



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 29 OF 2015

JAMES MOTURI NYAKWARA.....CLAIMANT

VERSUS

NATIONAL INTELLIGENCE SERVICE.....1ST RESPONDENT

DIRECTOR GENERAL,

NATIONAL INTELLIGENCE SERVICE.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

PUBLIC SERVICE COMMISSION.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 14.01.2015 through Nchogu, Omwanza & Nyasimi Advocates. The claimant prayed for judgment for:

- a) A declaration that the decision by the 2nd respondent to retire the claimant under the 50 year rule is unlawful and therefore invalid.
- b) To pay the dues as tabulated as follows:
 - i) Compensation or damages under section 49 of the Employment Act, 2007 at Kshs.323, 600 by 12 months making Kshs. 3, 883, 200.00.
 - ii) What the claimant would have earned had he been left to work up to his lawful retirement at age of 60 years making Kshs. 323,600 by 12 months by 5 years making Kshs.19, 416, 000.00.
 - iii) An order for the respondent to pay the claimant acting allowance as RIC Western Region between October 2012 and October 2013.
 - iv) In alternative to compensation an order for reinstatement.
- c) In the alternative to an order for compensation for unlawful or wrongful or unfair termination, an order for reinstatement.
- d) Interest on (b) above from the date the same became due until payment in full.
- e) Costs of the suit.
- f) Any other relief the Honourable Court may deem fit to award under the circumstances.

The respondents filed the response to the memorandum of claim on 23.09.2015 through Peter Ngumi, Litigation Counsel, for the Attorney

General. The respondents prayed that the suit be dismissed with costs and to grant the respondent any other relief that it may consider just.

It is not in dispute that the claimant was employed by the Kenya Police effective 04.05.1985 as a direct entry Inspector of Police on permanent and pensionable terms. The claimant's services were later transferred to the National Security Intelligence Service (NSIS) currently known as the National Intelligence Service (NIS). The claimant served and was promoted through the ranks to the County Intelligence Co-ordinator deployed at Kakamega County (and designated as Principal Intelligence Officer, Level 12). He held that position until 30.06.2014 and the last gross monthly pay was Kshs. 323, 600.00.

The claimant's employment was terminated by the letter dated 23.12.2014 issued by the 2nd respondent and effective 01.07.2014 being retirement under the 50 year rule. The claimant appealed against the retirement but he did not receive a favourable response.

The 1st issue for determination is whether the retirement under the 50 year rule was unfair. The claimant's case is that the applicable law and laid down procedure was not followed prior to the retirement under the 50 year rule. The parties are in agreement that the claimant's employment was subject to the NSIS Terms and Conditions of Service and the Retirement Policy Guidelines. Under Guideline (b) an officer who wished to serve beyond fifty five (55) years was required to give one year written notice prior to attainment of 55 years of age indicating the number of years he wished to serve subject to the maximum age of 60 years. Further it is not in dispute that all officers were entitled to be notified at least one year before attaining 54 years of age of the requirement to give the one year written notice if they wished to serve beyond 55 years indicating the number of years they wished to continue in service. Further, under the rules, any request to serve beyond 55 years of age was thereafter forwarded to a committee which considered the individual requests on merits. The affected officer was notified the decision and given a chance to appeal the decision in event of dissatisfaction. If an officer failed to give the one year notice to continue in service beyond the age of 55 years, it was deemed that the officer had opted to retire voluntarily at the age of 55 years.

The evidence was that the claimant was in charge of Kakamega County and was among other officers who were notified vide the letter Ref. INT/ADM/1/C Vol. 14(73) dated 31.01.2013 of their approaching 54 years of age and the need to give the one year written notice to serve beyond 55 years if they so desired. The claimant received the letter and responded by his letter Ref. No. PF/85024665 dated 14.02.2013 indicating that he had not attained 54 years and that he was to attain 54 years on 30.06.2013. He further indicated that he would make his decision once the required age "is clocked". It is the respondents' case that the claimant thereafter failed to give the mandatory written notice to serve beyond 55 years of age within or even after the stipulated period. Thus, it is the respondents' case that accordingly, by the letter dated 23.12.2013 the Director of Administration notified the claimant of his retirement with effect from 01.07.2014, the time the claimant attained 55 years of age. By the letter dated 16.01.2014 the claimant purported to appeal against his retirement seeking among others the waiver of the required one year notification period and to be allowed to serve for a further 3 years beyond 55 years. The appeal was found not meritorious as the claimant had failed to give the one year notice of the request to service beyond 55 years and the respondent's case is that the claimant's case should fail.

The Court has considered the material on record. Clause 4.8.4 (a) (vi) of the NSIS Terms and Conditions of Service on retirement on age grounds states thus, "**(vi) Officers who wish to continue in service beyond 55 years will be required to give notice of at least 12 months before the attainment of 55 years specifying the years up to which they intend to work provided that the years will not exceed 60 years.**" Again, clause (b) (1) of the NSIS Retirement Policy Guidelines provides thus, "**1. Where an officer wishes to continue in service beyond 55 years he / she will be required to give notice of at least twelve (12) months before the attainment of 55 years specifying the years up to which he/she intends to work provided that the years will not exceed 60 years.**"

The letter of 31.01.2013 notified the claimant together with other officers to indicate in writing if they desired to serve beyond 55 years of age or if they desired to retire upon attaining 55 years of age. The claimant's letter of 14.02.2013 informed the 1st respondent that the letter of 31.01.2013 had erroneously indicated that he had attained 54 years but he had been born on 01.07.1959 so that he would attain 54 years on 30.06.2013 and after attaining that age of 54 years he would make his decision accordingly.

The Court returns that the 1st respondent reminded the claimant to comply with the terms of service on notifying the respondent if he wished to extend the service beyond 55 years but the claimant of his own design failed to make the mandatory one year notice and he was therefore the author of his ensuing retirement under the 50 year rule as per the applicable regulations. In his appeal against the retirement by the letter dated 16.01.2014 the claimant wrote in part, "**....The reason for the retirement has not been indicated but it could be out of failure to apply in good time for extension beyond the 55 years, an oversight I sincerely apologize for in advance, although there were some factors beyond my control.**

There were delays by my supervisor in completing the 2012 PMS forms which would have formed part of the criteria in assessing my performance in the last three years.

I had made frantic efforts by travelling to the Headquarters in Nairobi from my station in KAKAMEGA, where I am the CIC and sometimes double as RIC Western Region to meet my supervisor to no avail, as he was in most cases busy elsewhere and for the few occasions we met, promised to do so soonest. To-date the form is lying in his office and has not been completed.

Sir, the above notwithstanding, there was an omission and I beg for forgiveness, coupled with your kind consideration in waiving the retirement notice and allow me to serve for three (3) more years."

The Court has considered that letter. It is clear that the claimant failed to make the relevant and mandatory notice requesting to serve beyond the 55 years of age. The claimant has not established that the performance appraisal forms that may not have been completed were a precondition to his making of the mandatory notice of request for extension and in any event, the Court considers that the appraisal reports would become relevant only at the assessment stage but which was predicated upon the claimant indicating he wished to have an extension. The claimant's invoking of the appraisal forms that had not been completed by his supervisor was premature or not relevant to the making of the notice for request for the extension. Accordingly, the Court returns that the termination was not unfair both in substance and procedure. The claimant would therefore not be entitled to reinstatement or compensation under section 49 of the Employment Act, 2007 for the alleged unfair termination. Similarly, the claimant has not therefore established a case for payment of gross salaries for the 5 years prior to

attainment of 60 years of mandatory retirement and as prayed for. The Court returns that the claimant, in the circumstances of the case, substantially contributed to his retirement under the 50 year rule and in accordance with the prevailing terms and conditions of the contract of service.

The Court has considered the claimant's concern that he did not receive the reply to his appeal. The Court considers that that failure did not decimate the claimant's clear contribution to his termination. Nevertheless, the Court returns that in view of that failure which substantially may have prompted the claimant to file the present suit, the same would mitigate in favour of the claimant in exercising the Court's discretion in awarding costs of the suit.

The **2nd issue** for determination is whether the claimant is entitled to acting allowance as RIC Western Region from October 2012 to October 2013. The Court returns that the claim was in the nature of special damages. The quantified amounts were not pleaded specifically. To that extent the claim and prayer would fail. Further the claimant conceded in the letter of 16.01.2014 that he was the CIC Kakamega and sometimes doubled as the RIC Western. The Court returns that the claimant knew that he only sometimes doubled as RIC western Region but was not an acting RIC Western. The respondent's witness confirmed that at the material time there were plans to abolish the post of RIC Western Region and other regions countrywide in alignment to the devolved system of governance under the Constitution of Kenya 2010. There is no reason to doubt the respondent's evidence. Further there was no evidence that prior to the retirement the claimant had raised a grievance about unpaid acting allowance. It was not in dispute that the claimant was informed his terminal dues and the issue of acting allowance which had not been included was never raised in the appeal by the claimant. Further the evidence was that the claimant had no letter appointing him to the alleged acting appointment. On a balance of probability, the Court returns that the claimant has failed to establish the claim for acting appointment and the same was not properly pleaded. The claim will therefore fail.

To answer the **3rd issue** for determination and in view of the mitigating factor that the 1st respondent failed to reply the appeal, each party will bear own costs of the suit.

To answer the **4th issue** for determination, and needless to do so, as submitted for the respondents, it was incurably irregular for the claimant to invoke in his submissions the circular OP.CBA.2/7A of 20.03.2009 generally increasing the retirement age to 60 years of age whereas the same had not been pleaded or evidence provided by the claimant in that regard. It was belated and an afterthought for the claimant to invoke the circular in the final submissions without a foundation to do so as properly embedded in the memorandum of claim and the evidence at the hearing. Further there was no clear legal basis for the argument made for the claimant that the circular superseded the NSIS Terms and Conditions of Service and the NSIS Retirement Policy Guidelines which were later in time in June 2009. The Court considers that the NSIS Terms and Conditions of Service and the NSIS Retirement Policy Guidelines must have been designed to implement the provisions of the circular consistent with the unique needs of the 1st respondent's service.

In conclusion, judgment is hereby entered for the respondents against the claimant for dismissal of the memorandum of claim with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 15th March, 2019.

BYRAM ONGAYA

JUDGE