



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.96 OF 2014

JOHN WACHIRA GIKONYO & 9 OTHERS CLAIMANTS

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....RESPONDENT

JUDGEMENT

1. The claimants were the employees of the respondent, formerly Municipal Council of Nyahururu and which later upon the promulgation of the constitution became the County Government of Laikipia. The claimants were employed on different dates and years and classification;

2. 1st claimant John Wachira Gikonyo was employed on 4th December, 1990 as chief fire officer and worked for 23 years and was to retire aged 60 years on 31st December, 2014 as provided for under the CBA of 1st September, 2012 covering two years until 31st August, 2014.

3. 2nd claimant Joseph Mwangi Wagura was employed on 30th July, 1985 as Askari and was issued with retirement notice effective December, 2013 which was premature as he was due to retire in December, 2014.

4. 3rd claimant Simon Wanjohi Ndirangu was employed in July, 1985 as Assistant Market Master until 16th January, 2014 he was retired whereas he was due to retire in December, 2014.

5. 4th claimant Abdurahman Ali Habole was employed on 18th February, 1997 as a Labourer and was retired in December, 2013 whereas he was due to retire in December, 2014.

6. 5th claimant Rachel Wachuka Ndungu was employed on 9th July as Cleaner and was retired early in December, 2013 instead of December, 2014.

7. 6th claimant Joshua Njoroge Kabitau was employed on 8th September, 1998 as Watchman and was promoted to Arresting Officer and retired early in December, 2013 instead of December, 2014.

8. 7th claimant Joseph Ndirangu Karangathi was employed on 6th April, 1977 as a Mason and retired early in December, 2013 instead of December, 2014.

9. 8th claimant Cecilia Nyambura Nderitu was employed in December, 1985 as a Sweeper/Cleaner and retired early in December, 2013 instead of December, 2014.

10. 9th claimant Joseph Mugambi Kariako was employed on 26th August, 1982 as labourer and was retired early in December, 2013 instead of December, 2014; and

11. 10th claimant was employed on 3rd January, 1992 and retired early in December, 2013 instead of December, 2014.

12. The claimants were members of the Kenya Local Government Workers Union, currently Kenya County Government Workers Union. The union has a Recognition Agreement with the respondent and negotiated a CBA. The respondent and the union had a CBA covering the period ending August, 2014 and until a new CBA was negotiated and registered. It was a term and condition of the CBA that the retirement age for employees was 60 years.

13. In breach of clause 29 of the CBA, the respondent illegally and prematurely issued the claimants with retirement notices on grounds of

age. The notices were dated 16th January, 2014 and by then the claimants had not attained 60 years having been born in the year 1954 and were to attain 60 years on 31st December, 2014. The claimants were retired from service with effect from December, 2013.

14. The respondent retired and dismissed the claimants from employment without payment of terminal dues, gratuities and emoluments provided for under clause 29(i) (e) of the CBA.

15. It was a term of the CBA that the respondent could only retire its employees at the age of 60 years and a notice of retirement be given to the officer 6 months in advance of the 60th birthday.

16. The claimants were born on divers dates in the year 1954. They were called to prove that they were born in the year 1994 and thus produced their birth certificates and identification card. Given the terms of the CBA the respondent was well aware that the claimants were to retire in December, 2014 at age 60 and not 59 years. The CBA had a mandatory retirement age.

17. The forced early retirement of the claimants denied them the due salaries, benefits and allowances for a year. The claimant challenged their early retirement and the union gave its views to the Minister vide letter dated 31st July, 2006 and in response the government in the letters dated 26th July, 2007 and 24th February,, 2014 had a different view. There was no proper guidance on the retirement age.

18. Some of the claimants were born in the year 1954 and thus were due to retire in December, 2014.

19. Other claimants have their national identity cards stating date of birth. The 1st claimant John Wachira Gikonyo was born on 31st December, 1954, John Mwangi was born on 4th December, 1954, Joseph Mwangi Wagura was born on 30th December, 1954, Joshua Mugambi was born on 30th December, 1954, and Joshua Njoroge was born on 28th December, 1954 and have birth certificates to confirm the same.

20. The pay slips issued to the claimants for December, 2013 indicate they were aged 59 year. The claimants then attained age 60 in December, 2014 and not December, 2013.

21. The claimants are seeking for a declaration that the retirement notice issued and dated 16th January, 2014 was premature, illegal and of no consequence; the respondent should pay the salary due for the year 2014; payment of 6 months' notice, the leave and off days' pay due for the year 2014, gratuity payable under the CBA read together with Legal Notice No.112 of 5th September, 2008; payment of leave allowance for the year 2014; the due payments be paid with interest and costs of the suit.

22. The 1st claimant John Wachira Gikonyo testified that upon employment by the respondent he was due to retire at age 60 in accordance with the terms of the CBA.

He has a birth Certificate confirming he was born on 31st December, 1954 and in his pay slips the retirement age was noted therein.

23. The claimant was retired early vide notice letter dated 16th January, 2014. Such letter and notice was issued to all the claimants noting date of retirement was 31st December, 2013.

24. Before retirement, the CBA provide for a 6 months' notice which the respondent failed to issue. Such notice was to provide for preparations for retirement.

25. The witness also testified that his gratuity was not paid. under Legal Notice No.112 of 2008 gratuity was due. by early retirement, the respondent denied him earning for a year and should be paid with the due leave, allowances thereof and benefits. There are salary arrears under the CBA which relates to the years 1993, 2002, 2005, 2010 and the increments for each two years period.

26. Mr Gikonyo also testified that his national identity card indicates he was born in the year 1954 and has no birth date. Later he obtained a birth certificate in the year 2013 on 20th August, 2013 while in employment and noted he was born on 31st December, 1954.

27. The employees were all called to a meeting by Ms Nyaga the human resource manager who directed all employees of the respondent to obtain birth certificates. There were more than 300 employees of the respondent requiring such certificates. The directive was not through any written letter/notice, it was verbal. Upon obtaining the birth certificate the claimant presented it and it was accepted by the respondent.

28. Mr Joseph Mwangi Wagura also testified that upon employment by the respondent he was due to retire at age 60 but was issued with notice dated 16th January, 2014 when he was retired early and was not paid his terminal dues. He has a birth certificate obtained in August, 2013 after Mrs Nyaga the Human Resource Manager directed all employees to update their records. The certificate indicated he was born in December, 1954 and should have retired in December 2014 and not December, 2013. There was a CBA setting out the retirement age and the respondent is in breach thereof by retiring the claimants early and should pay the dues for the year 2014.

29. The claimant also asked for salary arrears under the CBA for the years 2005, 2010 and 2012. Such dues have since been paid to other employees. The salary increments should be paid.

30. The claimants also called Simon Wanjohi Ndirangu and who testified that the claimant were employed in different positions and were retired early without payment of the salaries, allowances and terminal benefits which should have been paid for the year 2014. The CBA provided that where one used the ID for employment and had no date of birth; the end of each year was 31st December. The respondent paid

to the LAP FUND and NSSF with regard to the gratuities due to the claimant and the benefits which arise from the LAP FUND should be paid to the claimants. Under Legal Notice No.112 of 2008 the claimants were entitled to be paid gratuity.

Defence

31. The defence is that upon the perusal of the employment records in their custody the claimants have attained the mandatory retirement age and the retirement notices issued are lawful, valid and timely. The claimants rights have not been violated and there is no dismissal from employment as alleged. The reliefs sought are without merit and should be dismissed.

32. The defence is also that the pay slips issued to the claimants in August, 2013 indicate they were aged 59 years and due to retire on 31st December, 2013 upon attaining age 60 in accordance with the CBA. The claimants are guilty of age variation in the belated issued birth certificates in a design to serve beyond 60 years of age. Such is an illegality and deliberate fabrication of documents and against public policy which should not be allowed by the court. the claims should be dismissed with costs.

33. In evidence Gerald Mwangi Muturi the head of human resource management of the respondent testified that as the custodian of work records the claimants were employed based on their ID indicating they were born in the year 1954 without a date or month being disclosed.

34. Clause 2 (a) (i)(c) of the CBA regarding retirement date where employees records are inconclusive and the ID indicates the employee was born in the year 1954 the 60th anniversary is 31st December, 2013. The claim that the claimants were due to retire in December, 2014 on their inconclusive documents as regards age date and month cannot change the anniversary date.

35. The claimants had adequate notice with regard to the retirement date in their pay slips that being 31st December, 2013 and this had not been contested. The claims made that retirement date was different is without foundation.

36. While in employment the claimants were under a contributory pension scheme though LAP FUND or LAP TRUST and no gratuity is payable upon retirement.

37. There are no salaries due from arrears with regard to any CBA and if such exists the appropriate institution to address is the Transition Authority. The salary arrears with regard to the 2012 CBA have since been paid to the claimants and there are vouchers to confirm these payments. Upon retirement, the claimants were paid their terminal dues as set out in the retirement notice issued to them and issued with clearance letters to facilitate payment of pensions due.

38. Mr Muturi also testified that the respondent operates on a compulsory pay roll data system known as *Integrated County Government Payroll System* IPPD) and the system is configured to automatically detect when an employee attains a mandatory retirement age. The claimants were automatically removed on 31st December, 2013 as the 60th anniversary. The birth certificates submitted with changed date of birth should not be admitted in evidence.

39. At the close of the hearing only the claimants filed written submissions.

Determination

The issues which emerge for determination from the pleadings, evidence and written submissions by the claimants are;

Whether the retirement notice issued to the claimants and dated 16th January, 2014 is premature, illegal and null;

Whether on the finding above the claimant should be paid any salary, benefits and emoluments therefrom – salary, leave days, leave allowance and off days, and 6 months' notice pay;

Whether the claimants are entitled to gratuity as provided for under the CBA and under legal notice No.112 of 5th September, 2008;

Whether the terminal benefits, gratuity and salary arrears of between 2010-2012 based on the CBA of 1993 is due and payable; and on this basis whether the salary arrears for 1993, 2002 2005 and 2010 are payable; and

Who should pay costs.

40. It is trite, where employment is regulated by a CBA, the court is to enforce the same in its terms and conditions unless there is prove to the contrary. The claimants were members of the Kenya County Government Workers Union and which union was recognised by the respondent as had negotiated CBA over the years.

41. It is common cause that parties herein were regulated under the CBA registered with the court on 7th February, 2013 and covering the periods of the years 2012 to 2014 and until a new CBA was registered with the court.

42. It is also not contested that the claimants were issued with a retirement notice dated 16th January, 2014. Such notice provided that;

... you are due for retirement with effect from **1st January, 2014** on attainment of mandatory retirement age of sixty (60) years.

Subsequently, your last day of duty will be **31st December, 2013** up to and including which date you shall be due salary subject to clearance of any County Government of Laikipia liabilities and a clearance certificate issued thereof.

...

Note that you are entitled to Thirty (30) days annual leave for the leave year 2013/2014 calculated on pro-rata basis. You are eligible to Thirty (30) days terminal leave inclusive of Saturday, Sundays and public holidays. The terminal leave shall be utilised from 1st December, 2013 to 31st December, 2013 both days inclusive.

In view of the berated retirement notice, you will be eligible for the following payments;

1. Payment of the equivalent one (1) month basic salary and house allowance in lieu of notice and terminal leave.
2. Payment of accumulated leave to a maximum of sixty (60) days as stipulated in the current Collective Bargaining Agreement ...

43. From the evidence by the claimants, the notice for retirement was issued to them while at work and on the 16th January, 2014 and taking effect retrospectively to the 31st December, 2013.

44. On the first issue for determination as to whether the notice dated 16th January, 2014 is premature and lawful, a resort to the CBA under clause 29 is that it provided for retirement of the employees at age 60. The CBA provides that;

(i) Retirement

a) The council shall call upon an officer to retire from its service at any time following the officer attaining the age of 60 years and a notice of retirement shall be given to the officer six months in advance of the 6th birthday provided that an officer may exercise of option to retire ...

b) ...

c) Where documentary evidence of an officer's age is unobtainable or inconclusive, his age will be determined by reference to the date in his identity card together with the recommendation of the Medical Officer, and in such case the anniversary of his birthday shall be deemed to be 31st December. ...

45. The CBA in its nature and as the legal agreement regulating employment and labour relations provided for retirement at age 60 and further addressed lack of documents to show appropriate age in terms of date of birth. Where there was a year provided, the date of birth anniversary was 31st December translating the date of birth as 1st January.

46. The claimants lack of a date of birth was therefore contextualised under the CBA.

47. The year of birth was 1954. The anniversary was 31st December, 2013. Each year commenced on 1st January and ended on 31st December. The claimant clocked 60 year on the 60th anniversary of birth on 31st December, 2013 and not any other date later.

48. In this case, the sourcing for a Birth Certificate at the tail end of employment was unnecessary. This had conclusively been addressed and negotiated under the CBA registered with the court on 7th February, 2013.

49. The notices issued by the respondent dated 16th January, 2014 were lawful but not procedural. The negotiated CBA required notice to issue 6 months in advance to the 60th birthday anniversary. The notice issued found the claimants at work. Such time should be paid for.

50. From the pleadings and evidence of the claimants, none worked after the retirement notice was issued to them. no evidence was called to suggest that there was continued service to the respondent after the notice of 16th January, 2014.

51. Each claimant should be paid for the 16 days worked in January, 2014.

52. Such is compensation for time worked over and above the retirement age of 60 years attained on the 31st December, 2013.

53. Under the retirement notice there pay in lieu of notice. Such the court finds to be reasonable and appropriate pay upon the lapse by the respondent to issue the 6 months' notice contemplated under the CBA and for keeping the claimants in employment beyond the retirement age.

54. On the second issue, as above addressed, the retirement date settled, no salary is due to the claimants for the year 2014 save for the days worked and based on the retirement notice dated 16th January, 2014. Leave cannot accrue to an officer retired and without being at work after the retirement date, there are no due off days, allowances or other emoluments as would arise before the retirement date of 31st December, 2013.

55. The claim for gratuity pay is premised on Legal Notice No.112 of 5th September, 2008.

56. Under the CBA , clause 42 it was agreed that gratuity payment would be paid to the beneficiaries therefrom in accordance with the Rules governing such scheme. The Minister published Gazette Notice No.112 of 5th September, 2008 directing that;

If at any time an employee becomes a member of a provident fund, superannuation fund or any other fund established or approved by the Council, a gratuity shall be paid under this rule at the time of his/her retirement in respect of any period of his/her service prior to and after his commencing to contribute to those other funds, where had he not commenced to contribute, he would by reason of any provision contained in these rules have been entitled to gratuity or other payment.

57. The claimants have submitted their payment statements;

John Gikonyo, Cecilia Nderitu were registered with the LAP FUND;

Joseph Wagura, Josphat Ndirangu, Rachael Ndungu, Joshua Kabitu, Joseph Karagathi, Joseph Kiriako, Simon Ndirangu were all registered with the NSSF and LAP-FUND.

58. The claimants thus covered under registered provident funds and the Rules applicable subsisting, such funds are thus regulated and the role of the respondent is to issue the necessary clearance and retire notices for access to the requisite funds and benefits.

59. Such provident funds are regulated in law and have Rules separate and outside of the respondent management as the employer. There is no claim that the respondent deducted and failed to remit any dues therein.

60. On whether the salary arrears for the periods for 1993, 2002, 2005 and 2010 are payable, each CBA covered a term and once a new CBA was registered, the terms and conditions of employment were renewed. Where the term CBA was registered by the union and covering the claimants, the entity to address any salary arrears and spread the benefit is the union and not the individual members. To claim individually would be to lose the context applied by the union in addressing each category of employees and the causal link to each agreed term and condition. The claimants cannot separate themselves outside the trade union and claim under the CBA for a benefit in arrears outside the whole.

61. Noting the above, where the individual benefit(s) under the subject CBA relates to the period 1993 to 2010 and employment terminated on 16th January, 2014 and suit was filed on 11th April, 2014 the time lapse put into account, by application of section 90 of the Employment Act, 2007 any claims therefrom are lost in time.

Accordingly, the claims are hereby dismissed in their entirety save for wages due for the period ending 16th January, 2014 which shall be assessed at the shop floor per paragraph 51 above. Each party shall meet own costs.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of:.....