



**Irungu v Old Mutual Life Assurance Company Limited (Civil Appeal
333 of 2018) [2023] KECA 375 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KECA 375 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 333 OF 2018
HM OKWENGU, JM MATIVO & HA OMONDI, JJA
MARCH 31, 2023**

BETWEEN

NANCY WAIYEGO IRUNGU APPELLANT

AND

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED RESPONDENT

*(Being an appeal against the judgment and decree of the Employment and Labour Relations
Court at Nairobi (Ongaya, J.) dated 22nd June 2018 in ELRC Petition No. 17 of 2012)*

JUDGMENT

1. Nancy Waiyego Irungu, the appellant, had been employed by the respondent as a telephone Switch Board Operator in 1994, and later promoted to the position of a cashier, and finally assigned to the mail department in the capacity of Mail Room Administrator. In the course of time, her employment was terminated under circumstances which she perceived to be discriminatory, on account of her disability.
2. She subsequently, filed a petition in the High Court seeking a declaration that the actions of the respondent were unconstitutional and discriminatory, an order that the respondent reinstates her back to her employment position, with the full terms and conditions; and that the respondent pays damages to her for loss of earnings, humiliation, and inconveniences suffered as a result of the respondent's illegal acts.
3. Her claim was dismissed on grounds that the evidence did not suggest that the termination was as a result of discrimination due to physical disability and being aggrieved by the outcome, she preferred this appeal against the Judgment and Decree of the High Court at Nairobi (Ongaya, J), dismissing the suit she filed against the respondent in the High Court.
4. It was the appellant's case that she was terminated from employment on account of a physical disability she had from birth, having been informed by the human resource officer that the management had resolved to lay her off on medical grounds since they felt that she had difficulty in discharging her



duties. She was compelled to sign the request for early retirement, complete and sign the exit interview questionnaire under pressure and undue influence, as a condition to safeguard her terminal benefits.

5. The respondent denied the allegations, stating that there were several members of staff deployed to the mail room at all material times, the respondent never discriminated against the appellant; she was promoted through the ranks, her full salary and benefits paid; and she was given necessary support through her service. Further, that the contract between the parties was terminated when the appellant willingly and voluntarily signed a letter requesting to retire early which request was accepted by the respondent.
6. By a judgment dated June 22, 2018, the trial court having carefully considered the parties pleadings, testimony, and evidence on record, dismissed the appellant's petition finding that the appellant sought, and the respondent accepted her request to retire early; and by the parties agreement the appellant's contract with the respondent ended on December 31, 2009.
7. The court found and held from the evidence on record that the termination was on account of the written agreement on early retirement with agreed terminal benefits.
8. The court also found that the appellant's allegations that the reason for retirement was discrimination on account of disability had not been established as after the agreement to retire the appellant completed the exit questionnaire and took the terminal benefits and by that conduct, the appellant was clearly acting of her own will and voluntarily.
9. The court also found and held that the long service and the several promotions the appellant enjoyed, did not suggest any evidence of discrimination on account of disability but showed that the respondent accorded the appellant equal opportunity throughout her employment.
10. The court was also of the view that it could not write contract for parties, and in the present case the parties agreed to end the contract of employment by way of voluntary early retirement. The court took the view that the termination was agreed on by the parties and the alleged discrimination was not established anywhere as the proximate cause of termination.
11. As a result, the petition was dismissed on the ground that discrimination had not been established, and that being the case there was no need to delve into the issues of the alleged violation of rights and freedoms.
12. The appellant being dissatisfied has appealed on 5 grounds of appeal, which have been split into 2 main grounds.
 - i. Whether the learned Judge erred in law and fact by finding that the appellant's termination was voluntarily.

"The appellant contends she was unlawfully and unfairly terminated by being forced to resign, and as such the resignation was not voluntary. The appellant contends that she was unduly forced to draft and sign a resignation letter, and having no option she did so on December 10, 2009.

The appellant submits that the purported letter of resignation did not give reasons as to why she was resigning, arguing that for a termination to be deemed as legal under Section 41(1) of the *Employment Act*, it is mandatory for an employer to provide the actual reasons for termination of employment.



The appellant also submits that by paying her one month's pay in lieu of notice, the respondent effectively terminated her services as contemplated in her letter of appointment.

She finds fault with the trial court, saying it failed to consider what could have propelled her to suddenly desire to resign from a job that was her only source of income, and also considering the fact that she was yet to complete paying the mortgage; and it was rather curious for the respondent not to want to know how she would clear her loan.

ii. Whether the appellant merits the remedies sought.

It is the appellant's case that the respondent forced her into early retirement through duress, which included withdrawal of her assistant's services; and being told that if she did not resign, she would not receive her terminal benefits; and being a single mother with disability, taking away her benefits would have resulted tremendous suffering, so she had no choice but to comply.

The appellant therefore prays that the appeal be allowed.

13. The respondent in opposing the appeal submits that the appellant was treated fairly, equally and in conformity with the employment laws and fair labour practices; that at no particular time did the respondent inform the appellant that its management had decided to lay her off, nor did they inform her of any changes that would not accommodate her. That she voluntarily requested for an early retirement in writing, and the respondent acceded to the request. The respondent drew the Court's attention to the letter which the appellant signed and indicated her national identity card number with the accompanying explicit words:

"I Nancy Waiyego Irungu do confirm this as our agreement and final settlement..."

14. The respondent is categorical that there is nothing suspicious regarding the circumstances under which the appellant left its employment pointing out that contrary to her assertion, it is possible for an employee to write a resignation letter without indicating the reason for his/her resignation; and at no point did she protest against the respondent's acceptance of the resignation and payment of the terminal dues except after her employment had been conclusively terminated and she consumed the benefits of the termination. In this regard, the respondent relies on the case of *Steve Mutua Munga vs Homegrown(K) Limited & 2 others* [2013] eKLR to urge us not to rewrite what the parties had agreed on.

15. That in any event, the appellant in her exit interview, stated in the questionnaire which forms part of the record, that she was leaving the respondent's employment for health reasons and to pursue business. The respondent contests the allegations of duress, drawing from the positive feedback that the appellant, without compulsion, gave in describing it as a good employer, and that she would recommend the organization to a friend as a place to work without reservations.

16. As to whether the learned Judge erred in not finding that the respondent treated the appellant in a discriminatory manner, the respondent submits that the appellant's salary was consistently reviewed upwards just like its other employees which culminated at a gross salary of Kshs.95,487.00 as at the time of her exit; she was offered equal opportunities just like its other employees, the appellant was also shuffled between different departments as demonstrated by the various positions she held at different times as a telephone operator, cashier and Mail Room Administrator. The respondent urged for the dismissal of the appeal.



17. This being a first appeal as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 29 (1) (a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a AJ Oders & Associates vs John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.

18. In our considered view, the two main issues in this appeal are:

- i. Whether the learned Judge erred in dismissing the appellant's petition; and
- ii. Whether the trial court erred in law and in fact by finding that the Petitioner was not discriminated against by the respondent.

The crux of the appellant's case is that the respondent forced her to sign for voluntary early retirement with the looming threat of losing her terminal benefits, and in doing so the respondent infringed on the appellant's rights. The appellant alleges duress in drafting and signing the resignation letter. She also alleges that the payment by the respondent of one month's pay in lieu of notice was enough proof that the respondent had terminated her services.

19. Having considered the pleadings and the evidence on record, we take note that the appellant faults the trial judge for finding that she voluntarily terminated her employment. We recognize the observation made by this Court in Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] eKLR that:

“Involuntariness need not be through conduct that is physical, coercive, duress, or undue influence. Involuntariness can be deduced from the context and circumstances surrounding the case.”

20. Yet what were the circumstances as presented to the trial court? Was there any evidence, even a slight whimper from the appellant, to cause a reasonable person or tribunal to conclude that her departure was not voluntary? The evidence presented shows a request for early exit, and in her exit interview questionnaire, she indicated that the reason for her early retirement was for health reasons. The letter dated December 10, 2009 is the contract between the parties and the same has been signed by the appellant who confirmed the contents of the said letter as final settlement. It is so clear from the said letter the parties agreed to end the contract of employment by way of early retirement on the part of the appellant, and we echo and paraphrase what this Court stated in National Bank of Kenya Ltd vs Pipeclassic Samkolit (K) Ltd & Another [2001] eKLR that:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in the evidence presented at the trial and as such parties were bound accordingly.”

21. The appellant did not present any compelling evidence to the contrary. It would appear that the appellant waited until she received her exit package to raise some dust, and we are in agreement with the finding of the trial court that the appellant did not show to a satisfactory degree that she was compelled by physical force and/or threatened to propel her early retirement. We thus uphold the finding of the trial court that on 10th December the appellant freely and voluntarily requested the respondent for early retirement.

22. The appellant raised the issue of discrimination, saying that the respondent had discriminated against her on account of her disability. From her own account concerning her sojourn at the respondent's



institution, she paints a picture of an employer who considered her needs and assigned to her an assistant, who gave her an opportunity to rise and indeed her pathway at the institution was marked with upward mobility. The appellant does not clearly set out what constituted the violation, and the evidence and allegations presented, simply does not meet the test or threshold to constitute a violation of Articles 27 (1), (2), (3) (4) and (5), as well as Article 28, 41 (1) and 54 (a) to (e) that she seeks to invoke.

23. Surely it is not enough to simply flash out provisions of the *constitution* which address prohibition of discrimination, without specifically demonstrating how the violation has been effected. What is presented on record inclines us to agree with the trial court that the appellant was accorded equal and fair opportunity as is evidenced by her several pay increments and promotions and rising through the ranks in the respondent's company; and "...discrimination on account of disability has not been disclosed in this case as a reason for termination or a ground for denial of equal opportunity during the subsistence of the employment."
24. Consequently, we find that this appeal lacks merit and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 31st day of March, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

