



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1323 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BARNABAS MUSEMBI MUTUA

CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT, NGARA GIRLS HIGH SCHOOL 1ST RESPONDENT

THE PRINCIPAL, NGARA GIRLS HIGH SCHOOL

2ND RESPONDENT

JUDGMENT

The Claim herein is filed by Barnabas Mutua alleging unfair and unlawful termination of his employment by the Respondent on grounds of retirement and failure to pay terminal dues contrary to the provisions of the Employment Act. He seeks the following reliefs:

(i) The Respondent to pay the Claimant Service gratuity as quantified by the Ministry of Education Science and Technology Kshs.316,465

(ii) Compensation for the remainder of the period of service being 5 years' salary from May 2013 to May 2018 Kshs.15,449 x 60 months Kshs.926,940

Total Amount Kshs.1,243,405

(iii) The Respondents to compensate the Claimant for unfair termination of employment.

(iv) The Respondents to issue the Claimant with a Certificate of Service.

(v) The Respondents to pay costs of this suit with interest.

(vi) Any other Orders and/or Relief that this Court may deem just and expedient to grant.

The Claimant's case is that he was employed by the 1st Respondent as a watchman on 25th June, 1985 with a starting monthly salary of Kshs.565/-.

The Claimant further averred that he performed his duties diligently and to the Respondents satisfaction and was promoted to the position of Headman and his salary increased to Kshs.3,905/- and subsequently increased to Kshs.15,449/- being the last salary earned prior to his separation from the Respondents. He contended that his last deployment was that of plumbing/cleaning duties following the privatization of security services.

The Claimant contends that he was notified of his retirement vide the 2nd Respondent's letter dated 6th May, 2013 that was to take effect from 9th April, 2013. He further contends that this was unfair and contrary to the Employment Act, 2007 as he was scheduled to retire in the year 2018.

The Respondents filed a Memorandum of Response dated 12th May, 2015 and filed in Court on 14th May, 2015, in which it admits having engaged the Claimant in the manner alleged. It contended that the Claimant was duly notified of his retirement following his oral request to

the 1st Respondent on his wishes to take early retirement.

The Respondents further aver that the money due to the Claimant upon his retirement was remitted to the Claimant.

The Respondents contend that following settlement of his dues the Claimant has no other claim against the Respondents. They urge the Court to dismiss the instant Claim with costs to the Respondents.

The suit was heard on 23rd May, 2019, when the Claimant testified on his behalf and the Respondent called one witnesses (RW1) to testify on its behalf. Thereafter parties filed and exchanged written

submissions.

Claimant's Evidence

The Claimant adopted his witness statement filed in Court on 16th August 2016 as his evidence in chief. In his statement he reiterated the averments made in his Statement of Claim.

The claimant testified that he worked for the Respondent from the year 1985 to 9th April, 2013 on which date he was retired without notice and having not attained the mandatory age of 60 years. He further testified that he was scheduled to retire in April, 2018. He contended that he did not agree with his retirement.

The claimant admitted that he received Kshs.316,465/- at the time of his separation with the Respondent for service for the 30 years he worked for the Respondent. He stated that what he seeks to be paid is for the years up-to retirement which is 5 years, costs of the suit and compensation.

On cross examination the claimant stated that his gratuity claim has been paid in full having been paid Kshs.316,465/-.

He stated that he did not request to be retired as claimed by the Respondent in the defence. He reiterated that his retirement age as per the government circular on the same was 60 years. He however, confirmed having not availed the said circular to the Court.

He stated that he did request to be issued with a certificate of service by the Respondent but none was issued.

On re-examination the claimant testified that he did not apply for early retirement. He further testified that he was only issued with a letter dated 9th April 2013 signed by the Principal informing him of his retirement.

Respondent's Evidence

ANTONY MAINA MUSOMBA (RW1), the Bursar of the 1st Respondent testified on behalf of both Respondents. He adopted his witness statement filed in Court on 23rd May 2019 as his evidence in chief. In his statement RW1 reiterated the averments made in the Memorandum of Defence filed on behalf of the Respondents herein.

RW1 testified that the Claimant was paid all his dues at the time of his separation with the Respondent as per the computation done on 23rd October, 2018.

RW1 urged this Court to dismiss the instant claim with costs.

On cross examination RW1 stated that the Claimant was paid all the dues at the time of his separation. He further stated that he was not aware of the terms of retirement but averred that his retirement was 60 years.

On re-examination RW1 stated that as per the records held by the Respondents payments for the Claimant were done following his attainment of the mandatory retirement age.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

The Claimant further submitted that his forced early retirement by

the Respondent was capricious and in essence amounted to unfair termination of his employment. He therefore urged the Court to allow his Claim in terms of the reliefs sought therein.

The Claimant relied on the provisions of Sections 43 and 45 of the Employment Act, 2007. The Claimant relied on the cases of **Kenya Ports Authority v Silas Obengele (2008) eKLR**, **Moses Kaunda Moro v CMC Motors Group Limited (2013) eKLR** and **Fred Odhiambo v The Honourable Attorney General & Another (2013) eKLR**.

In conclusion the Claimant urged this Court to enter judgment in his favour as against the Respondent herein in terms of the following:

a) Compensation for remainder of service of 5 years in terms of salary from May 2013 to May 2018

Kshs.15,449 x 60 months Kshs.926,940

b) Compensation for unfair termination of employment

Kshs.15,499 x 12 months Kshs.185,388

Total Kshs.1,112,328

c) Claimant to be issued with Certificate of Service.

d) Respondents to pay costs of this suit with interest.

Respondent's Submissions.

The Respondent submitted that the Claimant was lawfully retired with effect from 9th April, 2013, following his oral request. It is submitted that the Claimant was paid all his dues as at the time of his separation.

The Respondents further submitted that the Claimant has failed to demonstrate that the decision to retire him was made prematurely by the Respondents. They refer to the provisions of the Code of Regulations (Revised 2006) under Paragraph 20 that provides that retirement shall be at any time after attaining the mandatory retirement age of 50 years.

The Respondents further submitted that the Claimant having been duly paid his service gratuity amounting to Kshs.316,465/- a fact that was not disputed by him, he is not entitled to the reliefs sought in his Statement of Claim.

The Respondents further submitted that the Claimant's claim for unlawful termination is unfounded the Claimant having lawfully retired from his services.

In conclusion the Respondents urged this Court to dismiss the Claim in its entirety with costs to the Respondents.

Analysis and Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the retirement of the Claimant's employment by the Respondents was wrongful, unfair and unlawful.
2. Whether the Claimant is entitled to the reliefs sought.

Whether the retirement of the Claimant's employment by the Respondents was wrongful, unfair and unlawful

The Claimant was initially employed by the 1st Respondent as a watchman on 25th June, 1985, a position he held until his promotion to headman on 19th June, 1997. The Claimant was the in-charge of security at the school gate for 2 years and was later on 13th October, 2010 deployed and assigned plumbing/cleaning duties, a position he held until his retirement on 9th April, 2013.

By her letter dated 6th May, 2013 the 2nd Respondent notified the branch Manager NSSF of the impending retirement of the Claimant with a copy of the same issued to the Claimant, which letter reads as follows:

"The Branch Manager,

National Social Security Fund,

Nairobi Branch

P. O Box 30599-00100

NAIROBI

RE: RETIREMENT

I wish to notify you of the normal retirement of Mr. Barnabus Mutua with effect from 9th April, 2013 after attaining retirement age.

Please assist him to process his retirement dues.

Signed

Munyasya A.N

Principal/Secretary BOG

Cc 1. Barnabus Mutua

Ngara Girls High School

2. Chairman B.O.G”

The said 2nd Respondent also authored another letter to the Permanent Secretary dated 29th January, 2019 with similar contents and the office the Principal Secretary Ministry of Education Science and Technology proceeded to tabulate the Claimant’s dues at retirement.

The Claimant contended that his retirement was not lawful and/or fair as he had not attained the mandatory age of retirement which he contended was 60 years. He contended that retirement age was initially 55 years but was later increased by the Government to 60 years.

The Respondent on the other hand contended that the Claimant had made verbal request to the 2nd Respondent to retire and that having attained the mandatory age the Respondents proceeded to retire him.

The court takes judicial notice of the circular which has been referred to in many decisions of this court among them the case of **Siro Andrew Leo Obaga v Judicial Service Commission**. The circular OP.CBA.2/71 of 20th March 2009 reviewing the mandatory retirement age for public servants with effect from 5th March 2009. The mandatory retirement age for public servants was reviewed from 55 to 60 years.

In the letter addressed to NSSF dated 6th May 2013 reproduced above and in identical letter dated 29th January 2013 addressed to the Permanent Secretary, Jogoo House B, the respondent’s Principal/Secretary to the BOD does not state the age of the claimant.

It is therefore not clear what age the claimant was at the time of his alleged retirement by the respondents. It is not clear whether the intention of the respondent was to retire him at age 50 or 55 or 60. The claimant having stated that he was to attain the mandatory retirement of 60 years in May 2018, it was incumbent upon the respondent by virtue of Section 43 and 47(5) of the Employment Act, to prove that it had valid reason for the termination of the claimant’s employment, being the attainment of mandatory retirement age for public servants, of 60 years. This was not done. In fact the respondent only wrote to the Ministry of Education and NSSF and copied the letters to the claimant without addressing him directly.

No notice was given to the claimant of his retirement date which would have given him an opportunity to prove to the respondent that he had not attained retirement age. In view of the fact that the termination of his employment was under governments terms of retirement, he was entitled to at least 3 months’ notice as provided in the **Code of Regulations 2006 Edition** which provides at Regulation R.20(1) and (2) that

(1) The Pensions Act (Cap. 189) does not prescribe any age limit at which an officer must retire, but under Section 9 of the Act an officer may be required to retire from the service of the Government at any time after he attains the age of 50 years. Whenever it is necessary to enforce the retirement of an officer on the grounds of age, the provisions of this Section will be employed in accordance with Regulation G.41.

(2) Where it is not intended to retain an officer beyond the age of 55 years, the Authorized Officer will so inform the officer giving him reasonable notice of one year. It is mandatory that an officer must be given at least three (3) months’ notice. The decision that an officer should compulsorily be retired on the grounds of age is vested by law in the Public Service Commission of Kenya.

Whether the Claimant is entitled to the reliefs sought

The Claimant having been paid his service gratuity in full sought the following reliefs from the Respondents:

a) Compensation for remainder of service of 5 years in terms of salary from May 2013 to May 2018 Kshs.15,449 x 60 months = Kshs.926,940/-

The Claimant is not entitled to the above as it amounts to unjust enrichment by the Claimant which this Court ought not to allow. In the case of **Pamela K. Butalanyi v University Council for the Kenya Polytechnic University College (2015) eKLR** it was held that employment remedies must be proportionate to the injury sustained by the Employee. They are not aimed at advancing any parties desire for unjust enrichment.

Further, in the case of **D. K. Njagi Marete v Teachers Service Commission, Industrial Cause No. 379 Of 2009** Rika J.

held:

“What remedies are available to the Claimant “This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.”

b) Compensation for unfair termination of employment Kshs.15,499 x 12 months = Kshs.185,388/-

Having been unfairly terminated, the claimant is entitled to damages. I have taken into account the notice of at least 3 months which the claimant was not given, the loss of employment for 5 years which the claimant cannot recoup by employment elsewhere taking into account his age and the nature of employment. I note that the maximum compensation under Act of 12 months cannot compensate his loss but it is the best the court can award in view of the cap by the statute. I thus award him 12 months' salary as compensation in the sum of **Kshs.185,388** and in addition the sum of **Kshs.46,347** being in respect of pay in lieu of the mandatory notice under Regulation R20.

c) Claimant to be issued with Certificate of Service.

The Claimant is entitled to be issued with a Certificate of Service by dint of Section 51 of the Employment Act, 2007.

Orders

I declare the retirement of the claimant unfair and award him **Kshs.231,735**. The respondent shall further pay the claimant's costs which shall attract interest from date of judgment for the compensation and from date of filing suit for the pay in lieu of notice.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE