



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 227 OF 2013

(Originally Nairobi Cause No. 2259 of 2012)

JACINTA KIBET

CLAIMANT

V

WEST POKOT COUNTY(formerly County Council of Pokot)

thru its County Clerk

RESPONDENT

JUDGMENT

1. Jacinta Kibet (Claimant) was employed by the County Council of Pokot (Respondent) on 22 February 1972 as a typist.
2. On 22 January 2007, the Respondent informed the Claimant that she was being retired as of the date of the letter because the Principal Registrar of Persons had confirmed that she was born on 15 February 1949. The retirement letter also informed the Claimant that she had been illegally paid for 2 years.
3. The Claimant was not happy with the turn of events and it appears a trade dispute was reported to the Minister for Labour. The parties were unable to reach an agreement hence the Claimant filed these proceedings.
4. The initial Statement of Claim was against the *County Council of Pokot* but the Claimant was allowed to amend the Statement of Claim to bring on board *West Pokot County* as the Respondent. The Court is uncertain as to whether the entity called *West Pokot County*, and not County Government of West Pokot or one of its organs should have been the proper Respondent, but because the point was not taken up by the parties, nothing turns on the issue.
5. The Claimant's evidence and part of the Respondent's witness testimony was taken before Ongaya J on 14 May 2014, while I took the evidence of the Respondent's second witness on 7 October 2014.

Claimant's case

6. The Claimant's case is that the retirement in 2007 was forceful, malicious, without notice, unjustifiable, premature and unlawful and contrary to the Provisions of the Employment Act, 2007.
7. In the particulars of malice, the Claimant pleaded that failure to give notice of intended retirement, failure to use proper legal process/procedures, failing to pay lawful dues, failing to seek a resolution of the County Council of Pokot in the premature retirement and acting in defiance of the Council's resolution under Min No. FS/GP-11/2005 all pointed to malice.

8. The Claimant testified. She stated that on employment in 1972 she was 18 years old and she submitted all her documents to the Respondent and also filled a personal file.

9. On 22 January 2007, while in Nairobi on official business, the Respondent caused a retirement letter to be taken to the Claimant's house. She stated she had not yet reached the retirement age of 55 years and that according to her identity card, she was born on 00.00.1954 (original identity card got lost and she got a reissue in 2005).

10. She also stated that the Respondent had details of her biodata and that a Committee of the Council meeting had resolved that her year of birth was 1954, which was adopted by the full Council.

11. The Claimant also testified that according to clause 29 of the Collective Bargaining Agreement between the Association of Local Government Employers and the Kenya Local Government Workers Union, she was entitled to 6 months notice of retirement and that the failure to give notice was malicious. She further stated that the Council's Clerk at the time wanted a relationship with her which she rejected hence the failure to give notice.

12. According to the Claimant, she should have retired around end of November 2010 because she was born on 28 November 1954.

13. In cross examination, the Claimant stated that she got her first identity card in 1978 after filling an application but the initial identity card got lost around 2000. She knew the date of her birth though the identity card she had produced in Court indicated the date of birth as 00.00.1954. The passport showed the date of birth as 18 November 1954.

14. The Claimant further stated that she was not aware of the letter from the Registrar of Persons showing her date of birth as 15 February 1949.

15. The Claimant seeks the reliefs set out in paragraph 6 of the Amended Statement of Claim.

Respondent's case

16. The Respondent filed an Amended Memorandum of Response on 29 November 2013 stating that the Claimant's year of birth was 15 February 1949 and therefore her retirement was due in 2004 and also that she had failed to disclose her correct and true year of birth at time of employment.

17. Further it was pleaded that the Claimant changed her name, identity card and year of birth in 1986.

18. The Respondent denied discriminating against the Claimant or that she is owed any dues. It was urged that instead the Claimant was paid illegally for 2 years.

19. The Respondent called two witnesses. The first witness' evidence was to the effect that the Claimant was properly retired based on information on the records from the Registrar of Persons. The instruction to retire the Claimant came from the Permanent Secretary, Ministry of Local Government.

20. On the issue of notice, the witness testified that it was given only when one was to retire normally at 55 years but in the instant case, the Claimant had worked beyond 55 year and that the resolution of the Council was subject to and could not override the law.

21. In cross examination, the first witness stated that the letter dated 11 January 2007 from the Principal Registrar of Persons advising the Permanent Secretary, Ministry of Local Government was received by the Respondent on 5 February 2008 long after the Claimant had been retired.

22. He further stated that the Claimant was entitled to 6 months notice, and that she was deducted contributions to the Superannuation Fund but there were no records to show the deductions were remitted to the Fund.

23. The Respondent's second witness stated that he was the Clerk to the Council and that he wrote to the Claimant the retirement letter after receiving instructions to do so. The Claimant had passed the retirement age. According to information from the Registrar of Persons, the Claimant was born on 15 February 1949.

24. The witness further stated that the Finance, Staff and General Purposes Committee 201st meeting of 4 October 2005 had resolved to adopt Claimant's year of birth as 1954. The said minutes were adopted by the full Council on its 132nd meeting on 21 December 2005. The retirement letter was not tabled before the Council.

25. But this resolution was before the letter from the Registrar of Persons and that the resolution of the Council could not supersede the records held by the Registrar of Persons.

26. The witness also stated that the Claimant would have been entitled to notice only if she had not passed the retirement age and there was no malice in the retirement.

27. On the contributions to the Superannuation Fund, the witness stated that the deductions were eventually remitted by 2011 and that the statement provided by the Claimant was not official.

28. The witness denied any bad blood or seeking to befriend the Claimant.

29. The Court need to note that an application by the Respondent to call a third witness (Registrar of Persons) was declined by Ongaya J.

Issues for determination

30. Arising from the pleadings, documents filed, evidence and submissions (Claimant filed submissions on 23 October 2014), the issues arising for determination are the applicable law, whether retirement of Claimant was premature and actuated by malice, whether notice of retirement was necessary and appropriate relief

Applicable law

31. The Claimant pleaded that her retirement was effected maliciously and without due regard to her rights under the Employment Act, 2007.

32. The Claimant was retired in January 2007. The Employment Act, 2007 commenced on 2 June 2008 and because there is no provision that its provisions would apply retrospectively, it is not material or applicable to the determination of the instant claim.

33. The statutory framework for employment and labour relations at the material time were the common law, the Employment Act, cap. 226 (repealed), the Trade Disputes Act (repealed) and the contract between the parties.

34. It is not disputed that the Claimant was a member of the Kenya Local Government Workers Union. The Collective Bargaining Agreement between the Union and the Association of Local Government Employers would therefore be applicable. The Claimant produced a copy of the same signed on 24 November 2005.

Whether the retirement was premature and actuated by malice

35. The Claimant testified that she filled a personal form on employment and gave all her details. In 2005, a Committee of the Council met and resolved to adopt 1954 as the Claimant's year of birth. The resolution was adopted by the full Council.

36. The Claimant also produced a copy of her identity card indicating her year of birth as 00.00.1954.

This was a reissue or duplicate identity card after the initial card allegedly got lost.

37. There was confusion as to the Claimant's correct date of birth. The Council met and adopted 1954 as the correct date in 2005.

38. Through a letter dated 22 January 2007, the Respondent informed the Claimant of the decision to retire her. The retirement letter made reference to letters dated 4 January 2007 from the Provincial Local Government Officer, 11 January 2007 from Registrar of Persons to Permanent Secretary, Ministry of Local Government, 12 January 2007 from the Permanent Secretary and 15 January 2007. These letters, though not produced made reference to the Claimant's date of birth and retirement.

39. The Claimant was not part of the exchange of these letters.

40. It appears there was incongruity in the date of birth in respect of the records held by the Registrar of Persons. A copy of the Claimant's identity card issued by the Registrar gave the date of birth as 00.00.1954. A letter written by the Registrar based on records it held later showed the Claimant was born on 15 February 1949.

41. An attempt by the Respondent to call an official from the Registrar of Persons office was unfortunately declined by the Court.

42. Material placed before Court indicates that there were doubts as to the Claimant's age as early as in 2005. The Councils Finance Staff and General Purposes Committee met on 4 October 2005 and resolved to adopt 1954 as the Claimant's year of birth. The resolution was adopted by the Full Council meeting on 21 December 2005.

43. In my view, the Respondent could not run away from this resolution without engaging the Claimant afresh. The Claimant's retirement should have been in 2009.

44. Without deciding on the correct date of birth of the Claimant, and based on the Council's resolution, the Court is satisfied that the Claimant was retired prematurely.

45. To demonstrate malice, it was incumbent upon the Claimant to prove that the Respondent had an intention without justification to commit a wrongful act against her or that the Respondent acted recklessly disregarding her legal rights.

46. The evidence before Court is that the Respondent was acting on the directives from the Permanent Secretary, Ministry of Local Government, who had information from the Registrar of Persons that the Claimant was born in 1949. The Respondent had adopted 1954 as the Claimant's date of birth. It did not bother to consult her on the fresh date of birth from the Registrar of Births. In my view, this was reckless act in disregard to the Claimant's legal rights.

47. On this basis, the Respondent's action was malicious despite the fact that the Respondent was acting on instructions from the Ministry of Local Government.

Whether notice of retirement was necessary

48. The relationship between the parties herein was contractual and also underpinned within a statutory framework. This was recognised in the Collective Bargaining Agreement in place then.

49. Clause 29(1)(a) of the Collective Bargaining Agreement required the Respondent to give 6 months notice of retirement in advance to an officer reaching 55 years. Clause 29(1)(b) of the Agreement on its part provided that where there was a doubt as to an officers age, regard would be had to the date in the identity card together with recommendations of a Medical Officer of Health.

50. Based on the contractual agreement, it was mandatory for the Respondent to give 6 months notice of

retirement to the Claimant. The contention that the notice was applicable only in retirements at 55 years cannot be correct. The Respondent knew that it had adopted 1954 as Claimant's year of birth.

51. The Respondent was bound therefore to give 6 months notice in advance to the Claimant according to the terms of the Collective Bargaining Agreement. It did not and so the retirement was unlawful.

Appropriate relief

Reinstatement

52. The Claimant, though pleading reinstatement did not express any wishes as to reinstatement. The Claimant is now past the retirement age. Nearly ten years have elapsed since the *retirement*. In the view of the Court it would not be practicable to order reinstatement.

Compensation for premature and unlawful retirement

53. The Court has reached a conclusion the retirement was unlawful. The Claimant seeks compensation of 12 months' salary for wrongful and premature retirement. The retirement was in January 2007.

54. The remedies for unlawful/wrongful terminations are now governed by the Employment Act, 2007. At the time of the retirement of the Claimant in 2007, there was a different statutory framework.

55. The Claimant has sought compensation for premature and unlawful retirement but has not demonstrated whether compensation was one of the available reliefs at the time.

56. An examination of the common law and jurisprudence on unlawful terminations generally at the material time do not support the award of compensation for unlawful terminations but damages where malice is shown as observed by the Court of Appeal in *Leonard Odindi v Kenya Ports Authority (2011)* eKLR.

57. The Court of Appeal in *Kenya Ports Authority v Silas Obengele (2008)* eKLR also reviewed the case law and the issue of measure of damages at page 8 of the judgment.

58. The Claimant has proved malice as a basis for her premature retirement. Considering the principles identified in the two authorities, the Court would award the Claimant not compensation but damages equivalent to 6 months wages, assessed at Kshs 249,878/-.

Payment of 6 months' salary in lieu of Notice

59. The Collective Bargaining Agreement provided for 6 months advance notice of retirement. No notice was given. The reason given by the Respondent why notice was not applicable has been rejected.

60. On the basis of the contractual term on notice, the Court finds that the Claimant is entitled to 6 months salary in lieu of notice. The amount was pleaded as Kshs 249,878/-.

Payment of 5 years of service to retirement

61. The Claimant under this head of claim sought Kshs 2,298,700/-, this being the monthly wage multiplied with 12 months and 5 years. In submissions, the Claimant sought what she would have earned upto 2014, because the retirement age had been increased to 60 years.

62. The Claimant sought umbrage in two authorities (third authority was not annexed to the submissions). The first case is *James Omwoyo Nyangau v Heritage Insurance Company Ltd (2014)*. But this authority cannot assist the Claimant. Rika J. observed while rejecting the salaries the Claimant would have earned upto retirement thus

He is not entitled to anticipatory salaries for the period of 22 years. To grant damages based on the sanguine prospects of continued service would be injudicious... The Claimant was instead awarded damages.

63. The second case Nakuru Cause No. 567 of 2012, *Silas Rukungu Karanja v Teachers Service Commission*. I have keenly perused this authority. The Court awarded Mr. Karanja 12 months gross wages on account of unfair termination (page 33), Kshs 1,000,000/- on account of Respondent's failure to implement statutory provisions of the Persons with Disabilities Act, 2007 on retirement age for persons leaving with disability and a further Kshs 1,000,000/- on account of discrimination on account of disability. The Court appears not to have directly addressed the claim for the 16 months Mr. Karanja did not work after retirement (he was subsequently engaged on contract). The Karanja decision, in my view turned on a particular statutory framework and is distinguishable from the instant claim.

64. This Court has also extensively discussed the issue of lost earnings in *Mary Mutanu Mwendwa v Ayuda Ninos de Africa-Kenya (Anidan K)* (2013) eKLR, and based on the principles discussed in the *Leonard Odindi and Obengele (supra)*, the Court would decline this relief in lieu of the damages already awarded.

Leave allowance from 2007 to 2012

65. Similarly, the Claimant sought Kshs 208,225/- being the leave allowance she would have got had she retired in 2012 at the rate of monthly salary for the 5 remaining years to retirement.

66. Clause 22 of the Collective Bargaining Agreement provided for leave allowance for officers proceeding on annual leave. What the Claimant is seeking is anticipated leave allowance had she served until 2012. The Claimant did not lay any contractual or statutory foundation for this head of claim.

67. In *Leonard Odindi decision (supra)*, the Court of Appeal in addressing a similar type of head of claim observed that

*A claim of house allowance, medical and other allowances are claims which would best be made by serving employees. These are payments made, as this Court stated in the case of **Kenya Ports Authority v Silas Obengele Civil Appeal No. 38 of 2005** to serving employees to enable them perform their work more conveniently and more efficiently.*

68. Further, it was not demonstrated that this was a remunerative allowance and the Court declines to grant this relief.

Refund of monies deducted and not remitted to the Superannuation Fund

69. Under this head, the Claimant sought a total of Kshs 246,243/-. The evidence tendered by the Respondent in Court was that though initially there was a problem with remitting the deductions to the Fund, all outstanding deductions were remitted by 2011.

70. The Claimant on her part annexed to the Memorandum of Claim, a Schedule purportedly showing deductions/contributions not sent to the Superannuation Fund. The said schedules were not signed.

71. It is not clear to the Court why none of the parties show it fit to simply get a statement from the Fund and produce the same in Court.

72. On the basis of evidence and material placed before Court, the Court is unable to determine whether the Claimant is entitled to the refunds.

Salary arrears of Kshs 1,105,683/-

73. The Claimant also sought Kshs 1,105,683/- on account of salary arrears from 31 October 2004 to

October 2006. A Tabulation was annexed to the Statement of Claim.

74. In the written submissions, the claim was tabulated as Kshs 3,901,412/90. No evidence was tendered in Court to support the plea for the salary arrears. It is also not clear how this is different from the claim for 5 years service to retirement. This head of claim is declined.

Conclusion and Orders

75. The Court finds and holds that the retirement of the Claimant was premature and unlawful and awards her and orders the Respondent to pay her

(i) 6 months salary in lieu of Notice	Kshs 249,878/-
(ii) 6 months wages as damages for unlawful retirement	Kshs 249,878/-
TOTAL	Kshs 499,756/-

76. The reliefs for reinstatement, compensation for premature and unlawful retirement, *payment of 5 years of service to retirement, leave allowance from 2007 to 2012 and refund of monies deducted and not remitted to the Superannuation Fund and salary arrears are dismissed.*

77. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 31st day of October 2014.

Radido Stephen

Judge

Appearances

For Claimant Ms. Guserwa instructed by J.A. Guserwa & Co. Advocates

For Respondent Mr. Barongo instructed by Barongo Ombasa & Co. Advocates