



REPUBLIC OF KENYA



KENYA LAW
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**Omulo v Attorney General (Cause 694 of 2019)
[2022] KEELRC 12931 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 694 OF 2019
MA ONYANGO, J
OCTOBER 25, 2022**

BETWEEN

EVERISTE OMULO CLAIMANT

AND

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Claimant is a retired civil servant. He was originally employed by the defunct East African Community in 1970. Upon the collapse of the Community his services were taken over by the Government of Kenya in 1977 and he was deployed to the Pensions Department in the Ministry of Finance, where he worked until 2000.
2. On or about 8th October 1999 a cheque leaf serial no. 0002036 for Kshs.229,612.70 in favour of the Director of Pensions disappeared from the Pensions Department while in the custody of the plaintiff.
3. A fake cheque with similar particulars but the name of the payee altered was later presented to the KCB and one Samson Odando Obor attempted to withdraw the same from the bank.
4. Both the Plaintiff and the said samson odando obor were arrested and charged in Nairobi Chief Magistrates Criminal Case No. 2819 of 1999 with the four counts being:
 - a. Stealing contrary to Section 2755 of the *Penal Code*.
 - b. Forgery contrary to Section 349 of the Penal Code.
 - c. Uttering a false document contrary to Section 353 of the Penal Code.
 - d. Attempting to obtain the above stated amount from one Samuel Kuloba.
5. While the case was pending in Court, the Respondent commenced disciplinary process against the Claimant. On November 29, 1999, the Claimant was interdicted on half salary.



6. By letter dated April 26, 2000 the Claimant was issued with a letter of notice to show causes why disciplinary action should not be taken against him for causing the disappearance of the cheque which was subsequently banked in the account of an unauthorised person.
7. The Claimant responded to the show cause letter denying any involvement in the fraudulent disappearance and banking of the cheque. He denied any knowledge of the person who banked the cheque and explained that having submitted the details of the cheque in the schedule to the Central Bank it was not practical to apply the cheque in any other person's name without the Central Bank detecting the same.
8. By letter dated July 17, 2000 the Respondent informed the Claimant that a decision had been made to retire him under the 50 years rule but he had the option to apply for voluntary early retirement. By his letter dated July 24, 2000 the Claimant opted for voluntary early retirement. The same was accepted by letter dated July 25, 2000 and he was subsequently retired.
9. The judgment in the criminal case was delivered on September 5, 2000 after the Claimant retired. He was acquitted of all the charges against him. Following the acquittal the Claimant filed the instant suit originally as High Court Civil Case No. 553 of 2012. The suit was later transferred to this Court in October 2019.
10. In the plaint dated November 5, 2012 the Claimant avers that he was forced to retire by the Respondent after being threatened that he would lose all his benefits should he be convicted. That by deliberate confusion the Respondent robbed him of some years of service.
11. The Claimant further accuses the Respondent of wrongful arrest without probable cause, wrongful confinement in custody, malicious prosecution, interdiction and premature retirement.
12. He seeks the following orders: -
 - i. A declaration that retirement under the 50 year rule was, and still is null and void.
 - ii. Lifting of interdiction.
 - iii. Accrued monthly salaries and due allowances until proper and lawful retirement.
 - iv. Damages
 - v. Cost of rehabilitation of children and family.
 - vi. Costs and interest on c, d and e.
 - vii. Any other remedy that this Honourable Court may deem fit.
13. The Respondent filed a statement of defence dated 28th November 2012. It denies the averments in the plaint and states that the Claimant was arrested, charged and tried in the criminal case lawfully and without malice. That this was in execution of a statutory duty after a complaint was made to the police and thorough investigations conducted consequent to which reasonable and probable suspicion against the Claimant was drawn.
14. The Respondent further avers that the Claimant opted to retire voluntarily under the 50 year rule.
15. At the hearing the Claimant testified that he sued the Ministry of Finance for retiring him maliciously without complying with the [Public Service Commission Act](#). That he was 46 years old at the time of retirement.



16. He testified that he was charged in the Magistrates Court but was acquitted. That when he went back to Treasury for reinstatement after acquittal he was informed that he was 50 years old.
17. Under cross examination the Claimant the reason for his interdiction was that he stole. That he was interdicted after he was charged in Court with five counts.
18. He stated that he was given notice to retire under Regulation 46 of the Code of Regulations within 21 days. That he did a letter dated July 24, 2000 opting to retire early. That he was forced to sign the retirement letter and that is why he appealed.
19. For the Respondent RW1 kenneth odhiambo, a Deputy Director Human Resource, Management and Development stationed at National Treasury testified that the Claimant was charged with an offence involving fraud after the Director of Pensions reported that a cheque belonging to the Pensions Department was deposited into a fraudulent account.
20. Upon this discovery the Claimant was interdicted and an opportunity given to him to show cause why disciplinary action should not be taken against him. He responded. That while the process was going on, the Claimant opted to retire on his own volition.
21. RW1 testified that the Claimant appealed against the decision to retire him after he was acquitted. The appeal was declined on grounds that he retired voluntarily and was receiving pension.
22. He testified that the reliefs sought by the Claimant are not available as he is no longer an employee of the Public Service Commission.
23. He denied that there was coercion or inducement to retire and insisted that the Claimant retired voluntarily.

Analysis and Determination

24. I have considered the evidence on record and the submissions filed. There is no dispute that the Claimant was interdicted following the loss of a cheque that was in his custody. There is further no dispute that the Claimant was charged in the Chief Magistrates Court with four counts being: -
 - a. Stealing contrary to Section 2755 of the Penal Code.
 - b. Forgery contrary to Section 349 of the Penal Code.
 - c. Uttering a false document contrary to Section 353 of the Penal Code.
 - d. Attempting to obtain the above stated amount from one Samuel Kuloba.
25. After the hearing of the case, he was acquitted of all the charges under Section 215 of the Penal Code.
26. The issues for determination are the following:
 - i. Whether the Claimant retired voluntarily or was induced or coerced to retire;
 - ii. Whether the Claimant is entitled to the reliefs sought.

Did the Claimant retire voluntarily?

27. Following the Claimant's arraignment in Court he was interdicted by letter dated November 29, 1999. The letter of interdiction does not give any reasons for the same.



28. By letter dated April 26, 2000 the Claimant was required to show cause why disciplinary action should not be taken against him. The letter is reproduced below –

“ 26th April 2000

Mr. Everiste Omulo

Thro’

The Director pensions Department

O. Box 20191

Nairobi

Dear Sir,

Discipline

It has been reported that you were involved in the loss of a- National Bank of Kenya cheque leaf S/No. 0002036 for Kshs.229,612.70 in favour of the Director of Pensions which disappeared from the Pensions Department sometimes in October 1999.

Information available in this office indicates that you received this cheque in the course of your duties on 8 October 1999 and issued acknowledgement receipt for the same.

According to standing regulations you were then supposed to have recorded receipt of the cheque immediately in the office records but you did not. This therefore means that you illegally retained. The cheque in your possession with ulterior motives.

The same cheque was later found to have been fraudulently banked in the account of an unauthorised person presumably with your knowledge and assistance.

Arising from the above, it is evident that you were directly responsible for the disappearance of the cheque and its subsequent fraudulent banking which apparently arose due to negligence and/or deliberate action on your part.

Your aforesaid actions clearly demonstrate that you have misconducted yourself towards your employer and by so doing contravened a fundamental condition of your employment as Senior Clerical Officer (Accounts).

In view of the foregoing your continued retention in the service is untenable. Consequently this office intends to recommend for your dismissal from the service on grounds of negligence and gross misconduct. However before this is done you are hereby called upon to show cause why the contemplated action should not be taken. Your representations if any, should be received here within twenty one (21) days from the date of this letter failure to which the aforesaid action will be taken without any further reference to you.

Yours faithfully,

Signed

D. I. Munoko (Mrs)

For: Permanent Secretary”

29. The Claimant responded to the letter by his letter of 8th May 2000 as below:

“ Pensions Department



Box 20191

Nairobi

8th May 2000

Permanent Secretary

Ministry of Finance & Planning

Box 30007

NAIROBI

Thro'

Director of Pensions

Pensions Department

O. Box 20191

Nairobi

Dear Madam

Re: Discipline

I have received your letter Conf/Tep 70061709(5) dated 26th April 2000. The contents of which I have carefully studied.

There were 300 cheques I received that day and as a general routine I banked and issued receipts for them except the cheque in question. There was no ulterior motive as it was already in records vide the acknowledgement letter to the P.C., Nairobi. Illegal retention does not arise as the cheque had a schedule already in the Central Bank monitoring its movements and whereabouts – It is not practical to apply the cheque in anybody's name without the schedule in Central Bank to detect so. As one who has handled these cheques for over 20 years, It is not a motive in me I imagine to have.

The unauthorized person was acting on his own intention without my knowledge because the Police is the one who came and alerted me of thecheque stolen. You are right in using your word "presumably". There was no assistance I gave, as I had never seen the man in my life. If he knew me he would have informed the Police who arrested him that very day of who gave him the cheque.

These cheques never stay on my table even overnight. The man who stole the cheque from me must have timed for it in advance most certainly when I was processing them for banking. In an open office, which in addition to receiving cheques I also receive all Pensioners and inspecting my cheque registers – I cannot rule out insecurity of the cheques.

This is the only cheque lost since 1996 July when I took over office and it was a bizarre incidence. In my 30 years' service I have not reported of such matters. - My employer saw the valiant service I gave her during my tenure of this office. It is my humble plea that you keep my dismissal from service in abeyance as I have worked very hard in office for now a generation of period.

Yours faithfully

Signed



Evariste Omulo
P/No. 70061709”

30. Following his response, the Respondent addressed the Claimant as follows –

“ 17th July, 2000

Mr. Everiste Omulo

Thro’

The Director of Pensions,

Pension Department,

Nairobi

Dear Sir,

Retirement From The Service Under The 50 Year Rule

According to records held in this office you are currently 50 years old.

In view of the above your retirement from the service under the 50 years rule is being considered in accordance with regulation G.46 of the Code of Regulations. Let us, therefore, have representations of a personal nature, if any towards the intended action.

Alternatively you are reminded that you may voluntarily opt to retire from the service under the 50 years rule through a letter addressed, to this office to that effect.

Your response should be received here within 21 days from the date of this letter.

Yours faithfully’

SIgned

D. L Munoko (mrs)

For: Permanent Secretary”

31. Before the Claimant was issued with this letter, the Claimant’s case had been presented to the Ministerial Human Resource Advisory Committee on 7th June 2000. The committee deliberated on the Claimant’s case and recommended that he be retired under the 50 year rule. (Refer to paragraph 7 of the Respondent’s replying affidavit sworn by K. A. Odhiambo on November 7, 2013.

32. Regulation G46 of the Code of Regulations under which the Claimant was retired provides as follows –

“ an officer on attaining the age of 50 years may elect to retire any time thereafter or may be required to retire by the government anytime thereafter, without assigning any cause”

33. It is clear from the foregoing that the retirement of the Claimant was the outcome of a disciplinary process arising from criminal offences that he was eventually acquitted of. From the content of the judgment in the criminal case which is appended to the plaint, it is clear that the Claimant was innocent of the charges.

34. As explained in both the judgment and in the Claimant’s response to the show cause letter, he had nothing to do with the disappearance of the cheque.



35. As stated by the Claimant, he had been informed by the Respondent that should he be convicted he would lose all his retirement benefits. This threat of loss of his retirement benefits for an offence he did not commit was the inducement for of the Claimant's option to retire under the age of 50. The decision to retire was therefore not voluntary. It was in actual fact a constructive dismissal to avoid loss of his terminal benefits. Indeed the fact that the Claimant appealed against the decision to retire him under the 50 year rule is evidence that he did not retire voluntarily.
36. I therefore find that the Claimant's option to retire under the 50 year rule was not voluntary and declare accordingly.
37. Is the Claimant entitled to the reliefs sought? I will consider each of the prayers hereunder:

i. Lifting of Interdiction

38. The prayer cannot be granted as the interdiction was lifted upon the Claimant's option to retire early. An interdiction is only available while an employee is in employment. Once employment ceases the interdiction also ceases. There is thus no existing interdiction to be lifted. The prayer therefore fails.

ii. Accrued monthly salaries and allowances until proper retirement

39. The Claimant would only be entitled to this head had he been reinstated. Having not been reinstated, the prayer fails as the Claimant cannot be paid salary for a period when he did not work and when he was drawing pension.

iii. Damages

40. The disciplinary process which led to the recommendation that the Claimant be retired under the 50 year rule was unlawful as it was based on an offence that was pending in Court and for which he was absolved by the decision of the Court. Had the Respondent waited for the Court's determination, the situation giving rise to this suit would not have arisen.
41. I therefore find that the Claimant is entitled to damages which I award him for the constructive termination of his employment by the Respondent. I award him an equivalent of 12 months consolidated salary taking into account all the circumstances of the case, the loss of income for five years, the arrest and incarceration, going through the criminal trial and reduced retirement benefits he is receiving as a result of his early retirement.

iv. Cost of Rehabilitation of Children and family

42. The Claimant did not adduce any evidence to support this claim. There is no evidence that his children and family require rehabilitation. In any event this would be too remote for the Respondent to be held liable for the same. I find that this prayer is not proved and dismiss the same.

v. Costs and Interest

43. Having represented himself and taking into account the length of time that the case has taken from the original date of filing in November 2012, I award the Claimant Kshs.80,000/- to cover reasonable expenses and disbursements related to and incidental to the case.
44. Interest shall accrue on the damages and costs at Court rates from date of judgment.



45. Both parties are to tabulate and file in Court the compensation awarded herein within 21 days. The case will be mentioned on a date to be fixed at the time of judgment for parties to confirm the compensation payable.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF OCTOBER, 2022.

MAUREEN ONYANGO

JUDGE

NAIROBI JUDGMENT ELRC CAUSE NO. 694 OF 2019 10 |

