



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1149 OF 2012

REX SIMIYU ASELI.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF LOCAL GOVERNMENT...2ND RESPONDENT

JUDGMENT

Introduction

1. This is a fairly old matter, having been first heard by my brother, **Rika J** on 18th March 2013, when the Claimant's case was taken. The Respondent then sought an adjournment which was granted.

2. Thereafter, the matter came up severally before different judges and on 21st February 2017 it was listed before me. The Respondent's witness failed to appear and I declined to grant any further adjournment, thereby directing the parties to file final submissions.

The Claimant's Case

3. The Claimant was employed by the Public Service Commission on 25th February 1991, in the position of Treasurer. On 14th July 2005, he was transferred from Nzoia County Council to Busia Municipal Council, to perform the duties of Town Clerk.

4. In December 2006, the Claimant was interdicted on the ground that he had been surcharged for misappropriation of the sum of Kshs. 927,481. Following the surcharge, which he fully satisfied, the Claimant was, by letter dated 14th April 2008, transferred to County Council of Lugari in the position of County Treasurer. When he reported, he found the outgoing County Treasurer still in office. Upon inquiry from the Permanent Secretary, Ministry of Local Government, the Claimant was told to wait for deployment within two weeks. He was neither deployed nor was he paid his salary.

5. The Claimant's further inquiries with the Ministry of Local Government did not elicit any response. However, in response to a letter from the Public Complaints Standing Committee dated 29th June 2009, the Permanent Secretary, Ministry of Local Government wrote back on 23rd July 2009, stating that another station had been identified for the Claimant. However, no action was taken to deploy the Claimant.

6. On 7th August 2009, the Claimant was charged with fraudulent acquisition of public benefit contrary to

Section 45 as read with Section 48(1) and (2) of the Anti-Corruption and Economic Crimes Act. The charge was later withdrawn for lack of evidence.

7. By letter dated 9th January 2012, received by the Claimant on 18th April 2012, he was required to show cause why disciplinary action should not be taken against him. The Claimant was retired in the public interest by letter dated 2nd May 2012.

8. The Claimant seeks the following remedies:

- a) Accumulated salary for 50 months from 1st May 2008 to 30th June 2012 plus interest;
- b) 18 months' salary in compensation;
- c) Redeployment;
- d) General and exemplary damages
- e) Costs plus interest

The Respondent's Case

9. In its Memorandum of Defence dated 30th October 2012 and filed in court on 2nd November 2012, the Respondents generally deny the Claimant's claim and put him to strict proof.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant's retirement in the public interest was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Claimant's Retirement

11. On 9th January 2012, the Respondent wrote to the Claimant as follows:

“DISCIPLINE

This is to inform you that following your interdiction on account of gross misconduct, it has been decided that you be retired in public interest with effect from 22nd November, 2011.

You are hereby required to show cause why you should not be retired in public interest as intended. Your representations, if any, should reach this office within twenty one (21) days of the date of this letter, failure to which the contemplated action will be instituted without any further reference to you.

(Signed)

Prof. Karega Mutahi, CBS

PERMANENT SECRETARY”

12. A subsequent letter dated 2nd May 2012 states as follows:

“DISCIPLINE

Further to this office letter no. S/130317/1/49 of 9th February, 2012 on the above subject matter, please note that in the letter under reference it was erroneously stated that you be retired from Service in the Public Interest with effect from 22nd November 2011 and were also requested to submit your representations if any, within 21 days which you have not done to date.

Be notified that this office is in the process of making a recommendation to the Public Service Commission that you be retired in the Public Interest. However, before this process is finalized you are hereby reminded to submit your representations of a personal nature if any, within fourteen (14) days from the date of this letter as to why you should not be retired from Service in the Public Interest. Failure to respond within this period will be construed as not having representations to make and the process of retiring you in Public Interest will be finalized through the Public Service Commission of Kenya without further reference to you.

(Signed)

PROF. KAREGA MUTAHI, CBS

PERMANENT SECRETARY”

13. The Claimant states that he received both letters three months later and there was no evidence that they were served earlier. The Respondent avers that the Claimant failed to respond to these letters which were sent to the Claimant’s last known address. In **Rashid Jeneby v Prime Bank Limited [2015] eKLR**, this Court held that an employer who claims that an employee has failed to respond to communication on a disciplinary process, must demonstrate the effort made to serve the communication on the employee.

14. It is not enough to state that communication was sent to the last known address. The Claimant was a long serving employee of the Respondent and his personal contacts were well known. It appears that the Respondent did not make any serious attempts to reach the Claimant, thereby denying him the opportunity to be heard.

15. Moreover, a reading of the said letters indicates that the decision to retire the Claimant in the public interest had already been taken. To my mind, this form of retirement is disciplinary in nature and must be preceded by due process.

16. The Court was referred to the decision in **D.K. Njagi Marete v Teachers Service Commission [2013] eKLR** where it was held that a public employer justifying premature termination of employment on the ground of public interest must demonstrate valid reasons amounting to public interest to justify the termination. I agree. Retirement in the public interest leaves an indelible stain in the life of the affected public servant and should therefore be effected in the clearest of cases and pursuant to a clear disciplinary process.

17. The Court did not have the benefit of hearing the Respondent’s testimony. However, piecing together the documents placed before the Court, it would appear that the decision to retire the Claimant in the public interest was informed by misappropriation of funds in the sum Kshs. 927,481, belonging to Busia Municipal Council, for which he was surcharged.

18. In **Kenya Library Services v Beatrice N. Ayoti [2014] eKLR** this Court held that a surcharge is a disciplinary action, which under the rule against double jeopardy, fully insulates the surcharged employee from any further disciplinary action, for the same offence. In the instant case, it seems to me that the Respondent, having surcharged the Claimant, also went ahead to terminate his employment, thus subjecting the Claimant to double jeopardy.

Remedies

19. From the foregoing findings, I have reached the conclusion that the decision to retire the Claimant in the public interest was not only unlawful but also unfair. I therefore award him 12 months’ salary in

compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in handling his case. I further award the Claimant one (1) month's salary in lieu of notice.

20. No basis was laid for the claims for accumulated salary, general and aggravated damages which are dismissed.

21. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 12 months' salary in compensation.....-Kshs. 889,740

b) 1 month's salary in lieu of notice.....--74,145-

Total.....-963,885

22. This amount will attract interest at court rates from the date of judgment until payment in full.

23. The Claimant will have the costs of the case.

24. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF OCTOBER 2017

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JUDGE

Appearance:

Mr. Gitau for the Claimant

Mr. Soita for the Respondent