



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1035 OF 2013

(Before D. K. N. Marete)

GEORGE IMBULU MUHALIA.....CLAIMANT

VERSUS

GLAXO SMITHKLINE LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 5th July, 2013. The issues in dispute are therein cited as;

1. *Whether the Claimant's early retirement was voluntarily.*
2. *Whether the Claimant's employment was terminated unfairly and illegally.*
3. *Whether the Respondent ought to compensate the Claimant.*
4. *If the Respondent ought to compensate the claimant, how much should the compensation be*
5. *Who is responsible for the costs of this claim?*

The respondent in a Response to Claim dated 24th October, 2013 denies the claim and prays that this be dismissed with costs.

The claimant's case is that he was employed by the respondent on 6th February, 1989 and worked/served till 20th December, 2010 when his services were terminated through an early retirement.

The claimant's further case is duly and clearly set out in his pleadings as follows;

- i. *On the 20th December, 2011 at around 3.00pm which was four days after Claimant was paid December salary he was summoned together with others before a panel of the Respondent's Human Resources Manager.*
- ii. *The Claimant together with others summoned by the Panel was told by the panel to apply for early retirement failure to which they would summarily be dismissed within 3 months.*
- iii. *Due to the undue pressure the Claimant was coerced to apply for early retirement and the respondent caused him to sign a voluntary retirement letter dated 22nd December 2010. "See annexure "GIM 2"*
- iv. *At the time of termination the claimant had worked for the respondent for twenty one years and still had five years before attaining the retirement age of 55 years.*
- v. *As a result to termination the Claimant was denied his source of Income and was left unclear loans which he had procured in hope that he still had five more years to work, which loans the respondent was also aware of.*
- vi. *Demand and Notice of intention to sue was issued by the Respondent has ignored and/or neglected to answer the same. See annexure "GIM 3"*

He claims and prays as follows;

<u>SERVICE DAY FOR:</u>	<u>KSHS:</u>	<u>CTS</u>
i. Leave allowance from 2002 to 2010 (8400 x 8)	67,200	00
ii. Six months notice in Lieu of Notice	204,378	00
iii. Six weeks service pay per year for 21 years	1,162,476	00
iv. Bank Loan (Co-operative)	<u>700,000</u>	<u>00</u>
TOTAL	<u>2,124,054</u>	<u>00</u>

The respondent's case is a denial of the claim.

It is her position and submission that the claimant voluntarily chose/opted for early retirement after various consultation *inter partes* on issues of his performance and performance based working environment which it is suspected scared him off. He therefore tendered a letter of request for early retirement which was accepted and the claimant paid his separation dues and benefits amounting to Kshs.524,566.10.

The respondent's further case is a quest for better particulars of the farfetched allegations of coercion and or threat of dismissal from the claimant.

The matter came to court variously until the 17th October, 2018 when the claimant in the absence of the respondent opted for a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the claimant was coerced or unduly pressurized to tender a letter of resignation by the respondent?
2. Whether the actions of the respondent, if at all, amounted to termination of the employment of the claimant by the respondent?
3. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
4. Whether the claimant is entitled to the relief sought?
5. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant was coerced or unduly pressurized to tender a letter of resignation by the respondent. The claimant in his written submissions dated 7th November, 2018 reiterates his case of being pressurized to early retirement by the respondent. It is his case that at this time, he had had a stint of twenty one year service with five years to compulsory retirement age.

The claimant buttresses his case of unfair termination of employment by upholding a contravention of section 40, 41, 43 and 45 of the Employment Act, 2007 in that there was no valid reason for such termination and neither was he afforded an opportunity to be heard before termination.

The respondent in her written submissions filed 12th November, 2018 reiterates her case of lawful termination of employment arising out of the claimant's early retirement. On this she relies on the authority of **Agnes Wachu Wamae & 104 Others v Barclays Bank of Kenya [2013] eKLR**

As aptly observed by Lord Denning in the case of Lloyds Bank v Bundy relied on by both counsel, this court is of the view that nothing leads it grant a relief in favour of the claimants on the basis of unfairness or unconscionable bargaining power especially in the circumstances where the exit package offered by the respondent was far above the statutory minimum and no sufficient evidence has been shown that the stronger party (the respondent) has used its strength unconscionably.

Freedom of contracts is a fundamental principle and the Courts would only interfere in exceptional cases where as a matter of common fairness it is not right that the strong should be allowed to push the weak to the wall. The Claimants have failed to sufficiently demonstrate that the exit package was unfair and that pressure was brought to bear upon them in executing the release letters to the extent that they were not even able to seek second opinion.

Her further case is that he who alleges must prove. This is illustrated by section 107 and 109 of the Evidence Act, Chapter 80, Laws of Kenya as follows;

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Again,

109 “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The respondent therefore urges the court to discount the allegation of coercion into retirement as this has not been proven by the claimant.

Further, the respondent’s submits a case of non-disclosure of material facts by the claimant that, as it were, he is the one who wrote the letter of early retirement dated 20th December, 2010. This non-disclosure is evidence of lack of utmost good faith and overrides the principle of equity that *he who comes to equity must come with clean hands*. This betrays the claimant’s case in agreement with the authority of **Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1KLR 126 at page 15** as cited in the case of **Patrick Waweru Mwangi & another v Housing Finance Co. of Kenya Ltd [2013] eKLR** thus;

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies.

The long and short of this is that the claimant’s case falls by the way side for want of proof. I therefore find a case of no pressure or coercion in the early retirement of the claimant. And this answers the 1st issue for determination.

On a finding of no coercion in the early retirement of the claimant, issues No.s 2, 3, and 4 also fall by the wayside. They are not necessary or good material for determination.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same. And this rests all the issues for determination and therefore the claim.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Asege Instructed by Njeru Gichobia & Company Advocate for the claimant.
2. No appearance for the respondent.