



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 413 OF 2018**

**AYUB IMBIRA .....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim challenging the decision by the respondent to retire the claimant on medical grounds. The retirement was to take effect from 1.5.2018 but on 2.3.2018, the claimant sought and obtained injunction restraining the respondent from recruiting any other person to fill the vacancy left by him pending the determination of this suit. It is the claimant's case that the said retirement was unfairly done in breach of the law and the rules of natural justice. He therefore prayed for reinstatement and in the alternative he be awarded compensatory damages.
2. The respondent has however denied the alleged unfair retirement and averred that the retirement was procedural and substantively fair and lawful. It is the respondent's case that the claimant fell ill and became incapacitated to perform the job which he was employed to perform and despite being accorded the necessary support, he failed to heal. It is further respondent's case that the claimant was referred for medical fitness assessment by the medical Board and he was found unfit to continue serving. It is also the respondents case that the retirement of the claimant is with full benefits and therefore prayed for the suit to be dismissed with costs.
3. The suit was disposed of by written submissions on the basis of the record filed by each party. The claimant filed his submission on 10.5.2018 and the respondent filed hers on 18.5.2018.

**Claimant's Case**

4. The claimant's relied on his written statements filed on 23.3.2018 and 26.4.2018 plus his Affidavit filed on the same 26.4.2018 and the Bundles of documents filed on 23.3.2018 and 26.4.2018. The gist of the said material is that he was employed by the respondent as Director ICT from 31.7.2015 and worked well until June 2016 when he fell ill while on duty at Mombasa and was hospitalized for 6 days after being diagnosed with a right side stroke. Thereafter he was treated both in Kenya and India and he is on his way to recovery same for his speech of which he is undergoing therapy. He produced medical Report from Medanta Global Health Private Limited to prove that his involvement in social and some office work of his capability would help in his recovery process.
5. While the claimant was undergoing treatment, the respondent wrote to the Director of Medical services on 2.8.2017 to convene a medical Board to assess his suitability and fitness to serve as Director ICT so as to enable her to make an informed decision on the matter of the prolonged sickness. The board met on 16.11.2017 and conducted examination but its report was never availed to the claimant. He contended that during the said examination by the Medical Board, he was not informed of his rights before hand and as such he made no representations but only presented himself for examination on physical fitness.
6. Thereafter he was shocked to received the letter dated 2.3.2018 purporting to retire him on medical grounds effective 1.5.2018. He contended that the retirement was unfair because it was done without according him any hearing before the Respondent's Board decided on his retirement in its meeting held on 21.2.2018. He contended that it was his right to be heard by the respondent's Board in the presence of a legal representative or fellow employee of his choice before the decision to retire him was made by the Board on 21.2.2018. he further contended that the meeting held on 28.2.2018 between him and the Respondent's Director for HR Development, did not , also amount to fair hearing but a forum for informing him the decision of the Respondent's Board to retire him and to advise to seek counselling. He therefore prayed for reliefs pleaded in his claim based on his gross salary of Kshs.302,637 per month.

**Respondent's Case**

7. The Respondent stated through the affidavits by her Director HR Management and Development Josephine M. Maundu that the Claimant was employed by the respondent from 31.7.2015 as Director ICT. She further stated that the claimant was tasked to head the ICT docket, to come up with an ICT strategic plan and to promptly implement ICT projects at a cost Kshs.59,993,011, Kshs.340,274,400 and Kshs.106,633,026.30 respectively. However, on 24.6.2016, the claimant fell ill while on duty at Mombasa and he was admitted at Mombasa Hospital for 6 days. Thereafter he was transferred to Nairobi Hospital for specialized treatment where he was admitted for 20 days followed by a 60 days sick off upto 20.9.2016. After the sick off, he sought and obtained leave for 3 weeks starting 21.9.2016 to 11.10.2016 which was extended by taking an annual leave by 12 days upto 10.11.2016. Thereafter, he reported back on and off with limited performance of duty until 25.8.2017.

She further contended that on 31.3.2017 the claimant applied for compensation for pioneer Assurance Company under the Critical Illness Insurance Cover and he was paid Kshs.2,045,401 after he indicated that he was not able to hold objects with his right hand he was walking with a limp and dragging gait due to weakness of his right lower hip, and that he was unable to communicate because he had lost his speech due to stroke. The respondent further contended that the claimant applied for Tax exemption on account of the said disability and he was granted.

9. It is the defence case that on 19.4.2017, the claimant was examined and found to be hypertensive, had Aphasia, could only voice certain words, his right upper limb sensation was impaired and all muscles of the shoulder and elbow joint, hand flexors power (wrist) and extensors (Right wrist joint) were spastic with a flexuous deformity tendency. As a result of the said medical condition, the claimant became incapable of performing the responsibilities under his contract of employment and the respondent was forced to designate a junior officer to perform the duties of the claimant.

10. As a result, she wrote letter dated 17.8.2012 to the Ministry of Health through the Director of Medical Services requesting for the convening of Medical Board to assess the claimant's suitability to serve in the position of Director ICT. In the meanwhile, the claimant was granted a special leave to for treatment in India from 25.8.2017. on 11.9.2017 he was given sick off from his Doctor in India from 11.9.2017 to 16.9.2017 which was extended from 6 weeks upto 27.10.2017

11. On 31.10.2017, she wrote letter to the claimant notifying him that a medical Board was going to be convened to assess his suitability to serve as Director ICT. The Medical Board met on 16.11.2017 at the National Spinal Injury at Nairobi and the claimant availed himself for examination and the Board found that he had suffered an Ischamic stroke that affected the left side with taint weakness of the right side and expressive aphasia and loss of speech. It therefore concluded that he was unfit for further service.

12. After receiving the report from the Medical Board, the respondent convened her full Board on 21.2.2018 where the claimant's fitness for service was discussed and a resolution reached that he should be retired on medical ground with full benefits effective 1.5.2018. It was further resolved that the claimant and family be taken through counselling. On 28.2.2018 the claimant and his wife were invited to the office and notified of the Medical Report by the Government Medical Board recommending for the retirement of the claimant and asked the claimant for his views but due to speech problems, he could not express himself. Same for his wife who enquired about his benefits.

13. The respondent contended that the claimant could not express himself due to loss of his speech and as such, he was not called to defend himself before the Respondent's Board before the decision to terminate him was reached on 21.2.2018. He further contended that the claimant was paid his full salary during the period of sick leave.

### **Analysis and Determination**

14. There is no dispute that the claimant was employed by the respondent from 31.7.2015 until 1.5.2018 when he was retired on medical grounds. The issues for determination are

- (a) Whether the retirement of the claimant was unfair.
- (b) Whether he is entitled to reliefs sought.

### **Unfair retirement**

15. Under section 45(2) of the Employment termination of employee contract or service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. A valid and fair reason is one which relate to the employees conduct, capacity and compatibility or the employer's operational requirement. Fair procedure on the other hand is one which accords to section 41 and 51 of the Act.

### **Reason for the retirement**

16. There is no dispute that on 24.6.2016 the claimant suffered stroke while on duty at Mombasa and despite specialized treatment and support from the respondent, he has not fully recovered. There is also no dispute that medical doctors both local and international are unanimous that the claimant has suffered permanent incapacity, which has impaired his speech, writing and movement. Such incapacity has seriously affected the performance of his duty in a very sensitive docket in the public service. He has indeed been out of work for many days as a result of the said sickness. Due to the said incapacity, the claimant has received compensation from the insurance cover taken for him by the respondent. It is further common knowledge that the claimant was examined by a Government Medical Board on 16.11.2017 and a finding was made that the claimant had suffered permanent incapacity which has rendered him unfit for further service. In view of the overwhelming evidence presented to the court on the claimant's medical status since 24.6.2016, I find and hold that the respondent has proved on a balance of probability that there was a valid fair reason for terminating the claimant's service through retirement on medical grounds.

### **Procedure followed**

17. Under section 41 of the Act, before the employer terminates the services of his employee on account of misconduct, poor performance or physical incapacity, he must explain to the employee in a language he understands, the reason for which the termination is being considered and the employee is entitled to have another employee or shop floor union representative of his choice present. After the said explanation the employer is required to invite the employee and his chosen companion to air their representations for consideration before the termination is decided. In this case, the foregoing mandatory procedure was not followed. The claimant was never called to any meeting with the employer in the presence of another employee of his choice for explanation that termination of his services was being considered on medical grounds and thereafter accorded a chance to defend himself.

18. On the contrary, the claimant was examined by a medical Board and the report thereof withheld from him. Thereafter the respondent relied on the said medical report to retire him without first inviting him to a hearing in the company of another employee of his choice. According to the defence witness M/s Maundu, the reason for not calling the claimant to a hearing before the termination was because he could not express himself except in writing. She even purported that the meeting between the claimant and the Director HR Management and Development on 28.2.2018 passed the test of fair hearing before termination. Respectively, I dismiss the said evidence as mere opinion which goes nowhere in proving that a fair procedure was followed before the claimant's retirement on medical grounds.

19. The procedure provided under section 41 of the Act is couched in mandatory terms and the employer has no option. The respondents Board was bound to first invite the claimant to the hearing and offered him the option to making oral or written defence. It was also immaterial that the employer was going to pay the employee millions of shillings as sendoff package. The statutory law expressly binds the employers of Kenya to uphold human dignity in discharging their employees through a fair procedure. In view of the failure by the respondent to prove that a fair procedure consonant with section 41 of the Employment Act was followed before terminating the claimant's contract of service on medical grounds, I find and hold that the retirement of the claimant on medical grounds was unfair within the meaning of section 45 of employment Act.

### **Reliefs**

20. In view of the foregoing finding, I make declaration that the claimant's retirement on medical grounds was unfair and unlawful and it violated his right to fair hearing and fair administrative action. I however decline to order his reinstatement because his medical condition has rendered him unfit to continue serving. I further decline to prohibit the respondent from recruiting another person to replace the claimant as Director ICT because there is no good cause shown to justify that relief. The court does not exist to muzzle the employers from exercising their managerial prerogative for their best interest so long as they act within the confines of the law.

21. However, I will grant the alternative relief sought being 12 months gross pay as compensation for the unfair compensation under section 49(1) of the Act. He prayed for Kshs.2,786,484 which I grant. In making the said award, I have considered the fact that the claimant may not be able to secure another gainful job within 12 months after termination. I have also considered the fact that the claimant did not contribute to his termination through misconduct.

22. The claim for loss of salary before retirement at 60 years is without merits and it is dismissed. The claimant has not proved that his diminished earning capacity was occasioned by the employer through occupational injury or sickness caused through exposure to harmful conditions of service. Likewise, the claim for severance pay is dismissed because the termination was not through redundancy. The claim for gratuity is also dismissed because without any evidence to contrary, the claimant will have to content with the pension payable.

### **Conclusion and Disposition**

23. For the reason that the retirement of the claimant on medical ground was procedurally unfair, I enter judgment for him on the sum of Kshs.2,786,484 plus costs and interest at court rates from the date hereof till payment in full. The said compensatory award shall be in addition to the other benefits accruing in his favour under his contract of service and the law. The award is however exempted from taxes in view of the Tax exemptions. Certificate produced as exhibit by the defence.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018**

**ONESMUS N. MAKAU**

**JUDGE**