



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 33 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DANIEL PIRANTO OLE NCHANI.....PETITIONER

VERSUS

MINISTRY OF INTERIOR AND NATIONAL CO-ORDINATION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Petitioner filed the Petition herein on 22nd March 2016 seeking the following reliefs:

1. This matter be certified as urgent and the service of the Petition be dispensed with in the first instance.
2. A declaration that the Petitioner's right to earn pension has been infringed, violated and denied.
3. An order of compensation.
4. An order of judicial review in form of mandamus compelling the Respondents herein to pay the Petitioner his pension benefits which has been pending and accruing from the date of his termination from the Civil Service to date.
5. Costs of the Petition to be awarded to the Petitioner.

The Respondents did not file a Response to the Petition but the Court on 13th November 2017 directed the Respondents to file a report on behalf of the Pensions Department and a Replying Affidavit.

The Respondent's on 5th December 2017 filed a Replying Affidavit sworn by Julius Nzioka the Chief Pensions Officer, Office of the Director of Pensions Department and another Replying Affidavit sworn by Benson Giuthua, the Director Human Resource Management, on 7th December 2017 as directed by the Court. The Petitioner filed a Supplementary Affidavit on 23rd January 2018 in response to the Affidavit sworn by Julius Nzioka.

Petitioner's case

The Petitioner, a retired civil servant, retired in 1983 as a clerical officer in the office of the District Commissioner. The Petitioner was employed as an interpreter to the office of the former Kajiado District Commissioner on 1st February 1965 and rose through the ranks until his retirement.

The Petitioner avers that upon attaining the retirement age of 55 years he retired to his rural home but he neither received his pension nor did the 1st Respondent communicate in relation to his pension. He avers that the 1st Respondent does not dispute the fact that the Petitioner was its employee.

The Petitioner avers that being fairly old now he requires proper care and funds to enable him seek proper medical attention. He further avers that he has on several occasions written to the 1st Respondent, The National Treasury (Pension Department) and the Commission on Administrative Justice regarding payment of his pension benefit but to no avail.

The Petitioner therefore avers that the Court should invoke the jurisdiction under Article 23(3) of the Constitution for orders including a declaration that the Petitioner has been denied his right to pension which arose from his employment.

Respondent's Case

In his Replying Affidavit, Julius Nzioka, states that subject to the provisions of the Pensions Act, the Petitioner was eligible to a compassionate gratuity having worked on temporary terms of service. He further states that the compassionate gratuity payable to the Claimant being a sum of Kshs.21,466 was paid to the Petitioner on 11th April 2017. He testified that the Petitioner's compassionate gratuity was computed by calculating a half of his last month's salary multiplied by the number of years worked.

Benson Giuthua, in his Replying Affidavit states that the Petitioner was appointed as an interpreter in the Provincial Administration office on temporary terms on 1st February 1965 and was subsequently promoted to the post of Clerical Officer on 21st October 1981. He states that the Petitioner could not be put on probation for 2 years as required in the Code earning Kshs.1,150 of Regulations and could also not be confirmed as a permanent and pensionable employee and this position was communicated to the District Commissioner when the Petitioner was being promoted. He further states that the records held by the 1st Respondent indicate that the Petitioner was neither issued with a letter of probationary appointment nor confirmed in permanent and pensionable appointment despite having held a pensionable post for 2 years.

He further states that the Petitioner did not apply for his compassionate gratuity after his retirement.

Petitioner's Submissions

The Petitioner submits that sections 5 f the Pension Act Cap 189 grants every person in the public service the right to be granted pension benefits yet the Claimant never received his pension upon retirement. The Petitioner relies on the decision in *Henry Kamau Ngare v Teachers Service Commission & Another [2016] eKLR* where the Court of Appeal held that once pension benefits become due to a person they amount to property under section 70 of the former Constitution. He therefore submits that he is entitled to his full pension benefits as a permanent and pensionable employee as opposed to a temporary employee. The Petitioner also submits that the Respondents violated his rights by failing to pay his pension contrary to the provisions of the Constitution and section 5 of the Pensions Act.

The Claimant submits that under Employment Act a casual employee is one who is not engaged for a longer period than 24 hours at a time. The Claimant further submits that it would not be possible for the Claimant to have worked for as a casual employee for a period of 18 years as a public servant. The Claimant further relies on the provisions of section 37 of the Employment Act Cap 226 in submitting that the Claimant was an employee under a contract of service.

The Claimant submits that it was wrong for the Respondent to have retained the Claimant a temporary staff over years to only pay his pension amounting to Kshs.21,446.67.

The Claimant submitted that having established that the Claimant was an employee under a contract of service and holding a position that was pensionable has an absolute right to his pension as provided under section 5 (1) of the Pensions Act. The Claimant relies on the case of *Director of Pensions v Abdul Majid Cocker, Civil Appeal No. 50 of 1999*.

The Claimant submits that the a pension benefit is recognised as an employee's right as under section 5 of the Pensions Act and section 35 (5) and 40 (1) (g) of the Employment Act as held in *Henry Kamau Ngare v Teachers Service Commission & Another [2016] eKLR*.

Respondents' Submissions

The Respondents submitted that Petitioner's terms of service did not qualify for pension after retirement. The Respondents rely on Regulation 5 of the First Schedule of the Pensions Act and Section 6(1)(a) of the Act.

The Respondents submit that the delay in paying the Petitioner's pension was occasioned by the Petitioner's delay in filling the requisite documents which he filled in the year 2016 and the pension being paid on 25th January 2017.

Determination

The Petitioner alleges that the Respondents have erroneously withheld his pension from 6th October 1983 to date. The Respondents on their part maintain that the Petitioner was only entitled to a sum of Kshs.21,466.67 being compassionate gratuity and which was already paid to him on 11th April 2017. The Petitioner in his Supplementary Affidavit states that he ought to have been paid pensions as a permanent employee and not a temporary employee.

The Petitioner relied on Section 37 of the Employment Act of Cap 226 of the Employment Act but the cited provisions are of Section 37 of the Employment Act No. 11 of 2017. Based on the doctrine of retrospectivity of the law the provisions of Section 37 of the Employment Act No. 11 of 2007 on the conversion of casual employment to term employment do not apply to this case since at the time of the Petitioner's retirement the applicable law was the Employment Act, Cap 226(now repealed).

The Petitioner's Letter of Temporary Appointment dated 24th April 2015 as an Interpreter provided thus:

"This appointment is purely temporary and carries with it no guarantee of permanent employment."

The Kajiado District Commissioner in his letter dated 24th December 2019 informed the Petitioner of his promotion to the position of Clerical Officer, Grade D. This letter did not stipulate the employment terms in respect of the new position but the Provincial Commissioner in his letter dated 24th June 1982 informed the District Commissioner that the Claimant was not eligible for appointment on probationary terms of service since he was above 45 years. No reference was made by the Provincial Commissioner on the Claimant's eligibility to a pension or further employment Act.

The Claimant submitted that the Petitioner could not have been employed as a casual employee for 18 years and relied on section 2 of the Employment Act Cap 226 (now repealed) which defined a casual employee as:

"casual employee" means an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."

I find that the Claimant was not employed as a casual employee but as a temporary employee. Additionally, the Petitioner's Letter of Temporary Employment at Clause 3 provided for the termination of the employment by one month's notice or payment of one month's salary in lieu of notice.

The Petitioner relied on Section 5 of the Pensions Act which provides that every officer has an absolute right to pension but this section is inapplicable as it was enacted under Act No. 4 of 1999. The Respondents relied on Regulation 5 of the First schedule of the Pensions Act which provides that every officer, otherwise qualified for a pension, who has not been in the service of the Government in a civil capacity for ten years, may be granted on retirement a gratuity not exceeding five times the annual amount of the pension which, if there had been no qualifying period, might have been granted to him under regulation 4. This provision does not apply to the Petitioner as he had served the government for a period exceeding 18 years.

A pensionable office under Section 2 of the Act is defined as:

"pensionable office" means—

(a) in respect of an officer's service under the Government, an office—

(i) to which he has been appointed (on probation or otherwise) by the authority having power for the time being to make appointments to the service of the Government on terms which include eligibility for the grant of a pension under this Act or under any Act repealed by this Act; and

(ii) which he has not ceased to hold on those terms;

(b) in respect of other public service, an office which is for the time being a pensionable office under the law or regulations in force in that service;

Pursuant to the definition provided under section 2 of the Pensions Act the Petitioner was not appointed under terms which provided for the eligibility for a pension.

Section 6(1) of the Pensions Act provides the circumstances under which Pensions and gratuity is payable. The Petitioner's grounds for retirement in the letter dated 6th June 1983 were that he had attained the retirement age of 55 years. The Petitioner's circumstance entitles him to gratuity as provided under Section 6(1)(a)(iii) of the Pensions Act which provides:

6 (1) No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases—

.....(iii) in any other case not falling within the succeeding paragraphs of this subsection, on or after attaining the age of fifty years.

The Petitioner was duly informed in the letter by the Provincial Commissioner dated 6th June 1983 that he was expected to return the commutation forms but he did not inform Court whether he filled the forms at the time as directed. He only annexed his letter dated 11th August 2015 addressed to the Principal Secretary, Ministry of Interior & Co-ordination of National Government informing him that he had never received his pension. There was therefore no delay in paying the Petitioner his gratuity since the Petitioner did not submit his duly filled forms to enable the respondent's process his gratuity.

The Petitioner having received his gratuity of Kshs.21,467 on 25th January 2017, is not entitled to payment of pension as he has never made any pension contribution as indicated in his payslip for the month of August 1983.

The petition is accordingly dismissed with no order for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH 2019

MAUREEN ONYANGO

JUDGE