



**Mekenye v National Bank of Kenya Limited (Cause 1813 of 2017)
[2025] KEELRC 2928 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2928 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1813 OF 2017
K OCHARO, J
OCTOBER 16, 2025**

BETWEEN
ROBERT KAMBUNI MEKENYE CLAIMANT
AND
NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. Robert Kambuni Mekenye (The Claimant) was employed by the National Bank of Kenya Limited (the Respondent) on or about the 11th day of May 1981 until the 10th of December, 2014, when the Claimant applied for early retirement. Contending that the Respondent unjustifiably underpaid his terminal benefits, he filed this suit seeking;
 - a) A declaration that the claimant was discriminated against.
 - b) Damages for discrimination.
 - c) Payment of all the lawful terminal dues as set out at par. 7 above.
 - d) Cost of this suit with interest thereon.

2. Particulars of special loss and damage;
 - a) Pay in lieu of two months' noticeKshs. 795,004.00
 - b) Pay in respect of 1-month salary for every year of service (35years)
.....Kshs.13,912,570.00

TOTAL.....Kshs.14,707,574.00



3. The Respondent resisted the Claimant's claim by filing a Memorandum of Reply. They denied the Claimant's cause of action and his entitlement to the reliefs sought. The Respondent averred that the Claimant voluntarily applied for retirement and was duly paid his dues.

Claimant's case

4. The Respondent employed the Claimant on or around 11 May 1981 as a clerk. He later rose through the ranks to the position of Branch Operations Manager at the Harambee Avenue Branch office.
5. He contended that he diligently, faithfully, and with integrity served the Respondent Bank throughout his employment until December 10, 2014, when he applied for early retirement in accordance with the terms of his contract and the Bank's Human Resource Manual in force at that time, which provided in Clause 9.4 as follows:

9.4 Retirement

9.4.1 Official Retirement date

The Bank's official retirement age is 60 years. However, there is an option of early retirement from the age of 50, either at the Bank's discretion or the employee's request. The Bank may accept or decline an employee's request for early retirement at its sole discretion.

9.4.2 Notice to Retire

The Bank will give an employee at least three months' notice prior to attaining the retirement date (age). Either party will give three months' notice in case of early retirement.

9.4.3 Benefits

Retirement benefits will be as defined in the Employees' Retirement Benefits Schemes' Rules and Regulations.

6. The Respondent Bank approved the Claimant's request for early retirement on December 10, 2014, and committed to disbursing the Claimant's lawful terminal dues accrued up to and including that date. Nevertheless, the Bank erroneously computed and underpaid the Claimant, resulting in his loss and damage.
7. The Respondent only paid the Claimant one month's salary in lieu of notice, contrary to Clause 9.4.2 of the HR Manual, which stipulated a notice period of three months. This constituted an unfair labour practice by the Respondent.
8. The Claimant was employed by the Respondent Bank from May 11, 1981, until his early retirement on December 10, 2014, totalling 33 years and 14 days. Consequently, he was entitled to receive service pay.
9. The terminal benefits paid to him by the Respondent were not only discriminatory but also contravened the Bank's Human Resources Manual, Articles 27 and 41 of *the Constitution*, and Section 26 of the *Employment Act* 2007.
10. The Respondent discriminated against the Claimant by paying him only one month's salary in lieu of notice, rather than the three months' salary specified in Clause 9.4.2 of the HR Policy, unlike other employees.
11. Furthermore, the Respondent's action was a unilateral move that disadvantaged him, yet it was carried out without prior notice.



12. He asserted that he was not given an opportunity to respond to the proposed changes, rendering the Respondent's actions discriminatory and a breach of the principles of natural justice regarding notice and the right to a fair hearing before any downward adjustment of his employment terms under Clause 9.4.2 of the HR Manual.
13. Additionally, the Respondent denied him fair administrative action by retiring him on less favourable terms, providing only one month's salary in lieu of notice instead of the required three months. This conduct was contrary to the provisions of Article 47 of the Constitution of Kenya, as read with Section 4 of the Fair Administrative Actions Act.
14. He further asserted that his claim for service pay for KShs. 13 912 510 is anchored on the stipulations of the Human Resources Manual.
15. Cross examined by counsel for the Respondent, the Claimant testified that the letter [circular] dated 19th February 2014, which encouraged voluntary early retirement by the Respondent's employees, did not apply to him. He applied for early retirement after the offer period stated in the circular had expired.
16. He applied for early retirement via his letter dated 10th December 2014. In the letter, he sought that his retirement take effect immediately. The Respondent accepted the application on the same day.
17. At the time of his application for early retirement, he was 54 years old. His application was anchored on the stipulations of clause 9.4.1 of the Respondent's Human Resources Manual.
18. By their letter dated 15th August 2017, the Respondent set out his terminal benefits: one month's salary in lieu of notice; earned but untaken leave days; pro-rated salary up to 10th December 2014; and retirement benefits [pension]. He was paid all these. However, this notwithstanding, he has made pension benefits one of the reliefs he has sought in his pleadings.
19. He further testified that at the time of exiting employment, he was a Branch Operations Manager. As such, he was serving at the Respondent Bank's managerial level. The Collective Bargaining Agreement did not apply to him by virtue of the level at which he was serving.
20. The offer made to him was not equivalent to that provided to individuals at the lower level.
21. He filed the recent case after realising that he was not paid his terminal dues in accordance with the provisions of the Human Resources Manual. His action was not prompted by the filing of other cases against the Respondent by other employees on the same subject matter as in this suit.

Respondent's case

22. The Respondent presented one witness, Stephen Opiyo Obengo, its Head Employee Relations, to testify on its behalf. The witness adopted his witness statement filed herein dated April 24, 2023, as his evidence in chief, and produced as documentary evidence the Respondent's documents filed herein.
23. The witness stated that the Claimant was an employee of the Respondent from May 11, 1981, earning a consolidated monthly salary of KShs. 397,501.00 at the time of his retirement.
24. The Claimant voluntarily applied for consideration for early retirement vide a letter dated December 10, 2014, and the Respondent noted that, having attained the age of 54 years, he was eligible for early retirement in terms of the provisions of section 9.4.1 of the Respondent's Human Resources Manual. The Claimant's request was therefore accepted by the Respondent's letter dated the same day, and the Claimant was paid his rightful [dues in terms of the Human Resources Manual and the Employment Act, thus;



- a) One (1) month's salary in lieu of notice – Kshs. 397,502.00
 - b) Prorated salary for ten (10) days – Kshs. 130,690.00
 - c) Overutilized leave days (1 day) – Kshs. 13,069.00
- Total: Kshs. 515,123.00
- d) Retirement benefits in accordance with the Respondent's Staff Pension Fund and Trust Deed Rules.
25. He stated the Claimant's claim for two months' salary is not founded. Clause 10 of the Claimant's Letter of Appointment dated 11th May, 1981 provides the notice period upon confirmation as 30 days. The Bank's letter dated 10th December, 2014, accepting the Claimant's request for early retirement clearly indicated that the Claimant would be paid 1month's salary in lieu of notice.
 26. The Respondent asserts that the benefits outlined in the Managing Director's Circular No. 1/2014, dated February 19, 2014, and shown on pages 1 to 2 of the Claimant's List of Documents, did not apply to the Claimant. This is because it was an express term and condition of the Voluntary Early Retirement Programme that all applications for early retirement be submitted to the Head of Human Resources on or before March 3, 2014. The Claimant submitted his request for early retirement on December 10, 2014, more than nine (9) months after the prescribed deadline. Consequently, he was not eligible for the benefits under the program.
 27. Additionally, the Respondent employed the Claimant under the Management Cadre (MG-8), so the provisions of the Collective Bargaining Agreement did not apply to him.
 28. The employee exiting must present himself in person for clearance with the relevant departments of the Respondent. As such, the Claimant is solely to blame if there were any delays in the clearance process.
 29. The Claimant has not provided enough evidence to prove that the Respondent discriminated against him. His early retirement was completely separate from the Voluntary Early Retirement (VER) programme, meaning he cannot claim benefits intended for employees involved in a different contractual arrangement. The VER programme was discretionary and operated independently of the Respondent's Human Resource Manual and the *Employment Act*. Since the Claimant chose not to participate, he cannot seek benefits from a programme he voluntarily opted out of.
 30. Cross examined by Counsel for the Claimant, the witness testified that in accepting the Claimant's request for early retirement, the Respondent offered him inter alia one month's salary in lieu of notice. Clause 9.4.1 of the Human Resources Manual commands the issuance of three months' notice in early retirement situations.
 31. Although the Claimant worked for 33 years for the Respondent, he was not paid service pay. Payment of service pay was not a practice within the Respondent Bank.

Analysis and Determination

32. The Parties herein agreed on issues for determination and documented them in a Statement of Agreed Issues filed herein, dated February 6, 2020. I have carefully reviewed the issues as drafted, along with the pleadings, evidence, and submissions from which they are supposed to derive, and I conclude that, with due respect, they are not properly formulated; relying on them may hinder this Court's objective of delivering a clear, fair, and easily comprehensible judgment. A court of law cannot be forced to base its judgment on issues identified by parties that are poorly drafted and presented.



33. Having stated as above, I am required to formulate issues for determination, regardless of those identified by the Parties. I have thoroughly examined the pleadings submitted by the parties, their respective evidence, and the submissions made by their Counsels. Accordingly, the following issues are identified for determination;
- I. Did the Claimant retire pursuant to the Circular dated 19th February 2014 or Clause 9.4.1 of the Human Resources Manual?
 - II. Was the Claimant entitled to notice pay, and to what extent?
 - III. Was the Claimant discriminated against by the Respondent, particularly on exit perks?
 - IV. Is the Claimant entitled to the reliefs sought?

Issue 1

34. It is undisputed that on 19th February 2014, the Respondent informed its employees of initiating a voluntary early retirement programme through the Circular issued by the Managing Director. The circular urged interested and eligible employees to apply, specified a deadline for applications as 3rd March 2024, and outlined the entitlements for those who would exit under the programme. During the hearing, the parties frequently referred to this circular, which is particularly relevant given that some of the Claimant's claims are based upon it.
35. I have meticulously examined the Claimant's correspondence dated 10th December 2014. It does not indicate in any manner that he was submitting his application in accordance with the circular. As accurately stated during testimony by the Respondent's witness, the application was submitted well after the deadline established for the receipt of applications. Consequently, it is reasonable to conclude that the Claimant's retirement was not pursuant to the circular but in accordance with the provisions outlined in the Human Resources Manual.

Issue 2

36. The attitude of both parties was that the Claimant was entitled to a termination notice and, where applicable, notice pay. However, their positions regarding the notice period, and thus notice pay [where applicable], were diametrically opposed. The Respondent contended in its evidence and submissions that the Claimant was entitled to a month's notice under its contract of employment. In contrast, the Claimant asserts that he was entitled to three months' termination notice or salary in lieu under the Human Resources Manual.
37. The Respondent's Counsel submitted that the Respondent rightly paid the Claimant one month's salary in lieu of notice, as his letter of appointment, a binding document, and the letter accepting his application provided so. That to award the Claimant notice pay outside of the stipulations of the terms of the letter of appointment would amount to rewriting a contract for the parties, contrary to the cherished legal principle that was aptly elaborated by the Court of Appeal in *National Bank of Kenya Limited v Hamida Bana & 103 others* [2017] eKLR.
38. In *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10. Lord Hoffman stated;
- “The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute, or an article of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means..... It is the meaning which the instrument would convey to a reasonable



person having all the background knowledge which would be reasonably available to the audience to whom the instrument is addressed.”

39. I truly appreciate the legal principle. The duty of this Court cannot be to rewrite the terms of contracts by parties, but to interpret them and, where called upon, enforce them. However, I take a clear view that the principle shouldn't be blanketly employed to the extent of blurring the courts from holistically interpreting the contracts and even discerning what implied terms of the contract exist.
40. The Human Resources Manual dated 3rd June 2012 provides in clause 9.4.;
- “9. Retirement
 - 4.1 Official Retirement Date
 - 4.1 The Bank's official retirement age is 60 years. However, there is an option of early retirement from the age of 50, either at the Bank's discretion or the employee's request. The Bank may accept or decline an employee's request for early retirement at its sole discretion.
 - 4.2 Notice to Retire
 - 4.2 The Bank will give an employee at least three months' notice prior to attaining the retirement date[age]. Either party will give three months' notice in case of early retirement.
 - 4.3 Benefits
 - 4.3 Retirement benefits will be as defined in the Employees' Retirement Benefits Scheme's rules and regulations.
41. Clearly, the Claimant's claim for payment of an additional two months' salary is based on the provisions of clause 9.4.2 of the manual. To resolve the dispute over the termination, notice to which the Claimant was entitled, this Court must consider whether external documents, such as Human Resources Manuals or employee handbooks, are part of the employment contract.
42. The significance of the Employee Handbook, Human Resources policies, and practice manuals within the contemporary employment relationship between employers and employees is increasing. Given the prominent role that documents external to the contracts of employment play in the employment relationship, many employment disputes turn on the interpretation and/or alleged compliance or non-compliance with the provisions of those documents. In certain disputes, questions have arisen regarding the contractual force of the Employee Handbooks or the Human Resources Policies and Practice Manuals, and whether the stipulations of the documents can supersede those of a contract of employment.
43. Across jurisdictions, the general principle is that external documents outside the employment contract do not possess automatic contractual force in employment relationships. The enforceability of the stipulations within these documents as contractual terms should be assessed on a case-by-case basis. As such, there cannot be an exhaustive list of instances when the stipulations can be embraced as having contractual force.
44. One of the instances when the stipulations of the documents referred to herein above can be held to possess contractual force and therefore enforceable as a contractual term[s], is where the contract of employment expressly or by implication refers or incorporates the terms and conditions of the document.



45. The Claimant's letter of appointment under clause 3 provides;
- “Your Terms and Conditions of Service will be laid down in the Collective Agreement at present in force in respect of this Bank and for the future as to whatever terms and conditions of service are in force at the time. You will also be subject to the general rules in respect of the staff in the Bank.” [Emphasis added].
46. A careful examination of the clause clearly shows that external documents, including the Human Resources Manual, were incorporated into the Claimant's letter of employment by necessary implication.
47. I note that under Section 9 of the Human Resource Manual, which provides for Separation, it is clearly stipulated
- “In recognition of the *Employment Act* 2007, this section deals with and explains the various forms through which the Bank may be separated from its employees.” In my view, by citing the law, which, typically, in organising events within relationships, is binding, the Respondent acknowledged and committed to be bound by all the stipulations under the clause, including those specified in subsection 9.4.2.
48. Undeniably, the provision regarding retirement notice period under subsection 9.4.2 of the Manual is inconsistent with clause 11 of the Claimant's letter of appointment, which provides one month's salary or pay of one month's salary in lieu of notice.
49. In instances where discrepancies exist between the provisions of a Human Resource Manual and those of an employment contract, the Court shall interpret both provisions to ascertain the true intentions of the parties involved. When the contractual provision concerning a particular matter is formulated in broad terms, whereas the corresponding provision in the Human Resource Manual is more specific regarding the same subject, the Court will favour the provisions outlined in the Manual.
50. This Court notes that the termination notice under the letter of appointment is a general notice of termination, which could apply to any form of separation where it was necessary to be issued. Conversely, the Human Resources Manual under Section 9 has provided specific notices for particular types of separation. For example, an employee resigning must give notice in accordance with the provisions of his/her letter of appointment [section 9.2]. When the bank terminates an employee's employment, it must issue notice as specified in that employee's letter of appointment [section 9.3]. Deliberately, section 9.4.2 states that a three-month retirement notice is required. I have no doubt, therefore, that the retirement notice was intended to follow the Manual; otherwise, no other reasonable explanation can be given for the difference in the provision for this notice compared to those for the other forms of separation.
51. By reason of the foregoing, I am convinced that the Claimant was entitled to a three months' notice or three months' salary in lieu of notice.

Issue 3

52. The Claimant asserted that the Respondent discriminated against him, particularly on the exit package. I note that in a bid to establish this claim, he heavily relied on the Collective Bargaining Agreement, which did not apply to him at the material time as he was not a unionisable employee. His discrimination claim must therefore fail. He chose the wrong comparators and basis.



Issue 4

53. The Claimant's claim for service pay is misplaced. Undeniably, the Claimant belonged to a pension scheme. He was paid his pension benefits under the scheme. I cannot fathom what prompted his claim for service pay. In any event, as he was a pension scheme member, the law under section 35 of the *Employment Act* expressly disentitles him from the benefit of service pay.
55. Having found that his discrimination claim lacks merit, the relief of general damages sought based on the alleged discrimination fails.
56. Having found that the Claimant was entitled to three months' notice, the Respondent was required to pay him in lieu of three months' notice, not one month's salary in lieu of notice, as it did.
57. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
 - I. KShs. 795,004.
 - II. Interest at court rates on this awarded sum, from the date of filing this suit to full payment.
 - III. Costs of this suit.

READ, SIGNED, AND DELIVERED THIS 16TH DAY OF OCTOBER 2025.

OCHARO KEBIRA

JUDGE

