



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 762 OF 2015

(Before Hon. Justice Mathews N. Nduma)

EDWARD C. ASITIBA.....CLAIMANT

=VERSUS=

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The Claimant worked in the position of Chief Supplies Officer at the Judiciary. He was retired in Public interest at the age of 42 years following a circular by the Treasury dated 27/5/03 to all supply personnel across Ministries to go on compulsory leave. Judiciary effected the Treasury directive by a letter dated 28/5/2003. A further circular dated 29/5/03, directed assessment for suitability for all procurement officers before redeployment.
2. The Claimant was served a notice to show cause on three issues as follows:
 - i. Poor Public relations.
 - ii. Lack of courtesy to seniors.
 - iii. Suspicion of corruption due to manner of dealing with suppliers.
3. The Claimant responded to the notice to show cause by a letter dated 23/6/2003. His immediate supervisor, was the then Registrar of the High Court Hon. Justice William Ouko.
4. The Claimant received a letter dated 17/6/2003 retiring him in public interest. The Claimant denies the matters he was accused of. The Claimant explains that he was a good officer, performed his work well and was promoted twice in recognition of his work.
5. The Claimant added that he was charged with generalities and no clear specific offence was leveled against him.
6. The Claimant states that he was wrongly retired in Public interest and prays that he be reinstated to his job, and be deployed to any ministry or he be compensated for lost years of service up to the current retirement age of 60 years. Retirement in public interest was provided under Regulation 28 of Judicial Service Commission Regulations in place at the time. The Claimant states that he was not served with a retirement notice with a report on intended action in terms of the regulations. The Claimant faults the procedure employed by his employer to retire him in public interest.
7. The Claimant earned a gross salary of Kshs. 55,840 as at 31/7/2003.
8. The Claimant explained that there developed bad blood between him and the then Chief Justice over various procurement matters to do with travel arrangements for the Chief Justice and renovation of the house of the Chief Justice. The Claimant stated that he was wrongly victimized arising from these matters which were not directly under him but were done by other officers.
9. The Claimant had been seconded to the Judiciary by Ministry of Finance. He was not an employee of the Judicial Services Commission. The Claimant appealed the retirement to the Head of Public Service and head of supplies in Public Service. The Claimant sought for forgiveness in the letter. He denied that he had admitted to wrong doing. Rather he stated, he took a conciliatory tone so that he could be reinstated. That Hon. Ouko had advised him to apologize to Hon. The Chief Justice which he did. He denied admission of any wrong doing.

10. The Claimant relied on the statement of claim and the list of documents produced as exhibits before court. The Claimant subsequently filed written submission on 17/11/2017 in support of his case.

Defence

11. The Respondent filed a statement of defence on 25/11/2004. The Respondent averred that on 28/5/2003 they sent the Claimant on compulsory leave and issued him a notice to show cause on 17/6/2003 to respond to the allegations set out herein before. The respondent averred that they did not unfairly and unlawfully terminate the services of the Claimant.

12. The Respondent did not file any witness statements nor call any witness in support of the case. The evidence adduced by the Claimant was wholly un-rebutted. The Respondent filed written submissions on 27/11/2017. In summary the Respondent states that the Claimant was retired in public interest as a result of various misconduct on his part in the course of his duties as a procurement officer in the Judiciary. The respondent prays that the suit be dismissed with costs.

Determination

13. The issues for determination are as follows:

- i. Whether the Claimant was an employee of Judicial Service Commission.
- ii. Whether the retirement of the Claimant prematurely at the age of 42 years was lawful and fair.
- iii. Whether the Claimant is entitled to the reliefs sought.

Issue i

14. The Claimant was seconded to the Judiciary by the Treasury. The Claimant was initially appointed to Public Service in the office of the President, Department of Police, on 26/1/87. He was subsequently appointed to the grade of supplies office II on 13/1/87 in the same office.

15. The Claimant was confirmed upon completing probation in the office of the President on 13/1/89. The Claimant was promoted to Supplies Office I to Group K- by a circular dated 30/9/92. Claimant was transferred to the Judiciary on 27th June 1994 and reported to work on 28/6/1994. The Claimant was promoted by the Registrar High Court to the position of Senior Supplies Office (PLS10) with effect from 1st July 1991. The letter of promotion written by Senior Principal Personnel Officer, High Court on behalf of the Registrar is dated 16/10/1991.

16. The Claimant presented various letters of commendation. One by Hon. William Ouko, Ag Registrar dated 30/6/02 thanking the Claimant for his presentation in a seminar for Magistrates at Kenya School of Monetary studies.

17. By a letter dated 26/9/2002, the Registrar/secretary to the Judicial Service Commission wrote to the Claimant on behalf of the Respondent promoting the Claimant to the position of Chief Supplies Officer with effect from 26th September 2002. By a letter dated 22/4/2003, the Claimant was appointed to be a member of the High Court Aids Control Unit to strengthen the unit.

18. From the foregoing, it is clear that the Claimant was an employee of the Judicial Service Commission and the commission had over all supervisory responsibility over the Claimant.

Issue ii

19. Was the termination of the employment of the Claimant lawful and fair? The Claimant presented oral and documentary evidence showing recognition of good service to the Judiciary leading to his meteoric rise to the position of chief supplies officer. Up to 22nd April 2003, the Claimant was recipient of additional responsibilities in recognition of his position and ability. The letters were written by Hon. William Ouko the then Registrar on behalf of the Judicial Service Commission.

20. A general circular by the Permanent Secretary Mr. Joseph Magari on behalf of Ministry of finance directed "all Procurement/Supplies Officers to vacate their offices and proceed on compulsory leave pending finalization of their further deployment within the Public Service through suitability interviews by the Public Service Commission."

21. Consequently the Registrar of the High Court sent the Claimant on compulsory leave by a letter dated 28/5/03. The Claimant was informed "at an appropriate time you will be invited for an interview with the Judicial Service Commission or the Public Service Commission as may be directed by the Permanent Secretary of Finance."

22. A further circular by the financial secretary ministry of finance dated 29/5/2007 directed all procurement officers aged 50 years and above were to proceed on compulsory retirement in accordance with regulation 18 of the Service Commissions Act Cap 185 Laws of Kenya.

23. Secondly all Procurement officers below '50 years' were to proceed on leave and would be required to complete application for employment Form PSC 29 through their respective authorized office, with copies to PSC. The closing date for the application was 27/6/03.

24. The applicants were to provide their certificates and suitability interview was to be conducted. The officers were to indicate where they would wish to be deployed. Authorized officers were required to give specific recommendations complete with appraisal reports for three

years.

25. In short, all the procurement officers below 50 years were being interviewed and re-employed afresh.

26. Before the appointed closing date for submitting fresh applications and by a letter dated 17/6/2007, the Claimant was retired in Public Interest.

27. The Claimant was informed:

“following numerous complaints against you by Judges, Magistrates and other members of staff with regard to your performance of duty, the Hon. the Chief Justice is of the opinion that it is desirable in the public interest that your service in the Judiciary be terminated.”

28. The Claimant was retired in public interest in terms of Regulation 28 of the Judicial Service Commission Regulation.”

29. As observed earlier, the Claimant testified under oath and presented his good record at work leading to various promotions and appointment of position, of responsibility up to the date they were suddenly sent on compulsory leave by the Treasury.

30. The Respondent chose not to adduce any evidence to contradict and/or rebut the oral evidence by the Claimant well supported by documentary evidence produced before court.

31. In terms of Sections 107, 108 and 109 of the evidence Act, the Claimant has the initial onus of adducing sufficient evidence in support of his case. Once that is done, the onus shifts to the respondent to adduce evidence in rebuttal of the evidence adduced by the Claimant. Failure to rebut, relevant and credible evidence adduced by the Claimant has led the court to the inevitable conclusion that the Claimant has proved on a balance of probabilities that his employment was wrongly and unfair terminated.

32. That the Judicial Services Commission did not follow the directive by the Treasury to retire officers aged 50 years and above and interview for re-deployment officers below 50 years of age.

33. The court accordingly finds that the termination of employment of the Claimant was wrongful and unfair.

34. In the **Industrial Court at Nairobi, cause no. 379 (N) of 2009, D.K. Njagi Marete vs Teachers service Commission**, Justice Rika, while dealing with retirement of a public officer in public interest stated:

“The Respondent had the onus to show objective and demonstrable grounds warranting retirement of Marete. When a public employer justifies the premature termination of a contract of employment on the ground of public interest, such an employer must show its decision is driven by public policy objective, and that the decision taken is legitimate and justifiable.... The employer would be expected to show adherence to fair termination procedure before arriving at the decision.”

35. The Judge cited with approval the decision by Justice Majid Cocker, in **HCCC No. 15 of 1989, Joseph Mulobi vs the Attorney General & Another** where the learned Judge stated:

“... An authorized officer must approach the issue of retirement on public interest with an open mind and behave in a quasi judicial manner. It is not sufficient for him to decide that a public officer should be retired and then tell him that he intends to recommend his retirement to the Commission.”

36. In the present case, none of the reasons cited in the letter of termination were proved to be valid at all. The record produced by the Claimant show otherwise up to the date of retirement.

Issue iii

37. What remedy is the Claimant entitled to? The employment of the Claimant happened on 17/6/2003, about fifteen (15) years ago. A lot of water has passed under the bridge. The Claimant is now about 57 years of age. He has suffered joblessness for the entire period. However the Claimant has been enjoying diminished pension as a result of the premature termination of his employment.

38. The Claimant sought to be reinstated to work and in the alternative be compensated for the wrongful and unfair termination of employment.

39. The Claimant has clearly suffered immense financial loss as a result of the wrongful termination of his employment. It is not appropriate or reasonable to reinstate the Claimant to his former job. It is also not appropriate to order re-engagement of the Claimant. The provisions of Employment Act 2007 are not applicable to this case.

40. The Claimant is entitled to equitable remedies under the common law applicable to breach of contract of employment leading to loss and damage by fact of unlawfulness.

41. The doctrine of legitimate expectation is applicable in the circumstance of the case. The Claimant has pleaded that he be awarded the

equivalent of lost income to retirement.

42. In the case of **Marete (supra)** Justice Rika cited **High Court Civil case No. 1139 of 2002 between Menginya Salim Murgani vs Kenya Revenue Authority** in which Hon. Justice Ojwang stated -

“...it would be injurious to found an award of damages upon sanguine assessments of prospects.”

In the case, the Claimant prayed to be awarded prospective salary up to the retirement age at 55 years. His employment had been terminated when he was 38 years of age.

43. The court observed that a plaintiff who is able bodied intellectually and professionally well guided ought to mitigate his loss by getting alternative employment. The Claimant herein prays for general damages as opposed to statutory compensation.

44. The court agrees with the rationale above and is moved by the principle of fair go all round award of damages.

45. In the Marete case, the court awarded the Claimant 1,847,820 calculated on the basis of twelve months salary in terms of Section 49 of the Employment Act, 2007.

46. The cause of action in this matter arose before the promulgation of the Employment Act, 2007.

47. In this matter, the Claimant has shown that he was victimized and consequently treated differently contrary to the directives given by the Treasury with regard to procurement officers under the age of fifty years. The court relies on the decision of Rika J. where the Judge awarded the Claimant “coalesced damages at 3,000,000” for discriminatory, unfair, unlawful conduct that led to termination of employment in **GMV vs Bank of Africa Kenya Limited [2013] Nairobi Cause No. 122 of 2011**.

48. The Claimant had many years of service before him as a chief procurement officer earning a very good salary as at the date of termination in 2003. Assessment of damages is a matter of discretion. It is difficult to assess the loss and damage occasioned the Claimant by the wrongful termination.

49. Considering all the circumstances of the case set out in the analysis of this matter, the court awards the claimant global general damages in the sum of Kshs. Six million (6,000,000).

50. In the final analysis judgment is entered in favour of the Claimant as against the respondent as follows:

- i. General damages Kshs. 6,000,000 for unlawful and unfair termination of employment.
- ii. The award is payable with interest at court rates from date of judgment till payment in full.
- iii. Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 31st day of July, 2018.

Mathews N. Nduma

Judge

Delivered and Signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances:

Paul Elkington for Claimant

M/s Chesinya for Respondent

Daniel Ngumbi : Court Clerk