



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 894 OF 2013

BENJAMIN ODUMA KOBARE CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGEMENT

1. The claim herein commenced before the Chief Magistrate's Court civil suit No.8058 of 2009 and by order of Court on 8th November 2012 the file was transferred before this court.

2. On 13th March 2014, the Court heard the Claimant in his evidence in the absence of the respondent who had been dully served and Affidavit of Service filed but was absent. On 12th May 2015, the respondent agreed to proceed by way of written submissions.

3. The claim is that the Claimant as a civil servant was deployed in the Ministry of Livestock Development as an extension officer in Garissa where he worked until when the medical Board convened at the provincial Medical Officer's Office, Garissa on 24th January 2000 and recommended his retirement from public service on medical grounds and on 9th may 2000 the then Ministry of Livestock & Fisheries Development acted on the recommendations and asked the Public Service Commission to retire the Claimant on medical grounds. On 2nd July 2002, the Claimant was thus retired on medical grounds. He appealed against the decision to have him retired on medical grounds to the Director of Medical Services and asked the Medical Board be reconvened and review his health status which Board declared the Claimant fit to resume duties.

4. The claim is also that the Public Service Commission, despite knowledge of the second medical report and letter from Permanent Secretary Ministry of Livestock & Fisheries Development on 8th November 2004 declined to reinstate the claimant. He lodged an appeal to the Public Service Commission but it was rejected on 16th April 2009.

5. The claim is that had the Claimant been allowed to continue in service he would have worked until retirement at the age of 60 years, enjoyed annual increments and promotions and have an enhanced retirement pension at kshs.4, 000.00 per month. By reasons of the failure by the Public Service Commission to reinstate him, the Claimant has suffered loss and damage. The Claimant is therefore seeking for judgement for;

- a. *General damages for forced and wrongful retirement*
- b. *Enhanced monthly pension*
- c. *Costs of the suit*

- d. *Interest on the claims*
- e. *Any other relief the Court may deem fit.*

6. In evidence the Claimant testified that upon his employment as an Extension Officer by the PSC, he was deployed to Garissa until 8th August 2000 when he was retired on medical grounds. He lodged an appeal and the Medical Board recommend that he was fit to resume duty on 27th March 2003. This recommendation was not acted upon by PSC.

7. The Claimant also stated that when he was sent to Garissa in 1987, he suffered severe cerebral malaria and the effects of the medication he took was severe but the condition was managed. He was in a hardship area and every year he developed a bout of sickness. He attended the Medial Board on 8th August 2000, one doctor did an examination and recommendations were made to be retired. The Claimant handed over his duties. Later he lodged an appeal and the Medical board made another report on 27th March 2003 and made a recommendation that he was fit to resume duty. The Permanent Secretary Ministry of Livestock confirmed the recommendation but the PSC refused to reinstate the Claimant and noted that the matter was closed.

8. On 29th April 2005 the Claimant lodged a further appeal but this was rejected. He appealed to the Ombudsperson but PSC wrote on 17th February 2008 and rejected any reinstatement. The Claimant has since tried to seek employment elsewhere but has only secured consultancies.

9. The Claimant also testified that his termination was wrong. The medical Board made a report that he was fit to resume duty but PSC refused to comply and reinstate him. He was retired at ae 38 while he was supposed to be retired at 60 years and had 22 years to retirement. The case is being heard when he is old and seek general damages for wrongful retirement that resulted in early termination of his employment which was unjust and unlawful. The Claimant also seeking enhanced retirement benefit together with interest. Due to the decision of the PSC he has suffered immensely and thus should be awarded as prayed.

Defence

10. In defence, the respondent stated that pursuant to recommendations of a properly constituted Medical Board by the Director of Medical Services, the PSC retired the Claimant from service on medical grounds in accordance with the Public Service Regulations. The regulations have no provision of convening a second medical board or appeal to the Public Complaints Standing Commission or any other body. On exiting service the Claimant received full retirement benefit on medical grounds and could only come back upon competitively and in line with service regulations on recruitment and appointment of public officers. The claims should be dismissed.

Submissions

11. In submissions, the Claimant stated that he was terminated in 2002 contrary to the provisions of the Employment Act, Cap 226 now repealed, and it took 9 years to lodge the claim. For the 9 years he has tried to seek reconciliation with the Ministry of Public Health and PSC which was not achieved and hence on 21st April 2009 decided to file suit. The reasons to termination of employment was a retirement on medical grounds that the Claimant was of unsound mind. This reason is not contested by the respondent. That the claim is not statute barred as the operative law is Cap 226 now repealed. That cause of action arose on 1st September 2000 when the Claimant was retired on medical grounds. the Claimant has records as to why he was not able to file suit until after 9 years noting that he lodged an appeal; a second Medical Board was convened; the Permanent Secretary Ministry of Livestock and Fisheries adopted the Board recommendation and directed he be reinstated; and the PSC rejected subsequent appeal on 21st April 2009. The cause of action therefore arose on 21st April 2009 and it was thus filed on 23rd November 2009 after 7 months. The last communication was from the Public Complaints Committee.

12. The Claimant also submitted that there was no valid reason of the termination of his contract of

employment and the decision arrived at retiring him on medical grounds was not fair. That in 1990 the Medical Board unlawfully recommended that he be retired and the PSC relied on the same to retire the Claimant on 1st September 2000. The Claimant was able to be re-examined by a second Medical board that recommended that he was fit to be reinstated but the PSC refused to effect the same. These facts are not contested and thus he should be reinstated and or paid his pension dues as an employee who retired at the set age.

13. The Claimant also submitted that he is entitled he is entitled to general damages for forceful and wrongful retirement and an enhanced monthly pension.

14. The respondent on their part submitted that the Claimant was retired from employment upon a Medical Board recommendation to PSC. The Medical Board was properly constituted and the Claimant never challenged its decision and his effort to have a second Medical Board constituted to make new findings was not a procedure allowed under Public Service Regulations. It is not contested that the Claimant was ill necessitating the recommendations by a Medical Board for his retirement and this took effect on 1st September 2000. There is therefore no rationale to claim a restatement on the basis of a secondary process not allowed by PSC.

15. The respondent also submitted that there was no forceful or wrongful termination through retirement as the respondent followed due process. Before retirement, the case was referred to a duly constituted Medical Board that made recommendation upon which the PSC relied upon to come up with a decision to terminate the claimant. Such communication was given to the Claimant and there is no challenge to that particular process. He cannot introduce a secondary process at this point. There is therefore no damages payable in this case.

16. The claim for enhanced pension is contested by the respondent on the grounds that the Claimant has benefited from pension in accordance with the applicable law. The pension due was never a fact in issue in the claim and cannot be introduced at this point. Nothing is thus due. The suit should be dismissed with costs.

Determination

What is the Applicable Law?

Whether there are any remedies due

17. The Claimant has based his claim on Cap 226, now repealed. However the same claim is stated to have arisen on 21st September 2009. On the one hand to claim under Cap 226 as repealed, this is essentially to defeat the very purpose and noting the cause of action arose on 21st September 2009 as by this time, the Employment Act, 2007 had come into force. There can therefore only be one position.

18. To rely on the provisions of Cap 226 as repealed, the claim has to comply with time limitations which in this case I find to be way out. At the time of termination on 1st September 2000, the Claimant appealed against the decision, which appeal was rejected vide letter dated 7th February 2005 by the line Ministry. To thus base his claim under Cap 226 as repealed, the claim remained alive for 6 years until 7th February 2011. Within the course of time, the applicable law was repealed and Employment Act, 2007 came into force. To thus rely on the provisions of a released law, Cap 226, does not do any justice on the claim as constructed and outlined. It fails to comply with the basic tenets of rule 4(e) of the Industrial Court (Procedure) Rules. The application of Cap 226 as repealed is therefore ousted by operation of the law, the enactment of the Employment Act, 2007 when the suit was filed.

19. However, to base the claim under the provisions of the Employment Act, 2007, the Claimant is faced with various legal hurdles. The basis of the claim is that the Claimant was retired on 1st September 2000 on medical grounds after he was reviewed by the medical board and the PSC relied upon the same to terminate his employment. Hence as of **1st September 2000** the Claimant effectively was terminated

from his position with the Ministry of Livestock & Fisheries Development. There is no appeal against this particular action. What the Claimant did was to seek a new medical board review which was done on **27th March 2003**. This is however a process that arose after the effect of his termination. What arose after such a termination could not be reversed by a second medical report, assessment, recommendation or the action that the Claimant sought through the Permanent Secretary Officer, David Stower as he then was and his letter dated 8th September 2004 and recommending his reinstatement. From 1st September 2000, the Claimant could only appeal against his termination vide the PSC regulations or seek a re-appointment, but not appeal through seeking a new medical report or assessment as he had already lost his employment.

20. I therefore find, the action taken by the Claimant after the 1st of September 2000 were inconsequential as concerned his termination. Where there was no challenge to the decision taken then, its rationale, the basis or validity, the Claimant remained effectively terminated. His employment could therefore not be revived through any other means. The appeals lodged lacked basis in law, as to seek a second medical report and rely on the same to seek a reinstatement is contrary to any known legal norms or employment and labour relations practice. Reinstatement was not available. A re-employment was possible where such a vacancy existed and to be so re-employed, the terms and conditions of such employment would be different from his previous employment as the two would not be linked.

21. In this regard therefore, the law applicable comes back to affect the cause of action, the nature of remedies sought and what this Court can grant. The events that took place after the 1st of September 2000 could only be challenged within a specific legal time frame. Such time has since lapsed and not extended. To base the claim on 21st September 2009 is to rely of facts that arose outside the claimant's cause of action vide his termination that took effect on 1st September 2000. Communications that relate to rejection of his appeals and subsequent communications cannot be visited upon the respondent looking at time from 1st September 2000.

22. Equally the application of the Employment Act, 2007 outside the cause of action as to when it arose is way out and removed as the Act only became operational on 2nd June 2008. This is a time of over 7 years before the law came into force. It cannot therefore be applied. The Claimant cannot also rely on facts that arose outside his employment with the respondent and outside the time limitations he was supposed to lodge his claim. The Claimant relied on the case of **Municipal Council of Mombasa versus Nyali Ltd [1963] EA**, I agree with the rationale in the same suit that the law does not operate retrospectively. Indeed the Claimant has removed himself from the application of the Employment Act even after filing suit in 2009 when the same law was in effect. The Claimant has also relied on **Naibei Gerishon Kisach versus National Cereals & Produce Board [2014] eKLR**, though the facts in this matter are fundamentally different from this case, the Claimant herein was terminated upon a medical board review and or assessment of his condition, the recommendations were applied by the PSC and he was retired on medical grounds. the Claimant did not appeal against that termination, what he sought to do was seek a second medical assessment and review upon which he sought to be reinstated on a position he had already lost. Upon such lose, the Claimant lost employment and the question of a reinstatement does not arise under the applicable law and case.

23. Thus on the question as to whether there are any remedies, once the cause of action is time barred, lacking in justification as to the time it arose and there having been no extension to lodge such a claim, the same must fail. This is not only a technical application but a bar in time that is contemplated in law. The basis of the law is that when a suit is not filed within the limitation period, the same abets as if it was never filed in the first place.

The claim is therefore dismissed. There will be no orders as to costs.

Dated and Delivered at Nairobi this 23rd day of July, 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant

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