



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 221 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**DR. MESHACK ONGUTI.....CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....1<sup>ST</sup> RESPONDENT**

**THE PERMANENT SECRETARY,**

**MINISTRY OF HEALTH.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The Claimant in his Amended Memorandum of Claim filed on 16<sup>th</sup> March 2015, alleges that his retirement in public interest was unfair and unlawful and that the Respondents have failed and/or neglected to pay his salary, house allowance and other terminal benefits. The Claimant seeks for the following remedies:

- a) A declaration that the retirement/termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful;
- b) An Order quashing the 1<sup>st</sup> Respondent's letter dated 7<sup>th</sup> May 2003 which barred the Claimant from visiting and treating patients at Kenyatta National Hospital;
- c) The Claimant be reinstated in his employment with the 1<sup>st</sup> Respondent in the capacity of Director and Chief Executive of the Kenyatta National Hospital without loss of employment benefits, seniority or service
- d) An Order of Specific performance as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and payment of the Claimant's full salary, allowances and benefits for the un served period of the contracts of service both as Director of Kenyatta National Hospital (20 months) and as a medical practitioner/doctor in the capacity of Chief Dental Specialist (until 55 years of age);
- e) Damages for unfair and unlawful termination of the Claimant's employment equivalent to 12 months gross salary of the Claimant;
- f) General damages;
- g) Severance pay for each completed year of service;
- h) One Month's salary in lieu of notice;
- i) Gratuity for the completed term of the contracts
- j) Pension and other unpaid terminal benefits due under the contracts;

k) Interest on item (d), (e), (f), (g), (h), (i), and (j) above at Court rates at 12% per annum from the date of termination of employment until payment in full;

l) Costs of the Suit; and

m) Certificate of Service.

The 1<sup>st</sup> Respondent in its Further Amended Statement of Response and Counter Claim filed in Court on 11<sup>th</sup> September 2015 denies the averments in the claim and avers that the Claimant occasioned the 1<sup>st</sup> Respondent losses during his tenure as Director of the 1<sup>st</sup> Respondent and raised a counter claim of Kshs.76,652,465.00/-.

The 1<sup>st</sup> Respondent urged the Court to dismiss the Claim with costs and enter judgment in its favour in terms of the Counter Claim together with costs and interest.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not file any Response to the Memorandum of Claim.

On 19<sup>th</sup> July, 2017, the Claimant in his testimony stated that he was employed by the Ministry of Health in the year 1978 and was posted to Kenyatta National Hospital as an intern.

CW1 further testified that on or about 8<sup>th</sup> March 2002, pursuant to Legal Notice 109 of 1996 (otherwise known as the Kenyatta National Hospital Board Order 1987) the then Minister for Medical Services appointed him to take up the position of Director and Chief Executive Officer of Kenyatta National Hospital and consequently became the Secretary to the Board of the Kenyatta National Hospital. Further, that the tenure of his appointment was to run for a period of 3 years.

CW1 further testified the terms of employment were as follows:

- 1) Employment was under Job Group K1 with the attendant salary scale at Kenya Pounds 21,948 per annum with a future incremental date of 1<sup>st</sup> January;
- 2) Monthly house allowance of Kshs.80,000;
- 3) Outpatient medical allowance of Kshs.3,060 per month;
- 4) Non practicing allowance of Kshs.2,000 per month;
- 5) Entertainment allowance of Kshs.1,500 per month;
- 6) The cost of employing one security guard and gardener to work at the Claimant's Residence whose pay would be reimbursed to him but which would be subject to a maximum of Kshs.6,300 per month;
- 7) Transport allowance of Kshs.1,370 per month which was not paid as the 1<sup>st</sup> Respondent would provide official transport for the Claimant.

CW1 further stated vide a letter dated 24<sup>th</sup> February 2003 from the 1<sup>st</sup> Respondent he was retired from Public Service and from his duties as Chief Executive Officer of the 1<sup>st</sup> Respondent. That prior to this communication a previous letter dated 31<sup>st</sup> January 2003 signed by the then Permanent Secretary of the Ministry of Health terminated CW1's services as Director of the 1<sup>st</sup> Respondent.

CW1 avers that his retirement as the Director/Chief Executive by the 1<sup>st</sup> Respondent and further retirement from service by the Ministry of Health was not only illegal and unlawful but was malicious, capricious unreasonable, without reason and did not follow due process and was contrary to the rules of natural justice.

CW1 further testified that vide the letter dated 7<sup>th</sup> May 2003 he was informed that pending his retirement he was not to visit and/or engage in any hospital work and/or activities and that his continued engagement in Hospital work/activities is viewed as prejudicial to the smooth running of the Hospital. CW1 testified that this not only prevented him from carrying out his professional skills but also denied him the chance of visiting his numerous patients at the Hospital.

CW1 stated in evidence that prior to his retirement and/or termination by the 1<sup>st</sup> Respondent, there was no staff appraisal conducted as required under section XIII of the KNH Terms and Conditions of Service.

CW1 further stated that he did not cause the loss of any funds as purported by the 1<sup>st</sup> Respondent and that he was not given an opportunity to defend himself.

On cross examination the Claimant averred that his appointment as Director of the 1<sup>st</sup> Respondent was to run for a period of 3 years (renewable) and that at the time of the purported retirement he was yet to attain retirement age.

CW1 prays that the Memorandum of Claim be allowed as drawn.

The 1<sup>st</sup> Respondent's case was heard on 24<sup>th</sup> January 2018. RW1 (**Peris Nyawira Ndungu**) Human Resource Officer with the 1<sup>st</sup> Respondent testified on behalf of the 1<sup>st</sup> Respondent. It was her evidence that she has worked for the 1<sup>st</sup> Respondent since 1997.

RW1 testified that the Claimant was appointed as Director with effect from 8<sup>th</sup> March 2002 and his appointment confirmed on 18<sup>th</sup> April 2002.

RW1 further testified that the Claimant was retired of his duties vide a letter dated 31<sup>st</sup> January 2003. Further that vide the letter dated 8<sup>th</sup> September 1998 it is indicated that the retirement age for normal retirement is 50 years and 55 years for compulsory retirement pursuant to Pensions Act and Code of Regulations applicable to the Public Service.

RW1 testified that the requirement of leave pending retirement is that leave pending retirement is taken before retirement. She further stated that there is also a provision for terminal leave for a person retiring which is normally 1 month (currently).

RW1 stated that the 1<sup>st</sup> Respondent's Board directed that the Claimant be retired from service with benefits. However, he was to be surcharged all amounts that were owing to the 1<sup>st</sup> Respondent which is the basis of the 1<sup>st</sup> Respondent's Counter Claim. RW1 further testified that the Claimant did not settle any of the liabilities according to their records.

RW2 (**Joyce Nthenya**), Chief Supplies Officer in Charge of Logistics also testified on behalf of the 1<sup>st</sup> Respondent. It was her evidence that the role of the Tender Committee was to deliberate and award procurement and that for emergencies and procurement below Kshs.500,000 procurement was done with the approval of the Director. That the Director was to act in the best interest of the 1<sup>st</sup> Respondent but this was not the case with the claimant.

RW2 avers that the Claimant did not act in the best interest of the Hospital and that the Board did come up with a task force to look into cases of irregular procurement done by the office of the Director. The Report of the task force was later forwarded to CID for investigations and a copy produced by the secretary to the Tender Committee.

On Cross examination RW2 stated that the Director had authority to approve procurement up-to a limit of Kshs.500,000 and emergency cases.

On further cross examination RW2 indicated that an audit was conducted and a report prepared. She stated that the report was not produced in Court. She also stated that she is not privy to the details in the report forwarded for investigations by the CID and whether anyone has been charged.

RW2 indicated that she has never worked for the Human Resources Department of the 1<sup>st</sup> Respondent and that she is not aware if the Claimant was surcharged or was taken through any disciplinary process.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not call any witness or file any pleadings in this claim.

The parties thereafter filed and exchanged written submissions.

### **Claimant's Submissions**

In the written submissions the Claimant reiterated the contents of the Amended Memorandum of Claim and his oral evidence in Court.

On the issue of unfair and unlawful termination of employment of the Claimant, it is submitted that the Code of Regulations provided for a normal retirement age of 50 years and a mandatory retirement age of 55 years. It is further submitted that the Claimant was born on 6<sup>th</sup> April, 1952 and therefore at the time of retirement he was 51 years of age and as such had not attained the age of mandatory retirement of 55 years.

It is further submitted that the Kenyatta National Hospital Terms and Conditions of Service (as produced in the Claimant's bundle of documents) makes specific provision on retirement of staff under clause 12 (c) as summarised below:

*“Cases of employees who leave service on attainment of normal retirement age of 55 years, or by voluntary retirement after 50 years, or retirement due to ill health are dealt with in the Staff Pension Scheme”*

The Claimant submitted that the Public Service Commission Act and the Regulations (see Regulation 40(1)) contemplate retirement either (1) on attainment of the age of 55 years being the mandatory retirement age, (2) a voluntary retirement after attaining the age of 50 years (3) a voluntary retirement after 5 years of service or (4) retirement on grounds of disability.

It is the Claimant's submission that he had not attained the age of retirement at the time of the purported retirement and he had never voluntarily retired or even applied for consideration for early retirement and as such his termination of his employment by way of retirement was unlawful and unprocedural.

On the issue of defamation of the character of the Claimant, it is submitted that the law on defamation is contained both in common law and in statute. It is further submitted that section 194 of the Penal Code provides as follows:

*“Any person who by print.....unlawfully publishes any defamatory matter concerning another person with intent to defame the other person is guilty of the misdemeanour termed libel.”*

Section 195 defines “**defamatory matter**” as a matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule or likely to damage any person in his profession or trade by an injury to his reputation.

The Claimant submits that the letter dated 7<sup>th</sup> May 2003 contains defamatory words. The Claimant further submitted that subsequent memo from the Respondent contained defamatory words:

*“From the documents availed, Dr. Onguti has a case to answer on abuse of office. He made irrational decisions and has had controversial and in subordinating and irresponsible employment history. He should not be allowed to come back to KNH. He should be retired in public interest.”*

The Claimant relied on the case of **Pyramid Strategies Ltd Vs Charles A Shillanga** where the Court noted that the defendant repeated the offending publications and refused to apologise. It awarded damages of Kshs.2,000,000/-. The Claimant further relied on the case of **Oyaro Vs Weekly Citizen & 2 Others**, Onyancha J took into consideration the fact that the Defendants had failed, neglected or refused to tender apology and repeated the publication twice after the first one. He awarded the Plaintiff general damages of Kshs.3,000,000/-.

Further reliance is made to the case of **J.P Machira T/A Machira & Company Advocates Versus Kamau Kanyango and The Standard Limited** Kariuki J awarded the Plaintiff Kshs.1,250,000/- as general damages and found that the Defendants had acted with malice and did not apologise and awarded the Plaintiff a further sum of Kshs.250,000/- as aggravated damages.

On the issue of the Counter Claim raised by the 1<sup>st</sup> Respondent, the Claimant submitted the 1<sup>st</sup> Respondent’s counterclaim for a colossal sum of Kshs.76,652,465.00/- lacks merit and ought to be dismissed.

The Claimant further submitted part of the sums claimed by the 1<sup>st</sup> Respondent are based on decisions of the board of the 1<sup>st</sup> Respondent and the tender committee of the Hospital during tender process yet the Claimant is not a member of the tender committee and he cannot be held liable for decisions of the board of the Hospital as the decisions of the board are arrived at collectively.

The Claimant submitted that the Court to grant the following Orders:-

- a) A declaration that the termination/retirement of the Claimant’s employment by the Respondents was wrongful, unfair and unlawful;
- b) An Order quashing the 1<sup>st</sup> Respondent’s letter dated 7<sup>th</sup> May 2003 which barred the Claimant from visiting and treating patients at Kenyatta National Hospital;
- c) The Claimant be restated in his employment with the 1<sup>st</sup> Respondent in the capacity of Director and Chief Executive of the Kenyatta National Hospital without loss of employment benefits, seniority or service for the remainder of his term of service;
- d) An Order of Specific performance as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and payment of the Claimant’s full salary, allowances and benefits for the un served period of the contracts of service both as Director of Kenyatta National Hospital (20 months) and as a medical practitioner/doctor in the capacity of Chief Dental Specialist (until 55 years of age);
- e) Damages for unfair and unlawful termination of the Claimant’s employment equivalent to 12 months gross salary of the Claimant;
- f) General damages for defamation in the sum of Kshs. 8,000,000/-;
- g) Exemplary damages for defamation in the sum of Kshs. 5,000,000/-;
- h) Severance pay for each completed year of service;
- i) One Month’s salary in lieu of notice;
- j) Gratuity for the completed term of the contracts
- k) Pension and other unpaid terminal benefits due under the contracts of employment;
- l) Interest on item (d), (e), (f), (g), (h), (i), (j) and (k) above at Court rates at 12% per annum from the date of termination of employment until payment in full;
- m) Costs of the main Suit and counterclaim; and
- n) Certificate of Service.

## 1<sup>st</sup> Respondent's Submissions

On the issue of whether the Claimant's retirement from employment by the 1<sup>st</sup> Respondent was wrongful, illegal, unfair and unlawful the 1<sup>st</sup> Respondent submitted that retirement is an eventuality. It should be noted by this Honourable Court that employment contracts are not a lifetime commitment by an employer to an employee. The 1<sup>st</sup> Respondent relied on the case of **East African Airways -Vs- Knight (1975) E.A. 165**.

That at that time, the laws and rules governing the retirement of an employee were the Government Code of Regulations, The Service Commission Act Cap 185 and the Pensions Act Cap 189. The Public Service Commission Act (2012) had not yet been enacted. The respondent submits that any reference to it in the Claimant's submissions should not be taken into account.

According to the Government Code of Regulations under section G.46 it stipulates that

*“an officer on attaining the age of 50 years may elect to retire anytime thereafter or maybe required to retire anytime thereafter or maybe required to retire by the Government anytime thereafter, without assigning any cause.”*

The 1<sup>st</sup> Respondent further submitted that since the Claimant has admitted in his submissions and in evidence that at the time of retirement, he was 52 years of age, the 1<sup>st</sup> Respondent did not unlawfully or unfairly retire the Claimant as he had attained the legal retirement age. Further, even if the Claimant had remained in the employment of the 1<sup>st</sup> Respondent, there is no guarantee that the Claimant would have worked until the age of fifty - five (55) years (mandatory retirement age).

On the Claim for defamation it is submitted by the 1<sup>st</sup> Respondent that the Claimant's allegations and claim for damages on account of defamation seem to be an afterthought as the same were never pleaded. Among the Claimant's prayers, he has not raised the issues of damages for Defamation. It is trite law that the Court cannot award remedies that have not been pleaded. Parties are bound by their Pleadings. The effect is that in general a Plaintiff is not entitled to a relief which he has not specified in his claim as was held in the case of **Abdul Shakoor -Vs- Abdul Majied Sheikh Nairobi Civil Appeal No. 161 of 1991**.

The 1<sup>st</sup> Respondent further submitted that The Claimant has not shown the effect of the alleged defamatory statement thorough an independent witness and/or any third party. In the case of **Daniel N. Ngunia -Vs- K.G.G.C.U. Limited [2000] eKLR**, the Court of Appeal observed as follows with regard to an allegation of Defamation.

*“We assume that ground concerned the appellant's claim for damages for defamation. Leaving aside any question of privilege upon which the learned Judge dismissed that aspect of the appellant's claim, we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”*

With regards to the Counter Claim raised the 1<sup>st</sup> Respondent submitted that it is an implied term of the contract of employment that an employee will exercise skill and care in the performance of his duties, and a breach of that term entitles the employer to claim damages in respect of the negligent performance of the work. This was emphasized in the case of **Harmer v Cornelius (1858) 5 CBNS 236 at 246** that

*“When a skilled labourer, artisan or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the task he undertakes, - spondes peritiam artis. Thus if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts.”*

It was submitted that the Directors owe a fiduciary duty to the company which fiduciary duties are broadly defined to include a duty of loyalty and a duty of care whose main elements include:-

- (i) That the directors must remain within the scope of the powers which have been conferred upon them;
- (ii) That directors must act in good faith in what they believe to be in the best interest of the company; and
- (iii) That they must not fetter their discretion as to how they shall act
- (iv) That they shall not put themselves in a conflict of interest situation out of a transaction with the company, out of the director's person exploitation of the company's property, information or opportunities, or out of receipt from a third party a benefit for exercising their directorial functions in a particular way.

For emphasis the 1<sup>st</sup> Respondent relied on the South African the case of **National Union of Mine Workers and Another and the Commission for Conciliation, mediation and arbitration case No. J. R. 2512/2007** it was held that:-

*“The second Applicant clearly did not act with the necessary fiduciary duty as required by law especially having regard to his position, and the interests of the employer he was required to serve.”*

The claimant in this case failed to exercise his duty of care and also his fiduciary duty as a Director in the above cases which led to 1<sup>st</sup> Respondent by incurring several losses to the detriment of the 1<sup>st</sup> Respondent. The Hospital is therefore entitled to claim the losses from the Claimant.

The 1<sup>st</sup> Respondent further submitted that the Claimant is indebted to it and as such the Court should allow the Counter Claim as prayed.

The 1<sup>st</sup> Respondent prays that the instant suit be dismissed with costs.

### **Determination**

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the termination/retirement of the Claimant's employment by the Respondents was wrongful, unfair and unlawful.
2. Whether the Claimant is entitled to the reliefs sought.
3. Whether the Respondent is entitled to the counterclaim.
4. Who bears the costs of the suit.

### **Whether the retirement/termination of the claimant's employment was wrongful, unfair and unlawful**

The claimant was appointed Director of Kenyatta National Hospital by letter dated 8<sup>th</sup> March 2002. The letter was signed by the Minister for Medical Services. Hon. Hussein Maalim Mohamed. Thereafter, a letter of appointment dated 8<sup>th</sup> April 2002 was issued by Kenyatta National hospital (the Hospital) detailing the claimant's terms of service. The letter of appointment make reference to the Hospital terms and conditions of Service being the authority upon which the claimant's terms and conditions of service were anchored.

The termination of the claimant's employment followed the same pattern as his appointment. First, there was a letter dated 31<sup>st</sup> January 2003 from the Permanent Secretary Prof. Julius Meme which states –

*“This is to inform you that the Government has decided to relieve (sic) you of your duties as Director, Kenyatta National Hospital with immediate effect.*

*You should hand over to Dr. Mukonyu Florence Musau who has been appointed by the Government to be Director, Kenyatta National Hospital.”*

By letter dated 24<sup>th</sup> February 2003, the Hospital retired the claimant from its service. The letter reads –

*“The Hospital Board of Management has directed that you should be and are hereby retired from the service with effect from 20<sup>th</sup> June 2003. You are deemed to have proceeded on your thirty days leave balance for the year 2002 and three (3) days earned leave for the year 2003 with effect from 3<sup>rd</sup> February 2003 to 19<sup>th</sup> March 2003. This will be followed by three (3) months special terminal leave with effect from 20<sup>th</sup> March 2003 up to and including 19<sup>th</sup> June 2003, during which period you will be paid salary and related benefits.*

*Upon retirement, you will be due for Pension under the provisions of Pension Act for the period of your service in the Civil Service and Retirement benefits under the Kenyatta National Hospital Staff Superannuation Scheme for the period of your service in the Hospital. You will also be entitled to Medical treatment as outlined in Personnel Circular Ref. KNH/PERS/4/85 of 19<sup>th</sup> July 2000.”*

By letter dated 7<sup>th</sup> May 2003 the claimant was advised that –

*“Ref: KHN/501289/(29)*

*Date: 7<sup>th</sup> May 2003*

*Dr. Meshack Ong'uti*

*c/o P.O. Box 20862*

*NAIROBI*

### **RE: RETIREMENT FROM THE SERVICE**

*This is further to this office letter No. KNH/501289/(22) of 24<sup>th</sup> February, 2003 advising you that the KNH Board of Management retired you from the Service effective from 20<sup>th</sup> June 2003.*

*As you are well aware, you are currently on your 3 months terminal leave till 19<sup>th</sup> June 2003 pending the aforesaid retirement. Accordingly, you are not supposed to engage in any Hospital work/activities at all. Your continued engagement in Hospital work/activities is therefore viewed prejudicial to the smooth and efficient running of the Hospital, which in itself is an offence/misconduct, and could easily be treated as such.*

However, if there is any issue(s) you wish clarified or considered, you could write to the Hospital for consideration.

SIGNED

DR. F. M. MUSAU

DIRECTOR”

The Terms and Conditions of Service from the Hospital provide for termination at paragraph 12 as follows –

**“12. Termination of Appointment**

*(a) In the course of employment, the Hospital for various reasons may wish to terminate the appointment of an employee, or the employee may wish to terminate his appointment with the Hospital i.e. by resignation. In such circumstances, the termination of appointment by either party shall be by notice of not less than one calendar month or the payments of a month’s salary in lieu of notice. The Director may waive the notice on discretion and merit.*

*(b) An employee’s appointment may also be terminated by dismissal and/or action that involves the application of disciplinary procedure as set out in the Code of Conduct. Dismissal may result in the forfeiture of benefits otherwise accorded to employees on leaving the service.*

*(c) Cases of employees who leave service on attainment of normal retirement age of 55 years, or by voluntary retirement after 50 years, or retirement due to ill-health, are dealt with in the Staff Pension Scheme.*

*(d) If for any reason redundancy occurs within the Hospital’s establishment, and the Board decides to terminate the appointment of an employee, notice to this effect shall be given as indicated in this sub-section, subject to the “last-in-first out” rule. The Hospital shall also pay in cash for any earned leave and accrued leave due, to any employee who is declared redundant.*

*(e) In the event and in addition to the employee’s rights and privileges under these terms and conditions of service, such an employee shall also receive such terminal benefits, if eligible, as provided for in the Staff Pension Scheme.”*

Neither the claimant nor the respondent produced the documents that provide for the procedure for early retirement of staff of the Ministry of Health. The Pension scheme for staff of the Hospital was also not produced by either party.

It is in the foregoing background that the retirement/termination of employment of the claimant is to be determined.

Based on the above, it is evident that the claimant was first relieved of his position of Director, Kenyatta National hospital on 31<sup>st</sup> January 2003 and thereafter retired as an employee of the Hospital by the letter dated 24<sup>th</sup> February 2003.

The claimant’s employment having been terminated before the enactment of the Employment Act, 2007, is governed by the repealed Employment Act (1976) and the terms of his employment which as has been stated above is the Kenyatta National Hospital Terms and Conditions of Service.

The provisions of both the law and the Terms and Conditions of service allow either party to terminate employment by giving notice or pay in lieu of notice as was stated in the case of East African Airways –V- Knight (1975) E.A 165 at page 173 per Musoke J.A –

*“Surely the respondent’s contract of service would automatically come to an end with the termination of the agreement under the clause; and the most that the respondent could have entertained was the hope that the agreement would last up to his retirement age. In my opinion the respondent’s employment was permanent only in the sense that it was regular and established and not temporary; but it was of an indeterminate duration and, accordingly, it was subject to determination on reasonable notice by the appellant, in the absence of an expressed or implied provision or custom to the contrary.”*

The claimant refers to Public Service Commission Act Regulation – 40(1) which contemplates retirement –

**(1) On attainment of the age of 55 being the mandatory retirement age**

**(2) Voluntary retirement after retaining the age of 50 years**

**(3) Voluntary retirement after 5 years of service or**

**(4) Retirement on grounds of disability.**

The claimant argues that since he had not attained the age of 55 years and his retirement was not voluntary, the retirement was unlawful and unprocedural. It is further the claimant’s argument that Legal Notice No. 109 of 1996 under which he was appointed gave the claimant security of tenure for 3 years.

The respondent on the other hand submits that under the Code of Regulations Section G.46, the retirement of the claimant was not unlawful regulation G.46 provides that –

**“an officer on attaining the age of 50 years may elect to retire anytime thereafter or may be required to retire any time thereafter by the Government without assigning any cause.”**

It is further the respondent’s submission that in the circular Ref. No. DPM. 2/3A Vol. XXIV (57) of 23<sup>rd</sup> July 1998 from the permanent secretary and Director of personnel management, office of the president with regards to retirement age in the civil service stated that –

*“...it is reiterated here that the provisions governing retirement as laid down in the code of regulations and Pension Act, Laws of Kenya will continue to apply .In this respect, the regulations on the normal retirement age of 50 years and mandatory retirement age of 55 years should be strictly enforced. Officers should also be made aware that the Government may at any time call upon anyone to retire under the 50/55 year rule without assigning any cause.”*

I find that the 2<sup>nd</sup> respondent only relieved the claimant of his position as the Director of Kenyatta National Hospital while the 1<sup>st</sup> respondent retired him from service. I further find that the claimant was the Secretary of the Board of Kenyatta National Hospital by virtue of his holding the position of Director and not vice versa as submitted by the claimant. For this reasons the claimant had no security of tenure of membership as his position in the Board was dependent on his holding the position of Director.

I further find that the claimant has not advanced any reason to persuade the court that his retirement was unlawful or irregular as all the relevant instruments being the Terms and Conditions of Service, the Code of Regulations of the Public Service Act and the circular Ref. No. DPM.2/3A Vol. XXIV(57) of 23<sup>rd</sup> July 1998 contemplated the retirement of an employee without assigning a reason after attaining the normal retirement age of 50 years.

I thus find no proof of wrongful, illegal, unfair and unlawful termination.

## **Remedies**

The claimant prayed for the quashing of the letter dated 7<sup>th</sup> May 2003 which barred him from visiting and treating patients at Kenyatta National Hospital. Having found his retirement not irregular or unlawful, this prayer must fail as the claimant only had access to the facilities of Kenyatta National Hospital in his capacity as an employee. He did not adduce any evidence relating to the rights of non-employee doctors practicing in Kenyatta. In any event that would not constitute rights between an employer and an employee and would therefore be outside the jurisdiction of this court.

The prayer for reinstatement must also fail for several reasons. First, at the time of the retirement of the claimant there was no provision for reinstatement in the applicable law.

Secondly the claimant has since attained the then mandatory retirement age of 55 years and even the current mandatory retirement age of 60 years. Thirdly, the Employment Act, 2007 currently in force limits reinstatement to a period of 3 years from date of termination which has long passed and lastly, the claimant did not prove that the retirement was unlawful or irregular or unfair to entitle him to the remedy.

The prayer for compensation equivalent to 12 months’ salary must also fail as the law prevailing then did not provide for the same and neither did the claimant’s terms of employment.

The prayer for specific performance which would entail reinstatement, must also fail for reasons already stated in respect of reinstatement.

The prayer for severance pay is not applicable as the claimant was not declared redundant. The prayer for gratuity is also not payable as the claimant’s terms of appointment did not provide for the same as he was on pensionable terms of employment.

The claimant served during the notice period and is therefore not entitled to the same. The prayer for pension is redundant as this was part of the terms upon which he was retired. The letter of retirement states –

*“Upon retirement, you will be due for Pension under the provisions of Pension Act for the period of your service in the Civil Service and Retirement benefits under the Kenyatta National Hospital Staff Superannuation Scheme for the period of your service in the Hospital. You will also be entitled to Medical treatment as outlined in Personnel Circular Ref. KNH/PERS/4/85 of 19<sup>th</sup> July 2000.*

*You are therefore required to forward to this office the following documents for our further necessary action:*

*(a) Original payslips for June 1988, June 1991 and May 2003*

*(b) Copy of your National Identity Card (both sides)*

*(c) Income tax Certificate*

*In this respect, please sign and return to this office the enclosed Official Secrets Act Declaration Form, election form for commutation of pension, retirees bank details form and also, have the attached Clearance Certificate duly completed in the relevant*

areas and returned to enable us process your dues.”

The Claimant is further **entitled** to be issued with a Certificate of Service as provided under the Employment Act (1976) repealed.

**General damages for defamation in the sum of Kshs.8,000,000/-**

It is trite law that parties are bound by their pleadings. The Claimant did not plead defamation in his Memorandum of Claim and as such the same cannot be awarded. Even if he had pleaded it he would still not be entitled to the same. As was held in the case of **Daniel N. Ngunia – V- K.G.G.C.U.** –

*“... we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the defence of qualified privilege.”*

In a claim for defamation the claimant ought to prove that some person other than himself found the publication defamatory.

The claimant did not call any evidence to prove any damage he suffered as a result of the alleged defamation.

**An Order of Specific performance as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and payment of the Claimant’s full salary, allowances and benefits for the un served period of the contracts of service both as Director of Kenyatta National Hospital (20 months) and as a medical practitioner/doctor in the capacity of Chief Dental Specialist (until 55 years of age).**

With reliance to the authority of **Benson Githinji Vs. the Attorney General & 4 Others**, Rika J. explored the issue of compensation for lost years of service as a result of an unlawful termination of service and stated as follows;

*“This court does not think that the premature termination, even upon finding of the Respondent to have acted unfairly, entitles the Claimant to salary he expected to earn for the years taken away from him before the mandatory age of retirement. Employment relationships are not commercial contracts, and the court must strive to achieve the delicate balance between the need for our national economic development and the protection of the dignity and economic well-being of an individual employee.”*

The Court dismisses this prayer as there is no guarantee that the Claimant would have remained in the 1<sup>st</sup> Respondent’s employment until attaining the mandatory age of retirement.

**Counterclaim**

The respondent counterclaimed the sum of Kshs.76,652,465.00 against the claimant. None of the two witnesses gave evidence to support the counterclaim. RW2 testified that it was the role of the Tender Committee to deliberate and award all tenders. No specific mention was made about the amount claimed in the counterclaim by the witnesses.

I find that the counterclaim has not been proved and accordingly dismiss the same.

**Conclusion**

The result of the foregoing is that both the claim and counterclaim have not been proved and are accordingly dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**