



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 2020 OF 2011

BETWEEN

JOHN BENSON GITHINJI
CLAIMANT

VERSUS

GENERAL
1. THE ATTORNEY

POLICE
2. THE COMMISSIONER OF

3. THE PUBLIC SERVICE COMMISSION

4. JOSEPH OLE TITO

5. JAMES KIRIMI RINGERA.....
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Mogaka instructed by Musyoki Mogaka & Company Advocates for the Claimant

Respondents absent

ISSUE IN DISPUTE: UNFAIR AND ULAWFUL TERMINATION

AWARD

1. This Claim proceeded in the absence of the Respondents. The Claimant testified on 30th April 2013, and 7th June 2013 when he closed his case.

2. Preceding this, the Claimant wrote to the Attorney General Notice of his Intention to bring this Claim, on 30th December 2010. He filed his Statement of Claim on 29th November 2011. The Attorney General entered appearance for all the Respondents on 14th December 2011, but defaulted in filing the Statement

of Reply.

3. The Claimant adopting the procedure in civil proceedings, filed an application dated 19th October 2012, seeking to have ‘*Judgment*’ in default of ‘*defence*.’ This was abandoned when Learned State Counsel Mr. Fedha showed up for the State on the hearing of the Claimant’s application, and prayed for leave to file the Statement of Reply out of time. The Respondents were granted leave to do so within 14 days. The Attorney General filed this on 31st October 2012. The Claimant closed the pleadings with the filing of a Reply to the Respondents’ Statement of Reply, received in Court on 17th December 2012. At the hearing however, the Respondents opted to give the proceedings a wide berth, even after being allowed to file their documents out of time, and after being notified of the hearing and subsequent mention dates.

4. The Claimant’s position is that he was employed on 1st January 1978 as a Member of the Kenya Police Force. He rose through the years from a Police Constable, to the last position held in the Force, of a Superintendent of Police.

5. The Respondents alleged the Claimant had misused Government resources in or around the year 2008. He received a letter dated 8th July 2008 from the 4th Respondent who served as the Commandant Kenya Railways Police, asking him to give an explanation why immediate disciplinary action should not be levied upon him.

6. The details of the allegations against the Claimant in the Commandant’s letter were that as the Claimant was the Officer Commanding Railways Police Nakuru Division, he was responsible for proper utilization of Government resources in the Division. The Commandant charged that the Division was apportioned motor vehicle fuel at the closure of the financial year in June 2008. When the Claimant went for briefing with the Commandant on an intended raid by the Police on scrap metal dealers within the Claimant’s jurisdiction, the Claimant asserted the operation would be hampered by insufficiency of fuel. The briefing was on the 2nd July 2008.

7. The Commandant alleged that the Claimant had misused the fuel apportioned to the Claimant by poor planning of the journeys the Claimant had made from Nakuru to Bungoma via Eldoret; back to Nakuru then off to Kisumu; and then Bungoma through to Webuye and Eldoret. The 4th Respondent felt the journeys should have been better planned, to move in a sequential order and ensure prudent utilization of fuel. The Commandant in addition to these queries, wished to have the Claimant explain why the Claimant had alleged he was being witch-hunted by Senior Superintendent of Police Titus Yoma. The Claimant’s behaviour was characterized as reckless and dangerous, which was unacceptable to the Kenya Police Force.

8. The Claimant answered on 12th July 2008. In a lengthy letter to the Commandant, the Claimant recounted his good employment antecedents over a period of 30 years. He alleged that the Commandant had grown to mistrust him over an inquest file in which the Claimant had expressed his misgiving that the file had been wrongly routed, and would end up absolving a Police Officer who was implicated in a case of sexual offence. The file had been forwarded to the Commissioner of Police by Mr. Yoma who then denied doing so, when confronted by the Commandant, resulting in the mistrust between the Claimant and the Commandant. There were other investigations and inquiry files where the Claimant and the Commandant had disagreed, leading the Commandant to brand the Claimant as a ‘controversial’ Officer.

9. Specific to the fuel allegation, the Claimant answered that it was true he had been apportioned Kshs. 100,000 for fuel and lubricants. He did not say to the Commandant that he had no fuel at all, but stated he did not have sufficient fuel to cover the entire operation against scrap metal dealers that was intended to be carried out under his jurisdiction. He explained he had used the fuel efficiently, and organized his journeys to limit excessive fuel consumption. He had been apportioned 120-140 litres of fuel and beyond the scrap metal operation, had supplied a grounded vehicle in Eldoret with fuel, to enable it move to Nakuru for repair and had fueled a lorry which collected supplies from Bata Company. The Claimant lamented that he was ripe for promotion and the effect of the Commandant’s damaging letter was to

ensure he was transferred, or more seriously affect his career advancement. Quoting from a Book titled 'Lucifer's Principles,' the Claimant eerily cautioned the Commandant that '*for any happening, there is always a corresponding side effect, either good or bad.*' He denied ever saying that Yoma was witch-hunting him. He at the same time prayed the Commandant to forgive him if he had done anything in ignorance.

10. The Claimant states the matter was closed, or he considered it closed, after he gave this response.

11. However, on 18th July 2008, he was slammed with another letter from the Commandant Joseph Ole Tito warning the Claimant that it had been noted '*you are one person who cannot be trusted and require close supervision.*' The Commandant told the Claimant that his explanation above, revealed what type of an Officer the Claimant was. The Claimant was told his conduct was dangerous and careless, and his relationship with colleagues wanting. He was accused of lacking in respect to his seniors. The Commandant warned the Claimant that if he did not reform, there would strong deterrent action taken against the Claimant.

12. The following month on 29th August 2008, the Commissioner of Police wrote to the Claimant a letter asking him to show cause why he should not be disciplined. The Claimant states the letter was based on the same allegations contained in the Commandant's two letters above. The letter states that the Claimant deviated from the real issues raised in the letters, and was disrespectful to the Commandant by quoting 'Lucifer's Principles.' The Claimant was asked by the Top Cop to show cause within 10 days, why disciplinary action should not be taken, in accordance with Regulation 27 of the Public Service Commission [Police Force] Regulations 2006, Cap 185 the Laws of Kenya.

13. The Claimant wrote to the Commissioner in large repeating the explanations he had given to the Commandant. He had utilized the fuel well, and the allegations revolving around Mr. Yoma were all hearsay. He assured the Commissioner he bore no ill-will against the Commandant, and was willing to accept his own mistakes, and seek the forgiveness of his seniors.

14. These calls for commiseration appear not to have persuaded the Commissioner that the Claimant should be retained in the Force, little less promoted. The Commissioner wrote to the Claimant on 28th August 2009, conveying the decision of the Public Service Commission of Kenya, to retire the Claimant early, under the 50 year Rule. Retirement would be effective from 1st October 2006. He was advised he had the right to seek for review to the Public Service Commission.

15. He sought for review from the PSC in a letter dated 1st September 2009. He explained that allegations made against him by the Commandant and the Commissioner were never proved. He was never granted a chance to defend himself properly. He had served over 31 years, without a single disciplinary lapse. He lamented he had a family who would be adversely affected by his retirement. Forced retirement before the disciplinary process had been exhausted, the Claimant argued, set a bad precedent in the Force. He asked to be allowed to continue in service until normal retirement. The PSC wrote to the Claimant on 18th November 2009 declining full review, but changing the effective date of retirement from 1st October 2006 to 1st October 2008.

16. He did not request to retire under the 50 year Rule, and received no notice of retirement. He received a certificate of service from the Police Force dated 25th May 2010, purporting he retired on 1st October 2008, while in fact, he worked up to 10th September 2009 when he handed over the Railways Police Division.

17. There was shortage of relievers in 2008 to 2009, and the Claimant did not go on leave for 2½ years. He was not compensated in lieu of leave, which he claims at 88 days. He was expected to retire at the age of 60 years, but was forced to retire under the 50 year Rule, losing out 10 years of expected service. He claims anticipatory salary of Kshs. 6,825,600 for the remainder 10 years. He claims he was not paid for the period between 1st October 2008 and 10th September 2009, a total sum of Kshs. 682,560 which he

seeks the Court to order the Respondents to pay to him. Kshs. 682,560 was deducted from the Claimant's pension by the Respondents, in alleged recovery of overpaid salary. He lost 10 years of pension by the forced early retirement. The two Officers named as the 4th and 5th Respondents acted maliciously by supplying the Commissioner of Police with false information concerning the Claimant.

18. Against this background the Claimant prays for:-

- a. Kshs 682,560 in unpaid salary for the period between 1st October 2008 and 10th September 2009;
- b. Kshs. 682,560 in wrongful deductions from the Claimant's pension;
- c. Leave pay of 88 days;
- d. Kshs. 6,825,600 in lost earnings for a period of 10 years;
- e. A declaration that the retirement of the Claimant under the 50 year Rule was arbitrary, unfair and /or unlawfully applied to the Claimant;
- f. A declaration that the warning letter dated 18th July 2008 lacked merit and be set aside;
- g. A declaration that the Statements made by the 4th and 5th Respondents against the Claimant were false and malicious;
- h. A declaration that any other purported disciplinary action taken against the Claimant on the matter as covered in the 2nd Respondent's letter dated 29th August 2008 amounts to double jeopardy, is unfair, unlawful and void for all purposes;
- i. Costs of the Claim;
- j. Interest on the monetary claims; and
- k. Any other relief the Court may deem fit to grant.

19. The Respondents as indicated at the outset did not appear at the hearing and called no evidence in response to the Claim. They filed a Statement of Reply on 31st October 2012 which the Claimant submits contained bare denials. It is the position of the Respondents that the Claimant engaged in gross misconduct and the Respondents were entitled to take disciplinary action against the Claimant, including retirement under the 50 year Rule.

The Court Finds and Awards:-

20. There are 4 ways, excluding death, in which a Public Servant in Kenya could in 2008/ 2009 exit employment. These are summarized from the Service Commissions Act Cap 185 the Laws of Kenya, in particular the various Service Regulations made under the Act. These ways of exit are:-

- a. Resignation;
- b. Termination in accordance with the letter of termination;
- c. Retirements, which may be split into-
 - On attainment of the age of 60 years, which until the circular OP. CBA. 2/7A issued by then Head of the Kenyan Public Service Ambassador Francis Muthaura on 20th March 2009, was 55 years.
 - Under the 50 year rule.
 - On abolition or re-organization of office.
 - On public interest.
 - On medical grounds.

d] Dismissal.

21. The Regulations are not an exhaustive bible governing the terms of exit for public servants from employment. The preamble to the Public Service Code of Regulations 2006, cautions that the Regulations are summary of the significant regulations incorporating provisions of relevant legislations which are applicable on matters of employment and all human resources management issues. These Regulations must be read with the relevant Acts of Parliament in particular the Employment Act 2007, which is foundational employment legislation in Kenya.

23. The facts in this dispute are largely not contested, the Respondents justification in ending the Claimant's contract of employment, being that the Claimant was engaged in acts of gross misconduct, for which the Respondents were entitled to take punitive measures, including retiring the Claimant under the 50 year Rule.

24. The issues raised by the Claimant are in large answered by resolving the question whether the Claimant was engaged in acts of gross misconduct, and whether the Respondents were entitled to take any punitive measure including retiring the Claimant under the 50 year Rule.

25. The 50 year Rule falls under Regulation 21 [1] of the Public Service Code of Regulations 2006. The Regulation states that on attaining the age of 50 years, an Officer may *elect* to retire anytime thereafter or *may be required to retire any time by the Government without assigning any cause*, in accordance with Section [9][1][iv] of the Pensions Act Cap 189 the Laws of Kenya, and Regulation 18 of the Public Service Commission of Kenya. The Officer should give to the Government 2 months' written notice of his intention to retire under the 50 year Rule, and conversely the Government is required to give the Officer a similar notice if it initiates retirement.

26. Where the Officer has completed 10 years of service, he is eligible to be paid pension should he elect to retire or is retired by the Government under this Rule. If he has served for less than 10 years, he is only eligible for gratuity in accordance with Regulation 5 of the Pensions Regulations.

27. The procedure in the implementation of the 50 year Rule is set out under Regulation 18 of the Public Service Commission of Kenya and Regulation 22 of the Public Service Code of Regulations [Revised 2006]. The procedure is replicated in the Public Service Commission [Police Force] Regulations 2006 and may be reduced to the following: the Authorized Officer shall advise the Public Officer that the Public Officer is being considered for retirement under the 50 year Rule; the Authorized Officer shall ask the Public Officer if he wishes to retire voluntarily or if he wishes to make representations of a personal nature against the compulsory retirement; the Authorized Officer shall then forward such representations together with the Authorized Officer's own observations to the Public Service Commission of Kenya, who shall determine if the Public Officer shall be called upon to retire.

28. Retirement under the 50 year Rule from these Regulations is not meant to be a form of disciplinary punishment. It is not retirement in the interest of the public, or dismissal, which are forms of exit from public service with their own specific regulations.

29. Punishments that result from disciplinary proceedings under the Service Regulations include:-

- Recovery of costs or part costs as a result of breakage caused by default or negligence, provided no cost has been recovered by surcharge action under appropriate financial instructions or regulations;
- Reprimand, including severe reprimand;
- Deferment of increment;
- With-holding of increment;
- Stoppage of increment;
- Reduction of rank or seniority; and
- Dismissal.

30. Retirement in the interest of the public is provided for under Regulation 25[2] and 36 of the Public Service Commission Regulations. It is a form of retirement that is resorted to, where termination cannot be effectuated suitably under other Regulations. It also has its procedural protections. The Authorized Officer must have considered every report in his possession made with regard to the Public Officer. The Authorized Officer must hold the view that it is desirable to retire the Public Officer in the public interest. The Public Officer shall be notified of the intention to retire him in this manner, and availed specified complaints and substance of any report or part thereof which is detrimental to the Officer. He must be given the opportunity to show cause why he should not be retired in the public interest. His representations and the observations of the Authorized Officer shall after this be forwarded by the Authorized Officer to the Public Service Commission, who determines whether the Public Officer shall be retired in the public interest.

31. These Regulations are in tandem with the Employment Act 2007, which requires Employers to observe certain procedural protections and to attempt substantive justification in all forms of termination. As observed at paragraph 21 above, the Regulations are not exclusive and exhaustive terms and conditions of Employment in public service; they must be read with the relevant Acts of Parliament and in particular the Employment Act 2007. In this aspect Regulation 21 [1] of the Public Service Code of Regulations 2006 must be read in consistence with the Employment Act 2007, with the effect that it would not be proper to retire any Public Servant under the 50 year Rule without assigning reason. To allow any Employer the right to retire Employees in any manner without assigning reason, would return employment relationships back to the era when employment was at the will of an Employer; when an Employer could terminate the contract of employment for any or no reason, arbitrarily, peremptorily, and inconsistently.

32. The Claimant was recruited in the Police Force on 1st January 1978. He rose over the years, ascending to the rank of Superintendent of Police. He left employment 10th September 2009. The process leading to his exit was characterized by the Employer as a disciplinary process. There were various allegations laid out against the Claimant. The disciplinary process was set in motion by the letter of Commandant Joseph Ole Tito dated 8th July 2008. The Claimant was alleged to have misused fuel allocated to his Division through imprudent schedule of police operations in various locations in the Rift Valley, Western and Nyanza Regions. He replied on 12th July 2008 explaining himself, in detail. The stage was set for a disciplinary process that would culminate in the absolving of the Claimant, or in finding him culpable with the resultant forms of punishments listed under paragraph 29 being administered. This did not happen.

33. Instead, ole Tito wrote to the Claimant a warning letter dated 18th July 2008. This, assuming the Employer had established that the accusations against the Claimant were true, should have served as a punishment. Once ole Tito wrote to the Claimant that "*I warn you in no uncertain terms that you should change your attitude towards senior officers,*" the matter should have rested there. This should have been the culmination of the disciplinary process. The letter was essentially a punishment in form of a severe reprimand as discussed in paragraph 29 above.

34. Surprisingly, ole Tito escalated the issue to the Office of the Commissioner of Police under whose delegated authority he had initiated and concluded the disciplinary process. The Claimant was asked to once again show cause why disciplinary action should not be taken against him, over the same accusations leveled earlier by ole Tito. The fresh letter calling for explanation is dated 29th August 2008, barely a month after ole Tito gave the Claimant a severe reprimand. The Claimant wrote his detailed explanation on 6th September 2008.

35. This restarted disciplinary process did not proceed along the Regulations governing disciplinary process and dismissal in the public service. The Commissioner of Police did not communicate any disciplinary sanction arising from the accusations against the Claimant. On 28th August 2009, the Commissioner wrote to the Claimant advising that the Public Service Commission of Kenya had decided to retire the Claimant early, under the 50 year Rule. Retirement was said to run from 1st October 2006, long before the Claimant was even firstly asked to show cause by ole Tito.

36. This sudden shift in the process obviously did not conform to the employment and labour standards established on termination of employment, through the Service Commission Regulations. It went against all the basic standards of employment termination given under the Employment Act 2007.

37. The Claimant was subjected to a disciplinary process that ended in a sanction. The process was repeated, with the same accusations, and no sanction made. The disciplinary process was then changed into a retirement under 50 year Rule. The procedural protections contained in the Regulations governing this form of retirement were cast to the swines. He was not advised that his compulsory retirement was under consideration. No representations with respect to retirement under the 50 year Rule were asked of him to make. It was not shown that any such representations were forwarded with the observations of the Authorized Officer, to the Public Service Commission of Kenya. He had not elected to retire voluntarily. There is no material to show that the Claimant was in fact notified that the process had now changed, and in consideration was retirement under the 50 year Rule, not a disciplinary process. He was not made aware of any reference to the Public Service Commission of Kenya. He just received a letter saying the PSC had determined he is retired under the 50 year Rule. This is a case where an Officer was made to leave employment prematurely, arbitrarily, peremptorily, and unfairly.

38. The Claimant went on working up to 10th September 2009. He wrote an application for review of the decision of the PSC on 1st September 2009. The PSC disallowed the application, but changed the retirement date from 1st October 2006 arbitrarily given in the first decision, to 1st October 2008. No explanation was made why the first date was given as 1st October 2006, or indeed the second given as 1st October 2008. The Claimant went on serving until handover on 10th September 2009. This conduct by a Public Employer in a critical sector of the security industry is perplexing.

39. The Claimant had a clean employment record in his 31 years of service. This was acknowledged none other than the Commissioner of the Police in the letter to the Claimant to show cause dated 29th August 2008. He states, ‘...since your enlistment, you have not registered any disciplinary conviction. You have earned no recommendation. You rose through the ranks attaining the rank of Superintendent of Police.’ The Claimant expected to advance his career; instead all he achieved at the end of the rainbow was a broken pot. His career was derailed.

40. The Court is convinced termination of his contract of employment through the retirement under the 50 year Rule, was an unfair termination under the Service Commission Regulations and Code, as well as the Employment Act 2007. He is entitled to compensation.

41. What other remedies does he merit? He states, and there was no evidence to contradict him from the Respondent, that he was not paid his salary from 1st October 2008 to the time he handed over on 10th September 2009. ***The Claimant is granted his arrears of salary over this period, at the rate of Kshs. 56,880 per month for 11 months and 10 days, amounting to Kshs. 647, 556.*** There was adequate evidence from the Claimant that he did not go on leave for a period of 88 days in 2008 to 2009, owing to lack of adequate and suitable staff to relieve him while on leave. No leave records contradicting the Claimant were availed by the Respondent. ***He is granted leave pay of 88 days at Kshs. 266,558.*** He seeks ***a declaration that his retirement under the 50 year Rule was arbitrarily, unfairly and/or unlawfully applied. The Court has found so, and grants a declaration in those terms.*** Other declaratory orders sought in relation to the warning letter; statements made about the Claimant by the 4th and 5th Respondents; and declaration that purported disciplinary action taken against the Claimant was unfair, unlawful and void, are not necessary orders that this Court should grant. They are peripheral to the main prayers and are taken care of by the declaration that retirement was unfair and unlawful. The Court has made findings which redress the grievances which the additional declarations are intended to redress. There shall be no declaration in terms of paragraph 6, 7 and 8 of the Prayers. There were no records from the Claimant’s Pension Scheme, or the Respondents’ Records, to substantiate the claim that Kshs. 682,560 was unlawfully deducted from the Claimant’s Pension. This prayer is disallowed.

41. A fair and equitable compensatory award, should satisfy the Claimant’s deprivation for the 10 years he expected to go on working. This Court does not think that the premature termination, even upon

finding of the Respondent to have acted unfairly, entitles the Claimant to salary he expected to earn over the years taken away from him before the mandatory age of retirement. Employment relationships are not commercial contracts, and the Court must strive to achieve the delicate balance between the need for our national economic development, and the protection of the dignity and economic well-being of an individual employee. The law presumes an employee is paid for actual work rendered, and irrespective of the manner of exit, the Claimant would not have rendered any service to the Police Force for 10 years, so as to merit the entire salary for the 10 years he feels were taken away from him. The law applicable in commercial contracts on recovery of damages is qualified in employment relationship by the special nature of the employment relationship.

42. The principle of a fair go all round requires the Court to strike a proper balance between the need for economic development and the concerns of social justice. It is a principle frequently invoked in arbitral interventions to correct outcomes from the natural higgling of the marketplace. In other words, the fundamental consideration in remedying employment wrongs is that the Court should grant reliefs which are fair and equitable.

43. In arriving at compensatory award which is fair and equitable the Court is guided by the following principles, some of which are captured under Section 49 [4] as read with Section 50 of the Employment Act 2007:-

- a. The nature and seriousness of the employment violation;
- b. Circumstances in which the infringement took place;
- c. The Employer's and the Employee's conduct, before, during and after termination;
- d. Duty of the Employee to mitigate loss;
- e. Length of service of the Employee in employment;
- f. Other terminal dues paid or payable to the Employee on termination; and
- g. The expectation of the Employee on the length of the time he would have continued working, but for the wrongful decision of the Employer.

44. The Police Force is in the public service sector. It serves in the domain of national security. It is critical to the stability of the Country. The Court has taken judicial notice of the current outcry, about the unmanageable public wage bill, experienced in the public sector. It is not prudent that an a Public Officer who was retired unfairly, should be paid the entire salary he would have received up to the date he turns 60 years. He is not contributing any labour to the public service any more. Anticipated salary for a period of 10 years would not amount to fair remuneration, as no work will have been performed by the Claimant in those years. Fair remuneration is premised on fair work. To grant the prayer for 10 years' salary would result in endorsement of the concept of unjust enrichment. Such an Award would go against the protection and promotion of fair dealing between labour and capital and would be in transgression of the principle of a fair go all round. The Claimant had a duty to mitigate his loss after retirement. Furthermore he appeared to egg the Commandant on, if somewhat unwittingly, in the process of the unfair termination by alluding to some principles he called 'Lucifer's Principles.' What would the Police Commandant make of such cryptic references? The Claimant's conduct and choice of words may have lit the powder keg, and led the Commandant to resolve that the Claimant had to leave employment by whatever means.

45. All these factors taken into account, the Court finds that there is no good ground to grant anticipatory salary for the remainder 10 years, **but instead grants the Claimant 10 months' gross salary at Kshs. 568,880 in compensation for unfair termination. The Court also grants him 2 months' salary in lieu of notice of retirement under the 50 year Rule, at Kshs. 113,760.** Lastly the Court does not think that the 4th and 5th Respondents, who are Officers within the Police Force, should have been named as parties to the Claim. The Claimant was a Public Officer, employed by the Public Service Commission, and

anything done or said by the 4th and 5th Respondent was in their capacities as Employees in the Force, with delegated authority. In the presence of the substantive Employer, there is no reason to pursue the 4th and 5th Respondents. In sum-:

- a. ***The 4th and 5th Respondents' names are struck off the record;***
- b. ***It is declared the Claimant's retirement under the 50 year Rule was arbitrarily, unfairly and unlawfully applied to the Claimant;***
- c. ***The Respondents shall pay to the Claimant 10 months' salary in compensation, at Kshs. 568,880;***
- d. ***The Respondents shall pay to the Claimant 2 months' salary in lieu of notice of retirement under the 50 year Rule, at Kshs. 113,760;***
- e. ***The Respondents shall pay to the Claimant annual leave pay of 88 days at Kshs. 266,588;***
- f. ***The Respondents shall pay the Claimant arrears of salary for the period 1st October 2008 to 10th September 2009 at Kshs. 647,556;***
- g. ***The total sum of Kshs 1,596,784, shall be paid by the Respondents to the Claimant within 45 days of the delivery of this Award; and***
- h. ***Other prayers are disallowed.***

Dated and delivered at Nairobi this 14th day of February 2014

James Rika

Judge