



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE 938 OF 2017**

**CHRISTINE MWAMBUA.....CLAIMANT**

**VERSUS**

**PARLIAMENTARY SERVICE COMMISSION.....RESPONDENT**

**RULING**

1. By a motion dated 18<sup>th</sup> May, 2017, the claimant sought order inter alia that:

a. Upon hearing and determination of this application inter-partes, but pending hearing and determination of the claim, an order be and is hereby issued restraining the respondent, either directly or through its agents, servants, representatives or any other person acting on its authority from implementing the decision to retire the applicant from service with effect from 1<sup>st</sup> July, 2017 and from making unlawful deductions from the applicants monthly salary.

2. The application was supported by the affidavit of the claimant in which she deponed among others that:

a. That the respondent issued me with a notice of retirement dated 4.11.2016 in which I was advised that my contract of employment shall come to an end on 1<sup>st</sup> July, 2017 when, according to the respondent I shall attain 60 years which is the retirement age in the respondent commission.

b. That the retirement notice further stated that the decision to retire me from service on 1<sup>st</sup> July, 2017 was made pursuant to a letter reference No. NRB/CON/ADM/113/VOL.LXXXXIX/60 from the Director of National Registration which had advised the respondent that I was born in 1957.

c. That the respondent apparently commenced investigations over my date of birth without my knowledge or involvement culminating in its decision to retire me from service on account of an alleged retirement age and the decision was communicated to me with finality without giving me an opportunity to be heard on or to explain the question of my date of birth.

d. That I was born on 5.7.1963 as shown on some of my documents including my birth certificate and national identity card.

e. That I have copies of some of my school leaving certificates bearing varying dates of birth which variations I attribute to the fact that I was never born in hospital hence I had no birth notification and different teachers in different schools had to guess my date of birth based on their own individual sense of judgement thereby causing the variations.

f. That I am aware that I was registered by the registrar of persons before my birth was registered and therefore I was issued with a national identity card before being issued with a birth certificate.

g. That I am aware that in 2006, I made a late application to the Registrar of births and deaths to register my birth and issue me with a birth certificate.

h. That I am aware that around 2006 it was a requirement in Kenya that if one wished to have late registration of one's birth and issuance of birth certificate, as was the case in my situation, one had to obtain a letter and printouts of one's registration particulars and status including finger prints from the office of the Principal Registrar of persons now referred to as Director, National Registration Bureau. I obtained the said printout on 7<sup>th</sup> September, 2006 at 14:10:49 hours together with a cover letter from the Principal Registrar.

i. That in response to my request for information, the respondent on 16.5.2017 furnished me with a copy of a purported printout allegedly obtained from the office of Director, National Registration Bureau. The printout is in sharp contrast and contradiction to the one I obtained in 2006 in the following respects:

i. While my copy was printed out on 7<sup>th</sup> September, 2006 the respondent's copy was printed out on 26<sup>th</sup> October, 2016

ii. While my copy bears my date of birth as 5.7.1963, the respondent's copy does not bear date of birth, instead it has the work "destroyed" in the place where the date of birth ought to be.

iii. My copy states, and correctly so, that my district of birth is Kitui, District code No 33; constituency Kitui South, while the respondent's copy states, which information is wrong, that my district of birth is Kitui Central, code 151.

j. That it therefore beats all logic and is inconceivable that the same office of Registration of Persons which issued me with a printout containing all my correct and accurate particulars including my date of birth cannot be alleged to have supplied particulars with such glaring incorrect and contradictory particulars about my registration status. Whereas the respondent states that the Director, National Registration indicated that my date of birth was 1957 and that my date of birth was altered no information is given as who made the unprocedural entry and when it was made. Yet my national identity card does not bear 1957.

k. That even the purported advice from the Director's office only suggests that I was born in 1957. It does not say the date and month of birth and it is therefore hard to understand how the respondent arrived at 1<sup>st</sup> July, 2017 as my 60<sup>th</sup> birthday.

l. That I am aware that by issuing me with such a controversial retirement notice and then denying me an opportunity to be heard and refusing to furnish me with information within its custody to enable me respond appropriately to the notice, the respondent contravened the principles of natural justice and violated my right to fair administrative action as enshrined in article 47 of the constitution.

m. That in further violation of my right to administrative action, the respondent went ahead to make a decision to retire me from service on 1.7.2017 basing its decision on an advice from the Director National registration Bureau yet in response to my letter, the respondent states that the issue is still undergoing investigation by relevant authorities. The purported advice has not implicated me in the alleged alterations.

n. That I consider this latest move to terminate my contract of employment on the ground of retirement age as falling within a consistent pattern by the respondent to frustrate, harass, mistreat and eventually terminate my services. The following chronology of events illustrate my deposition herein:

i. Purporting to terminate my contract in May 2014 for no valid reason.

ii. Resisting my reinstatement even after court issued judgement in my favour ordering court to reinstate me and pay my benefits and costs.

iii. Insisting on proceeding with the appeal even after reinstating me,

iv. Refusing to supply me with basic items and facilities that I need in order to perform my duties while other employees, some of whom are my juniors have been supplied with similar items.

3. The respondent opposed the application and filed a replying affidavit through one Jeremiah Nyagenye in which he deposed among others that:

i. That I am an advocate of the High court of Kenya, the clerk of the Senate of Kenya and the Secretary to the Parliamentary Service Commission, the respondent herein.

ii. That I am authorized by the Parliamentary Service Commission to make this affidavit on its behalf and by virtue of my above stated position, I am competent to make this affidavit.

iii. That the claimant herein was appointed as a Senior Clerk Assistant on 2<sup>nd</sup> November, 2004.

iv. That the commission received the following complaints regarding the claimant's conduct:

- Gross misconduct for failing to call a meeting of the departmental committee in Agriculture, Livestock and Co-operatives.
- Negligence of duty for failing to attend and provide administrative and technical support to the departmental committee in Agriculture, Livestock and Co-operative.
- Misconduct for displaying rudeness, using unbecoming language, insubordination, persistently missing work, inciting staff and extending annual leave without permission from her supervisor.

v. That the commission therefore commenced disciplinary proceedings against the claimant pursuant to Regulation 34 of the Parliamentary Service Commission Regulations 2002.

vi. That the commission wrote to the claimant on 29<sup>th</sup> May, 2013 informing her of the complaints made against her and requesting that the claimant respond to the claims within seven days.

vii. That the claimant responded to the complaints in a letter dated 5<sup>th</sup> June, 2013.

viii. That thereafter, the matter was placed before the Staff Advisory Committee to investigate the matter.

ix. That the Staff Advisory committee investigated the matter and found that the claimant's action while in employment were in breach of Regulation 25(a) (b) (c) and (g).

x. That in particular the Staff Advisory Committee found that the claimant was liable for misconduct for the following:

- Failure or refusal to perform lawful duty
- Contravention of regulation
- Disobedience
- Insubordination

xi. That the Staff Advisory Committee therefore recommended that pursuant to Regulation 24(2) of the Regulation, the claimant be retired from the service on the grounds of the interest of the service of gross misconduct.

xii. That subsequently the matter was placed before the Board of Senior Management of Parliament and the matter was considered at the meeting held on 24<sup>th</sup> March, 2014.

xiii. That having considered the matter the Board of Senior Management agreed with the recommendation of the Staff Advisory Committee that the claimant be retired from the service on the interest of the service with full benefits.

xiv. That the matter was therefore placed before the Parliamentary Service Commission (herein the commission) and on 28<sup>th</sup> April, 2014 the Commission resolved that the claimant be retired from the service on the grounds of interest of the service for gross misconduct.

xv. That thereafter, I wrote to the claimant on 9<sup>th</sup> May, 2014 notifying her of the commission's resolution to retire her in the interest of the service with full benefits on the grounds of gross misconduct and for breach of Regulation 25.

xvi. That the claimant challenged her retirement from the parliamentary service in Cause No 824 of 2014; Christine Mwambua Vs Parliamentary Service Commission and the Industrial court delivered its judgement on 18<sup>th</sup> December, 2015 reinstating the claimant into employment.

xvii. That subsequently, the Parliamentary Service Commission filed an appeal to the Court of Appeal being Civil Appeal 75 of 2016; Parliamentary Service Commission Vs Christine Mwambua and the said appeal was heard by the Court of Appeal on 24<sup>th</sup> May, 2017 and is now due for judgement on 22<sup>nd</sup> September, 2017.

xviii. That pending the hearing of the said appeal, the claimant was reinstated in employment by a letter dated 29<sup>th</sup> September, 2016 and deployed to the Parliamentary Joint Services to be in charge of public educational programmes.

xix. That on 23<sup>rd</sup> May 2017 a day before the hearing in the Court of appeal, the claimant herein filed this matter in the Employment and Labour Relations Court.

xx. That the claimant's actions are in bad faith as the Notice of Retirement was issued on 4<sup>th</sup> November, 2016 and she has waited until the last minute to institute these proceedings and obtain order so injunction against the Commission. The claimant is guilty of inordinate delay in instituting these proceedings and is time barred under the provisions of the Fair Administrative Action Act.

xxi. That after a massive recruitment exercise in 2013, on 29<sup>th</sup> April, 2014 the Parliamentary Service Commission resolved to audit the authenticity of its employees' records. In line with this resolution, on 14<sup>th</sup> October, 2016, the Commission wrote to the director of the Directorate of Immigration and Registration Bureau ("the Bureau") requesting for confirmation of the details on Ms Mwambua's national identity card. The letter to the Director of the Directorate of Immigration and Registration Bureau was not sent earlier as the claimant had been retired in the interest of the service.

xxii. That the Bureau replied by a letter of reference number NRB/CON/ADM/1/13/2/VOL.LXXXXIX/60 indicating that Ms Mwambua's year of birth is 1957, and her national identity card had been unprocedurally altered in 1963.

xxiii. That the commission therefore wrote a Retirement Notice dated 4<sup>th</sup> November, 2016 advising the claimant, Ms Mwambua, that pursuant to the official records from the National Registration Bureau indicating her correct year of birth is 1957, her date of retirement is 1<sup>st</sup> July 2017 when she will attain the age of sixty (60) years.

xxiv. That indeed, the claimant has annexed to the claimant's bundle of documents-

- At page 11 of the claimant's bundle, passport number A323549 issued on 26<sup>th</sup> May, 1995 with the date of birth as 5<sup>th</sup> July, 1957.
- At page 12 of the claimant's bundle, passport number A793150 issued on 15<sup>th</sup> August, 2003 with the dates birth as 5<sup>th</sup> July 1957.
- At page 13 of the claimant's bundle, passport number C008676 issued on 18<sup>th</sup> December, 2009 with the date of birth as 5<sup>th</sup> July, 1957.

xxv. That the claimant's school leaving certificate at page 16 of the claimant's bundle of documents from Machakos girls High School indicates the claimant's date of birth as 1957.

xxvi. That if the claimant finished her secretary studies in 1977 and her date of birth is 1963, it means that she sat for her O-level examinations at the age of 14 years.

xxvii. That further, from page 19 of the claimant's bundle of documents, which is a Kenya Primary school Leaving Certificate issued on 19<sup>th</sup> January 2017 the claimant entered standard one in 1967 at the age of 4 years which is an absurdity.

4. This application raises interesting and serious issues some which if proved by the respondent might support criminal prosecution being mounted against the claimant. The court has further noted that the claimant is not new to controversy with the respondent. In May, 2014 the respondent attempted to retire her from the service in the interest of the commission and she successfully contested the retirement before this court and was reinstated back to work. It is therefore her view that the second attempt to retire her was part of the bigger scheme to remove her from the service.

5. This is an interlocutory application and the concern of the court at this stage is whether the applicant has demonstrated a prima facie case with probability of success and further if ultimately successful damages would not be an adequate remedy. The claimant has contested her early retirement based on the year 1957 as her year of birth. She contends that her actual year of birth is 1963 hence her expected retirement year should be around 2023 when she attains 60 years.

6. The claimant does not deny the discrepancy in her actual year of birth. She attributes this to the fact that her birth was at the time never formally registered and that teachers at various schools guessed her year of birth based on their individual sense of judgement. The respondent on the other hand has contested the year 1963 and has submitted documents from National Registration Bureau alleging that the claimant's actual year of birth was 1957.

7. The facts here are hotly contested hence it would not be prudent to resolve issues in contestation based on affidavit evidence. The matter is best resolved through a trial on merit where evidence will be called and witnesses cross-examined.

8. The claimant is a Senior Officer of the respondent and her monthly salary is substantial. Further she has served the respondent for a long time let alone public service. Her pension upon retirement will therefore be substantial.

9. In the circumstances, the only order which commends itself to me is to order that the claimant does not retire as intimated to her by the respondent's letter dated 4<sup>th</sup> November, 2016 pending the hearing and determination of the main claim. The court further orders that the respondent shall reserve the right to offset salary and emoluments paid to the claimant from her pension dues if the court ultimately finds that her actual date of birth was 1957 and therefore ought to have retired in 2017. Parties shall make effort to fast track the hearing and conclusion of the suit.

10. It is so ordered.

Dated at Nairobi this 9<sup>th</sup> day of August, 2018

**Abuodha J. N.**

**Judge**

**Delivered at Nairobi this 9<sup>th</sup> day of August, 2018**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant

.....for the Respondent.