



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.264 OF 2017

DANIEL WAMBUGU NGURURI.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGEMENT

The claimant is a male adult. The respondent is a constitutional commission with mandate spelt out under the Teachers Service Commission Act and with mandate to employ teachers.

The claimant was an employee of the respondent and last served as head teacher at Naivasha Boys Boarding.

On 6th April, 2016 the claimant received letter that he was due for retirement on 1st July, 2017 but he explained that his retirement was not due until 30th August, 2017 as indicated on his payment statements. However the date of retirement had been changed. The respondent refused to adjust the retirement date from 1st July, 2017 to 30th August, 2017.

On 27th December, 2017 the claimant wrote to the respondent attaching his birth certificate and advising his correct date of birth.

The respondent responded and indicated they would only consider the date of birth indicated as the year 1957.

To retire the claimant early meant that he would lose all his retirement dues that he was to earn as of 1st July, 2017 under the Collective Bargaining Agreement (CBA) that came into force.

The claim is for a declaration that the claimant's retirement date is 31st December, 2017 and not 1st July, 2017; the payment of damages for wrongful retirement; and costs.

The claimant testified that he was employed by the respondent vide letter dated 26th October, 1991 and being born in the year 1957 his retirement date was noted as 31st August, 2017. He was issued with several payment statement bearing the same date of retirement but in the year 20117 the retirement date was changed to 30th June, 2017.

He was born on 31st December, 1957 per the birth certificate issued by the Registrar of Persons.

The retirement age for the respondent employees was 60 years. he was therefore due to retire on 31st December, 2017.

By being retired early he lost the benefits in the CBA which came into force on 1st July, 2017 and had he been retired on 31st December, 2017 his pension would have been governed under the CBA at an escalated rate which he lost with the early retirement.

The claimant also testified that he was aware that the respondent had various work policies which never came to his attention with regard to retirement age. He was however aware that his employment was regulated by the various policies issued by the respondent. the payment statement was regulated under the IPPD system based on the data he had supplied and indicating the date of birth was 1st July, 1957.

The defence is that the claimant was employed in the year 1981 as a teacher and posted to various schools. While applying for employment he noted his date of birth to be 1957 which was accredited by the respondent as true.

In the absence of an employee stating the accurate date of birth, as a matter of practice the respondent adopted the 1st July as the date of retirement.

The respondent maintained work records that the claimant was born in 1957. Vide Government Circular No.2 of 15th November, 1982 there was communication that an employee's official date of birth is the date declared by the employee in the application for employment and not the date shown in the national identity card or any other document.

The date of birth once captured in the data system cannot be changed unless there is production of a birth certificate issued before 15th November, 1982. Accordingly the respondent could not change the claimant's date of birth as declared at the time of employment and where there was no compliance with the issued circular.

Before the year 2014 the respondent had the practice of retiring teachers during the school holidays so as to avoid interruption of normal learning activities. This was done irrespective of the retirement age. In some cases teachers were retired early or late to achieve this purpose. In this case the claimant was to retire on 31st August, 2017 which was noted in his pay slips.

By circular dated 14th February, 2014 the Office of the President outlawed retention of public servants beyond the mandatory retirement age at 60 years. All public officers were required to exit at age 60. This led to the amendment of the initial circular on retirement age and practice. The claimant's pay slip was changed to indicate retirement date.

Regulation 11 (2)(a) of the Code of Regulation for Teachers which complements the government regulations the retirement age was changed to 1st July, 2017 save that where there was a certified birth certificate issued before 15th November, 1982 confirming the date of birth, this would facilitate a change of retirement age.

The claimant's age having been declared as 1957 and without a birth certificate, his retirement age was 1st July, 2017 and he was issued with a one (1) year notice on 6th February, 2016.

Upon the issuance of the retirement notice the claimant by letter dated 27th December, 2016 raised the issue that he had been born on 31st December, 1957 but based on the records, his retirement date was 1st July, 2017 and through the IPPD system in operation his name was permanently deleted from the respondent's payroll on 1st July, 2017.

The claimant cannot benefit from the CBA coming into force on 1st July, 2017 as he had already attained the retirement age. The claims made should be dismissed with costs.

Maureen Mollet Atieno Sango Assistant Department Director in the pensions Department of the human resource and development of the respondent testified that the respondent as a constitutional commission has the mandate to register teachers. Upon the employment of the claimant he declared his date of birth as 1957 which was accepted and adopted as true and maintained in the records as such. This was not changed during the term of employment.

Public practice and policy does not allow omission or distortion of public records.

The government issued Circular No.2 of 15th November, 1982 that an officer's official date of birth is the date declared by the employee on application for employment and not the date shown in the national identity card or any other document. Once such date is captured in the records, it is maintained except where there is production of a birth certificate issued before 15th November, 1982.

Ms Sango also testified that the respondent has a code of regulation for teachers which compliments the government policy and circulars and regulation 11 requires that where there is doubt on the date of birth, a certified birth certificate issued on or before 15th November, 1982 is acceptable.

In this case, on 6th April, 2016 the claimant was issued with his retirement notice a year in advance pursuant to regulation 73 as he was to attain age 60 on 1st July, 2017. He was required to submit his documents for the processing of his pension.

For the first time the claimant raised the issue of his birth certificated vide letter dated 27th December, 2016 that he was born on 31st December, 1957. This was contrary to the circulars issued, the code and regulations governing operations for the respondent.

The claims made have no basis and the respondent acted within its mandate.

The respondent filed the work records.

At the close of the hearing, both parties agreed to file written submissions. Only the claimant complied.

On 14th November, 1980 the claimant applied for employment with the respondent for the position of a teacher and therein indicated that he was born in the year 1957 and was then aged 23 years. On his application, he claimant was issued with letter of appointment dated 26th October, 1980 which he signed on 5th September, 1991.

In the letter of appointment, clause 6 stipulated that;

Employment is subject to the Code of Regulations compiled and published by the Teachers Service Commission under section 6 of the Teachers Service Commission Act 1966 (No.2 of 1967 and on any amendment of such Code which may be made from time to time.

Thus bound, the respondent has undergone various changes over the years, these including being elevated to a constitutional commission under the provisions of Article 237 of the Constitution, 2010 and the amendment to the Teachers Service Commission Act. there are also the Code of Regulation for Teachers amended from time to time as allowed for under the letter of appointment, clause 6 cited above.

Of the Code of Regulations, teachers being public officers, the work regulations and codes issued by the government apply.

The claimant was therefore bound. He cannot extricate himself from the circulars of the respondent or those issued by the government with regard to retirement age and the records here already supplied noting as of 14th November, 1980 he was already 23years old.

Save for the above, there is the Employment Act, 2007 which govern employment and labour relations. Employment particulars cannot be changed by the employer without good cause. The requirement to submit the Birth Certificate on or before 15th November, 1982 with regard to any changes to the dates of birth was a reasonable requirement upon the claimant.

The claimant contests his retirement date from the notice issued by the respondent on 6th April, 2016 that he was not due to retire on 1st June, 2017 but on 31st August, 2017 as noted in the various payment statements and also that he has since obtained a birth certificate indicating he was born on 31st December, 1957 thus the due retirement date is thus regulated as of 31st December, 2017.

Whereas the claimant has heavily relied on the case of **Republic versus Judicial Service Commissions & 2 others Exparte Erastus M Githinji [2019] eKLR**, that;

Thus the Court presumes that the applicant's 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 Court finds that the circular was clearly **ultra vires** in prescribing a step in acquiring the birth certificate, namely applying through the Permanent Secretary or Head of Department but which was never provided for or contemplated under the Births and Deaths Registration Act, (Cap.149) –and it was equally **ultra vires and offensive of the principle of legality for the respondents to require the petitioner to have complied with such ultra vires procedural step when he applied for his certificate of birth. The Court returns that besides stating that he had not been notified about that procedure in the circular for applying for the birth certificate, the Court holds that it was unnecessary and unlawful to bind the applicant to such ultra vires policy that was inconsistent with the statutory provisions on the procedure for applying for the birth certificate. ...**

The applicant above was thus regulated under the Constitution, 2010 the regulations and codes applicable to judicial officer and the judicial Service Commission regulations. Unlike the claimant herein, the Code of Regulation for Teachers requiring the change of date of birth was by a different circular.

In this case, the claimant only obtained his Birth Certificate on 28th June, 2012 and only notified the respondent vide letter dated 27th December, 2016 after the notice to retire issued on 6th April, 2016. Based on the circulars and regulations applicable at the time, without the respondent having the knowledge of the Birth Certificate issued following its notice to the claimant, the court finds no illegality. The respondent acted rationally, within reason and the decision taken to retire the claimant was legitimate.

The claimant was notified of his retirement date 15 months prior. He only brought to the attention of the respondent his Birth Certificate vide letter dated 27th December, 2016. Such matter ought to have been addressed instantly and immediately the certificate was obtained on 28th June, 2012. The inaction and indolence is not explained.

To produce the Birth Certificate on 28th December, 2016 after the issuance of the Retirement Notice on 6th April, 2016 is to totally negate the letter of appointment and employment by the respondent, which required him to abide the Code of Regulations compiled and published by the Teachers Service Commission under the provisions of the Teachers Service Commission Act.

Accordingly, the claims made to have the claimant be retired on 31st December, 2017 and not 1st July, 2017 and the payment of damages thereof is found without merit. The claim is dismissed. Each party shall bear own costs.

Delivered at Nakuru this 20th day of February, 2020.

M. MBARU

JUDGE

In the presence of: