**Banking, Insurance and Finance Union [Kenya] v Access Bank PLC [Kenya] Limited (Cause E679 of 2021) [2024] KEELRC 2124 (KLR) (9 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2124 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE E679 OF 2021**

**J RIKA, J**

**AUGUST 9, 2024**

**BETWEEN**

**BANKING, INSURANCE AND FINANCE UNION [KENYA] ..... CLAIMANT**

**AND**

**ACCESS BANK PLC [KENYA] LIMITED ..... RESPONDENT**

## JUDGMENT

1. The Claimant Union brings this Claim, through a Statement of Claim, lodged at the Court's Registry, on 31st August 2021.

2. The Claim is brought on behalf of 4 former Employees of the Respondent Bank, members of the Claimant Union, Florence Mbithi, Florence Ogwora, Kennedy Bosire and Jeremiah Ongubo, [hereinafter called the 'Grievants'].

3. The Grievants left employment through Voluntary Early Retirement Scheme [VERS], in the month of February 2019. They had served for 28-30 years.

4. They dispute the VERS packages paid to them. They state that under the Respondent's Human Resource [HR] Policy, 2014, clause 24.2, they were entitled to notice period of 3 months, and severance of 2 months' basic salary, for every complete year of service.

5. Contrary to this policy, they were paid 1-month salary in lieu of notice, and 1-month salary for every complete year of service in severance pay.

6. The Claimant states that the Grievants were therefore underpaid notice and severance under VER, added up as follows: -

    I. Florence Mbithi ... Kshs. 6,256,440.

    II. Florence Ogwora ... Kshs. 3,025,296.

III. Kennedy Bosire ... Kshs. 2,898,930.

IV. Jeremiah Ongubo ... Kshs. 3,489, 888.

7. In total, the Claimant pleads a sum of Kshs. 15,670,554, on behalf of the Grievants.

8. Clause 24.2 of the HR Policy adopts a uniform standard, with regard to terminal benefits payable to Employees, on VERS, voluntary redundancy and compulsory redundancy.

9. Page 49 of the Policy provides for severance pay equivalent of 2 months' basic salary for every complete year of service; 1- year leave allowance; maintenance of medical cover for a maximum of 12 months after exit; notice of 3 months, or 3 months' salary in lieu; and rebate of outstanding staff loans at 20%.

10. The Claimant submits that the Respondent is bound by its own HR Policy, and could not justify underpayment to the Grievants.

11. The dispute was reported to the Cabinet Secretary for Labour, and conciliation there, yielded no settlement.

12. The Claimant prays for grant of the above underpayments, costs and interest.

13. The Respondent filed a Statement of Response, dated 7th April 2022. It is conceded that the Grievants were Employees of the Respondent, that they left employment under VERS, and were members of the Claimant Union. The presence of the CBA is conceded, but the Respondent states that it came into force after the VERS.

14. The Grievants received individual letters of VERS offer from the Respondent's General Manager. They accepted the offer and were bound by all the rights, obligations and terms arising therefrom. The letters gave details of the packages to be paid.

15. The Respondent states that, the letters created binding contracts between the Respondent and the Grievants. The contracts were in line with the Respondent's HR Policy.

16. The Grievants were paid net amounts as shown below: -

I. Florence Mbithi ... Kshs. 4,547,673.

II. Florence Ogwora ... Kshs. 2,547,501.

III. Kennedy Bosire ...2,367,679.

IV. Jeremiah Ongubo... Kshs. 2,788,159.

17. The Respondent applied at all times, the HR Policy, and in particular clauses 24 and 25. The packages were properly tabulated, and paid out to the Grievants.

18. The letters of offer were clear, that severance was payable at 1-month gross salary, for every complete year of service. Notice under clause 25 was 1-month or 1-month salary in lieu thereof. The Respondent agrees that the dispute was referred to the Ministry of Labour, and there was no settlement, because the Conciliator failed to appreciate the terms of VERS offer, in the letters issued to the Grievants.

19. The Respondent urges the Court to dismiss the Claim with costs.

20. The Claimant presented 1 Grievant, Florence Mbithi, who gave evidence on behalf of the other Grievants. The other Grievants filed witness statements, which are factually similar. She adopted these statements, her own statement and documents filed by the Claimant. She restated the contents of the Statement of Claim, as summarized above, in her evidence-in chief. She added that she was called by

Emmy Kiptugen at the Respondent's Head Office. She was told that, the Respondent Bank had been sold, and staff would be laid off, because their wage bill was unsustainable. The Grievants did not want to retire early, but were constrained to take the offers. Florence Mbithi was paid a net sum of Kshs. 4,547,673 as pleaded by both Parties. Her colleagues were paid the indicated sums. She emphasized that severance and notice were not paid in accordance with the applicable Human Resource Policy. The Policy applied uniformly, to redundancy and all voluntary separation agreements. The dispute was referred to the Ministry of Labour for conciliation. The Conciliator recommended that the Grievants are paid VERS dues, in accordance with the Human Resource Policy.

21. Cross-examined, Mbithi told the Court that she was employed in 1990. She was a tea girl. 2 of her colleagues were messengers, and the 3rd a driver. She applied for VERS. She made a request in writing. Severance and notice payable were indicated in the letter of offer. Clause 25 [a] of the HR Policy, provided for 1-month termination notice, or payment of 1-month salary, in lieu of notice. She was not compelled to apply for VERS. She signed and accepted VERS terms. Severance and notice were paid, in accordance with VERS terms. The Conciliator's recommendation, upheld the HR Policy.

22. Redirected, she told the Court that she did not resign; she retired early; and, clause 25 [a] of the Policy, on 1-month notice, did not therefore apply. The Grievants accepted VERS offer under pressure.

23. Jayne Silamoi, Respondent's Human Resource Manager, gave evidence on 27th October 2023. She adopted her witness statement and documents filed by the Respondent. She conceded that the Grievants were employed by the Respondent as pleaded, and left on VERS, upon their own requests. They were not coerced into it. They were paid in accordance with the HR Policy. They are no pending dues to them.

24. Cross-examined, Silamoi told the Court that she was employed by the Respondent Bank, in 2016. The VERS proposal was discussed between the Respondent and the Grievants, the same date it was offered. There was no announcement for VERS. Termination was actually a resignation by the Grievants. The payment formula was in conformity with the HR Policy. There is no specific formula in the HR Policy. It provided for voluntary and compulsory redundancy. The Respondent was required by its Policy to follow the *Employment Act*. The Grievants' separation did not fall within these categories. Redundancy under the HR Policy was payable at equivalent of 2 months' gross salary for every year completed in service, and notice of 3 months. Theirs was a request; there was no VERS program on offer. They could accept or reject what was offered.

25. Redirected, she told the Court that the Respondent acted in accordance with the Grievants' requests. There was no coercion. Acceptance was voluntary. The Claim was filed 2 years later, in afterthought.

26. The Claim was last mentioned before the Court on 7th December 2023, when the Parties confirmed the filing and exchange of their Submissions. The Court has taken a considerable time in preparation and delivery of this Judgment, owing to the unusually large number of Claims under its docket, that have progressed to conclusion at a faster rate than usual, under the virtual hearing platform. While the Parties deserve an apology from the Court for this delay, it should be understood that the Court has prepared and delivered Judgments in accordance with their age, complexity, and urgency, and as soon as practicable, recognizing that while justice delayed is justice denied, justice hurried is justice buried.

27. The single issue in this dispute is whether the Grievants were paid the correct terminal benefits under VERS, and whether they merit the prayers sought. To unravel the answer, the Court needs to examine the Parties' individual contracts of employment; their CBA; the Human Resource Policy; and the VERS agreement. Understanding how these different employment instruments relate to each other, is important.

**The Court Finds: -**

28. There is no dispute that the 4 Grievants, were members of the Claimant Union. There was a subsisting CBA concluded between the Claimant and the Respondent, which was applicable to the Grievants.

29. It is common ground that Florence Mbithi worked as a tea girl for 28 years; Florence Ogwora was a messenger for 29 years; Kennedy Bosire was also a messenger who served for 28 years; while Jeremiah Ongubo was a driver, with 30 years of service.

30. All the Grievants, except Florence Mbithi, exited service on 22nd February 2019. Mbithi exited on 27th February 2019.

31. There are letters written by the respective Grievants to the Respondent, preceding exit, applying for exit from service under Voluntary Early Retirement Scheme [VERS]. The Respondent wrote back to the Grievants acceding to their applications.

32. Subsequently, the Grievants exited service, and were paid severance and notice, as had been agreed under the VERS.

33. Florence Mbithi was paid Kshs. 4,547,673 after-tax; Florence Ogwora, Kshs. 2,547,501; Kennedy Bosire, Kshs. 2,367,679; and Jeremiah Nyakundi, Kshs. 2,788,159.

34. Their contracts executed in 1988-1990, did not incorporate any terms and conditions of service, from the Respondent's Human Resource Policy or other Organizational Policy. They did not mention that the Grievants were bound by other terms and conditions of service, beyond those identified in the respective contracts of employment.

35. They did not make provision for severance pay, and provided for 1-month notice, or 1-month salary in lieu of notice. They did not provide for 3 months' notice or equivalent salary, in lieu thereof.

36. The CBA exhibited by the Claimant provided for notice of 1 month, while severance under clause A7, is on account of redundancy. The CBA defines 'redundancy' similar to the definition under Section 2 of the *Employment Act*, to denote 'involuntary' loss of employment. The Parties agreed that the Grievants left employment under VERS, which by its very description is, voluntary. VERS is not regulated by Section 40 of the *Employment Act*, or any other provision of the *Employment Act*. It is not redundancy. It is consensual termination. The clause on severance pay under the CBA, or indeed notice pay, is not therefore relevant, to this dispute.

37. The Claimant relied heavily on the Respondent's Human Resource Policy, 2014, in particular clauses 24 and 25, in arguing that the Grievants were paid less than merited, under VERS.

38. The Court found clause 24.2 rather confusing. The Policy correctly defines the term 'redundancy,' to mean involuntary loss of employment. It goes on to split redundancy into two- 'voluntary redundancy' and 'compulsory redundancy.' The Court does not think that there is such a thing as 'voluntary redundancy,' under Section 40 of the *Employment Act*, which the Respondent invokes in its Policy. All redundancy is involuntary, imposed on the Employer and his Employee, by economic reasons. It is termination through no fault of the Employee. It is hard to see how this can be split into voluntary and compulsory.

39. The Human Resource Policy refers to 'Voluntary Agreement,' which it describes to occur, when an Employee voluntarily agrees to leave employment, in the interest of business efficiency.

40. Clause 24.2 provides that the Respondent, will adhere to the minimum statutory requirements of the *Employment Act*, relating to redundancies and 'voluntary retirements.'

41. Section 40 of the *Employment Act* however, regulates redundancy alone. It does not cover what the Respondent's Human Resource Policy characterizes as 'voluntary agreement' or 'voluntary retirements.'

42. Clause 24.2.2 regulates 'leaving by voluntary agreement in the interests of efficiency of the service.' It cautions that it is difficult to define this mode of exit. It makes it clear that this mode of exit in voluntary. It however states that, 'where early retirements in the interest of efficiency of service are management instigated, the bank will pay a lump sum compensation, equivalent to the number of years an Employee would be entitled under redundancy formula.''

43. The redundancy formula is contained in clause 24.2.7. It comprises severance pay at 2 times the basic monthly salary, for each year completed in service; 1-year leave allowance; continuation of medical insurance cover, for 12 months after exit; 3 months' gross salary in notice; and staff loans rebate at 20%.

44. The Claimant submits that the Grievants were paid severance, at the rate 1-month gross salary for every complete year of service, and 1-month salary in lieu of notice, which benefits were inferior to the promise of the Human Resource Policy.

45. One problem with this submission, is that the Claimant did not establish, that the Human Resource Policy was a contractual instrument, enforceable between the Parties.

46. It is not mentioned in the Grievants' contracts. It is not alluded to in the individual contracts or the collective agreement. It is not incorporated as part of their contracts of employment. They did not sign the Human Resource Policy. They are not recorded to have signified their consent to be bound by the Human Resource Policy, for it to be deemed as part of their binding contracts. Section 9 [3] of the *Employment Act*, requires Employees to sign their names or thumbprint thereon, in any written contract of employment. Neither the contracts, nor the Human Resource Policy establish that, their contents were merged, and all became contractually enforceable.

47. Clause 2.0 of the Human Resource Policy cautions that, the letters of employment are the principal contractual documents. Where a clause in the letters of employment differs with the Human Resource Policy, the letters of employment will prevail. The Human Resource Policy does not hold itself out, as a contractual document.

48. A Human Resource Policy is a guidebook. It guides Policy and Practice. A contract on the other hand is a legally binding agreement between the Parties, outlining their rights and obligations. Human Resource Policies are not automatically considered contractual.

49. To be considered contractual, Human Resource Policy must unambiguously indicate that it is contractual, and leave no room for misinterpretation. The Employee must be shown to have received, and acknowledged, the Human Resource Policy. Ideally, the Employee must sign the Human Resource Policy, expressing his consent to be bound, in terms of the law regulating employment-contract making, under Section 9[3] of the *Employment Act*.

50. The Human Resource Policy, under clause 2.1 was subject to amendments every 3 years. The Grievants' contracts were not subject to such amendments. Because the Human Resource Policy is not contractual, amendment would not require any consultation or consent of the Employees. It can be done unilaterally by its author. A Human Resource Policy which includes a unilateral right of the Employer to vary the Policy, cannot have been intended to be contractual. The Court is persuaded that the Respondent's Human Resource Policy was not incorporated in the Grievants' individual contracts of employment. It was not part of the CBA. It was not a standing Voluntary Early Retirement Scheme.

51. The Respondent's evidence that it acted in accordance with the HR policy, is immaterial. The Human Resource Police was never a binding contract.

52. The terms of VERS were communicated to the Grievants, in the letters dated 27th February 2019. The Grievants were offered the packages stated elsewhere, in this Judgment. The letters were signed by the Grievants personally and by the Respondent's Human Resource and Administration Manager Emmy Kiptugen and Chief Executive Officer, Sammy Lang'at.

53. The letters constituted separate and binding contracts, away from the individual contracts and the CBA. They were, like the individual contracts signed by both the Grievants or their representatives, and the Respondent. The Grievants expressed their consent to be bound under VERS. The VERS letters, were separate from the Human Resource Policy. They were standalone contracts. Unlike the Human Resource Policy, they were contractual, with all the elements of a valid contract. They were freely executed by both Parties.

54. VERS is not governed by the *Employment Act*. It is a voluntary contract. It culminates in consensual termination. The Grievants expressed their consent, by appending their signatures to the VERS letters of offer, and by receiving what was agreed, as their exit packages. Being a separate agreement, VERS supersedes all other contractual terms. It is not wrongful, that the terms of VERS, are less favourable than terms ordinarily enjoyed, under other pre-existing employment instruments. Notice period for instance, may be less than the notice provided for, in the original contract of employment. Severance pay does not have to match what is promised under the CBA or the Human Resource Policy. VERS is a standalone contract. This position has been upheld by the Court of Appeal in National Bank of Kenya Limited v. H.B. & 103 Others [2017] e-KLR. In the same Court's decision William Barasa Obutiti v. Mumia Sugar Company Limited [2006] e-KLR, it was held that Parties are at liberty to contract outside the instruments governing their employment relationship. The only limitation is that they transact within the law. In National Bank of Kenya Limited v. Pipeplastic Samkolit [K] Limited and Another [2001], again the Court of Appeal underscored that Parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

55. The Grievants, while testifying half-heartedly that they were pressured by Kiptugen to apply for VERS, because the Respondent was in financial doldrums; closing down; and, unable to sustain their monthly salaries, did not through their Union, plead and prove coercion, fraud or undue influence. They made a deliberate application to exit employment voluntarily, on early retirement. They had worked for 3 decades, and opted to retire voluntarily. They were paid adequate benefits. Even assuming they were to be paid severance, in accordance with Section 40 of the *Employment Act*, the rate of 1-month for every complete year of service, was way above the minimum of 15 days' salary for every complete year of service, prescribed under Section 40. They were fairly and lawfully treated. It is neither here, nor there, that they accepted VERS offer the very same day it was made. Their acceptance was voluntary and binding.

56. The recommendation by the Conciliator from the Ministry of Labour, that the Grievants are paid benefits in accordance with the Human Resource Policy, failed to weigh the contractual force of the Human Resource Policy, against that of the VERS. It was a recommendation based on a misapprehension of the legal architecture, of both the Human Resource Policy and the VERS, and therefore, not to be embraced by the Court.

57. The Court finds no merit in the Claim.

**It is ordered: -**

a. The Claim is declined.

b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 9TH DAY OF AUGUST 2024.**

**JAMES RIKA**

**JUDGE**