



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA

ELRC CAUSE NO. 289 OF 2017

SYLVESTER ODHIAMBO NYAKANGA.....CLAIMANT

VERSUS

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....1ST RESPONDENT

PETER ULIRA OTIENO.....2ND RESPONDENT

FRANCIS ATWOLI.....3RD RESPONDENT

REGINA CHEPKOECH.....4TH RESPONDENT

J U D G M E N T

The Claimant was the Area Secretary of Kenya Plantation and Agricultural Workers Union (KPAWU) from 1.9.2006 and earned Kshs 39,000 at the time he was retired at the age of 73 years on 20th February, 2016 by Mr. Francis Atwoli, General Secretary of KPAWU.

The Claimant protested the retirement by a letter dated 23rd/8/2016, stating that the retirement was like sending him closer to his grave yard.

The Claimant seeks the following orders.

- a) Declaration that the action by KPAWU of retiring the Claimant and subsequent refusal to include the Claimant's 32 years he served in the Fishing Union in calculation of terminal benefits was unfair, wrongful and a disrespect to the Claimant and the entire trade union movement.
- b) An order compelling the 4th Respondent to reinstate the Claimant to his rightful post of Assistant General Secretary.
- c) An order compelling the 4th Respondent to calculate the Claimant's long service gratuity based on 2 months wages for each year of service
- d) An order compelling the 4th respondents to pay the Claimant arrears since the date he was retired on 20.2.2016.
- e) An order compelling the 4th Respondent to build a big house for the Claimant as was promised to

the Claimant by Mr. Francis Atwoli, 3rd Respondent.

f) An order compelling the 4th Respondent to pay the Claimant the difference in salary between the Assistant General Secretary and Area Secretary, a post given to the Claimant contrary to the initial agreement reached at Golf Hotel Kakamega on 18th May 2006 in the sum of Kshs 8,520,000 as set out in the statement of claim.

g) Costs of the suit.

Defence.

The Respondents filed Defence to Memorandum of Claim on 18.7.2017, in which they admit having employed the Claimant on 1.11.2006 in the position of Area Secretary and that he earned Kshs 39,000 per month.

The Respondent pleaded that the claim is time barred having been filed more than 3 years from the date the cause of action arose. The claim was filed on 27.6.2017.

It is also not in dispute that the Claimant was the General Secretary of Kenya National Union of Fishermen workers until the Claimant and the KPAWU entered into an agreement to amalgamate the two unions. Whereas the Claimant states that he was promised to be elevated to the position of Assistant Secretary General of KPAWU, it is denied by the Respondents who state that the Claimant was appointed to the rightful agreed position which he held till retirement.

Further more, the Respondents state that the post of Assistant General Secretary is an elective post, hence the Respondents had no authority under the union constitution to promise or appoint the Claimant to such post.

The Claimant did not vie for the said post nor did he apply for a recommendation by KPAWU to the electorate.

The Claimant did not complain about his position until he was retired in February, 2016.

The Respondents further state that the Claimant was retired in good faith as his actual age is about 80 years old and at the time of retirement, he was way past recommended retirement age of Sixty (60) years.

The 3rd Respondent Mr. Atwoli states that though he is past 60 years of age he holds office by virtue of being elected to the position of General Secretary.

The Respondents deny that there was any agreement between KPAWU and the Claimant to carry over any liabilities in respect of terminal benefits with respect to past employment of the Claimant with the Fishermen union. The Claimant is put to strict proof thereof. That the issue was not raised at all at the time of amalgamation. That the Claimant voluntarily left the Fishermen Union to join KPAWU on the stated appointment terms.

The Respondent prays that the suit be dismissed with costs for lack of any sound basis.

Determination.

The issues to determination are:

- i. Whether the suit is statute barred.
- ii. Whether the Claimant is entitled to the reliefs sought.

Issue (i)

The Claimant was retired by the Respondents on 20th/2/2016 and filed this suit seeking various reliefs on 27th/6/2017.

It is the court's considered view that provided that the reliefs sought constitute valid claims of terminal benefits arising in the course of the Claimant's employment which would ordinarily crystallize on the date of retirement, the same cannot be said to be statute barred because they are based on a 32 year service by the Claimant.

Retirement benefits are continuous in nature and only accrue on the retirement date. To that extent the claims made, including the prayer for reinstatement are not statute barred in so far as the same are claimed as terminal benefits.

Accordingly, the suit is not statute barred.

Issue (ii)

The critical issue in this suit is whether any of the claims made by the Claimant had any contractual basis, the relationship between the Claimant and the 4th Respondent (KPAWU) being on one part based on contract of amalgamation between the Fishermen Union and KPAWU and on the other part employment agreement of the Claimant by the 4th Respondent on 1.11.2006.

The specific claims made by the Claimant being contractual in nature they have to be proved by the Claimant by producing the amalgamated agreement so as to establish what the parties agreed upon at the time of amalgamation and the terms and conditions in the employment agreement itself.

Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, places the burden of proof on he who alleges, and one who would lose if no evidence was adduced at all to support the allegation made.

In this case, the Claimant seeks the court to belief that although he was employed as Area Secretary by the 4th Respondent on 1.11.2006 earning between Kshs 20,000 and 39,000 by the time of retirement, he had been offered the position of Assistant General Secretary which would have entitled him to a salary of Kshs 100,000 a month and therefore has made a claim of Kshs 8,520,000 being the difference in salary over the period the Claimant served the 2nd Respondent.

Even though the Respondent did not call any witness to rebutt the testimony by the Claimant to this effect, the Claimant failed to prove by way of documentary evidence that he had been offered the position of Assistant General Secretary at the time of amalgamation or at any other time. The claim therefore has not been proved on a balance of probabilities. It lacks merit and is dismissed.

It follows that the claim for payment of terminal benefits based on alleged salary of the position of Assistant General Secretary is imaginary and lacks basis. The same is also dismissed.

Equally, true is that no documentary evidence has been produced to prove that the 4th Respondent carried over any financial burdens in respect of the Claimant's employment with the Fishermen Union prior to the amalgamation.

Accordingly, payment of terminal benefits carried over from the previous employment have not been proved on a balance of probabilities. The claim lacks merit and is also dismissed.

It is not in dispute that the Claimant was 73 years old at the time he was retired from employment.

The Letter of Appointment of the Claimant did not state the retirement age, but the court takes judicial notice of the national policy on retirement age of Public Officers which is generally pegged at 60 years of

age with specific exceptions.

The decision to retire the Claimant at the age of 73 years, provided terminal benefits were paid upon retirement, is not unlawful nor can it be said to be unreasonable.

Accordingly, the prayer to declare the retirement unlawful and reinstate the Claimant to his previous position lacks merit and is also dismissed.

In the final analysis, the entire suit is dismissed with no order as to costs taking into account the age of the Claimant and the good service he had given the 4th Respondent.

DATED, SIGNED and DELIVERED at BUNGOMA this 1st day of FEBRUARY, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:-

Claimant in person

Mr. Magaga for Respondent

Chrispo: Court Assistant.