



**Mwilitsa v Attorney General (Employment and Labour Relations Petition
E182 of 2023) [2024] KEELRC 13293 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13293 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E182 OF 2023
AN MWAURE, J
NOVEMBER 27, 2024**

BETWEEN

ALBERT MWILITSA PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a petition dated 18th September 2023.

Petitioner's case

2. The Petitioner avers that he was employed as an assistant secretary in the Ministry of Local Government.
3. The Petitioner avers that he was later appointed as a District Officer and ultimately elevated to the rank of District Commissioner.
4. The Petitioner avers that he resigned on or about 22nd August 2012 to vie for a political seat.
5. The petitioner states that he worked for 17 years, qualifying for pension, as the requirement is one needs to have worked at least 10 years of service.
6. The Petitioner avers that the policy that was in place has become outdated since the retirement age has been changed from 50 years then 55 years finally to 60 years.
7. The Petitioner avers that the chairman of the Public Service Commission issued a circular dated 21st October 2022 to all authorised officials.



8. The Petitioner avers that the chairman issued directives stating that any civil servant who has been dismissed from service, regardless of the circumstance, should be entitled to their benefits, including pension. The same applies even to those who served for less than ten years.
9. The Petitioner avers that he pursued the matter with the Ministry of Interior and National to no avail.
10. The Petitioner avers that he was informed that the interpretation of the circular only applied to those who left service from 2018 onwards, which meant that he does not qualify for the benefit, having left service in 2012.
11. The Petitioner avers that it amounted to discrimination against him since he worked for the government for 17 years.
12. The Petitioner prays that:
 - i. A declaration that the Respondent had violated the principles enshrined in Article 41 of the Constitution.
 - ii. A declaration that the petitioner is entitled to be paid his pension having worked for Government for 17 years.
 - iii. Costs of the petition to be awarded to the Petitioner
 - iv. Any other relief that the Honourable Court may deem just and fair to grant.

Respondent's replying affidavit

13. In opposition to the Petition, the Respondent filed a replying affidavit dated 3rd June 2024.
14. The respondent avers there was a circular Ref: PSC/ADM/13/ (28) dated 21st October 2022 issued by the Chairman of the Public Service Commission addressed to all authorised officers on the entitlement to terminal benefits on dismissal.
15. The respondent avers that the Commission issued another circular Ref: PSC/ADM/13/ (28) dated 16th December, 2022, to all authorized officers titled "Clarification on entitlement to terminal benefits on dismissal."
16. The respondent avers that it clarified the directive issued on 21st October 2022 which applied to officers who left service from 6th April, 2018, following the judgment in Obadiah Mutisya Kitonyi vs. Attorney General [2018] eKLR.
17. The respondent avers that the law is applied progressively, not retrospectively. Consequently, the circular dated 21st October 2022, excludes him from the benefits, as he resigned from service on August 22, 2022, to run for a political position.
18. The respondent avers that the Petition is an abuse of the court process and lacks merits and, therefore, be dismissed with costs.

Respondent's grounds of opposition

19. The Respondent filed a preliminary objection dated 20th May 2024 on the following grounds that:
 1. The Petition is an abuse of court process and lacks merit.
 2. The law does not apply retrospectively; thus, the circular Ref: PSC/ADM/13/(28) dated 21st October, 2022, issued by the Chairman of the Public Service Commission does not apply to



the Petitioner because he exited the service in 2012; hence, he is rightfully excluded from the said benefits.

3. In the circumstances and based on the foregoing reasons the Petition is misconceived and devoid of any merit and the orders sought should not be granted.
 4. The Petition should be dismissed with costs to the Respondent.
20. The court directed the parties to file their written submissions.

Petitioner's submissions

21. The Petitioner submitted that it is not disputed that he worked for the respondent for 17 years and based on the circular issued on 21st October 2022, which clarified that it applied to the officers who had left employment at the time of its issuance.
22. The Petitioner submitted that the circular further clarified that any provision that require persons who were dismissed from service to forfeit their pension is unconstitutional as it violates Article 41 on fair labour practices, Article 40 on protection of property rights, and Article 43 on social security rights.
23. The Petitioner relied on section 5(1), (2) and (5) of the Employment Act which provides as follows:
 - (1) It shall be the duty of the Minister, labour officers and the Industrial Court—
 - (a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and
 - (b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (5) An employer shall pay his employees equal remuneration for work of equal value.
24. Section 2 of the Pensions Act Chapter 189 Laws of Kenya defines pension office as follows:
 - a) in respect of an officer's service under the Government, an office—
 - (i) to which he has been appointed (on probation or otherwise) by the authority having power for the time being to make appointments to the service of the Government on terms which include eligibility for the grant of a pension under this Act or under any Act repealed by this Act; and
 - (ii) which he has not ceased to hold on those terms;
 - (b) in respect of other public service, an office which is for the time being a pensionable office under the law or regulations in force in that service;
25. Section 3(1) of the Pension Act provides that pensions, gratuities, and other allowances can be granted by the Cabinet Secretary, as per the Pensions Regulations, to officers who have served in the government while section 5(1) provides that every officer shall have absolute right to pension and gratuity.
26. The Petitioner cited the case of Richard Michosi Mwasura V Beverly School of Kenya Limited [2020] eKLR the court held that according to the RBA Regulations, an employee is entitled to 100% of the employer's contributions to a pension or provident fund scheme after one year of service. Since the claimant worked for one and a half years, he qualifies for 100% of the employer's contributions.



27. In conclusion, the Petitioner submitted that he is entitled to payment of pension and the petition should be allowed as prayed.

Respondent's submissions

28. The Respondent submitted that the petitioner had resigned from service in 2012 when the circular dated 16th December 2022 was issued and applied only to public servants who exited service from 2018 onwards. Therefore, the 2022 circulars cannot retroactively extend benefits to him.
29. In *Municipal Council of Mombasa V Nyali Limited* [1963] E.A 371 the court held as follows:
- “Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a Clear intention to that effect is manifested whereas if it affects procedure only, Prima-facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of Construction is only one of the factors to which regard must be had in order to ascertain that intention.”
30. The Respondent stated that the 21st October 2022 circular did not imply retroactive application, and that the subsequent clarification confirmed it was not intended for those who exited before 2018.
31. The Respondent submitted that the Petitioner's pension was subject to the *Pensions Act*, which defined his benefits based on 17 years of service and there is no proof that the Petitioner was denied any legally owed benefits at that time.
32. In *Teachers Service Commission V Wanjiku Munyao* [2021] eKLR the Court of Appeal affirmed that the claimant cannot request additional benefits beyond the laws and policies in place when their employment ended.
33. The respondent submitted that the petitioner failed to give evidence that his rights under Article 41 of the *Constitution* were infringed. The issuance of new circulars after his resignation does not violate his rights, especially since those circulars are not applied retroactively.
34. In the case of *Joseph Mutuura Mbeeria and another V Cabinet Secretary for Education, Science and Technology and others* [2014] eKLR, the court held that for a claim under Article 41 to be successful, the claimant must demonstrate that their labour rights were violated due to unfair treatment, coercion, or the denial of benefits they were entitled to at the time of termination. The burden of proof rests on the Petitioner.
35. The respondent submitted that the principle of legitimate expectation occurs when a public body, through a clear and consistent promise or practice, leads an individual to reasonably expect a certain benefit or specific treatment.
36. In the case of *Communication Commission of Kenya and 5 others v Royal Media Services Limited and 5 others* [2014] eKLR, the Supreme Court of Kenya emphasized that for legitimate expectation to arise, the representation must be clear, unambiguous, and without qualifications.
37. The respondent submitted that the Petitioner's claim of legitimate expectation based on 21st October 2022 circular is without merit. The subsequent circular, issued within two months, explicitly excluded



those who left the service before 2018, undermining any reasonable reliance the Petitioner may have had.

38. The respondent submitted that the Petition is baseless, lacks merit, and should be dismissed with costs.

Analysis and determination

39. The main issue for determination is whether the Petition herein is merited.

40. Section 68(4) of the Public Service Act provides as follows:

“Subject to any law or such agreement as may be in force, a public officer who is dismissed shall forfeit all rights or claims to a pension, gratuity, annual allowance or other retiring award, and any rights or claims that the public officer enjoys in regard to leave or passages at the public expense”

41. In *Francis Bundi Kimathi V National Security Intelligence Service* [2016] KEELRC 766 (KLR) the court held that the Claimant’s resignation was voluntary and that he was not entitled to retirement benefits under the *Pensions Act*.

42. In this instant case, the Petitioner admitted that he resigned from his position to vie for a political seat in 2012. The petitioner was not terminated and the two circulars issued by the respondent dated 2nd October 2022 and December 2022 respectively did not apply to him as it dealt with persons who were terminated or dismissed.

43. The petition is confusing because the Petitioner resigned voluntarily and was not dismissed. Even if the circulars which were issued were applicable which the court finds are not applicable as they were issued long after he resigned the same applied to civil servants who were dismissed.

44. The Petitioner has not tendered evidence to establish from the date he resigned on 22nd August 2012 he pursued his pension dues. There is no such evidence.

45. The court finds this petition which was filed on 8th September 2023 is not merited and did not need to be filed in court. If Petitioner was entitled to the pension he should have followed the same when he resigned.

46. The petition is therefore unmerited and dismissed accordingly.

47. Each party will meet their respective costs.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article



159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

