



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA CAUSE NO. 1625 OF 2011

MARY W. NDIRANGU.....**CLAIMANT**

VS

THE BOARD OF TRUSTEE

NATIONAL SOCIAL SECURITY FUND.....**RESPONDENT**

RULING

1. The matter was filed under certificate of Urgency on 26th September

2011 and after a series of interlocutory applications was finally set down for hearing on a number of occasions but the hearings did not take off until 27th October 2012 before this Court. The appearances were as follows: Mr. Koceyo for Claimant and Mr. Okeche for Respondent. Mr. Koceyo called the Claimant Mary Wambui Ndirangu. She testified as follows : The Respondent was my employer. I was employed in July 1990 as a Senior Accountant. I was suspended as Internal Audit Manager in August 2011. It was allegedly done in 2012 after a court case for neglect of duty for 2 years. The case was 15/2010 and I was accused No. 9. The only count I faced was count seven. The case is still pending. I was charged with the offence of neglect of official duty between January 2006 and 2008 failing to audit the Fund's Investment Department leading to a loss of 1.6 billion through irregular payments. The case is still ongoing. I have pleaded not guilty. I was suspended from duty on 9th April 2010. The letter is attached and is dated 13th April 2010. The suspension is by my employer on account of the case. I was put on half salary until further notice. The same is contained in paragraph 2 of the letter. I was not paid the half salary. The salary was stopped on 31st August 2011. I obtained a court order on 24th January 2012 to compel the NSSF to pay the half salary – Justice Kosgei made orders in this case. In spite of the orders of the Judge for payment I have not received payment. I have not been terminated. I am still on suspension as the case is ongoing. While on suspension I filed this case because Respondent wanted to terminate me yet the employer is the one that took me to court. I was going to collect payslip on 19th September 2011 when I was advised I had been removed from payroll. I was on suspension as I was not to leave duty station until end of the case. Monthly I used to come to collect payslip. When I came to collect payslip I was told I had been removed from payroll from 31st August 2011. Since there was no communication to that effect I asked for document that removed me from payroll. I was given a copy or pay change advice by the salaries office which indicated that I had been retired. It is marked MWN6 and the document is dated 9th September 2011. The document states I have been retired under 50 year rule. There was no prior letter before the PCA issued. I got a photocopy when I went to pick payslip. The Staff Employment Guideline is what has the 50 year rule. It is produced in court as an exhibit. At page 46 of the manual the 50 year rule is stated. The Notice is given to officers on attaining 50 years if the employer is terminating or if the employee wishes to terminate when getting to 50 years. I was 56 years old as of the time I was removed from payroll. I have attached my ID as last exhibit. I was not notified nor was I called to

be asked. It was not right to be retired. It was unlawful. I pray for an order restraining the employer from terminating my services until the case 15 of 2010 is determined. The half salary is to be paid normally until the case is concluded. I am also asking that the employer meets the costs of the case.

2. In Cross Examination by Mr. Okeche she stated that she worked for NSSF and was first appointed on 12th July 1990. The terms of employment were permanent and pensionable after confirmation. She stated that she accepted the terms of employment per Appendix 1 of the Respondent and was aware of the terms and conditions of Staff Regulations as per page 3 of the letter. She stated that her salary was stopped with effect from 31st August 2011. She was not earning full salary but half salary plus allowances. She was earning half salary because she was interdicted. She was interdicted after being taken to court on 9th April 2010. She was charged in a case investigated by KACC. Her understanding is that up until now she is under suspension. She stated she was aware of the "50 Year Rule". The Rule is under the Staff Employment and Guideline Policy document at clause 5:8. She agreed that there is early retirement in the staff pension. The early retirement is before one reaches the age of 55 years. By August 2011 she was already about 56 years. At present she is about 57 years. She stated she was not retired at 55 years as the retirement policy was changed by government to 60 years. The early retirement age was also changed. It is from 55. Between 50 and 55 the employee can opt to retire. She stated should not have been retired as the other case is running. She stated that it is a double punishment if she is terminated as if she has been convicted. She stated that she has been auditing since 2003 and used to audit personnel procedures. She stated she was aware of other officers of NSSF who were retired on attaining 50 years of age. She stated that if she was to be retired she would have been retired under the 55 year rule. On being referred to Staff Rules

5.8(a) she stated that at 55 the retirement is automatic. Using the rule

50 does not apply since 60 was retirement age.

3. In Re-Examination by Mr. Koceyo she stated that the amount of 2.1 million was not paid. The amount indicated to have been paid were never paid. She stated that when she filed the case there was no issue of half salary payment, the only case at the time was termination. When she came to court the salary was stopped and she sought to get the half salary. She stated that she has 2 issues in Court - half salary and termination. That marked the end of the case for the Claimant.

4. Mr. Okeche called Mr. Wilson Gachoni the Employee Relations Manager NSSF. He testified as follows:- I am conversant with the matter before court. Mary Wambui Ndirangu was terminated. She was served with letter of retirement under 50 year rule. Clause 58. The claimant was employed in 1990. She rose up to level of audit manager by the time she left the organization. She is retired by virtue of the 50 year Rule. Refer to Appendix 2 of Respondent memorandum. The payment was to be half salary. She was paid. Appendix 3 is the letter issued to Mary. The original of the letter was by one of the officers to the Claimant on

20th October 2011. The letter was accepted. There are dues payable to Mary. The amount was calculated and the Claimant declined to accept the sum. The sum has not been collected. Appendix 3(a) is the payment of final dues. The signature under Approved is that of Alex Kasongo the Chief Executive Officer of Respondent. The approval means the money is payable to her. Appendix 5 – 5.8 is the Staff Regulation. Paragraph 5:8(a) – the persons above 50 can be retired under this rule. The years of retirement was raised to 60 by the Head of Public Service. The age 56 is below 60 so person can be retired. There are other cases since 1999 when we recorded the first case of a Retiree under this clause Boaz Makoinigo. There are managers at her level who retired at senior management level. There are many who were retired under this rule. It is not strange to be retired under early retirement scheme.

5. In Cross Exam by Mr. Koceyo, the witness stated that there is a difference in clause 5:8 (a) and (c). On paragraph (c) the Managing Trustee may call upon the employee to retire (a)

is if the employee

wants to retire. She was called by employer to retire. She could have fallen under both. Mary was called upon to retire by employer. That would be under (c). The clause requires one to be given opportunity to give representation. He stated that he was aware of her being advised but did not carry the letter advising her of the retirement – under 50 year rule. In reference to Appendix 3, the witness stated that the Claimant was to make and appeal if she was unhappy. There is no invitation for her to make representation prior to retirement. He stated that she was beyond age 50. He stated that the letter was not irregular and that the letter was in compliance. There were others who retired under 50 year rule above 50 years. He stated that half salary was stopped at that time the Claimant was retired on 50 year rule. The last pay of half salary is August 2011 as per the letter. The half salary was stopped before the service of the letter on 21st October 2011. He admitted that was unlawful. He stated that suspension letter of 13th April 2010 was because of corruption case.

6. In Re-Examination by Mr. Okeche the witness stated that Payment of half salary was until end of 31st August 2011. Salary is paid in arrears, not in advance. The due was only up to August. One can be paid 6 months in lieu of notice. Calculation included 6 months in lieu of notice per Appendix 3 3(a).

7. Mr. Okeche wanted to call one more witness who delivered the letter and prayed for an adjournment to a date when the Court could hear the witness. Mr. Koceyo conceded that the letter had been produced and the witness would only repeat it. He proposed that parties instead submit. Mr. Okeche was in agreement that parties could submit if it is conceded there was a letter delivered. Parties filed submissions and judgment was deferred to today.

8. The issues for determination are two:

a) Wrongful termination

b) whether during suspension the Claimant was entitled to half-pay

9. The provisions of Section 43 of the Employment Act are crystal.

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

10. No reasons were given to the Claimant for the callous termination meted out to her and she only found out about the termination when she went to check on her payslip as she was wont to do periodically. In the premises, the termination amounted to unfair termination in terms of the Employment Act.

11. The Claimant was employed by the Respondent, that is not in dispute.

The Claimant was charged in Criminal Case No. 15 of 2010 where she is the 9th Accused. The only count she faces is Count VII. She is charged with the offence of neglect of official duty between January

2006 and 2008 whereat she is alleged to have failed to audit the Fund's Investment Department leading to a loss of 1.6 billion through irregular payments. She pleaded not guilty. Under the Anti Corruption & Economic Crimes Act, the law under which she was charged, the

Act provides under Section 62(1) that a public officer charged with corruption or economic crime shall be suspended on half pay from date of charge. Allowances are to be paid in full.

12. The salient parts of the Section are as follows:-

62.(1) A public officer who is charged with

corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half

pay shall continue to receive the full amount of any allowances.

(3).....

13. The Claimant was suspended but her half pay was not effected. This is clear breach of the law and as such the Respondent is bound to honour the provisions of law. The Court is minded that the sums due will be required to be calculated by the Respondent from date of the Charge until date of termination. The termination was improperly done as the Rule which was used did not strictly fit the Claimant. Article 50 makes ample provision on presumption of innocence.

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved; (b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence; (d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;.....

14. These rights should not be abridged by the Respondent and to the extent the Respondent seems to have ascribed guilt, the Court deprecates such behaviour. In the premises, the court lifts the termination and places the Claimant on suspension on half pay until termination of the proceedings in the Criminal Case or the attainment of 60 years by the Claimant whichever comes earlier. If the trial Court finds her not guilty she is entitled to her full pay and reinstatement. An accused is presumed innocent until found guilty. The sum of Kshs.

2,100,000/- which was already prepared will also be factored in the

Claimant's dues.

15. The Claimant's pay shall be calculated and paid out within the next 15 days.

It is so ordered.

Dated and delivered in Nairobi on this **15th** day of January 2013

Justice Nzioki wa Makau

Judge