



**Judicial Service Commission v Obaga (Civil Appeal 21 of 2019)
[2024] KECA 1576 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1576 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 21 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
NOVEMBER 8, 2024**

BETWEEN

JUDICIAL SERVICE COMMISSION APPELLANT

AND

SIRO ANDREW LEO OBAGA RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relation Court at Kisumu (Maureen Onyango, J.) dated 2nd November, 2017 in ELRC Cause No. 305 of 2014)

JUDGMENT

Judgment of Mumbi Ngugi, JA

1. In its decision dated November 2, 2017, the Employment and Labour Relations Court (ELRC, Maureen Onyango J.) held that the appellant's purported retirement of the respondent in the public interest was null and void as he had already retired. The court further held that the purported retirement did not affect the respondent at all, 'except perhaps by annoying or irritating him'. The court ordered the withdrawal of the letter and directed the appellant to issue the respondent with a letter of normal retirement. It also awarded the respondent nominal damages of Kshs. 200,000 as compensation for having to go to court to get the letter of retirement in the public interest reversed.
2. These findings and orders encapsulate the issues for determination before this Court: did the trial court err in finding that the letter from the respondent dated 9th June 2009 retiring the respondent in the public interest was null and void; in directing that the appellant issues him with a letter indicating that he had proceeded on normal retirement; and in awarding him nominal damages of Kshs. 200,000?
3. The factual background to the appeal is not in dispute. The respondent, who had served as a clerk in various court stations in the judiciary, filed a memorandum of claim dated 10th November, 2014, amended on 26th February, 2016, seeking, *inter alia*, a declaration that the termination of his employment was unlawful, unfair and illegal, contrary to the prevailing employment law and more



specifically the *Employment Act* No. 11 of 2007, compensation for the unlawful termination, damages and costs of the suit.

4. The respondent contended that his purported dismissal in the public interest by the appellant's letter dated 9th June 2009 was unfair; that he should be reinstated as he had been acquitted of the criminal charges preferred against him; and that his retirement date should have been 31st December 2015, not 31st December 2008.
5. In its statement in response, the appellant denied the respondent's claim. It averred that the respondent attained the mandatory retirement age of 55 years on 31st December, 2008 based on the date of birth recorded at the time of his recruitment in 1978, being 1st January, 1954. Further, that the respondent had a bad employment record, details of which were enumerated in the response; was accorded a fair hearing; and that the termination of his employment was fair in the circumstances.
6. In its memorandum of appeal dated 29th January, 2019, the appellant impugns the decision on some eight grounds, which summarised, are that the learned judge: misdirected herself by failing to correctly interpret the appellant's mandate to retire employees in the public interest and in awarding the respondent nominal damages as compensation; misapprehended the law in holding that the appellant had no power to discipline the respondent as the employer-employee relationship had terminated when the respondent's retirement took effect; erred in law by awarding the respondent nominal damages of Kshs. 200,000 having held that the letter retiring him in the public interest only affected him by annoying or irritating him.
7. The appellant further impugns the judgment on the basis that the court erred in holding that the appellant's Human Resource Advisory Committee acted without jurisdiction and failed to comply with the prescribed procedure when it resolved to retire the respondent in the public interest; erred by failing to consider the evidence presented that the appellant's Human Resource Advisory Committee had considered the respondent's bad employment record in resolving to retire him in the public interest; misapprehended the law and erred in holding that the role of the appellant's Human Resource Advisory Committee was only to process the retirement benefits which had been put on hold pending the finalisation of the respondent's criminal case; misdirected herself on the applicable law and principles in the evaluation of evidence adduced and consequently arrived at a wrong decision.
8. Notwithstanding these grounds of appeal, the appellant did not file written submissions in support thereof. At the hearing, Ms. Agwata, appearing for the appellant, sought an adjournment to enable her seek directions from the appellant on whether or not to proceed with the appeal. The basis of the application was that counsel was of the view that the appeal had been overtaken by events. In the end, unable to obtain an adjournment, Ms. Agwata proceeded with the appeal.
9. In her submissions, Ms. Agwata contended that the trial judge erred in her decision to award the respondent nominal damages of Kshs.200,000 on the grounds that he should have been issued with a letter retiring him on normal retirement, as opposed to retiring him in the public interest. She then basically narrated the facts that were before the trial court and the decision reached, and she prayed that this Court finds in favour of the appellant and sets aside the decision of the trial court.
10. The respondent filed submissions dated 27th February 2023 which his learned counsel, Mr. Kirwa, indicated that the respondent would rely on, without highlighting. In these submissions, the respondent contends that he was entitled to his benefits upon attaining the retirement age. He notes that by a letter dated 9th June 2009, the appellant had alleged that the respondent was retired in the public interest; and that he was not given any notice to show cause or the (reasons) for his retirement in the public interest. He further submits that the appellant's action of backdating the retirement in



the public interest to the date of the respondent's retirement upon attaining the normal retirement age showed that the decision was an afterthought.

11. His submission was that he ceased to be the appellant's employee after 31st December, 2008 since that is the date his retirement was to take effect. His submission therefore was that the appellant had no right to subject him to its disciplinary process as there was no longer an employer- employee relationship in existence. The relationship had come to an end on 31st August (sic) 2008 when the appellant issued the respondent with the notice of attainment of the retirement age of 55 years.
12. The respondent submits that the procedure followed in retiring him in the public interest was not just and reasonable; that starting to discipline him after he had been sent on retirement, and after he had been acquitted, caused more trauma and psychological disturbance to him. Further, that rule 18(3) of the third schedule to the *Judicial Service Act*, 2011 provides that an officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted. He submits that the appellant had no right whatsoever to discipline him considering that the appellant had earlier decided to retire him upon attaining the retirement age of 55 years.
13. He submits, further, that regulation 27 and 28 of the *Judicial Service Regulations* provides the procedure to be followed prior to retiring an employee in the public interest; that the appellant was required to issue a show cause letter with detailed reasons; and that he ought to have been given a chance to reply before a determination is made by the appellant. It is his submission that this procedure was not followed, and that he was just informed of the decision to retire him without inviting him to appear before the appellant's disciplinary committee to defend himself. The respondent submits therefore that the trial court cannot be faulted for finding that the procedure adopted by the appellant was unlawful, and for awarding him the nominal damages of Kshs. 200,000.
14. Having considered the record of appeal, the judgment of the trial court and the submissions of the parties, I believe the appellant seeks determination of two issues. First, whether the trial court erred in finding that its purported termination of the respondent's employment in the public interest was null and void. Secondly, whether the trial court erred in awarding nominal damages of Kshs. 200,000 to the respondent.
15. The facts in this matter are undisputed. The respondent, a long-term employee of the judiciary, was facing criminal charges, the contention against him being that he had assisted a prisoner to escape from lawful custody. He was interdicted with effect from 24th September 2007 following the start of the prosecution. While the criminal case was still pending, he attained the mandatory retirement age. The appellant informed him, by its letter dated 26th August, 2008, that based on its records, in which his date of birth was indicated as 1st January 1954, his last day of work would be 31st December 2008.
16. When the respondent was acquitted, he wrote to the appellant asking for the lifting of his interdiction. In its letter dated 9th June, 2009, the appellant indicated that it had lifted the interdiction and was retiring the respondent in the public interest with effect from 31st December, 2008.
17. The provisions relating to retirement of judicial officers and staff are contained in regulation 27 of the Provisions Relating to the Appointment, Discipline and Removal of Judicial officers and Staff, *Judicial Service Act* 2011 and Regulation 28 of the *Judicial Service Commission Regulation*, which I have read and considered. These provisions require, among other things, that the officer whom the appellant seeks to retire in the public interest is given notice in writing specifying the complaints in respect of which his retirement is contemplated; an opportunity to show cause why he should not be retired in the public interest; and that a report on the case is laid before the appellant, with recommendations,



as well as the officer's reply. The appellant is then required to consider the matter and decide whether or not the officer should be required to retire in the public interest.

18. I have perused the appellant's letter dated 9th June 2009 and find that it does not comply with the above requirements. What the appellant's Human Management Advisory Committee did was meet and arrive at the decision to retire the respondent in the public interest because of his 'poor employment record'. The appellant did not present anything before the trial court to show that it complied with the due process requirements in its regulations in its purported retirement of the respondent in the public interest. Even if it had, however, could such retirement, in June of 2009, have any effect?

19. In the letter dated 26th August 2008, the appellant had informed the respondent that his last day as a member of staff would be 31st December 2008 as he would turn 55 years, then the retirement age, on 1st January 2009. By the time the appellant wrote to the respondent informing him of retirement in the public interest, he had already attained retirement age, and been so notified, several months before. In reaching the decision that the decision to retire the respondent was null and void, the trial court stated:

In my opinion the purported retirement of the claimant in public interest does not change his circumstances. Receiving a letter retiring him in public interest when he was already retired did not affect the Claimant at all except perhaps by annoying or irritating him. The solution to the problem was simple: the withdrawal of the annoying or irritating letter.

...I declare the letter retiring the Claimant in public interest null and void and order that the same be withdrawn and in its place the Respondent issues a letter of normal retirement to the Claimant."

20. I find no reason to fault this conclusion by the trial court.

Having been informed already that he had reached the then retirement age, the respondent could then not be retired 'in the public interest' six months later.

21. The second issue is whether the trial court erred in awarding nominal damages of Kshs. 200,000 for the reason that:

"Since the Claimant was compelled to come to court because of the unreasonable decision of the Respondent I award him nominal damages in the sum of Kshs. 200,000 to compensate him for being dragged to court to get the letter of retirement in public interest reversed. The Respondent will also pay the Claimant's costs." (Emphasis added).

22. The kind of remedies that a court can grant in a situation of unfair dismissal or termination of a contract are set out in section 49 of the *Employment Act*. Having considered those provisions, I am unable to find a basis for an award of damages, even nominal damages, to the respondent, for being sent a letter purporting to retire him in the public interest when he had already been sent another letter, on August 26, 2008, informing him that he would retire upon reaching retirement age on January 1, 2009. The trial court appreciated that the respondent had suffered no damage for having been sent such a letter. It stated:

"In my opinion the purported retirement of the claimant in public interest does not change his circumstances. Receiving a letter retiring him in public interest when he was already retired did not affect the Claimant at all except perhaps by annoying or irritating him."

23. It seems to be a bit of a stretch to award damages, however nominal, for being sent a letter that was deemed 'annoying' or 'irritating'. The award of costs was sufficient recompense for 'being dragged to



court' to get the letter of retirement in the public interest withdrawn and substituted with a letter of normal retirement, which he had already been sent in August of 2008.

24. I would therefore allow the appeal with regard to the award of damages and set the said award aside. As the appeal partially succeeds, I would direct that each party bears its own costs of the appeal.

Judgment of Kiage, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with it and have nothing useful to add.
2. As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Mumbi Ngugi, JA.

Judgment of Tuiyott, JA

1. I have had the benefit of reading in draft the judgment of my sister, Mumbi Ngugi, JA. which I entirely agree with and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

