



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.145 OF 2017

PETER KIMEU NGUI.....CLAIMANT

VERSUS

CATHOLIC RELIEF SERVICES.....RESPONDENT

JUDGMENT

1. The Claimant was first employed by the Respondent Company in January, 1980. He retired in the year 2006, but was subsequently employed under various yearly fixed term contracts between October 2006 to December 2014. Upon the expiration of the employment contract in 2014, the Respondent retired from employment.

2. The claimant in his memorandum of claim dated 27th January, 2017 says he was an employee of the Respondent from January 1980 to 2014.

3. The Claimant says that he was not paid provident fund from the year 2006 upto 2014. He also says that severance pay was wrongly calculated by the Respondent. The Claimant avers that the Respondent is in blatant breach of the Constitutional right of the claimant to fair labour practices.

4. He contends that the Respondent is not cognizant of mandatory statutory stipulations. The claimant avers that as a result of the foregoing he has suffered loss and is therefore entitled from the Respondent to the following;-

a. A declaration that the claimant did not retire on 2006 at all.

b. An order of payment to the claimant for the pecuniary loss suffered as a result of the wrongful termination of contract comprising of;-

i. Severance pays..... Ksh3,599,566.54/=

ii. Provident Fund.....Ksh 14,930,044.82/=

c. An order for General Damages

d. An order for payment of costs.

e. Interests on (b), (c) and (d) at court rates from date of filing to payment in full.

f. Any other relief the Court deems fit.

5. The Respondent in their response dated 9th March, 2017 admits having re-employed the Claimant from February, 2006 when he retired having attained age of 55 years.

6. The Respondent avers that following the Claimant's attainment of retirement age, on the 28th February 2006 the Respondent paid to the claimant all his accrued severance pays in the sum of ksh 3,249,097.00 less statutory deductions.

They says they subsequently re-engaged the Claimant on post-settlement fixed terms from March, 2006 to December, 2014.

7. The Respondent says that during the Claimant's fixed term contracts post retirement and solely based on the Respondent's goodwill and without any legal requirement, the Respondent made the decision to pay the claimant severance pay equivalent of fifteen days (15) for each year worked paid on pro rata basis effective 1st March 2006. The permanent term contract and fixed terms contract are produced in court.

8. The Respondent avers that after completion of the Claimant's last fixed term contract in December 2014, the Respondent once again recomputed his severance pay using the aggregate period of thirty (35) years from the year 1980 to the year 2014 based on the claimant's last salary as at December 2014. The Respondent says that the claimant was paid the sum of Ksh.4, 880, 870.59/= having given credit to the sum of Kshs.3,249,970/= earlier paid in 2006.

9. The Claimant also is claiming payment of the provident fund pension amounting to Kshs.14,930,044.75/=.The Respondent says the provident fund is handed by staff pension scheme by the name Huduma Provident Fund and it has own operative rules and regulations and independent management. Claims relating to pension cannot according to the Respondent be attributed to them that is to the Respondent but should be referred to the trustees provident fund.

10. That notwithstanding the Respondent avers that under the Huduma Provident Fund Trust Deed and Rules for the year 2006 the eligibility of the members was limited to employees under full time and permanent service within the age bracket of eighteen and fifty- five years. It says that the Claimant automatically ceased to be a member of the Provident Fund as expressly provided for under clause 7 of the Trust Deed.

11. The Respondent says that upon the attainment of 55 years, the claimant ceased to be a member of the provident fund. That the Claimant upon retirement was paid all his pension dues. The Respondent says that the Claimant did not make further contributions after attaining the retirement age and the only available option to the claimant would have been to defer his notice of withdrawal whereupon the contributions could have continued to earn interest.

12. The Respondent says that after the withdrawal and re-employment of the Claimant he was given an equivalent of an employer 15% contribution to his monthly contribution to his monthly salary which was subsequently paid to the claimant upon completion of his last contract. He was paid Kshs.1,581,064/= from the Provident Fund. The Respondent says no further dues in form of pension is payable to the claimant.

EVIDENCE

CLAIMANT'S EVIDENCE

13. The Claimant adopted his witness statement and said that he is claiming Kshs.18,529,611/= as per the policy of Catholic Relief Services (CRS). He testified that this comprised of 15% of monthly salary to the retirement benefits body. He said he worked for an average of 20.6667 days in a month. The highest salary according to him was Kshs.59,9052/= which was to be divided with 20.6667 which gave his daily wage. This was to be multiplied with 15. This was also to be multiplied with 35 years giving the severance pay. He says the sums were not duly paid to him as was required.

14. The Claimant asked the court to consider that he did not retire and should therefore be paid his fund dues and benefits. He says he got Ksh.3,630,004/= severance pay in the year 2006 and 4,880,870 in 2014. The claimant maintained he did not retire in 2006. He says he was eligible to be a member of the provident fund. He is claiming a total of compensation of Kshs.18,529,611/=.

RESPONDENT'S EVIDENCE

15. **RW1** Alice Kiarie the Human Resource Manager of Catholic Relief Services adopted the statement and documents contained in the list. The witness says that the claimant having been paid the aggregate severance pay for 35 years worked, there are no further outstanding claims against the Respondent relating to the claimant's terminal dues. The sum of Kshs.3,599,566.54/= claimed by the claimant is therefore not due and there is no sum due in this case, in any event.

SUBMISSIONS

16. The Claimant did not file submissions in this matter by the mention date to confirm compliance being 18th October, 2021. The Respondent submitted that based on the Claimant's employment contract, the Respondent's terms and conditions of service and the Provident Trust Deed and Rules, the contractual retirement age was upon attainment by the claimant of the age of 55 years which the claimant attained in the February 2006.

17. The Respondent submits that to hold otherwise would be tantamount to inviting the Court to rewrite the contract between the parties and also to enter into the realm of the Trust Deed which is outside the jurisdiction of the Court for now.

18. ISSUES FOR DETERMINATION

- (1) Did the claimant retire in February, 2006 or in December, 2014.
- (2) Is he entitled to the reliefs sought.

DETERMINATION

19. The Claimant's letter of appointment dated 16th February, 1984 and signed by the Claimant states that retirement was upon attaining the age of 55 years.

20. The trust deed and rules of Huduma Provident Fund also provide retirement was the first day of the month on which the member attain 55th birthday.

21. It further goes to define an eligible employee as one in the employment of a sponsor who is at least eighteen years of age or not more than fifty years of age unless the sponsor decide otherwise.

22. The claimant had a contract with the Respondent and he signed the same.

He therefore was clear his retirement age was upon attaining the age of 55th years. The provident fund also is clear who is an eligible member of the fund i.e between 18 years to 50 years. Claimant actually said in his evidence that he requested to retire in 2006. But he thereafter insists he retired in 2014.

23. On 6th April, 2006 the Claimant signed a discharge form confirming he had received his final benefits from the provident fund.

He has not testified that he was duped or forced to sign it. He signed it voluntarily and he admits as much. The discharge reads "*being my full benefits due from the fund*".

That confirms Claimant knew what he was doing and was not coerced to sign the discharge form.

24. Furthermore the Claimant was offered various fixed contracts by the Respondent from time of retirement to 31st December, 20014.

All those contracts were for a defined period. The contracts have a clause that he was not entitled to provident fund, death and severance benefits (clause 8). The Claimant signed those contracts consistently and adhered to the terms of the contract. He cannot now come after expiry of the fixed contracts and demand those same benefits which he was well aware was not entitled to during the period he served on fixed contracts.

25. The court concurs with the sentiments of the learned Judge in the case of **ANNASTACIA N. WARUI VS BOARD OF MANAGEMENT OF ST. MARY'S SCHOOL (2018) eKLR** where the court in dismissing the claim for an alleged unlawful retirement held as follows:-

It is trite law that the court's jurisdiction is only limited to enforcing the contract between the parties and not to rewrite it. The Claimant retired at the age of 55 years as provided in his letter of appointment.

26. He received all his terminal dues and provident fund dues. The Respondent graciously offered him further employment opportunities from 2006 to 2014 and offered him post severance benefits equals to 15 days of his basic monthly salary effective 1st March, 2006. His retirement age was 28th February, 2006.

27. The court also cannot miss the clause in the Claimant's letter of contract that "*his previous employment with Catholic Reliefs Service will not be counted as part of employment hereunder for any purpose whatsoever*" paragraph 5 of 10th July, 2006 fixed letter of contract.

28. The Claimant who was a very senior employee of the Respondent and of long standing was well versed with the documents he signed over the years. He was not tricked to sign them and no duress was used. He was aware he was to retire at the age of 55 years and he admits he requested to retire in February, 2006 in his evidence in court. He thereafter signed several contracts for fixed terms with the Respondent and the terms of the new contracts were clear to him and he accepted them. He is bound by the contract and the terms therein are applicable to him and his employer as well.

29. The fixed terms contracts carry only the rights stipulated therein and no other rights can be created by the court. In the case of Registered trustees of the **Presbyterian Church of East Africa and another vs Ruth Gathoni Ngotho (2017) eKLR** the court of Appeal held that fixed terms contract carry no rights or obligations or expectations beyond the expiry of the contract. The Claimant may have wanted to have his cake and at the same time eat it. That is not possible.

30. Therefore concerning the prayer for payment of severance pay of Kshs.3,599,566/= the Claimant was paid all his severance pay upon his retirement in 2006 as far as the evidence on record show and also what more he was offered in his new contracts as follows:-

(1) Cumulative severance pay 1980 – 2014 Kshs.10,214,980.13/=

(2) Severance pay paid in 2006 Kshs.3,249,097/=

(3) Net pay Kshs.4,880,870/= which he received on 5th March, 2015 and affirmed "the above calculations are correct and amount payable Kshs.4,880,870/59 should be wired to my bank being my final dues from Catholic Relief Services Kenya".

He confirmed those were his final dues and had no other claims for services rendered to date and had no other outstanding claim against Catholic Relief Services for payments for overtime, annual leave and sick leave or any other compensation.

31. The finding in the case of **GILBERTY MUGAMBI VS MUCHIMIKURU TEA FACTORY LIMITED (2018) eKLR** where the court with the approval of the Court of Appeal decision in **COASTAL BOTTLERS LIMITED VS KIMATHI MITHIKA (2018) eKLR** held as follows:-

*The Claimant signed a discharge whose terms and effects were a waiver of all claims against the Respondent. The Court of Appeal in the **COASTAL BOTTLERS LIMITED VS KIMATHI MITHIKA (SUPRA)** ruled “in our minds it is clear the parties had agreed that payment of amount stated in the settlement agreement would absolve the appellant from any further claim under the contract of employment and even in relation to the Respondent’s termination. It is instructive to note the Respondent never denied signing the agreement or questioned the veracity of the agreement. Further from record we do not discern any misrepresentation on the import of the said agreement or incapacity on the Respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed inadequate. As it stood, the agreement was binding between the parties”.*

32. In the instant case the court is in total agreement with the findings above. All the court is left to do both in the claim for severance pay as well as provident fund pay is to give effect to the intention of the parties as provided in the discharge agreement.

33. As in the severance pay, the Claimant also signed a discharge voucher on 6th April, 2006 upon receipt of the provident fund contributions both from his employer and from himself. He conceded the payment was “*in full and granted free and perfect discharge for the said sum in according to the law*” after receiving Kshs.1,581,064/=.

34. After retirement it was clear from the provident fund rules the Claimant was not qualified to be a member of the fund and so could not benefit from the same any longer.

35. The court has considered this matter from all angles and relying on the facts, the law and the evidence finds the Claimant cannot receive his payments, acknowledge the same and even give a waiver to the Respondent and thereafter move the court for remedies beyond what is their respective contract. That route is misplaced on account of clear written and properly signed contracts and waivers.

The court finds the Claimant’s claim and prayers lack merit and are dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 4TH DAY OF NOVEMBER, 2021.

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