



**Bana & 102 others v National Bank of Kenya Limited (Civil Application
8 of 2018) [2023] KECA 1038 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1038 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 8 OF 2018
HM OKWENGU, HA OMONDI & JM MATIVO, JJA
AUGUST 4, 2023**

BETWEEN

HAMIDA BANA & 102 OTHERS APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

(Being an application under Article 163 (3)(b) (4) of the Constitution Rules 24 and 26 of the Supreme Court and Rule 40 of the Court of Appeal Rules for leave to appeal against the decision of the Court of Appeal and for a certificate that a matter of public importance is involved in the intended appeal (Visram, Karanja & Koome, JJ.A) delivered on 1st December 2017 in Civil Appeal No. 72 of 2017)

RULING

1. By a notice of motion dated March 20, 2018, the applicants Hamida Bana & 102 others have moved this court seeking certification to lodge their appeal against the judgment of this Court delivered on December 1, 2017, at the Supreme Court on the grounds that the intended appeal ‘raises a point of law of general public importance with regard to the employees’ terms of voluntary early retirement in the face of the right to lawful expectation as provided by articles 27, 41, and 47 of *the Constitution*’.
2. The background to the motion before us is a claim that was lodged by the applicants in the former Industrial Court of Kenya wherein the applicants who were all former employees of National Bank of Kenya (respondent), lodged a claim seeking declarations that they were discriminated against in the implementation of the voluntary early retirement offered by the respondent.
3. In the response to the applicants’ claim, the respondent denied that their offer of voluntary retirement made to the applicants was discriminatory, and contended that the applicants had failed to illustrate or establish factual and legal comparable terms against which the offer is discriminatory. The respondent denied that the offer of voluntary retirement was in breach of the respondent’s human resource manual



- and maintained that it allows for early retirement of employees either at the bank's or employees' discretion.
4. The matter was subsequently heard in the Employment and Labour Relations Court (ELRC), and judgment delivered in favour of the claimants as against the respondent, with a declaration that the claimants were discriminated against and unfairly treated by the respondent in the voluntary early retirement scheme. The ELRC awarded each of the claimants' compensation, pay in lieu of notice, and severance pay.
 5. Being aggrieved by the judgment, the respondent lodged an appeal before this Court which appeal was heard and judgment delivered on December 1, 2017. In the judgment, the learned Judges of this Court allowed the appeal, set aside the judgment of the ELRC, and substituted the same with an order dismissing the applicants' suit with costs to the respondent herein.
 6. The applicants are aggrieved and would like to take up the matter in the Supreme Court. They believe that they have an appeal which raises a point of law of general public importance in regard to employees' terms of voluntary retirement. The applicants have attached a draft petition which indicates that they wish to raise 8 grounds.
 7. The grounds are as follows:
 - i. That the learned Appeal Judges erred in finding and holding that the applicable terms under which the appellants retired under the VER Scheme were those set out in the Circular and repeated in the acceptance letters without any reference to the application of Human Resource Manual that was referred to in the circular thereby denying the appellants their accrued benefits.
 - ii. That the Learned Appeal judges erred in law and in fact in violating and/or breaching the appellants' accrued rights under articles 27, 41 and 47 of *the Constitution* that provides for their labour practices lawful expectation by denying the appellants the rights to benefit from the Human Resource Manual.
 - iii. That the learned Appeal Judges erred by misapprehending the application of accrued rights under a contract of employment and those set out in an Employer's Human Resource Manual to employees who effect out (sic) retirement on a voluntary basis as the appellants did.
 - iv. That the learned Appeal Judges erred in law and in fact in making a finding disregarding the reference to the incorporation of the respondent Human Resource Manual and the parties Collective Bargaining Agreement as submitted by the appellants.
 - v. That the learned Appeal Judges erred in law and in fact in selectively reading the VER Circular issued to the appellants thereby disregarding the parameters of the application of the HR Manual that denied the appellants their lawful accrued constitutional rights as it relates to fair remuneration without discrimination.
 - vi. That the learned Appeal Judges erred in law and in fact in giving the reference of the HR Manual a restricted meaning touching on procedures without considering the substance of the said procedures thereby giving the application of the procedure set out in the HR Manual a biased and prejudiced meaning.
 - vii. That the learned Appeal Judges erred in law and in fact in finding and holding that the retirement of the appellants under the VER Scheme as offered to them was different from the VER Scheme as offered to one Leonard Gethoi Kamweti v National Bank of Kenya Ltd.



- viii. That the learned Appeal Judges erred in law and in fact by making the decision which is plainly wrong as they failed: -
 - a. To appreciate the effect of having a Human Resource Manual in place and the implementation of its accrued rights to the appellants on exit from the Bank.
 - b. To uphold the trial judge's findings on discrimination and unfair treatment of the appellants.
 - c. To appreciate the appellants' denial of accrued rights by the respondent who chose to shortchange the appellants and violate their rights to lawful expectation as set out in *the Constitution*.
8. The application is supported by an affidavit sworn by Hamida Bana (Hamida). She depones that the applicants wish to exercise their right of appeal against the said judgment which touches their right to lawful expectation and right to protection against discrimination in terms of employment and exit terms, which is a matter of public interest as it affects all employees who take the voluntary early retirement.
9. Hamida depones that the applicants' right of appeal is informed by the view that the Court of Appeal judgment was not informed by law and evidence before it, but by way of argument and case laws. She urges the Court to grant leave for the applicants to file the appeal as their intended appeal is well founded in law, and has overwhelming chances of success. She pleads that the applicants stand to suffer irreparable loss and damage if their application is denied, as they will suffer loss of the accrued lawful benefits under the Bank's Human Resource Manual as read together with the *Employment Act*, and *the Constitution*.
10. The applicants have filed written submissions in support of their motion. They contend that the findings and judgment of the learned Judges of the Court of Appeal, were not supported by the law nor were they based on sound legal provisions as set out under articles 27, 41, and 47 of *the Constitution*, section 14 of the *Labour Relations Act*, and section 5 of the *Employment Act*. They contend that the impugned findings and judgment are unconstitutional and a violation of the applicants' rights; and that the appeal relates to matters of public interest in so far as the voluntary early retirement vis-à-vis the terms of Human Resource Manual and article 41 of *the Constitution* is concerned.
11. The applicants argue that the intended appeal raises a point of general public importance as well as issues of violation of *the Constitution* and, therefore, warrant placement before the Supreme Court for consideration. They urge that the Court of Appeal overlooked
and did not consider the constitutional requirement touching on the right to fair labour practices and protection from discrimination, and therefore, arrived at wrong conclusion and finding that is suitable for consideration by the Supreme Court.
12. In support of their submissions, the applicants relied on *SGS (K) Limited v Energy Regulatory Commission & 2 Others*, Civil Appeal No. Sup 167 of 2018, and *Kenya Plantation and Agricultural Workers Union vs Kenya Export Floriculture, Horticulture, and Allied Workers Union* [2018] eKLR.
13. The respondent also filed written submissions in which it identified the only issue for determination as whether the applicants should be granted leave to appeal to the Supreme Court on grounds that the appeal raises a point of law of general public importance. The respondent referred to *Peter Oduor Ngoge vs Hon. Francis ole Kaparo & 5 others*, Supreme Court Petition No. 2 of 2012 on the jurisdiction of the Supreme Court under article 163(4)(b) of *the Constitution*.



14. The respondent also relied on *Koinange Investments & Development Limited v Robert Nelson Ngethe* [2013] eKLR, wherein the Supreme Court stated that:

“The requirement for certification under Article 163(4)(b) is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court as the role of the Supreme Court as was observed in *R. vs Secretary of State Exp. Eastway* [2001] 1All ER 27 at page 33 paragraph b (per Lord Bingham) cannot be relegated to deal with correction of errors in the application of settled law even where such are shown to exist.”

15. In addition, the respondent relied on the decision of this Court in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2012] eKLR. It submitted that the dispute involves the employment of the applicants and the termination of the employment by means of voluntary early retirement; that the contracts were personal individual contracts between the applicants and their employer; and that the applicants voluntarily entered into the early retirement scheme and they cannot turn round and claim that the contract was discriminatory. The respondent urged that the applicants have not shown any single issue of complaint that establishes a point of general public importance and, therefore, there was no ground to warrant certification of their intended appeal.

16. We have considered the motion before us and the contending arguments. The background to the motion is not in dispute. The applicants and the respondent were in an employer-employee relationship until the applicants accepted a voluntary early retirement scheme that was offered by the respondent. The dispute arising is on the implementation of the voluntary retirement scheme, the applicants maintaining that they were discriminated against and unfairly treated, and that the respondent was in breach of its Human Resource Manual. The ELRC agreed with the applicants and gave judgment in their favour, but this Court allowed the respondent’s appeal and set aside the judgment of the ELRC. The issue for our determination is whether in allowing the respondent’s appeal, and setting aside the judgment of the ELRC, a point of law of general public importance has arisen that merits address by the Supreme Court in exercise of its powers under Article 163(4)(b) of *the Constitution*.

17. Article 163(4)(b) allows this court to certify a matter to be fit for determination by the Supreme Court if the matter is one of general public importance. In *Hermanus Phillipus Steyn vs Giovanni Gneccchi-Ruscone* [2013] eKLR, the Supreme Court identified the governing principles in determining whether a matter merits certification to the Supreme Court as one of general public importance, as follows:

- “(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme



Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”

18. In their notice of motion and the draft petition, the applicants have identified what they consider to be the issues that the Supreme Court should render itself on. These issues have already been set out in paragraphs 7 and 8 of this Ruling. In effect, the applicants are concerned with the Court’s interpretation of the voluntary early retirement scheme, the implementation of which scheme in their view, breached articles 27, 41, and 47 of *the Constitution*. In effect, the issues raised are issues that are germane to the parties who are before the Court. They are not issues that go beyond the circumstances of the particular parties. The interpretation relates to a particular voluntary early retirement scheme, which the applicants have voluntarily subscribed to.

19. Although articles 27, 41, and 47 of *the Constitution* were cited, they are anchored on the employment contract relationship between the applicants and the respondent. In other words, what was before the Court was more of an employment relationship dispute, rather than a general constitutional violation. The grounds set out by the applicants on the face of the motion, the supporting affidavit, and the draft petition, do not reveal any point of law that is a substantial one, the determination of which will have a significant bearing on the

public. The invocation of articles 27, 41, and 47 of *the Constitution* did not per se require the interpretation or application of these constitutional provisions, and if it did, then the applicants’ intended appeal would fall under article 163(4)(a) of *the Constitution*, and would not require leave or certification.

20. The upshot of the above is that the applicants have not met the threshold for certification under article 163(4)(b) of *the Constitution* as their intended appeal is not one that raises issues of general public importance. Accordingly, we decline to certify the intended appeal as appropriate for the Supreme Court and dismiss the applicants’ motion with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL



J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

