



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 34 OF 2017

JILLO BORU JILLO.....CLAIMANT

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE COUNTY COMMISSIONER-

MOYALE SUB-COUNTY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents for unlawfully and unfairly retiring him from employment in the public interest. The Claimant averred that he was appointed/employed as a Chief II Bori Location on 21st October 2005 on permanent and pensionable terms from 3rd September 1996. He averred that he was tasked with among other functions, overseeing and maintaining law and order and chairing all Locational Development Committees. He averred that he carried out these tasks diligently and he earned a promotion to the rank of Chief I in the year 2011. The Claimant averred that by a letter dated 2nd August 2013, by the Assistant County Commissioner Moyale Sub-County, the 2nd Respondent directed him to show cause within 7 days as to why he should not be relieved of his duties on account of misconduct and insecurity within the location. He averred that via a letter dated 10th August 2013 and a second letter dated 23rd September 2013, he asserted that his intended dismissal was politically instigated as he was innocent and a victim of the unfortunate insecurity incidences witnessed in Bori Location in the year 2013. He averred that on 11th June 2014 despite his explanation, he received a letter dated 26th May 2014 from the 1st Respondent through the 2nd Respondent's office purporting to retire him in public interest with effect from 1st July 2014. The Claimant averred that he wrote a letter to the 1st and 2nd Respondent on 9th September 2014 expressing his dissatisfaction and sought for a review of the decision to retire him in the public interest. He averred that in the letter he contended that his retirement was politically and ethically motivated, unconstitutional, undemocratic, totally uncalled for and unjust. He averred that the allegations of misconduct and involvement in criminal activity were baseless and that it was only after over two years that he received a response from the 1st Respondent's office disallowing the application for review. He averred that he was not accorded a proper hearing prior to his forced retirement, was not given any formal warning or at all prior to being retired in public interest, and that there was no complaint lodged against him by any member of public over any involvement in any criminal activity and/or misconduct. The Claimant averred that upon being retired, he was paid salary for a period of one year and has subsequently not received any salary from his employer. The Claimant thus prayed for Judgment against the Respondents for:-

- i. A declaratory order that he was and is still entitled to the enjoyment of rights and fundamental freedoms guaranteed under Articles 41(2)(a) and 47(1) & (2) of the Constitution and the statutory rights secured under the Employment Act.
- ii. A declaratory order that his implied early retirement in public interest was unconstitutional, illegal, unprocedural, unfair, unjust, undemocratic, null and void ab initio and of no legal effect.

iii. An order reinstating the claimant to his position as Chief I, Bori location.

iv. An order compelling the 1st, 2nd and 4th Respondents to pay him all salary arrears owed to him from August 2015 as the allegations leveled against him were baseless and not proved through a fair and transparent process.

v. An order restraining the 1st, 2nd and 4th Respondents or their agents from proceeding to fill the position of Chief Bori Location until further and/or final order of the Court; and

vi. In the alternative, an order compelling the 1st, 2nd and 4th Respondents to pay the Claimant full salary allowances and benefits up to the mandatory retirement age of sixty (60) years and gratuity in accordance with the terms and conditions of service.

vii. Costs and interest on the claim.

2. The Respondents' response to the memorandum of claim denied the averments that the Claimant was appointed Assistant Chief in 2005 with effect from 3rd September 1996 or that he worked diligently as such Assistant Chief earning a promotion in 2011. The Respondent averred that if at all the Claimant was terminated, then the same was done following due procedure as laid down in the Employment Act. The Respondent averred that the Claimant's suit offended the mandatory provisions of Cap. 39 and 40 of the Laws of Kenya and that it would raise a preliminary objection to the suit and seek its dismissal with costs.

3. The Claimant testified but the Respondents did not appear at the hearing of the case. The Claimant adopted his statement and the list of documents in his evidence in chief. He said that he worked diligently and was even issued with a recommendation letter for recovering stolen camels and that his retirement in public interest was politically motivated. He testified that he believes that he is still young and that he was willing to work for the people of Bori as their chief as he used to and as was sought by the people of Bori in a letter sent to the Principal Secretary. He thus sought reinstatement as the chief of Bori and in the alternative for payment of his salary till his retirement age.

4. The Claimant submitted that he was offered as a sacrificial lamb as particularly in the period 2010-2014 there was a volatile political situation in Marsabit County. The Claimant submitted that the unrest witnessed in Moyale between the year 2010-2014 was not only confined to Bori Location but was all over Moyale and it affected all the locations in Moyale. The Claimant submitted that the other chiefs from the sister locations in Moyale were not retired in public interest as the Claimant was. He submitted that interestingly, the 2nd Respondent and his other security team were equally spared. The Claimant submitted that he was laid off on mere suspicion and without any evidence of any wrongdoing. The Claimant submitted that the Respondents failed to file any documents to prove any wrongdoing on his part. The Claimant submitted that he was not given a fair hearing as no tribunal was constituted to investigate his conduct as Chief Bori and that all his letters to the 1st and 4th Respondents fell on deaf ears as the whole process was instigated by political motive with the warring communities seeking to have one of their own as Chief Bori. The Claimant submitted that this situation was worsened by the 2013 general elections. The Claimant submitted that to confirm that the actions of the Respondents were indeed mala fides, the 4th Respondent never even bothered to process and pay his benefits even after prematurely retiring him. The Claimant submitted that this was unconstitutional and unlawful. The Claimant submitted that his evidence was uncontroverted as the Respondents never recorded any statements' nor did they turn up to give evidence to defend their case. The Claimant submitted that he was retired for wrong reasons at a prime age of 39 years. He submitted that he was now 45 years old, energetic and willing to serve the people of Bori who have been illegally and unlawfully been denied crucial Government services for the past 5 years on account of a flawed, unconstitutional, and illegal retirement process by the Respondents. There was no proof that the submissions by the Claimant were served on the Respondents.

5. The Claimant's grouse with the 1st, 2nd and 4th Respondents was on his alleged unlawful termination. It was not denied that he was dismissed in the public interest. Retirement in the public interest is not necessarily a result of disciplinary process. It may result from an administrative decision by the employer but nevertheless must meet the requirements of Section 43. There must be valid grounds for the retirement in the public interest. In the Claimant's case there was an allegation that the Claimant ought to be retired in the public interest as he had been unable to stop the mayhem and chaos that Moyale had become. The Claimant himself admitted as much that there was a letter dated 2nd August 2013 from the Assistant County Commissioner Moyale Sub-County requiring the Claimant show cause within 7 days as to why he should not be relieved of his duties on account of misconduct and insecurity within the location. The letter was responded to and it is clear there was insecurity within Bori Location where the Claimant worked. The Claimant asserts that he was tasked with among other functions, overseeing and maintaining law and order and chairing various committees. Quite clearly, the issue of security fell within his docket and his reply to show cause which seemed to suggest that he had no role to play in maintenance of law and order is hollow. It does not aid the Claimant to assert that the chaos witnessed was not just in his area of jurisdiction but also in other areas. In any event he did not avail proof of the clashes or insecurity in the areas covered by other chiefs and the resultant action or inaction of the Respondents to prove that he was singled out. Be that as it may, the Respondents had to accord the Claimant an opportunity to be heard. From the evidence before me it is clear the Claimant was heard and the decision to retire him in the public interest made. It would seem therefore the Respondents had cause for the termination. This court would be remiss if it allowed an employee who is found unfit to serve entitled to any of the remedies sought despite his evidence being given without challenge by the Respondents. The suit is thus dismissed for failing to meet the threshold for grant of the relief sought. There will be no order as to costs.

It is so ordered.

Dated and delivered at Meru this 3rd day of March 2020

Nzioki wa Makau

JUDGE