



REPUBLIC OF KENYA



**Nyandong v National Social Security Fund (Cause 895 of 2018)  
[2023] KEELRC 729 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 729 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 895 OF 2018  
AN MWAURE, J  
MARCH 16, 2023**

**BETWEEN**

**AGGREY OCHIENG NYANDONG ..... CLAIMANT**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated June 7, 2018.

**Claimant's Case**

2. The claimant says he was employed as an accountant by the respondent since 1991 8<sup>th</sup> April. He says over the years he served the respondent faithfully.
3. He says that on March 1, 2013 the respondent gave a voluntary early retirement (VER) to all staff members.
4. The early retirement for the claimant included
  - a. 2 months' severance for every year worked capped at 10 years.
  - b. Ex gratia payment of Kshs 1000,000/-
  - c. 30% rebate for all outstanding mortgage loan
  - d. 1 month salary in lieu of notice
  - e. Pre-retirement training.
5. Claimant says he accepted the package and submitted his application on March 21, 2013. The respondent accepted the retirement by a letter dated March 26, 2013.



6. The claimant was to be released by 31<sup>st</sup> June 2013 subject to hand over. He was invited for pre training on retirement on April 9, 2013. His dues were as follows:
  1. One month's basic salary in lieu of Notice Kshs 208,700
  2. Payment of outstanding leave days Kshs 90,436.70
  3. Transport Kshs 50,000
  4. Severance pay kshs 4,174,000
  5. Ex gratia Payment Kshs 1,000,000
  6. Less payee Kshs 1,656,941

Total Kshs 3,886,195.70/-
7. Claimant had legitimate expectation he would be released by 31<sup>st</sup> June 2013 and would be paid Kshs 3,886,195/70.
8. However on May 27, 2013 he got a letter asking him to hold his retirement until June 30, 2014. Claimant said that the respondent wrote to him further on June 13, 2014 that his retirement package would be extended to June 2016.
9. At the same time claimant was asked to re-apply for his retirement package and claimant was not agreeable to that and he appealed the decision but got no response.
10. He says that in a surprise move the respondent informed him his early retirement had not been approved. He says failure of the respondent the grant his early retirement dues was a breach of the agreement and constitutes an unfair labour practices. He prays for judgement for payment of Kshs 3,866,195/20 and costs and interest till full payment.

### **Respondent's Case**

11. The respondent avers in his response dated November 5, 2016 that the claimant was a high ranking officer of the respondent earning a competitive remuneration and benefits which included pension scheme, medical cover and other benefits in the HR manual.
12. He says on March 1, 2013 they sent a circular to all their staff including the claimant that management had a right to stagger release of their staff so as not to interrupt fund operation.
13. They say that by their memorandum dated November 21, 2013 they directed the human resource manager to ensure that voluntary early retirement (VER) scheme should protect critical skills and competences.
14. They affirm claimant applied to be released on early retirement on March 21, 2013 and was to be released by June 30, 2013 and same was approved. He same was deferred as per respondent's discretion up to June 30, 2014.
15. They say that on June 13, 2014 they extended claimant's exit to June 2016 and so the claimant did not exit the respondent's fund and they issued him a letter dated February 6, 2017 informing him he would retire on July 1, 2018.
16. They further state that the claimant did not apply for VERS until 1<sup>st</sup> August 2017 as per their advise to re-apply and by then the application was not approved as there was no VERS available at that time.



17. The claimant according to the respondent is not entitled to kshs 3,866,195/70 as he did not exit the fund via VERS but he remained in employment up to retirement in June 2018 and continued to enjoy salaries for months of June 2013 to June 2018 when he retired and got package of normal retirement.
18. They aver that claimant is seeking unfair enrichment which he is not entitled.

### **Claimants Viva Voce Evidence In Court**

19. The claimant in his evidence in court on June 23, 2022 basically confirmed the contents in his memorandum of claim. He emphasised that he made an application for voluntary early retirement at the age of 55 years in 2013 but even though his application was approved the respondent asked him to continue working and he was under expectation he would still be given he package but that did not happen. He finally took a normal retirement and was not given the package for early retirement.

### **Respondent's Viva Voce evidence in court**

20. The respondent witness is Caroline Okul who is the human resource manager of the respondent. She confirmed she received claimant's applicant letter to get voluntary early retirement and they accepted it. She says that however the claimant term was extended as he was performing special assignment.
21. She says they had informed the staff via a memo that they would stagger the exit because of skills and competencies. She also says claimant earned salary from March 2013 to 2017 when he retired and he earned a total of Kshs 13,498,803 and so he lost nothing by not getting the early retirement package.

### **Claimant Submissions**

22. The claimant in his submissions states that as per his early retirement package which was approved by the respondent he was to get a package of kshs 3,886,195/- which he says it was computed by an agreement between the parties as per the respondent's letter of 20th March 2013.
23. Claimant relies on the case of *National bank of Kenya Limited v Hamida Bana and 103 others* (2017) eKLR where court held:

“It is not in dispute that the respondents accepted the terms offered in the circular according to their respective applicants 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... A concomitant of the doctrine of freedom to contract is the bidding force of the contract.”

24. He says the respondent in their letters to the claimant did not vary the package offered to the claimant. The respondent only stated they would stagger the dates of release of their staff.
25. He further submits that the staggering of the employees only applied to those whose application for early retirement was approved. The respondent kept staggering the claimant's employment “due to exigencies of service” and on 13<sup>th</sup> June 2014 the respondent wrote to the claimant that his exit for voluntary early retirement was extended to June 2016.
26. The claimant has argued vehemently in his submissions that he is entitled to the VERS exit package as this had been approved and it is the respondent who extended his term to remain in the fund but always indicated to the respondent that he was entitled to the retirement package according to the ruling in the above case.



27. He also argues the court to consider the findings of the case of *William Barasa Obutiti v Mumias Sugar Company Ltd* 2006 eKLR the court held that VER package is clearly insulated from the existing or future contract restrictions at all. Infact the VERS overrides them. Any subsequent engagements and payments in consideration thereof do not act or vitiate VER package according to the ruling in the above case.
28. The case of *Wiltshire and Others v University of North* (J1814/03 2005) the court in deciding whether an employee not leaving employment after VERS had any effect on the agreement reached and concluded between the parties held:
- “the respondent by its own actions actively sought to prevent the applicants from leaving in accordance with the agreement reached by threatening them with disciplinary action... the applicants concluded a valid and binding agreement with the respondent. The respondent sought to unsuccessfully to escape the agreement. In doing so, it continued to employ the applicants. It did so at its own risk and not at the risk of the Applicants ...”
29. The claimant urges the court to be persuaded by the foregoing and find it would be unlawful for respondent to claw back on benefits already accrued to the claimant. He urges the court to enforce the VERS contract between the parties and allow the claim as prayed.

### **Respondent’s submissions**

30. The respondent in its submissions states that the claimant alleged he was offered early retirement option and he accepted and submitted his application on March 2013.
31. According to him his offer was accepted and a tabulation of his terminal dues was done amounting kshs 3,886,195/70 as a package.
32. The respondent concedes there was such an offer but was subject to conditions and management reserved rights to stagger the release of the staff and staff were informed of the same.
33. The claimant continued to discharge his duties and was being remunerated. He did not suffer any prejudice and he did not show there was coercion for him to keep working
34. The respondent relied on the case of *National Bank of Kenya Limited v Pipe Plastic Sam Kolit (k) Limited* [2002] EEA 503 where court held:
- “It was observed that a court of law cannot rewrite 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 ... on that account the court rejected the move to fault the contact because the plaintiff had not pleaded coercion, fraud or undue influence ...”
35. The respondent avers that the claimant is attempting unjust enrichment as he received his salary for all years he worked and now wishes to be paid for a scheme he did not participate in.
36. The respondent submits that claimant cannot claim severance pay under section 40 of *Employment Act* as he was not declared redundant.
37. He further provides ex gratia is not provided in law and is a voluntary payment by an organisation.
38. He says that the claimant did not lay basis for his leave days and was paid all his dues at retirement.



## Determination

39. This is an intriguing claim and what the court perceives to be the main issue for determination is whether the claimant is entitled to be paid voluntary early retirement benefits (VERS) even though he continued working till his normal retirement and never took the early retirement.
40. The claimant indeed applied for voluntary early retirement and it was approved. Apparently he tabulated his dues to be Kshs 3,886,195/70.
41. Thereafter the respondent informed the staff the retirement would be staggered to ring fence critical skills talents and competence. Hence claimant was informed his retirement would be put on hold until 2014 and further until 2016.
42. By the time he got the second notice on June 13, 2014 he was already informed that the terms may be varied and so he needed to reapply again.
43. The claimant aver that when the respondent accepted his retirement on March 26, 2013 it was an agreement or even a contract that must be enforced by the court. They therefore cite the case *National Bank of Kenya v Hamada Bama & 103 (supra)* that a court cannot rewrite a contract between the parties but must only enforce it. Hence the court is grappling with the question whether this was a contract in terms of a contract between the parties. The court held in the above case that a court has no power to improve upon the instrument which it is called upon to construe whether it be a contract, a statute or an article of association...
44. The court can only construe that document approving the early retirement of the claimant's exit was not a contract but was a response to an application for early retirement by an employee.
45. Immediately after and on November 21, 2013 the respondent's board made exceptions to the retirement of the staff and asked the human resource manager to handle the exercise. This made it open that not all applicants would be allowed to leave the respondent at their time of application.
46. By then the claimant had already been informed that his release was put on hold and that was on May 27, 2013. The claimant continued to work and to receive all his benefits.
47. Then by the respondent's further letter to the claimant dated June 13, 2014 he was told his application had been extended to June 2016. He was informed his package could be varied and so he need to re-apply.
48. Apparently he did not re apply and he only wrote on August 1, 2017.
49. The claimant seems to advance that he had legitimate expectation that the VERS package would be available to him despite continuing to receive all his employees' benefits and despite not having been part for the early retirement scheme.
50. Legitimate expectation occurs where a body gives unequivocal expectation due to their action or promise. In the case of *National Director of Public prosecutions v Philips (supra)*

“ the requirement of legitimate expectation are (1) clear representation and not ambiguous and devoid of relevant qualification.”
51. The expectation must be reasonable in the sense that a reasonable person would act on it and



52. That the expectation must have been induced by the decision of the maker. The expectation must have been lawful and if the expectation is reasonable and lawful the court will invalidate it and refer the matter to the decision maker to deal with it in a procedurary fair manner.”
53. The court in this case does not find that the respondent acted or behaved in a manner to give the claimant expectation that he would be paid for early retirement and clearly he worked until the date of retirement.
54. By the time he was asking to be released on September 1, 2017 it would appear he was just a year to his normal retirement which he did in 2018.
55. Indeed the court would retaliate that the early retirement was not a binding agreement but was organisation driven and even claimant admitted in his evidence in court that the managing Trustee spoke to him and he continued serving. Obviously there is no evidence that if he insisted he still wanted to leave early the respondent would have stopped him. If he left in 2013 then he would have been entitled to the early retirement package. He now proceeded to work for another five years with full benefits and still asks for early retirement package.
56. The court would concede the findings that the claimant had not shown whether there was any coercion to continue working nor any promise which denied him any opportunity in life.
57. Finally in the case of *Njagi Marete v Teachers Service Commission* Cause no 379 of 2019 the court held what remedies are available to the claimant this court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by an employee. These remedies are not aimed at facilitating unjust enrichment of aggrieved employees and they are meant to address economic injuries in a proportionate way. To pay an employee for early retirement when he worked and was paid full benefits till full retirement no doubt would be unjust enrichment.
58. The claimant is demanding one month salary in lieu of notice payment of outstanding leave days and transport, severance pay, ex gratia and yet none of these have been proved why he would be entitled to the same. He was not even declared reductant and so this prayer would not be warranted. As for leave days there is no evidence of which leave days he is praying for and court finds the same were not proved.
59. As for *ex gratia* again this is not in his contract and it seems to have been a special offer for those retiring early. The same is not warranted.
60. Finally he is asking for payment of one month in lieu of notice and yet he does not demonstrate he was terminated without notice. Even transport claim is a generalised claim and the court would have no basis to grant it just like the other claims. As an observation the claimant has not alluded to what he was paid at his termination.
61. Flowing from the above the court finds the claimant has not proved his claim and so his prayers to be paid kshs 3,866,195/70 is not proved. The court will order each party to meet their costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

