Birth Certificate indicating that his date of birth is 26 December 1960 and hence he ought to retire on 26 December 2020 at 60 years.
11. The claimant testified that the respondents refused to comply and proceeded to direct him to hand over his office and duties, they removed him as a signatory of the bank accounts and proceeded to seek deregistration with the Registrar of Trade Union. The respondents also stopped payment of the due salaries in July 2019. The orders sought should be issued.

Response

12. In response, the respondents maintained that the the claims made are not enforceable against it since the claimant was only seconded to the 2nd Respondent by the Teachers Service Commission (TSC) which has since retired the claimant. He was employed by the TSC in 1980 and the documents supplied to the TSC at the time of his first employment showed that he was born in the year 1959.
13. The claimant was elected to be the Tana River Branch Executive Secretary on 19th February, 2016 and after he was elected an official of the 2nd respondent. He submitted official documents as well as those from the TSC which indicated his date of birth as 1959 as per the ID card submitted.
14. The claimant's employment is governed and/or regulated by among others, the 1st respondent's Constitution which provides at Article XVIII (E) that Any Union Official shall cease to hold office, upon attaining the age of sixty (60) years, upon resigning by notice in writing to the National Executive Council (NEC) or Branch Executive Committee (BEC), dies, or is removed by vote at an Annual Delegates Conference (ADC) or Special Conference. where an individual's exact date of birth is unknown, such persons shall retire on the 1st of July in the year they are deemed to have reached their retirement age. considering that the claimant was seconded to the 1st respondent by the TSC, it follows that upon retirement by the TSC, he automatically ceases to hold office since one of the qualifications to hold the 1st respondent's branch office is being a trained and qualified teacher. under the impending retirement as communicated by the TSC, he was promptly notified of his retirement via a letter to his Branch Chairman dated 23rd January, 2019 requiring him to proceed on terminal leave from 1st January, 2019 to 30th June, 2019 during which period he was entitled to full payment of his salary and allowances. Therefore, the correct claim ought to be Kshs. 534,707.90 as per the claimant's pay slips of his last months of service not as indicated in the Memorandum of Claim.
15. The TSC has made regulations to give effect to the *Teachers Service Commission Act* as well as the *Births and Deaths Registration Act*:
 - a. Government Regulations communicated through Circular No. 2 of November 15, 1982 provide that an employee's official date of birth is the one declared by him or her on the application for employment and not that shown on the national identity card or any other document.
 - b. Further, Regulation 11(2) (a) of the Code of Regulation of Teachers, which complements the Government Regulations, also provides that the date of birth acceptable to the commission is the date the applicant has stated in the application form for employment".
 - c. Regulation 11(2)(b) further states that, "where there is doubt, the commission shall require proof of the date of birth, and for this purpose the commission shall accept a certified copy of the birth certificate issued under the *Births and Deaths Registration Act* as proof provided it was issued on or before November 15, 1982.
16. The initial documents used by the claimant to be employed showed his year of birth which is 1959, yet the documents submitted by him in support of his age were issued between the year 2017 and now, and not before November 15, 1982, as required by the regulations. His claim should be dismissed with costs.
17. In evidence, the respondents called Issa Umuru Awadth, a teacher with TSC and head teacher of Mikomani Primary School. The witness testified that in the course of working as a teacher was posted to Hola Primary School from July 2017 to May 2018 and knew the claimant since childhood as he

was the teacher at Daku Primary School. In the year 1997 they met at Kumbi Primary School where he was head teacher.

18. Umuru testified that investigators from the DCI offices came to the school asking for the claimant's School Leaving Certificate issued while he was at Hola Primary School on 21 December 2017 which was shown in a Photostat copy. The witness was the head teacher at Hola Primary School at the time and it was part of the duties to issue a School Leaving Certificate. The claimant alleged that he had been issued his Certificate through Admission No. 90671 dated 21 December 2017 which was not correct. The witness never issued such document as purported to have been signed and stamped by the head teacher. The handwriting entries made in the documents do not arise from the same hand and the signature closes resembles but not from the witness. The admission number indicated in the documents is not in tandem with the school records as the number is far much lower than what is in the document.
19. Umuru also testified that the document was falsified. A specimen of the witness's signature is produced to confirm the same as being different from what the claimant submitted. The practice in signing the School Leaving Certificate is always to scribe the name above the signature which is conspicuously missing in the submitted document of the claimant.
20. The 4th respondent Bakari Ali Komora testified that as the assistant secretary of the 1st respondent and currently the vice chairperson and a teacher with the TSC. The witness submitted documents filed by the respondents. The witness testified that the claimant was elected secretary of the 2nd respondent branch in the year 2016 for 5 years. The next election was in the year 2021 in March.
21. Komora testified that the claimant was a teacher, TSC records show his date of birth as 1959. He did not submit to the 2nd responding branch any documents but the TSC had these records. The retirement notice was to the head office and not to the branch. The claimant did not respond to the notices issued by the respondents. The respondents relied on the government copies and TSC to effect the retirement notice and terminal leave. The documents presented by the claimant have different dates and year of birth. The TSC as the employer retired the claimant and not a party herein.
22. Christine Mkala the principal, of Hola Primary School testified that she has been in the same school since May 2018. The former head teacher was Awadth Umuru Issa. The documents submitted by the claimant is a Primary School Leaving Certificate under his name bearing Number 90671 is not registered in the records at the school. For all students who were admitted in the year 1968 admission numbers were between 100 and 200. The alleged admission number 90671 is not genuine according to the records at the school.
23. At the close of the hearing, both parties filed written submissions.
24. The claimant submitted that his claim is for payment of his salaries from July 2019 to the date of the judgment. In the year 1980, he was employed as a teacher by the TSC, and on 19 February 2016, he was elected branch secretary of the 2nd respondent for a term of 5 years. However, through notices dated 23rd January 2019, the respondents issued him with retirement notices under the mistaken belief that he was aged 60 years as of June 2019 but his date of birth is 26 December 1960 so he ought to have retired on 26 December 2020. The refusal to pay salary due from July 2019 is unlawful.
25. The claimant submitted that under Section 161(2) of the Teachers Service Commission Code of Regulations for Teachers, the retirement age is 60 years. At the time of his employment, the claimant indicated that he was born in the year 1959 but his identity card and Certificate of Birth dated 5 March 2018 indicate the date of birth as 26 December 1960. In the case of Republic v Judicial Service Commission & 2 others ex parte Erastus Githinji, Judicial Review Application No.82 of 2019 the

- court held that the date of birth of a person is that shown in his Certificate of Birth. Section 26(4) of the Births & Death Registration Act provides for certified copies of any entry in the register as correct.
26. The claimant submitted that the witnesses called by the respondents did not challenge the fact that the claimant has a national identity card and certificate of Birth indicating the date of birth as 26 December 1960. The records submitted are original and are certified. In the case of *Iskorostinkaya Svetlana & another v Gladys Naserian Kaiyoni*, High Court Misc. Appl. No.39 of 2019 and *Kenya Ports Authority v Modern Holdings (EA) Limited* [2017] eKLR Civil Appeal No.108 of 2016 the court relied on the original records submitted and certified as such.
 27. The respondents submitted that the retirement notice and compulsory retirement leave were issued by the TSC. The TSC as the employer is not a party herein. According to the claimant, he was employed by the TSC in the year 1980 and later he was seconded to the 2nd respondent in February 2016.
 28. The claimant submitted two identity cards. One was issued in the year 1979 and another in the year 2003 and both indicated the year of birth as 1959. The claimant only discovered his identity card had an alleged error in the year 2018. This was a year before retirement. He only moved to seek to change his date of birth just before the due retirement date and should not be allowed to benefit from the same.
 29. The respondents submitted that the claimant filed suit and also an application seeking interim orders which were allowed. In the interim, the 1st and 2nd respondents held elections in March 2021 and new officials were elected. The office of the claimant is occupied by another elected official of the 2nd respondent.
 30. The claim for salary arrears from July 2019 to date has no merit, there are no arrears and the claim should be dismissed.

Determination

31. The issues for determination are whether the claimant was properly retired by the respondents and whether the remedies sought should be issued.
32. Before delving into the issues highlighted, it is worth noting that the claim was filed in the year 2019 but has not been concluded for one reason or the other. The claimant was heard in the absence of the respondent on 24 May 2023 and the matter was reserved for judgment. Through an application dated 28 August 2023 the respondents sought to be heard and on a good basis, the court allowed the respondents more time for this purpose.
33. The court cannot be blamed for the delay in hearing this matter. Despite the change in the Judges presiding, the parties have not been diligent.
34. What this had done is to allow the claimant to enjoy interim orders issued on 30 May 2019. That pending hearing and determination of the claim, the claimant should not be forced into retirement.
35. In his Memorandum of Claim and Amended Memorandum of Claim, the claimant is clear to the extent that he was employed by the TSC in the year 1980. For employment, he submitted his national identity card and his Certificate of Birth indicating his year of birth as 1959.
36. Through his hand, the claimant applied for employment with the TSC way back in the year 1980 where he indicated that he was aged 21 years and was born in the year 1959. At the age of 21, the mind is fresh and clear and events of youth are fundamentally clear.
37. A simple arithmetic would confirm the claimant was correct when he applied to be a teacher with TSC. Being born in the year 1959, ordinarily, entry-level to school was 6 to 7 years, to the year 1965.

The primary level was ordinarily 7 years taking him to the year 1972.

Secondary leave was ordinarily 4 years taking him to 1976.

38. Taking college and training for a teacher would ordinarily be 3 to 4 years ending up being a teacher in the year 1980.

This tabulation is done generously.

39. A person born on 26 December 1960 would take a two-year backwards meaning school entry in the year 1967 and cumulatively, a trained teacher in the year 1982. This does not coincide with the claimant's tabulation of years taking him to apply with TSC while aged 21 years as of 1980. His arithmetic does not serve him justice.

40. The claimant only applied to change his date of birth in March 2018. At the time, he was still registered with the TSC as a teacher. The claimant was elected as an official of the 2nd respondent. He acknowledges that such a position was held until the due retirement age, removal from office, or through an election.

The employer thus remained the TSC.

41. The employer and TSC are the legal custodians of all work records under Section 10(6) and (7) of the Employment Act, 2007 read together with Section 74 of the Act. As the custodian of work records, the claimant was issued with the notice of retirement by the employer and not the respondents. The respondents were only triggered into action by the employer's notices concerning the retirement age.

42. The claimant has not enjoined the TSC herein as a respondent. The notices he has relied upon to commence these proceedings arise from the TSC and are basis on which the respondents issued the requisite notices of retirement and terminal leave. The sole entity that could verify the employment status of the claimant and hence allow him more time to serve under the seconded role with the respondents is the TSC. To move outside the employment negates the entire claim

43. The claimant has relied on the case of Erastus Mwaniki Githinji v Judicial Service Commission, cited above, but his case and that referenced are based on different facts. On the one hand he asserts a retirement date changed a year before retirement year whereas in the other case, the year of birth and retirement remained constant over the years.

44. In the case of Ouma v SGA Mombasa Limited, the court held that an employee cannot purport to unilaterally change the date of birth so as to affect the date of retirement without the approval of the employer. The purpose of work records is to give the employer certainty in structuring its systems including the allocation of the retirement date and the attendant benefits.

45. In this case, the TSC through a letter dated 18 March 2019 confirmed that the claimant was born in the year 1959 and the date of retirement is 1st July 2019.

This letter was not challenged at all.

46. The TSC issued the claimant notice dated 15 March 2019 on compulsory retirement on age grounds. The notice was to serve as the basis for tabulation of terminal dues.

47. The court finds the notices issued to the claimant concerning his retirement age, and compulsory leave towards retirement are all based on his work record with the TSC, his employer. TSC is not a party herein. The suit against the respondents, although these were paying him, they are only interested parties.

48. Accordingly, with the claimant having attained his retirement age, and notices issued by the employer, he cannot claim a salary beyond 30 June 2019.

49. The claimant enjoyed interim orders herein and his elected office has since reverted to the 2nd respondent. He cannot justify the claim in costs. Each party bears its costs.

50. Accordingly, the claim herein is dismissed. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29TH DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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