



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

**CAUSE NO. 15 OF 2017**

**(Originally Kericho Cause No. 125 of 2016)**

**SAMUEL LANGAT TANUI**

**CLAIMANT**

**v**

**DIRECTOR GENERAL,**

**NATIONAL INTELLIGENCE SERVICE 1<sup>st</sup> RESPONDENT**

**HON ATTORNEY GENERAL**

**2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Samuel Langat Tanui (Claimant) was offered employment by the National Security Intelligence Service as an Intelligence Officer through a letter dated 7 July 1999.
2. On 11 March 2002, the Claimant was offered an appointment as NSIS Officer Level 4 by the National Security Intelligence Service on transfer arising from the coming into force of the National Intelligence Service Act.
3. The Claimant continued to serve until 10 July 2013 when the National Intelligence Service (1<sup>st</sup> Respondent) informed him that he was being retired on medical grounds with effect from 1 August 2013.
4. On 28 July 2016, the Claimant instituted legal proceedings against the 1<sup>st</sup> Respondent and the Attorney General (2<sup>nd</sup> Respondent) and he stated the Proposed Issues for Determination as
  - a) Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent?
  - b) Whether the Respondent is justified for laying off the Claimant from employment on ground of disability?
  - c) Whether the Claimant is entitled to reinstatement?
  - d) Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this Memorandum of Claim?
  - e) Whether the Claimant is entitled to any other relief as the Honourable Court may deem fit and just to grant?

f) Whether the Respondent should pay costs of this suit?

5. The Respondents filed a Reply to Statement of Claim on 18 January 2017 and a bundle of documents on 24 February 2017.
6. On 25 September 2017, the Respondents agreed that the *Issues* as proposed by the Claimant could be adopted for the hearing, and the Court adopted them as *Issues* for hearing.
7. The hearing commenced on 30 October 2017 when the Claimant testified and closed his case.
8. The Respondents then sought an adjournment to enable them file witness statement(s), and the Court granted leave leading to the filing of a witness statement and supplementary documents on 6 November 2017.
9. The 1<sup>st</sup> Respondent's Human Resource Officer testified on behalf of the Respondents on 23 November 2017 and the Claimant filed his submissions on 27 November 2017 while the Respondents filed their submissions on 29 November 2017.
10. The Court directed that judgment would be delivered in Nakuru because the Cause was heard during the Eldoret Circuit
11. The Court has given due consideration to the pleadings, evidence and submissions.
12. The *Issues* as framed by the Claimant were not concise or precise such that some of the real *Issues* in contention were not brought out.
13. Issues a) and b) as framed by the Claimant related to the fairness of the retirement on medical grounds

### **Whether retirement on medical grounds was unfair**

#### ***Procedural fairness***

14. It is not in dispute that the Claimant was retired on medical grounds.
15. The dispute revolves around whether the 1<sup>st</sup> Respondent complied with its own internal terms and conditions of service and any other statutory provisions which would be applicable.

#### ***Contractual procedures***

16. It is regrettable that the 1<sup>st</sup> Respondent filed and produced in Court only 3 pages of a *Report of the Technical Committee on the Terms and Conditions of Service for the National Security Intelligence Service, June 2009* instead of the complete copy of the Terms and Conditions of Service.
17. There was also no evidence that the *Report of the Technical Committee* was adopted, but the Court will assume that it was adopted as the *Terms and Conditions of Service* for employees of the 1<sup>st</sup> Respondent as the Claimant did not suggest otherwise.
18. Clause 4.8.4 (c) of the *Terms and Conditions of Service* on retirement on medical grounds envisage that the 1<sup>st</sup> Respondent would notify the employee of the intention to retire him on medical grounds and allow him to make representations to the *Service Medical Board*.
19. In the instant case, the 1<sup>st</sup> Respondent did not produce any evidence or record to suggest that the Claimant was notified that it was intended to retire him on medical grounds and advising him to make representations to the *Medical Service Board*.

20. Nevertheless, it appears that the *Service Medical Board* met in Nakuru on 19 December 2012 and 20 December 2012, and made a recommendation for the retirement of the Claimant without having received prior representations from him.

21. The *Terms and Conditions of Service* also contemplate the *Service Medical Board* seeking the opinion of the Director of Medical Services who in turn is expected to convene a *Medical Board* which should determine whether the employee is unfit to continue in service.

22. In my view, the role of both the *Medical Service Board* and the *Medical Board* are to undertake a technical (medical) incapacity enquiry aimed at assessing whether the employee is capable of performing their duties, be it in the position they occupied before the enquiry or in any suitable alternative position.

23. Any conclusion as to the employee's capability or otherwise can only be reached by both *Boards* once a proper assessment of the employee's condition has been made, and after hearing his representations which may include assessments by the employee's own doctors of choice.

24. It appears that the Claimant was not only not afforded an opportunity to make representations, but to present his own medical experts/reports.

25. In terms of the exhibits produced in Court, it appears that both the *Medical Service Board* and the *Medical Board* met in Nakuru and at the National Spinal Injury Hospital in Nairobi on 19 December 2012, respectively.

26. In practical terms, it is not probable that the *Service Medical Service Board* met in Nakuru on 19 December 2012 and that the *Medical Board* also met on the same day in Nairobi to deliberate on the Claimant's case.

27. The Claimant's testimony that he did not appear before the *Medical Board* which recommended his retirement on medical grounds, therefore appears plausible.

28. The Court is therefore satisfied that the Claimant has proved that he was not afforded an opportunity to make representations on the intent to be retired on medical grounds.

29. He was equally not afforded an opportunity to appear before either the *Service Medical Board* or the *Medical Board*, contrary to contractual agreement.

#### *Statutory procedures*

30. The primary law of general application on employment in this country is the Employment Act, 2007. It provides the irreducible minimums to those employees to whom it applies.

31. On the face of it, it applied to the Claimant and 1<sup>st</sup> Respondent's employees.

32. Section 41 of the Act requires that if an employer is contemplating terminating the employment of an employee on account of *misconduct, performance or physical incapacity*, the employee should be informed and afforded an opportunity to make representations.

33. Although not defined in the Act, it is generally agreed in human resource practice that there are three types of incapacity. These are, *incapacity due to illness/ill-health, physical disability*, which could be temporary or permanent and *incapacity due to poor work performance*.

34. The 1<sup>st</sup> Respondent's witness testimony was that the Claimant, being a field officer could no longer perform the duties expected of him, as his movement had been limited after he was put on crutches/wheelchair.

35. That testimony appear to have corroboration in the medical report produced by the 1<sup>st</sup> Respondent, that the Claimant's was a case of physical incapacity for the *Board* made the finding

He is an adult male, in poor nutritional status, well oriented in time, place and person. All systems reviewed were found to be essentially normal except;

- *He has to use crutches to walk.*
- *Power grade on the right lower limbs is 1 (one).*
- *Right side facial nerve palsy.*

36. However, in the view of the Court, *physical incapacity* as visited the Claimant did not and does not mean inability to be engaged in productive employment as his mental faculties were not negatively impacted.

37. The Claimant's doctor's medical report, albeit prepared after the he had been retired, also noted that he was fully functional except for mobility (though progressive multiple sclerosis was noted).

38. In the view of the Court, the 1<sup>st</sup> Respondent was under a statutory obligation to hear out the Claimant on the question of retiring him on the ground of *physical incapacity* (ill health/medical) grounds as the representations to the *Boards* were expected to serve a more technical objective, unlike the hearing contemplated by the aforesaid provision.

39. And because the hearing contemplated by section 41 of the Employment Act, 2007 was not held nor *show cause given*, the Court concludes that the statutory protection was violated.

### **Discrimination**

40. Although citing sections 15 and 22 of the *Persons with Disabilities Act* in the pleadings, the Claimant did not lead evidence to demonstrate on which of the 6 grounds the Respondents discriminated against him.

41. If at all the discrimination related to remuneration and exemption from tax, the evidence presented before Court was that the Claimant only registered under the provisions of the *Persons with Disabilities Act* after the retirement.

42. The Court is therefore of the view that the Claimant did not prove discrimination to the required standard.

### **Appropriate remedies**

#### ***Declaration***

43. In the view of the Court, it is not necessary to issue the declarations as worded and sought in a) and b). A declaration in an amended form would suffice.

#### ***Reinstatement***

44. The Court has agonised over this remedy.

45. The Court has kept at the back of its mind the interdict in section 12(3)(vii) of the Employment and Labour Relations Court Act that reinstatement should be allowed only within three years of dismissal, and the provisions of section 15(2) of the *Persons with Disabilities Act* and the 1<sup>st</sup> Respondent's Human Resource Officer's testimony that it did not have suitable or alternative duties which could be assigned to

the Claimant.

46. In many instances, the three years provided for in section 12(3)(vii) of the Employment and Labour Relations Court Act will lapse before determination of a dispute, not because of the indolence of the parties, but because of the slow wheels of justice and the judicial staff constraints.

47. Should a party deserving of reinstatement be excluded from the remedy in that regard therefore?

48. That question is at large. In this case the parties did not address the Court on the question and what could have been the mischief or public policy consideration in regard to the three year restriction.

49. The 1<sup>st</sup> Respondent's witness also testified that there were no alternative duties that the Claimant could be assigned because he was a field based operative.

50. In the view of the Court, that testimony must be taken with a pinch of salt.

51. The National Intelligence Service cannot all be about operatives physically roaming gatherings and meetings, the ravines and hills and breadth of the land. It must as well have a presence in the blogosphere, the clouds and the like.

52. The intelligence gathered in the field and the clouds must be synthesised and analysed.

53. It cannot be therefore that the 1<sup>st</sup> Respondent has practical difficulties in taking the Claimant back.

54. Considering the lapse of 3 years since the separation, the Court reaches a conclusion that re-engagement rather than reinstatement on terms and conditions not less favourable than obtained in August 2013 is the appropriate and fair remedy in this case (the intervening period up to date of this judgment may be treated as leave of absence without pay).

### ***Dues, compensation, damages and benefits***

55. The particulars of the dues, compensation, damages and benefits were not disclosed, and the Court cannot grant a remedy in vain.

56. In any case, the 1<sup>st</sup> Respondent testified that the Claimant was entitled to all benefits due to a retired employee and that his benefits had been returned as the bank account he had given was dormant.

### ***Compensation***

57. Considering that the Court has granted the remedy of re-engagement, compensation would not be appropriate.

58. However, were the Court minded to grant compensation, in view of the fact that the Claimant served the 1<sup>st</sup> Respondent for accumulative period of about 14 years, the Court would have awarded the equivalent of 12 months gross wages, being the maximum provided by law.

### **Conclusion and Orders**

59. From the foregoing, the Court finds, holds and orders that

(i) A declaration do issue that the retirement of the Claimant on medical grounds was unfair.

(ii) The 1<sup>st</sup> Respondent do re-engage the Claimant on terms and conditions not less favourable than obtained in August 2013 with effect from 5 December 2017.

60. Claimant to have costs.

61. The file being an Eldoret Cause, the Court directs that it be transmitted back to Eldoret after delivery of this judgment.

**Delivered, dated and signed in Nakuru on this 5<sup>th</sup> day of December 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mr. Nyambegera instructed by Nyambegera & Co. Advocates

For Respondent    Ms. Lungu/Mr. Ngumbi

Court Assistants   Etyang/Martin