**Dourado v Attorney-General**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 7 March 1974

**Case Number:** 38/1973 (25/74)

**Before:** Sir William Duffus P, Law Ag V-P and Mustafa JA

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**Appeal from:** High Court of Kenya – Hancox, J

*[1] Master and Servant – Government – Pension – Whether servant’s post abolished.*

*[2] Master and Servant – Government – Pension – Whether qualified officer entitled to pension.*

**JUDGMENT**

The following considered judgments were read.

**Mustafa JA:** The facts in the case giving rise to this appeal are not in dispute. The appellant had filed an action in the High Court of Kenya seeking a declaration that she was entitled to be admitted to the permanent and pensionable establishment of the Kenya Civil Service and that she was entitled to a pension in terms of the Pensions Act (Cap. 189) as from the last day of her service, 21 February 1969. The Attorney-General on behalf of the Government of Kenya denied that the appellant was so entitled, and Hancox, J. found for the respondent Attorney-General. The facts as found by the trial judge and substantially accepted by the parties were as follows. The appellant was employed on a letter of temporary appointment as a clerk in the Police Department on 1 December 1952. In 1959 the appellant married, and in the same year she was promoted to clerk Grade 1 (Higher Clerical Officer). In February 1968 the appellant applied for registration as a Kenya citizen, and in November 1969 she was duly registered as such. On 30 November 1967 she had completed 15 years’ continuous service with the Government. In October 1968 her temporary appointment was terminated on one month’s notice. In January 1969 in the certificate of service issued to her the reason for termination was that her “services were no longer required”. Her work and conduct throughout her period of service were extremely satisfactory. She was basing her claim primarily on Establishment Circular 25 of 17 May 1961. Prior to the said circular, she, being employed on temporary terms, was not entitled to any retirement or pension benefits. In May 1969 she wrote to the Permanent Secretary to the Treasury regarding her retirement benefits and she was eventually informed that her claim was rejected by the Government. The appellant, at the time her services were terminated, was performing the duties of a registry clerk and typist, and her job was then split and taken over by two officers, one performing the work of a registry clerk and one that of a typist. At this stage I think it will be convenient if I set out the relevant portions of Establishment Circular 25 of 1961. It reads: “(2) It has however been represented to the Government that those married women who have rendered long service on temporary terms should be specially treated. The Government considers that there is merit in these representations and has agreed that, with effect from 1 January 1961: ‘a married woman who has completed 15 years’ continuous service on temporary terms will be eligible to be considered for admission to the permanent and pensionable establishment immediately prior to her retiring from the service under Section 6 of the Pensions Ordinance 1950 on medical or age grounds or on abolition of office.’ (3) . . . Although as explained, the officer’s admission will only take effect on her last day of service, there will be no objection to her applying for admission as soon as she has attained the minimum qualification making her eligible for the concession. Her case will then be examined by the Government, and if approved, she will be notified that . . . she will be admitted to the permanent and pensionable establishment.” Mr. Georgiadis for the appellant has submitted that as she had completed over 16 years’ continuous service with Government, in terms of Establishment Circular 25 of 1961, she was qualified for admission to the permanent and pensionable establishment. He submitted that her office was abolished, as the other two grounds, age or medical, were inapplicable. For the purpose of this appeal it has been agreed that if the appellant’s post was in fact abolished then she would be entitled to pension benefits. The onus of establishing abolition of office was on the appellant. When the appellant’s appointment was terminated by notice in October 1968, no reason was given for such termination. At the appellant’s request a certificate of service was issued to her in January 1969, and in the said certificate the reason for termination was that her “services were no longer required”. The appellant in May 1969, wrote to the Treasury claiming pension benefits and in December 1970 she was informed that she did not qualify for the grant of retirement benefits. The appellant’s advocates then took over the matter, and wrote a number of letters on her behalf to the Treasury which elicited no response. Eventually the Attorney-General’s Chambers came into the picture, and after some exchange of correspondence the appellant was informed that her appointment was terminated in furtherance of the Government’s Policy of Kenyanisation. This information was given in a letter dated 15 November 1971, about two and a half years after the appellant had applied for admission to the permanent and pensionable establishment. The said letter dated 15 November 1971 went on: “. . . The whole question of whether married women retiring under circumstances such as those of Mrs. A. Dourado should be awarded retiring benefits, has been considered by the Government and a decision has been reached that they should not. The Public Service Commission has concurred, under s. 113 (1) of the Constitution, that such persons should not be granted retiring benefits.” There was no evidence adduced that the Public Service Commission had concurred in the Government’s decision not to grant retiring benefits to the appellant; the evidence adduced only showed that the Public Service Commission was consulted. It is common ground that if the appellant’s post was in fact Kenyanised there was no need to consult the Public Service Commission. It is also common ground that in the case of an officer who has applied for Kenya citizenship, a special procedure has to be followed if that officer’s post is to be Kenyanised. In the appellant’s case no such procedure was followed despite the fact that she had, prior to the notice of termination, applied for Kenya citizenship. When the appellant’s appointment was terminated, her work was carried out by two officers of a lower grade, officers who were not Higher Clerical Officers as she was, but in the same cadre. No evidence was adduced as to whether the establishment of clerical or Higher Clerical Officers in the section or department was increased or decreased as a result of the appellant’s departure. Mr. Georgiadis has submitted that the appellant’s post was in fact abolished, and she was therefore entitled to retirement benefits. He contended that the appellant had carried out the work of a registry clerk and typist, and when she left, her job was split, and two officers took over her job, one as registry clerk and one as typist; that the two officers were of a lower grade, though in the same cadre. He referred to Personnel Circular 3 of 1966 and submitted that the fact that the two officers were in the same common establishment as the appellant could not be interpreted to mean that there was no functional distinction between the duties of each grade. He also pointed out that the appellant was not supplanted by another Higher Clerical Officer. He referred to the certificate of service issued to the appellant in January 1969 which stated that her services were no longer required. He submitted all these factors tended to show that the post of Higher Clerical Officer held by the appellant was abolished. He also submitted that the circumstances surrounding the termination of the appellant’s services gave rise to a strong inference that her post was abolished. He contended that the Government’s allegation that the appellant’s post was Kenyanised was untrue. If it were true, the Government would have said so at any early stage, not two and a half years later. If the post was in fact Kenyanised there was no reason why the normal procedure relating to a person who had applied for Kenya citizenship (as was the case with the appellant) was not followed. Again in that event there was no need to have referred the matter to the Public Service Commission. He also referred to Regulation 20 of the Public Service Commission Regulations, and submitted that a reference to the Public Service Commission in connection with the appellant’s termination was indicative of the fact that her office was abolished. I think that the belated explanation given by the Government that the appellant’s appointment was terminated because of Kenyanisation is unacceptable. I agree with Mr. Georgiadis, for the reasons he has stated, that it was unlikely that that was the real reason. Despite this, however, the onus still remains on the appellant to establish abolition of her office, on a balance of probabilities, if she were to succeed. Mr. Georgiadis has contended that the false reason given by the Government is another factor for believing that the Government was trying to keep secret the real reason for the termination of the appellant’s services, namely abolition of her office. However that is only an inference which could be drawn, not factual evidence. What is the factual evidence to support abolition of the appellant’s office? The appellant’s job was split and taken over by two officers of a lower grade in the same cadre. The appellant’s work was carried on, by two instead of one officer. Mr. Georgiadis has submitted that he was unable to prove abolition of office without the co-operation of the Civil Service, and judging from the un-co-operative attitude the Government had maintained throughout, he stated that he could not expect any help from that quarter. He contended that it was for the Government, in such circumstances, to adduce evidence to show what was the real reason for the termination of the appellant’s services, as his client was unable to prove a negative. I am not persuaded by this argument. I can see no reason why the head or some senior officer of the appellant’s section or department could not have been summoned to testify whether, as a result of the appellant’s departure, there was any change in the number of clerical officers, or of Higher Clerical Officers, there. Interrogatories also could have been administered to obtain such evidence. Nor can I see why the personal file of the appellant could not have been produced, if necessary with the aid of the court, to show what was the reason for the termination of her services. There could hardly have been any successful objection to the production of such documents on the ground of executive or other privilege. In order to succeed the appellant had to establish that her office was abolished, by positive and factual evidence, not only by possible inferences from the circumstances surrounding the termination of her appointment. As I have said I do not accept the Government’s belated explanation that the appellant was in fact Kenyanised. That however would only amount to another circumstance from which an appropriate inference might be drawn. The Government was not, in my view, bound to give any reason for the termination of the appellant’s services as she was on temporary terms, see G. 39 of the Kenya Code of Regulations. Mr. Georgiadis has submitted that unless an officer is given the reason for termination, he or she would be unable to apply for the appropriate retirement benefits, and that would defeat the tenor of the regulations in Section G of the Kenya Code of Regulations. There is some force in this submission, but in my view, the Government is under no legal, as opposed to a moral, duty to give any reason for the termination of the services of an officer on temporary terms. Mr. Georgiadis also referred to Treasury Circular 10 of 8 June 1963. That circular referred to the abolition of a number of posts as a result of recommended economy measures, and stated that the Government would be prepared to treat a temporary officer who was displaced or made redundant by a permanent and pensionable officer due to abolition of posts as if he had been retired on grounds of abolition of office. That again would turn on the question of abolition of posts. There was evidence that the work carried out by the appellant was general clerical work, that is registration and typing. There was no evidence that the appellant’s post was an established one in the sense that it carried certain specified and assigned duties of a particular nature. The evidence adduced, in my view, indicated that on the appellant’s departure, the clerical work she used to do was re-distributed and I think that the actual distribution of clerical work in a section or department would be a matter of internal discipline and arrangement. Mr. Georgiadis referred to the following passage in the judgment of hancox, J.: “It may be that the duties she performed are now performed by two other persons, and of course Personnel Circular No. 3 of 20 January 1966 makes it clear that there is a common establishment for clerical officers. But in my view while it is obvious that the plaintiff was made redundant, in the sense that she lost her job, this was not as a result of the abolition of her office. . . .” Mr. Georgiadis has submitted that since the trial judge had found that the appellant had been made redundant, he should have equated redundancy with abolition of her office, in terms, so he submitted, of Treasury Circular 10 of 8 June 1963. It is clear that Hancox, J. used the word “redundant” in a special sense, in the sense that “she lost her job”. The word “redundant” in Treasury Circular 10 of 8 June 1963 was in reference to a temporary officer being displaced or supplanted by a permanent and pensionable officer arising from abolition of posts. I do not think that the circumstances mentioned in Treasury Circular 10 of 8 June 1963 are relevant to the appellant’s case. The word “abolition” was not defined in the Establishment Circular 25 of 17 May 1961 or the Public Service Commission Act or the Pensions Act. Hancox, J. referred to the Oxford English Dictionary for its meaning. “Abolition” there is defined as: “The act of abolishing, or putting an end to; the fact of being abolished or done away with.” I would adopt this dictionary definition of abolition. The trial judge then said in his judgment: “In this case I cannot see that the plaintiff’s office was abolished within the meaning of the word . . .” In my opinion the evidence that the appellant’s clerical work was split and undertaken by two other officers of a lower grade in the same cadre could not amount to any proof that her post was abolished. I think the appellant was attempting to build too much on too little. If there was even some slight positive or factual evidence indicating that her post was abolished, I would have used the circumstantial evidence and the inferences which could be drawn therefrom to reinforce such evidence, and I would then have shifted the burden to the respondent to establish that the post was not abolished. But unfortunately, in my view, the appellant’s case never got off the ground; the appellant had nowhere got near to establishing that her post was abolished. At the hearing of this appeal, the issue whether a pension is a right or a privilege was raised. Hancox, J. did not decide this question, as in view of his finding, it was unnecessary for him to do so. He however, by way of obiter dictum, said: “I would incline to the view . . . that a pension is intended to be a right rather than a privilege, provided the officer in question qualifies for it . . .” Mr. Shields for the respondent conceded that an officer, provided he has qualified for it, has a right to his pension, unless the Public Service Commission concurs to withhold or reduce it in terms of s. 113 (1) of the Constitution of Kenya. However I would prefer to reserve this question to another occasion, as it is not necessary for the determination of this appeal. Before I close I must say that the appellant, in view of her long and satisfactory service, has certainly deserved better treatment from her employers. However on the evidence I regret I must dismiss the appeal with costs.

**Sir William Duffus P:** I agree with the judgment of Mustafa, J.A. and as the Vice-President also agrees, the appeal is dismissed with costs.

**Law Ag V-P:** I have read the judgment prepared by Mustafa, J.A. I agree with it and cannot usefully add anything. *Appeal dismissed.*

For the appellant:

*B Georgiadis* (instructed by *Kaplan & Stratton*, Nairobi)

For the respondent:

*JF Shields* (Principal State Counsel) and *HAM Kithyoma*