



**Ndiritu v Boc Gases Kenya Limited (Cause 1846 of 2016)
[2022] KEELRC 13304 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1846 OF 2016
SC RUTTO, J
NOVEMBER 25, 2022**

BETWEEN

ANDREW DICKOSN NDIRITU CLAIMANT

AND

BOC GASES KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent as a DAG plant attendant on February 19, 2007. That he was thereafter promoted to the position of Assistant Charge Hand and his salary subsequently rose from Kshs 26,387.00 to Kshs 81,851.00. That on July 25, 2014, while in the course of employment, he was involved in an accident resulting in serious injuries. That upon examination, the doctor attending to him recommended that the respondent assigns him light duties.
2. One thing led to another and eventually, the claimant retired from employment. The claimant contends that his retirement was premature and was forced by the respondent. It is on this account that he claims against the respondent a sum of Kshs 21,220,515.00 being one month's salary in lieu of notice, medical allowance for 10 years, salary and allowances for 10 years, salary increment for 10 years, pension for the months of May, June, and July, 2016, pension for 10 years, unpaid salary for the months of May, June and July, 2016, compensation for loss of employment, baggage and leave allowance for 10 years. The claimant further sought an order of reinstatement without loss of benefits as well as a certificate of service.
3. The respondent opposed the claim and stated that the claimant applied to retire from employment on medical grounds following a long period of bad health. That the claimant retired on his own volition. The respondent further denied that the claimant is entitled to the sums claimed. Consequently, the respondent has asked the Court to dismiss the claim with costs.



4. The matter proceeded for part hearing on September 28, 2021 and later on May 9, 2022 when the defence presented and closed its case.

Claimant's Case

5. The claimant testified in support of his case and at the outset, asked the Court to adopt his witness statement and bundle of documents to constitute his evidence in chief. The claimant told Court that at the time of his employment, he was a member of the Kenya Union of Commercial Food and Allied Workers Union (KUCFAW) and his employment was governed by the company's manual as well as the Collective Bargaining Agreement (CBA) between the said union and the respondent.
6. He testified that following his injuries, the doctor recommended that he resumes work but only undertake light duties. That he was advised not to lift any load that was above five kilograms in weight. That upon assessment the Director of Occupational Safety and Health Services (DOSHS), he was awarded the sum of Kshs 874,679.52, which money was paid by the respondent.
7. That on February 4, 2016, he received a Notice of Incapacity requiring him to appear before a Committee on February 10, 2016. That the committee comprised the Human Resource Manager, the Operations Manager, Safety, Health, Environment and Quality Manager and Sales and Marketing Manager and the Shop Steward. That following deliberations, the committee recommended that he be retired on medical grounds. That the committee's recommendation had no legal basis as none of its members, was a doctor by profession.
8. The claimant further testified that there was no medical report to support his retirement on medical grounds. That on 18th March 2016, the respondent's Human Resource Manager, contrary to the recommendations of his own doctor, wrote a letter to the Occupational Safety and Health Services Director seeking assistance from the directorate to procure a Medical Examination report to recommend his retirement on medical grounds. That the Director advised that such a recommendation/report could only be procured from Kenyatta National Hospital and that the same would only be done by a board of doctors who would recommend his retirement on medical grounds after exhaustive examination.
9. That he was never taken to Kenyatta National Hospital for medical evaluation and instead, the Human Resource Manager, Sarah Onyoni advised him to write a letter requesting for retirement on medical grounds notwithstanding the fact that there was no doctor's recommendation to that effect.
10. That following his forced retirement, he was not paid his terminal dues. That he did not receive any notice of retirement and that the letter retiring him from employment was backdated to three months. That despite receiving his letter of forced retirement on medical grounds on 1st August, 2016, the respondent unlawfully withheld and refused to pay his salary for the months of May, June and July, 2016, notwithstanding that he was in employment during the said period.
11. That the respondent's action of forcing him into early retirement without paying his terminal dues is illegal, unlawful, wrongful and amounts to an infringement of his constitutional rights. The claimant concluded his testimony by asking the Court to allow his claim as prayed.

Respondent's Case

12. The respondent presented oral evidence through Ms Catherine Kamau who testified as RW1. She identified herself as the respondent's Human Resource Manager. Similarly, she proceeded to adopt her witness statement and bundle of documents filed on behalf of the respondent, to constitute her evidence in chief. The documents were also produced as the respondent's exhibits before Court.



13. It was the testimony of RW1 that the claimant requested to retire on medical grounds following a work injury that left him incapacitated. That the respondent acknowledged the claimant's request and accepted his retirement on medical grounds.
14. RW1 further denied the claimant's assertions that he was forced to retire by the respondent. She further told Court that the claimant's injuries had left him incapacitated. That as per the respondent's company policy, the age of retirement is 55 years old for the unionisable staff. It was RW1's further testimony that during the time the claimant was recuperating, he was granted sick leave with full pay, for one month. That he was further paid compensation as a result of the injuries he sustained. That further, the respondent has a medical scheme which is not encashable. In summing up her testimony, RW1 asked the Court to dismiss the claimant's suit for being misconceived.

Submissions

15. It was claimant's submission that the respondent failed to exercise due care and sensitivity by showing him support to recover and resume duty. In support of this argument, the claimant placed reliance on the case of *Kennedy Nyangucha Omanga v Bob Morgan Services Limited* (2013) eKLR and Mombasa Cause No 563 of 2015: *Kenya plantation and Agricultural Workers union vs Rea Vipingo Plantations Limited*.
16. It was the claimant's further submission that the respondent's actions amounted to unfair termination and that his termination was premature as the respondent failed to comply with the legal requirements for retirement on medical grounds.
17. That further, the respondent failed to prove the reason for his termination from employment on health grounds and that the same was without valid reasons. It was further submitted by the claimant that the respondent failed to prove the existence of a medical report or the medical board recommending his retirement on medical grounds. That the respondent further failed to prove that the proper procedure was followed prior to his termination from employment. To buttress his submissions, the claimant cited the cases of *Kenfreight (EA) Limited vs Benison K. Nguti* (2016) eKLR, *Janet Nyandiko vs Kenya Commercial Bank* (2017) eKLR and *Ayub Imbira vs Teachers Service Commission* (2018) eKLR.
18. On its part, the respondent submitted that all through the claimant's injury and treatment, he was still engaged at work undertaking light duties. That the claimant's letter requesting to retire was written freely without intimidation, threats and or force being asserted upon him. That the claimant had failed to prove that the retirement was unfair under section 47(5) of the *Employment Act*. In support of its submissions, the respondent sought to rely on the cases of *Ann Wanjiku Mwangi v Faith Homes of Kenya* [2021] eKLR and *Francis Makori v Bob Morgan Services Limited* [2021] eKLR.

Analysis and Determination

19. Upon considering the Claim before Court, the evidentiary material on record as well as the parties' submissions, the following issues stand out for determination:
 - i. Whether the claimant was forced by the respondent to retire early on medical grounds.
 - ii. If the answer to (i) is in the affirmative, whether the claimant's retirement was unfair and unlawful.
 - iii. Is the claimant entitled to the reliefs sought?



Whether the claimant was forced by the respondent to retire early on medical grounds.

20. It is the claimant's case that he was forced into retirement by the respondent. On the other hand, the respondent contends that the claimant is the one who sought to retire on medical grounds. On record is a letter dated 30th March, 2016, from the claimant to the respondent's Human Resource Manager. Notably, the same is written on a "without prejudice" basis and is couched as follows:

"RE: Retirement On Medical Grounds: - Andrew Disckon Ndiritu PF No 1063

I refer to the above subject matter in which I incapacitated a permanent injury on my spinal code while on duty and the same is serious whereby I am unable to carry out duties as before.

For the above foregoing, I and your Human Resource Manager had a consultation meeting initiated by the Human Resource Management on Wednesday, February 10, 2016. Based on the doctor's recommendation that I should be allocated light duties but the management said there is no light duties and instead we agreed on a retirement on medical grounds.

It is therefore my opinion, that as per the foregoing decision by the management to go on retirement on Medical grounds. I adopt the same and request you to retire me on Medical grounds as soon as possible by calculating all my lawful benefits and the same should be processed earliest possible upon receipt of the notice of retirement in writing by yourselves."

21. The claimant's request to retire on medical grounds was accepted vide a letter dated July 29, 2016 from the respondent's Operations Manager, thus:

"Dear Andrew,

Retirement

We acknowledge receipt of your letter dated March 30, 2016 whose contents have been noted and wish to respond as follows:

The company has considered your request to retire on medical grounds and has considered the medical reports from various doctors and in particular the one from the Directorate of Occupational Health and Safety, and have come to a decision that the company do hereby accept your request to retire you on medical grounds.

The company will therefore proceed to process your lawful benefits under the Provident Fund Scheme and will effect payment as soon as possible in accordance with the rules of the scheme.

Kindly note the retirement takes effect from May 1, 2016 when you ceased working for the company."

22. At the outset, it is worth noting that the claimant has not disputed authoring the letter of March 30, 2016 through which he requested to be retired on medical grounds.
23. It is also apparent that the claimant made the request to retire on medical grounds following the meeting convened by the respondent on February 10, 2016 whose items of agenda included:
- i. Nature of the claimant's illness;
 - ii. Whether the illness is temporary or permanent;



- iii. If temporary, the estimated recovery period;
 - iv. To determine whether or not he was able to perform his duties; and
 - v. Possibility for alternative employment.
24. The claimant was further advised to appear with a fellow employee or a representative. He was also advised of his right to; an interpreter; to lead evidence; and to obtain relevant documentation.
25. The record from the said meeting was not availed hence it is not possible to ascertain its outcome. However, it is evident that the claimant asked to retire more than one month later. As stated herein, his request to retire was on a “without prejudice” basis. So, what was the implication?
26. In regards to the principle of “without prejudice”, the Judges in the case of *Oceanbulk Shipping and Trading SA V TMT Asia Limited and 3 others* [2010] UKSC 44, stated as follows:
- “The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute”.
27. Further, in the case of *Walker v Wilsber* (1889) 23 QBD 335 at 337 Lindley LJ reckoned thus -
- “I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.”
28. And in the case of *Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd* [1986] eKLR, it was held:
- “...if an offer is made “without prejudice”, evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that ‘without prejudice’ letter”.
29. Turning to the case herein, the claimant requested to retire from employment, more than a month after the meeting of February 10, 2016. Thus, if at all the inquiry committee had prevailed on him to accept retirement on medical grounds, he took more than a month to consider the same. He had time to think things over. Further, by requesting to retire on medical grounds on a “without prejudice” basis, signified that he had left his options open and could withdraw the request any time before the same was accepted by the respondent.
30. Indeed, it is notable that the incapacity inquiry meeting took place on February 10, 2016 while his request to retire was on March 30, 2016. This therefore means that he did not make his decision immediately after the meeting. He could have changed his mind anytime. At the end of the day, he is the one who pulled the plug on the employment relationship.



31. As it came to be, the respondent accepted the claimant's request to retire early almost four months thereafter, on July 29, 2016. It is notable that in the intervening period, the claimant did not retract the request to retire on medical grounds. His request was therefore sealed with the acceptance by the respondent.
32. In the event the claimant had reservations about his earlier decision to retire on medical grounds, then he did not indicate as much considering that he had close to four months to reconsider his position. In my view, four months was long enough for him to retract his request to retire on medical grounds if indeed, he wished to do so.
33. As indicated above, the claimant has not disputed authoring the letter requesting to retire on medical grounds hence it is not in doubt that the same emanated from him. Further, during cross examination, the claimant admitted writing the letter asking to retire on medical grounds.
34. It is therefore not accurate that the claimant was retired through the respondent's letter dated July 29, 2016. It is apparent that the same was in response to his letter of March 30, 2016. The same cannot therefore be termed as his letter of retirement.
35. The claimant further stated that he was coerced and intimidated into writing the letter requesting to retire on medical grounds. However, he did not provide better particulars of the said coercion. In the case of *Wenslaus Oduki Odinga v Kenyatta National Hospital Board* [2013] eKLR, the Court determined as follows:

“Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant's employment.”

36. And further, the Court reckoned as follows in *Hussein t/a MN Transporters v Agro-Chemical & Food Company Ltd* [2002] eKLR:

“But as observed above, the plaint has no pleading with particulars of duress or such other aspect that can vitiate a contract/agreement of this nature.”

37. In view of the fact that the claimant did not furnish particulars constituting the alleged duress, his assertion to that extent remains unsubstantiated.
38. Against this background, the Court finds that the claimant has not proved on a balance of probability that he was forced to retire on medical grounds by the respondent.
39. In light of the above finding, the second issue for determination falls by the wayside as logically, it cannot be determined.

Reliefs

40. The claim in regards to baggage allowance succeeds in light of Clause 19 of the CBA exhibited by the claimant, provides that an employee retiring at the normal retirement age or on medical grounds shall be entitled to receive a baggage allowance of Kshs 17,000/= for the first year and Kshs 17,000/- for the second year. The claimant is entitled to the same as there is no proof that the same was paid by the respondent.



41. With regards to the claimant's pension, he is entitled to the same from the provident fund.
42. The claim for salary for the months of May, June and July, 2016 is declined as there is no proof that he worked during the said months. As per the respondent's letter dated 29th July, 2016, the claimant worked upto May 1, 2016. Notably, the claimant did not controvert this assertion or prove otherwise.
43. The claim for medical allowance for 10 years, salary and allowances for 10 years, salary increment for 10 years, pension for the remaining 10 years, leave allowance for 10 years, is declined as the claimant has not laid basis for award of the same.
44. As the Court has found that the claimant was not forced to retire on medical grounds by the respondent, the claim for compensatory damages and salary in lieu of notice collapses.
45. The claimant is entitled to a certificate of service as the employment relationship is not disputed.

Orders

46. The upshot of the foregoing is that the claimant has failed to prove his case on a balance of probability, save for the claim on baggage allowance which is awarded at Kshs 34,000/=. Interest shall apply at court rates from the date of filing of the suit until payment in full.
47. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mageto

For the Respondent Mr. Museve

Court assistant Abdimalik Hussein

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE

