



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.47 OF 2013

(Formerly Civil Suit No. 20 of 2007 at the Principal Magistrate's Court at Murang'a)

HENRY KAMAU NGARE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION..... 1ST RESPONDENT

DIRECTOR OF PENSION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th March, 2016)

JUDGMENT

The claimant filed the plaint on 19.01.2007 through Kirubi, Mwangi Ben & Company Advocates. The amended plaint was filed on 20.12.2007.

The claimant prayed for judgment against the respondent for:

- a. The defendant to be compelled to compute, declare and produce in court an account of the claimant's legal terminal (retirement) benefits and the schedule thereof payment of the claimant's legal terminal (retirement) benefits as computed in 7(A) and (B) of the amended plaint (being Kshs. 4, 539.00 claimant's monthly pension and Kshs. 363, 195 as the claimant's commuted lump sum gratuity.)
- b. A declaration that the claimant is entitled to his legal terminal benefits as in (a) above and the respondent be ordered to pay costs and interest of the suit at court rates and at court's discretion.
- c. Costs and interest of the suit at court rates and at the court's discretion.
- d. Any other or better relief the honourable court may deem fit to grant.

The respondent's statement of defence was filed on 03.07.2014 through Cavin Anyuor Advocate. The respondent prayed that the claimant's suit be dismissed as is unjustifiable and devoid of any merit. The respondent further filed a preliminary objection on 04.03.2015 that the claimant's amended plaint dated 20.12.2007 did not disclose any reasonable cause of action against the respondent and that the respondent had no capacity or mandate or power to compute pensions benefits payable to employees in the public service including the claimant. Thus, the respondent prayed that the respondent's name be struck out as being a party to the suit. The respondent's application to enjoin the Director of Pensions as a defendant to the suit was allowed by the court on 18.06.2015. The amended 1st respondent's statement of defence was deemed as duly filed on 10.06.2015.

The 2nd respondent, the Director of Pensions, filed the memorandum of response on 22.07.2015 through

F.O. Makori, Litigation Counsel, for the Attorney General. The 2nd respondent prayed that the claimant's claim filed in court against it be dismissed with costs.

On 27.05.2015 the court directed that the preliminary objection be taken up as a substantive issue at the full hearing of the suit. On that date, the claimant opted to rely on the documents and pleadings on record without giving evidence at the hearing and the court directed as much and the claimant's case was closed subject to making of the final submissions. The 1st respondent was to call a witness at the hearing. The witnesses for the 1st and 2nd respondents were heard on 22.10.2015, the respondents closed their respective cases and parties were directed to file final submissions on the issues for determination including:

- a. The law applicable in granting and denying the claimant's pensions benefits.
- b. The rationale for payment of pension benefits.
- c. Whether the claimant is entitled to the remedies as prayed for.
- d. Any other issue the parties would deem necessary to address.

All the parties filed their respective written submissions paving way for this judgment.

The facts of this case are clear. The claimant is a teacher by profession. He was employed by the 1st respondent to serve as a teacher in the public schools effective 1971 to 1981 as an untrained teacher. Thereafter, the 1st respondent appointed the claimant effective 31.05.1983 as a trained teacher on permanent and pensionable terms of service. The claimant received the letter dated 26.03.2004 from the 1st respondent stating that the records showed that the claimant was born in 1950 and he would have attained 55 years of age on 1.09.2005 so that his last date of service would be 31.08.2005 and he would therefore retire on account of attaining the compulsory retirement age of 55 years.

The evidence shows that before the retirement took effect, the 1st respondent dismissed the claimant effective 1.03.2005 when the claimant was about 54 years old. The dismissal letter dated 1.03.2005 conveyed that the 1st respondent had determined that the claimant be dismissed from the teaching service with effect from 1.03.2005 for the reasons, thus, **“ You breached the TSC Act Cap 212 section (3b) of the laws of Kenya and regulation 70 (2) (a) of the code of regulations for teachers in that; you had carnal knowledge of your own pupil (J.W) a class five pupil at Koimbi Primary School, between 9th and 19th July 2004 at around 5 pm near the Independent Church Koimbi.”**

The court has carefully examined the amended plaint. Despite pleading at paragraph 3 that the 1st respondent unilaterally and for no apparent right or reasonable grounds terminated the plaintiff's services, the claimant offered no evidence to establish that allegation.

On the other hand, the 1st respondent pleaded at paragraph 13 of the amended defence that the claimant's termination was fair for the following reasons:

- a. At the earliest opportunity the respondent informed the claimant of the allegations leveled against him and was invited to submit his defence.
- b. The claimant appeared before the respondent's disciplinary panel when the allegations were formally read to him.
- c. The claimant was accorded an opportunity to present his evidence both oral and written and to cross examine the witnesses before the disciplinary panel.
- d. The respondent duly and without delay communicated its decision to the claimant.
- e. All the issues of fact involved in the claimant's matter were completely evaluated by the respondent.

The court finds that the stated 1st respondent's assertions as pleaded were not controverted by the claimant either by evidence or pleadings and the 1st respondent's evidence established that the reason and the procedure leading to the claimant's termination was valid and fair. Accordingly, the court finds that the

dismissal was not unfair as the reason appears to have been established by the 1st respondent and the claimant was accorded a chance to defend his position.

The court will now proceed to deal with the issues for determination as set out earlier in this judgment.

The 1st issue for determination is to establish the law applicable in granting and denying the claimant's pensions benefits. The claimant was dismissed effective 1.03.2005 when the claimant was about 55 years old and having served for about 21 years. Regulation 73 of the Teachers Service Commission Code of Regulations for Teachers as revised in 1986 (hereafter, the code), provides for eligibility for retirement with benefits from the 1st respondent. The regulation provides that a teacher on permanent and pensionable terms of service is eligible for pension or gratuity in accordance with Pensions Act (Cap 189) only if such teacher retires:

- a. On completion of 10 years qualifying continuous service and attainment of 50 years of age (in which event the teacher may retire or 1st respondent may require the teacher to retire).
- b. On age grounds upon attaining 55 years of age- the then mandatory retirement age, and in which event the 1st respondent would require the teacher to retire.
- c. On grounds of ill health.
- d. In the public interest- a teacher may retire if, in the light of the usefulness the teacher to the teaching service and all other circumstances of the case, retirement of such teacher is necessary in the public interest.

Regulation 82(2) of the code then provides that a teacher who is dismissed from service forfeits all claims to pension, etc. It was the 1st respondent's case that the court must respect the provisions of the code which set out the contractual terms of service that were binding between the claimant and the 1st respondent. The 1st respondent cited National **Bank of Kenya Limited –Versus- Pipeplastic Samkolit (K) Limited and Another [2001]eKLR** where it was held that the parties are bound by terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

The 1st respondent further cited section 5 of the Pensions Act, Cap 189, which provides that every officer has a right to pensions and further that the right conferred under the section shall not apply in respect of compensation for past services, nor shall anything in the Act affect the right of the Government to dismiss any officer at any time and without compensation. It was therefore submitted that the 1st respondent was entitled to dismiss the claimant as was done in the instant case and the claimant was not entitled to the pension benefits.

The 1st respondent further submitted that section 6 of the Pensions Act, Cap 189, did not provide that a pensionable officer who is dismissed would be eligible to get pension. Instead, the section provided for payment of pensions benefits only in circumstances whereby the officer has retired from the service upon attaining 50 years with attainment of the service for vesting of pension; attainment of mandatory retirement age; retirement upon reorganization of government; retirement upon abolition of office; retirement in the public interest; or retirement upon terms of service that allowed payment of pensions benefits. The 1st respondent submitted that the claimant was dismissed and did not retire from service and therefore was not entitled to pension benefits.

The 2nd respondent cited the **Director of Pensions –Versus- Abdul Majid Cocker, Civil Appeal No. 50 of 1999** where the Court of Appeal held that property included choses in action, money or pension and no person who was eligible for pension can be deprived of his pension at the whim of the Director of Pensions; once pension becomes due, the director had no choice but to pay the pension. Thus in that case the Court of Appeal held that pension benefits, once they became due to a person, it amounted to property under section 70(c) of the former Constitution of Kenya that could not be deprived without compensation and could not be taken away except with due and prompt compensation as was envisaged under section 75 of the former Constitution. The 2nd respondent further cited **Kenneth Njoroge Gitau- Versus- Attorney General and Another [2012]eKLR** where the High Court at Nairobi held that pension, in the

court's understanding, becomes property when it is due and payable, that is to say, a person can only claim that pension amounts to property when he is eligible for that pension and its payment is due.

The court upholds the opinions in the cases as cited for the 2nd respondent that pension benefits or service pay as is also known is a right in the nature of property which once it has crystallized or became due cannot be withheld, denied, diminished or taken away without due compensation. Pension benefits or service pay become due to the employee under constitutional, statutory and contractual provisions. The court finds that contractual provisions must accord to the constitutional and statutory provisions and any contractual provision that contravenes clear constitutional and statutory provisions would be null and void.

In the instant case there were clear constitutional provisions that applied to the protection of the claimant's pension benefits but about which the parties to this suit did not make submissions. Nevertheless, the court considers that such constitutional provisions bind this court and the court is not permitted to pay a blind eye to their application. Thus, section 113 (1) of the former Constitution provided that where under any law a person or authority has discretion to decide whether or not any pensions benefits shall be granted; or to withhold, reduce in amount or suspend any such pension benefits that have been granted, those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the Public Service Commission concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold them, reduce them in amount or suspend them. Section 113(5) of the former Constitution defined "**pensions benefits**" to mean any pensions, compensation, gratuities or other similar allowances for persons in respect of their service as public officers or for the widows, children, dependants or personal representatives of those persons in respect of their service.

Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee's right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35 (5) and section 40 (1) (g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee's crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer's resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee. The court has further considered and persuaded itself that every person is entitled to social security under Article 43 (1) (c) of the Constitution of Kenya, 2010 and provisions that deny eligible employees from receiving their service pay or pensions benefits would undermine that right to social security. While that provision was not in force at the time of the cause of action in the present case, the court holds that in event of established poor performance, misconduct, gross misconduct or other adverse ground that would justify the dismissal of the employee, it is sufficient that the employer terminates the employment relationship and, where the grounds bear a criminal element, like it appears to have been the allegation in the present case, the matter should be remedied under the criminal justice system without depriving the employee the accrued pension benefits or service pay. The court therefore holds that contractual or statutory provisions that attach disciplinary action to depriving the employee pension benefits or service pay the employee has become eligible to be paid are unconstitutional because it amounts to unfair deprivation of the employee's property and is unfair labour practice.

In the present case, the claimant had attained over 50 years of age and he had served for over 20 years. The court finds that the claimant had therefore become eligible to be paid pension benefits. The court finds that the dismissal by the 1st respondent amounted to the claimant exercising its discretion to decide that the claimant should not be granted pension benefits or that the benefits be suspended or withheld eternally. The court further finds that such was a decision that required the concurrence of the Public Service Commission under section 113 of the former Constitution but it has not been shown that such concurrence was obtained.

Further the court considers that Regulation 82(2) of the 1st respondent's code that provides that a teacher who is dismissed from service forfeits all claims to pension was unconstitutional because it contravened the clear provisions of sections 70, 75 and 113 of the former Constitution and, persuasively, would contravene the clear provisions of Articles 41(1) and (2) (b) on fair labour practices and working conditions, Article 40 on protection of right to property and Article 43(1) (e) on the right to social security.

The 2nd issue for determination is to establish the rationale for payment of pension benefits. The court has already found that pension benefits or service pay is paid to recognize the employee's service. Once the employee is eligible, pension or service pay becomes a property vested in the employee incapable of being taken away without due compensation. It is payable as of right as a fair labour practice and reasonable working condition. Its payment is consistent with the right to social security. The court further holds that statutory and contractual provisions that attach disciplinary action to depriving pension benefits or service pay from eligible employees would be unconstitutional.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. In view of the findings made in this judgment, the court returns that the dismissal of the claimant with consequence that he lost all his pension benefits was unfair as it was unconstitutional and not justified.

The court returns that the claimant is entitled as prayed for. Taking all circumstances of the case into account, the court finds that the claimant would be entitled to retire in the public interest and with due pension benefits under the Pensions Act, Cap. 189. While making that finding, the court has considered that the claimant having become eligible to earn pension benefits and in view of the misconduct that was leveled against the claimant, the appropriate action was to retire the claimant in the public interest so that while terminating the employment, the pension benefits would nevertheless be protected as was protected in the former Constitution that applied to the claimant's case.

The 4th issue is whether the preliminary objection had merits. The claimant made specific allegations against the 1st respondent and it is clear that the 1st respondent made the dismissal decision whose consequence was to deny the claimant his pension benefits. The court therefore finds that whereas the respondents cooperate and work together towards payment of pension benefits under the Pensions Act, Cap 189, the 1st respondent could not escape the liability as was urged for the claimant and the court finds that the 1st respondent was a proper party to the suit and the preliminary objection fails with costs.

In conclusion, judgment is entered for the claimant against the respondents and for:

- a. The declaration that the dismissal with the consequence that the claimant forfeits pensions benefits is hereby set aside and substituted with retirement in the public interest effective 1.03.2005 and the claimant to be paid the pensions benefits under the Pensions Act, Cap. 189.
- b. The respondents are hereby compelled to compute, declare and file in court an account of the claimant's legal terminal (retirement) benefits and the schedule thereof, payment of the claimant's legal terminal (retirement) benefits as computed in 7(A) and (B) of the amended plaint (being Kshs. 4, 539.00 claimant's monthly pension and Kshs. 363, 195 as the claimant's commuted lump sum gratuity) or such other due computation under the Pensions Act, Cap 189 consequential to order (a) above and to file in court by 1.05.2016.
- c. The declaration that the claimant is entitled to his legal terminal benefits as in (a) above and the respondents shall pay the dues by 1.07.2016 failing interest at court rates shall be payable thereon from the date of this judgment till full and final payment.
- d. The 1st respondent to pay the claimant's costs of the suit.
- e. The 1st and 2nd respondents to bear own costs of the suit.
- f. The parties to mention the matter on a convenient date to confirm compliance with the judgment.

Signed, dated and delivered in court at Nyeri this **Friday, 11th March, 2016.**

BYRAM ONGAYA

JUDGE