



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NUMBER 688 OF 2011

BETWEEN

EDWARD NDOMBI UKOKHE.....CLAIMANT

VERSUS

1. THE HON. ATTORNEY-GENERAL

2. THE PERMANENT SECRETARY MINISTRY OF MEDICAL

SERVICES.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Wachakana & Company Advocates for the Claimant

Attorney-General for the Respondents

JUDGMENT

1. The Claimant was employed by the 2nd Respondent, through the Public Service Commission of Kenya, as a Subordinate Officer, in 1979.
2. He was promoted to Supplies Officer in 1998.
3. He was, alongside 2 of his Colleagues, charged with the offence of false accounting by a Public Officer, contrary to section 331 of the Penal Code, in Chief Magistrate's Court at Nairobi, Criminal Case Number 213 of 2003.
4. The Claimant was interdicted on 27th June 2002.
5. All 3 Employees were acquitted by the Chief Magistrate on 31st July 2003.
6. He was retired in Public Interest, with effect from the date of interdiction. The letter retiring the Claimant is dated 28th September 2004. His last salary was Kshs. 12,500.
7. He lodged an Appeal against the decision to retire him, in a letter addressed to the Public Service Commission, dated 22nd June 2007. He sought review through a letter dated 26th September 2007. He lodged further Appeals to the Public Service Commission on 10th June 2008 and 31st October 2008.
8. He was advised by his Employer that his Appeal was considered, dismissed and file closed on 28th November 2007. His various Appeals

were found untenable.

9. The Claimant filed this Claim on 6th May 2011, seeking the following orders against the Respondents:-

a) 1 month salary for every year worked [23 years] at Kshs. 287,500.

b) 1 month salary in lieu of notice at Kshs. 12,500.

c) Annual leave pay at Kshs. 9,584.

Total... Kshs. 309,584

d) Declaration that termination was unlawful.

e) Special and punitive damages.

f) Alternatively, the Claimant is reinstated.

g) Costs.

10. The Claimant testified, and closed his case, way back on 22nd March 2012. Hearing of the Respondents' case appears to have stalled, after the Trial Judge was transferred to a different station.

11. On 16th October 2018, the Court closed the proceedings and ordered Parties to file their Closing Submissions.

12. The Claimant restated in his evidence before the Court, the contents of his Pleadings as summarized above. He added that he was not able to secure alternative work, after leaving Public Service. He worked for about 22 years.

13. The Respondents filed their Statement of Response on 3rd November 2011. Termination of the Claimant's contract was fair. Due process was followed. The Claimant was involved in acts of gross misconduct. The Claim is bad in law as the Claimant had filed other Claims, in other Courts, over the same subject matter.

14. The Respondents submit that the Claimant filed a Notice of Withdrawal of the Claim on 8th September 2011. There is no suit before the Court.

15. Alternatively, the Respondents submit that the Claimant was retired in Public Interest fairly and lawfully. He has not specified the nature of damages sought. It is not possible to reinstate the Claimant. He left employment in 2002. He was retired and receives pension regularly.

The Court Finds:-

16. The Court has not found any Notice of Withdrawal of the Claim on record. There is no order recorded by the Court, marking the Claim as withdrawn. The Respondents did not, in the course of the proceedings, bring it to the attention of the Court that the Claim was withdrawn. Parties have appeared before the Court on various dates over the past 7 years. There is no order of Withdrawal of the Claim, recorded by the Court. The Respondent suggested there are other Claims of a similar nature, over the same subject matter, filed by the Claimant elsewhere. No evidence of such Claims has been placed before this Court.

17. The Respondents have not given reasons justifying the decision to retire the Claimant in Public Interest. He was interdicted as the criminal trial was going on. There was no administrative process parallel to the criminal trial. He was acquitted, alongside other Employees. The Employees were charged arising out of the same incident. Their circumstances were similar. Other Employees were reinstated. The Claimant was retired in Public Interest. The Respondents have not been able to show why there was different treatment for Employees who were similarly placed.

18. The Claimant made various Appeals to the Public Service Commission. He complained that of the 3 Accused Employees, it was only him, who was not reinstated. He complained also that he was not given any chance to defend himself, before being retired.

19. The Respondents, in their answer to these complaints, did not address themselves to the specific grounds raised by the Claimant in his Appeals. He was simply told that his Appeals, and Review had been considered, dismissed and file closed. There are no reasons given, to justify dismissal of the Appeal and Review, and quick closure of the Claimant's file.

20. In **H.C.C.C Number 3472 of 1994, Geoffrey Muguna Mburugu v Attorney- General; High Court decision in John Mulobi v Attorney- General [Law Monthly No. 15 of March/April 1989]; and E&LRC decisions Sheikh Abubakar Bwanakai Abdallah v Judicial Service Commission & Another [2017] e-KLR; D.K.Njagi Marete v Teachers Service Commission [2013] e-KLR; and John Cheruyiot v The Attorney- General & Another, [2018] e-KLR**, the Courts held that the Employer must approach retirement of Officers in Public Interest, with an open mind. The Employer must always have objective and demonstrable grounds, and act in quasi-judicial manner.

21. The Respondents have not shown they acted objectively. No explanation is made at all, why the Claimant alone was retired, while his Colleagues were reinstated. The Employees faced the same criminal charges, underwent the same criminal trial, and had the same favourable Judgment. There was no internal disciplinary process, which resulted in the Claimant being culpable for any employment offence, which his Colleagues were absolved from.

22. The Courts in the decisions cited above held that retirement in Public Interest must not be used as a tool, for covering up wrongful termination decisions made by Employers. It should never be a substitute for valid reasons, justifying termination of the Officer's contract of employment.

23. The Court is satisfied that termination through retirement in the Public Interest, which was confirmed with the rejection of the Claimant's Appeal and Review, through the letter from the 2nd Respondent to the Claimant dated 18th March 2009, was unfair and unlawful.

24. *The Claimant is granted 1 month salary in lieu of notice at Kshs. 12,500.*

25. His prayer for service pay is not supported, through evidence. He has not directed the mind of the Court to any wage instrument, wage order, law, contract, collective agreement, or public service policy document, enabling the Court to award him 1 month salary for every year worked. The prayer is rejected.

26. The prayer for reinstatement is not reasonable, lawful, or practicable. He was interdicted and last worked for the 2nd Respondent, over 6 years ago. The Claimant's position has since been filled up. The Claimant states he was about 53 years when retired in 2002. He is today at the age of mandatory retirement within the Public Service. The Court cannot order the Employer to take back a retiree. The Respondents submit the Claimant is earning his pension. Reinstatement is unavailable also on the basis of the law. The law does not allow the Court to reinstate an Employee more than 3 years, after termination.

27. The Court is satisfied the Claimant merits a compensatory award. He still had a number of years left, before he expected to retire. He had worked for over 20 years. He was retired, while those he was charged alongside went back to work. He was cleared of all the charges by the Criminal Court. There was no administrative process at the workplace, faulting or in any other way contradicting, the criminal trial. No valid reasons were shown, justifying the decision to retire the Claimant. The Claimant lodged a series of Appeals and Review to the Public Service Commission. All were declined without any reason apparent on the face of the record. Termination was flawed in substance and procedure. ***The Claimant is granted compensation equivalent to 12 months' salary in compensation for unfair termination at Kshs. 150,000.***

28. The prayer for annual leave pay is unclear. The Claimant does not in fact, plead annual leave pay; he pleads annual leave allowance. The Claimant does not state on what provision of the law or clause in his contract, annual leave allowance is based. The prayer is declined.

29. So too are the prayers on special and punitive damages. These are not pleaded with specificity. The compensatory award granted in favour of the Claimant, redresses his economic injury.

30. No order on the costs.

IN SUM IT IS ORDERED:-

a) Retirement of the Claimant in Public Interest was unfair and unlawful.

b) The Respondents shall pay to the Claimant: notice pay at Kshs. 12,500 and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 150,000 – total Kshs. 162,500.

c) No order on the costs.

Dated and signed at Mombasa this 4th day of December 2018

James Rika

Judge

Dated and delivered at Mombasa this 18th day of January 2019.

Joram Nelson Abuodha

Judge