



REPUBLIC OF KENYA
 IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 379 [N] OF 2009

BETWEEN

D.K. NJAGI MARETE

.....
 CLAIMANT

VERSUS

TEACHERS SERVICE

COMMISSION..... RESPONDENT

Rika J

CC. Leah Muthaka

Mrs. Purity Mbabu instructed by P.K. Mbabu & Company Advocates for the Claimant

Mr. George Masese Advocate, instructed by the Federation of Kenya Employers for the Respondent

ISSUE IN DIPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. D.K. Njagi Marete is a Judge of the Industrial Court of Kenya. He became a Judge in July of 2012. Before then, he had filed this Claim against his former Employer the Teachers Service Commission. He served as the Senior Legal Principal Officer. He filed his Statement of Claim way back on 17th July 2009, and an Amended Statement of Claim, on 16th July 2010. The Respondent filed its Statement of Reply on 23rd October 2009 through the Principal Executive Officer of the F.K.E Mrs. Maureen Onyango. Destiny has now placed both Mr. Marete and Mrs. Onyango together, as Judges of the Industrial Court.
2. The Parties Representatives agreed to have the matter considered, and disposed of, on the basis of the pleadings, documents, and submissions on record. This agreement was recorded in Court on 25th August 2010. The matter was mentioned before the trial Judge Charles Chemmutut, on 25th October 2010. The Court advised the Parties Award would be delivered on Notice.
3. There was no Award made by the time Judge Chemmutut left the Court in July of 2012. It is not clear why there was such a delay in determination of the dispute. The matter was finally referred to this Court by the Principal Judge Nderi Nduma on 2nd April 2013. The Advocates now on record for the respective Parties, agreed that this Court proceeds to make a determination, on the strength of the materials before it.

4. There are some points that merit noting from the outset. One, there has been a considerable delay in finalization of the dispute, for which the Court profoundly apologizes to the two Parties. Two, it is not an easy task for any Judge to be called upon to make a decision, in a matter involving a Colleague. This is much more so within the Industrial Court of Kenya, which has only 12 Judges, serving the entire Country. It is a small field, with Officers enjoying a degree of familiarity with one another. The Judges interact all the time, and it would be easy for the issues of bias, or appearance of bias to crop up. Cases such as these ones, can also result in a fallout between the concerned Judges. Judges caught up in such situations must tread carefully, and remind themselves of their Judicial Oath of Office, always dispensing justice fairly and dispassionately. This Court has fervently recited the Judicial Oath of Office, before embarking on this perilous undertaking. Mrs. Mbabu and Mr. Masese also confirmed they know the Claimant is now a Judge of the Industrial Court, and did not have any objection with this Court making the determination. The Claimant himself must be commended. In all private and official interactions with the undersigned, the Claimant has not even momentarily, mentioned this dispute. It would be wrong if the Court disqualified itself, and the matter has to be moved to another Judge in the same Court, who would have similar ethical and moral misgivings, as any other Judge serving the Court would have. The work has to be done, and it is now the unpleasant duty of this Court, to weigh the facts and the law, in the case of D.K. Njagi Marete v. the TSC.

5. The Claimant states he was employed by the Teachers Service Commission, on 25th February 2003, as the Senior Principal Legal Officer. TSC is a body corporate established under the Teachers Service Commission Act, Cap 212 the Laws of Kenya, whose role is to regulate Public School Teachers. Mr. Justice Marete worked dedicatedly until 2nd February 2009, when he received a letter from the Chief Executive Officer of the Respondent, Mr. Lengoiboni, purporting to retire him on the ground of public interest. There was no warning or notice. The Claimant argues that the decision by the Employer was malicious, unwarranted, against natural justice and in breach of employment law.

6. His record was unblemished. No evidence was given by the Respondent to support retirement of the Claimant on public interest. He was not made aware of any complaints by the Public and other Stakeholders, with respect to the performance of his duties. He was not accorded any opportunity to be heard. Marete had at the time of retirement invested 22 years in Public Service. This long service was without blemish. The action by the Respondent was contrary to the Employment Act 2007, and in breach of the contract of employment.

7. Marete was employed on permanent and pensionable terms. He was due to retire at the age of 60, in line with the Public Service Policy in place. He was 49 years on retirement, and was deprived 11 years of service. On the date of retirement, he earned a gross monthly salary of Kshs. 153,985. His beginning salary was Kshs. 88,423. The incremental credits were testimony to the good work done by Marete over the years. Dismissal of the Claimant was disguised as retirement. The Claimant was entitled to procedural protections under Section 41 of the Employment Act 2007, as well as to valid reason or reasons before termination under Section 43 and 45 of the Act. The Claimant prays for grant of terminal benefits; compensation for unfair termination or in the alternative, damages for breach of the employment contract; costs; interests and any other reliefs the Court may find suitable to grant.

8. The particulars of the Claimant's prayers are as follows:-

- a. Salary and allowances for the remaining 11 years of service at Kshs. $153,985 \times 12 \times 11 =$ Kshs. 20,326,020;
- b. Leave allowance for the remaining 11 years of service at the rate given in the pay slip of Kshs. 10,000 per year = Kshs. 110,000;
- c. Airtime allowance of Kshs. 8,000 per month, for 11 years at Kshs. 1,056,000;
- d. Salary for 2 days worked in February 2009 at Kshs. $153,985 \times 2/28 =$ Kshs. 10,998;
- e. Unpaid and underpaid traveling and accommodation claims amounting to Kshs. 54,475;
- f. Medical allowances at the rate of Kshs. 119,520 for 11 years = Kshs. 1,314,720;
- g. Employer's contribution of 25% of the Claimant's basic salary as pension for 11 years = 3,265,257;
- h. Newspaper allowance at Kshs. 70 per day, for 5 days a week x 11 years = Kshs. 200,200

Sub-Total Kshs.26,337,665

9. Additional prayers include general damages for breach of contract; punitive damages; exemplary damages; and aggravated damages. Compensation for unfair termination is pleaded in the alternative, and without prejudice to the foregoing.

10. Marete relies on the following documents in support of the Claim: letter from the Respondent inviting the Claimant for job interview dated 12th August 2003; Claimant's birth certificate No.E439431; letter of appointment dated 20th November 2003; pay slips for December 2008 and January 2009; letter of retirement; bundle of payment vouchers for traveling and subsistence expenses; bundle of letters of authority for traveling and subsistence; application for imprest forms; and memos in pursuance of traveling and accommodation expenses.

11. He cited a number of Kenya High Court decisions in support of his case, the most persuasive with regard to this dispute, in the view of the Court, being ***Nairobi H.C.C.C No. 3472 of 1994 between George Muguna Mburugu v. the Attorney General and Nairobi H.C.C.C No.1139 of 2002 between Menginya Salim Murgani v. the Kenya Revenue Authority***, both determined by the eminent Scholar and Judge Prof. Jacktone Ojwang.' Marete urges the Court to grant the Claim in terms of his prayers.

12. The Respondent admits it employed the Claimant, as its Senior Principal Legal Officer, on 24th November 2009. It is not disputed the Claimant was retired on public interest. The Respondent gives the date of retirement, in paragraph 1.4 of its Statement of Reply, as 30th January 2009. He was paid all his benefits including pension, notice and outstanding leave in accordance with his terms of employment.

13. His contract was not terminated; he was retired. Retirement is not provided for under any law. The employer sets out the terms upon which the employee may retire. Under the Respondent's Pension Scheme to which the Claimant was a member, there was a provision for discharge of an employee with full benefits. These included Provident Fund benefits. His discharge was regular, and in accordance with his employment terms. He cleared with the Respondent, and was paid all his terminal benefits. His last working day according to his clearance form was 31st January 2009. He was paid a total of Kshs. 1,197,139. Retirement was regular, and did not offend any law, or the terms and conditions of employment.

14. On the specific prayers, the Respondent answers as follows:-

- a. There is no justification to declare retirement of the Claimant unlawful and a nullity. There was no law that was offended. The terms of employment provided for the Claimant to draw full benefits from the Pension Scheme to which he is still a member. He accepted the terminal benefits paid to him. No law provides for declaration of retirement as being illegal.
- b. The Claimant has failed to explain the basis upon which he arrived at a figure of Kshs. 20,326,020 as salary and allowances. His employment came to an end 31st January 2009.
- c. He was paid the leave due to him on retirement. He has not justified through evidence, the claim for annual leave payment of 11 years.
- d. The Claimant has not shown he was entitled to calling cards, or that if entitled, calling cards were not issued to him.
- e. The letter of early retirement was effective 30th January 2009. He cannot claim salary for 2 days worked in February 2009.
- f. No evidence has been submitted to support the Claim for unpaid and underpaid traveling and accommodation allowances.

- g. He was paid all his medical allowance up to the date he ceased working.
- h. He was a member of a Retirement Benefits Scheme, which only allows him to draw his pension, after attaining the age of 50 years. He had not attained that age at the time of coming to Court. The Pension in any event, is not administered by the Respondent, but the Scheme Managers, against whom the Claimant should direct his pension claim.
- i. Marete is not entitled to general damages, as he has not demonstrated breach of the employment contract.
- j. There was no evidence given by the Claimant to support the prayer for punitive damages, exemplary damages, or aggravated damages. He has not shown that such damages are payable in the circumstances of the case.
- k. He does not merit costs and interests. The Respondent urges the Court to reject the entire claim. The Respondent availed to the Court the following documents in support of its position: Teachers Service Commission Clearance Form, duly filled and signed by Marete and various Departmental Heads of the TSC; Payroll Record showing the Claimant received 1 month salary in Notice Pay and was paid for un-used leave of 28 days; Two Cheques paid to Marete through Scheme Managers, Aon Minet Insurance Brokers Life and Pensions Division; and Payment Vouchers accompanying those cheques

The Court Finds and Awards:-

15. The Claimant was employed by the Respondent as its Senior Legal Principal Officer, with effect from 24th November 2003. His letter of employment, signed by the Secretary/ Chief Executive of the TSC, is dated 20th November 2003. His starting salary was Kshs. 31, 385 per month. He was entitled to other monthly allowances which included house rent allowance of Kshs. 40,000 ; medical allowance of Kshs. 3,588 ; non-practicing allowance at Kshs.3,500; responsibility allowance of Kshs. 4,000; transport allowance of Kshs. 2,250; entertainment allowance of Kshs. 1,700; and mobile phone airtime of Kshs. 2,000. His salary was to be increased every year on 1st October. It was not disputed that on 30th January 2009, the Respondent wrote the Claimant a letter, retiring him on public interest, with effect from 1st February 2009. At the time of retirement, the Claimant's monthly basic salary was Kshs. 98,947, while his total earnings stood at Kshs. 153,985.

16.

[a] Is retirement on public interest outside the purview of termination law under the Employment Act 2007 as suggested by the Respondent?

[b] Was the retirement of the Claimant lawful and fair and is he entitled to general damages for breach of contract, punitive damages, exemplary damages, and aggravated damages, or in the alternative compensation for unfair termination?

[c] Is he entitled to the salaries and allowances he would have earned between the age of 49 years and 60 years, a period of 11 years, and to the other claims particularized under paragraph 8 above, totaling Kshs. 26,337,665?

17. Termination of employment as a general term, means, the coming to an end of the contract of employment. The end may come voluntarily, involuntarily or consensually. It comes voluntarily when for instance, the employee resigns; involuntarily when the employee is dismissed or has his position declared redundant; or consensually when a fixed term employment contract lapses. The overall terminology for the end of the employment contract is termination. The means by which that end comes vary. Any form of termination, as discussed by this Court in the ***Industrial Court Cause Number 886 of 2010 between Julie Topirian Njeru v. Kenya Tourist Board***, should always be on objective and demonstrable ground.

18. Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of a disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non performers from the employer's business. As a decision based on public interest results in termination of employment, it would fall within the requirements of Section 43 of the Employment Act 2007. It is the responsibility of the employer to prove the reason or reasons for the retirement.

19. The Respondent had the onus to show objective and demonstrable grounds warranting the retirement of Marete. When a public employer justifies the premature termination of a contract of employment, on the grounds of public interest, such an employer must show its decision is driven by public policy objective, and that the decision taken is legitimate and justifiable. It is not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest has been made. There must be shown valid reasons amounting to public interest, to justify termination. The employer would be expected to show adherence to fair termination procedure, before arriving at the decision. If the allegation against the employee is on non performance, the employer must at the outset advise, counsel, and assist the public servant to mend his ways. In case there is no change, the employer should call for special appraisal. At the end of these procedural steps, the employer would have material with which to confront the employee, and justify retirement on public interest. If public employers are allowed to merely invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the Employment Act 2007 would be meaningless to public servants.

20. The Public Officer Ethics Act 2003 and the codes of conduct applicable to various Commissions, do not contemplate retirement of employees on the bare allusion to public interest. The codes, like the Employment Act, demand that administrative and disciplinary decisions against public servants are fair, legitimate and justifiable. Allegations against the employee, whether they involve public interest or internal workplace infractions, must be investigated, the employee notified of investigations and given adequate opportunity to respond to the allegations.

21. The Respondent did not justify retirement of the Claimant on public interest. It was not shown that there was a complaint against the Claimant, initiated by a member of the public or by the Respondent; that this complaint was investigated; the Claimant given a chance to answer the complaint; and a decision made to retire him based on valid grounds. It appears to this Court that the Claimant was retired for no reason, the facts giving rise to public interest, having never been disclosed to the Claimant, and to this Court in the materials filed herein. Retirement on public interest was an empty termination of employment reason. The Court was not told what common well being, or general welfare of the public, the retirement of Marete was meant to serve.

22. The need for safeguards of the law, in carrying out retirement on public interest, is well-captured in the ***High Court Civil Case No. 3472 of 1994, between Geoffrey Muguna Mburugu v. Attorney General***. In that case the plaintiff was retired on public interest by the Public Service Commission, relying on Regulation No. 40 of the Public Service Regulations. Citing an earlier decision by ***Justice Majid Cockar, in High Court case of Joseph Mulobi v. the Attorney General & Another [Nairobi Law Monthly No. 15 March/ April 1989]***, the High Court concluded that an authorized officer must approach the issue of retirement on public interest with an open mind, and behave in a quasi judicial manner. It is not sufficient for him to decide that a public officer should be retired, and then tell him that he intends to recommend his retirement to the Commission. Although the plaintiff's services were terminated by virtue of Regulation 40 which provided for retirement on public interest, the Courts in both decisions concluded that the circumstances attending to the actions taken against the respective public servants, did not take the cases out the category of any other kind of dismissal. The two decisions were made before the enactment of the Employment Act 2007 and its generous raft of employment protections, during the era of employment at the will of the employer, but notably agree entirely with the Act of 2007 that, the ultimate test on the legality of a decision to retire an employee on public interest is: compliance with the

law, as well as the underlying principle of fair hearing and quasi-judicialism.

23. The letter from Lengoiboni to Marete, simply informed him that the TSC had decided to retire Marete on public interest from 1st February 2009. There are no processes leading to this announcement. The letter does not even cite what Regulation the decision was made under. It is not shown when, why or how the TSC arrived at the decision. There are no complaints, investigations or proceedings of any shade, where the employee was involved. There are no minutes of any meeting, that would assist the Court to understand the mind of the employer, and the trail leading to this peculiar retirement on public interest.

24. Section 43 states that where the employer fails to prove the reason or reasons for termination, the termination shall be deemed to be unfair within the meaning of Section 45 of the Employment Act 2007. The Court is convinced termination of the Claimant's contract of employment through premature retirement, was unfair under Section 43 as read with Section 45, of the Employment Act 2007.

25. What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. ***In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013 e.KLR] and the unreported Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited***, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.

26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.

27. In the ***High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority***, Hon Justice Ojwang' stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of *Maria Kagai Ligaga*, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies. To his credit, the Claimant prays for general damages as an alternative to statutory compensation.

28. ***The effect of this finding is that the following claims, must fail:-***

- a. Salary and allowances for 11 years at Kshs. 20,326,020;

- b. Leave allowance of 11 years at Kshs. 110,000;
- c. Airtime of 11 years at Kshs. 1,056,000;
- d. Medical allowance of 11 years at Kshs. 1,314,720;
- e. Employer's contribution to pension of 11 years at Kshs. 3,265, 251; and
- f. Newspaper allowances for 11 years at Kshs. 200,200.

Total disallowed Kshs. 26, 272, 191

29. This leaves the prayers for unpaid and underpaid traveling and accommodation claims; salary for 2 days worked in February 2009; general damages; punitive damages; exemplary damages; aggravated damages; or in the alternative 12 months' salary in compensation.

30. From the above analysis the Court does not see this as a case where general damages for breach of contract, punitive, exemplary, and aggravated damages, are suitable remedies. Section 49 of the Employment Act affords the Claimant fair, adequate and reasonable remedy of compensatory award as prayed in the alternative to other damages. ***The Claimant is granted compensation for unfair termination, at 12 months' gross salary, calculated at Kshs. 1,847,820.*** The Court has examined the various documents availed by the Claimant in authentication of his travel and accommodation costs. The Claimant had made demands for payment of these costs, after making several journeys during his service, to different Courts in the country, to represent the Respondent. There is no reason to doubt these records. ***The claim for travel and accommodation is allowed at Kshs. 54,475.*** The letter of retirement stated it was effective from 1st February 2009. The Claimant states he received this letter in the afternoon of 2nd February 2009. He worked the 2 days after the letter of 30th January 2009. ***The claim for the salary for 2 days worked in February 2009 looks persuasive and is allowed at Kshs. 10,998.*** The Court finally, is of the view, that each party bears its own costs. There shall be no order on the costs and interest. In sum:-

[a] The respondent shall pay to the Claimant a total sum of Kshs. 1,913,293, as detailed in paragraph 30, within 30 days of the delivery of this Award.

Dated and delivered at Nairobi this 28th day of June 2013

James Rika

Judge