



REPUBLIC OF KENYA



**Bollore Transport & Logistics Kenya Limited v Mgendi (Appeal
E067 of 2022) [2023] KEELRC 3463 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3463 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E067 OF 2022
M MBARÚ, J
NOVEMBER 23, 2023**

**BETWEEN
BOLLORE TRANSPORT & LOGISTICS KENYA LIMITED APPELLANT
AND
HANNINGTON MGHALU MGENDI RESPONDENT**

*(Being an appeal against the judgment of Hon. Maureen Nabibya in
Mombasa CMELRC E104 of 2020 delivered on 15 September 2022)*

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CMELRC E104 of 2022 delivered on 15 September 2022. The background of the appeal is the claim filed by the respondent herein on the basis that on 18 October 1983 in the department of sea import transit as officer-road escort at a wage of Kshs. 48,984.87 per month. He worked for 37 years until the early retirement notice issued by the appellant on 7 January 2020. The claim was that the early retirement was in breach of clause 46(1) and (iv) of the contract and resulted in unfair termination of employment. There was no mutual agreement and the appellant induced him to sign the discharge voucher. The appellant had the option to terminate employment under redundancy but not on early retirement which was applied in bad faith. The respondent hence claimed for terminal dues comprised of;
 - a. Notice pay Kshs. 48,924;
 - b. 12 months' compensation Kshs. 587,088;
 - c. 2 years pay due until retirement age Kshs. 1,174,176;
 - d. Severance pay for 36 years at 26 days' pay each year Kshs. 1,526,428;
 - e. Service pay before joining pension scheme at 26 days' pay of each year Kshs. 805,615.20



2. The respondent's case was also that the appellant offered him terminal dues for days worked, overtime, house allowance, service pay, union dues and statutory dues all at Kshs. 480,876.06
3. In response, the appellant's case was that on 20 December 2019 the appellant held a meeting with the respondent and resolved that he would proceed on early voluntary retirement subject to payment of service pay prior to joining the pension scheme, 6 months' salary in lieu of notice, leave days earned, salary for days worked and the pension savings and which has since been paid. The voluntary early retirement notice issued in accordance with the CBA with his union, Kenya Aviation Workers Union (KAWU) without inducement as alleged. Upon the meeting, the respondent was served with notice of termination of employment dated 20 December 2019 and 17 January 2020 and he went through clearance and signed the retirement agreement.
4. There was no redundancy as alleged to claim in severance pay and terminal dues have since been paid comprised of the following;
 - a. 6 months' notice pay Kshs. 966,676.92;
 - b. Basic salary Kshs. 161,112.82;
 - c. Service pay before the pension scheme Kshs. 698,155.55;
 - d. Leave liability Kshs. 8,950.89Total Kshs. 1,781,191.91 less statutory deductions.
5. Parties were heard before the trial court and in the judgment, the learned magistrate held that there were no justified grounds to retire the respondent before 60 years of age, the early retirement agreement was not signed out of free will and therefore this led to unfair termination of employment and was awarded pay for 2 years, severance pay, notice pay less amount paid.
6. Aggrieved, the appellant filed this appeal on the grounds that the trial court applied wrong facts leading to wrong conclusions, there was a speculative award and awarding severance pay was in error in the absence of a redundancy. The award of notice pay was a duplication as this had been paid with terminal dues already acknowledged and it was an error to make a finding that the retirement was unfair simply because it was before the legal retirement age, despite it having been by mutual consent and allowable under the CBA. The respondent signed the retirement agreement out of his free will which was ignored by the trial court. A certificate of service has since been issued and the judgment of the trial court should be set aside with costs.

Both parties attended and filed written submissions.
7. The appellant submitted that the trial court relied on wrong facts leading to erroneous findings. The termination of employment was based on early retirement agreement and the respondent signed the same voluntarily and the finding that there was no free will is in error. Retirement was one of the ways to end employment in accordance with the CBA. There was no case of unfair termination of employment or a redundancy to justify the award of severance pay. The respondent has since cleared and paid his terminal dues and in this process he was represented by his union, KAWU. In the case of *Faiyadh Ahmed Mohamed v Bollore Transport & Logistics Kenya Limited* [2021] eKLR the court held that employment can terminate through early retirement. The parties are bound by the agreement of separation and the court cannot infer terms as held in *Amicabre Travel Services Limited v Alios Kenya Finance Limited* [2014] eKLR. By signing the discharge voucher, the respondent released the appellant from liability as held in *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR.



8. The appellant submitted that the speculative awards of future earnings are not justified upon the separation agreement and the appeal is with merit and should be allowed with costs.
9. The respondent submitted that there was unfair termination of his employment since there were no reasons given in terms of Section 43 of the *Employment Act*, 2007 (the Act). The judgment of the trial court is well reasoned and should be confirmed with costs.
10. The Amended appeal is an abuse of court, it is fatally defective and not properly before court as held in *Bernard Gonzale Lando v Mehta Electrical Limited* [2015] eKLR. The amendment is without leave and out of time. The decree attached is defective since the matter is indicated to have been heard by Hon. D O Mbeja instead of Hon. Nabibya.
11. The respondent submitted that termination of employment was not justified, there was coercion to sign the early retirement agreement yet he had 2 years to his employment which matter was assessed and addressed by the trial court. The discharge voucher signed in the case of Faiyadh Ahmed Mohamed, cited above is different from this case, which related to different facts.
12. The total sum awarded of Kshs. 2,748,780 was paid less Kshs. 1,781,191.91 but the court award related to what the respondent should have earned for the 2 years' balance to retirement age and hence should have been paid in full. There was loss of income, compensation for unfair termination of employment and severance pay as the early retirement was not justified. The appeal should be dismissed with costs.
13. This being a first appeal, the court is required to re-evaluate the entire record and arrive at own conclusions taking in mind that the trial court had the opportunity to hear the parties in evidence.
14. The judgment leading to his appeal is the one delivered on 15 September 2022 by Hon. Nabibya in Mombasa CMELRC No.104 of 2020. The decree thereof is executed by Hon. D O Mbeja on 30 September 2022, an officer of the court of equal jurisdiction.
15. The appeal relates to the judgment of the trial court and through Memorandum of Appeal filed on 5 October 2022 and through the Amended Memorandum of Appeal filed on 14 June 2023.
The appeal was filed in time and is properly before this court.
16. The respondent's case before the trial court was that on 7 January 2020 his employment was terminated by the appellant through early retirement. His case was that he was not given sufficient notice as required under clause 46(i) and (iv) of the CBA which required that the normal age of retirement was 60 years and that earlier or later retirement will be through mutual agreement between the company and the employee. And that a retiring employee shall be entitled to a minimum of twelve months' notice before the actual date of retiring.
17. These CBA clauses are therefore distinct and separable. On the one hand, the retirement age is agreed as 60 years. However, an employee, through mutual agreement with the employer was allowed to retire earlier or later. The other part is that, where the employee was due to retire, a 12-month notice should issue.
18. In this case, the respondent had early retirement through mutual agreement.
19. Through notice dated 20 December 2019 the appellant invited the respondent to discuss re-organisation that had affected his role. At the meeting, the respondent was present together with the shop steward, Johnson Bakari.



20. At the meeting, it was noted that the respondent was 58 years of age, he had served the company for 36 years and had attained the required age of 50+ for early retirement. The appellant offered to retire him under the CBA terms with payment of the following;
- a. 6 months' pay in lieu of notice;
 - b. Service pay for 26 years for each completed year prior to the pension scheme;
 - c. Leave earned;
 - d. Salary for days worked;
 - e. Pension savings.
21. The respondent made a case that he had two years to retirement. He was allowed time out to consult with the shop stewards (Johnson and Orinyo) on the matter. They returned and reported that the respondent had agreed to a retirement on the given terms but would have appreciated to be paid for the rest of his contract term to retirement.
22. On this basis, notice of early retirement issued and the respondent accepted it on 30 December 2019. On 10 January 2020 he was invited to a counselling session. On 17 January 2020 notice to end employment by 20 January 2020 issued.
- The retirement package included the following;
- a. 6 months' pay in lieu of notice;
 - b. Service pay for 26 years for each completed year prior to the pension scheme;
 - c. Leave earned;
 - d. 20 days Salary for days worked in January 2020;
 - e. Pension savings.
23. The respondent accepted the notice.
24. On the same day, 22 January 2020 the respondent signed the early retirement agreement. He accepted the settlement on the offered terminal dues.
25. A payment statement issued for Kshs. 1,044,765.36 less deductions all paid at Kshs. 480,876.06.
26. Whereas a discharge voucher or a settlement agreement does not preclude an employee from filing suit to claim employment dues owing and lawfully due in terms of Section 35(4) of *the Act*, where an employee is taken through the motions of the CBA, in the presence of the union representatives and executes the same out of his own free will, the court is bound by such agreement. The agreement can only be reopened where there is fraud, misrepresentation or other good cause.
27. At the meeting on 20 January 2020 the respondent was in the company of two shop stewards, Bakari and Orinyo. He was allowed to consult. He had misgivings with regard to his two years pay before retirement. He considered such matter and rationalised that staying on would also lead to dismissal and hence took the option to take the early retirement offer.
28. Was there coercion, misrepresentation or other untoward matter against the respondent? early retirement was an option addressed in the CBA. The appellant made a proposal and the respondent accepted with the guidance of his shop stewards.



The court is bound by that acceptance.

29. The early retirement terminated the employment relationship. The finding that there was unfair termination and payment of compensation is without a legal foundation. The award of severance pay without any matter relating to a redundancy is without justification.
30. On the award of notice pay, this was put into context in the separation agreement for 6 months.
31. With regard to award of lost earnings, the offer for early retirement accepted, the employment relationship terminated. Future earnings cannot apply on this basis.
32. The findings by the trial court that the awards made should be paid less what the respondent had received at Kshs. 1,781,191.91 negated the entire award of the court. Where indeed the respondent took the offer for early retirement and was paid his dues in full, to then make an award for future earnings, severance pay and notice pay was to go contrary to the same.

The appeal is therefore found with merit.

33. Parties settled the terminal dues at the shop floor and the awards in Mombasa CMELRC No.104 of 2020 issued on 15 September 2022 and the decree thereof dated 19 May 2023 are hereby set aside in their entirety. On the mutual agreement to terminate employment, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

