



**Gichuhi v Bollore Transport & Logistics Kenya Limited (Cause
257 of 2020) [2023] KEELRC 981 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 981 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 257 OF 2020
NZIOKI WA MAKAU, J
APRIL 19, 2023**

BETWEEN

EMMA WANJIRU NG'ANG'A GICHUHI CLAIMANT

AND

BOLLORE TRANSPORT & LOGISTICS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against Bollore Transport and Logistics Kenya Limited, the Respondent, through a Memorandum of Claim dated June 11, 2020. She avers that the Respondent engaged her in employment as a Manager, Packing and International Removals from January 3, 1995 to January 30, 1999. That she later undertook various senior roles and eventually took up the role of Front Office - Customer Support Services Manager, which position she held until termination of her employment. The Claimant avers that her remuneration package included a monthly gross salary of Kshs 412,484.57, car allowance of Kshs 51,948.55, airtime allowance of Kshs 10,000/- per month, 300 litres of fuel per month, a medical insurance with an outpatient cover limit of Kshs 50,000/- for herself and each member of her family, and a consolidated inpatient family cover with a limit of Kshs 5 Million per annum. She further that her tenure at the Respondent's employ was marked by outstanding professional performance that earned her excellent performance appraisals over the years and consequently, promotions of both her status and terms of employment.
2. The Claimant avers that when she entered into the employment contract and diligently served the Respondent for 24 years, she had the legitimate expectation that the Respondent would at all times act fairly, conscionably and in good faith in all its dealings. That on the contrary, the Respondent forcefully and compulsorily retired her and through reverse engineering of the unlawful, irregular and unprocedural process, imposed unilateral terms of exit and arm-twisted her into signing documents to regularise and sanctify its actions. In this regard, she narrates that on December 18, 2019, the Respondent's Senior Human Resource Officer, Lydia Machanga, called to inform her that she needed to collect an invite to a meeting from the Human Resource office. That whereas this caught her by



surprise as invites to meetings were procedurally sent on email, she nevertheless went and picked the invite letter dated December 11, 2019 which indicated that she was required to attend a meeting the following day at 8.00am. That upon inquiring about the 'reorganization' mentioned in the invite, her Line Manager informed her that he was aware of the reorganization and about an expatriate joining the department in 2020. She avers that the Respondent's decision to forcefully retire her and several of her junior colleagues and the exit package thereof was allegedly informed by a Collective Bargaining Agreement signed between their Union, Kenya Aviation and Workers Union (KAWU) and the Respondent on October 12, 2018 (hereinafter "the CBA").

3. It is the Claimant's averment that she attended a meeting on December 19, 2019 and that the Respondent's HR Manager, Mrs Mary Chemas and Ms Machanga were in attendance. That Mrs Chemas informed her that the Respondent had exercised its right to retire her as she had worked for it for 24 years and had also attained the age of 50 years. She was further informed that she would thus receive a notice of early retirement pursuant to which she was expected to co-operate with her Supervisor to ensure smooth transition and handover and that her last day of work would be January 20, 2020. That with regard to her terminal benefits, she was informed that she was entitled to: 20 days' salary for days worked in January 2020; leave earned and not taken; service prior to joining the pension scheme at 26 days for each completed year of service; six months' notice in lieu of notice; and pension savings in accordance with the law. She avers that on December 21, 2019, Ms Machanga went to her office and issued her with a letter referenced NBO/1211/2C "Notice of Early Retirement" which rehashed the decision of the management that was communicated to her in the meeting of December 19, 2019. That she was then asked to immediately sign the said notice to hasten her exit process including the computation of her final dues which she initially declined but later signed it on December 31, 2019.
4. The Claimant further avers that via an email of January 2, 2020, she raised concerns about the manner in which her services had been terminated and also sought clarification on the terms of exit on early retirement and a computation of her dues. That in an email dated January 2, 2020, the Respondent's Senior Human Resource Officer, Mr Michael Kariuki acknowledged receipt of the Claimant's emails and undertook to revert with a response to the queries raised. That she placed an email reminder to the HR Manager (Mrs Chemas) on January 14, 2020 as it was less than a week to her scheduled date of exit and Mrs Chemas responded with an invite to a meeting scheduled for January 17, 2020. That when she then requested for her queries be addressed to her in advance in writing to help her prepare for the said meeting, Ms Chemas insisted that her issues would be addressed in the said meeting of January 17, 2020 and that the deliberations would be documented. The Claimant avers that she attended the meeting as scheduled and that in attendance were her Line Manager, Mr Charles Maina representing the Senior Management, Ms Machanga and Mrs Chemas. That during the meeting, the management yet again asserted the Respondent's right to retire her and when she inquired the basis for that right, she was informed that she had become an expensive resource and the company was getting a much younger and cheaper resource to replace her. That however, nothing was mentioned about her performance, skills or trainability in the event the company was planning to introduce new systems and processes which if related to the cost of retaining her, would have qualified the statement about her being an expensive resource. The issue of cost further surprised her considering she had been informed about an expatriate joining the department who was definitely going to be more expensive than her.
5. It is the Claimant's averment that in response to her earlier queries, she was informed in the meeting of January 17, 2020 that her exit package would not include her other employment benefits and that gratuity was not payable to her as it was not the company's policy. She avers that she never accepted the terms of the supposed offer of early retirement and that she requested for a copy of the minutes of the said meeting before leaving. That on January 20, 2020, which was supposed to be her last day of



service, she reported to the Respondent's HR office to follow up on her terminal benefits and together with the other junior staff being retired, waited until 5.00pm before their exits were processed. That however her final dues had not been tabulated yet the company was forcing her to sign documents absolving the Respondent of any further claims and she requested for the detailed computation as promised in the earlier meetings before she could sign off. It is the Claimant's averment that despite the express indication of having declined the purported early retirement offer and her refusal to sign against the purported offer, the Respondent through Mrs. Chemas, wrote an email to her on January 20, 2020 at 6.24pm giving her 24 hours to sign the supposed early retirement offer. Responding to this email on January 21, 2020, she explained why she would not sign the early retirement document and consequently declined the early retirement and that she also requested for a reconsideration of her terms of exit in her response. That unfortunately, a further reminder of the same on January 25, 2020 went unanswered by the Respondent.

6. The Claimant further avers that on February 3, 2020, she was called for a meeting by Mrs Chemas who informed her of a "special" *ex gratia* payment as she was one of the few remaining members of staff that had been retained during the various transitions from Notco Kenya Limited to the Respondent Company. That this payment would however be done after the exit process had settled down. She reveals that since the Respondent had deliberately withheld and delayed her payment including her monthly salary for close to two weeks and considering she desperately and urgently needed funds for her mother's cancer treatment and her son who was also unwell, which facts she disclosed to the Respondent, she gave in and signed the discharge forms to unlock the withheld monies. That this notwithstanding, the Respondent continued to withhold her monies despite her pleas for the same to be released and that on February 12, 2020, she was summoned to the Respondent's offices to sign a Non-Disclosure Agreement. That she was also issued with a Certificate of Service which did not capture the different senior positions she had served in the Respondent Company. That she sent several texts to Mrs Chemas on February 13, 2020 expressing her frustrations with the delayed payment and that on February 14, 2020, she camped at the Respondent's premises from 9.30am to about 4.00pm but had to leave to attend to her sick son's particulars, which she also disclosed to the Respondent.
7. It is the Claimant's averment that having served in the Respondent's management, she was aware that it did not have a retirement policy that required employees to retire at the age of 50 years once they served for more than 20 years. That the Respondent's importation of the criterion and terms of early retirement from a CBA between it and other junior staff, some of whom had previously worked directly under her supervision and which terms were foreign to her employment contract with the Respondent, epitomizes the irregularity, lack of procedure and unfairness which the Respondent treated her with. That the process in which she exited the Respondent's employ was thus unfair both substantively and procedurally as the restructuring process carried out by the Respondent lacked transparency and was unlawful. She particularises the irregularity of the retirement process and further avers that a section of the Respondent's members of staff who fell under the same category as her were retained in employment despite meeting the criteria used to terminate her employment. That despite members of staff who were offered redundancy having served for a shorter period than the Claimant, they got a superior exit package compared to that of early retirement i.e. accrued leave, two months' notice pay, salary earned, severance and service payments each at the rate of 26 days for each completed year of service, and less monies owed to the company. She also particularises this discrimination and avers that the decision to terminate her employment was thus based on an illegitimate reason and was grossly unfair as the Respondent retained members of staff who had attained the age of 50 years and had served it for more than 20 years. The Claimant therefore prays for:
 - i. A declaration that the act of the Respondent of forcing the Claimant into retirement is unfair, unlawful and against the principles of fair labour practices.



- ii. A declaration that the act of discrimination in the place of work on basis on the Claimant's age is unconstitutional, unlawful and illegal and amounts to breach of contract of employment.
 - iii. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - iv. Service payment (2 months/year worked) (412,454/- x2) x24) = Kshs 19,797,792/-
 - v. Severance payment (2 months/year worked) (412,454/- x2) x24) = Kshs 19,797,792/-
 - vi. 12 months' pay for unfair termination (412,454/- x 12) = Kshs 4,949,448/-
 - vii. Payment of salary for remainder of her years of service until retirement.
 - viii. General, aggravated and exemplary damages for discrimination on basis of Age.
 - ix. General, aggravated and exemplary damages for distress, loss of career and future earnings, deceit and mental anguish.
 - x. Cost of the suit and interest thereon at court rates.
8. In her witness statement, the Claimant states that during her last appraisal session for 2018 and 2019, she had expressed to her employer that she was ready to work for any of the Bollore offices in Africa since her children were grown and she was flexible to work outside the country. That she wonders why her employer did not prepare her or inform her of its decision in advance for her to have an opportunity to air her views on the restructuring and whether she wanted to be retired early. That Mrs Chemas informed her that the rush was because the approval for the restructuring had come late from Bollore's headquarters office in France. She further asserts that the minutes of the meeting held on January 17, 2020 were never shared with her and reiterates that the Respondents made a sole decision to dismiss and terminate her employment under the guise of early retirement.
9. In response, the Respondent filed a Reply dated September 14, 2020 denying that it unilaterally imposed upon the Claimant terms of her exit and or that it forced her to leave the Respondent's employment under the guise of forced early retirement. The Respondent avers that sometime in 2019, its business experienced significant changes in its logistics operations largely due to changes in the logistics landscape in the country including the launch of the Standard Gauge Railway (SGR). That the changes fundamentally affected its clearing and forwarding operations and the company's structures and resulted in decline in the company's financial performance in business, clients and volumes. That it was consequently forced to reorganize its operations including incorporation of new technology and review of internal operational processes so as to ensure that the business was addressing specific customer requirements. That this reorganization necessitated rationalisation and restructuring of the Respondent's workforce to a leaner work structure and at the same time, enhance efficiency to best meet the customers' needs and to manage costs. It is the Respondent's averment that the effect of the restructuring was two-fold as follows: declaration of redundancies that would lead to termination of employment on account of redundancies for employees whose roles were completely abolished in the new business model; and early retirement for roles that were still relevant for the business but which required a different skill set and additional training, which was within the provisions of the CBA and the Pension rules.
10. The Respondent confirms that the Claimant was among the Respondent's employees considered for early retirement following the restructuring decision, averring that the Claimant had at the time attained the minimum early retirement age of fifty (50) years as provided under the applicable Trust Deed and Rules as well as the NSSF Act, which applies to all pensionable employees. That whereas the Respondent's HR Manual did not specifically provide for the procedure for early retirement in respect



of management employees who were not otherwise subject to the provisions of the CBA such as the Claimant, it complied with the requirements of substantive and procedural fairness as provided under the *Employment Act*. That the Claimant was given a fair hearing where her concerns regarding the early retirement offer were addressed, including the opportunity to negotiate the terms of her separation as documented in her pleadings, and that she was encouraged to seek clarifications. That during the meetings, the Claimant was informed of the selection criteria used to ascertain the employees who would qualify for early retirement and which was adopted in making her the offer of early retirement - being the age of the employee and the period of service with the Respondent. That notably, the Claimant did not raise objections on the offer of early retirement and only sought to confirm if the package would have been the same had she been the one who requested for Early Retirement.

11. The Respondent further avers that the Claimant in fact by an email dated January 2, 2020, wrote to it forwarding the duly signed Minutes of the meeting held on December 19, 2019 together with the signed Notice of early retirement dated December 20, 2019 thereby accepting the offer of early retirement. That in the said email, she sought additional clarifications regarding the retirement package particularly on the issue of the payment in lieu of notice, service pay and gratuity. That her concerns were addressed in the meeting held with her on January 17, 2020 and subsequent discussions aimed at ensuring transition on amicable terms were pursued between her and the Respondent's management. That in the end, the Respondent agreed to pay the Claimant an additional sum of Kshs 6 Million as gratuity, over and above the retirement package set out in the letter dated December 20, 2019 after having considered her long service and seniority in employment. That the Claimant has however deliberately not mentioned this additional payment in her pleadings.
12. It avers that the extensive deliberations and negotiations between the parties culminated to a Non-Disclosure Agreement dated February 12, 2020 signed between the Claimant and the Respondent and in effect, the Claimant agreed not to disclose the proprietary information defined under the NDA. That the Claimant had also on February 3, 2020, signed the Acceptance Letter of the offer of early retirement, the final dues agreed and negotiated with the Respondent and a Discharge Voucher confirming settlement of the final dues and no further claims against the Respondent (pages 26 and 27 of Claimant's documents). According to the Respondent, it paid all the final dues and settlement amounts set out in the Discharge Voucher, including the additional ex-gratia payment which were duly received by the Claimant. That from the foregoing, it thus denies the allegation that it coerced or arm-twisted the Claimant into accepting the offer of early retirement or signing the acceptance and the discharge voucher. It also denies withholding the Claimant's settlement dues at any time once she accepted the offer and negotiated retirement package, asserting that she was promptly paid after completing the exit formalities. In the premises, the Respondent denies the allegations of unfairness, arbitrariness and forced termination as alleged by the Claimant.
13. The Respondent further denies the allegations of discrimination averring that it exercised its contractual and statutory right to undertake the restructuring process on specific roles and not all functions in the organisation. That the reasons for declaring some of the employee roles redundant were clearly distinct from those warranting the exercise of the right of early retirement and that in this case, the Claimant did not merit the redundancy option since her role was not abolished. That the Claimant simply lacked the required skills set and training necessary for the restructured operations to better meet the demands of the job and client needs. It avers that that it duly complied with the terms of early retirement as negotiated and agreed between it and the Claimant. On the allegations and particulars of unfairness in the termination process, the Respondent avers that the termination process met the fairness criteria provided under the *Employment Act* and the Claimant was compensated beyond expectation through the additional ex-gratia payment. That the claim for payment of 12 months' salary for alleged unfair dismissal does not arise, the claim for payment of severance pay



is misconceived as the Claimant was not terminated on account of redundancy while the claim for payment of service pay does not arise as she was paid all her lawful and contractual dues and was a member of the Pension Scheme since 1995. Further, that the claim for payment of salaries up to the date of retirement is misconceived and not tenable whereas the claim for aggravated damages is not merited. The Respondent prays that the Claimant's suit be dismissed with costs.

14. The Respondent also filed two witness statements made by its HR Manager, Mary Chemas and Regional Director Development and External Affairs- East Africa, Auni Bhaiji on 1st and March 16, 2021 respectively. Mr Auni Bhaiji states that when he met the Claimant, she was initially unhappy with her exit package given her seniority in the organization and longevity of service and upon informing her that the management would consider paying her an *ex gratia* payment, she accepted and signed the relevant paperwork of the offer. He asserts that the Claimant left the Respondent's employment following a negotiated separation which she voluntarily accepted and that the Respondent duly paid her terminal dues and the agreed separation package. He urges this Court to find that the entire claim has no basis.

15. Evidence

The Claimant testified that she exited the Respondent company on January 20, 2020 and handed over company property and equipment on the said date and that she did not have access to the office after that. She stated that she was shocked when she saw her letter stating that she had accepted a voluntary early retirement and that when she sought explanation for the same, she got none. That whereas she left on January 20, 2020, she was given the computation of her dues in around February 3, 2020 and that she also did not know why she was being asked to leave. In cross-examination, she stated that the Performance Review she filed in court was relevant because the Respondent had indicated in its pleadings that she was not trainable which is an issue related to performance. She confirmed being a member of the Pension Scheme. She further stated that she knew her goose was cooked once she found out that the company's headquarters was involved and she could not therefore refuse the early retirement. She stated that she neither had negotiating power nor room to negotiate and that she accepted the early retirement and the 6 Million *ex-gratia*. She confirmed receiving payment 14 days after signing the discharge voucher on February 23, 2020 and that she was paid 6 months as notice for early retirement, outstanding sales and 6 Million as *ex-gratia*. She also confirmed having signed a non-disclosure agreement related to the exit terms but had her back to the wall considering the circumstances of her father and son and she had no money having not been paid her January salary. In re-examination, she stated that the Notice of Early Retirement had no provision for acceptance or refusal and that no explanation was given to her during the meeting on December 19, 2019.

16. The Respondent's witness Mrs Mary Chemas, testified that they tabled the offer for early retirement to the Claimant who was eligible after they had sent notices to her to attend meetings and that the Claimant thereafter signed the early retirement after a very consultative process. She stated that the Claimant had an opportunity to decline the offer but there was no disagreement with the retirement from her part and confirmed that the payments were made to the Claimant in mid-February. That the Claimant signed the NDA as she was not to discuss the negotiated package of 6 Million paid to her over and above the offer for early retirement.

17. In cross-examination, she stated that the notice did not indicate that the Claimant needed a different skill set and confirmed that the minutes for the January 2020 meeting had not been annexed. She further stated that they communicated to the Claimant that if she did not accept the offer for early retirement, they would re-deploy her. That the Claimant actually initiated the process of negotiating for her additional package and met the Executive Management to negotiate her package. In re-examination, she asserted that the Claimant's position was not declared redundant.



18. The 2nd Respondent's witness Mr. Bhajji adopted his witness statement and was offered for cross-examination. In cross-examination he stated that the Claimant went to see him more than once for help to get a good package for the years she had worked. In re-examination, he stated that the Claimant was happy with the 6 Million package which she signed off and left which to him was a golden handshake as it was way above what anyone else would get. According to him, this case was therefore not right as they had taken care of the Claimant in her employ and when she left.

Claimant's Submissions

19. The Claimant submits that the process leading to her termination disguised as an offer of early retirement was unfair while the reason given was invalid and amount to unfair termination of employment as contemplated under section 45 of the Employment Act. With regard to the procedure applied to retire her early, she submits that there was no document before Court that lawfully and regularly governed and/or regulated her employment relationship that supported the Respondent's actions of retiring her early as it did. On this submission she relies on the authority in the case of Praxides Akoth Oduor v Liberty Eagle Limited & another [2016] eKLR in which the court noted that majority of employers will have a human resource policy or manual attached to the employment contract or issue regular guidelines, memo and annexures to the contract of employment that regulate the employment relationship. It is the Claimant's submission that the Employment Act, the Contract of Employment and revised terms, and the NSSF Act relied upon by the Respondent do not provide for early retirement. That therefore, the consequent process was unsupported and irregular *ab initio*. That whereas the Respondent's Trust merely defines early retirement at page 8 thereof, Rule 8(b) merely provides for circumstances in which early retirement benefits may be paid to an employee but does not grant the Respondent any right to act as it did. In addition, the language used in the said Rule is instructive and consistent with the submission that early retirement can only be initiated by the employee and not the employer, unless on medical grounds. The Claimant submitted that Rule 8(b) thereof provides as follows:

“Save as otherwise specifically provided under the Rules, no retirement benefit shall be payable to a Member except on retirement from service of the Founder in the following circumstances

- i. On or after attaining the Normal Retirement Date
 - (ii) On or after attaining age 50 with the consent of the Founder
 - ii. On medical evidence to the satisfaction of the Scheme and the Founder that he is incapable by reason of any infirmity of mind or body of discharging the duties of his office and that the infirmity is likely to be permanent
 - (iv) Upon the permanent emigration of a Member from Kenya to another Country with the consent of the Scheme Trustees and approval of the Authority” (Emphasis by Claimant)
20. The Claimant further submits that the only other document that provided for early retirement of employees in the exact similar manner applied by the Respondent is the CBA made between the Respondent and KAWU (2018-2021). That the language used in the notice dated December 20, 2019 adopts word for word the wording of clause 46(v) and (vi) on the benefits to be paid (six months' salary in lieu of notice) and criteria of retiring early (an employee shall be allowed to retire at the age of 50 years provided the same employee has served the Company for 20 years) respectively. That this was also admitted by the Respondent both in its documents and witness account of Mrs Mary Chemas.



However, it is the Claimant's submission that she was not party to the said CBA and was further non-unionisable as she was part of the management. That grounding the said CBA in the process applied to retire her early was therefore grossly irregular, unlawful and illegal, goes against the principles of fairness, natural justice and legitimate expectation and cannot be countenanced by this Court. That the Respondent misapplied the said CBA to retire her early to suit its selfish ends and that even if clause 46 of the said CBA was to be held applicable, the only circumstance in which an employee can be retired early at the initiative of the Respondent is on medical grounds.

21. Secondly on the issue of the process applied, the Claimant submits that the Respondent inverted the procedure of retiring her as she did not voluntarily apply for early retirement. That the process was therefore not initiated by her and is thus not an early retirement arrived at consensually nor a regular termination made within the contract of employment. That under the contract of employment, the Respondent could only make a decision to retire her prematurely on medical grounds and any other form of premature retirement called for her consent as the employee. That considering there was nothing in writing to show that the Respondent requested her to retire early and she consented to do so, the Respondent breached the terms of the contract of employment on premature retirement. That firstly, the email correspondence and meetings did not express any consent to retire early and secondly, the Notice of Early Retirement did not give her the option of declining her employer's position and already made decision to retire her. That if indeed there were negotiations between her and the Respondent on the terms of her exit package as alleged, proof of the same should have been provided in court. It is the Claimant's submission that she was unlawfully and unfairly retired at age 54 years and consequently lost six (6) years of service and that the lack of a letter of request and/or a letter of consent to the request makes the Respondent's version highly unlikely and untrue. The Claimant relies on the case of *Benson N Irungu v Total Kenya Limited* [2015] eKLR in which the Court faced with similar facts, held that:

“...a serious matter of early retirement ought to have been properly documented by an employee initiating it in writing and the employer to accept the request in writing. Lack of a letter of request and a letter of consent to the request makes the Respondent's version highly unlikely and untrue.

The court finds that the Claimant has proved his case on a balance of probabilities and that the Claimant was unlawfully and unfairly retired at age 55 years and as a result lost five (5) years of service and has suffered loss and damage...

Forced retirement of employees who have served an employer royally and diligently for long period is a conduct that needs to be discouraged by this court.”

22. The Claimant further cites the case of *Pauline Wangeci Warui v Safaricom Limited* [2020] eKLR in which the court found that in a situation where an employer had already indicated that an employee was leaving, execution of a mutual separation agreement did not give an indication that the separation was mutual. She submits that similarly in the present case, she was left with little to no option in the days leading to her exit with her last day of work already pre-determined and set for January 20, 2020. That from the foregoing, her termination was thus not via a Voluntary Early Retirement Scheme and she was in fact dismissed.
23. As regards the Respondent's reasons for the early retirement, the Claimant submits that she has already submitted that the Respondent wrongly applied on her the CBA provision on early retirement as she was not party to the CBA being in Grade 5 while clause 2 of the CBA provided that it was applicable to the Respondent's members of staff in Grade A1-A3. She further raises issue with the Respondent's reliance on its Pension Trust Deed and Rules that provided for retirement of employees



who had attained the age of 50, stating that the Respondent did not table any document before court indicating that she accepted the terms contained in the Trust Deed dated September 10, 2019. She further states that the Trust Deed as under Rule 8(b) does not provide that the Respondent can retire an employee who has attained 50 years and served the Respondent for 20 years. It is the Claimant's submission that this policy did not therefore grant the Respondent justification to retire her early from service for the reason that she had attained 50 years and was in service for more than 20 years. On the second reason of re-organization of the Respondent's operations, the Claimant submits that the Respondent had a burden, pursuant to the provisions of section 43 and 47 of the Employment Act, to prove that there was indeed a business need to re-organise so as to enable the court investigate the reason and establish whether the same existed. That the Respondent neither produced any evidence pointing to the Claimant's inability to perform her role nor denied that her role was still needed at the Respondent's employ. For the third reason that she required a different skill set to perform her role, the Claimant submits that she has demonstrated that the same was never brought to her attention and if anything, she was appraised highly two weeks before she was informed of the early retirement. The Claimant relies on the case of Florence Kavosa Wanyanga v Kenya National Examination Council [2021] eKLR in which an employee challenged an unlawful and forced early retirement and the court while making a determination on the reason advanced by the employer, held that once the respondent chose to assign reason for retiring the claimant early, it had the mandate to prove the same as per section 43 of the Employment Act 2007 but failed on this.

24. On the issue of the 6 Million *ex-gratia* payment, the Claimant cites the case of Gaye Madiodio v Societé Internationale De Tele Communication Aerornautiques (SITA) [2021] eKLR in which Keli J relied on the case of Nicolas Wachira Koiga v NCR Kenya Limited [2013] eKLR where the court held that an intended benefit called *ex gratia* is not a right. The Claimant submits that an *ex-gratia* payment is a discretionary amount paid to an employee by the employer at the sole discretion of the employer and that the burden of proving that she participated in the negotiation for payment of the same was upon the Respondent. That an *ex-gratia* amount cannot be applied to negate a right and that therefore the right to fair dismissal and dues therefrom that she ought to have received cannot be negated by an application of a discretionary amount by the Respondent. That the record indicates that the *ex-gratia* payment in lieu of retirement was a discretionary award granted to her due to her long service with the Respondent and cannot be applied to defeat her employment rights claim. That the doctrine of legitimate expectation estops the Respondent from reclaiming the *ex-gratia* award or arm-twisting her to defeat her rightful claims.
25. On her prayer for compensation, the Claimant relies on the case of Florence Kavosa Wanyanga (*supra*) in which the Court awarded the claimant maximum compensation of 12 months' pay for termination of employment vide an unfair and forceful early retirement. On the claim for severance, she submits that termination of her employment due to a need to re-organise directly translates to a redundancy situation and she is as such entitled to severance pay in accordance with section 40 of the Employment Act. On the claim for general, aggravated and exemplary damages for discrimination on basis of age, she submits that she has demonstrated that she was discriminated against due to her age contrary to Article 27(5) of the Constitution and section 5(3) of the Employment Act. She relies on decision in the case of Bakery Confectionery Food Manufacturing and Allied Workers Union Kenya v the Wrigley Co (EA) Ltd [2013] eKLR in which the Court awarded the claimant compensation for 8 months' salary for early forced retirement. The Claimant urges the court to find that she was unfairly and unjustly terminated through forced early retirement.



Respondent's Submissions

26. The Respondent submits that section 43 of the [Employment Act](#) requires that before terminating an employee from employment, the employer must demonstrate that there were valid reasons warranting the termination and that the employer genuinely believed to the existence of those reasons at the time of termination. That section 45 of the Act further provides that the reason for termination shall be deemed to be valid and fair if it was based on the operational requirements of the employer and that the employment was terminated was done in accordance with fair procedure. It submits that it opted to give the Claimant an offer for early retirement as her position did not merit redundancy within the meaning of section 2 of the [Employment Act](#) and that she was duly informed of the reasons for the termination of her employment on the basis of the early retirement as demonstrated in the minutes of the meeting held on December 19, 2019 titled "Staff Rationalization meeting" (page 49 of the Respondent's documents). That it is instructive to note that during the said meeting, the Claimant did not raise any concerns as to the validity of the reasons that underlined her proposed early retirement. That the only concern the Claimant raised during the said meeting and which it provided a clarification on was in relation to the difference between early retirement and redundancy. Furthermore, that had the Claimant had any intention to decline the offer for early retirement, the intention would have been clear in her emails of January 2, 2020 which were written almost two (2) weeks after the meeting of December 19, 2019.
27. The Respondent relies on the case of [Faiyadh Ahmed Mohamed v Bollore Transport & Logistics Kenya Limited](#) [2021] eKLR, whose facts are identical to those in the instant case and in which the Court found that the early retirement of the claimant was based on fair reasons, being operational changes in the business of the respondent, of which the claimant had been made aware of. The Court noted that the minutes which were signed including by the claimant showed that parties discussed early retirement and if agreeable the process would commence. The Court went on to find that the claimant was bound accordingly as he had signed the discharge confirming the separation and not having any further claim arising from his employment with the respondent and held that the claimant was not entitled to the claim and the prayer for compensation.
28. Regarding the Claimant's contention that if indeed there was a case for re-organization then the Respondent ought to have declared her position redundant under section 40 of the Act, the Respondent submits that the decision on how an employer restructures an organisation is a prerogative of the employer. That it is not in every case of a re-organization that an employer must pursue redundancy as a mode of separation as alleged by the Claimant and that the mode of separation an employer adopts is a commercial decision which is based on prevailing circumstances in the employer's operations. The Respondent relies on the Court of Appeal decision in the case of [Kenya Airline Pilots Association v Kenya Airways Limited](#) [2020] eKLR in which the Court held that an employer cannot be faulted for choosing the option of early retirement in the case of a reorganization as opposed to a redundancy as long as the basis for the decision was valid. That similarly in the Court of Appeal in the case of [Pure Circle \(K\) Ltd v Paul K. Koeh & 12 others](#) [2018] eKLR held that the appellant could not be penalized for having made a commercial decision in a bid to restructure its operation for its sustenance. In the upshot, the Respondent submits that the reasons for terminating the Claimant's employment on grounds of re-organization of the business were valid and that the Claimant was duly notified of these reasons prior to the termination in accordance with the provisions of section 43 and 45 of the [Employment Act](#).
29. On the procedure used in effecting the termination, the Respondent submits that whereas it is undisputed that its Human Resource Manual did not set out the procedure for early retirement and



that the Claimant was not a member of the Union hence the provisions of the CBA were not applicable to her, in the absence of a contractual document governing the procedure for early retirement, it resorted to the provisions of sections 41, 43 and 45 of the Act on procedural fairness. That the law requires that the employee must be given a fair hearing before a decision to terminate their employment is made and, in this case, parties consulted and reached an agreement on the terms of the separation that culminated into the Claimant signing an NDA and discharge voucher. That the Claimant is thus estopped from denying that the terms of her separation were mutually agreed between the parties as the agreement is binding upon her. Furthermore, that it was within the Respondent's right to initiate the early retirement process provided that the separation was on mutually agreed terms and that it is therefore immaterial that the early retirement offer was initiated by the employer.

30. It is the Respondent's submission that it is trite law that parties are at liberty to contract outside the instruments governing the employment relationship and that the mere absence of a provision in the HR manual or the [Employment Act](#) on the procedure for effecting early retirement does not take away the parties right to negotiate and agree on the separation. On this submission it relies on the holding in the case of [Sunil Kumar Chhabra v G4S Security Services Limited](#) [2013] eKLR where the Court equated retirement arrangements to binding exit contracts that are negotiated and agreed between employer and employee and that once parties agree, the terms of early retirement become binding. The Respondent submits that the Claimant's attempt to impeach the entire early retirement process merely on the misconceived allegation that there was no document in place governing the Claimant's early retirement is misleading, and her contract was therefore terminated in accordance with the dictates of fairness as provided under the [Employment Act](#).
31. On the contention that the Claimant was forced into early retirement and/or arm-twisted into signing the separation agreement, the Respondent submits that the evidence on record demonstrates that the Claimant enjoyed a relative bargaining power with the Respondent's Directors, including her ability to negotiate an enhanced package owing to her period of service and seniority in the Respondent's employment. The Respondent cites the case of [Patrick Nyoro Njuguna v East African Portland Cement](#) [2014] eKLR in which the court held that the claimant's version on duress failed because it was unsupported by evidence whereas the respondent had brought documentation to the extent of the claimant's information and acceptance of the varied retirement scheme. It is the Respondent's submission that in the absence of evidence of duress, coercion, misrepresentation or undue influence, the agreement signed by the Claimant in February 2020 constituted a binding agreement and a valid mode of termination of her employment contract.
32. Regarding the claim of discrimination, the Respondent submits that the Claimant's allegations of discrimination have not been substantiated in evidence. That the Claimant has not provided evidence of the particulars of the alleged discrimination and or evidence to show that because of the distinction made between her and others, she was denied equal protection or benefit of the law. The Respondent submits that the holding of the Court of Appeal in the case of [Ol Pejeta Ranching Limited v David Wanjau Muhoro](#) [2017] eKLR was that for a claim on discrimination to be sustained, it must be shown that notwithstanding that the employees were under the same terms of employment, they were treated differently on grounds such as race, health status, ethnic or social origin, belief or culture as set out under Article 27(4) of the [Constitution](#). The Respondent urges this Court to consider that the Claimant, unlike other employees, was given an *ex-gratia* payment of Kshs 6 Million as a negotiated package, which by itself was a preferential benefit that was not available to other employees. Further, that since the Claimant has failed to prove the claim of discrimination, she is not entitled to any general, aggravated and exemplary damages for discrimination.



33. The Respondent urges the Court to disallow the prayer for service pay, section 35(6) of the Employment Act provides that an employee who is a member of the NSSF is not entitled to service pay and that from the payslip tendered in court on page 25 of the Claimant's Bundle of Documents, the Claimant was evidently a member of NSSF. For severance pay, it submits that it has demonstrated that the termination of the Claimant's employment was based on early retirement and not redundancy and the Claimant is therefore not entitled to severance pay. That since the termination of the Claimant's employment was based on valid and fair reasons and the process adopted in effecting the termination was fair, just and in accordance with the provisions of the law, the Claimant is not entitled to 12 months' pay as compensation. For the claim of salary for the remainder of years of service until retirement, it submits that is now settled law that a court cannot award damages until retirement as these constitute anticipatory pay. The Respondent cited the cases of *Engineer Francis N Gachuri v Energy Regulatory Commission* - Industrial Cause No 203 of 2011; *Robert Kennedy Moi v Attorney General & another* [2014] eKLR; and *DKNjagi Marete v Teachers Service Commission* [2013] eKLR). The Respondent further submits that the Claimant's contract of employment provided a legitimate expectation that either party could terminate the contract of employment by giving three (3) months' notice and that as such, there is no basis for the claim that she expected to continue working for the Respondent up to retirement. That with respect to the claim for loss of career and future earnings, the Court in *Faiyadh Ahmed Mohamed (supra)* held that parties claiming loss of earnings must demonstrate a reason attributable to the respondent that prevented them from engaging in alternative gainful activities after the early retirement. It submits that the Claimant has however failed to establish this and the prayer for damages on the same thus ought to fail.
34. It is not disputed that the Claimant and Respondent were in an employee/employer relationship until January 20, 2020 when the employment relationship was severed. The Claimant seeks compensation in this regard. She however, signed a discharge voucher on February 3, 2020 which was not signed 'without prejudice' or with any conditions on her part. It states in parre materia as follows:- I, Emma Wanjiru N Gichuhi holder of National Identity Card No (redacted) hereby acknowledge signing final dues amounting to the sum of Kenya Shillings.....which is to be transferred through EFT to the Bank/Account details below (confirmed by myself) – [the Claimant gave her bank details which the Court will not reproduce] – From Bollore Transport & Logistics Kenya Ltd, being full and final compensation in outstanding claims/terminal benefits as entitled to me. Subject to the funds being credited to my account within 3 working days, I hereby declare that I have no further claim, past, present or future arising from employment with Bollore Africa Logistics Kenya Ltd.
35. The Claimant has not shown that the sums were not paid out as agreed or that she signed this under any duress. She thus held out that she was satisfied with the package negotiated and settled by the Respondent who gave an *ex gratia* payment of Kshs 6 million which is more than sufficient granted she also received other sums in settlement. Her suit is unmerited and is hereby dismissed with costs.
- 36 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2023

NZIOKI WA MAKAU

JUDGE

