



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 1 OF 2019

MICHAEL BABWOYA BAHOLA.....CLAIMANT

VS

KENYA NATIONAL UNION OF TEACHERS.....1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS

TANA RIVER BRANCH.....2ND RESPONDENT

MAURICE MARO ADE.....3RD RESPONDENT

BAKARI ALI BADESA.....4TH RESPONDENT

RULING

1. The Claimant is a Teacher by profession, initially engaged by the Teachers Service Commission as an Untrained Teacher on 1st September 1980. He was subsequently employed as a P1 Teacher on 1st May 1986.
2. In the general elections of the Kenya National Union of Teachers (KNUT) Tana River Branch held on 19th February 2016, the Claimant was elected to the position of Executive Secretary. He was released by the Teachers Service Commission to work full time for the Union Branch from 1st April 2016.
3. On 23rd January 2019, the 1st Respondent's Secretary General, Wilson Sossion wrote to the 2nd Respondent's Chairman as follows:

*"We are writing to inform you that the records held in our office indicates that the Branch Executive Secretary, KNUT Tana River Branch, Brother Babwoya B. Michael was born on **1st July, 1959**. He will therefore attain the age of **60 years on 1st July, 2019** which is the compulsory retirement age for both permanent and full-time elected KNUT employees.*

*For that reason, you are hereby instructed to give Brother Babwoya **six months notice of retirement with effect from 1st January, 2019**.*

*However, Brother Babwoya will proceed on **six months terminal leave** with effect from **1st January, 2019** up to **30th June, 2019** which will be his last working day with KNUT Tana River Branch.*

*Further note that while on six months terminal leave, Brother Babwoya will be retained in the payroll and will be entitled to full payments of salaries and any other allowances due to him up to **30th June, 2019**. You should therefore instruct the Branch Treasurer to start preparing his terminal benefits to be paid to him at the end of his terminal leave.*

In case of age dispute, kindly get in touch with us.

Yours faithfully,

(Signed)

(HON. WILSON SOSSION)

K.N.U.T

4. Pursuant to this letter which I have reproduced in full, the 2nd Respondent's

Chairman wrote to the Claimant on 25th January 2019, requiring him to hand over and proceed on six (6) months' compulsory terminal leave. By copy of the letter, the Branch Treasurer was instructed to prepare the Claimant's terminal benefits, pending his retirement on 1st July 2019.

5. Prior to receiving the notice of retirement, the Claimant had on 4th January 2019, written to the Teachers Service Commission indicating that he had made an application to the Principal Registrar in the Department of National Registration Bureau, asking for correction of his date of birth in his Kenyan National Identity Card.

6. On 28th January 2019, the Claimant wrote two separate but similar letters to the 1st Respondent's Secretary General and the 2nd Respondent's Chairman stating that his date of birth was 26th December 1960 and not 1st July 1959. Attaching a copy of his birth certificate, the Claimant asked that the notice of compulsory retirement issued to him be withdrawn.

7. On 8th February 2019, the Claimant sent an appeal to Sossion who subsequently wrote another letter dated 13th February 2019, revising the Claimant's retirement date to 31st August 2019. On the same date, the Claimant dispatched a copy of his new Kenyan National Identity Card, showing his date of birth as 26th December 1960, to the Respondent's Chairman and to the Secretary of the Teachers Service Commission. Similar information was sent to the 1st Respondent's Secretary General on 15th February 2019.

8. The Respondents did not accede to the Claimant's request. He therefore moved the Court by way of Notice of Motion dated 8th March 2019 seeking an injunction restraining the Respondents by themselves, their servants or agents from retiring him on grounds of having attained the mandatory retirement age.

9. The application, which is supported by the Claimant's affidavit and further affidavit is premised on the following grounds:

a) That on 19th February 2016, the Claimant was elected the Branch Executive Secretary of the 2nd Respondent for a term of 5 years subject to retirement on account of age or resignation;

b) That the Claimant has not attained the mandatory retirement age of 60 years but the Respondents are taking steps to retire him prematurely;

c) That although the Claimant shall attain the mandatory retirement age on 26th December 2020, the Respondents on 24th January 2019 issued him with a 6 months' retirement notice effective 1st January 2019 and also gave him a notice to proceed on a 6 months' compulsory terminal leave pending retirement on 30th June 2019;

d) That on 13th February 2019, the Respondents purported to rectify the earlier notice and informed the Claimant that the retirement shall take effect on 31st August 2019 and that the 6 months' retirement notice and compulsory terminal leave should now commence on 1st March 2019 and lapse on 31st August 2019;

e) That the said retirement and compulsory terminal leave notices by the Respondents were based on an erroneous record of the date of birth of the Claimant in his initial records with the Respondents;

f) That the Claimant duly notified the Respondents of the error by supplying them with supporting documents but the Respondents have for unknown reasons refused to correct the error in their records and cancel the said notices;

g) That the Respondents have started enforcing the impugned notices by removing the Claimant as a signatory to the 2nd Respondent's bank account;

h) That the Respondents may at any moment from now proceed to forcefully eject the Claimant from the office, collect the 2nd Respondent's property presently in his possession and deregister him as the 2nd Respondent's Branch Executive Secretary at the Trade Unions Registry;

i) That the Respondents' intended action will not only occasion loss and damage to the Claimant but will also render the entire suit nugatory and defeat the will of the Teachers who elected him as their Branch Executive Secretary for a term of 5 years or until his retirement on account of age whichever comes earlier;

j) That no prejudice shall be occasioned to the Respondents if the relief prayed for in this application is granted.

10. The Respondents' response is contained in a replying affidavit sworn by the 1st Respondent's Secretary General, Wilson Sossion on 12th April 2019. He deposes that when the Claimant was first employed as a Teacher by the Teachers Service Commission, the year of birth he gave on first appointment was 1959.

11. Sossion adds that when the Claimant was elected to the office of Branch Secretary of KNUT Tana River Branch on 19th February 2016, he submitted documents from the Teachers Service Commission, including a payslip which indicated his date of birth as 1959.

12. Sossion states that he has received advice from his Advocates to the effect that where an individual's exact date of birth is unknown, then such person shall retire on 1st July in the year they are deemed to have reached their retirement age. He further states that the Teachers Service Commission, which had seconded the Claimant, to the union, had written a letter confirming that the Claimant was born in 1959 and was due to retire on 1st July 2019.

13. Sossion avers that the documents produced by the Claimant in support of his claim are very recent and suspect in the sense that they were procured with the sole intention and purpose of extending his stay in office beyond the provided period.

14. Sossion makes reference to Government Circular No 2 of 15th November 1982 and Regulation 11(2)(a) of the Code of Regulations for Teachers, which provide that the official date of birth is the one declared in the application for employment.

15. The issue in dispute in this application has to do with the Claimant's date of birth. According to the Respondents, the Claimant was born in 1959, being the year declared by him on first appointment.

16. The Claimant on the other hand maintains that he was born on 26th December 1960. In support of his case, the Claimant produced copies of his certificate of birth, new generation National Identity Card and Primary and Secondary School Leaving Certificates.

17. By his application, the Claimant seeks an interlocutory injunctive order and the conditions upon which such an order may be granted are well articulated in the celebrated case of *Giella v Cassman Brown & Company Ltd [1973] EA 358* as follows:

- a) That the applicant has a prima facie case with a probability of success;
- b) That applicant will suffer irreparable injury which is not compensable by an award of damages;
- c) That if the Court is in doubt, it will decide the application on balance of convenience.

18. In their response to the application, the Respondents cast doubt on the authenticity of the documents relied on by the Claimant due to their recent dates of issuance. They state that the documents were procured solely for purposes of extending the Claimant's stay in employment.

19. The Respondents' sentiments which are in the nature of an opinion are however not backed by hard evidence. Even if one were to ignore the School Leaving Certificates, which may have been issued by persons well known to the Claimant, there is no basis upon which the Court could trash the Certificate of Birth and the National Identity Card, both being official documents issued by Government Departments in accordance with relevant law. What is more, an employer's records, code of regulations or government circulars cannot override these official documents.

20. It seems to me therefore that the Claimant has made out a *prima facie* case against the Respondents. On the issue of injury I have this to say; if the Court does not restrain the Respondents, they will go ahead and retire the Claimant and that will be the end of the story because by each passing day, time runs against the Claimant. Having determined that the first two conditions in *Giella v Cassman Brown (supra)* have been satisfied, I do not need to go to the third condition which is to be applied as a tie breaker.

21. I am therefore persuaded that this is a proper case for grant of an interlocutory injunction and make the following orders:

- a) The Respondents jointly and severally, by themselves, servants or agents are restrained from taking any action towards retiring the Claimant on the ground of age, pending the hearing and determination of the main claim herein;
- b) The parties are directed to comply with pre-trial requirements and take steps to set down the claim for hearing on priority basis;
- c) The costs of this application will be in the cause.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF MAY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Shujaa for the Claimant

Mr. Atyang h/b Sigeti for the Respondents