



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

Cause No. 308 of 2011

GEDEON IKENGU NG'ANG'A CLAIMANT

VERSUS

HON. ATTORNEY GENERAL RESPONDENT

JUDGEMENT

This is a claim dated 25th February 2011 that was later amended and dated 28th April 2011, claiming unlawful refusal and failure by the respondent and its officers to pay and or for withholding the claimant's retirement benefits, golden handshake and other benefits due to his early retirement. The respondent defence dated 4th July 2011 admit that indeed the claimant was their employee and that he applied for early retirement but that the same was not approved and that his departure from his employment was desertion of duty and therefore not owed any benefits. The claimant gave his sworn evidence and the respondent made did not call any witness and opted to rely on their pleadings and written submissions.

In the claim it is stated that the claimant was the employee of the Ministry of Health which over time became the Ministry of Medical Services and the Ministry of Public Health and Sanitation herein represented by the respondent the Attorney General. That on 17th January 1979 he was employed on temporary basis as junior Clerical officers where he rose to become the Senior Store man his last station being Kapsabet Hospital in Nandi District as personal Number 79031400. On 15th June 2006 he gave his employer a notice of his intention to retire having worked for over 27 years and following a Civil Service Reform programme, he applied for early retirement. That following this dues and benefits were computed all amounting to Kshs.296, 220.00 but excluded his pension.

That these dues were not paid on alleged desertion of duty and the same remains outstanding unpaid. The claimant therefore prays the court to grant this amount together with his pension, costs and interests of the suit amounts.

In evidence, the claimant gave his sworn statement that he is currently a social worker in the United States of America (USA) was employed by the Ministry of Health with his last place of work being Kapsabet District Hospital as a Senior Store man in 2006. He worked with the Ministry of Health since 1979. On 15th June 2006 he applied for early retirement which application was approved on 14th July 2006 and his dues computed with a net package of Kshs.296, 220.00. this amount included 10,680.00 as pay in lieu of notice for 3 months all being Kshs.32,040.00, service pay at Kshs.5,340 for 27 years served all being 144,180. A handshake of Kshs.120, 000.00 was also added. This computation was done by the Ministry of Health but did not include his pension dues under the scheme which he now claims.

That following these processes, the claimant received a letter indicating the Head of Department had not signed the application in approval and when the Ministerial Reform Committee decided on the case on

17th October 2006 the claimant's application was not considered as there was no recommendation by the Department and thus decided the application be returned for appropriate action, that is for approval. That in the case of the claimant, Dr. Gatiri was his head of Department who had had not signed on his application in approval or stamped his application. Therefore though the claimant's application for retirement was recommended, the same was not approved.

That as the application for retirement was being processed, the claimant took his annual leave which was approved but on 13 August 2006 his salary was stopped and no reasons were given. That the respondents indicated to him that he had deserted duty while his annual leave was to end on 13th September 2006 and that if any salary was to be stopped, the same should have taken effect after this date. That he did his part of filling his applications to the relevant authorities, and he submitted the same to the Ministry of Health headquarters for approval. He was however not paid his dues. That the salary was stopped on 13th August 2006 on the reason that the claimant had left for the USA.

On cross-examination the claimant confirmed that he made his application for retirement while at Kapsabet District Hospital in 2006 June which was done through his head of department in Nakuru who was the responsible officer at the time as he had been moved to Naivasha and then to Kapsabet. That the application was made in 4 copies, one to the District, the other to the permanent secretary, one to Ministry and he kept a copy. That all these copies were fully filled and submitted. That on 13th August 2006 his salary was stopped and the reasons given were not valid as he did not leave the country until later.

The claimant also confirmed that he was on his annual leave and was to report back on 15th September 2006 but on this date he did not report back to work as he had proceeded to the USA. That he took his application letter to Nakuru to the officer who knew him as the Medical Officer of Health in Kapsabet did not know him. That the Ministry did not approve his application for retirement which was returned and when he received this information he had left the country and so was not able to take the application for the required approval.

Upon the court questioning the claimant he confirmed that he only discovered that his application for retirement had not been approved in October 2006 as he was to take it to the necessary personnel department which was done by a co-worker as he was away in the USA. That the Ministry wrote to him that he had absconded duty on 22nd May 2007 and was in breach of Civil Service Code of Regulations.

The respondent on the other hand stated in their defence that the claimant as their employee was on permanent and pensionable terms until 2006 when he requested for early retirement after working for 27 years. That on 3rd July 2006 he applied for unpaid leave on the pretext that his father had become blind and he needed to manage his estate and transport him on a daily basis which leave was granted for 30 days starting 1st August 2006 and ending 11th September 2006 thus he was supposed to be at work on 12th September 2006 but he failed to do so.

That the claimant request for leave was submitted on 3rd July 2006 to the Provincial medical office instead of doing so through his immediate boss and his salary was stopped on 6th September for the reasons that he never waited for his unpaid leave approval from the DPM and later it came to the notice of the respondents that the claimant had left for the USA. In a letter dated 30th October 2006 the respondent gave reasons as to why the Ministerial Service Reform Committee did not approve the claimant's request for early retirement, the reason being the application was not recommended by the head of department. That further to this on 10th May 2004 the claimant was posted to Nakuru where he appealed against the transfer, which was refused but failed to report to work where his salary was stopped and on this basis, the claimant had the habit of absconding duty and failed to follow protocol.

That the claim should be dismissed with costs.

A party to a contract who wishes to terminate that contract is by law allowed to do so subject to giving the other party notice within the prescribed time limitation or payment in lieu of such notice. This is a

practice that form the principles to good labour practices to ensure that there is labour harmony and that services, production or other work related processes do not stall when employees or employers take the liberty to terminate ongoing contracts without warning.

I note from the proceedings herein that the claimant was on various dates from 23rd February 1981, 22nd April 1981, 26th April 1999, 21st April 1994, issued with various communications from the Permanent Secretary Ministry of Health with regard to his appointment as the Clerical officer and Senior Store man which communications also outlined his terms and conditions of service as a civil servant. The letter dated 26th April 1999, did confirm the claimant as a permanent and pensionable employee of the Ministry of Health. This confirmation was done through the Medical Officer for Health, Nakuru and copied to Provincial Medical Officer, Nakuru. Therefore, as a permanent and pensionable public officer, the claimant was bound by the respondents terms and conditions of service and became eligible on retirement for retiring benefits in accordance with the provisions of the pension legislation of the Public Service of Kenya. He became subject to all regulations for officers of the Public Service of Kenya which are reviewed from time to time.

To terminate this contract, each party was required to give notice. This contract could also be terminated upon mutual consent of the parties. The mutual consent seems to have been what was envisaged under the early retirement scheme that the claimant had applied for consideration.

It is not in dispute that on 15th June 2006 the claimant submitted his request for early retirement to the employer (Respondent) which application was received and acknowledged on the same date. On 3rd July 2006 the claimant had also applied for unpaid leave for one year pending his early retirement and proposed that the same do take effect as of 16th September 2006. I also note that the claimant through his application serial No. 0011643 filed application for retirement under re-organisation/abolition of office which is acknowledged by Medical Officer of Health, Nakuru, the District Internal Auditor, Nakuru, but the same remains blank where the Permanent Secretary and Public Service Commission of Kenya should have approved.

On the basis of the application for early retirement, the application for unpaid leave and the application for annual leave, did the claimant give notice to terminate his contract with the respondent?

Was there a termination of the contract between the parties herein by consent?

The first question seem to have been addressed when the claimant stated that due to the ongoing voluntary early retirement process, he opted to take this and hence instead of terminating his contract with the respondents by giving notice, he applied for the early retirement. He submitted his application to various officers, submitted this application to the head office and on this basis, he believed that he had done his part, and he expected the processes to be completed.

To move this process forward, his dues were computed as his application was under consideration. This having been a termination of the claimant's contract by mutual consent out of the early retirement scheme, the mutual approval of both parties was paramount. The claimant did his part and the respondent was equally expected to do his part upon satisfaction that all procedures had been complied with. On this basis, the claimant could be paid his computed dues.

Termination was therefore based on this mutual process of early retirement as against the other termination process where a party opts to put things in motion to terminate a contract. However, before this mutual process could be confirmed and or approved or processed, the claimant applied to have unpaid leave, which was approved to commence in September 2006, and further that before all these could be approved, confirmed or be processed, he applied for annual leave that was approved to commence on 1st August 2006 to 11th September 2006 a period of 30 days only.

Therefore, pending the application for early retirement, pending the application for unpaid leave for one year, the claimant was granted 30 days annual leave that was to end as of 11th September 2006. In the

meantime, the claimant admitted that he left the country and could not report back to work on 12th September 2006.

An application for early retirement, as stated above is a mutual process that involves an employee and employer. Each party to this process must work in good faith otherwise it defeats the very purpose of the voluntary aspect to this early retirement process. In this case I find and out of the claimant's own admission that his application for early retirement was not approved, he only came to learn of this in October 2006 when he was already out of the country and therefore in any event he was not in a position to report back to work to finalise on the process. This effectively made him absent from his duty station as and when his approved annual leave ended on 11th September 2006.

The claimant cannot be found to contest that as at the time he submitted his application for early retirement, he had it approved and that the computed dues of Kshs. 296,220.00 were dues owed to him. These dues were only payable once his application was approved and confirmed that indeed he had severed his employment relationship with the respondent, as he was a permanent and pensionable employee. I reject the claimant's submissions that he tendered his resignation and should not have been forced to work, rather he applied for early retirement, that application was not approved, confirmed or processed to a conclusion and his absence from duty effectively created a termination on his part.

I therefore find that the claimant effectively was absent from duty, this was without notice to the respondent/employer and cannot claim any dues as owing having frustrated his own contract of employment with his absence. However, I note the claimant was on his annual leave with the permission and approval of the respondent and whatever dues were owing as of 11th September 2006 are payable to him. This court is only asked to grant payment in lieu of notice which is declined, severance pay which is not payable in a case where the claimant frustrated his own contract and the golden handshake is discretionary upon terms as agreed by the mutual consent of the parties.

If any pension is due to the claimant, this is normally due upon satisfaction of the law relating to pensions or retirement benefits and due to a retired employee. I will not direct in this regard.

Based on the above, I will dismiss the claim. On costs, the respondents did not submit any evidence a sorely relied on their pleading and therefore direct that each party to meet their own costs.

Delivered in open Court this 10th July 2013.

M. Mbaru

Judge

In the presence of

.....
.....
.....