



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 1 OF 2018

PAUL GITARI.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

KANYAKINE HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged wrongful termination of employment under the guise of retirement. The Claimant asserts that he was employed as an accountant clerk in June 1981 and through the years rose to the rank of bursar before his employment was wrongfully terminated under the guise of retirement on 1<sup>st</sup> July 2016. The Claimant averred that he was forcefully told to retire and/or had his employment wrongfully terminated at the age of 55 years whereas he expected to retire at 60 years in accordance with the law. He averred that the forceful early retirement was malicious and it caused him great loss and damage and that the Respondent failed to heed to his many verbal and written protestation against early retirement. The Claimant thus prays for judgment against the Respondent for the losses due to underpayment of salary – Kshs. 246,288/-, loss of income for the 60 months to the mandatory retirement age of 60 years – Kshs. 1,725,120/-, refund and/or compensation for accumulated leave days – Kshs. 202,222.40, loss of underpaid terminal dues – Kshs. 105,864/-, loss of terminal dues for the shortened 5 years (60 months) of employment – Kshs. 143,760/-, compensation for two months for terminal leave Kshs. 57, 504/- all totaling to Kshs. 2,480,758.40. The Claimant also sought general damages and/or exemplary damages for illegal termination of employment and/or illegal or forced early retirement.

2. In the defence filed, the Respondent averred therein that the Claimant illegally forged a document claiming that he had been given retirement by the School Management on 20<sup>th</sup> May 2014 and presented the document to NSSF and claimed his benefits from January 1982 until 30<sup>th</sup> May 2014 and the Claimant was paid accordingly by NSSF. The Respondent averred that after that the Claimant secretly started diverting NSSF funds totaling to Kshs. 30,246/- from April 2014 to July 2015 contrary to the school rules and when asked about it he said that he had retired and had claimed his benefits from National Social Security Fund. The Respondent averred that the matter was reported to the Board of Management which noted the same as a case of gross misconduct and the Board instructed the Principal to have him submit the school books of account for audit and make his retirement official as he had written to the NSSF. The Respondent averred that the Claimant finally submitted the books of account on 27<sup>th</sup> April 2016 but the County Auditor discovered that the Claimant had not prepared the books as required by the audit department. The Respondent averred that the Principal informed the Board of what had happened and the Principal was given instructions to give him a terminal leave and retirement letter on 1<sup>st</sup> July 2016. The Respondent averred that as the Claimant waited to proceed on terminal leave he verbally made a request to be paid his service gratuity on 1<sup>st</sup> June 2016. The Respondent averred that the school wrote him a cheque No. 0015505 for Kshs. 429,682/- covering 22 years at a salary of Kshs. 19,531 as approved by the Board of Management in reference to his terms of employment. The Respondent averred that it was later realized that the Claimant had applied for a loan to be repaid through the school payroll without the Principal's approval as required by the Bank. The Respondent averred that it retired the Claimant at the age of 57 and not 55 as claimed after he personally prepared and presented unauthorized documents to NSSF and indicated he had retired. The Respondent averred that it effected his wish because after alleging he had retired he neglected his work and engaged in defrauding the school by directing NSSF funds to his personal account. The Respondent averred that the Claimant was not honest in instituting this suit and prays that the suit be dismissed with costs.

3. The Claimant testified and adopted his supporting affidavit as his evidence in chief and stated that he was forcefully retired at the age of 55. He stated that a worker can collect dues from NSSF from age 55 and as such he did not have any issue with NSSF as far as the suit is concerned. He testified that he did not forge any document not even the payslip as the payment of Kshs. 24,662/- emanated from the appointment letter and the directive from Ministry. He stated in cross-examination that he had a letter promoting him to job group H. He also confirmed that he had 158 untaken leave days as at 2014. He testified that he complained of the forceful retirement verbally to the Principal and wrote a letter to the Ministry. He stated that he was ready to serve until the age of 60 and he was not informed of the retirement. He stated that he was sent on terminal leave sometime in July but he refused to go as he was seeking to reverse the retirement. He testified that he was not ready to retire as he had a loan he was servicing and his wife was in hospital suffering from cancer and with a bill of Kshs. 2 million. He testified that he did not receive any complaint from NSSF and that there was no notice to show cause on the failure to give accounts for auditing neither was he called for any audit query. He maintained that he never had issues with the audit. He testified that he was underpaid contrary to the Ministry circular and his demand for salary increment generated his problems as they said that he was inciting others. In re-examination he confirmed that he was supposed to be paid Kshs. 24,622/- and not Kshs. 19,421/- and that is why he came to court. The Respondent's case was closed as it did not avail a proper witness in court.

4. The Claimant submitted that there was unlawful termination. He relied on the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** and Section 49(1) of the Employment Act. The Claimant submitted that since the courts are reluctant to award exemplary and punitive damages in such cases, he would urge the court to calculate damages awardable to the plaintiff based on his monthly pay. The Claimant also relied on Section 107 of the Evidence Act which provides that "whoever desires any court to give judgment as to any legal rights or reliability dependent on the existence of facts he asserts must prove that those facts exist." The Claimant cited the case of **North End**

**Trading Company Ltd (carrying on business under the registered name of Kenya Refuse Handlers Ltd v The City Council of Nairobi [2019] eKLR**, where the court agreed with the ruling in the case of **Edward Mariga Through Stanley Mobisa Mariga v Nathaniel D Schulter & Another [1997] eKLR**, where it was held that where a defendant does not adduce evidence, plaintiff's evidence is to be believed, as allegations by the defence is not evidence. The Claimant submitted that in the instant suit he had proved on a balance of probability that he was wrongfully and illegally terminated and/or forced to go into early retirement hence his evidence remains unchallenged. He urged the court to enter judgment against the Respondent as prayed in his claim.

5. The Respondent submitted that the Claimant was at pains to demonstrate the authenticity of some of the documents that he relied on. The Respondent submitted that his leave form was altered as the leave form computation for the year 2014 indicates that the Claimant had applied for 158 days. This means that he had never gone for leave for 5 years and 2 months that is to mean the last date of his leave was in the year 2009. The Respondent submitted that the Claimant was unable to show how he accumulated the days he alleged to have. The Respondent submitted that it had on the other hand filed a leave computation forms for the Claimant for the years 2007, 2008, 2009 and 2013 which showed that the Claimant had exhausted all his leave days and the allegations made by him are false. The Respondent submitted that the Claimant's pay slips as filed were also altered so that he can mislead this honorable court on the salary he used to earn. The Respondent submitted that the Claimant's pay slip for June 2016 showed that he earned Kshs. 21,791/- as net pay while the Respondent's pay slip filed for the same month showed Kshs. 19,531/-. The Respondent submitted that the forged pay slip which he used to claim his retirement dues from the Ministry of Education and the Respondent. The Respondent submitted that by using the forged pay slips the Claimant enriched himself unfairly and due to the forged pay-slips which showed that he earned Kshs. 24,662/- instead of Kshs. 19,531/- he received Kshs. 308,275 from the Ministry instead of Kshs. 244,137 and he was thus overpaid by Kshs. 64,138. The Respondent averred that the school also paid him Kshs. 449,213/- instead of Kshs. 439,447.50 thus overpaid him by a sum Kshs. 9,765.50. The Respondent submitted that the Claimant is thus dishonest. The Respondent submitted that the Claimant was paid all his dues at the time of retirement and stated that he who comes to equity must come with clean hands. The Respondent submitted urged the court to find that the Claimant had failed to prove his claim on the required standards, and urged the court to dismiss the Claimant's case with costs to the Respondent.

6. The Claimant herein forged his retirement papers to access his NSSF dues. The result was that his NSSF payments could not be receipted as he was on the record a retiree. He was dishonest in his dealings with the Respondent and it was in order for the Respondent to initiate the retirement process to formalize what he had already achieved through cunning and deceit. The Respondent paid him his dues as required and there is nothing more for him to recover. The Claimant used falsehoods to enrich himself unjustly from the Ministry and his employer. His suit is entirely unmerited and is accordingly dismissed with costs to the Respondent.

7. I would be remiss if I did not point out that the Claimant's papers were inelegant in presentation contrary to Rules of the Court. They were not bound as required by the Court Rules and it is untenable for such to be filed. Deputy Registrar at Meru is directed to bring the attention of all parties the requirements on the Practice Directions issued by the Court and the Registry staff comprehensive guide on filing at the Employment Court by Mr. Odinga and Mr. Mugambi.

It is so ordered.

**Dated and delivered at Nyeri this 10<sup>th</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**