



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 294 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

WILSON REMOI LULE.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The Claimant originally instituted this suit at the Chief Magistrate's Court in CMCC No. 3912 of 2010. However, the Claimant filed a Miscellaneous Application to have the matter transferred. Consequently, the matter was transferred to this Court.

The Claimant was employed by the Ministry of Provincial Administration and Internal Security (as it then was), as an area chief of the OI Moran location. He had worked for 16 years when he was compulsorily retired on 3rd April 2006.

Aggrieved by this decision, the Claimant filed the claim herein seeking the following orders:

a. A declaration that the retiring of the Claimant is illegal and/or

unlawful thus the Claimant is entitled to severance pay, terminal benefits, three months in lieu of notice, unpaid leave, general damages for wrongful dismissal all shall be assessed by the Court and/or unconditional reinstatement to his gainful employment.

b. Costs of this suit.

c. Interest on (a) and (b) above at court rates.

d. Any other relief that the Court may deem fit and just grant.

It is the Claimant's case that the retirement was unlawful, unjustified, arbitrary, a contractual breach and the same has caused him damage and loss. Further, that he was not given the opportunity to be heard.

During trial, it was his testimony that he was earning a basic salary of Kshs.11,730 and a house allowance of Kshs.3,000. He stated that he was required to show cause, which he did vide his letter of 5th June 2005 explaining the work that he had initiated and the projects he spearheaded.

Nevertheless, he received the retirement letter dated 3rd April 2006. His retirement was on the grounds of poor performance, lack of co-operation with his superiors and failing to implement government policy. He appealed against the decision vide his letter of 25th May 2006 and another of 10th April 2007 when he did not receive a response to his earlier letter. On 16th April 2007, he received a letter from the Public Service Commission informing him that his appeal had been declined.

He earned his salary until April 2006 when it was stopped. He led evidence that the allegations against him were never investigated.

During cross examination, he acknowledged that he was given a chance to defend himself as he was issued with a notice to show cause and responded to the same. He conceded that he did not have his letter of appointment as an assistant chief. He testified that he had not yet retired as he never returned the retirement forms.

On re-examination, he stated that he was never given notice.

In its Defence filed on 14th December 2010, the Respondent denied the allegations set out in the plaint. It was its case that due procedure was followed in dismissing the Plaintiff as he was involved in the proceedings. As such, he was not entitled to any benefits or reinstatement. The Respondent did not call any witnesses.

Both parties filed their written submissions.

The Claimant submits that the Public Service Commission ought to have been guided by the provisions of Regulation 8 of the Service Commissions Act (Public Service Regulations) 2005 (Repealed) which required the Commission to hear a matter referred to it by an authorized officer. As such, the Commission was in violation of the Employment Act CAP 226 (Repealed) and the Service Commissions Act (Public Service Regulations) 2005 (Repealed).

He relies on the cases of *Francis Waithaka Ng'okinyo & 2 Others vs. Telkom Kenya Limited [2013] eKLR*, *D. K. Njagi Marete vs. Teachers Service Commission [2013] eKLR* and *Sheikh Abubakar Bwanakai vs. Judicial Service Commission & Another [2017] eKLR*. The Claimant also submits that he is entitled to the reliefs sought.

The Respondent submits that the claim is time barred having been filed 5 years after the date the cause of action arose. It is also his submissions that the retirement was lawful because there was valid reason for terminating the Claimant's employment. Further, the claimant was given the opportunity to show cause, which he did. The respondent submits that the cases of *Walter Ogal Anuro vs. Teachers Service Commission [2013]* and *Alphonse Machanga Mwachanya vs. Operation 680 Limited [2013] eKLR* are not applicable as they are anchored on the Employment Act, 2007 which had not been enacted at the time of termination of the claimant's employment.

The respondent submits that the Claimant is not entitled to compensation for damages beyond the 12 months' compensation for wrongful termination relying on the case of *Lawrence Onyango Oduori vs. Kenya Commercial Bank Limited [2014] eKLR*. The respondent argues that reinstatement is not an ideal as the Claimant has only 3 years before he attains retirement age of 60 years. Further, that the Claimant is not entitled to costs as he has not proved his case on a balance of probabilities.

Analysis and Determination

After considering the pleadings filed before this Court, analyzing the evidence adduced and the parties' arguments as set out in their submissions, the following are the issues for determination: whether the claim is time barred, whether the Claimant's employment was unfairly terminated and whether he is entitled to the reliefs sought.

The Claim

Section 3 (2) of the Public Authorities Limitation Act provides that no proceedings founded on contract shall be brought against the government after the end of three years from the date on which the cause of action accrued.

The Claimant's employment was terminated in April 2006. However, the claim was filed on 23rd June 2010. I note that the Claimant had previously issued the Attorney General with a notice of intention to sue dated 18th May 2010, however, such issuance was after the expiry of the 3 years stipulated in the Act. As such, the provisions of section 13A of the Government Proceedings Act cannot rescue this claim under section 5 of the Public Authorities Limitation Act. The court in *Bosire Ogero v Royal Media Services [2015] eKLR* observed as follows:

"...The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over."

However limitation was not pleaded by the respondent. The Court of Appeal in *Stephen Onyango Achola & Another vs. Edward Hongo Sule and Another [2004] eKLR* stated as follows:

"The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such a defence and thus let the suit proceed to trial on its merit."

The issue of limitation of time having not been pleaded by the Respondent in its defence, which consisted of mere denials, and the same having not been raised as a preliminary objection nearly 8 years after the suit was instituted, it was only raised during submissions. In light of the foregoing, this Court will not make a finding on the issue of limitation of time and will determine this case on its merits.

Termination

Under section 17 of the Employment Act, 1976, Cap 226 (Repealed), dismissing an employee found guilty of gross misconduct was a justifiable ground for summary dismissal. The Court in *Kenya Ports Authority -V- Festus Kipkorir Kiprotich [2014] eKLR* held that-

"... at the time the Respondent was summarily dismissed...Employers were not obliged to give reason, or hear the Employee before termination. Employment was at-will of the Employer. The Employer could terminate the contract of employment for good cause, bad cause or no cause at all. This was the law of wrongful or unlawful termination. The relationship was seen within the 4 corners of the employment contract."

In his submissions, the Claimant relied on regulation 6 and 8 of the Service Commissions Act (Public Service Regulations) 2005 (Repealed). The Claimant misled himself by submitting that regulations ought to have been taken into consideration. The information required of a public officer by the Commission under regulation 6, was to assist it to exercise its functions. Additionally, the authorized officer referred to in paragraph 8 of the regulations is defined as permanent secretary or minister. As such, the regulations are not applicable in this case.

The Claimant also misinterpreted the provisions of Regulation 36 which reads as follows:

(1) If an authorized officer, after having considered every report in his possession made with regard to a public officer, is of the opinion that it is desirable, in the public interest, that the service of the public officer be terminated on grounds which cannot suitably be dealt with under any other provision of these Regulations, he shall notify the public officer, in writing, specifying the complaints by reason of which his retirement is contemplated, together with the substance of any report or part thereof that is detrimental to the public officer.

(2) If, after giving the public officer an opportunity of showing cause why he should not be retired in the public interest, the authorized officer is satisfied that the public officer should be required to retire in the public interest, he shall, in the case of any public officer, forward to the Commission the report on the case, the public officer's reply and his own comments, and the Commission shall decide whether the public officer should be required to retire in the public interest."

As such, based on the grounds for which the Commission sought to retire the Claimant, I am satisfied that the correct procedure was followed by the Commission. The termination was therefore fair.

Reliefs Sought

The Claimant is not entitled to payment in lieu of notice as he has not adduced any evidence to warrant the issuance of this relief.

He is further not entitled to the claim for unpaid leave, as he has not adduced any evidence to prove the same. He is not entitled to severance pay as he was not declared redundant. He has not proved his case for grant of terminal benefits which must be specifically proven hence he is not entitled to the same.

The Claimant is not entitled to damages for wrongful dismissal as the correct procedure was followed in retiring him in public interest.

The result is that the entire claim is dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE