



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2480 OF 2013

(FORMERLY NAIROBI HCCC 375 OF 2006)

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH NJOROGI MUGENDA.....CLAIMANT

-VERSUS-

KENYA BUREAU OF STANDARDS.....RESPONDENT

JUDGMENT

This suit was initially instituted vide a plaint dated 13th September 2005 filed at the High Court Nairobi on 11th April 2006. It was transferred to this court by orders made on 30th November 2012. The Plaint was replaced by a memorandum of claim dated 30th July 2013 by way of amendment.

In the amended memorandum of claim, the claimant avers that his employment was unfairly terminated by the respondent. He avers that he was paid Kshs.452,828.35/= in respect of 6 months salary in lieu of notice, leave allowance and part of his salary for April 2005 which according to him did not fully cover his entitlement under the Kenya Government Code of Regulations, the Public Servants Code of Regulations, the Chief Secretary's Circular dated 27th May 2004 and the Kenya Bureau of Standards Staff Retirement Benefits Scheme of July 2003. He prays for the following remedies –

- (a) Loss of salary
- (b) Severance pay
- (c) Golden handshake
- (d) Allowances for the month of April 2005
- (e) Deletion from payroll
- (f) Pension difference (6% of loss of additional pension)
- (g) Assumption of 30% salary increment per year.

All totalling to Kshs.4,095,106.65/=.

The claimant further pays for pension earning at Kshs.30,000/= per month instead of Kshs.18,040, general damages, costs and interest at 12% per annum.

The respondent filed a memorandum of reply on 29th August 2013 in which it denies the averments in the amended memorandum of claim and avers that the claimant's services were properly, legally and procedurally terminated in accordance with his letter of appointment, the respondent's terms and conditions of service and the Kenya Government Code of Regulations governing the claimant's employment. The respondent avers that it paid the claimant his full legal dues as admitted by the claimant who further discharged the respondent from any future liability.

Evidence

At the hearing the claimant testified on his behalf while the respondent called JOSHUA WASIGALA, its Principal Human Resource Officer (RW1).

Claimant's Case

The claimant testified that he was employed by the respondent in 1980 and worked until 31st May 2005 when he was retired with immediate effect under the 50-year Rule of Regulation G44 and G46 of the Code of Regulations for civil servants. He was Head of Engineering in Job Group R at the time of retirement. He denied that he was retired under Voluntary Early Retirement Scheme.

The Claimant was paid Kshs. 452,828.35/= as tabulated in the Last Pay Certificate dated 25th May 2005. He was not given notice. He found the letter of retirement on his desk when he came from a meeting. He testified that there was no approval from the Permanent Secretary/Director of Personnel Management to retire him as was provided in Regulation G44 and G46 of the Code of Regulations for civil servants as provided for officers in Job Group L and above.

The claimant testified that the Circular on Targeted Voluntary Early Retirement Scheme (TVERS) dated 27th May 2004 provides that the Scheme was intended to reduce the size of civil service for non-core staff. He testified that he was 53 years, a professional and not in an over-manned department. He was not in a non-core area and should not have been retired.

The claimant testified that in the respondent's strategic plan the approved staff establishment was 87 but only 41 were in post. The establishment for support staff was 17 but there were 41 in post. There was therefore a shortage of 31 officers. In the establishment his position was in a ring-fenced critical area.

The claimant testified that page 32 of the respondent's Strategic Plan for 2003/4-2006/7 it is stated that the respondent had a backlog of 32 standards to be achieved. The respondent therefore required more technical staff to achieve its targets.

The claimant testified that he was retired under inferior terms, that because of his age and position the TVRS did not apply to him. He testified that he was challenging both the retirement and the quantum paid. He stated he handed over on 27th May 2005.

Respondent's Case

For the Respondent RW1 testified that the Claimant was retired under the 50-year rule and was in the position of Chief Principal Officer. The basis for retirement was Government Circular on TVERS and Regulations G44 and G46 of Government Regulations. The claimant was issued with a retirement letter dated 8th April 2005. The reasons for retirement were stated in the retirement letter.

He testified that the benefits that the claimant was supposed to be paid were severance payment, 3 months' basic salary, normal and additional pension and golden handshake of Kshs. 80,000. He testified that the Claimant was paid 6 months' salary in lieu of notice and leave days. He testified that the 22 days

that he is claiming and the 2 days of handing over are all within the 6 months' notice period.

He testified that acting allowance was 15% of basic pay. He testified that the claimant's pension as prepared under the scheme and amounted to Kshs.1.8 million which was paid to the claimant. He testified that the claimant was not paid golden handshake.

Under cross-examination, RW1 testified that the authority for retirement of the claimant was from the respondent's Board which is equivalent to Permanent Secretary.

He testified that the claimant was not in a department that was overmanned or non-core area. He admitted that the claimant was wrongly retired and was not paid severance and golden handshake.

Submissions for Claimant

It is submitted for the claimant that the retirement was unfair as both the TVRES and Regulations G44 and G46 were not complied with by the respondent and the claimant is therefore entitled to the prayers sought.

Respondent's Submissions

It is submitted for the Respondent that the claimant was 53 years old at the time he was retired under the 50-year rule and was eligible for retirement under Regulation G44 and G46. It is submitted that having served for 24 years, the claimant was entitled to pension which he was paid together with payment in lieu of 6 months' notice as confirmed by copy of cheque produced in the claimant's bundle of documents. It is submitted that Targeted Voluntary Early Retirement Scheme (TVERS) did not apply to the claimant.

Finding and Determination

I have considered the pleadings and evidence on record. I have further considered the submissions filed by both parties. The issues that arise for consideration are in my understanding the following –

- (1) Whether the claimant was retired under the Code of Regulation or TVERS
- (2) Whether the retirement of the claimant was in compliance with the regulations applicable to him.
- (3) Whether the claimant is entitled to the remedies sought.

(1) Whether the claimant was retired under TVERS

The TVERS circular dated 27th May 2004 is addressed to the following-

- (i.) The Attorney General
- (ii.) The Chairman, Electoral Commission
- (iii.) All Permanent Secretaries (with sufficient copies for Heads of Department)
- (iv.) The Controller and Auditor General
- (v.) The Secretary, Public Service Commission
- (vi.) The Registrar, High Court of Kenya
- (vii.) The Director General, National Security Intelligence Service

(viii.) The Clerk, National Assembly

(ix.) All Provincial Commissioners

(x.) All District Commissioners

Paragraph 4 of the circular states as follows-

“The TVERS will be applicable to civil servants in overmanned and non-core areas who are below fifty three (53) years of age. Ministries/departments are, therefore, required to use the findings and recommendations of their strategic plans, already developed, to determine specific cadres in non-core areas and in area where staff is in excess of requirement and at the same time, “ring-fence” critical cadres including professionals, managerial and technical personnel who offer critical services in the Civil Service.”

The circular specific about the targeted area for the TVERS. It was therefore not applicable to the claimant who was not a civil servant, was not in an overmanned and non-core area and was not below 53 years of age. His prayers based on the TVERS circular are therefore without foundation and are dismissed.

(2) Whether the Retirement was Fair

The claimant’s letter of retirement reads as follows –

“2005.04.08

Mr. J. N. Mugenda

P. BO. Box 54974

NAIROBI

Thr’ GM SDD

Dear Sir

REF: RETIREMENT UNDER THE 50 YEARS RULE

This is to inform you that the Board has decided to retire you will immediate effect pursuant to the Kenya Government Code of Regulations G44 read along with G46.

Your benefits will be paid according to Kenya Bureau of Standards Staff Regulations. Please get in touch with the personnel department for clearance purposes.

Yours Faithfully

SIGNED

Eng. J. M. Masila

MANAGING DIRECTOR”

Kenya Code of Regulations G44 and G46 provide as follows –

Retirement on Attaining the age of 55

G43....

G.44. The Pensions Act (Cap 189) does not prescribe any age limit at which an officer must retire, but under Section 8 of the Act an officer may be required to retire from the service of the Government at any time after he attains the age of 5 years. Whenever it is necessary to enforce the retirement of an officer on grounds of age, the provisions of this Section will be employed in accordance with Regulation G46.

Retirement Under the '50 Year' Rule

G.46 (1) An officer on attaining the age of 50 years may elect to retire any time thereafter or may be required to retire by the government anytime thereafter without assigning any cause.

(4) Applications from officers holding posts below Job Group 'L' other than Assistant Secretaries to retire under the '50 year' rule may be approved by Permanent Secretaries. Authority for officer in Job Group 'L' and above and Assistant Secretaries to retire from the service under the 50 year' rule must be obtained from the Permanent Secretary/Director of Personnel Management."

The claimant's letter of appointment at page 8 of Amended Claim reads at paragraph 2 as follows

"You will be subject to all regulations for officers of the Kenya Bureau of Standards which are in force or which may be promulgated from time to time."

The letter of confirmation dated 29th July 1981 reads "you have been confirmed to permanent terms of service with the Kenya Bureau of Standards... The other terms of service remain unchanged."

The letters of promotion dated 7th December 1982, 15th March 1990, 27th November 1996 and 28th October 2012 all contain the sentence –

"All other terms of service remain the same as per your letter of appointment."

The respondent did not produce any letter stating that the terms of service of the claimant will be governed by Kenya Government Code of Regulations which was used to retire him. In fact, even the letter of retirement at paragraph 2 states that the Claimant will be paid benefits according to the Kenya Bureau of Standards Staff Regulations. Those regulations have not been produced by the respondent to confirm that they provide for the claimant to be retired under the Kenya Government Code of Regulations G44 along with G46.

G44 refers to the Pensions Act which the claimant was not subject to as he was a member of the respondent's Staff Retirement Benefits Scheme. It further applies to retirement upon attaining the age of 55 which the claimant had not attained. Regulation 46 provides for retirement on the "50-year" rule. Even the respondent's Staff Retirement Benefits Scheme did not provide for compulsory early retirement. The Scheme only provided for early retirement on voluntary basis or on account of infirmity of body or mind and penalised the same by a reduction of pension by 3% for every year of early retirement.

For the foregoing reasons, I find that the Code of Regulations for Civil Servants generally and Regulations G44 and G46 specifically were not applicable to the claimant and his retirement was therefore unlawful.

The retirement was also unfair as the claimant was not given an opportunity to state his position on the same. He had legitimate expectation to work until he reached normal retirement age of 55 years according to his terms of employment, having served the respondent diligently for 25 years without any adverse record, earned several promotions, commendations and long service awards and having only two more years to work before reaching the mandatory retirement age.

At the time of retirement, the claimant was Acting Head of Engineering Branch having been appointed to

the acting position with effect from 7th July 2003. He was therefore looking forward to a happy retirement from his employer of many years. The sudden unexplained early retirement requiring him to leave immediately and without any prior notification must have come as a shock to the claimant. He was entitled to an explanation for this abnormal turn of events.

As demonstrated by the claimant, the respondent was understaffed, as there were 56 officers in post while the approved establishment was 86 and there was further, a backlog of standards that required more technical staff. There was therefore no logical basis or explanation for the claimant's retirement. Had the respondent submitted to court the minutes of the Board meeting where the decision was made perhaps there would have been an explanation for this otherwise illogical decision.

The Respondents only witness RW1 too admitted that the claimant was wrongly retired.

For these reasons I find the early retirement of the claimant unlawful and unfair.

Remedies

1. Loss of Salaries and Allowances for the months of April 2005 and May 2005

The claimant's retirement letter is dated 8th April 2005. He was paid salary up to that date. He is therefore not entitled to salary after the date of the letter as his employment terminated on the date of the letter. The prayer is dismissed.

2. Lost Earnings

The claimant prays for lost earnings between the time he should have retired at 55 years and the time he was retired at 53 years being 24 months. Having found the retirement unlawful and unfair and the Claimant had legitimate expectation to work until he reached the retirement age of 55 years, I find that the claimant is entitled to the lost salary. His last gross salary was Kshs. 116,600. For the 24 months' lost earnings I award him Kshs. 2,798,400. In making this decision I am guided by the Court of Appeal decision in EAST AFRICAN AIRWAYS V KNIGHT 1975 EA 165.

3. Lost Salary Increment

According to the claimant's last letter of promotion, his salary was to increase at the rate of Kenya Pounds 882 per year and his incremental date was 1st January each year. This means that he lost the increment for 1st January 2006 and 2007 which he would have earned had he retired on 19th May 2007 upon attaining age 55. He therefore lost Kshs. 35,280 due to the early retirement. I award him the said sum.

4. Acting Allowance

The claimant prayed for acting allowance of 30% of basic salary. RW1 however testified that acting allowance was 15% of basic salary. Neither the claimant nor the respondent produced the terms of service to confirm whether the acting allowance was at 15% or 30% of salary. I therefore award the claimant the admitted rate of 15% of basic salary for the period July 2003 to April 2005 a period of 22 months at Kshs. 154,440.

The claimant is not entitled to acting allowance for the period he did not serve after the date of his early retirement.

5. Loss of Pension

The claimant avers that he lost 30% of his pension as a result of his early retirement. In the Staff Retirement Benefits Scheme Handbook extract produced by the claimant and not contested by the

respondent the formula for calculation of annual pension is based on years of service and last salary. Had the claimant worked to his retirement date he would have served for 27 years and his last pensionable salary would have been Kshs. 49,740 per month and Kshs. 1,136,880 per annum. This is the figure that should have been used to calculate his pension.

I therefore direct that his pension be calculated based on a last salary of Kshs. 49,740 and 27 years of service. From the resultant amount should be recovered the pension paid to the claimant to date. This adjustment will be paid for by the respondent to the pension scheme managers to enable the Scheme adjust the claimant's pension accordingly.

6. Severance Pay

As I already stated above the claimant was not subject to TVERS and the prayers for severance pay and a golden handshake must therefore fail, I accordingly dismiss the same.

7. General Damages

The claimant prayed for damages of Kshs. 561,600 based on the fact that the claimant proved unfair and malicious termination of his employment. The claimant was retired in April 2005 while the Employment Act, 2007 was operationalised on 2nd June 2008. He is not entitled to compensation of 12 months as this was introduced in the Employment Act 2007 which came into force after he left service.

8. Interest

Having found that the claimant was unfairly denied earnings and pension by the unexplained unfair action of the respondent, I award him interest on decretal sum from the date of filing suit being 11th April 2006.

The respondent shall also pay the claimants costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE