



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 59 OF 2019

LEONARD MUNYUA KAMAU.....PETITIONER

VERSUS

KENYA WILDLIFE SERVICE.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF

TOURISM AND WILDLIFE.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition on 15.3.2019. He contended that the failure by the Ministry of Tourism (the Ministry) to pay him his entitlements upon seconding him for absorption to Kenya Wildlife Service (KWS) is unconstitutional, unfair, irregular, inappropriate, improper and in breach of the principles of natural justice, Fair Administrative Action Act and the Constitution.

2. He seeks the following prayers:

- a) The Ministry of Tourism and Wildlife under the leadership of the former Permanent Secretary acted improperly and irregularly in the conduct and management of the entire process more particularly in its secondment, deployment and failure to compute and finalise the employment entitlements and benefits accruing to the Petitioner before seconding him to KWS.
- b) That the Ministry of Tourism and Wildlife compensates him for unfair treatment and loss of earnings.
- c) That the Ministry of Tourism and Wildlife in its action is in violation of the general principle of common law and the rules of natural justice, Article 10, 47 and 232 of the Constitution and the Employment Act.
- d) That KWS is in its action in violation of the general principles of common law and the rules of natural justice, Articles 10,47 and 232 of the Constitution and the Employment Act.
- e) That the KWS compensates him for unfair treatment and loss of earnings.
- f) That he be awarded the costs of this suit.

3. The petition was opposed by the respondents through the Reply to the Petition on 23.7.2019 and Replying Affidavits sworn by Vincent M. Samoo, Human Capital Officer for KWS on 23.12.2019 and by Prof. Fred H. Sergor the Principal Secretary in charge of State Department of Wildlife in the Ministry of Tourism and Wildlife, on 8.10.2019.

Petitioner's case

4. The Petitioner averred he was employed by the Ministry of Tourism and Wildlife in 1973 as a subordinate staff and rose the rank to become Senior Subordinate Staff Job Group C by dint of the letter dated 24.8.1988 which also entitled him to an owner occupier house allowance. By another letter dated 14.5.1990, he was appointed as Senior Subordinate Staff by the 1st Respondent (herein after called KWS) and posted as a Mail Dispatch Attendant following KWS' organizational structuring programme. Again, he averred that his new job in KWS was Grade CA/RR/AA9 but he retained a gross monthly salary of Kshs. 8,654 inclusive of housing allowance subject to pension contributory in accordance with the Pensions Act as confirmed in the letter dated 15.10.1997. Thereafter he rose to the rank of Support Staff 1 Grade 14 earning Kshs. 13,439 and a housing allowance of Kshs. 2,700.

5. He contended that after working for a cumulative period of 32 years being 17 years and 15 years for the Ministry and KWS respectively, he was requested to retire upon attaining the mandatory age of 55 years with effect from 1.1.2006. The letter communicating his retirement stated that he would be paid all his salary and other applicable allowances up-to and including 31.12.2005. On 22.12.2005, he was paid a sum of Kshs. 12, 061 which comprised his net salary for the month of December 2005 and his housing allowance but no pension was paid to him including his contributions under the Pensions Act as well as his severance pay for the 32 years.

6. He contended that his re-deployment without being paid the accumulated allowances and benefits arising from his employment at the Ministry amounts to discrimination and unfair treatment and contravenes of Articles 10, 47 and 232 of the Constitution. Finally, he contended that his cumulative service for 32 years to the Respondents cannot be termed as employment on temporary basis.

1st Respondent's case

7. The case for KWS is that the Petitioner was absorbed into the 1st Respondent from the former Wildlife Conservation and Management Department a support staff job Grade 14 from 1.7.1990 following the establishment of the Service as a State Corporation vide the letter dated 14.5.1991. She averred that the Petitioner's appointment was to be on temporary terms and the Petitioner was required to contribute towards the National Social Security Fund (NSSF).

8. She further averred that sometime in the year 1997, the service commenced its restructuring and grading process and the Petitioner was appointed to the position of Mail Dispatch Attendant (Support Staff 1 Grade 14) vide the letter dated 15.10.1997 on temporary terms. She averred that the letter dated 15.10.1997 erroneously referred to the deduction of 15% of the Petitioner's salary as pension but the sum was not deducted from his salary.

9. She denied any form of violation of the Petitioner's right and averred that the claim is misconceived because the Petitioner retired on 1.7.2005 long before the Employment Act 2007, Constitution of Kenya 2010 and the Fair Administrative Action Act of 2015 came into force. She further averred that the Petitioner retired from service on 1.1.2006 and that vide the letter dated 7.2.2005, the Petitioner was informed that he was entitled to his benefits under NSSF and was to contact the nearest NSSF office. She contended that KWS having remitted the Petitioner's NSSF contributions, she discharged her duty. Finally, she averred that the Petition is fatally defective and ought to be struck out *in limine*.

2nd and 3rd Respondents' case

10. The 2nd and 3rd respondents admitted that the Petitioner was employed by the Ministry from 1973 to 1990 and then moved to KWS where he worked until 1.1.2006 when he retired upon reaching the mandatory age of 55 years. They admitted that the petitioner worked for a total of 32 years but contended that his service was on temporary basis and not permanent and pensionable. They averred that the Petitioner's promotion to the post of subordinate staff Job Group "C" on 20.4.1988 was not a confirmation into permanent and pensionable terms of service, and that fact was expressly stated in the letter dated 31.8.1998.

11. They further averred that the parties had an express contract in the form of appointment letters which set out their terms of engagement and contended that the claim for pension is misconceived. Therefore, they maintained that the Petitioner was employed on temporary terms of service and the only terminal benefits due to him upon retirement was his NSSF contribution.

12. Finally, the 2nd and 3rd respondents averred that the Petitioner retired in the year 2005, he waited for 14 years before instituting this petition and has not bothered to advance any reasonable basis for the undue delay. Therefore, they prayed that the Court does dismiss the claim with costs to them because the Petition is unjustifiable and devoid of merit.

Petitioner's submissions

13. The Petitioner submitted that his letter of appointment dated 15.10.1997 did not mention that his appointment was on temporary basis. He contended that his employment with the Respondents was a form of modern day contract as described by Charles Reich in his Article "The New Property" 1964 that an individual's profession or job or right to receive income are the basis of his various status in society and may be the most meaningful and distinctive wealth he possesses.

14. He further submitted that this Court is called upon to determine what benefits are legally owned to him and relied on **Telkom Kenya Limited v John O. Ochanda [2013] eKLR** where the Court held that an employer is obliged to pay all normal terminal benefits and severance pay; and that, a pension benefit is to be enjoyed in retirement and is usually managed by the Trustee separate from the employer. He, therefore, argued that the Respondents' assertions that the only retirement benefits owed to him was NSSF contributions is farfetched and contrary to section 5 and 20 of the Pensions Act.

15. He submitted that the effect of Articles 2, 10 (1) & (2) of the Constitution in the legal interpretation of claims in the employment sector is to bar stakeholders from discriminating on injustices that have been performed prior to the enactment of the Employment Act. He contended that the failure by the 1st and 2nd Respondent to pay him his pension was an abrogation of his constitutional entitlement under Article 43 (1) of the Constitution. He further contended that he was discriminated upon by not being paid his severance pay for the 32 years he worked for the 1st and 2nd Respondents. He submitted that the definition of a casual employee under the Employment Act, Cap 226 (repealed) was retained under the Employment Act, 2007 and that the period he worked cannot be termed as casual.

16. On the other hand, he submitted that his retirement was a form of redundancy and that under section 40 of the Employment Act, it is

evident that severance pay is not optional. He submitted that the Respondents have not denied that they did not paid him severance pay. He further relied on Section 3 of the Trade Disputes Act(repealed) and maintained that his retirement was a redundancy and that the Act was applicable to the Respondents.

17. He submitted that even though at the time of his retirement the Employment Act had not been enacted the provisions of Article 2 (5) & 2 (6) of Convention No. 111 on Discrimination (Employment and Occupation) Convention 1958 were applicable. Therefore, he urged the Court to allow his Petition.

1st Respondent's submissions

18. The 1st respondent submitted that the Petition should be struck out *in limine* because it is fatally defective *vis a vis* Rule 10 of Part II of the Mutunga Rules, on institution of Court proceedings, which requires that the Petitioner must plead his claims with a reasonable degree of precision. She contended that the Petitioner has not demonstrated through pleadings, how the 1st Respondent infringed his rights.

19. For emphasis, she relied on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** where the Court of Appeal cited the case of **Annarita Karimi Njeru v Republic** and held that the principle in that case established the rule that requires reasonable precision in framing issues in constitutional petitions.

20. On the other hand, she submitted that there is no cause of action against her since the gravamen of the Petition is against the 2nd and 3rd Respondents, that is, the failure to compute and accumulated dues and terminal benefits upon redeployment to the KWS. She relied on Susan **Rokih v Joyce Kandie & 6 others [2018] e-KLR**.

21. Finally, she submitted that the claim was filed as a Petition in 2019 to escape the limitation period and that the applicable law is the Employment Act Cap 226 and that the Limitation of Actions Act Cap 22. She relied on **Gerald Muli Killu v Barclays Bank of Kenya [2016] eKLR** where the Court held that Cap 226 did not have a limitation for lodging claims and the issue for limitation was therefore covered by the Limitations of Actions Act. She submitted that since the cause of action arose on 1.1.2006, the Petition ought to have been filed 6 years from that date which is on or before 1.1.2012. Therefore, she urged the Court to dismiss the Petition **2nd and 3rd Respondents' submissions**

22. They submitted that the Petition is statute barred and offends the mandatory provisions of section 3 (2) of the Public Authorities Limitation Act and section 90 of the Employment Act as the Petitioner retired in December, 2005 while he filed suit on 15.3.2019 outside the 3-year limitation period. They relied on **Benjamin Wachira Ndiithi v Public Service Commission & another [2014] eKLR** to urge that a cause of action in an employment claim takes effect from the date of termination.

23. They submitted that the 2nd Respondent paid him all his salary and his NSSF contributions remitted. They maintained that there were no other payments due to him from the Ministry. They relied on section 2 of the Pensions Act to urge that the Petitioner was not appointed under terms which provided for the eligibility for pension. They further relied on **Daniel Piranto Ole Nchani v Ministry of Interior and National Co-ordination & another [2019] eKLR** for emphasis. Again they relied on the case of **Stephen Koech v Teachers Service Commission [2017] eKLR** where the Court held that the Claimant's contract was never converted from temporary terms to permanent and pensionable terms thus the claims pension in addition to other claims were not available to the Claimant.

24. They prayed for the petition to be dismissed with costs to them.

Issues for determination and analysis

25. After careful consideration of the petition, affidavits and submissions presented by the parties, there is no dispute that the Claimant was initially employed by the Ministry of Tourism and Wildlife from 1973 to 1990 when he was absorbed by the Kenya Wildlife Service. There is further no dispute that the claimant worked for the KWS until 1.1.2006 when he retired upon reaching the mandatory age of retirement. Finally, it is common ground that the claimant was not paid any pension after the retirement and instead he was referred to the NSSF to claim his terminal benefits. The main issues for determination are:

- a. Whether the petition meets that competence threshold of a constitutional reference.
- b. Whether the Petitioner's rights were violated by the Respondents.
- c. Whether the Petitioner is entitled to the orders sought

(a) Whether the petition meets competence threshold.

26. The threshold of a competent petition for a claim of violation of constitutional rights and freedoms in Kenya was set out in **Anarita Karimi Njeru v Republic [1979] eKLR** where the High Court held that:

"... We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." [emphasis added]

27. The foregoing position was affirmed as the threshold for constitutional pleadings by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** when it held, thus: -

“We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this case, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to.”

28. In this case, the petitioner pleaded in his Petition and the Supporting Affidavit that his deployment from the ministry without computation and payment of his accrued benefits was discriminatory and unfair and it contravened Articles 10,47 and 232 of the Constitution and the Rules of Natural Justice. Thereafter he prayed for an order that KWS’ action is in violation of the general principle of the common law and the rules of natural justice, Article 10, 47 and 232 of the Constitution and the Employment Act. The respondents objected to the petition contending that it is defective and prayed for the same to be struck out.

29. As in the case of **Mumo Matemu case**, the petitioner never saw the need to remedy the defect by an amendment. The said pleading lacks the precision required for constitutional pleadings in Kenya because the petitioner did not plead the particulars of the infringement of the provisions stated and the manner in which it was specifically violated. All what has been pleaded in my view is general statements about violation of the said Articles of the Constitution, statutes and the rules of natural justice. Consequently, I agree with the respondents that the petition is defective due to the said substantive shortcomings.

(b) Whether the Petitioner’s rights were violated by the Respondents

30. The Petitioner contended that he would not have been employed for 32 years on temporary terms. It is his further contention that the failure by the Ministry to pay him his accumulated allowances including his pension amounts violation of the rules of natural justice and the Constitution. The letter appointing the petitioner to join the Ministry in 1973 was not produced as an exhibit and as such the terms of his engagement then were not proved. However, a letter dated 31.8.1988 was produced showing that the petitioner was promoted to job Group “C” but it was silent on whether he was eligible for pension or that he was employed on permanent and pensionable terms.

31. The Respondents’ case is that the Petitioner was on temporary terms of service which is confirmed by the Petitioner’s letter of appointment in Clause (ii), that his appointment was on temporary terms and that he would contribute towards NSSF. The 1st Respondent letter dated 15.10.1997 referred to a contributory scheme but the Payslips produced by the 1st Respondent, indicate that the Petitioner never contributed to any pension scheme but rather to the NSSF.

32. The burden of proof is upon the petitioner to prove that he was employed by the respondent on permanent and pensionable basis before the court can consider the allegation that his constitutional rights were infringed by the denial to pay him his pension. He produced no evidence to prove that he was employed by the respondents on permanent and pensionable basis and that he made pension contribution or that the Respondents withheld his and thereby violated his rights. Therefore, I find and hold that the petitioner did not prove that he was employed on permanent and pensionable terms and that the respondents unlawfully deprived him of the same.

(c) whether the petitioner is entitled to the reliefs sought

33. In view of the finding that the petition has not met the threshold for constitutional pleadings and that the petitioner did not prove that his employment was permanent and pensionable, I proceed to dismiss it for being defective and devoid of merits. Each party shall bear its own costs.

Dated, signed and delivered at Nairobi this 16th day of July 2020.

ONESMUS N. MAKAU

JUDGE