



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1279 OF 2012

(FORMERLY CIVIL SUIT NO. 720 OF 2007)

(Before Hon. Justice Hellen S. Wasilwa on 25th May, 2015)

STEPHEN RUGARA NDUHIUCLAIMANT

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Stephen Rugara Nduhiu filed his Complaint on 15/10/2007 through the firm of Rumba Kinuthia & Company Advocates against the Respondent herein, the Government Chief Legal Advisor.

The Claimant had been granted leave to file this suit out of time on 26/9/2007. This case had initially been filed at the High Court Civil Division but was transferred to this court for hearing and disposal on 20/7/2012 following an application longed by the Claimant herein.

Claimant's case

2. The Claimant's case is that he was employed on temporary basis as a Clerical Officer in the office of the President on 15/2/1983. He was subsequently issued with a letter of temporary appointment dated 7/9/1983 as per his Appendix 1 in his list of documents.

The letter provided that the appointment was purely temporary and carried no guarantee of permanent employment but the appointment could be terminated by one month's notice on either side or payment of equivalent salary in lieu of notice.

The appointment was also subject to all regulations for officers in the public service which may be promulgated from time to time.

3. The Claimant stated that he was later issued with a letter of appointment in the same position he had worked in on temporary basis on 2/2/1990. The appointment was with effect from 1st August 1989 but also incorporated the period between 15th February 1983 to 31st July 1989 when he worked on temporary basis.

4. The Claimant avers that he was later re-deployed in the Presidential Press Unit where he worked as a Rigger until he was transferred to the Provincial Commissioner's Office Nakuru as per his Appendix 2. He then took up his posting to Nakuru but before he reported, he fell ill and was hospitalized at the

Provincial Hospital for about 6 months. Once out of hospital and after battling with ill health for some time he opted to apply for early retirement vide his letter dated 14/1/1994 and acknowledged on 4/1/1994. In the reply he was informed that his application for early voluntary retirement was being considered and that he would be informed of the decision made thereon.

5. He avers that on or about 21st March 1994, his application for voluntary early retirement was finally accepted and he was notified vide a letter of approval.

6. He avers that after this, he applied to be paid his terminal benefits and was advised to wait as the same was being processed. He waited for about 6 months and did not receive any response despite sending constant reminders to the respective offices.

7. He avers that on or about January 1995 however, he went to inquire on the progress of the payments and was verbally informed that his file had been taken to the Office of the President Headquarters in Nairobi for alleged action based on the fact that it was purported that he had been dismissed from service. This, he avers came as a total surprise as he had not been issued with any dismissal letter. He followed up the matter with Office of the President and was able to obtain a copy of a letter dated 19/1/1995 whereby his services were alleged to have been terminated.

8. The Claimant avers that the dismissal was fraudulent, unlawful and unjustified given that he had not been notified and/or asked to explain himself against allegations of desertion from duty.

He avers that as a result of the matters aforesaid, he has never been paid his dues which amount to 68,880/=. He states that he suffered depression as a result of the mistreatment the Respondent subjected him to. He therefore seeks redress from this court and seeks to be paid the termination dues as stated plus interest at commercial rates from 21st March 1994 to date. He also seeks to be paid damages plus costs of this suit.

The Respondent's Case

9. On 15/11/2007, the Respondents filed their Statement of Defence through their Litigation Counsel. In their defence, the Respondents denied the claimant's case. It is their contention that the Claimant was lawfully dismissed from service and that the right procedures and rules were followed in arriving at the said dismissal. They asked court to dismiss this suit with costs.

Issues of determination

10. Upon considering the evidence adduced by the parties and their respective submissions, the issues for determination are as follows:

- i. ***Whether the Claimant's application of early retirement was acknowledged and accepted.***
- ii. ***Whether the cancellation of early retirement and substitution with dismissal was fair and justified.***
- iii. ***If not, if the Claimant is entitled to prayers sought.***

11. On the 1st issue, there is evidence that on 14/1/1994, the Claimant requested for early retirement. This request was channeled through the Provincial Commissioner Rift Valley Nakuru who signed it on 21/3/1994. Calculation of his Safety Net Payment was Kshs.68,880/=.

This application was acknowledged and he even received communication that his application was receiving the necessary attention and he would be informed of the decision made in due course. The reason for the decision to voluntarily retire early was ill health as per the Claimant and he attached the medical report from the Provincial General Hospital Nakuru that he was unwell when he was seen in the facility on 25/5/1994.

12. It is the Respondents averment that that is falsehood. However, this court finds that indeed the

Claimant applied for early retirement and the same was received and acknowledged and even approved. The payments due to him were computed by staff in Office of the President including the Internal Auditor and signed by the Accounting Officer who was the Provincial Commissioner then on 21/3/1994.

13. It appears that a decision was later made to reverse the retirement and dismiss the Claimant which decision was made in 1995. This decision was not however communicated to the Claimant until 16/8/2004, when the Respondent through the Permanent Secretary wrote to the Counsel for Claimant stating that he had been dismissed for desertion of duty. In a letter of 19/1/1995, the Provincial Commissioner Rift Valley had communicated to the Permanent Secretary, Office of the President that the early retirement had been cancelled and the file forwarded to the Permanent Secretary. This letter was not copied to the Claimant and there is no evidence that the Claimant was informed of the reversal of this decision on the dismissal from service.

14. The Respondents have averred in their evidence that a disciplinary case concerning the Claimant was held in accordance with the provisions of the Service Commission Act (Cap 185 Laws of Kenya).

The proceedings of the said disciplinary hearing were not adduced in evidence not the provisions of the said regulations that were adhered to as a test that his was actually done.

Part IV of the repealed Cap 185 had provision on discipline of staff. Under Section 23 of this part – it was provided that:

“ (1) if in any case an authorized officer is satisfied that the public interest requires that a public officer should cease forthwith to exercise the powers and functions of his public office, he may interdict the public officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.

(2) A public officer who is interdicted shall receive such salary, not being less than half his salary, as the authorized officer shall think fit.

(3) Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished under these Regulations, the whole of any salary withheld under paragraph (2) shall be restored to him upon the termination of such proceedings.

(4) If any punishment other than dismissal is inflicted, the public officer may be refunded such proportion of the salary withheld as a result of his interdiction, as the Commission shall decide. “

In the case of the Claimant no disciplinary proceedings were instituted against him.

15. Though under the repealed Employment Act Cap 226 Laws of Kenya, there was no express provision over a hearing before terminating, the essence of being condemned unheard is an age-long established precept of natural law that no man should be condemned unheard. The Claimant herein for whatever reason was dismissed without any hearing- this decision to retire early was reversed without any hearing. It is this court's finding that his rights to be heard were flouted and I declare the decision to summarily dismiss him unfair and unjustified and null and void. I revert it to a decision to retire early.

It therefore follow that the Claimant is entitled to his retirement benefits of Kshs.68,880/= plus interest at court rates with effect from 21st March 1994 to payment in full.

16. Given the suffering he underwent waiting for the said payments and the malice indicted against the Claimant I also grant him a further 100,000/= as punitive damages.

The Respondent will pay costs of this suit.

Dated and delivered in open Court this 25th May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent