



**Otieno v National Bank of Kenya Ltd (Cause 2464 of 2016)  
[2022] KEELRC 107 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 107 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2464 OF 2016  
K OCHARO, J  
JUNE 8, 2022**

**BETWEEN**

**LYNETTE AKINYI OTIENO ..... CLAIMANT**

**AND**

**NATIONAL BANK OF KENYA LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant herein, through her statement of claim dated November 4, 2016, sued the Respondent seeking the following reliefs:
  - a. A declaration that the Claimant was discriminated against.
  - b. Payment of all the lawful terminal dues set up at paragraph 9 above in the sum of Kshs. 4,546,364.
  - c. Damages for discrimination.
  - d. Cost of this suit with interest thereon.
2. Upon being served with the summons to enter appearance, the Respondent filed a memorandum of appearance, and a memorandum in response dated December 28, 2016, which response was amended on 22<sup>nd</sup> November 2017. The Respondent denied the Claimant's claim.
3. At the close of pleadings, the matter got destined for hearing. The Claimant was heard on the October 25, 2021, and the Respondent's case taken on the November 29, 2021.



### **The Claimant's Case.**

4. At the hearing the Claimant moved this court to adopt her witness statement dated June 18, 2018 as her evidence in chief, and admit the documents that she had filed under the list of documents dated 4<sup>th</sup> November 2016, as her documentary evidence. There was no objection, the adoption and admission were accorded.
5. The Claimant stated that she was employed by the Respondent on the July 24, 1985 in the position of clerk typist, and in the course of her employment she was promoted variously. Her last position held with the Respondent was that of Executive Assistant Grade MG9, with a salary of Kshs. 285,274 per a month.
6. The Claimant stated that on the 19<sup>th</sup> day of February, 2014, the Respondent released to all members of staff an internal memo informing them of a mandatory Voluntary Early Retirement [VER] programme.
7. The Claimant contended that the memo proposed that the members of staff who would be existing the Respondent Bank through the programme would be entitled to certain benefits. The programme and the proposed entitlement were without the input of the employees. The internal memo was accompanied with Voluntary Early Retirement Programme Application form to be filled by those interested in the VER programme by close of business on 3<sup>rd</sup> March 2014.
8. The Claimant stated that she signed the VER Programme Application on the February 28, 2014, believing that the accrued benefits in terms of notice and years of service would be applicable as per the Bank's Human Resource Manual in force than was set out in the VER circular. The VER Programme was to take effect on 30<sup>th</sup> day of April 2014.
9. It later dawned on the Claimant that the package she had been offered was discriminatory and disadvantageous when compared to the unionsable cadre employees and management staff who had been paid superior terms to what she was offered.
10. The Claimant contended that the terms that she was offered by the Respondent for the VER Programme were unfair and contravened the Respondent Bank's Human Resource Manual 3<sup>rd</sup> Edition, June 2012, *the Constitution* of Kenya Article 27 and 41 as well as the provisions of the Employer's Act.
11. The Claimant alleged that whereas the VER programme was to take effect on the 30<sup>th</sup> day of April, 2014, the Respondent Bank unlawfully, maliciously and unfairly kept her in employment until July, 2014, an act that subjected her to great anxiety and stress.
12. The Claimant contended that under the stipulations of the Human Resource Manual, she was entitled to 3 months' salary in lieu of notice. Further that she came to realise that the provisions of the manual had not been followed after she had left the Respondent's employment.
13. Explaining her claim on discrimination, the Claimant asserted that while those who had left earlier were paid one month's salary for each year served, she was paid half year for each year worked.
14. In her evidence under cross-examination the Claimant stated that she read the contents of the circular before she made the application for Early Retirement.
15. She stated that though she was paid as per the terms that were put forth in the circular, the payment was not in accord with the terms of the Respondent's Human Resource Manual. The circular did not make any reference to the manual and the Collective Bargaining Agreement.



16. The Early Retirement was Voluntary. She had no document to demonstrate that those who exited the Respondent's employment earlier benefitted more than her. She admitted that she was not a member of a trade union and therefore the terms of the CBA did not apply to her.
17. She stated that after she applied for retirement, she was given a two months' temporary employment as she prepared to hand over.
18. In her evidence in re-examination the Claimant asserted that it was not brought to her attention that what the bank was offering as an exit package under the programme was less than what the Human Resource Manual provided for those retiring from the bank. Paragraph 9.4.2. provided for 3 months' notice. The manual applied to all employees.

### **The Respondent's Case.**

19. The Respondent's witness was Stephen Obonyo, its Head of Employee services. The witness adopted his witness statement that was filed herein as his evidence in chief, and tendered the documents that had been filed under the list of exhibits dated December 6, 2018 as the Respondent's documentary.
20. The witness stated that the Claimant joined the employment of the Respondent on the August 12, 1985 as a clerical staff, through an appointment letter dated July 24, 1985. Her appointment was confirmed on March 7, 1986. Consequently, she got entitled to join the Respondent's staff retirement scheme effective July 1, 1986. The witness contended that both the letter of appointment and the letter of confirmation notified her that her employment could be terminated by either party giving to the other one month's notice in writing or payment of one month's salary in lieu of notice.
21. The witness asserted that the Claimant later rose to the rank of secretary Grade "C" by a promotion letter dated April 21, 1987, and was subsequently confirmed to the position through a letter dated October 30, 1987 effective October 22, 1987. The witness alleged further that through a letter dated March 17, 1989 and July 30, 1990, she was notified of a review of her terms of service as a non-unionsable staff member.
22. The witness stated further that the Claimant was later promoted to secretary Grade B by a letter dated July 16, 1996 and subsequently confirmed to the position on the July 1, 1997. She worked in that position till the time she exited from the Respondent company's employment. As at that time her consolidated salary was Kshs, 285,274.
23. The witness stated that in early 2014, the Respondent rolled out a Voluntary Early Retirement programme and on 19<sup>th</sup> February 2014, a circular No. 1/2014 stipulating the terms and conditions of the Voluntary Early Retirement scheme was circulated to all staff. The circular provided that the option to exit the Bank's employment was Voluntary and based on the terms:
  - a. A rebate of 40% if all outstanding loans are settled immediately, a rebate of 20% if an individual settled more than 50% but less than 100% of their outstanding loans immediately and any outstanding balances thereafter, would be consolidated into one loan account and repaid at 10% up to the normal retirement age.
  - b. Payment of retirement fund benefit.
  - c. Severance pay of half a month's salary for every completed year of service.
  - d. Payment of unutilized leave days.
  - e. One month's salary in lieu of notice.



24. Through her letter dated 28<sup>th</sup> February 2014 the Claimant requested to be allowed to retire early pursuant to the terms of the circular. The Respondent accepted her application and issued her with an acceptance letter dated April 2, 2014 which she voluntarily executed.
25. Due to the necessity of a proper handover within her department, the Respondent engaged the Claimant on contractual terms for a period two months after she retired vide letters of temporary employment dated April 24, 2014 and June 4, 2014. The Claimant thereafter left the employment of the Respondent on the terms of the programme.
26. The Respondent in accordance with the exit management policy completed the Claimant's staff clearance process after which she was paid her final dues. The witness contended that the exit clearance process was undertaken by the Claimant herself. Thereafter she signed a clearance certificate stating that she had not further claims against the Bank. She was issued with a certificate of service.
27. The Claimant being an employee in the secretary Grade 8 [MG8] at the time of her voluntary retirement, the terms of the Collective Bargaining Agreement were not applicable to her. She was not a unionsable employee.
28. The witness stated that the Respondent's actions were not discriminatory and were within the law. The Claimant did not demonstrate any cause of action against the Respondent.
29. In his evidence under cross examination, the witness stated that the terms of the circular were different from those of the Human Resource Manual, and that the circular did not expressly state that the terms of the manual were not to be applicable in the Claimant's retirement situation. The circular was not clear that it was an independent contract from the manual.
30. The Human Resource Manual that was applicable to all employees equally, as at the time the programme was being put into place and effected. Clause 9.4.2. provided for a 3 [three] months' salary in lieu of notice in case of Early Retirement.
31. The one month's notice pay that was paid under the circular was inferior to what the manual provided for. The Claimant was not informed that the terms under the circular were less favourable. She was not issued with any notice of change of terms.

### **The Claimant's Submissions**

32. According to counsel for the Claimant, the following issues, emerge for determination in this matter:
  - a. Whether the Respondent Bank complied with the Human Resource Manual 2012 that was then in force while coming up with the terms set out in Voluntary Early Retirement dated February, 2014.
  - b. Whether the Respondent discriminated against the Claimant.
  - c. What reliefs is the Claimant entitled to.
33. Counsel further submitted that the circular did not inform the Claimant and other employees who were interested in applying for the Early Retirement, that the terms of the existing Human Resource Manual had been suspended from application.
34. It was argued that section 10 [5] of the [Employment Act](#) requires a notice to be issued whenever there is change of terms of an employment contract.



The section provides:

“ 10. Employment particulars

[5] Where any matter stipulated in subsection [1] changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

35. It was asserted that the Claimant and the other employees proceeded to apply for retirement under the Voluntary Early Retirement Scheme as invited by the Respondent and the latter accepted the Application to retire and applied terms of payment without any reference whatsoever to the provisions of its Human Resource Manual.
36. In the end, the Claimant and the other employees who exited the Bank under the Voluntary Early Retirement Scheme were discriminated against and underpaid contrary to the provisions of the Human Resource manual. The stipulations of clause 9.4. thereof were violated.
37. On the 2<sup>nd</sup> issue whether the Respondent discriminated against the Claimant, it was submitted that by offering less favourable terms in the programme as opposed to the superior terms contained in the Human Resource Manual applicable to the other employees, the Respondent’s act that affronted the provisions of section [3] [6] and [7] of the *Employment Act*, and Article 27 and 41 of *the Constitution*. Reliance was placed on Cause No. 781 of 2015 – Christopher Onyango & others v Heritage Insurance Co. Limited.
38. On the reliefs, counsel submitted that the manual provided for 3 months’ salary for Early Retirement under the Clause 9.4.2 yet she was paid only 1 [one] month’s salary upon taking the retirement. She is therefore entitled to notice pay to an extent of 2 months’ salary. In respect of this submissions counsel placed reliance on the case of *Josephat Kamau & 2 others vs. National Bank of Kenya* – [ELRC Cause No. 2228 of 2014].
39. Further that the Claimant having established that she was discriminated against she is entitled to damages for discrimination as well as for wrongful and unfair retirement.

In support of this submission, counsel cited the case of *Leonard Getboi Kamweti v National Bank of Kenya & 2 others* – Cause No 273 of 2014.

### **The Respondent’s Submissions**

40. The Respondent’s counsel cited two issues as those that commend themselves for determination thus, whether the retirement was lawful and whether the Claimant’s acceptance of an offer for Voluntary Early Retirement was discriminatory and if the Claimant is entitled to damages and payment of additional terminal dues.
41. It was submitted that the scheme inviting employees to Early Retirement was independent of the Human Resource Manual. Clause 9.4 provided only allowed employees who attained the age of 50 years to apply for Early Retirement, in contrast to the VER scheme offered by the Respondent on February 19, 2014 which was open to all the employees including those below 50 years.
42. The Claimant wilfully accepted the terms of the Early Retirement offer. No evidence of coercion, undue influence or misrepresentation was tendered in evidence by the Claimant. The Claimant’s retirement was therefore conducted lawfully and procedurally. To buttress this submission, reliance



was placed on the case of *John Mwove & 97 others vs. Kenya Meat Commission* [2018] eKLR where it was held:

“I have found that Voluntary Early Retirement was a voluntary termination requested by the Claimant and accepted by the Respondent and it cannot be set aside except if there is no evidence that the Voluntary Early Retirement was vitiated by factors of duress, undue influence, mistake or misrepresentation.”

And the case of William Baraza Obutiti vs. Mumias Sugar Company Limited, Civil Appeal No. 198 of 2004, where the Court of Appeal held:

“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 is the Voluntary Early Retirement Schemes. 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.”

43. Counsel submitted that the Claimant retired voluntarily and the terms that were applicable were those that were contained in the circular and repeated in the acceptance letter – *National Bank of Kenya Limited v Hamida Bana & 102 others* [2017] eKLR.
44. This Court’s role is to enforce and give effect to the intention of the parties as expressed in their agreement. The court should give effect to the Voluntary Early Retirement Agreement.
45. On the 2<sup>nd</sup> issue it was submitted that the Respondent did not in any manner flout Section 5 of the *Employment Act*, article 27, and Article 41 of *the Constitution* as by a circular dated February 19, 2014 the Claimant accepted the Voluntary Early Retirement and received benefits arising therefrom.
46. It was argued that the Claimant willingly applied for Voluntary Early Retirement on the terms set out in the Respondent’s letter dated April 2, 2014. The offer was not discriminatory. The Claimant did not establish factual and legal comparative terms against which the offer made is alleged to be discriminatory. The offer for Voluntary Early Retirement was not in breach of the Human Resource Manual, it was at the parties’ discretion.
47. The decision of *Leonard Gethoi Kamweti v National Bank of Kenya & 2 others*, Cause No 273 of 2014 [2016] eKLR cited by counsel for the Claimant distinguishable. To buttress this counsel for the Respondent urged the Court to consider the distinction as was brought out in the case of *National Bank of Kenya Limited v Hamida Bana & 102 others*, thus:

“Besides the learned Judge 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 Respondents’ case.

Secondly, his retirement was expressly under the provisions of the Human Resource Manual and not the VER Scheme which the Respondents applied for.”

### **Analysis and Determination.**

48. From the pleadings, the evidence and the submissions by the parties herein, the following issues emerge for determination thus:



- a. Whether the Claimant had any cause of action against the Respondent.
- b. Whether the Claimant was discriminated against by the Respondent in any manner.
- c. Whether the Voluntary Early Retirement Programme under which the Claimant's employment got determined was lawful and procedural.
- d. What reliefs is the Claimant entitled to if any?

#### **Of the cause of action**

49. A cause of action being a set of predefined factual elements that allow for a legal remedy, I have found immense difficulty in understanding how an employee who voluntarily applied for an Early Retirement under a scheme, whose terms of exiting from employment were clearly brought his or her attention before the application, and who picked the benefits from her employer after the latter accepted the application could have basis to, and successfully, assail the scheme, on grounds as the Claimant has put forth in his pleadings, evidence, and submissions. I am of the view that the Claimant didn't have any cause of action to institute this suit against the Respondent.
50. In fact, where circumstances of a matter are that they attract the principle estoppel to apply against a litigant as is in this matter, there cannot be said to be present a cause of action. In the supreme case of India case of *State of Punjab & others v Dhanjit Singh Sandu* – Civil Appeal No 5698 – 5199 of 2009, the Court held:

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

The Supreme court in the *Rafosthan State Industrial Development and Investment Corporation and Another vs. Diamond and Gem Development corporation Limited and Another* made an observation that.....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, he is estopped to deny the validity or binding effect on him of such a contract or conveyance or order. This rule is applied to equity, however, it must not be applied in a manner as to violate the principles of good conscience.”

#### **Whether the Voluntary Retirement Scheme was lawful and procedural.**

51. It was the Claimant's case, and her Counsel's submissions that the VER Scheme was unlawful and unprocedural as it clearly was not in agreement with the provisions of the Human Resource Manual and more specifically the stipulations of clause 9.4 on Early Retirement.
52. The Claimant held the position that under the scheme, the terms of exit and to be specific the Early Retirement benefits were less favourable than those that the Respondent's Human Resource Manual, and the CBA provided. The latter instruments provided for 3 months' salary in lieu of notice as compared to 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, under the Programme.
53. In sum the Claimant was contending that an employer cannot on some matter[s] for instance Early Retirement enter into an agreement with its employee[s] on terms: that are outside the stipulations of its Human Resource Manual; not akin to those that some of its employees who are members of a trade



union are enjoying at that material time; and or that some of its employees who exited its employment under a voluntary scheme did.

54. This kind of view is ignorant of the fact that employment is an individual relationship negotiated between the employee and the employer according to their needs. *Krystaline Salt Limited v Kweiwu Mwalele & 67 others* [2017] eKLR.
55. The Respondent contended that the Claimant voluntarily accepted the terms offered in the circular as reflected through her application, and the acceptance letter. The Claimant failed to demonstrate that there was undue influence or coercion on her, and I agree. It was not contended by the Claimant that the programme was afflicted by mistake or misrepresentation. Consequently, this court can only but respect the doctrine of freedom of contract and hold that the parties voluntarily agreed on the terms of the VER, and agree with the reasoning of Lord Hoffman in *Attorney General of Belize v Belize Telecom limited* [2009] UUPC 10 thus:

“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.”

56. I hold that through the Circular, the Application and the acceptance letter, the Claimant and the Respondent varied the terms of retirement as stipulated in the Human Resource Manual free from any factor that could vitiate a contract. The VER was lawful and procedural therefore. In the case of *William Baraza Obutti v Mumias Sugar Company Limited* [2006] eKLR, the Court held:

“We would also disagree with Mr. Menezes in his submissions that VERS was irregular in any manner. It is open to the employer and the employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual separation 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 Limited vs. Ennion & Peterson* [1931] 2 Ch.409.”

57. Having found as I have hereinabove, I see no foundation for the Claimant’s claim for discrimination, and presence of a justification for grant of any of the reliefs sought by the Claimant.
58. In the upshot, I find no merit in the Claimant’s claim and dismiss the same with costs.

**READ AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JUNE, 2022.**

**OCHARO KEBIRA**

**JUDGE**

**In presence of**

Mr. Museve for the Claimant

Ms. Nyari for the Respondent

**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 Civil 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.

**OCHARO KEBIRA**

**JUDGE**

