



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 288 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**SIMON KIPKORIR KETTER ..... CLAIMANT**

**-Versus-**

**1. A.C.K CHRISTIAN INTERMEDIATE**

**TECHNOLOGY CENTRE**

**2. ANGLICAN CHURCH OF KENYA**

**ELDORET REGION ..... RESPONDENTS**

**J U D G M E N T**

The Claimant was employed by the Anglican Church of Kenya Eldoret Region on 1st August 1984 as a clerk. In 1989 the ACK Diocese of Eldoret Seconded him to Christian Community Services (CCS) where he worked in various capacities until 1998. He was then transferred to Christian Intermediate Technology Centre (CITC) by letter dated 22nd April, 1998 where he worked until 30th September, 2012 when he was retired.

The Claimant had been issued with a notice of retirement on 9th January, 2012. The letter gave him 3 months notice of the retirement ending on 31st March, 2012. The Claimant however appealed and was allowed to serve the full term of his fixed term contract at that time which was expiring on 30th September 2012.

In his Statement of Claim filed on 23rd October, 2014 the Claimant avers that the retirement was unfair as he was not given notice and was not paid gratuity and other terminal benefits.

He also alleges that he was a member of a retirement benefits scheme whose funds the 2nd Respondent invested in Stallion Insurance Company Limited which was later on wound up. He seeks the refund of contributions deposited in the Retirement Fund at an interest rate of 19% per annum compounded which by his calculation should have been Shs.3,345,961 after deducting Shs.50,000 paid in 2011 and Shs.56,000 paid in 2012.

The Claimant further seeks payment of gratuity from 2003 to 2012 including interest which as at 2013 stood at Shs.1,005,601.90 based on his calculations.

The Claimant also seeks severance pay at 15 days salary per year worked for 14 years at Shs.8,446,200, 3 months salary in lieu of notice at Shs.120,660 based on his last salary of Shs.40,220 per month, general damages equivalent to 6 months salary at Shs.241,320, general damages for lost earnings for 14 years at Shs.2,585,520, damages for unlawful retirement being salary for 48 months at Shs.1,930,560, gratuity from the 1st Respondent at Shs.3,345,961, gratuity from the 2nd Respondent at Shs.1,005,601.90, further payment of arrears from January to December 2013 at Shs.117,528, Certificate of Service and Costs.

The Claimant also seeks a declaration that the termination of his employment was unjust and inequitable and contravene Articles 28, 41(1), 45(2), 47, 48 and 50(1) of the Constitution, a declaration that his retirement was unfair and unlawful, commercial interest, costs and any other relief the court may deem just to grant.

At the hearing of the case the Claimant testified in support of his case and thereafter his advocate Mr. Angu Kitigin instructed by Angu Kitigin & Company Advocates filed written submissions on behalf of the Claimant.

The Respondents filed separate defences through Ms. Masai instructed by Cheptoo Masai and Company Advocates and called two witnesses at the hearing. The Respondents filed joint final submissions.

The 1st Respondents case is that the Claimant was retired upon attaining the mandatory retirement age of 55 years but appealed and was allowed to complete his contract which expired on 30th September, 2012. The 1st Respondent avers that its gratuity scheme was abolished in 2003 when the employees were enrolled into membership of NSSF and the Claimant together with all other employees in service at the time was paid gratuity due to him for the period served which for the Claimant amounted to Shs.643,464 paid on 2nd September, 2003.

The 1st Claimant denied owing the Claimant the sum claimed or any other sum and prayed that the claim be dismissed with costs.

The 2nd Respondent also denied the allegations of the Claimant in its defence. It clarified that;

- a) The 2nd Respondent invested in a Life Assurance Contribution Scheme with Stallion Insurance Company Limited in 1st January, 1995.
- b) That it had been contributing 25% and the claimant 15% towards the pension scheme. The claimant was a member of this scheme.
- c) That Stallion Insurance Company was placed under Statutory Management in the year 2000.
- d) That Trinity Life Assurance Company took over the life insurance assets and liability of Stallion Insurance Company.
- e) That Capital Express Assurance Company Limited of Nigeria (on behalf of Trinity Life Assurance Company Limited) entered into a memorandum of understanding with the 2nd Respondent to resolve all outstanding issues in respect to the pension scheme.
- f) That a proposal of payment in three equal instalments was made by the Insurance Company to be cleared by 31st December 2010.
- g) That payment as aforesaid delayed and the 2nd Respondent raised concerns and made follow ups but the same was not fruitful.
- h) That the Capital Express Assurance Company Limited started paying out the 1st instalment of pension for staff who had left the company, the claimant included, on 27/6/2013.
- i) The 2nd Respondent went ahead and paid out the money to the members, the claimant included.

j) That the 2nd Respondent has been paying the members of the pension scheme as they receive payment from the Insurance Company.

k) That the 2nd Respondent had no knowledge of and/or could not have foreseen the winding up of Stallion Insurance Company Limited which is no fault of the 2nd Respondent.

The 1st and 2nd Respondent called two witnesses at the hearing.

During the hearing the Claimant stated that the mandatory retirement age should be 60 years based on the circular extending retirement age from 55 to 60 for public service employees while both witnesses of the Respondents testified that the retirement age contained in the Respondents Terms and Conditions of Service was and is still 55 years.

### **Determination**

The issues for determination are the retirement age for the Claimant and whether he is entitled to the prayers for notice, gratuity, pension, severance pay and general damages for unlawful retirement, costs and interest.

### **Retirement Age**

Retirement age is not one of the terms covered by the Employment Act. It is therefore left for each employer to set its own retirement age. Both the National Social Security Fund Act and the Retirement Benefits Authority allow persons to withdraw benefits upon attaining 50 years of age. This means that companies are free to set their own retirement age at 50 years or above.

In the case of the Claimant he acknowledged being aware of the Respondents' retirement age of 55 years but presumed that the extension of retirement age to 60 years applicable to the Government applied to all employees in Kenya including those in the private sector. He referred to and produced the circular dated 20th March, 2009 reviewing mandatory retirement age for public servants which was written by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service, then Amb. Francis K. Muthaura, E.G.H, as proof of his allegation. The circular is address to ;

- All permanent Secretaries/Authorized Officers
- The Controller and Auditor General
- The Registrar, High Court of Kenya
- The Secretary, Public Service Commission
- Vice Chancellors of Public Universities
- Clerk to the National Assembly
- All Chief Executive Officers of State Corporations
- The Secretary, Teachers Service Commission
- All provincial Commissioners **(with sufficient copies for District Commissioner)**
- Clerks to Local Authorities.

As is evident from the Circular, it is not addressed to any entity outside the public service and its title leaves no doubt about who it applied to. It is titled "**Review of the Mandatory Retirement Age for Public Servants**" The circular does not therefore apply to the Claimant or to the Respondents.

Indeed in his letter dated 24th January, 2012 in response to his retirement notice, the claimant confirms this position as he stated as follows in the penultimate paragraph thereof:-

*Attached, please find Review of THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS OF, 20.3.2009. This may assist the management in future review of the Personnel Manual's Retirement age.*

In the said letter the Claimant was seeking the extension of his retirement date. He stated in paragraph 2 of the letter that;

*"May I request to be allowed to complete the remaining period of my current contract which expires on 30.9.2012 as stated by the appointment attached."*

For these reasons I find that the Claimant was aware and accepted the fact that his retirement age was 55 years.

The retirement was extended upto 30th September 2012 to allow his running contract to expire at his request. The Claimant retirement was therefore not unlawful or unfair.

### **Notice**

Having been given notice of 3 months and having requested for extension of his service up to 30th September, 2012, the Claimant was not entitled to any further notice from the Respondents.

The Claim for 3 months salary in lieu of notice has no basis and is dismissed.

### **Pension**

The Claimant testified that he was a member of a Pension Scheme whose funds were invested in Stallion Insurance Company Limited without due diligence by the Respondents and that he holds the Respondents liable for the loss of his funds. He seeks payment of the same inclusive of 19% compounded interest.

The Retirement Benefits Act provides for management of all pensions. Under Section 46 of the Act any person aggrieved by the manner in which his pension has been handled may appeal to the Chief Executive Officer and if dissatisfied by such decision to the Retirement Benefits Tribunal under section 48 of the Act. This Court only assumes jurisdiction on matters relating to pensions in the form of appeals from the decisions of the Retirement Benefits Tribunal.

This Court therefore has no jurisdiction to deal with the Claimants complaints in respect of the pension funds and he is advised to file a complaint with the Chief Executive Officer of the Retirement Benefits Authority.

### **Gratuity**

Like pensions, gratuity only becomes due if provided for under an employee's terms of contract. The Respondents stated that their gratuity scheme was abolished in 2003 when the Claimant was paid all pension due to him, a fact that the Claimant has admitted. The Claimant did not submit his final contract to court to prove that the same provided for gratuity.

I find that the prayer has not been proved and dismiss the same.

### **General Damages and Payment up to age 60 years**

Having not proved that he was unlawfully or unfairly retired, the Claimant is not entitled to general damages. He is also not entitled to payment of salary up to age 60 as his retirement age was 55. The Claims for damages and payment to age 60 are thus dismissed. The claims for costs and interest are also dismissed.

The prayer for certificate of service succeeds as it is a mandatory requirement under section 51 of the Employment Act and the Respondent is directed to issue the same to the Claimant within 30 days.

The upshot is that the Claim fails and is dismissed, save for the prayer for certificate of service. Each party shall bear its costs.

**Judgement Dated, signed and delivered this 21st day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**