



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 420 OF 2016

CALISTA KINA GITOBU.....CLAIMANT

v

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Calista Kina Gitobu (Claimant) was offered employment by the Teachers Service Commission (Respondent) through a letter dated 4 May 1982 as an Assistant Lecturer, Kenya Polytechnic on permanent and pensionable terms.
2. On 1 October 1996, the Claimant gave notice of retirement effective 31 December 1996.
3. The Respondent approved the retirement through a letter dated 27 November 1996 and advised the Claimant that her pension would be processed.
4. On 2 October 1997, the Director of Pensions wrote to the Claimant informing her that she had been awarded monthly pension effective 1 January 1997.
5. Around 29 April 2003, the Claimant applied to the Respondent for employment and on 3 July 2003, the Respondent offered her the position of Principal Lecturer. She was posted to the Kenya Polytechnic.
6. On 9 December 2003, the Respondent issued to the Claimant a *Letter of Temporary Appointment* and the Claimant accepted the terms on 22 December 2003.
7. On 10 July 2009, the Claimant wrote to the Respondent seeking amalgamation (consolidation) of her pension. She indicated she was ready to refund the lump sum pension which had been paid to her upon retirement in 1996.
8. On 17 November 2010 (after serving for about 7 years on the temporary appointment), the Claimant wrote to the Respondent asking that the terms of her service be reviewed from *temporary to permanent and pensionable*.
9. Upon receipt of the letter seeking review of terms of service, the Respondent wrote to the Director of Pensions on 23 November 2010 to bring to his attention the request by the Claimant for translation of terms of service from *temporary to permanent and pensionable* (amalgamation of pensionable service).
10. The Respondent indicated in the letter that it was not opposed to the translation of the Claimant's terms of service.
11. The Director of Pensions replied to the Respondent's letter 2 years later, on 14 April 2012 advising that the *temporary terms and permanent and pensionable* terms could not be amalgamated as the terms of service were different and there would be irregular overpayment of lump sum and monthly pension, and further because a pensioner could not have the terms of service reverted back to pensionable on re-appointment where no authority had been granted for the re-appointment.
12. The Director also advised that the Claimant could claim benefits from the National Social Security Fund.
13. On 26 March 2014, the Respondent gave notice of retirement to the Claimant on the basis that she would reach the retirement age of 60 years on 1 September 2014. Her last day of service was to be 31 August 2014.
14. The notice informed the Claimant that she would not be eligible for *pension* because she had been employed on non-pensionable terms

15. The Claimant appear to have taken time to comprehend the effects of retirement, for 2 years later, on 16 March 2016 she commenced legal proceedings against the Respondent alleging that the *temporary terms of service* violated Articles 41 and 47 of the Constitution (right to fair labour practices and right to fair administrative action).

16. The Claimant also alleged that the failure to pay her retirement benefits/gratuity for the 12 years served upon her retirement was discriminatory as other employees had been paid.

17. And for the 12 years served on temporary appointment (2003 to 2014), the Claimant sought Kshs 3,039,910/84 as gratuity.

18. The Respondent filed its Response on 6 May 2016 and this prompted the Claimant to file a Reply to Response on 10 August 2016.

19. Hearing commenced before Nzioki wa Makau J on 10 October 2017 and continued on 7 December 2017 when the Claimant closed her case.

20. Nzioki wa Makau J was transferred before concluding the hearing and on 5 February 2018, I took the Respondent's case.

21. The Claimant filed written submissions on 22 February 2018 while the Respondent filed its submissions on 1 March 2018.

22. The Claimant raised 4 Issues as arising for determination, to wit,

(i) Whether the Claimant's claim for payment of gratuity by the Respondent is justified and grounded in law.

(ii) Whether the Respondent's action of discrimination against the Claimant with regard to the payment of her retirement benefits comprising gratuity for the 12 years she served had been effected to other retirees and employees in her Grade of employment was lawful and justified to what extent.

(iii) Whether the Claimant suffered loss of her lawful expectation on retirement.

(iv) What remedies are available to the Claimant.

23. On its part, the Respondent identified 3 Issues being

a) Whether the Claimant is entitled to gratuity benefits;

b) Whether the Respondent deducted the Claimant's NSSF dues;

c) Whether the Claimant was discriminated against by the Respondent.

24. The Court has considered the pleadings, evidence and submission and come to the conclusion that Issues as arising for determination can be condensed into 3, *whether the temporary terms of service violated the Constitution/law, whether the Claimant was discriminated and appropriate remedies/orders.*

Violations of the Constitution/law

25. Article 36 of the Constitution guarantees all persons the right to freedom of association.

26. When the Claimant and the Respondent entered into the contractual relationship(s), the cause of the instant litigation, it was an expression of the right of all persons to associate. In their case, it was a contractual association.

27. As part of that association, the Claimant and the Respondent had party autonomy to agree to the terms of that engagement.

28. The terms of engagement between the Claimant and Respondent was in the first instance expressed in the offer letters, the appointment letter and the Code of Regulations published by the Respondent pursuant to the Teachers Service Commission Act.

29. The engagement of course was also subject to other statutes in place at the material time such as the Employment Act, the Pensions Act among others, and the Supreme law of the land.

30. In 2003, it is the Employment Act, cap. 226 (repealed) which was in place.

31. The Claimant admitted in her testimony that she was offered employment on temporary terms, although the offer letter did not state that the offer was temporary terms of service.

32. However, the Respondent issued to the Claimant a more detailed contractual document on 9 December 2003. The Claimant signified acceptance of the terms.

33. According to the document, the contract was subject to the Code of Regulation, and the Code in place at the time was the Code of

Regulation for Teachers (Revised 1986).

34. In terms of Regulation 17(3)(c) of the Code, a teacher employed on temporary terms was not eligible for pension.

35. And going further, pursuant to Regulation 17(3)(d) of the Code, it was teachers appointed on *Local Agreement* who were eligible for gratuity.

36. The Claimant herein did not suggest that she was serving on *Local Agreement*.

37. The Court has reviewed the testimony of the Claimant. She did not attempt at all to correlate the contractual and statutory provisions which applied to her engagement with the Respondent and how the provisions violated her rights to fair labour practices or the right to fair administrative action.

38. In all, the Claimant did not demonstrate or prove and the Court has not been able to ascertain that the Claimant was entitled to gratuity or that the terms under which she served were in violation of the rights enshrined in the Constitution or any statutory law.

39. The Court will therefore find that the Claimant having failed to demonstrate constitutional/statutory law violations, this head of claim was not proved as required by the laws and principles of evidence.

Discrimination

40. The Claimant made very vague allegations on discrimination.

41. In her testimony, there was reference to discrimination because she worked on temporary terms for more than 1 year and request for consolidation from 2009 which was not allowed. She also alleged that employment on temporary terms of service was inferior to those on permanent and pensionable terms on account that pension/gratuity was not payable.

42. On the question of limiting temporary appointments to not more than 1 year, the Claimant did not draw the attention of the Court to the particular regulation outlining the prescription.

43. The Court has already referred to the principle of party autonomy and the implicated constitutional right to associate.

44. That principle and constitutional right finds content in the Employment Act, 2007 which defines the fundamental rights of employees in general (the Act came into effect during the subsistence of the contractual relationship in dispute herein).

45. The Employment Act, 2007 being a statute of general application recognises different types of contracts, oral, written, contracts of definite duration and those of indefinite duration. It is of no assistance to the Claimant in the present case.

46. In the same vein, the Claimant admitted in her submissions that the Teachers Service Commission Act and the consequential Regulations applied in her case.

47. It is not in dispute that the Claimant was already a pensioner when she was re-engaged on temporary terms of service.

48. The Act and the Regulations thereunder expressly provided that those on temporary terms would not qualify for pension or gratuity.

49. The letter from the Director of Pensions only clarified the issue on why amalgamation was not possible to enable her get pension or gratuity.

50. On the related legal question of whether other employees on the same terms as her had been paid pension or gratuity, the Claimant did not provide any evidence.

51. The Court finds no discrimination as alleged by the Claimant.

NSSF contributions

52. The Claimant contended that because deductions towards the National Social Security Fund were not paid and therefore she did not earn interest on the contributions, she was equally discriminated against ((the contributions were made in arrears).

53. Although contributions were remitted late, the issue of National Social Security Fund contributions was resolved when the same were sent but in arrears, and as to whether the Claimant lost interest, an evidential foundation as to whether what was paid did not include interest was not presented. Not even a statement of account was produced.

54. The Court finds that the Claimant has not demonstrated that there was discrimination or loss from the late payment of National Social Security Fund contributions.

Case law

55. The Court has looked at the authorities cited by the Claimant. They do not assist the Claimant's case.

56. In *Henry Kamau Ngare v Teachers Service Commission* (2016) eKLR, the Claimant was on permanent and pensionable terms.

57. In *George Aseey v Mabati Rolling Mills* (2014) eKLR, the award of gratuity though not provided for in contract was allowed on the basis that the Respondent's Executive Director had made a promise that gratuity would be paid.

Appropriate remedies/orders

58. The upshot of the foregoing is that the Claimant having failed to prove her case, the Court finds and holds that the Statement of Claim and the causes of action presented have no merit.

59. The same is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 6th day of April 2018.

Radido Stephen

Judge

Appearances

For Claimant	Ms. Guserwa instructed by J.A. Guserwa & Co. Advocates
For Respondent	Mr. Calvin Anyuor, Advocate, Teachers Service Commission
Court Assistant	Lindsey