



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1145 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> February, 2017)**

**PIUS KAKONO KAU.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF STATE**

**FOR PROVINCIAL ADMINISTRATION.....2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on 5<sup>th</sup> July, 2012, through the firm of Musyoka & Muigai, seeking damages for unlawful dismissal. He states that he was employed by the Respondent on 14<sup>th</sup> December, 1993, as an Assistant Chief on permanent and pensionable terms in the service of the Government of Kenya effective 1.9.1992.
2. Upon assignment he states that he was assigned duties and responsibilities with respect of the then Nzalae sub-location of the then Kitui District; and he took up his position with devotion, zeal, loyalty and commitment.
3. He states that he was interdicted from exercising the functions of the office of Assistant Chief by a letter dated 17<sup>th</sup> July, 1998, which interdiction was followed by his retirement vide a letter dated 12<sup>th</sup> August, 1999.
4. It is the Claimant's contention that he appealed against the retirement in public interest and his appeal was successful as the decision was rescinded by a letter dated 25<sup>th</sup> January, 2001, in effect requiring him to report for duty with immediate effect. He further alleges that the reinstatement was short-lived as the same was set aside and retirement in public interest was reinstated.
5. Later on 13<sup>th</sup> March, 2009, the Claimant states that he was reinstated in the service effective 1<sup>st</sup> March, 2001, and by a different letter of 13<sup>th</sup> March, 2009, the Claimant was retired yet again on the grounds of attainment of mandatory retirement age of 55 years, which was to take effect from 1<sup>st</sup> July, 2005.

6. The Claimant contends that the retirement in public interest was unjustified and unlawful, and that he is entitled to damages for unlawful dismissal. He states that upon reinstatement he was not paid the salary arrears that had accumulated from the date of his retirement in public service in 1999 till when he attained the age of retirement in 2005.
7. The Claimant further contends that he sought payment of the outstanding salary arrears and he was informed by a letter dated 8<sup>th</sup> July, 2011, that it had been decided that he had been on leave over that period without pay which position is unconscionable and unjust. He prays for salary arrears and damages for unlawful dismissal.
8. The Respondents filed a Memorandum of Response wherein they admit the employment relationship and state that the Claimant was interdicted from office as an Assistant Chief when the District Commissioner received reports that the Claimant was not carrying out the duties attached to his appointment to the satisfaction of the local people to allow for investigations into the Claim.
9. They contend that the retirement in public interest was a decision reached as an appropriate action as a result of disciplinary proceedings which had been instituted against the Claimant of which he was aware of.
10. They further aver that the reinstatement of the retirement in public interest if at all, was after the Claimant's representations had been carefully considered and it had been established that there were no sufficient grounds to change the previous decision to retire him in public interest.
11. The Respondents state that the Claimant is not entitled to any of the prayers sought and they pray for the suit to be dismissed with costs.
12. In evidence the parties led evidence as per the pleadings and proceeded to file submissions wherein the Claimant states that no disciplinary proceedings took place before dismissal and as such it was unlawful. They state that the process that commenced in 1998 was only completed on 8<sup>th</sup> July 2011, when the Claimant was finally told his withheld salary would not be paid. That the final Appeal that led to the reinstatement and retirement of the Claimant upon attainment of the mandatory retirement age took 8 years which was an inordinately long period amounting to unfair labour practices.
13. The Claimant submits that he was always willing to work at all material times but the Respondent kept him away from work and as such he is entitled to withheld salary arrears of upto the time when he attained the mandatory retirement age. They pray for the Claim to be allowed.
14. The Respondents on the other hand submit that the Claimant was retired from public service in public interest on 27<sup>th</sup> July, 1999, which retirement was rescinded and he was reinstated and later the reinstatement rescinded on 27<sup>th</sup> July, 1999. That the Claimant appealed to the 3<sup>rd</sup> Respondent who considered the appeal and reinstated him with effect from 1<sup>st</sup> March, 2001, up until he resigned on attainment of retirement age on 1<sup>st</sup> July, 2005.
15. The Respondents submit that the Claimant admitted in evidence that he received half his salary upto the end of January, 2001, and at the end of February 2001, he was paid all the money deducted from the time of interdiction up to end of February, 2001. That this being the case, the moneys owing to him if any should be from 1<sup>st</sup> March, 2001, to his retirement date which is 30<sup>th</sup> June, 2005 and not arrears from 1<sup>st</sup> July, 1999 as claimed in the Statement of Claim.
16. The Respondents state that the Claimant cannot claim withheld salaries and at the same time claim damages for unlawful dismissal as this would amount to double compensation. They further submit that by the mere fact that the Claimant was reinstated, mitigated the earlier dismissal and as such the Claim should be dismissed as a whole.
17. Having considered evidence of both parties, I note that the Claimant was employed on 14.12.1993

(PKK.1). On 17.7.1998 he was interdicted (PKK.2). During the period of interdiction, he was paid ½ salary. On 12.8.1999 he was retired in public interest (PKK.4). He appealed against this retirement in public interest vide a letter dated 20.9.1999 and was reinstated on 25/1/2001.

18. However 6 months later, on 3.7.2001 the Claimant received a letter retiring him in public interest and rescinding the letter of 25/1/2001. He was then expected to ensure he is paid his final dues without any further delay and was asked to submit certain documents to the Permanent Secretary, Provincial Administration to enable processing of the terminal benefits.

19. The Claimant again appealed against the decision and was reinstated in the service again vide a letter dated 13-3-2009 thus rescinding the letter of 1.3.2001. On the same day he was also retired from the service on attaining his mandatory retirement age at 55 years.

20. It is after this that he wrote a letter asking to be paid his unpaid salary being salary of 280 per month for the period 1/7/99 to 28/2/2001 and 280 per month for the period 1/7/2000 to 28/2/2001 as per Ref. Salary Revision DPM SAL.COM 16/1/4A/VOL IV/79 dated 27/10/97 and letter Ref No. C/71003770/19 of January, 25<sup>th</sup> 2001.

21. He indicated that before his interdiction his salary was Kshs.7,090/= as at March 1999. He indicated that when the interdiction was lifted, he was paid ½ salary withheld without the two early increments of 1/7/1999 and 1/7/2000.

22. He also sought to be paid full salary from 1.3.2001 to and including 30<sup>th</sup> June 2005 also putting in consideration salary revision circular Ref No. DPM SAL.COM 16/1/4A/VOL VII (128) dated 30/1/2004 and any other circular letter on salary issued before his retirement date Ref letters No. C/71003770/38 and No. 71003770/66 all dated 13.3.2009. He tabulated the entire amount to be 656,500/=.

23. The Respondents never paid him but decided to treat the period when he was out of service to be treated without pay for purposes of pension.

24. It is my view that the Respondents cannot reinstate the Claimant in employment vide their letter of 13.3.2009 and thereafter on 8.7.2011 purport to have the reinstatement with conditions being the period of absence being considered as unpaid leave.

25. Reinstatement is defined in Blacks Law Dictionary 9<sup>th</sup> Edition as:

***“to place again in a former state or position; to restore....”.***

26. The issue of leave without pay is therefore a regression from a reinstatement and the decision by Respondent not to pay the Claimant all withheld salaries and allowances was illegal.

27. I therefore find that the Claimant has established his case as expected and I find for him and enter judgment as prayed in salary arrears of Kshs.656,500/= plus costs and interest.

Read in open Court this 15<sup>th</sup> day of February, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant – Present

No appearance for Respondent