



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 245 OF 2013

JAMES MWANGI KIRANGATHI

CLAIMANT

v

KENYA MARINE & FISHERIES RESEARCH INSTITUTE

RESPONDENT

JUDGMENT

1. James Mwangi Kirangathi (Claimant) opted for a Voluntary Early Retirement from Kenya Marine & Fisheries Research Institute (Respondent) in 2010. He had initially been employed as a guard.
2. On retirement, the Claimant was paid Kshs 594,772/- as early retirement benefits and the Respondent retained Kshs 258,334/- on account of Pay as You Earn/ income tax.
3. The Claimant was not amused and on 6 August 2013 he lodged a Memorandum of Claim against the Respondent seeking Kshs 177,658/30 retained for purposes of income tax (in an Amended Memorandum of Claim filed on 27 September 2013 the amount was revised to Kshs 258,334/30).
4. The Respondent after service filed a Memorandum of Reply on 13 September 2013 (Respondent opted not to amend the Reply).
5. On 19 June 2014 the parties agreed to have the Cause determined on the basis of pleadings and submissions. The Claimant filed his submissions on 2 July 2014 while the Respondent's submissions were filed on 21 July 2014. The submissions were highlighted on 21 July 2014.

Claimant's case

6. According to the Claimant, he was entitled to Kshs 842,208/- on voluntary early retirement but he was paid Kshs 594,772/-. The Claimant's case is that the Respondent unlawfully retained Kshs 258,334/30 on account of Pay As You Earn.
7. The Claimant relied on the cases of *Patrick Nyoro Njuguna v East African Portland Cement* (2014) eKLR and *Timothy Manyara & 144 others v Pyrethrum Board of Kenya* (2013) eKLR to urge that he was entitled to income tax exemption on payment of benefits on early voluntary retirement.
8. In submissions, the Claimant also urged that he was entitled to Kshs 80,684/- on account of salary arrears which was not included in the lump sum paid to him.

Respondent's case

9. The Respondent's case is that the Claimant was one out of 11 employees who opted for Voluntary Early Retirement in 2010 and that it paid the Claimant full retirement benefits but retained the Pay As You Earn portion in accordance with the applicable law.
10. The Respondent submitted that it had made an application for exemption of the retirement benefits from Pay As You Earn but had not got the requisite exemption (letters seeking exemption to the Ministry of Finance and other correspondence in this regard were exhibited).
11. According to the Respondent, by the time of filing the Cause and hearing, exemption had not been granted and it was still pursuing the exemption.

Evaluation

12. None of the parties made any reference to the applicable statutory regime on the levying of taxes on income or exemption thereof. In this regard the parties did not do what is expected of counsel in assisting the Court to determine the issues in contestation in a fair manner.
13. But the primary statute regarding payment of income tax is the Income Tax Act. A reading of sections 3, 5, 13, 35 of the Income Tax Act and the first schedule thereto leave no doubt that payments made to an employee on retirement (whether voluntary or not) is subject to income tax unless and until an exemption has been gazetted and laid before the National Assembly).
14. The Claimant did not suggest that an exemption had been granted or provide the statutory anchorage for his claim and on this score his claim is both premature and lacks merit (the Respondent produced correspondence that it was still pursuing the grant of exemption).
15. But the Court needs to briefly discuss a few authorities cited by the parties.
16. The case of *Patrick Nyoro Njuguna v East African Portland Cement Ltd* (2014) is not applicable considering the facts of the present Cause. It is clear from the *Nyoro* decision that the Minister for Finance had granted tax exemption therein through Legal Notice No. 178 of 5 November 2010.
17. The case of *Timothy Manyara & 144 others v Pyrethrum Board of Kenya* (2013) eKLR is also distinguishable from the instant claim. The decision itself states that the parties did not dispute that the *government offered tax exemption in cases of redundancy such as the one under which the claimants were terminated* after which statement the Court made a finding that there is *no dispute that there existed a general Government policy that public officers such as the claimants subjected to redundancy were entitled to tax exemption*.
18. In my considered view the *Manyara* decision made a sweeping generalization and was made per incuriam regarding tax exemption question. The general policy and which has statutory foundation is that retirement benefits are subject to tax unless exemption is granted.
19. Furthermore, a government policy is a matter of evidence and the Claimant here did not show or prove the existence of a government policy to generally exempt early retirement benefits from income tax. In any case, government policy cannot supersede the express provisions of a statute.
20. The Claimant also sought Kshs 80,684/- as salary arrears. The claim was grounded on a letter dated 8 January 2009 from the Union of National Research & Allied Institutes Staff of Kenya.
21. In my view the letter cannot suffice to ground the claim as sought and this head must fail for lack of proof.

Conclusion and Orders

22. In light of the above discussion, this claim must fail for being premature and lacking merit. The Court orders that the Amended Memorandum of Claim (and Memorandum of Claim) be dismissed with no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 9th day of September 2014.

Radido Stephen

Judge

Appearances

For Claimant Ms. Mutuku instructed by Lamanya Katee & Associates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers