



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1001 OF 2014

(Before Hon. Justice Mathews N. Nduma)

OBADIAH MUTISYA KITONYI.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL..... RESPONDENT

J U D G E M E N T

1. The suit commenced vide a plaint filed on 16th July, 2007 at the High Court. The Plaintiff sought the following reliefs:-

- a. The declaration that the Plaintiff was wrongfully dismissed while the matter was pending before the court.
- b. The Plaintiff to be reinstated to his previous position with effect from the 27th January 2000 with full benefits.
- c. The Plaintiff to be reinstated to his monthly salary of Kshs.14,210/- with effect from the 27th day of January 2000 together with house allowance, medical allowance, leave allowance and other benefits as stipulated under the Civil Service Regulation.
- d. The Plaintiff to be admitted to his retirement benefits and the same to be calculated from the date he attained retirement as provided in the Civil Service Regulation.
- e. The Plaintiff to be paid his full pension retirement benefits and thereafter to continue earning a monthly pension as provided for in the Civil Service Regulation.
- f. The Plaintiff to be paid general damages.
- g. Costs of this suit.
- h. Interest on (b) (c) (d) (e) and (g) at court rate.
- i. Any other benefit which this Honourable Court may deem fit to grant.

2. The Defendant filed a statement of defence on 2nd September, 2007.

Facts of the Case

3. The Plaintiff was employed on 14th February, 1985 as an Executive Officer II in Job Group H with the Ministry of Lands, Settlement and Housing by then and he diligently served in different departments until he was wrongfully dismissed from the Civil Service on 27th January, 2000.

4. At the time of dismissal, the Plaintiff worked as Executive Officer I Job Group K, earning a monthly salary of Kshs.14,210, Housing Allowance of Kshs.10,000 and Medical Allowance of Kshs.1,245 and other fringe benefits stipulated in the Civil Service Regulations and guidelines issued from time to time.

5. The Plaintiff was arrested and charged in the Chief Magistrate's Court at Nairobi, Law Courts with the offence of fraud.

6. The charges were later withdrawn and the Plaintiff was acquitted under section 22 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

7. On 27th January, 2000, the Plaintiff was interdicted from service with effect from 30th August, 2000. The Plaintiff, remained in suspension but was ordered to continue reporting at his work station.

8. The Plaintiff claims that the defendant was in breach of Statutory Regulations applicable to Civil Servants as follows –

a) Interdicted the Plaintiff's terms of service without giving him the chance to be heard.

b) While the Plaintiff was on interdiction, the Defendant suspended him from the service before the matter was heard and determined.

c) While the Plaintiff's case was pending for hearing and determination, before the Chief Magistrate's Court, the Defendant dismissed the Plaintiff from the service with effect from the 27th day of January, 2000.

d) The Defendant breached the Code of Civil Service Regulations by dismissing the Plaintiff from the Civil Service while the matter was before the court.

e) The Defendant failed to reinstate the Plaintiff to his employment with full salary and all the benefits as stipulated Under the Civil Service Regulations after the complaint was withdrawn and the Plaintiff acquitted.

f) The Defendant failed to consider that the Plaintiff was working on permanent and pensionable terms of service and he was entitled to his full pension with all benefits.

g) The Defendant decided to terminate the Plaintiff's service on 27th January 2000 without giving the Public Service Commission the chance to articulate the Plaintiff's case.

h) The Defendant violated the Plaintiff's right as stipulated Under Section 77 of the Kenyan Constitution.

9. The Plaintiff states that he suffered loss and damage as a result of the wrongful and unfair conduct by the Defendant particulars of which are set out in the plaint as follows –

a) Loss of monthly salary of Kshs.14,210/=

b) Loss of monthly house allowance of Kshs.10,000/=

c) Loss of monthly medical allowance of Kshs.1,245/=

d) Loss of promotion

e) Loss of annual leave allowance

f) Loss of retirement pension

g) Loss of integrity and psychological mental torture.

10. At the time of dismissal, the Plaintiff was 52 years old and was due to retire with pension on attaining 55 years. The Plaintiff earned a gross salary of Kshs.25,455 at the time of dismissal.

Defence

11. The Defendant admits the particulars of employment set out by the Plaintiff. The Defendant however denies that the Plaintiff was wrongfully and unfairly dismissed from employment.

12. The particulars of breach and those of loss and damage are also denied by the Defendant.

13. The Defendant avers that the Plaintiff was dismissed from his employment after engaging in fraud for which he was charged in Nairobi Chief Magistrate's Court No. 3960 of 2000.

14. That the Plaintiff defrauded one Mrs. Beatrice Wambui Muthuri of plot No. LR 209/9435; signed transfer forms as Mrs. Beatrice Wambui Muthuri and wrote letters calling for the title deed as Mrs. Beatrice Wambui Muthuri.

15. That the suit be dismissed with costs.

Testimony

16. The Plaintiff testified on oath in support of his case and reliefs sought in the Complaint filed on 16th July, 2007, and list of documents filed on 13th July, 2012 and admitted as exhibits in this suit.
17. The Plaintiff said that he was wrongfully charged on false allegation of fraud and the case was withdrawn and he was acquitted of the trumped up charges.
18. That the Plaintiff was placed on suspension by a letter dated 1st September, 2000 pending the hearing and determination of the criminal case. That the Plaintiff was dismissed before the criminal trial was finalized. He was given the letter of dismissal on 21st December, 2000. The dismissal was for gross misconduct. Letter was by Mr. C. N. Kaseya for permanent Secretary.
19. The Plaintiff appealed the decision and the appeal was dismissed.
20. The Plaintiff states that he had a clean record at work until he was falsely accused of fraud.
21. That the Plaintiff has suffered immense loss and damage as a result of the dismissal. That he lost his pension and earnings unlawfully. He has suffered mental torture due to the false accusations, loss of job and support for himself and family.
22. The Plaintiff seeks reinstatement to his work and in the alternative the court to award the Claimant damages, lost salary, to be declared pensionable and be paid retirement benefits from the date of dismissal to date.
23. The Claimant was 70 years old at the time of trial and beyond the 60 years retirement age. The Claimant denied any involvement in the alleged fraud or at all when he was intensively cross examined by M/s Chesinya for the Defendant. The Plaintiff denied having committed any gross misconduct, the purported reason for the dismissal.

Defence

24. The Defendant called RW1 Avisa Kiguhi Harold to testify for the defendant. He was the Human Resource Management Office at the Public Service Commission. He told the court that he was familiar with this case from the records at the office. That the Plaintiff was dismissed from employment for gross misconduct. That the commission had considered the facts of the case and deemed it fit to dismiss the Plaintiff from service with effect from 27th January, 2000. The decision was made on 29th November, 2000 and RW1 produced the letter of dismissal.
25. The Plaintiff appealed by a letter dated 1st February, 2001. The appeal was considered on 25th April, 2001 and was disallowed.
26. The Plaintiff had a right of 2nd appeal within one year. The Plaintiff submitted a 2nd appeal out of the stipulated time and it was therefore not considered. The Plaintiff was informed of this decision on 19th July, 2006.
27. RW1 stated that all procedures and Regulations were followed to the letter in this matter and the Plaintiff has no cause of action against the Defendant.
28. RW1 was subjected to very close cross examination by Mr. Mwangombe for the Claimant and withstood the same quite well.

Determination

29. The agreed issues by the parties may be summarized as follows –

- (i) Whether the dismissal from employment of the Plaintiff was for a valid reason and done in terms of a fair procedure.
- (ii) Whether the Plaintiff is entitled to the reliefs sought.

Issue i

30. The burden of proof of the Plaintiff's case on a balance of probabilities lies with the Plaintiff. The Respondent bears the evidential burden of rebuttal once sufficient, credible evidence has been adduced by the Plaintiff in support of his case that the dismissal was wrongful and in violation of Civil Service Regulations.

31. Civil Service Code Regulations, Revised Edition of 1992 provides that –

“ 37 (4) if Criminal proceedings are instituted against an officer or where an officer has been acquitted of a Criminal Charge in a Court of Law, the Authorized Officer shall not however, be prevented from dismissing him or otherwise punishing him on any other charge arising out of his conduct in the matter.”

32. In the present matter, the Plaintiff was charged for gross misconduct while the Criminal Trial was going on against him, and was found guilty of the offence and dismissed while the criminal charges were pending against him.

33. The fact that the plaintiff was subsequently acquitted of the charges levelled against him, upon withdrawal of the case by the complainant does not negate the disciplinary process that led to his dismissal. See (i) **David O. Owino vs Kenya Institute of Special Education Industrial Court cause No. 453 of 2012** (ii) **Raphael Juma v Armed Forces Canteen Organization [2014] eKLR** (iii) **Nelson Mwangi Kibe [2003] eKLR**.

34. The Civil Service Code Regulations of 1992 provide under Regulation G. 36 that power of interdiction and/or supervision should be exercised only in the circumstances set out in Regulations 23 and 24. That is to say –

“a Public Officer may be interdicted only if proceedings which may lead to his dismissal are being taken out or about to be taken out or when criminal proceedings are being instituted against him.”

35. In the present case, the Plaintiff was interdicted and later suspended while disciplinary proceedings were being taken against him. The disciplining proceedings led to his dismissal.

36. The court does not fault at all the nature and the manner the disciplinary process was instituted and concluded against the Plaintiff.

37. The Plaintiff has failed to discharge the burden of proof placed on him on a balance of probabilities.

38. Accordingly, the court finds that the dismissal of the Plaintiff was for a valid reason and was done in terms of a fair procedure.

Issue ii

39. As to whether or not the Plaintiff is entitled to the reliefs sought, the court has agonized over the fact that the plaintiff had served the Civil Service for his entire working life and at the time of dismissal he was 52 years old and had less than three (3) years to go to attain the then official retirement age at 55 years.

40. The terms of employment of the Plaintiff, were on permanent and pensionable basis. The Claimant was subsequently acquitted of the Criminal charges that precipitated the disciplinary action against him.

41. The letters of appointment of the Plaintiff are silent on the consequences of dismissal on the pension benefits of the Plaintiff. The Court has not referred to any statutory law, Regulation or Circular by the Defendant which was relied upon to refuse the Plaintiff the benefit of pension which progressively accrued from the date of his employment and was to crystalize upon his attainment of 55 years retirement age.

42. That notwithstanding, and having considered that the 2010 constitution was promulgated after the cause of action arose, having recognized non payment of pension as a continuing injury within the meaning attached to it under the Employment Act, 2007, the court has considered the provisions of Article 40 of the constitution of Kenya 2010 which provides:-

40 (2)

“Parliament shall not enact a law that permits the state or any person –

“(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description.”

43. The court finds that entitlement of pension of a civil servant or any employee, whose contract of employment entitles him to be permanent and pensionable or entitled to payment of gratuity or any social benefit upon completion of the employment term by fact of retirement or lapse of the employment period is a right to property that accrues from the date the entitlement is attained, and the right progressively accrues until the event upon which it crystalizes takes place. However, it is unconstitutional, and a violation of the right to property to negate enjoyment of such property or right to such property attained over time, retrogressively, as a result of an event that has subsequently occurred, be it of whatever nature.

44. Any purported statutory law, Regulation or Circular relied upon by the Defendant to deny the Plaintiff pension upon attainment of the retirement age of 55 is unconstitutional and a violation of Article 40 (1) as read with Article 40(2) (a) of the Constitution of Kenya 2010.

45. Accordingly, the dismissal of the Plaintiff by the Defendant is commuted to a termination and the court declares that the Plaintiff is entitled to payment of Pension (both lump sum and monthly) from the date he attained the retirement age of 55 years.

46. The court therefore directs, the Respondent as follows –

(a) Calculate and pay the Plaintiff, lump sum pension due and owing to the Plaintiff from the date he attained the retirement age of fifty five (55) years.

(b) Continue to pay the Plaintiff monthly pension in terms of the applicable law and regulations.

(c) Pay interest on the lump sum pension awarded in (a) above from the date of filing suit till payment in full.

(d) The Defendant to pay costs of the suit.

Dated and Signed in Kisumu this 8th day of March, 2018

Mathews N. Nduma

Judge

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

Maureen Onyango

Judge

Appearances

Ratemo Oira for Plaintiff

A. J. Chesinya for Defendant

Anne Njung'e – Court Clerk