



REPUBLIC OF KENYA



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**National Bank of Kenya Limited v Nyamu & 10 others (Civil Appeal
137 of 2020) [2022] KECA 704 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 704 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 137 OF 2020
RN NAMBUYE, AK MURGOR & J MOHAMMED, JJA
MAY 13, 2022**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

FRANCIS M.P. NYAMU 1ST RESPONDENT

MERCY WAIRIMU WAITHAKA 2ND RESPONDENT

JOSELINE MAREGU NYAGAH 3RD RESPONDENT

JOSIAH MWAURA NJOROGE 4TH RESPONDENT

PERIS WAIRIGU KIGUTA 5TH RESPONDENT

JOSEPH KIPROP BARTOCHO 6TH RESPONDENT

JACKSON J. SOPHAS KHOLE 7TH RESPONDENT

BRET'TA MWIKALI MWOLOLO 8TH RESPONDENT

JEDDAH KISIAVUKI LODENYI 9TH RESPONDENT

WILSON NYARANGA MIMA 10TH RESPONDENT

PETER MUSEMBI MUTHAMA 11TH RESPONDENT

*(Appeal from the Judgment and decree of the Employment and Labour Relations
Court of Kenya at Nairobi (Makau, J.) delivered on 24th January 2020 in
ELRC Civil Cause No. 1476 of 2015 Consolidated with Causes No. 1467,
1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475 of 2015 & 1629 of 2016)*



JUDGMENT

1. In this appeal, the appellant, National Bank of Kenya Limited is aggrieved by a judgment of the Employment and Labour Relations Court (ELRC) that reached a finding that the termination of the respondents' employment by early retirement was unfair and in awarding each of the respondents ten months' salary as compensation for unfair termination.
2. The respondents who had each filed separate suits that were consolidated in the course of the proceedings were employed by the appellant on diverse dates. During their employment, the appellant issued a Circular 1/2014 dated 19th February 2014 inviting eligible employees to apply for Voluntary Early Retirement (VER) whereupon they would receive the following benefits;
 - a. pension benefits in accordance with the appellant's pension rules.
 - b. one-month salary in lieu of notice
 - c. purchase of leave days due but not taken up to the last day of employment.
 - d. severance pay equivalent to half a month salary for each completed year of service.
 - e. rebates amounting to up to 40% on outstanding loans by the member to be repaid within a period not exceeding the normal retirement age of 60 years.
3. Though eligible at the time, having reached the age of 50 years, the respondents declined to take up the offer preferring to continue in employment instead. But their continued employment was short lived when the appellant by way of a letter dated June 2, 2015 terminated their employment, effective July 1, 2015 under an early retirement provision in its Human Resources Manual and after offering the respondents the following benefits;
 - a. pension benefits in accordance with the respondents' pension scheme.
 - b. lump-sum payment of three months' gross salary
 - c. purchase of leave days earned but not taken up to the last day of employment
 - b. 10% rebate on the outstanding loan amount to be repaid within the years remaining to normal retirement age of 60 years. In the 1st respondent's case this was increased to a 20% rebate.
4. The respondents were aggrieved by the termination of their employment and instituted proceedings against the appellant. The basis of their case was that their employment was terminated unfairly when they were retired early, that they were discriminated against owing to the different terms that they were subjected to compared to the staff members who chose to retire under the VER, that they were entitled to severance pay, which the appellant had declined to pay them.

As a consequence, they sought the following orders;

- a. A declaration that the termination of the Claimant's employment on different terms compared to members who took voluntary early retirement was discriminatory contrary to section 5 of the *Employment Act*, 2007.
- b. A declaration that the termination of the Claimant's employment on different terms compared to other members selected for termination within the same period was discriminatory contrary to section 5 of the *Employment Act*, 2007.



- c. A declaration that the termination of the Claimant's employment was unfair and unlawful contrary to section 43 of the [Employment Act](#) 2007 and international labour practice.
 - d. A declaration that the Respondent did not act in a just and equitable manner by selectively applying the termination process to the Claimants, while leaving out, without any valid reasons, other employees who are within the same age bracket of fifty years and above.
 - e. Severance pay of one and a half months' basic salary for every completed year of service.
 - f. A refund equivalent to 40% rebate in the loan outstanding from the Claimant as at the time of termination.
 - g. An order for general damages; -
 - i. On the grounds of unfair and unlawful termination in breach of the [Employment Act](#), 2007.
 - ii. On the grounds of discrimination in breach of section 5 of the [Employment Act](#), 2007 and Article 27 of [the Constitution](#).
 - h. An order for payment of costs of this claim.
 - i. Interest on (e), (g) and (h) above at court rates from the date of filing of this claim until payment in full.
 - j. Such other orders as this Honourable Court may deem fit in the interest of justice.”
5. In its defence, the appellant denied unfairly terminating the respondents' employment or discriminating against them. It asserted instead that, the respondents were terminated lawfully and in terms of the respondents' letter of appointment, and the provisions of the Human Resources Manual which provided an option for early retirement of employees upon their attaining 50 years, at the discretion of the appellant or at the employee's request.
 6. At the hearing, Francis M.P. Nyamu testified on behalf of the respondents, while Tabitha Mutwa the appellant's employee advisor testified on behalf of the appellant.
 7. After hearing the parties, the trial judge determined that the respondents were unfairly terminated since they were not given any reason for their early termination; that the appellant failed to properly exercise its discretion when it decided to retire the respondents before 60 years. As concerns the claim that the respondents were discriminated against in the retirement package that was offered to them, the learned judge concluded that since they decided against retiring under VER, they were not entitled to the package offered therein. The court also found that the manner of selecting the respondents for retirement was not discriminatory since the respondents had not produced any evidence to show that their selection for early retirement was discriminatory.
 8. Dissatisfied by the trial court's decision, the appellant has brought this appeal on grounds that; the trial court failed to appreciate the binding nature of the parties' contracts; in finding that the respondents were unfairly terminated, which finding had no basis in law since the learned judge failed to take into account the early retirement option provided for under clause 9.4.1 of the Human Resources Manual; and in finding that the appellant was obliged to give the respondents valid and fair reasons for exercising its discretion to send them on early retirement, and for holding that the appellant should have accorded the respondents a fair hearing prior to retiring them; that in so doing, the learned judge was rewriting the terms of the parties' contract. It was further contended that the trial court was wrong in awarding the respondents ten months' compensation for unfair termination without any basis.



9. When the appeal came up for hearing before us on a virtual platform, learned counsel, Mr. D. Kiragu and Ms. Cheruiyot holding brief for Mr. Chacha Odera appeared for the appellant, while learned counsel Mr. Githinji appeared for the respondents. Both parties filed written submissions and lists of authorities that were fully adopted which were orally highlighted in support of the respective parties rival positions.
10. In its written submissions, the appellant asserted that the basis of the appeal was that the trial judge failed to appreciate that the parties had entered into a contract of employment that specified the employment terms; that the terms of engagement did not require the appellant to give the respondents a valid and fair reason for exercising their discretion before subjecting them to early retirement, and that by so finding, the learned judge rewrote the parties' contract. The case of *National Bank Limited v Pipeplastic Samkolit (K) & another* [2001] eKLR was cited for the proposition that a court cannot re-write a contract validly executed and binding between parties.
11. It was further submitted that the decision to retire the respondents early did not amount to a dismissal or a termination of the respondents' employment under section 45 of the *Employment Act*; that the employment came to an end by virtue of their early retirement which was a provision in the appellant's Human Resources Manual. The appellant also argued that the respondents had not demonstrated that their termination was unfair as they were duly notified of their early retirement and paid all their terminal dues; that as a result, they were not entitled to compensation. The judge was also faulted for awarding the respondents ten months' compensation without any basis.
12. On their part, the respondents submitted that the trial court rightly found that no reason was provided by the appellant for exercising its discretion to send the respondents on early retirement; that the law required the appellant to indicate the reasons. It was further argued that the respondents were entitled to three months' notice and not salary in lieu of notice, yet the appellant only gave the respondents one month's notice.
13. We have considered the grounds of appeal, the written and oral submissions by counsel for the parties. This is a first appeal and we are duty bound to re-evaluate the evidence and arrive at our own independent conclusions also taking into account that unlike the trial court, we did not see or hear the witnesses. – See *Selle v Associated Motor Boat Co.* [1968] EA 123.

With this in mind, the issues falling for our consideration in the disposal of this appeal are;

- i. whether the respondents were unfairly terminated having been sent on early retirement; and
 - ii. If so, whether the trial judge rightly awarded the respondents ten month's compensation.
14. Issue (i) above requires that we interrogate the provision upon which the appellant based its decision to retire the respondents early from its employment, even after they had declined to take up the offer earlier floated to them by the appellant. The appellant relied on the retirement provisions of its Human Resources Manual. It provides as follows;

9.4.1 Official Retirement Date

The Bank's official retirement age is 60 years. However, there is an option of early retirement from age of 50 years either at the Bank's discretion or employees 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”.

15. Based on this provision, the appellant issued the respondents with a retirement letter dated June 2, 2015 in the following terms;

“We wish to advise you that in accordance with the Bank’s Separation Policy and the rules of the National Bank of Kenya Staff Retirement Benefits Scheme, one can separate from the Bank on early retirement either at the Bank’s discretion or on employee’s request upon attaining 50 years of age.

The purpose of this letter is to inform you that the Bank has exercise its discretion to release you on early retirement. The bank therefore gives you a one-month notice which runs from the date hereof subsequently your last day in the service of the bank shall be July 1, 2015.”

16. The question that arises is whether this provision entitled the appellant to send the respondents on early retirement. Our reading or construction of the above provision would lead us to conclude that the retirement age for all employees of the appellant at the material time was 60 years. It is also our observation that the provision is clear that the appellant, at its discretion, could send the respondents on early retirement upon their attaining the age of 50 years. What the provision did not specify is the manner in which the employment contract ought to have been brought to an end in a case of early retirement.

17. The respondents have argued that they were not at any time consulted prior to the letter of termination having been issued, and as a consequence, the appellant unlawfully terminated their employment. On the other hand, the appellant contended that it was entitled to terminate the respondents’ employment at its absolute discretion under clause 9.4.1 of the Human Resources Manual, and that the learned judge was wrong in rewriting the parties’ contract when the judge concluded that the respondents were unfairly terminated as they were not given reasons for their early retirement.

18. In this regard the court stated;

“We wish to advise you that in accordance with the Bank’s Separation Policy and the rules of the National Bank of Kenya Staff Retirement Benefits Scheme, one can separate from the Bank on early retirement either at the Bank’s discretion or on employee’s request upon attaining 50 years of age.

In this case the respondent never explained the reason for early retirement to the claimants, before the decision to send them on early retirement was made neither were they accorded a hearing. The reason was disclosed during the hearing by Rw1 when she stated that the reason for sending the claimants to the early retirement was due to the respondent’s operational requirements and not a punishment for the claimants’ refusal to take the 2014 VER. Such reason in my view is valid and fair within the meaning of section 45 (2)(b) (ii) of the *Employment Act*, taking judicial notice that the respondent had showed her desire to reduce her staff under the said VER which did not interest the claimants. However, they said reason was given to late in the day and the claimant were denied the chance to air their representations before the discretionary decision was made to retire them before the normal retirement age. Consequently, I return that the respondent’s discretion to send the claimants to an early retirement under Clause 9.4.1 of the HR policy manual was not properly



exercised and said early retirement amounted to unfettered termination of employment within the meaning of section 45 of the *Employment Act*”.

19. It is not disputed that the appellant offered early retirement to the respondents under VER. It is not also in dispute that the respondents had declined that offer. The respondents’ response to VER made it clear that they had chosen to remain in employment up to the age 60 years as stipulated in the Human Resources Manual. As already highlighted above, the same Manual also provided that the appellant could exercise its discretion to separate from the respondents by sending them on early retirement, provided that they had attained the age of 50 years. The respondents’ earlier rejection of VERS, and their intention to remain in employment until age 60 years meant that an early retirement at the appellant’s behest would in effect terminate the employment contract. And in terminating such a contract, section 43 of the *Employment Act*, is unequivocal. It provides;

- (1) “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair, within the meaning of section 45.
2. The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

20. When faced with similar circumstances in the case of *Leonard Getboi Kamweti v National Bank of Kenya Limited* [2020] eKLR this Court observed;

“That said, the Bank argued that the appellant was not dismissed from employment but it exercised its discretion to invoke an early retirement clause in its human resource policy. The Judge was not persuaded this was the case and even if it was, the appellant was entitled to a hearing and to be given reasons for the separation.” (emphasis ours)

21. In applying the requirements of section 43 to the instant case, though the appellant sought to exercise its discretion to send the respondents into early retirement, it did not provide them with any reasons for doing so. The respondents were not accorded a hearing or given any explanation for their having to be retired early. The learned judge found, and rightly so in our view, that failing to provide reasons prior to retiring the respondents was an improper exercise of discretion on the appellant’s part, with the result that the respondents’ contract of employment was unfairly terminated.

22. In the case of *Damondar Jibabbhai & Co. Ltd v Eustace Sisal Estates Ltd* [1967] EA 153 it was held that;

“The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above – *Globe Motors Inc & others vs TRW Lucas Electric Steering Ltd & Others* (supra) – Lord Justice Beatson stated as follows:

“Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”

23. In view of the express requirements of section 43, the appellant was required to give reasons for retiring the respondents, and effectively terminating their contract. As such, we do not agree that by so concluding the learned judge rewrote the parties’ contract.



- 24. As we have already found above that the respondents’ employments were variously unfairly terminated, we turn to consider the question of whether the learned judge rightly awarded ten months’ compensation to the respondents.
- 25. Section 50 of the Act provides;

In determining a complaint or suit under this act involving wrongful dismissal or unfair termination of employment of an employee the Industrial Court shall be guided by the provisions of section 49”.
- 26. Section 49 provides a raft of remedies, including compensation for wrongful dismissal or unfair termination. In particular, section 49(1)(c) provides for compensation for unfair termination. This Court has explicitly stated that the exercise of the court’s mandate under this provision is merely discretionary. This Court has already expressed itself on the mode of procedure to be followed by a court of law when determining appropriate reliefs under section 49(1) of the Act. We reference the position taken by this Court in the case of Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2016] eKLR in which the Court stated, *inter alia*, that the trial court’s exercise of mandate under section 49(1) of the Act is discretionary. The appellant argues that the learned judge awarded the respondents’ ten months’ compensation without any basis.
- 27. In other words, the appellant’s complaint is that the court exercised its discretionary mandate under the said provisions injudiciously. The threshold for the exercise of judicial discretion is as was stated by Ringera, JA in Githiaka v Nduriri [2004] 1 KLR 67 namely, devoid of whim and or caprice but with reason and for ends of justice to be met towards both parties. The mandate to interfere with the exercise of the above discretionary mandate by this Court is as was crystallized in the case of Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others [2014] eKLR, wherein it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.
- 28. In awarding ten months’ compensation, the learned judge took into account that the respondents had provided long service of over 25 years to the appellant, and had not contributed to their termination by misconducting themselves. The court also appreciated that their being over 50 years meant that the prospects of gaining other employment was lean. We consider these to be adequate reasons for an award of ten months’ compensation.
- 29. In sum, we find no basis upon which to interfere with the trial court’s decision. In other words, the appeal lacks merit and is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED



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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

