



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 253 OF 2015

(Before D. K. N. Marete)

MICHAEL MATATA ARAP CHEPKOY.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

This matter was originated by way of a Complaint dated 12th April, 2010.

The respondent in a Statement of Defence dated 12th May, 2011 denies the claim and prays that the same be dismissed with costs.

The plaintiff's case is that he was an employee of the Kenya Prisons Service from 13th June, 1972 to 1st August 2005 when he retired on attainment of the mandatory retirement age of 55.

It is his further case that at retirement he had served the Prisons Service for a period of 32 years in various capacities and eventually retired as a Superintendent of Prisons and Prisons Farm Supervisor attached to Prisons Headquarters, Nairobi.

The plaintiff's other case on 1st July, 2003, he was erroneously and unlawfully retired from service but was reinstated on 1st February, 2005. Following this erroneous retirement, he was requested to await a decision of his appeal which decision took a record 19 months before a decision to reinstate him was issued. He avers that in this period, he was housed by the prisons service and would not seek any other employment as he was still in prisons service.

The plaintiff's further case is that upon his reinstatement as aforesaid he was unfairly and unlawfully denied his salary for the 19 months he spent awaiting the outcome of his appeal. The employer unilaterally decided to treat this period as leave without pay, a decision he also appealed against.

It is the plaintiff's other case that he retired in 2005 but the defendant refused to pay his pension and other employment benefits until April, 2008 on the intervention of his advocates. This is also the time he realized that the defendant had refused to pay him for the 19 months waiting period before his reinstatement.

The plaintiff restates a case of not applying for leave during the 19 months above and also that his pension was erroneously calculated and paid without interest despite being unlawfully withheld for over 3

years.

The plaintiff's avers that he earned Kshs.47,705.00 per month at the time of retirement, which amount was applied in the computation of his pension. The refusal to pay him for the 19 months and also compute his pension based on the amount of Kshs.47,705.00 and also the withholding of his pension for 3 years was unjustified, unprocedural, wrongful, unfair, malicious in bad faith, irregular and patently unlawful in the following terms;

- a) Purporting to retire the Plaintiff on 1st July, 2003, when it was aware that the Plaintiff had not attained the mandatory retirement age of 55.*
- b) Taking 19 months to reinstate the Plaintiff and claiming that the said 19 months constituted the Plaintiff's leave without pay.*
- c) Unlawfully withholding the Plaintiff's pension for over 3 years on the alleged ground the Plaintiff would seek legal redress should he be paid his employment dues.*
- d) Converting the Plaintiff's 19 months salary arrears into leave without pay without consulting the Plaintiff.*
- e) Failing to adjust the Plaintiff's monthly pay to be at par with his uniformed contemporaries.*
- f) Refusing to adjust the Plaintiff's salary on a year to year basis as required by its customs and practices.*
- g) Refusing to consider the Plaintiff's due salary adjustments in computing his pension.*

He has therefore suffered and continues to suffer loss and damage.

He prays for compensation as follows;

- a) Salary for the 19 months period together with the attendant benefits.*
- b) Pension (less paid) to be determined by court taking into account the Plaintiff's yearly salary increment.*
- c) Interest on (a) and (b) above at the prevailing commercial bank lending rates to be charged as from 1st August 2005 till payment in full.*
- d) Costs of the suit.*

The defendant denies the claim. It is her averment that the plaintiff was lawfully retired on 1st July, 2003 and further;

- a) That the plaintiff was appointed to the service in July, 1972 and his dated of birth was recorded as 1948 based on a doctors assessment of his age as 24 years in 1972.*
- b) The doctor's assessment was then a requirement for all uniformed officers and was signed by all newly recruited officers. The plaintiff had signed the doctor's assessment report thus acknowledging its authenticity.*
- c) The plaintiff was issued with a retirement notice on 15th July 2002 to retire from the service with effect from 1st July 2003 on the basis of the existing records showing that he was born in 1948*

The defence further avers that the decision to reinstate the plaintiff with effect from 24th January, 2005

and not 1st February, 2005 was based on his presentation of an ID Card issued on 25th July, 1972 which indicated his dated of birth as 1950. He was not paid for the 19 months stint as he did not render any service as to entitle him to salary payment.

The defendant further faults this action as incompetent for failure to serve the Attorney-General with a notice of intention to sue as required of section 13A (1) and (2) of the Government Proceedings Act, Chapter 40, Laws of Kenya.

The defendant also contends and submits that the action as taken out, drawn and filed is bad in law, incompetent and does not disclose any cause of action against him and shall at an opportune time at the hearing of this suit raise and argue a preliminary objection with a view to having it struck out.

The matter came to court variously until 24th November, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the Ministry's decision to withhold the Claimants 19 month's salary arrears was justified and whether the same should be paid to the Claimant with interest.
2. Whether the Ministry's wrongly computed the Claimants pension based on a monthly pay of Kshs.45,705/- and to withhold his pension for over 3 years without interest is justified.
3. Whether the Claimant is entitled to damages for diminished employability caused by the Respondent.
4. Who bears the costs of this claim?

The 1st issue for determination is whether the Ministry's decision to withhold the Claimants 19 month's salary arrears was justified and whether the same should be paid to the Claimant with interest. The claimant in his written submission dated 5th December, 2017 submits as follows;

17. ...it is not in dispute that the Claimant was recruited on 13th June, 1972 however at the time of enlistment an erroneous dated of birth was entered based on the doctors assessment, without taking into consideration the identity card presented alongside the baptismal card provided which indicated his date of birth as 25th My, 1950.

18. The Claimant learnt about the erroneous entry of his date of birth, when he was awarded scholarship to travel to the state of Israel for a horticultural course on 30th June, 1983, where it became necessary for the commissioner to write to registrar of persons to confirm the date of birth.

19. Upon his finding the Claimant lodged a complaint on the wrong entry of his date of birth and presented to the commissioner of prisons his identity card and baptismal cards so as to allow for the change to be effected.

See Claimants bundle of documents page marked folio 17 paginated at the top of the plaintiffs bundle.

20. However the same was never effected despite the Claimants persistent complaints regarding the erroneous entry of his date of birth. The commissioner of prisons rejected to amend his date of birth and formally communicated vide his letter dated No.PF/72017764/113 dated 25th January, 2001, without any justifiable reason.

See letter marked folio 8 of the Plaintiffs bundle

Further, and in answer to the 2nd issue for determination, the plaintiff sums it thus.

40...., it is our submission that the Claimants retirements benefits were withheld by the Respondents without any reason but through their own fault and subjected the claimants to a game of musical chairs and withheld his benefits furthering the torture he was subjected as gain he was reduced into a beggar after offering the prison service for over 33 years.

41.We pray that the court award interest for the period that his benefits were withheld for the torture that was subjected to the Claimant.

42.Additionally ..., you will note that (the) in calculating his retirement benefits the erroneous figure of 45,705 was used to calculate his retirement benefits while at the time his uniformed contemporaries were earning a sum of Kshs.48,970 which had been increased as through the yearly increments that were paid to service men of his rank.

43.This had the ripple effect of drastically reducing the total benefits that were paid out to him based on his salary which were paid at the time of his retirement, the Claimant therefore submits that his retirement benefits ought to (be) recalculated based on the figure that was paid to his uniformed colleagues at the rates of Kshs.48,970/-

The defendant in her written submissions dated 5th December, 2017 emphatically reiterates her case. On closing, she submits as follows;

...the suit has no merit. The actions of the plaintiff are openly questionable. It can be noted that all the years since being employed in 1972 he has never presented his Birth Certificate and the National Identity Card. He only showed them upon being issued with a notice to retire. The period of time 19 months he is claiming salary cannot be justified, he did not work for the government to be

paid and he was retired as per the record he had declared to be true. The Government owes him no liability. He should (have) raised the issue of identity card early before, he worked for over 25 years and failed to inform the authorities of his age.

The plaintiff subjected himself to the system and procedure, when the Permanent Secretary offered to reinstate him he gladly unconditionally accepted. ... the plaintiff has already been paid what is due to him. The plaintiff has no complaint for the period he was reinstated. The Government records are very clear and standard to avoid any preferential treatment of its citizens. The plaintiff should be compelled to refund the amount of salary upon being reinstated. This suit is an afterthought which lacks merit and should be dismissed with costs.

I disagree with the case and submissions of the respondent. The plaintiff's case is not entirely lost, or lost at all. The claimant submits a case of pursuance of a rectification and readjustment of his date of birth during the pendency of his service. This was ignored by his superiors.

This court also takes judicial notice of the environment at the work place: particularly in the disciplined forces where officers are subjected to strict, and albeit super human codes of practice which render them helpless in a pursuit of their fundamental rights and freedoms. The million dollar question is: would the claimant have had the guts to fervently pursue his issues relating to the record of birth without antagonizing his employment? Your answer is as good as mine.

I find the claimants case overwhelming and proven. I therefore find in his favour, order and award relief as follows;

i. That the salary for 19 months withheld by the defendant employer be paid to him at rates applicable at the time of such service.

ii. That the plaintiff's pension benefits be reviewed and computed based on a monthly salary of Kshs.48,970.00 or any other sum that was payable to his cadre of office at the time of retirement.

iii. That the claimant retirement altogether be computed based on his monthly salary on the last date of service: that is after the close of his service on reinstatement.

iv. That the Commissioner for Labour, in consultation with the Director of Pensions and the parties be and are hereby ordered to compute pension and other dues of the plaintiff and report back to court in 120 days.

v. That the plaintiff shall only be paid the computed pension less the amount released to him on retirement.

vi. The plaintiff is awarded interest on (i) and (ii) above at court rates from the date of this judgment of court until payment in full.

vii. The costs of this claim shall be borne by the respondent.

Delivered, dated and signed this 15th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mwitwa holding brief for Professor Muma instructed by Professor Albert Muma & Company Advocates for the claimant.
2. Miss Langat instructed by State Law Office for the respondent.