Bank of Baroda (K) Limited v Banking Insurance & Finance Union (K) & another (Civil Appeal 440 of 2019) [2025] KECA 439 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 439 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 440 OF 2019

K M'INOTI, FA OCHIENG & WK KORIR, JJA

MARCH 7, 2025

BETWEEN

BANK OF BARODA (K) LIMITED ..... APPELLANT

AND

BANKING INSURANCE & FINANCE UNION (K) ..... 1ST RESPONDENT

KENYA BANKERS ASSOCIATION ..... 2ND RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Nairobi, (H. Wasilwa, J.) dated 4th October 2018 in ELRC Case No. 234 of 2018)

JUDGMENT

1. This appeal originates from the 1st respondent's suit against the appellant and the 2nd respondent. The matter revolved around the unfair, unlawful, premature retirement of employees from the appellant's employment, before they had attained the age of 60 years.

2. The 1st respondent sought the following prayers in the memorandum of claim:

    a. That the Honourable Court should find and declare that all the employees of the appellant shall retire at the age of 60 years but may be allowed to opt for early retirement on attaining the age of 50 years with full retirement benefits.

    b. That the Honourable Court do find and order that the parties in this suit do adopt the retirement age as a negotiable item and include it in the CBA for future negotiations.

    c. Costs of the suit.

3. The 1st respondent's evidence was adduced through CW1, an employee of the appellant for over 24 years, the chairman of the central staff community, the chairman of medical scheme of the appellant, and a member of the joint negotiating council.

4. His testimony was that the appellant was discriminating against the workers in Kenya who retired at the age of 55, in comparison to the workers in India who retired at the age of 60 or more. He produced a list of names and pointed out the discrepancies in support of this claim.

5. He stated that although the 2nd respondent had a membership of 35 banks, all of whom had a retirement age of 60, three banks, including the appellant, had a retirement age of 55. He informed the court that it was the duty of the 2nd respondent to negotiate the issue, but they had failed to do so, despite it being a negotiated item as per the CBA between the 1st respondent and the 2nd respondent.

6. Opposing the claim, the appellant through the evidence of RW1, its human resource manager, stated that the retirement age had been set out in the human resource manual as 55 years. He stated that this is brought to the attention of the employees at the time they are being employed, and there is no room for early retirement, or a longer term of service.

7. He stated that retirement age was not one of the negotiable items set out in the CBA for the last 18 years since the appellant was recognized by the 2nd respondent, and that the 2nd respondent had not given any policy directives to its members on retirement age. This was left to the discretion of each individual bank to decide within the law, and also as dictated by its financial means.

8. He stated that retirement age was linked to pension schemes, which was why it was one of the non-negotiable items set out under Appendix B, "Pension and Provident Funds/Gratuities".

9. He refuted the claim that there was discrimination of the employees in Kenya, compared to the employees in India, and stated that all the employees retired at the age of 55 years.

10. Also opposing the claim was the 2nd respondent. Through the evidence of RW2, the 2nd respondent's head of human resources and industry relations, the 2nd respondent stated that each individual member bank had varying retirement ages ranging from 55-60 years. She stated that the 2nd respondent had a recognition agreement with the 1st respondent since 2005, which sets out negotiable, and non-negotiable items, and retirement age was not a negotiable item.

11. She stated that although the 1st respondent had sought to have retirement age as a negotiable item, their prayer was declined. She reiterated the appellant's claim that the 2nd respondent did not recommend retirement age to banks, as that was left to the discretion of the banks to decide.

12. She further stated that the 2nd respondent had not received any complaints of discrimination of the appellant's employees, and stated that it was not discriminatory for staff who had been seconded from different countries to have different retirement ages from the locals, as their contracts of employment were signed in different countries, which had different minimum retirement ages.

13. Upon evaluating the evidence before the court, the trial court noted that it was not in contention that employees of Asian origin retired at 60 years, while the locals retired at 55 years. The trial court referred to Article 27 of *the Constitution*, Article 1 of the ILO 1958 Convention No. 111 in finding that the two- tier retirement age within the appellant bank was discriminatory, as the 1st respondent's members worked for the same bank.

14. The trial court also referred to Article 6 of the ILO Convention which was also ratified by India on 3rd June 1960, and made a finding that there were no special circumstances that would necessitate a difference in retirement age for employees in the same sector, despite having contracts drawn in different territories.

15. The trial court pointed out that under Appendix A of the CBA between the respondents dated 16th August 2017, item 4 on "duration of individual contracts", was included as a negotiable item. The court went on to hold that;

> " This confirms that retirement age is an item for negotiation because retirement ages informs the duration of an individual contract. That then settles issue no 2 above for consideration. For avoidance of doubt then, I confirm that retirement age is a negotiable item as per the CBA between the parties and hence should be a subject of negotiation."

16. Consequently, the trial court held that the action of the appellant subjecting certain employees to a retirement age of 55 years and others to 60 years was discriminatory, and should henceforth be reviewed accordingly. The court also held that retirement should be reviewed as a negotiable item as per the parties' CBA. Costs of the claim were awarded to the 1st respondent.

17. Being dissatisfied with the judgment by the trial court, the appellant lodged the present appeal in which he raised the following grounds of appeal:

    a. The learned Judge erred in failing to appreciate that the form and duration of employment is one of the terms set out under Section 10(2) (e) of the *Employment Act* to be agreed between the employer and the employee.

    b. The learned Judge erred in failing to appreciate that Section 10(5) of the *Employment Act* envisages that where any terms to be agreed between the employer and the employee change, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing,

    c. The learned Judge erred by rewriting the terms of the contract of employment between the appellant and its employees.

    d. The learned Judge erred by ignoring the provisions of the appellant's employment handbook, and the CBA between the appellant and the 1st respondent.

    e. The learned Judge erred by failing to consider the testimonies of the appellant and 2nd respondent witnesses.

    f. The learned Judge erred by failing to appreciate that the 2nd respondent had not issued any directive or guideline to its members to enhance the retirement age to 60 years.

    g. The learned Judge erred in finding that employees of Asian origin retired at 60 while those of African origin retired at 55.

    h. The learned Judge erred by finding that the appellant was in breach of the ILO Convention by having different retirement ages for Indian managers seconded by the appellant bank in India to work for the appellant, and they were working for one employer.

    i. The learned Judge erred by finding that the employees of the appellant who are not of Asian origin were discriminated.

    j. The learned Judge erred by finding that the appellant bank in India was the same organization as the appellant, despite the documentary evidence adduced showing that they were two distinct legal entities incorporated in different countries.

18. The appellant condensed its grounds of appeal into two main issues:

a. Whether the Learned Judge erred in fact and in law by ignoring the witnesses' testimonies and rewriting the terms of the employment contracts between the Appellant and its employees thus ordering the review of the retirement age to 60 years and ordering that retirement age be a negotiable item.

b. Whether the Learned Judge erred in fact and in law by finding that the Appellant had discriminated against some of its employees.

19. When the matter came up for hearing on 30th October 2024, legal representation was as follows: Mr. Ondati Mogaka for the appellant, Mr. Museve for the 1st respondent, and Mr. Jason Namasake for the 2nd respondent. Counsel relied on their written submissions, which they orally highlighted.

20. Mr. Mogaka submitted that the core contention was whether retirement age should be a negotiable item under the CBA. This was so because the prayer for increasing the retirement age of the appellant's employees from 55 years to 60 years had already been implemented.

21. Counsel submitted that employment contracts were being negotiated individually between the banks and the employees, and they should not have been subject to CBA negotiations, especially since the 2nd respondent was not willing to negotiate retirement age on behalf of its member banks. Counsel argued that employment contracts, including retirement age, should be negotiated between the individual employee and the bank.

22. Counsel emphasized that Bank of Baroda, Kenya, was a separate entity from Bank of Baroda, India, and that the 1st respondent was regulated by the Central Bank of Kenya. Counsel was of the view that this distinction was important to the case because the terms of the parent company in India were different from those in Kenya.

23. Counsel further submitted that the Human Resource (HR) policy, which includes the retirement age, applied to all employees, whether they were unionized or not.

24. In its written submissions, the appellant submitted that the respondents had concluded several CBAs over the years, the latest of which was signed on 30th August 2017. The said CBA did not address the issue of retirement age for employees of the 2nd respondent's member banks, including employees of the 1st respondent.

25. The appellant was of the view that in absence of an express retirement age set by statute or a CBA, retirement age remained a contractual issue for agreement between employees and employers. The appellant reiterated that the 1st respondent sought to introduce the issue of retirement age set at 60 years in the CBA, but the 2nd respondent objected.

26. The appellant submitted that the 1st respondent had referred a trade dispute against the appellant to the Department of Labour, for Conciliation on 5th September 2017, because the appellant allegedly failed or refused to enhance the retirement age of its employees to 60 years.

27. The appellant submitted that a court cannot rewrite the terms of a contract freely entered into between the parties. The issue of the appellant's employees retirement age had not been addressed in previous CBAs concluded by the respondents.

28. The appellant pointed out that the Recognition Agreement provided that the subject of pension and provident funds/gratuities shall not be a negotiable issue in any collective bargaining agreement between the 1st and 2nd respondent, and that the trial court had no power to improve on the contract

which it was called upon to construe, and could not introduce terms to make it fairer or more reasonable.

29. The appellant submitted that the issue of retirement age was prematurely before the trial court, as the 2nd respondent was responsible for negotiating the CBA on behalf of its members, the appellant included. The appellant submitted that 1st respondent failed to invite the 2nd respondent to negotiate the CBA.

30. The appellant relied on the following authorities in support of its legal arguments; Simon Kipkorir Ketter v A.C.K Christian Intermediate Technology Centre & Another [2016] eKLR; Francis M.P. Nyamu & 10 Others v National Bank of Kenya Limited [2020]eKLR; Heritage Insurance Company Limited v Christopher Onyango & 23 Others [2018] eKLR; Amatsi Water Services Company Limited v Francis Shire Chachi [2018]eKLR; Five Forty Aviation Limited v Erwan Lange [2019]eKLR; National Bank of Kenya Limited v Hamida Bana & 103 Others [2017]eKLR; Banking, Insurance, and Finance Union (Kenya) v Bank of India & Another [2019]eKLR; Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018]eKLR; Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v Attorney General & another [2011]eKLR; and Kenya Medical Research Institute v Samson Gwer & 8 Others [2019] eKLR.

31. Mr. Namasake for the 2nd respondent supported the appeal and submitted that the recognition agreement signed in 2000 included appendices listing negotiable and non-negotiable items, with retirement benefits being a non-negotiable item. Counsel submitted that they do not negotiate retirement age as part of CBA terms, considering it a prerogative of individual banks. Counsel emphasized that retirement age was typically agreed upon between the employer and employee, and the 2nd respondent's involvement did not extend to negotiating retirement ages. Counsel further submitted that the 2nd respondent was not involved in the initial dispute reporting.

32. The 2nd respondent submitted that the 1st respondent had raised a trade dispute against the appellant in 2007, regarding the "Failure/Refusal to enhance the Retirement age to 60 years for its employees as the practice in the Industry". Following the dispute, a conciliator was appointed, but the 2nd respondent was not involved in the conciliation or dispute resolution.

33. The 2nd respondent submitted that the Recognition Agreement between the 1st and 2nd respondents listed negotiable items in Appendix A and non-negotiable items in Appendix B. The negotiable items included rates of pay, leave, hours of work, and medical schemes, while the non-negotiable items included social activities, management methods, sickness benefits, and pension and provident fund/ gratuities.

34. The 2nd respondent submitted it had always regarded retirement age as a non-negotiable item. The 2nd respondent submitted that no trade dispute, if any, amending or altering or interpreting any clause of the Recognition Agreement was reported against the 2nd respondent.

35. The 2nd respondent submitted that the ELRC lacked jurisdiction to adjudicate on the dispute, as no dispute existed between the respondents. The 2nd respondent pointed out that a trade dispute was a difference between a trade union and an employer or an employers' organization, and that the respondents could discuss negotiable or non-negotiable items.

36. The 2nd respondent submitted that the law relating to trade disputes and resolution was outlined in Part VIII of the Employment and *Labour Relations Act*. The 2nd respondent also relied on the case of Banking, Insurance, and Finance Union (Kenya) v Bank of India & Another, (supra), in support of its submissions.

37. On his part, Mr. Museve in opposing the appeal submitted that he was relying on his submissions that were dated 4th September 2020. Counsel submitted that, generally, parties should be able to negotiate issues in collective agreements, and referenced Section 12 of the Employment and *Labour Relations Act* and Article 41 of *the Constitution*.

38. The 1st respondent submitted that when it proposed the inclusion of a clause on retirement age in the CBA, the discussions led to a deadlock, which was then reported to the Cabinet Secretary. The 1st respondent submitted that its demand was well founded in law, and its recognition agreement.

39. The 1st respondent was of the view that retirement age was a negotiable item as per the CBA. The 1st respondent pointed out that the trial court had found that the retirement age in the circumstances was discriminatory and should be reviewed accordingly, so that all employees should have equal terms of employment.

40. To buttress its submissions, the 1st respondent relied on the following cases: Telkom (K) Ltd v John Ochanda & Others, C.A. No. 207 of 2012; Kenfreight (E.A Ltd) v Benson Nguti, C.A. No. 37 of 2018; and OI Pejeta Ranching Limited v David Wanjau Muhoro, C. A. No. 42 of 2015.

41. The Court sought clarification on the legal basis for negotiable and non-negotiable items. Mr. Namasake pointed to the *Labour Relations Act*, but clarified that it did not address retirement age directly, but Part Eight addressed dispute resolution processes. Counsel submitted that disputes should be reported to the Ministry of Labour for conciliation before proceeding to the Employment and Labour Relations Court. Counsel referenced Judge Ongaya's argument in a similar case.

42. The Court also raised concerns about whether retirement age negotiations should occur at the individual bank level or through the 2nd respondent, and questioned the appellant's attempt to introduce a retirement age of 60 when existing individual contracts did not include this provision. Counsel submitted that the 1st respondent's employment handbook and HR policy applied to all employees, both unionized and non- unionized. Therefore, the retirement age captured in that HR policy covered the unionized employees as well.

43. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issue for determination is whether retirement age was a negotiable item in CBAs between the 1st respondent and the 2nd respondent.

44. The 1st respondent argued that the trial court correctly considered the matter as an economic dispute affecting unionisable employees and that the retirement age was a negotiable item as per the CBA. The 2nd respondent contended that retirement age was a non-negotiable item listed in Appendix B of the Recognition Agreement and that the ELRC lacked jurisdiction because no dispute existed between the respondents, while the appellant argued that the Learned Judge rewrote the terms of employment contracts and that the CBA did not address the issue of retirement age for employees of the 2nd respondent's member banks.

45. It is not in dispute that the CBA did not explicitly address retirement age as a negotiable item. Furthermore, the recognition agreement between the parties specifically listed certain items as negotiable, while others, including retirement benefits and pension schemes, were deemed non-negotiable. In Alghussein Establishment v Eton College [1991] 1 All ER pp 267, the Court held that:

> " The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party

was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach..."

46. That being the case, we are inclined to agree with the appellant's submission that retirement age, being part of the individual employment contracts, should remain a matter for agreement between the employer and the employee, rather than being dictated by the CBA. We are persuaded that the trial court erred in its finding that retirement age should be made a negotiable item under the CBA. Employment contracts, including those relating to retirement age, should be negotiated individually between the employer and the employee. The trial court's decision to introduce this term into the CBA was, therefore, a misapplication of the law.

47. The appellant argued that the trial court had no jurisdiction to rewrite the terms of the employment contract. We agree that the role of the court is not to alter the terms of an agreement that had been freely entered into between parties. The trial court's duty was to interpret the law and assess whether the terms of the contract violated any statutory or constitutional provisions. In the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014]eKLR, Court stated that:

> " It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract." "...Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case..."

48. In this case, the trial court's decision to introduce the concept of a negotiable retirement age was an overreach, as it effectively rewrote the terms of the employment contracts between the appellant and its employees. This was an error in law, as the court does not have the authority to impose terms on the parties that were not mutually agreed upon or negotiated. This was an issue which required resolution between the respondents, given that the court cannot rewrite a contract freely entered into between the parties.

49. For the reasons outlined above, we find that: the trial court erred in holding that retirement age is a negotiable item under the CBA; and that the trial court exceeded its jurisdiction by rewriting the employment contract between the appellant and its employees.

50. Accordingly, we allow the appeal and set aside the judgment of the trial court.

51. The appellant is awarded costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

K. M'INOTI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar