



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS

Civil Case 33 of 2002

PAUL MUHORO KIHARA.....PLAINTIFF

- VERSUS -

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

J U D G M E N T

The plaintiff is a former employee of the defendant. The plaintiff was employed as a clerk vide a letter of employment dated 14th June, 1971. According to the plaintiff, a condition of the said contract of employment was that he would work for the defendant until he reached the retirement age of sixty (60) years provided that he did not do anything that would, under common law, entitle the defendant to terminate his service on account of gross misconduct. The plaintiff averred that he had reasonable expectation that he would work for the defendant until he attained the said retirement age. According to the plaintiff, the defendant, in breach of his constitutional rights as contained in **Sections 72, 73, 74 and 82** of the **Constitution**, by intimidation and coercion forced him to retire early from employment. The plaintiff averred that at the time of his forced retirement from employment, he was working as a section head. The plaintiff contended that his forced retirement amounted to constructive dismissal from employment and therefore he is entitled to be paid special and general damages in respect of the thirteen (13) years that he would have worked until he attained the contracted retirement age. The plaintiff pleaded to be awarded the sum of Kshs.13,351,949/= as special damages. The plaintiff further prayed to be awarded general damages. He further prayed for a declaratory order of the court that his constitutional rights as provided by **Sections 72, 73, 74 and 82** of the **Constitution** were infringed when he was forcefully retired from employment. He also prayed for costs of the suit.

The defendant filed a defence. It denied that it had forcefully retired the plaintiff from employment. It denied that the employment contract that was entered between the plaintiff and the defendant entitled the plaintiff to work until he reached the retirement age of sixty (60) years. The defendant stated that it was an express or implied term of the said employment contract that the plaintiff would be terminated from employment upon either party giving one (1) month's notice or one (1) month's salary in lieu of notice. The defendant averred that plaintiff could also have been dismissed from employment if he misconducted himself. The defendant averred that the plaintiff was retired after he voluntarily accepted to take early retirement. The defendant denied that it coerced, tricked, intimidated or humiliated the plaintiff in any manner whatsoever so as to secure his early retirement from employment. The defendant denied that it had breached the plaintiff's constitutional rights when the plaintiff retired from employment. The defendant averred that the plaintiff was not entitled to any special or general damages or any benefits other than that which he was granted upon retiring from employment. The defendant urged the court to dismiss the plaintiff's suit with costs.

At the hearing of the suit, the plaintiff was the only witness who offered evidence on his behalf. The defendant called one witness, DW1 Florence Ann Odongo, a clerk at the defendant's Human Resources Department. After hearing both the plaintiff's and the defendant's case, the following are the undisputed facts of the case:

The plaintiff was employed as a clerk by the defendant on 14th June, 1971. Clause 13 of his letter of employment provided that:

"If, after you have served your probationary period, your appointment is confirmed it will be that of a monthly servant and may be terminated at any time by either party giving one month's notice of termination in writing or paying one month's salary in lieu thereof, provided that should you at any time either during your probationary period or afterwards, commit any breach of the conditions herein contained or be guilty of unsatisfactory conduct inside or outside the Bank, the Bank reserves the right to take disciplinary action against you as appropriate."

The said letter of appointment did not specify the retirement age of the plaintiff. Clause 14 of the letter of appointment stated that upon the plaintiff completing his probationary period, he would be eligible for pension under the defendant's Regulations of Kenya Staff Pension Fund. The defendant had other rules governing the terms of employment of the plaintiff. The said rules were contained in the defendant's Staff Pension Fund Rules. The said rules provided the retirement age of the employees of the defendant. Clause 20 (c) provided as follows;

"RULES AFFECTING MALE CLERICAL STAFF APPOINTED TO THE PENSIONABLE STAFF OF THE BANK ON AND AFTER 1ST OCTOBER 1964 AND PENSIONABLE MESSENGER STAFF.

1. (a) *The normal retirement age is 60 years.*

(b) *An Official or Messenger of the above-mentioned categories of the Male Staff of the Bank will be granted a pension subject to the General Rules and calculated according to the undermentioned conditions provided that he:*

(i) *has attained the age of 60 years at the date of retirement: or*

(ii) *has been permitted under the terms of General Rule A15 to retire on account of ill health before reaching the age of 60 years: or*

(iii) *has not attained the age of 60 years but the Directors consider it desirable that he should retire on the grounds of unsatisfactory service: or*

(iv) *has retired at the request of the Directors before reaching the age of 60 years after satisfactory service or by reasons of redundancy."*

The retirement age of the plaintiff was therefore sixty (60) years. It was apparent from the testimony of the plaintiff that for the period of twenty one (21) years he worked for the defendant without any disciplinary problem. During the said period, he was promoted to the rank of a section head.

On 3rd March, 1992, the defendant issued a staff circular No.18 under the title "*Early Retirement Scheme*". The circular was authored by a Mr. B. N. Mtuweta, the then Chief Manager Personnel. It stated as follows:

"After long and careful consideration, the Bank has now decided to introduce an Early Retirement Scheme. This has become necessary due to the fact that there is a growing number of staff who are on top of their scales and are unlikely to receive further promotions. A number of such staff have also been enquiring about such a scheme for quite some time. While appreciating the need for the Bank to give staff the opportunity to leave the Bank, especially when they reached their maximum potential, such a scheme must be applied very sparingly as we do not want to weaken our overall experience levels. To

this end therefore, it has been decided that participants in the scheme will be by invitation.”

According to the plaintiff, he understood the above circular to mean that only employees who desired to take up the offer of early retirement from employment would take advantage of the scheme introduced by the defendant. The plaintiff testified that he did not intimate to the defendant that he desired take up the early retirement option. In his view, he was willing to work for the defendant until he attained the retirement age of sixty (60) years.

It was the defendant’s case that after the said circular was issued by the defendant, the management of the defendant, including the then Branch Manager of Queensway Branch Mr. Gacheru, the Operations Manager Mr. Nderitu and later the General Manager Mr. Ruturi, pressurized him to consider taking up the early retirement option. The plaintiff testified that he emphatically told the said officers that he was unwilling to take up the option of retiring early from employment. According to the plaintiff, it was from the moment that he gave his indication that he would not to take up early retirement that he started facing difficulties in his employment. He testified that he was transferred to the Current Account Department, where in his view, he would be prone to make mistakes which would result in his being terminated employment. He testified that soon after his transfer to the said department, some forged cheques were paid. The defendant held him accountable and on 18th November, 1993, suspended him from employment. After investigations, the plaintiff was reinstated to employment. He was however transferred to the Kericho Branch of the defendant.

According to the plaintiff, while he was at Kericho, the then General Manager of the Bank, Mr. Ruturi visited the branch on two occasions. On each occasion, he sought to see the plaintiff with the intention of persuading him to accept early retirement. The plaintiff testified that he declined to see the said manager. It was not disputed that 15th December, 1994, the then acting manager of the Kericho Branch, a Mr. D. Muinde wrote a letter to the plaintiff inviting him to accept the defendant’s offer to retire him prematurely under the then existing early retirement scheme. The plaintiff was required to indicate his acceptance of the offer to retire early from employment. The plaintiff testified he had no objection to being retired provided that the retirement did not interfere with this initial employment contract. The plaintiff produced a copy of the said letter in which he made the following remarks:

“I have no objection provided that early retiment (retirement) does not interfere with the intial (initial) contract signed when I joined the Bank.”

The defendant took it that the plaintiff had accepted the offer to retire him early from employment. The plaintiff testified that he was retired from the bank on 1st March, 1995.

It was the plaintiff’s case that he was unlawfully terminated from employment under the guise that he was being retired under the early retirement scheme which had been put in place at the time by the defendant. It was the plaintiff’s case that he was coerced and intimidated into accepting early retirement when he was unwilling in the circumstances to take such early retirement. It was his case that he had not accepted to be retired under the early retirement scheme since he had the intention of working for the defendant until he had attained the retirement age of sixty (60) years stipulated in the contract of employment. The defendant did not dispute that under its terms and condition of employment the retirement age of its male employees is sixty (60) years. It was the defendant’s case that the plaintiff was not unlawfully terminated from employment. It was the defendant’s case that the plaintiff had accepted to take early retirement under the Early Retirement Scheme which had been put in place at the time by the defendant. It was the defendant’s further case that it was under no obligation to retain the plaintiff in employment until he reached the retirement age of sixty (60) years. It stated that under its contract of service, it could terminate the plaintiff from employment by giving a month’s notice.

After the close of the plaintiff’s and the defendant’s respective cases, the parties agreed by consent to file closing written submissions. Each party filed the said closing submissions. The issues for determination by this court are as follows:

(i) Whether the plaintiff was terminated from employment or whether he accepted to retire early

under the Early Retirement Scheme then put in place by the defendant.

- (ii) Whether the contract of employment entered between the plaintiff and the defendant provided for early retirement by the plaintiff.
- (iii) Whether the defendant breached the employment contract when it terminated the plaintiff's employment by retiring him early from employment.
- (iv) Whether the defendant breached the plaintiff's constitutional rights when it retired the plaintiff from employment.
- (v) Has the plaintiff proved his case to entitle this court to award him damages as prayed in his plaint?

As regard issue (i), it was the plaintiff's case that he was coerced and intimidated and literally forced to take early retirement. From the staff circular No.18 which was issued by the defendant on 3rd March, 1992, it was evident that the defendant put in place the early retirement scheme to enable it induce its staff members who had reached the top of their earning scales and were unlikely to receive further promotions. In the defendant's opinion, the plaintiff fell under this category of employees. The defendant stated in the said circular that it would offer an early retirement option to employees it had targeted by inviting them to take up the said offer of early retirement.

Immediately after the said retirement scheme was put in place, the plaintiff was approached by the defendant and requested to consider taking up the early retirement option. From the said circular, it appeared to the plaintiff that the early retirement scheme was a voluntary scheme under which employees who were willing to take early retirement would voluntarily offer to retire from employment. The plaintiff was of the view that he could not be requested to take early retirement if he was unwilling to take such offer to retire early from employment. The plaintiff was categorical that he was willing to work for the defendant until he attained his mandatory age of retirement.

There was evidence to support the plaintiff's assertion that he was hounded by the defendant until he had no option but to take early retirement. It was the plaintiff's case that this harassment by the defendant in its bid to secure his consent to accede to early retirement, amounted to unlawful constructive termination from employment. It was the plaintiff's case that early retirement was not contemplated in his letter of employment. This court quoted the rules that governed the plaintiff's terms of employment at the time of his employment by the defendant. Clause 20 (c) (1) (b) (iv) of the defendant's Staff Pension Fund Rules which was produced by the plaintiff provided that an employee may be retired at the request of the directors of the defendant before reaching the age of sixty (60) years after satisfactory service or by reason of redundancy. It was therefore clear that the basis of the plaintiff's case that his employment contract did not provide early retirement has been disproved by a document which the plaintiff himself produced in support of his case. I therefore hold that although the plaintiff established that he was forced by the defendant to take early retirement, he failed to establish that his early retirement was in breach of the contract of employment that he signed when he was employed by the defendant.

As regard issue (ii), I hold that the contract of employment entered between the plaintiff and defendant provided for early retirement of an employee in the event that the directors of the defendant requested such an employee to take early retirement. The staff circular No.18 which was issued on 3rd March, 1992 by the defendant was approved by the directors of the defendant. The defendant made a decision to "weed out" members of staff who had reached the top of their respective grades and were unlikely to be further promoted. In the opinion of the defendant, the plaintiff fell in this category. The plaintiff was earlier in 1992 invited by the defendant to take early retirement, but he declined. After a period of nearly three years, the plaintiff bowed to the inevitable; he accepted to take early retirement. This court abhors the manner in which the plaintiff was induced to take early retirement. However, the contract between the plaintiff and the defendant was a service contract; one party cannot be forced to be in the employment of another when the other party is unwilling to have such a person as its employee. Much as the court sympathizes with the position that the plaintiff found himself in, there is no relief

recognized in the law that this court can give to the plaintiff.

As regard issue (iii), whether the defendant breached the contract when it retired the plaintiff from employment before he attained the mandatory retirement age of sixty (60) years, I hold that the contract of employment entered between the plaintiff and the defendant provided for an employee to be retired before attaining the retirement age if such an employee was requested to so retire by the directors of the defendant.

As regard issue (iv), whether the defendant breached the plaintiff's constitutional rights when it retired the plaintiff from employment. The plaintiff averred in his plaint that his constitutional rights as contained in **Sections 72, 73, 74 and 82** of the **Constitution** were breached when the defendant forced him to take early retirement from employment. **Sections 72** of the **Constitution** provides that no person may be deprived of his personal liberty save as is provided by the law. This court failed to comprehend how the defendant could have breached the plaintiff's fundamental rights when it requested him to take early retirement. The plaintiff was not bound to work for the defendant. He was not in servitude nor was he offering free labour to the defendant. **Sections 72 and 73** of the **Constitution** does not therefore apply. Similarly **Section 74** of the **Constitution** dealing with torture and inhuman or degrading punishment or other treatment does not apply in regard to the employment contract between the plaintiff and the defendant. The employment contract between the plaintiff and the defendant was a simple employment contract which cannot by any stretch of imagination raise any constitutional question under **Sections 72, 73, and 74** of the **Constitution**. In any event, this court was not sitting as a constitutional court when it heard the plaintiff's case. I therefore hold that the plaintiff failed to establish that his fundamental rights as enshrined in the **Constitution** were breached when he was retired prematurely from his employment by the defendant under the Early Retirement Scheme.

Has the plaintiff established a case to be paid damages on account of his early retirement from employment? I think it is now settled law that an employee cannot be paid damages on account of being wrongfully terminated from employment by an employer. In **Rift Valley Textiles Limited vs Edward Oganda C. A. Civil Appeal No.27 of 1992** (unreported) the Court of Appeal held at its page 4 of its judgment as follows:

“With respect to the learned judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better paid job and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action.”

In a recent case, the where facts were not dissimilar to the facts of this case, Waki J. A. while delivering judgment in a case in the High Court pursuant to **Section 64 (4)** of the **Constitution** had this to say:

“My finding on the facts is that the plaintiff's employment with the defendant was wrongfully terminated. There is no doubt that the plaintiff feels that the manner of termination was most contumelious, coming as it did after 11 years of acknowledged exemplary services to the airline. She has suffered financial loss and will continue to do so until she fully mitigates it. But the law is very clear that the contract of employment cannot be enforced by specific performance, else it would be servitude. The law is also clear on what damages are payable to an employee whose services are terminated in whatever manner which is outside the contractual terms. It is the amount she would have been paid of the contract was lawfully terminated.”

(See **Mary Wakwabubi Wafula vs British Airways PLC [2006] eKLR.**)

Similarly in ***Bii vs Kenya Commercial Bank Limited [2001] KLR 458***, Ringera J., (as he was then) when faced with a claim similar to the one being made by the plaintiff in this case in which the plaintiff was seeking to be paid compensation for the period that he would have worked from the time he was terminated from employment to the time he would have attained the mandatory retirement age, had this to say:

“A termination of employment in accordance with the contract terms could not possibly be unlawful. Unfair it may be, but unlawful it cannot be. And the laws of Kenya do not know of the doctrine of unfair dismissal. But even if the dismissal was unlawful, the law is as laid down by the Court of Appeal in the Rift Valley Textiles Limited case (supra): the dismissal is effective and the measure of damages is according to the terms of the contract.”

In ***Githinji vs Mumias Sugar Company Ltd [1994] LLR 1373 (CAK)*** the Court of Appeal quoted with approval the common law position summarized in paragraph 649 of ***Halbury’s Law of England (4th Ed) Volume 16*** which states as follows;

“The fact that the dismissal of the employee is otherwise than in accordance with the procedure laid down in his contract does not, in a case where the rights of the parties are regulated by contract and are unaffected by statute, normally prevent the dismissal from being effective to terminate the contract, in such a case the employee cannot claim that the contract has not been validly terminated and his remedy is in damages.”

In a recent decision, ***Kenya Airways Corporation Limited vs Tobias Oganya Auma & 5 Others [2007] eKLR***, the Court of Appeal held at page 21 of its judgment, regarding a situation where employees were terminated from employment in circumstances similar to the plaintiff in this case:

“Is an employee whose services have been terminated entitled to general damages? This Court in Kenya Ports Authority vs Edward Otieno – Civil Appeal No.120 of 1997 (unreported) drawing support from the case of Addis v Gramophone Company (1909) A.C. 488 emphatically stated that there can be no general damages in respect of suits based on a termination of employment contracts. We should think that it was unreasonable for the respondents to believe that it was their entitlement and right to be employed by the appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the same contract.”

It is therefore clear from the foregoing decided cases, that even if this court were to find that the plaintiff was unlawfully terminated from employment by being coerced to accept early retirement, the only damages that this court can award to the plaintiff in the circumstances, is a sum equivalent to the notice period as provided by the contract of employment. In the present case, the notice period stipulated in the letter of appointment of the plaintiff dated 14th June, 1971 is a month (see clause 13 of the agreement). The plaintiff was terminated under the early retirement scheme of the defendant under which he was paid the sum of Kshs.439,365/=. This was equivalent to two years and ten months of the plaintiff’s monthly salary. The plaintiff was therefore paid a sum more than the one month salary in lieu of notice that he was entitled to be paid in the event that he was unlawfully terminated from employment. Further, the plaintiff is currently enjoying his pension which was not affected by his early retirement from employment.

Taking into account the totality of the evidence adduced, I hold that the plaintiff failed to establish his case to the required standard of proof on a balance of probabilities. This court cannot award damages to the plaintiff under the circumstances pleaded in his suit. His claim has no basis in law. It is hereby dismissed with costs to the defendant.

DATED at NAIROBI this 9th day of June 2008.

L. KIMARU

JUDGE