



Ngau v Nacico Co-operative Savings & Credit Society Ltd (Cause 1354 of 2018) [2023] KEELRC 1541 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1354 OF 2018**

B ONGAYA, J

JUNE 22, 2023

BETWEEN

DANIEL WAMBUA NGAU CLAIMANT

AND

**NACICO CO-OPERATIVE SAVINGS & CREDIT SOCIETY
LTD RESPONDENT**

JUDGMENT

1. The claimant was employed by the respondent on April 3, 1989 as a registry clerk. It is his case that he was to retire at the age of 55 years by relevant government policy. In 2009 the government increased mandatory retirement age to attainment of 60 years. The respondent raised retirement age for its staff to 60 years and the claimant says he was due to retire on August 21, 2022 under that policy.
2. The claimant says in June 2016 the respondent unilaterally altered his terms of service without consulting him and on 27.02.2016 the respondent went on to force him to sign a two-year contract of service. He says the contract was forced down his throat as he signed it under duress and threats of being sacked as well as misrepresentation particulars being pleaded as follows:
 - a. That he was threatened he would lose his job if he did not sign the two years fixed term contract.
 - b. Promise he would retain the vacated position after the two-year contract.
 - c. Making secret arrangements for claimant to be prematurely retired.
 - d. Failing to keep him the permanent and pensionable payroll after he signed the management contract.
 - e. Acting clandestinely to the claimant's detriment.
 - f. Breaching the claimant's right against his legitimate expectation.



3. In a statement of claim filed on September 5, 2013 through B.M Musyoki & Company Advocates, the claimant claimed and prayed for:
 - a. Payment of Kshs. 6, 863, 263.72 being the money he would have earned upto August 21, 2022 when he would have retired at age of 60 years.
 - b. In alternative the retirement was unfair and be compensated in damages.
 - c. Costs of the claim.
 - d. Any other relief and orders the court may deem just and expedient.
4. The respondent filed the memorandum of response on November 6, 2018 through Modi & Company Advocates. The respondent admitted parties were in a contract of service and in June 2016 the contract was varied by consent of both parties to a two years fixed term contract which expired on 30.04.2018. The respondent denied the claimant's case and claims and prayed his suit be dismissed with costs.
5. The claimant testified to support his case. The respondent's witness(RW) was Francis Adulu, the Loans Manager.
6. To answer the 1st issue, the court returns that the claimant has established that by the letter dated November 27, 2009 the Ministry of Co-operative Development and Marketing communicated to the respondent that the retirement age for co-operative movement staff would be moved from 55 years to 60 years.
7. To answer the 2nd issue, the court returns that the claimant has established that the he was forced to sign the two year fixed term contract dated June 27, 2016. He has exhibited his letter dated April 26, 2016 thanking the respondent for the promotion and requesting to continue in his former Grade but with the same work performance and he promised to work best towards realising the respondent's targets for growth. The respondent replied by the letter dated June 27, 2016 stating that the Board had declined his request to remain in his current job grade and he was being given a final opportunity to accept the term contract failing the Board would deny him chance to continue in the respondent's service. The letter directed him to sign by July 1, 2016. That was really duress and it cannot be said that he signed it of his free will but as pleaded, merely to protect his job for the time being. He signed the contract in June 2016 at a time he was 54 years of age. The contract was running from May 1, 2016 to April 30, 2018 and was renewable solely at the respondent's discretion and with particular reference to achievement of targets.
8. To answer the 3rd issue, the court returns that the claimant requested for renewal of the contract by his letter dated April 24, 2018 and by letter dated April 24, 2018 the respondent declined stating retirement age for management staff was 55 years of age and his request was accordingly rejected. He had to leave effective April 30, 2018. the court finds that clearly the respondent forced the claimant to join the management cadre and then rejected the renewal of the fixed term contract upon age grounds instead of considering his meeting of targets as was agreed in the renewal clause. It was never stated that he had missed on his targets.
9. To answer the 5th issue the court returns that as urged and submitted for the claimant he was unfairly terminated. The tactics invoked by the respondent in the circumstances cannot be said to have amounted to a fair procedure as envisaged in section 45 of the *Employment Act*, 2007. Further under the section, it cannot be said the reason for termination was fair as it deviated from the contractual terms of the renewal clause and did not relate to the respondent's operational requirements or the claimant's contact, compatibility or capacity. It was unfair in substance and in procedure.



10. The 6th issue is on remedies. The Court finds that nothing is attributable to the respondent denying the claimant opportunity to engage gainfully after the termination. The prayer for pay for unserved and unexpired tenure up to age of 60 years is declined as not justified. The court has considered the factors in section 49 of the Act. It is aggravating that the respondent forced the claimant to join management and thereafter failed to renew the expiring contract upon extraneous considerations outside the terms of the renewal clause. The Court has considered the highhanded and unlawful behaviour of the respondent and the long clean service by the claimant. He has established a case for maximum compensation and he is awarded Kshs. 155, 036.21 per gross pay in April 2018 payslip x12 months = Kshs. 1, 860, 434.52 (less PAYE). The respondent will pay costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Payment of Kshs. 1, 860, 434.52 (less PAYE as of the date of this judgment) by September 1, 2023 failing interest to be payable thereon at court rates from the date of this judgment until full payment.
2. The respondent to pay costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 22ND JUNE, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

