



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 72 OF 2017

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

AND

HAMIDA BANA & 103 OTHERS.....RESPONDENTS

***(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi
(Monica Mbaru, J.) dated 22nd February, 2017***

in

***ELRC Cause No. 1300 of 2014, Consolidated with ELRC Cause No. 1301 of 2014 and ELRC Cause
No. 1302 of 2014.)***

JUDGMENT OF THE COURT

1. By an order of this Court dated 21st March, 2017 these three appeals namely; Civil Appeal Nos. 72, 73 & 74 of 2017 were consolidated. In this judgment reference to the appellant relates to National Bank of Kenya Ltd, while reference to the respondents relate to all the respondents in the three appeals.
2. The dispute revolves around the entitlements of the respondents under a Voluntary Early Retirement (VER) scheme offered by the appellant. The parties' relationship was that of employer/employees wherein the respondents had been engaged by the appellant in various capacities under diverse terms and conditions in its branches countrywide.
3. By a circular dated 19th February, 2014 the appellant invited all its employees who wished to retire early, to take advantage of a new scheme it had launched (the VER scheme) effective 31st March, 2014. The invitation was open to all employees, below and above 50, subject to the appellant's approval. The circular set out the entitlements thereunder as follows: -

“For those who will be exiting the Bank the last day of work will be communicated directly to them. They will be entitled to the following dues:

- 1. Pension benefits in accordance with the scheme rules.***

2. One month's salary in lieu of notice.

3. Purchase of leave days earned but not taken up to the last day of employment.

4. Severance pay equivalent to half a month salary for each completed year of service.

In addition, the following rebates will be considered on the outstanding loan facilities;

i. A 40% rebate of the outstanding loans granted if the total outstanding amount is settled immediately.

ii. A 20% rebate to be given where 50% and above but less than 100% of the outstanding loans are settled immediately.

iii. All balances outstanding thereafter will not qualify for rebate and will be consolidated into one loan account and repaid at 10%.

iv. The securities will also be consolidated to continue securing the consolidated loans. The repayment period will however not exceed the normal retirement age of 60 years.

4. The respondents applied individually for retirement under the said scheme. By letters dated 2nd April, 2014 (herein after referred to as the acceptance letters) the appellant accepted the same. In doing so, the appellant not only reiterated the entitlements set out herein above but also tabulated the payment due to each respondent. Subsequently, the respondents were paid as per the acceptance letters.

5. Be that as it may, the respondents felt that they had gotten the short end of the stick, that is, the appellant had offered them unfavorable terms of retirement compared to other employees who had earlier on retired under similar circumstances. They alleged that the terms under VER were discriminatorily applied against them in breach of the appellant's Human Resource (HR) Manual, Collective Bargaining Agreement (CBA) which was applicable to unionisable employees', the ***Employment Act*** and the ***Constitution***. In particular, both the HR manual and the CBA provided that on retirement an employee is entitled to payment of 3 months' salary in lieu of notice instead of the one month notice offered, severance pay calculated at the rate of one month's salary for every year of completed service and not ½ month's salary and tax rebate.

6. It is on the basis of that perception that the respondents filed three suits against the appellant in the Employment and Labour Relations Court (ELRC). The first was Cause No. 1300 of 2014 where the claimants (respondents) were non-unionisable employees; the second was Cause No. 1301 of 2014 wherein the claimants were unionisable employees whose terms were regulated by a CBA negotiated between the appellant and their union, Banking Insurance Finance Union (BIFU). Last, but not least, was Cause No. 1302 of 2014 wherein the claimants were initially employed by the appellant's subsidiary known as Kenya National Capital Corporation (KNCC) and later employed by the appellant following the takeover of KNCC by the appellant.

7. The respondents in the three suit sought similar orders *to wit*,

a) A declaration that the claimants were discriminated against

b) Damages for discrimination.

c) Damages for wrongful and unfair treatment.

d) Payment of all the lawful terminal benefits.

e) Costs of the suits.

In addition, the claimants in Cause No. 1302 sought severance pay for the years they had worked in the appellant's subsidiary.

8. In response, the appellant's position was that the respondents willingly and voluntarily applied and accepted the VER scheme and the terms thereunder. As a result, they were estopped from reneging on the terms thereunder. In any event, the respondents had been paid their dues under the scheme in question which was formulated outside the HR manual and the CBA. As far as the appellant was concerned, it was not under any obligation to pay severance pay for the period when the respondents in Cause No. 1302 were employed by KNCC. Ultimately, the respondents had not established that they had been discriminated against by the appellant.

9. Faced with the foregoing, the learned Judge (Mbaru, J.) in a judgment dated 22nd February, 2017 found for the respondents. In doing so, she held that the VER scheme did not oust the application of the HR manual and the CBA or the benefits thereunder. The VER scheme could not vary the respondents' terms of employment without their consent where applicable. She also found that the appellant had engaged the respondents who were initially employed by KNCC under new contracts and as such the appellant was not liable to pay severance for the period when they were not in its employment. In the end she granted the following orders: -

- a) A declaration that the claimants, were discriminated against and unfairly treated by the respondent in the Voluntary Early Retirement;***
- b) Compensation awarded at 10 months gross salary to each claimant;***
- c) Each claimant shall be paid two (2) months gross salary in notice pay;***
- d) Each claimant shall be paid ½ months' salary for each year worked in severance pay; and***
- e) Costs of the suit.***

However, over and above the foregoing, the learned Judge granted each claimant in Cause No. 1301 of 2014 an award of Kshs.50,000 for discrimination suffered.

10. It is that decision that instigated the appeal before us which is premised on the grounds that the learned Judge erred by:-

- a) Failing to appreciate the effect and binding nature of agreements/contracts.***
- b) Finding that the respondents had been discriminated.***
- c) Awarding 10 months gross pay to each respondent as compensation yet the respondents in their pleadings sought damages and not compensation.***
- d) Failing to appreciate that compensation could only be awarded where there is wrongful/unfair termination which wasn't the case herein.***
- e) Rewriting the contract between the parties by awarding payment of 2 months' salary in lieu of notice.***
- f) Selectively awarding Kshs. 50,000 to some of the respondents without any legal basis.***

11. The appeal was disposed of by way of written submissions as well as oral highlights. Mr. Chacha Odera together with Mrs. Omondi appeared for the appellant while Ms. Guserwa appeared for the respondents.

12. Mr. Chacha reiterated that from the onset the respondents willingly applied for the VER on such terms

as were set out in the circular and later reproduced in the acceptance letter. He faulted the learned Judge for not appreciating that the VER agreement was separate and distinct from the HR manual and CBA. Making reference to this Court's decision in ***William Barasa Obutiti vs. Mumias Sugar Company Ltd [2006] eKLR***, it was submitted that parties are at liberty such as in this case, to contract outside the instrument (s) governing the employment relationship. Therefore, the respondents were bound by the terms of the VER scheme and it was not open to the learned Judge to rewrite the contract as she did. In that regard, the case of ***National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd. & Another [2001] eKLR*** was cited.

13. In any event, there was no evidence that there had been coercion as alleged. For that reason the respondents were estopped under **section 120** of the **Evidence Act** from claiming that they entered into the agreement through coercion or undue influence. The appellant argued that the HR manual and the CBA were not applicable; the HR manual was only mentioned in the acceptance letter to guide the exit procedures of the respondents.

14. Furthermore, the respondents having accepted the payment under the terms of the VER scheme ought not to be allowed to approbate and reprobate. We were referred to ***State of Punjab & Others vs. Dhanjit Singh Sandhu - Civil Appeal No. 5698-5699 of 2009*** where the Supreme Court of India expressed itself as follows:-

“The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

The Supreme Court in the Rajasthan State Industrial Development and Investment Corporation and Another vs. Diamond and Gem Development Corporation Ltd. and Another AIR 2013 SC 1241, made an observation that a party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such a contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of good conscience.”

15. Mr. Chacha contended that the learned Judge erred in granting the respondents compensation which had not been pleaded. Equally, she erred in issuing an additional award of Kshs.50,000 to some respondents without any justification. He urged us to allow the appeal on those grounds.

16. On her part, Ms. Guserwa submitted that at all material times the respondents applied for VER knowing that their dues will be paid in conformity with the HR manual and the CBA. At no time did they abandon or agree for the exclusion of the benefits thereunder. The acceptance letter clearly indicated that the HR manual would be implemented under the VER scheme. Of relevance was Clause 9.4 of the HR manual which provides:-

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 employee 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.

17. It followed that the payment under the VER scheme was less than what the respondents were entitled to. Consequently, the learned Judge was correct in finding that the respondents had been discriminated

against. Buttressing that line of argument, the Court was referred to the ELRC case of **Leonard Gethoi Kamweti vs. National Bank of Kenya - Cause No. 273 of 2013 (ur)** wherein the claimant who was the appellant's employee was awarded VER benefits which were more favourable than those offered to the respondents.

18. Ms. Guserwa argued that the benefits which had accrued to the respondent during their tenure of employment could not be taken away by a circular as this would amount to variation of terms without the consent of the employees or their union. According to her, the learned Judge exercised her discretion judiciously in awarding the damages she did. Ms. Guserwa urged us to dismiss the appeal.

19. We have reappraised the record of appeal under **Rule 29 (1)** of the **Court of Appeal Rules** in the manner of a retrial in order to arrive at our own conclusions in the matter. As always, we shall not lightly differ with the findings of fact made by the trial Court, which had the added advantage of seeing and hearing the witnesses, but will not hesitate to do so if, in our assessment, the findings were made without any evidential basis or through an error in principle.

20. As we have noted above the appeal turns on the determination of the applicable terms under the VER scheme. Albeit an employment relationship as it stands in this country is now regulated by the **Constitution** and legislation, it is still subject to the general principles of the law of contract. See **Chitty on Contracts 31st Edition Vol. 1 para 39-029**. This Court in **Krystalline Salt Limited vs. Kwekwe Mwakele & 67Others [2017] eKLR** aptly put it as follows:-

"... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."

21. Therefore, our mandate just like that of the trial court is to interpret the terms under the scheme in issue and enforce the same. Sir Charles Newbold P in **Damondar Jhabhai & Co Ltd & Another vs. Eustace Sisal Estates Ltd 1967 EA 153** at p 156 observed as much:-

"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."

The same was restated by Githinji, J.A in **Kenya Airways Limited vs. Aviation &**

Allied Workers Union Kenya & 3 Others [2014] eKLR thus:-

"The function of the Industrial Court is limited to interpreting and enforcing only those obligations which the parties to employment relationship has agreed to assume.

There is no legal obligation express or implied for the implication into the employment contact of terms that the parties have not agreed to be binding conditions for the mere reason that the court considers it reasonable to do so."

22. What were the terms of the VER scheme? Unlike the trial Judge we find that the applicable terms were those set out in the circular and repeated in the acceptance letters. In our view, the circular and acceptance letters made no mention of the incorporation of the terms under HR manual or the CBA as

alluded to by the respondents. That position is crystal clear from the acceptance letter which read in part that-

“RE: LETTER OF ACCEPTANCE OF VOLUNTARY EARLY RETIREMENT

...

The Bank hereby accepts your request for Early Retirement under the terms which have been set out in the Managing Director’s Circular No. 1 dated 19th February, 2014 and the annexes thereto. Emphasis added.

In fact, the HR manual was only mentioned in the acceptance letters in the following manner:-

“The Human Resource Division will liaise with you to facilitate all the required exit procedures as stipulated under the Bank’s regulations including but not limited to the procedures under the Human Resource Manual. We hope for your utmost co-operation in this regard.”

The foregoing limited the application of the HR manual to the extent of regulating the exit procedures of the respondents, and no more.

23. It is not in dispute that the respondents accepted the terms offered in the circular according to their respective applications as well as acceptance letters issued by the appellant. Similarly, it was open for the respondents to reject the aforesaid terms and indeed not take advantage of the VER scheme. In our view, there was no evidence of undue influence or coercion which diminished the respondents’ capacity to voluntarily accept the terms in question. Moreover, it is clear that the parties vide the circular, applications and acceptance letters varied the terms of retirement as stipulated in the HR manual and CBA. Consequently, the argument of lack of consent to the variation on the respondents’ side falls on its face. In William Barasa Obutiti vs. Mumias Sugar Company Ltd (*supra*) this Court faced with somewhat similar circumstances held:-

“We would also disagree with Mr. Menezes in his submission that VERS was irregular in any manner. It is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual release may be subject to terms as in the VERS. In such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself. See Latchford Premier Cinema Ltd. vs. Ennion & Paterson [1931] 2 Ch.409.” Emphasis added.

24. A concomitant of the doctrine of freedom to contract is the binding force of the contracts. See Chitty on Contracts (supra) Para 1-036. As such, the learned Judge by holding otherwise re-wrote the terms of the VER contrary to the intention of the parties. It did not matter that the respondents got less favourable terms than those that were provided for under the HR manual or CBA. What matters is that the parties voluntarily agreed on the terms of the VER which ought to have been enforced. We agree and adopt the reasoning of Lord Hoffman in Attorney General of Belize vs. Belize Telecom Ltd [2009] UKPC 10 to the effect that:-

“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 articles 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.”

25. Besides, the learned Judge also misapprehended that the circumstances in the case of Leonard Gethoi Kamweti vs. National Bank of Kenya (supra) were completely different from the respondents’ case. Firstly, in that case the claimant was the appellant’s employee whose retirement was at the instance of the

appellant and not the employee as in the respondent's case. Secondly, his retirement was expressly under the provisions of the HR manual and not the VER scheme which the respondents voluntarily applied for. The relevant portion of his letter of retirement stated:-

“Mr. Leonard G. Kamweti

RE; EARLY RETIREMENT

We write to draw your attention to the Bank's policy as contained in the staff manual, particulars of which are otherwise within your knowledge, the official retirement age is 60 years. It is however, within the discretion of either party to exercise the option of early retirement from the age of 50 years.

You have attained the age of 51 years and accordingly the bank wishes to exercise its discretion to retire you as provided by the said provision...

You will be entitled to the following payments ...

- *Three months' salary in lieu of notice ...*

...

- *Severance pay of one month for every completed year of service ...”*

26. That being the case, the terms of Leonard's retirement as outlined herein above could not be the basis of holding that the respondents had been discriminated against. Accordingly, the appellant discharged its burden under **section 5 (7)** of the **Employment Act** that it did not discriminate against the respondents. In light of the foregoing, there was nothing irregular or unlawful with the respondents' retirement hence there was no basis of the learned Judge granting the damages she did.

27. In the end, we find that the appeal has merit and is hereby allowed with costs to the appellant. We hereby set aside the judgment of the trial court dated 22nd February, 2017 and substitute the same with an order dismissing the respondents' suit with costs to the appellant.

Dated and delivered at Nairobi this 1st day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR