



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 16 OF 2019

HAFIDHI MUHSIN.....CLAIMANT

- VERSUS -

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd April, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 21.03.2019 through Oduor Simiyu & Company Advocates. The claimant filed the amended memorandum of claim on 29.09.2020 and prayed for judgment against the respondent for:

- 1) A declaration that he was unlawfully retired earlier than he ought to have been retired before attaining the age of 60 years,
- 2) The respondent to pay the claimant terminal dues amounting to Kshs. 1, 374, 869.20.
- 3) Costs of the suit and interest thereon at courts rate.

The claimant's case is as follows:

- 1) The claimant was employed by the respondent on 20.06.1980 and was born on 09.09.1958 and was therefore set to retire in August 2018. However, contrary to expectations, the respondent retired him on 30.06.2018 while earning a salary of Kshs.65, 550.00 and was given a commuted pension gratuity (lump sum) of Kshs. 3, 198, 924.80 by which time he had not attained retirement age.
- 2) The claimant held the designation of senior head teacher and as per the CBA of 01.07.2018 to 30.06.2019 he was entitled to a salary of Kshs.80, 242.00 hence he was entitled to a commuted pension gratuity of Kshs.4, 573, 794.00 (No. of months worked/480 x Annual Basic Salary x $\frac{1}{4}$ x 20) if he had retired at the correct age on August 2018.
- 3) The respondent refused to correct the date of retirement despite several reminders hence the claims made.
- 4) The claimant claims that he has lost Kshs.1, 374, 894.20 in pension, Kshs. 160, 484.00 being salary arrears for 2 months, Kshs. 56, 000.00 being house allowance for 2 months and Kshs. 24, 000.00 being commuter allowance.

The respondent filed the memorandum of response on 17.05.2019 and the amended memorandum of response on 15.10.2020 through Oyucho Timon Advocates. The respondent admitted that the claimant was employed on 20.06.1980. The employment was on temporary terms until 01.01.1992 when he was placed on permanent and pensionable terms of employment having qualified as a professional teacher upon successfully undergoing a Primary Teacher 1 (P1) in service course. The respondent further stated that the claimant was born on 01.07.1958 and not on 09.09.1958 as alleged and stated that his retirement date was indeed 30.06.2018 and not August 2018. The retirement was in accordance with the law. The respondent stated that upon retirement on 30.06.2018 the claimant was fully paid and the respondent denied allegations of premature retirement and alleged no full payment. Further, after 30.06.2018 the claimant left service – he did not continue in service as alleged. The respondent further stated that the respondent relies on the internal memo dated 19.09.2018 without explaining how he obtained it. The internal memo is dated 19.09.2018 from the respondent's acting Senior Deputy Director (Pensions) to Assistant Deputy Director (Legal) about the claimant's date of birth having been captured as 01.07.1958. The internal memo further stated that the claimant had submitted a birth certificate dated 03.04.1978 declaring his date of birth as 09.09.1958 in march 2018 as per circular Ref. No. DPM/7/7/43A VOL.1V/ (125) dated 15.11.1982. The internal memo concluded thus, **"In the foregoing, it is prudent to allow him serve for the two months to avoid legal battles on date of birth."**

The respondent prayed that the suit be dismissed with costs.

The claimant opted to rely on the documents filed for parties and the pleadings on record. The respondent's witness (RW) was Maureen Mollet Atieno Sango, Respondent's Director for Pension Division. Final submissions were filed for the parties.

The **1st issue** for determination is whether the claimant's date of birth is 01.07.1958 as relied upon by the respondent or 09.09.1958 as urged for the claimant. The claimant relies on the documents filed and offered no oral evidence. By consent, all documents filed for parties were admitted in evidence. The claimant's certificate of birth was given on 20.07.1982 pursuant to the Births and Deaths Registration Act. The certificate states, **"This certificate is issued in pursuance of the Births and Deaths Registration Act which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Registrar-General shall be received as evidence of the dates and facts therein contained without any or other proof of such entry."** The informant to the entries in issue is indicated in the certificate to have been the claimant's father. That certificate states that the claimant was born on 09.09.1958. The Court easily and readily returns that the claimant's date of birth was on 09.09.1958 per the statutory certificate of birth. While making that finding the Court follows its holding in **Republic –Versus- Judicial Service Commission & 2 Others Ex-parte Erastus M. Githinji [2019] eKLR**, **"Thus the Court presumes that the applicant birth certificate is the true evidence of the dates and other facts it declares and the officer who issued the certificate had the authority to issue it and he issued the certificate relying on the entries in the register and such useful and relevant information."**

The **2nd issue** for determination is whether the respondent acted unfairly or unlawfully in retiring the claimant effective 01.07.2018 instead of effective 09.09.1958. RW testified that in the application for registration and employment as a teacher on 01.04.1980, the claimant declared his date of birth as 1958. The respondent applied that date in the records of the claimant's employment. By circular No.2 of 15.11.1982 an employee's official date of birth is the one declared by the employee on the application form for application for employment and not the date shown on the employee's national identity card or any other document procured by the employee after date of first appointment. RW testified that from practice a date captured in the employment application form cannot be changed unless upon production of a birth certificate issued before 15.11.1982 as per circular No. DPM 7/7/43A Vol. IV/ (125) dated 15.11.1982 issued by A.K. Kandie, Permanent Secretary and Director of Personnel Management. RW further testified as follows:

- a) In the application for employment form and another form for registration as a teacher both completed on 01.04.1980 and the claimant stated that he was born on "1958".
- b) The claimant's certificate of birth dated 20.07.1982 was brought to the respondent's attention around 10.08.2018 after he had already retired effective 01.07.2018.
- c) The respondent's Code of regulations at regulation 11(2) on the date of birth states that the date of birth acceptable to the Commission is the date the applicant has stated in the application form for employment, and, where there is doubt, the Commission shall require proof of the date of birth, and for that purpose the Commission shall require proof of the date of birth, and for the 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 15th November, 1982. The birth certificate that the claimant submitted had not been certified as provided in the regulation.

The Court has considered the dispute in the instant case. It is clear that under the said regulation 11(2) required the claimant to submit a certified copy of his birth certificate to verify his date of birth. Clause 6 of the letter of appointment incorporated the respondent's code of regulations in the contract of service between the parties. The Court finds that the material on record does not show that the claimant submitted the certified birth certificate to the respondent prior to the retirement date to clarify and remove doubt about his date of birth. The Court has considered the claimant's letter dated 05.03.2018 to the respondent requesting the respondent to adjust the retirement date as per attached documents. The letter enumerates attached or enclosed pay slips. It does not enumerate and say it is attaching a certified copy of the claimant's birth certificate. The claimant had been notified by the notice dated 16.01.2017 about his looming retirement but he failed to comply with the requirements of the relevant regulation to remove any doubt about his exact date of birth. The claimant then failed to testify in Court on veracity of his birth certificate and the time he may have brought to the attention of the respondent about the certificate and the date of birth therein. The Court finds that in absence of any other material before the Court, the claimant notified the respondent about the certificate of birth long after he had retired as testified by RW.

RW testified that by the circular Ref. No. 10/2014 dated 01.07.2014, it was conveyed by the respondent that the respondent had been retiring teachers in batches corresponding with start of school term, that was 1st January, 1st May and 1st September of each year. Further by circular Ref. OP/CAB.2/7A of 14.02.2014 the Government had discouraged retention of officers in the service beyond retirement dates due to unsustainable wage bill. The circular therefore directed that from 01.01.2015 and in adherence to the new Government directive, the respondent will retire teachers on the dates they attain 60 years of age whether it will be in the middle of the terms or otherwise. The circular stated thus, **"This therefore means that the teachers' birthday will be the retirement date."**

The pertinent issue is, the claimant having not complied with the respondent's regulation 11(2) on providing a certified birth certificate to guide on his date of birth, how did the respondent arrive at the retirement date as effective 01.07.2018? RW testified as follows, **"In old practice, a teacher failing to declare exact date of birth was presumed born on 1st July therefore retiring on 1st September – so that the claimant would have retired on 1st September 2018. In view of the circular of 01.07.2014 his retirement date was to be 01.07.2018 because he had not specified date of birth. If one did not declare date of birth the practice was that he is presumed born on 1st July. The rationale is due to budgetary planning process and to factor in placement and recruitment that occurred - by March we need to know. So I say he was presumed born on 1st July 1958 so that per circular his last day at work at 60 years was 30.06.2018. So he was retired effective 01.07.2018. It was fair He was paid June 2018 salary in full."**

In cross-examination RW was shown the claimant's pay slips showing that he would retire on 30.06.2018 and RW clarified that the discrepancy occurred prior to the circular of 01.07.2014 stating that retirement date would be on the birth date upon attaining the 60 years of age. The ones prior to the circular placed the claimant's retirement date at 31.08.2018 because having stated birth date as simply "1958" and

no exact birth date, under the old practice he would have been presumed born on 01.07.1958 and therefore deemed to retire at the beginning of third term on 01.09.2018. The respondent had implemented the circular of 01.07.2014 in July 2016 and from that month onwards, the claimant's pay slips showed the retirement date as 30.06.2018.

The Court has considered the coherent evidence by RW and returns that there is no reason to doubt the evidence by RW. The Court finds that the claimant failed to provide (prior to retirement) the certified copy of his birth certificate to remove any doubt in his date of birth as envisaged in the relevant regulation 11. The Court finds that under the prevailing practice the respondent properly presumed the claimant to have been born on 01.07.1958 and as per the prevailing circular of 01.07.2014, the respondent correctly presumed that the claimant was to retire effective 01.07.2018 per the Government policy on retirement upon attainment of the 60th birthday. The evidence is that it was long after retirement on 01.07.2018 that the claimant wrote the letter of 10.08.2018 appealing against the retirement and attaching the birth certificate. The Court finds that the claimant presented the certificate belatedly (having received due notice to retire in advance but failed to present the certificate of birth to urge his case per regulation 11). The Court returns that the effective date of retirement of 01.07.2019 as decided by the respondent was not unfair or unlawful in the circumstances of the case.

While making that finding, the Court has considered the claimant's submission that the respondent did not ask the claimant to provide the certified copy of the birth certificate as envisaged in regulation 11 (2). In urging as much the respondent cited **Republic –Versus- Judicial Service Commission & 2 Others Ex-parte Erastus M. Githinji [2019] eKLR**, where the Court stated, **"The 1st and 2nd respondents have not shown that they ever asked the applicant to make a clarification about his date of birth and instead it is urged for them that it was his duty to notify about his date of birth – and the Court considers that it would be unjustified and unfair for the respondents to shift their statutory obligation and make it the applicant's burden."** The Court has considered the circumstances of that case and returns that they were entirely different. In that case the applicant had declared to the respondents his date of birth including in declarations he had made under the Public Officer Ethics Act and which Act vested upon the 1st respondent the duty to seek clarifications on the declaration made by the applicant but such clarification had not been sought and obtained. Such situation to seek statutory clarifications has not been shown to arise in the instant case as was in the cited case.

The claimant has exhibited internal memo dated 10.08.2018 showing that some internal opinion was that the claimant's age had to be rectified but the complete deliberations about that opinion are not exhibited. The claimant having not testified as to how he obtained the internal memo dated 10.08.2018, the Court finds that the evidential probative value of the memo (which states that the claimant had submitted his birth certificate on dated 03.04.1978 declaring his date of birth as 09.09.1958) is open to doubt and is highly questionable. In particular, the Court upholds the respondent's submission that the internal memo amounts to a public document as per section 79 of the Evidence Act Cap. 80 Laws of Kenya and under section 80 of the Act the same ought to have been certified by the respondent's officer who gave it out to the claimant as a true copy held in the respondent's records. Further and more pertinent to this case, the internal memo exhibited for the claimant states that the birth certificate submitted by the claimant was dated 03.04.1978 whereas the copy exhibited in these proceedings show that it was given (dated) 20.07.1982. The claimant has not pleaded the date he may have submitted the birth certificate to the respondent and the respondent's evidence is upheld to the effect that the first time the claimant submitted the certificate was long after retirement and as attached on the claimant's letter appealing against the retirement dated 10.08.2018. In the appeal letter, the claimant does not say that he had earlier submitted his birth certificate. The Court finds that the claimant, for the first time, submitted the birth certificate as attached on his letter appealing against the retirement.

The respondent has fully explained by evidence before Court that the discrepancies in the pay slips the claimant forwarded by his letter dated 05.03.2018 could not justify variation of the date of retirement from 01.07.2018. With respect to that letter of 05.03.2018, the Court has already found that the claimant never mentioned his birth certificate. Now, on what basis should the respondent have required the claimant to provide his certified birth certificate and to clarify whereas the issue of date of birth in the certificate had not been raised by the claimant prior to retirement date, 01.07.2018? The Court finds that the claimant has therefore failed to establish that the respondent had a duty to ask for clarification. Further, if such duty existed as based on date of birth stated in a birth certificate and in view of the provisions of the said regulation 11, the issue never accrued at all as at prior to retirement on 01.07.2018, because, the claimant had not brought to the respondent's attention the fact of existence of his birth certificate and the date of birth stated therein. The Court however finds that the respondent failed to officially respond or reply to the claimant's letter dated 05.03.2018 and considers that on that account, each party will bear own costs of this suit. It is the Court's view that if the respondent had promptly replied the letter and prior to retirement (effective 01.07.2018) explaining to the claimant why that was the proper retirement date, then, probably the suit would not have been filed or the claimant would have presented his certified copy of birth certificate prior to retirement date.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court has found that in the circumstances, the claimant was properly retired effective 01.07.2018. It is also clear that as urged for the respondent, after 01.07.2018, the claimant left the work place and never worked for the respondent. In the circumstances he is not entitled to the salary and pension dues flowing for the period 01.07.2018 to 09.09.2018 or 01.09.2018 as alleged. The claimant's submissions have not made justification for any award based on alleged breaches of the CBA. The Court has already found that for the reasons earlier stated in this judgment each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for the dismissal of the suit with orders that each party to bear own costs of the suit,

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 23RD APRIL, 2021.

BYRAM ONGAYA

JUDGE