



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1625 OF 2015

STEPHEN M. KARIMI..... CLAIMANT

VERSUS

THE BOARD OF GOVERNORS

SENIOR CHIEF KOINANGE GIRLS HIGH SCHOOL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 6th December, 2019)

JUDGMENT

The claimant testified that he worked for the respondent for 32 years as the Lab Technician. His last monthly salary was Kshs.29, 918.00. His case is that he was terminated from employment by way of retirement on age grounds prior to attainment of the age of 60 years prescribed for retirement of public officers. He filed the memorandum of claim on 17.09.2015 through Omwoyo Masese & Company Advocates. He prayed for judgment against the respondent for:

- a) Three months' salary in lieu of notice Kshs. 89, 754.00.
 - b) Service gratuity for 33 years served $\times 15.30 \times 29, 918 =$ Kshs. 7, 404, 705.
 - c) 12 months compensation for loss of employment Kshs. 359, 016.00.
 - d) Unpaid salary arrears from 1st July 2004 to 31st June 2008 Kshs. 90, 000.00.
 - e) Unpaid salary arrears from 1st July 2012 to March 2014 Kshs.628, 278.
 - f) Unpaid leave allowance for 33 years at Kshs. 29, 918 per year Kshs. 987, 294.00.
 - g) Total claim Kshs.9, 559, 047.00.
 - h) Certificate of service.
 - i) General damages.
 - j) Reinstatement to employment.
 - k) Costs of the claim.
 - l) Interest on the above at Court rates.
- m) The Honourable Court do issue such orders and give such directions as it may deem fit to meet ends of justice.

The response to the memorandum of claim was filed on 05.07.2017 through Kivuva Omunga & Company Advocates. The respondent prayed that the suit be dismissed with costs.

First, there is no dispute that the parties were in a contract of service. The claimant was employed by the respondent as a Laboratory Technician.

Second, was the retirement unfair? The claimant testified that he worked for the respondent for 32 years. By the letter dated 12.03.2014 the claimant was informed that he had retired on 30.05.2008 and he had received his dues by cheque No. 000106 but had failed to proceed on retirement as expected. The letter stated that instead the claimant had stayed in school and was drawing salary illegally. The purpose of the letter was therefore to inform the claimant that he was to go on retirement on 31.03.2014 and he was to make arrangement to return the respondent's property.

The claimant replied by his letter dated 22.04.2014 to the following effect:

- a) He had commenced his retirement officially on 31.03.2014.
- b) It was true he received his benefits in July 2008 but he had not been served with any letter on retirement. At that time he had attained 50 years of age and not the 60 years of mandatory retirement age.
- c) After July 2008 he had no means to retain himself at work but was retained by the respondent and no illegal salaries had been drawn as had been alleged.
- d) He claimed that he had been underpaid in view of the minimum salary increments by the government.
- e) After 2007 the government mandatory retirement age moved from 55 years to 60 years. He did not wish to retire effective 31.03.2014 at a time he had 3 years to attain 60 years of age. The retirement had been forced on him and the respondent was asked to consider paying for the 3 unexpired years.
- f) The retirement dues should be calculated based on his payment on 31.03.2014 and the difference be paid to him in view of the earlier benefits paid in July 2008.

The claimant testified that he was not given a letter asking him to retire on 30.05.2008. He testified that in 2008 the School Principal told him verbally that he had retired. From July 2008 he continued to draw salaries until 31.03.2014. In cross-examination the claimant confirmed that he was born in 1957 and he worked for 32 years. Further when he retired in July 2008 he was paid Kshs.395, 000.00 by cheque. He stated that he thought it was salary arrears. His monthly salary that time was Kshs.29, 918.00. The respondent did not call a witness.

The evidence is clear. The claimant acknowledges that he had retired in July 2008 and while further admitting that he had received the retirement package, he alleges that he thought it was salary arrears. He testified that he was not aware of any basis for such salary arrears. The Court returns that the claimant retired in July 2008 and by accepting the retirement benefits he is estopped from denying that fact of retirement. The suit was filed on 17.09.2015 and a cause of action to deny that retirement is invariably time barred as the 3 years of limitation under section 90 of the Employment Act, 2007 had already lapsed.

The Court finds that after the retirement in July 2008 the claimant was retained in the respondent's service as a month to month employee and claims for retirement upon attainment of 60 years of age fail. Under section 35 of the Act, prior to being asked to proceed on retirement on 31.03.2014, the claimant was entitled to a one month notice but which was not given. He is awarded one month pay in lieu of notice making **Kshs.29, 918.00**. The claimant's testimony was that three months' notice pay as claimed had no contractual basis and will fail as not justified.

Third, the claimant testified that he was a member of the NSSF and the court returns that as submitted for the respondent, in absence of relevant contractual provision on service pay or gratuity, the claimant is not entitled as claimed and prayed for in view of the provisions of section 35(6) of the Employment Act, 2007 and as was held by the Court of Appeal (Makhandia, Ouko and M'Inoti JJ.A) in **Bamburi Cement Limited –Versus- William Kilonzi [2016]eKLR** thus, **“Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.”**

Fourth, the claim for salary arrears from 2004 to 11.06.2008 and 2012 to March 2014 must fail. The claimant testified that he had no basis for computing the arrears as claimed. Further the Court finds that such claims related to continuing injuries under section 90 of the Employment Act and 12 months of limitation had lapsed. Similarly the claim and prayer for leave must fail because it was a continuing injury over the 32 years of service ending on 12.03.2014 and the 12 months of limitation had lapsed.

Fifth, the claimant surrendered the prayer on reinstatement when he testified that he would not like to go back to the respondent's service.

Sixth, the claimant is entitled to a certificate of service per section 51 of the Act.

Seventh, the claimant has partially succeeded in his claim and is awarded partial costs of the suit fixed at **Kshs.20, 000.00** only and the Court having taken into account the parties' margins of success in that regard.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs. 49, 918.00** by 01.02.2020 failing interest to be payable thereon at Court rates from the date of this judgment till

full payment.

b) The respondent to deliver a certificate of service per section 51 of the Employment Act, 2007 by 31.12.2019.

Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.

BYRAM ONGAYA

JUDGE