



Siro Andrew Leo Obaga v Judicial Service Commission (Cause 305 of 2014) [2017] KEELRC 103 (KLR) (2 November 2017) (Judgment)

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Neutral citation: [2017] KEELRC 103 (KLR)

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

CAUSE 305 OF 2014

MA ONYANGO, J

NOVEMBER 2, 2017

BETWEEN

SIRO ANDREW LEO OBAGA CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

- 1 The Claimant is a former employee of the Judicial Service Commission, the Respondent herein. He was employed as a clerical officer on temporary terms on 16th February 1978 and posted to the Senior Resident Magistrate's Court Sheria House Nairobi. By letter dated 14th June 1979, the Claimant was appointed on probationary terms of service with effect from 1st February 1979, with a continuous service from 16th February, 1978. He was later confirmed by a letter dated 30th September 1982, with effect from 1st February 1981, and served in various stations, being Nairobi, Eldoret, Kikuyu, Kajjado, Kitale and Iten Law Courts. According to the Respondent, the Claimant had a poor record, until he was retired in the public interest by a letter dated 9th June 2009, with effect from 31st December 2008.
- 2 It is the Respondent's evidence that while serving at Sheria House Law Courts:
 - i) The Claimant was warned and reprimanded through a letter dated 16th September 1982 for rude and unruly behaviour, absenteeism and insubordination. He defended himself and his explanation was reluctantly accepted through a letter dated 24th July 1984;
 - ii) By a letter dated 28th July 1984, the Claimant was given seven (7) days' notice to show cause why appropriate disciplinary action should not be taken against him for the following misconduct:
 - iii) Reading a newspaper during working hours on 27th June 1979;



- iv) Leaving the courtroom at 10.00am and leaving the Magistrate unattended causing embarrassment to the court, only to return to work at 12.10 pm on 9th July 1982;
 - v) Leaving the courtroom at 10.00am and when asked to explain his absenteeism by his superior officer at 11.45 am, was rude and disrespectful on 13th September 1982;
 - v) Causing disappearance of the court file in RMCC No.1380 of 1984; and
 - vi) Holding lengthy talks with visitors during official work hours and using disrespectful language against his immediate superior officer when confronted about the same.
- 3 While serving at Kikuyu Law Court;
- (i) By a letter dated 4th September 1990, the Claimant was required to show cause why disciplinary action should not be taken against him for absenteeism from work on the same day from 2.00 pm to 5.00 pm which was not his first time, as well as his habitual reporting to work after 9.00 am;
 - (ii) By a letter dated 19th September 1991, the Claimant was required to give a written explanation as to why he had breached government regulations by showing the day's charge sheets to a person who was not part of the judicial staff;
- 4 While serving at Kajiado Law Courts;
- i) By a letter dated 17th Friday 1993 from the Executive Officer, the Claimant was required to show cause why he should not be reported to a higher authority for disciplinary measures, for repeatedly reporting to his station of work late;
 - ii) By a letter dated 29th March 1993, the Claimant was required to give an explanation as to why he had been negligent and only filed pleas of guilty, months after the warrants of arrest had been issued;
 - iii) By a letter dated 11th May 1993, the Claimant was required to explain how one Bilha Wanini, the accused person in R.M. Crim. Case No. 337 of 1993 had been released from the court cells without a warrant or order to do so;
 - iv) In September 1993, the Claimant breached government and court regulations by moving Court File No.342 of 1993 out of the Court Registry and Photocopying court documents from the file without authority or permission;
- 5 While serving at Eldoret Law Courts;
- v) In early 1994, the Claimant was charged with the offence of "aiding a prisoner to escape contrary to Section 124(1) of the penal code in Criminal Case No.341 of 1994"
 - vi) By a letter dated 16th February 1994, the Claimant was interdicted with effect from 25th January 1994 pending the outcome of his criminal case, during which period he would be receiving half his salary, and was required to show cause why he should not be dismissed from service on grounds of gross misconduct from aiding a prisoner to escape;
 - vii) The Claimant responded through a letter dated 16th March 1994 and admitted that:
 - a) He has indeed been arrested and charged with the offence of aiding a prisoner to escape in Eldoret Criminal Case No.341 of 1994 which case was withdrawn on 25th January 1994 under Section 87(a) of the Criminal Procedure Code;



- b) He was sorry for what had transpired which was not of his own making or intention.
- viii) The Claimant's interdiction was lifted on 24th June 1997, through a letter of even date, with effect from 25th January 1994 and he was warned that and future adverse reports would earn him severe disciplinary action.
- 6 While serving at Iten Law Courts;
- i) On 24th September 2007, the Claimant was arraigned before of Chief Magistrate's Court, Eldoret and charged with the offence of aiding a prisoner who had been convicted and sentenced to serve seven (7) months imprisonment to escape and abuse of office by gaining Kshs. 3,700.00;
- ii) By a letter dated 16th November 2007, the Claimant was interdicted due to the seriousness of the charge with effect from 24th September 2007 and was required to show cause why he should not be dismissed for gross misconduct within Twenty-one (21) Days;
- 7 The Respondent states that by a letter dated 26th August 2008 the Claimant was given notice of retirement with effect from 26th August 2008, to retire from service with effect from 1st January 2009. The Respondent avers that the Claimant was to attain the compulsory retirement age of 55 years on 31st December 2008 having been born on 1st January 1954.
- 8 The Respondent's Human Resource Management Advisory Committee (the Committee) met on 18th December 2008 to deliberate on the Claimant's disciplinary case and resolved that the same would be deferred until the determination of the criminal case against the Claimant.
- 9 By a letter dated 12th January 2009, the Claimant was informed of the Respondent's Committee's decision and was notified that the processing of his retirement benefits had been put on hold as he was still under interdiction.
- 10 The Respondent states that by a letter dated 19th May 2009, the Claimant requested that the interdiction imposed on him be lifted on the grounds that:
- i) He had been discharged under Section 210 of the Criminal Procedure Code and forwarded a copy of the charge sheet as well as certified copies of the proceedings and ruling in Eldoret CM Cr.Case No.8958 of 2007;
- ii) He had worked for the judiciary for over Thirty (30) years and had dependants relying on him; and
- iii) His retirement had been due on 31st December 2008.
- 11 The Respondent's Human Resource Management Advisory Committee deliberately on the Claimant's request for the lifting of the interdiction in a meeting held on 27th May 2009, lifted the interdiction imposed on the Claimant with effect from 24th September 2007 and retired the Claimant from service on grounds of public interest with effect from 31st December 2008 in accordance with Regulation 28 of the Judicial Service Commission Regulations, Chapter 185 of the Laws of Kenya.
- 12 By a letter dated 9th June 2009, the Respondent conveyed its Committee's decision to the Claimant.
- 13 The Claimant appealed against the Respondent's Human Resource Management Advisory Committee decision to retire him in public interest through a letter dated 6th May 2010 on the grounds that:



- (i) He did not receive his retirement letter in good time as it had been sent to the wrong address;
 - (ii) No reasons had been given in the said letter for the decision to retire him in the public interest;
 - (iii) The decision was injurious to him and implied some wrong-doing on his part; and
 - (iv) He had provided dedicated public service throughout his employment.
- 14 The Respondent states the Claimant's first appeal against retirement was considered and rejected on 29th July 2011 as there were no sufficient grounds advanced and the Claimant had a bad disciplinary record. The Claimant had also reached the retirement age at the time disciplinary action was taken against him.
- 15 By a letter dated 22nd August 2011 the Claimant was notified of the rejection of the 1st appeal and was notified of his right of a second appeal which would only be accepted if there would be new and material facts.
- 16 The Respondent states that the Claimant exercised his right to a second appeal and forwarded the same to the Respondent through a letter dated 10th February 2012, based on the grounds that:
- i) The decision to retire him on grounds of public interest was unfounded and unjust;
 - ii) It was not true that he had a 'bad record' and that in regard to the criminal cases levelled against him, he had been cleared by the court in both instances of the malicious allegations;
 - iii) During the pendency of both criminal cases, he and his family had suffered incredibly due to the long suspensions and restrictions on his salary;
 - iv) He had provided dedicated service to the judiciary and public for a long time;
 - v) He had contemplated suing the Government upon his reinstatement to seek compensation for the loss he incurred during his malicious prosecution in 1994 but was forced by circumstances to reconsider;
 - vi) He was not eligible for retirement as his National Identification Card clearly showed that he was born in 1956 and earlier employment records with the judiciary showing 1954 as the year of his birth were erroneous;
 - vii) His retirement should have been in 2016 when he turned 60 as the retirement age had been increased to 60 years in 2009; and
 - viii) He should be reinstated to his job until 2016 as he needed the job to cater for his family's needs.
- 17 The Respondent states that it considered the Claimant's second appeal against his retirement in public interest, in a meeting held on 27th November 2012, but disallowed the appeal for lack of merit. The Respondent's decision was communicated to the Claimant through a letter dated 7th January 2013.
- 18 In response to paragraph 4(c) of the Amended Memorandum of Claim, in calculating the Claimant's age, the Respondent relied on the Claimant's application for Employment Form, in which he indicated his date of birth to be 1st January 1954.
- 19 The Respondent states that by a letter dated 19th May 2009, the claimant had previously admitted that his retirement date was on 31st December 2008 which fact was corroborated by the Claimant's Employment Application Form in which he indicated his date of birth to be 1st January 1954. The



Claimant is therefore estopped in law from contending that his date of birth as contained in the Respondent's records is incorrect.

20 By his memorandum of claim dated 10th November 2014 and amended on 26th February 2016 the Claimant prays for judgment against the Respondent as follows:

- a) Declaration that the termination of his employment was unlawful, unfair and illegal contrary to the prevailing employment law and more specifically the employment Act No. 11 of 2007.
- b) Compensation for:
 - i) Payment in lieu of notice calculated as follows – (Basic Salary + House Allowance) period of notice
 $(16692 + 6000)3 = 68076/=$
 - ii) Service pay calculated as follows (15% of Basic salary per annum x years worked)
 $(15 \times 35429 \times 12) 37 = 2,359,571.4/=$
100
 - iii) Accrued arrears of wages equivalent to a half of the claimants salary for the period of interdiction calculated as follows (basic salary x half x 22months)
 $(16692 \times 2 \times 22) = 183,612/=$
2
 - iv) Compensation under section 49 (I)a calculated as follows
(Basic Salary x Period of notice)
 $(16692 \times 3) = 50076/-$
 - v) Difference in gratuity computed at current rates as the claimant would have retired on the 31st December 2015 to be computed as follows $(2 \times \text{basic salary}) = y(y - (1xy)) = \text{monthly pension payment}$
Gratuity = monthly pension x 12 months x 12 years less pension paid at end of January 2016 (1111199)
 $2/3 \times 35429 = 23619$
 $23619 - (1/4 \times 23619) = 17714.3/ = (\text{monthly payment})$
Lumpsum = $(17714.3 \times 12 \times 12) = 2550816 - 1111199$
Difference in gratuity = 1439617/=
 - vi) In total the claimant claims the following amount from the respondent
KSHS4100952.4/=
 - vii) Damages
 - viii) Compensation under section 49(1)c of Employment Act 2007
 - ix) Cost of interest of suit.
 - x) The claimant further prays that his monthly pension payment be increased to Kshs.17714 as per the rates at the time when he could have retired.



- 21 The Respondent filed a Statement of Response denying the allegations of the Claimant. The Respondent avers that the Claimant attained mandatory retirement age of 55 years on 31st December 2008 based on the date of birth recorded at the time of recruitment being 1st January 1954. The Respondent further avers that the Claimant had a bad employment record, that the Claimant was accorded a fair hearing and the termination of the Claimant's employment was fair in the circumstances.
- 22 The case was heard on 8th March 2017. The Claimant testified on his behalf while the Respondent called one witness, Peter Bunde, an Assistant Director Human Resource. The parties thereafter filed and exchanged written submissions. The Claimant's submissions were filed on 30th March 2017. The Respondent filed submissions on 21st June 2017 and Supplementary Submissions on 22 June 2017.
- 23 At the hearing the Claimant was represented by Ms. Soita instructed by Mwakio Kirwa & Company Advocates of Eldoret while the Respondent was represented by Ms. Mugo instructed by Issa & Company Advocates of Nairobi.

Claimant's Submissions

- 24 In the submissions filed on behalf of the Claimant, it is submitted that the Claimant was forced into an early retirement in public interest on 9th June 2009, that he was not given an opportunity to show cause why he should not be retired in public interest nor was he given reasons for retirement in public interest. It is further stated that the Claimant was not informed of his right of appeal against the retirement in public interest, and when he appealed, was not heard in the appeal as he was not given an opportunity to appear in person to argue his appeal. It is further stated that the Claimant was not informed of his benefits. It is submitted that the only notification the Claimant received was on 26th August 2008 for retirement upon attaining retirement age and not in public interest.
- 25 The Claimant submitted that his retirement in public interest was wrongful and unfair as it was without justification and the particulars for retirement in public interest were never furnished to him.
- 26 It is further submitted that the Claimant was born in 1956 and at the time of retirement had two years before attaining the mandatory retirement age. It is submitted that the Claimant's identity card reflects his date of birth as 1956 and that it was upon the Respondent to keep and produce the Claimant's employment records as provided in section 10 and 74 of the Employment Act. It is submitted that under Circular OP.CBA.2/7A of 20.03.2009 retirement age was increased from 55 to 60 years, that in view of the circular the Claimant's retirement age was 60 years as the new policy came into force before the Claimant could proceed on retirement. The Claimant relied on the decision in the case of Michael Kagoma v Kenta Police Service & 2 Others in which it was held:
- 27 The court has found that the reason for termination namely attaining 55 years of age was invalid in view of the circular increasing retirement age to 60 years. The court further finds that the Claimant was not accorded due process as submitted. Accordingly, the court finds that the termination was unfair.
- 30 The Claimant further relied on the case of D. K. Njagi Marete v Teachers Service Commission in which it was held:
- Retirement in public interest was an involuntary termination, instigated by the employer. As a decision based in public interest resulted in termination of employment, it would fall within the requirements of section 43 of the Employment Act 2007.
- 31 It is submitted that the Claimant's retirement failed to take effect on 31st December 2008 as the Respondent was waiting for the outcome of the criminal case in order to ascertain whether the



Claimant would be entitled to retirement benefits or not by virtue of Regulation 22 of the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff of Judicial Service Commission Act 2011 and Regulation 22 of the Judicial Service Commission Regulations, Cap 185 Laws of Kenya both of which provide that:

- 32 Subject to any other law, an officer who is dismissed shall forfeit all rights or claims to pension, gratuity, annual allowance or other retiring award, and any rights or claims he enjoys in regards to leave or passages at the public expense.
- 33 It is submitted that the effect of the first retirement notice issued to the Claimant upon attaining retirement age was to delay the retirement and once the Claimant was acquitted of criminal charges that necessitated the delay of his retirement he should have been reinstated. The Claimant relied on Regulation 18(3) of the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff of Judicial Service Commission Act 2011 and Regulation 22 of the Judicial Service Commission Regulations which provides that:
- 34 An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted.
- 35 The Claimant further relied on the case of Mathew Kipchumba Koskei v Baringo Teachers SACCO where the court states v:

Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

- a. Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.
 - b. If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.
 - c. If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.
 - d. To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.
- 36 It was submitted that Section 45 of the Employment Act, 2007 provides that:
'No employer shall terminate the employment of an employee unfairly.



- 37 A termination of employment by an employer is unfair if the employer fails to prove—
- (a) That the reason for the termination is valid;
 - (b) That the reason for the termination is a fair reason—
 - (i) Related to the employee’s conduct, capacity or compatibility; or
 - (ii) Based on the operational requirements of the employer;
 - (c) That the employment was terminated in accordance with fair procedure”
- 38 That in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013]eKLR the Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness and that substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.
- 39 Section 45 (4) (b) of the Employment Act, 2007 provides:-
- that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.
- 40 It was submitted that Regulation 27 of the provisions relating to the appointment, discipline and removal of judicial officers and staff, Judicial Service Act 2011 and regulation 28 of the judicial service commission regulation, CAP 185 laws of Kenya both provide for the procedure of retirement of a judicial officer or staff under public interest. That:
- 41 The chief justice shall;
1. Notify the officer, in writing, specifying the complaints by reason of which their retirement is contemplated;
 2. Together with the substance of any report or part thereof that is detrimental to the officer.
 3. The officer shall be given an opportunity to show cause why he should not be retired in public interest;
 4. The chief justice shall lay before the commission a report on the case, the officer’s reply and their own recommendation;
 5. The commission shall then decide whether the officer should be required to retire in the public interest.
- 42 On the handling of the Claimant’s appeal the Claimant relied on the case of *Miriam Siwa v Kenya Post Office Savings Bank Limited*. The honourable had this to say:-
- 43 The Claimant wrote an Appeal against the termination decision on 2nd December 2010. Clause 7.7.2 of the Code states that the Appeal, “ shall be heard and decided on as early as possible.” There is no indication that the Appeal was heard, either in the presence or absence of the Claimant.
- 44 The letter communicating the rejection of the Appeal is dated 22nd February 2011, and merely alluded to “careful consideration accorded to your letter.” It is not shown when the Appeal was heard, where it was heard, and whether the Claimant was invited for the hearing. It is not shown who heard the Appeal.



- 45 The Respondent merely advised the Claimant that “all the concerns raised in your letter had adequately been addressed before meeting the action on you.”
- 46 The Respondent ought to have given the Claimant a hearing. An Appeal is not just a formality, but must be given the seriousness any other disciplinary hearing deserves.
- 47 On these grounds the Court finds that the Respondent did not observe fair procedure in carrying out the termination decision. Termination was unfair on account of these procedural lapses.”
- 48 The claimant further relied on the case of Phares Omondi Ochieng’ v Deacons Kenya Limited. In this case the court had this to say:
- 49 The Appeal went to the CEO, and without calling the Claimant to argue his appeal, determined that his own decision which had substituted that of the first panel, summarily dismissing the Claimant, is sustained.
- 50 Objectivity was not sustained in the appeal process. It was just a case of the CEO stamping his executive authority and disregarding the views of disciplinary organs within his organization. This compromised fairness of procedure.
- 51 Termination was based on valid ground but flawed in fairness of procedure. The Claimant is granted the equivalent of 7 months’ salary in compensation for unfair termination.

Respondent’s Submissions

- 52 For the Respondent it was submitted that it has mandate to discipline staff that is derived from Article 172(1)(c) of the Constitution, Section 32 of the Judicial Service Act 2011 and the Regulations under the Third Schedule to the Act specifically regulations 15, 17(2), 18(1), (2) and (3), 19 and 28.
- 53 It is submitted that when the Claimant was issued with the notice of retirement to take effect on 1st January 2009 he did not raise any complaint and that by letter dated 6th May 2010 the Claimant confirmed having attained retirement age of 55 years. It is submitted that the Claimant confirmed receiving his pension and had no complaint over pension arrears.
- 54 The Respondent submitted that the Claimant is not being candid about his date of birth. That in the employment records his date of birth is 24th January 1954 which he declared when applying for employment and he never sought to change the date of birth throughout the period he was in employment. That in the identity card obtained in 2006 the date of birth is indicate as 1956 while in the birth certificate obtained on 7th February 2014 his date of birth is recorded as 1st January 1956. It is submitted that the relevant date of birth according to record held by the Respondent is 14th January 1954.
- 55 The Respondent submitted that Circular OP.CBA.2/7A of 20.03.2009 on review of the mandatory retirement age for public servants with effect from 5th March 2009 is not applicable to the Claimant as he had already attained the mandatory retirement age by the effective date of the circular as his date of retirement was 1st January 2009.
- 56 It is submitted that the Respondent deferred the disciplinary proceedings against the Claimant in accordance with Regulation 18(2). It is submitted that by letter dated 19th May 2009 the Claimant requested for lifting of his interdiction as he had already attained retirement age of 55 years and was due to retire on 31st December 2008.



- 57 The Respondent submitted that in the case of David O. Owino v Kenya Institute of Special Education quoted in Kibe v Attorney General (Civil Appeal No. 164 of 2000) (unreported) the Court of Appeal held that
- 58 An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.
- 59 It is the Respondents submission that the acquittal of the Claimant did not automatically mean that the disciplinary proceedings were determined. It is submitted that the Claimant's interdiction was lifted but he was informed of his retirement in public interest with effect from 31st December 2008 and that by the time the Claimant's appeal was determined he had already been retired from service. It was submitted that the Respondent relied on Regulation 28 and considered the Claimant's response to show cause letter dated 10th December 2007 and his previous record to arrive at the decision to retire him in public interest.
- 60 The Respondent relied on the decision in D. K. Njagi Marete v Teachers Service Commission where the court stated that retirement in public interest is not necessarily a result if disciplinary process and may result from an administrative decision by the employer. The Respondent submitted that the disciplinary process against the Claimant had come to an end upon his attaining retirement age and the election to retire him in public interest was not unlawful or unfair.
- 61 The respondent further relied on the decision of Court of Appeal in the case of Mwangi Mutahi Ruga v Municipal Council of Nyeri & Another [2014] eKLR in which the court concurred with the judgment of the High Court that the Public Service Commission complied with the provisions of Regulation 41 of the Public Service Commission Regulations which is similar to Regulation 28 of the Judicial Service Commission Regulations. The Court held as follows;
- '...As reproduced above, regulation 41 requires an officer being considered for retirement in the public interest to be notified in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer. In this case the appellant was informed in writing of the allegations against him which led the 1st respondent contemplating his retirement in public interest by a letter dated 15th December, 1999 and was required to make a response within 14 days which he did by a letter dated 29th December, 1999. To this extent the court is not persuaded that the appellant was denied an opportunity to be heard on his defence.
- 62 Having perused the record, we concur with the trial court that the appellant failed to prove that the said retirement process was contrary to the 1st respondent's disciplinary procedure and the terms and conditions of his employment. Why do we say so? The appellant did not produce a copy of the contract of employment or documents setting out the 1st respondent's disciplinary procedure. Therefore, it was not possible for the trial court to make a finding on whether the said retirement was contrary to the 1st respondent's disciplinary procedure.'
- 63 The respondent also relied on the Court of Appeal's decision in the case of Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR in which the court held as follows;



64 There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed”

67 The respondent also relied on the Nigerian Supreme Court’s decision in the case of B. A. Imonikhe v Unity Bank Plc S. C. 68 of 2003 held that:

70 Accusing an employee of misconduct, etc. by way of query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

71 In the supplementary submissions the Respondent relied on an excerpt from ‘Dismissal’ authored by John Grogan in which he states as follows with reference to Section 187 of the Labour Relations Act of the Republic of South Africa;

‘The difference in the wording of paragraphs (a) and (b) of sub-s (2) is important. Paragraph (a) states that a dismissal for one of the reasons enumerated in s 187(I) (f) may be fair if it is based on an inherent requirement of the employee’s job. Paragraph (b) states that a dismissal is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. In other words, paragraph (a) leaves room for a finding that, even if the dismissal is based on an inherent requirement of the job, it is still automatically unfair if it is based on a prohibited reason. Paragraph (b) by contrast, leaves not such room: once it is proved that the dismissed employee has reached retirement age, the dismissal is deemed fair.’

72 Section 187 (1f) and (2) of the Labour Relations Act of the Republic of South Africa provides as follows;

f) that the employer unfairly discriminated against an employee, directly or indirectly; on any arbitrary grounds including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

(2) Despite subsection 1 (f) –

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) A dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity”.

73 The respondent also relied on the case of B. Schweitzer v Waco Distributors (J463/97) [1998] ZALC 48 in which the Labour Court in South Africa held as follows;

‘Once all these three conditions are present, as is the case in this matter, sec 187(2)(b) says the “dismissal is fair”. The Court has no competence to enquire into the fairness of the dismissal save, maybe, to declare what the statute says anyway. In this context I am of the opinion that such fair procedure as the employer may be obliged to follow in a case such as this one can only be aimed at giving the employee a hearing on whether or not those conditions exist. I have been driven to the conclusion that I have reached by the specific language used by the legislature in sec 187(2)(b). It is, in my view, significant that in sec 187(2) (b) the legislature has said “is fair” and not “may be fair”. In my view it is this choice of words that has the effect of placing a limitation on the enquiry which the court may embark upon in a case such as this one. In sec 187(2)(a) the legislature says despite sec 187(1)(f) “a dismissal may be fair



if the reason for dismissal is based on an inherent requirement of the particular job”. (My underlining). Of significance in subsection (1)(a) is the choice of words “a dismissal may still be fair” when in par (b) the words chosen are “a dismissal is fair”. Later on in sec 188 (1) and (2) “a dismissal is fair” is used again but in those instances it is directed at only the reason for dismissal as opposed to the entire dismissal.’

74 The court further held as follows;

In my view there would be no justification for not giving effect to sec 187(2) (b) as it is. To give effect to it means in this case the respondent was under no obligation to follow any particular procedure once the conditions contemplated in sec 187(2)(b) were present. I assume that it was obliged to give contractual notice of termination. It must have been so obliged. However, I do not have to decide this because there is no dispute about it in this case. Accordingly the dismissal of the applicant is said by sec. 187(2)(b) to be fair. I am alive to the far reaching implications of this construction of sec 187(2) (b) but I consider that that is the construction which is called for by the particular language employed by the legislature in sec 187(2)(b) and effect must be given to it.

75 The respondent prays that the case be dismissed with costs.

Determination

76 I have carefully considered the pleadings, evidence on record and the very detailed written submissions filed by both parties. The determination of this case hinges on two issues. The first is the date of birth of the Claimant and the second is how the Circular OP.CBA.2/7A of 20.03.2009 reviewing the mandatory retirement age for public servants with effect from 5th March 2009 affects the claimant who had already attained retirement age on the date of the circular but was retained in service by virtue of criminal proceedings pending against him in view of the provisions of Regulation 18(2) which provides that. Regulation 18(2) of the Third Schedule to the Judicial Service Act, 2011 provides that if criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom. Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer.

Date of birth of Claimant

77 It is not in dispute that the Claimant’s date of birth according to the information he gave at the time of appointment is 1st January 1954. The Claimant was by letter dated 26th August 2008 given retirement notice by the Respondent. The opening sentence in the notice reads;

“Records in this office indicate that you will attain the compulsory retirement age of 55 years on 31.12.08. having been born on 1.1.1954.” The retirement notice leaves no doubt about the date of birth or age of the Claimant. The Claimant did not dispute the notice.

78 On 12th January 2009, the Respondent addressed a letter to the Claimant in the following terms–

The Human Resource Management Advisory Committee held on 18th December 2009 (Should read 2008 as letter is dated January 2009) deliberated on your discipline case and resolved that the same be deferred until your court case is finalised.

In that regard therefore, processing of your retirement benefits or otherwise will be put on hold as the process cannot commence while you are on interdiction.

79 In my understanding the Respondent’s letter did not change the status of retirement of the Claimant. It only deferred the processing of his pension on grounds of his interdiction.



80 After the Claimant's acquittal he wrote a letter to the Respondent asking for the lifting of his interdiction. The title of the letter is Re: Lifting Of An Interdiction and the penultimate paragraph of the letter reads:

I have worked with judiciary for over thirty (30) years and I have dependants, its my humble request that you lift an interdiction which was imposed on me because of false and malicious prosecution and my retirement was due on 31.12.08.

81 The Respondent wrote a letter to the Claimant on 9th June 2009 lifting the interdiction and retiring the Claimant in public interest with effect from 31st December 2008. In his appeal dated 6th May 2010 the Claimant states as follows in the second paragraph:

.... I was under the impression that I had retired under the normal course of retirement, having attained the age of 55 years. No reasons have been provided in the letter for the said decision to retire me in the Public Interest....

82 In the Response by the Respondent dated 22nd August 2011 dismissing the appeal the Claimant was informed as follows in the third paragraph:

The Commission also observed that you had reached retirement age at the time disciplinary action was taken against you and you were supposed to leave the service.

83 It is in my view clear that both the Claimant and the Respondent were in no doubt about the retirement date and age of the Claimant as is reflected in the correspondence between them extracted above. I therefore find that the Claimant was born on 1st January 1954 and reached mandatory retirement age of 55 years on 31st December 2008.

84 Circular OP.CBA.2/7A of 20.03.2009 reviewing the mandatory retirement age for public servants with effect from 5th March 2009

85 It is important to reproduce the circular in order to understand its contents.

86 The circular addressed to chief executive officers of all Government departments including public or statutory bodies and signed by the Permanent Secretary, Secretary to the Cabinet and Head of Public Service Amb. Francis K. Muthaura stated as follows:

Review Of The Mandatory Retirement Age For Public Servants

The current policy on retirement of Public Servants provides for a mandatory retirement age of 55 years. This is with the exception of Judges, Academic staff in Public Universities, Research Scientists and Public Servants with disabilities whose retirement ranges from 60 years to 74 years.

Due to the current retirement age at 55 years, the Public Service has continued to lose employees with critical skills while they are still productive. This is particularly so with regard to employees in the professional and technical areas in whom the Government has invested considerable resources in training and capacity building, and, who have several years of hands-on-experience in their respective professions. Their retirement has in most cases left succession gaps in key areas, necessitating requests for retention beyond retirement age or re-engagement on contract.

The current policy has also had the effect of rendering employees who would otherwise be productive, largely unproductive and reliant on the tax payer for funding of their pension when they should be contributing to the economy.

Further, the East African Community (EAC) of which Kenya is a member and a signatory to the EAC Treaty, has adopted an official retirement age of 60 years.



In order to address the above challenges and in the spirit of harmonizing the retirement age applicable to the East African Community Countries, the Government has decided to raise the mandatory retirement age for all Public Servants from 55 years to 60 years with effect from 1st April, 2009. The provisions in the Pensions Act Cap.189, various Pension Schemes and other Policy Guidelines governing the Civil Service, Disciplined Services, Teachers, State Corporations, Public Universities and the Armed Forces regarding compulsory and voluntary retirement will remain.

Employees serving on contracts as at 5th March, 2009 after attainment of the age of 55 years will however continue to serve for the duration of these contracts. Contracts expiring before the attainment of the age of 60 years will be renewed in accordance with the provisions of the contracts.

Employees who had already received retirement notices or had their pension claims already prepared, but had not attained the age of 55 years as at 5th March, 2009, will continue to serve until they attain the age of 60 years if they so wish.

All authorized officers, Chief Executive Officers of State Corporations, Vice-Chancellors of Public Universities and Clerks to Local Authorities are required to note and implement this Policy Accordingly.

Signed

Amb.Francis K. Muthaura, E.G.H

Permanent Secretary, Secretary To The Cabinet And Head Of The Public Service”

- 87 The second last paragraph of the circular expressly states that only employees who had not attained the age of 55 years as at 5th March, 2009, will continue to serve until they attain the age of 60 years if they so wish.
- 88 It is therefore manifestly clear that the Claimant who had attained the age of 55 years before 5th March 2009 was not affected by the circular.

Whether retirement of Claimant in public interest was unlawful, unfair and illegal

- 89 The Claimant’s case is very unique in that he was charged with a criminal case that was pending when he attained mandatory retirement age. If he was convicted he would loss all retirement benefits as provided in Regulation 22 of the of the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff, Judicial Service Act 2011 and Regulation 22 of the Judicial Service Commission Regulation, CAP 185 both of which provide that;
- Subject to any other law, an officer who is dismissed shall forfeit all rights or claims to pension, gratuity, annual allowance or other retiring award, and any rights or claims he enjoys in regards to leave or passages at the public expense.
- 90 Because of these provisions, the Claimant’s terminal benefits could not be processed as was communicated to him in the letter dated 12th January 2009. As was stated in the letter, the Respondent deferred his disciplinary case until after the case pending in court was concluded.
- 91 It is my view that this was unlawful as the Human Resource Management Advisory Committee had no capacity to discipline a person who was no longer an employee. The power of discipline of an employer ends upon the termination of the employment relationship which in the case of the Claimant was 31st December 2008 when his retirement took effect. After the claimant’s retirement, there was no employer/employee relationship between the claimant and the respondent.



92 Further Regulation 27 of the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff, Judicial Service Act 2011 and Regulation 28 of the Judicial Service Commission Regulation, CAP 185 both provide for the procedure of retirement of a judicial officer or staff under public interest as follows.

The Chief Justice shall;

1. Notify the officer, in writing, specifying the complaints by reason of which their retirement is contemplated;
2. Together with the substance of any report or part thereof that is detrimental to the officer.
3. The officer shall be given an opportunity to show cause why he should not be retired in public interest;
4. The chief justice shall lay before the commission a report on the case, the officer's reply and their own recommendation;
5. The commission shall then decide whether the officer should be required to retire in the public interest.

93 These provisions were not complied with by the Respondent thus the retirement in public interest was unlawful. The Claimant was therefore right when he appealed against the retirement in public interest. As he pointed out in the appeal:

.... I was under the impression that I had retired under the normal course of retirement, having attained the age of 55 years. No reasons have been provided in the letter for the said decision to retire me in the Public Interest....

94 It is therefore my finding that the Committee acted without both jurisdiction and authority and without complying with the prescribed procedure when it retired the Claimant under public interest. The Claimant having already been retired, the role of the Committee was only to process the retirement benefits of the Claimant which had been put on hold pending the finalisation of the criminal case.

Does this entitle the Claimant to the remedies sought?

95 In my opinion the purported retirement of the claimant in public interest does not change his circumstances. Receiving a letter retiring him in public interest when he was already retired did not affect the Claimant at all except perhaps by annoying or irritating him. The solution to the problem was simple: the withdrawal of the annoying or irritating letter. As the Claimant stated in his first appeal all he wanted was a reversal of the letter retiring him in public interest. In the last three paragraphs of the letter of appeal, the claimant stated as follows:

96 The said accusations were found to be utterly groundless and dismissed by the Court under section 210 of the Criminal Procedure Code. Further, of all witnesses called before the Court, not a single one of them implicated me in any capacity whatsoever to the said charges. The case was ridden with many irregularities, among which was the fact that the Complainant was also the investigating Officer in the same case. It came as a shock to me therefore, to learn that a decision to retire me in the Public Interest was made following this chain of events. Further still, the same Investigating Officer brought several other charges against other colleagues in Court as well as the Police Force, all of whom have been discharged and reinstated. It seems very unjust that I should have to suffer the humiliation of retirement in the Public Interest on the basis of the actions of this officer.



97 Further to the above, the decision seems to have caused a delay in the processing of my pension as the file seems to have been moving from department to department. This has caused me a lot of frustration as well as travelling and lodging expenses in the several trips I have been forced to make from Eldoret to Nairobi in pursuance of the said Pension.

98 It is my request therefore that the said decision to retire me in the Public Interest be promptly reversed and my record be kept free of any stains and implications of any wrongdoing whatsoever.

Conclusion

99 In conclusion, I declare the letter retiring the Claimant in public interest null and void and order that the same be withdrawn and in its place the Respondent issues a letter of normal retirement to the Claimant.

100 Since the Claimant was compelled to come to court because of the unreasonable decision of the Respondent I award him nominal damages in the sum of Kshs. 200,000 to compensate him for being dragged to court to get the letter of retirement in public interest reversed. The Respondent will also pay the Claimant's costs.

DATED AND DELIVERED IN KISUMU THIS 2ND DAY OF NOVEMBER, 2017.

MAUREEN ONYANGO

JUDGE

