



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1717 OF 2014
PHILIP OCHANDA OGETO CLAIMANT
VERSUS
THE ATTORNEY GENERAL RESPONDENT
JUDGMENT

1. The claimant was a General Service Unit Constable and was retired at the age of thirty six (36) years on 3rd March 2012 on medical grounds. He had suffered injuries arising from a motor vehicle accident in the course of duty.
2. The claimant earned Kshs.25,700 per month.
3. The accident occurred in the year 2000. The claimant was out of service for one month then resumed working as a security officer at the presidential pavilion at the JKIA Airport.
4. After four (4) years, the claimant was asked to attend a medical board in 2004. The Board recommended that the claimant was unfit to continue working but this recommendation was not implemented. The claimant continued to do light duties at the Embakasi Barracks until the year 2008 when the claimant was asked to attend another Medical Examination. The report recommended that the claimant was fit to continue with work. The claimant had improved and was put in full service and worked in the anti-riot squad. There was no complaint on his performance. He was fully involved in peace keeping in the post election riots in 2007.
5. The commissioner however retired the claimant on medical grounds ten (10) years after the accident. The claimant testified that he had injury on the ear but it did not diminish his ability to work. The claimant appealed to the commissioner of police to retract the retirement in vain. The claimant was paid Kshs.100,000 compensation for the injury and he had received Kshs.600,000 lump sum pension and continued to receive monthly pension to date of Kshs.7000. The claimant states that he still has young children in school and was desirous to continue serving his country. The claimant was informed that the commissioner's decision was final.
6. The claimant seeks reinstatement and in the alternative compensation equivalent to the remainder of service years up to the retirement age of constable at fifty (50) years.
7. The claimant states that he did not attend any hearing before retirement. He attributes the decision to retire him to malice. The purported hearing was on 17th November 2010 but he was not present.

Claimant said his counterparts who had gotten injured were transferred to General duties. The claimant was married.

8. The respondent opposes the case relying on statement of defence filed on 23rd April 2013 and various bundle of documents filed on 19th May 2014 and 23rd March 2016 respectively.

9. M/S Chege for the respondent cross-examined the claimant closely.

10. RW1 Snr Superintendent Mr. Andrew Kimeu charging the commanding officer GSU Headquarters to testified for the respondent.

11. M/S Chege also filed final submissions on 28th July 2016.

12. RW1 joined GSU in September 2015. In 2011, he was at Embakasi GSU Training School as Adjutant. He met the claimant there.

13. RW1 wanted to know why the claimant was placed on light duties. The claimant was cleaning the abolition block. RW1 was informed the claimant was awaiting removal from force for ill-health. That the claimant had attended the Medical Board twice and the Board had recommended the claimant's removal on medical grounds.

14. The attendance was on 27th January 2005 and 2nd May 2008 respectively.

15. That according to the bundle before court, the removal was approved by the commissioner of police and payment processed. The claimant was duly retired and paid his pension lumpsum and monthly instalments.

16. RW1 was rigorously cross-examined by Mr. Nyabena for the claimant. RW1 admitted that the claimant worked on light duties mainly from the year 2000 up to the year 2012 twelve (12) years after the accident. RW1 explained that the claimant was meanwhile awaiting results of the Medical Board. The claimant was said to be 55% fit for service in the 2nd report of 3rd April 2008. The 1st report had initially recommended removal for ill-health. Even after the 2nd report, the claimant worked for a further four (4) years before removal.

17. Determination

Issues for determination are;

- a) Whether the claimant's retirement on medical grounds was for a valid reason and in terms of a fair procedure.
- b) Whether the claimant is entitled to either reinstatement or compensation for retirement.

18. Issue (a)

The claimant had a road accident in the year 2000 in the course of duty. In 2004, the Medical Board of the Armed forces recommended his removal on medical grounds. However the claimant continued working in various capacities until the year 2008, when he was re-evaluated by the Medical Board and was declared 55% fit to work. The claimant was then placed on light duties at the Embakasi GSU Training School until the claimant was retired by the Commissioner of Police on medical grounds.

19. The claimant appealed the decision to retire him on medical grounds at age 36 but the appeal was not successful. The claimant was paid compensation for the injuries received in the course of duty and was also paid lumpsum pension and also continues to receive monthly retirement dues todate.

20. The error the respondent committed is delaying to implement the recommendation of the Board to retire the claimant on grounds of ill-health which omission worked in favour of the claimant who continued to serve until 2008 when the Board reviewed his case. In 2008, the Board found the claimant 55% fit to work. The claimant continued to work for further four (4) years until when the commissioner of police retired the claimant in the year 2012.

21. In court's view, the respondent was magnanimous to allow the claimant to serve for twelve (12) years after he met an accident in the course of duty in the year 2000.

22. Rather than fault, the respondent for the omission, the claimant ought to consider himself lucky on the face of the medical report that recommended his removal in the year 2004 but he continued to work up to the year 2012.

23. The claimant did not suffer much prejudice, because he received Kshs.100,000 compensation in respect of the work injury, and has received full pension benefit upon retirement in terms of the applicable Armed Forces Legislation.

24. The court finds that the respondent had a valid reason to retire the claimant on medical grounds and in doing so the respondent followed a fair procedure.

25. Issue (b)

In view of the finding in (a) above, the remedy sought by the claimant is without merit and the same is dismissed.

Accordingly, the final orders of the court are that, the entire suit is dismissed with no order as to costs.

Dated and delivered at Nairobi this 20th day of December, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE