



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 46 OF 2019**

**JOSHUA O. OGALO.....CLAIMANT**

**VERSUS**

**KENYA NATIONAL UNION OF TEACHERS .....1<sup>st</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS,**

**KISUMU EAST BRANCH.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Joshua O Ogalo (the Claimant) was elected as the Branch Secretary, Kisumu East Branch of the Kenya National Union of Teachers (the Respondent) on 6 March 2011. The Claimant was re-elected on 11 February 2016. The term was for 5-years (was to lapse on or around 11 February 2021).
2. On 23 January 2019, the Secretary-General of the Respondent wrote to the Chairman of the Kisumu East Branch to instruct him to issue to the Claimant a 6-month notice of compulsory retirement upon attaining the age of 60 years on 1 July 2019. The Claimant was to go on terminal leave pending retirement.
3. The Branch Chairman consequently issued a retirement notice dated 28 January 2019 to the Claimant.
4. The Claimant was aggrieved and, on 21 May 2019, lodged a Memorandum of Claim with the Court wherein he started the Issue in Dispute as:  
  
Unfair and unlawful termination of employment by way of retirement.
5. At the same time, the Claimant filed a Motion under a certificate of urgency seeking orders restraining the Respondent from implementing or enforcing the retirement notice.
6. The Court granted an *ex-parte* conservatory order on the same date but, after hearing the parties *inter-partes*, declined to confirm the orders in a Ruling delivered on 5 March 2020 (other applications were also filed in the course of time).
7. Pursuant to leave, the Claimant filed an Amended Memorandum of Claim on 4 January 2021, and this prompted the Respondent to file an Amended Response on 5 May 2021 (should have been filed by 19 March 2021).
8. When the Cause came for directions on 15 June 2021, the parties proposed and agreed that the Cause be determined on the basis of the record and submissions to be filed. The Court obliged the parties.
9. The Claimant filed his submissions on 8 June 2021, while the Respondents filed their submissions on 15 August 2021.
10. The Claimant identified the Issues for adjudication as:
  - (i) Whether the Claimant elected as Executive Secretary of the 2<sup>nd</sup> Respondent on 11/2/2016 for a 5-year term pursuant to Article X – D – (1) and (4) of the Union's Constitution 2105 and could only lose his position through removal, dismissal, resignation or death?
  - (ii) Was the Claimant as a consequence of the said election employed by the 2<sup>nd</sup> Respondent on a fixed-term contract of 5 years lapsing on 11/2/2021, pursuant to Article X –A (5) of the said Constitution?

(iii) Was the Claimant issued with a notice of retirement on 23/1/2019 pursuant to Article XVIII – E of the said Constitution, and was the Claimant, as a consequence of the said notice, unfairly dismissed from employment on 1/7/2019?

(iv) Are Articles X – D – (1) and (4), Article X –A (5) and Article XVIII – E of the said Constitution contradictory?

(v) Should the Claimant be granted the reliefs prayed for?

(vi) Who bears the costs of the Claim?

11. The Respondents, on their part, only saw 2 Issues:

(i) Whether the notice of terminal leave pending compulsory retirement on age grounds was proper, and what is the correct retirement age?

(ii) Whether the Claimant should be granted the orders sought and or Whether the Claimant has been paid all his dues and allowances by the Respondents?

12. The Court has considered the record and submissions and is of the view that the primary question for adjudication is whether elected officials of the Respondent are subject to the retirement age of 60.

### **Retirement of elected officials of KNUT**

13. In challenging his retirement, the Claimant contended that there was a contradiction between Article X – D (4) which provides that:

every branch officer of the union shall vacate his/her office on the expiry of five years but shall be eligible for re-election and Article XVIII – E, which has made provision for the vacation of office thus:

#### **Vacating of Office**

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.

14. According to the Claimant, since he held an elective office with a term of 5-years, and which term was part of the contract issued to him, the decision by the Respondents to retire him before completion of the term was unilateral, unprocedural and without due regard to the fact that he was a full-time employee.

15. The Respondents, however, asserted that the Claimant did not deny that he attained 60 years on 1 July 2019 and that having attained that age, he ceased being a teacher under the Code of Regulation for Teachers, 2015, and that having ceased to be a teacher, he could not continue to represent teachers as an official.

16. The Respondents further urged that the terms of Article XVIII – E applied notwithstanding that the Claimant's 5-year tenure had not lapsed.

17. In the view of the Court, Article X – D (4) speaks to the need for elected officials of the Respondent to vacate office for purposes of organising and facilitating fresh elections upon the expiry of a 5-year term, while Article XVIII – E provides for means of separation between the Union other than through fresh elections.

18. Consequently, the Court finds no contradiction, discrimination or unfairness in Articles X-D (4) and XVIII -E.

19. The Court, therefore, holds that retirement under the 60-year rule applies to all elected union officials of the Respondent.

20. With the above conclusion, the Claimant is not entitled to an award of compensation for unfair termination of employment.

### **Breach of contract**

#### **Salaries up to February 2021**

21. The Claimant's service terminated upon retirement on or around 1 July 2019, and the Claimant's claim for salaries up to February 2021 are legally untenable.

#### **Annual leave up to February 2021**

22. The Claimant cannot legitimately lay claim to leave for a period after he had separated from the Respondents.

#### **Subsistence and Transport allowance up to February 2021**

23. For reasons already given above, the Court finds that the Claimant would not be eligible or entitled to transport and subsistence allowance after retirement.

#### **Normal retirement benefits**

#### **Duty allowance BEC allowance (transport and subsistence), and honoraria**

24. Under these heads of the claim, the Claimant sought a total of Kshs 3,576,000/- but no evidential or contractual foundation was provided showing eligibility or entitlement to the allowances and relief is declined.

25. In any case, the Respondents produced a Circular dated 23 March 2004 to demonstrate that the payment of honoraria upon retirement had been replaced with a Staff Terminal Benefits Scheme.

#### **31% basic pension**

26. The Claimant prayed for Kshs 104,160/- calculated at the rate of 31% of basic salary (the Claimant did not disclose the formula he used to arrive at the sum).

27. The Respondents countered that the Claimant was entitled to Kshs 80,240/- based on the basic salary he was earning from March 2011.

28. The Court will adopt the computations by the Respondents as the formula and factor applied was disclosed.

#### **Annual leave 2016**

29. The Claimant waived the right to annual leave for 2016 at a meeting of the Branch Executive Council held on 16 November 2016, and the Court finds this head of the claim misplaced.

#### **BEC allowance**

30. Under this head, the Claimant pleaded a sum of Kshs 302,400/- for a period of 9 years, but the Respondents produced records to show that the same was paid up to June 2019.

#### **Unpaid head office gratuity**

31. The Respondents proved that the Claimant was paid gratuity up to September 2018 and would thus be only entitled to gratuity from October 2018 to June 2019, amounting to Kshs 145,359/-.

#### **Unpaid duty claims refunds for 9 years.**

32. On account of unpaid duty claims refunds, the Claimant made a pitch for Kshs 1,080,000/- .

33. The Claimant did not provide any evidence to show that he spent such monies on account of the Respondents and was therefore entitled to be reimbursed.

#### **Lump-sum payment of Kshs 1,522,800/-**

34. The Respondents admitted that the Claimant was entitled to a lump-sum payment for the 100 months he served as Branch Secretary (but limited to 60 months) by virtue of section 5.3 of the KNUT Staff Terminal Benefits.

35. The Respondents computed the amount as Kshs 698,460/, and the Court will allow the same as computed by the Respondents.

#### **Conclusion and Orders**

36. From the above, the Claimants claim on unfair termination of employment is dismissed while the action for breach of contract is allowed partially as hereunder:

(i) Pension	Kshs 80,240/-
(ii) Head office Gratuity	Kshs 145,359/-
(iii) Lump-sum payment	Kshs 698,460/-

**TOTAL                      Kshs 924,059/-**

37. The award to attract interest at court rates from the date of judgment.

38. Claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

**FOR THE CLAIMANT RAKORO & CO. ADVOCATES**

**FOR RESPONDENTS SMS ADVOCATES LLP**

**COURT ASSISTANT CHRISPO AURA**