



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 62 OF 2018

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS IN ARTICLES 19, 20, 21, 27, 41, 43 & 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 2,
3, & 10 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT NO. 7 OF 2007

IN THE MATTER OF: SECTIONS 4.7, 10 (1), 11 AND 12 OF THE

FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

DANIEL MWANYASI MWALWALA.....PETITIONER

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Petitioner filed this suit on 28.6.2018 alleging that he was forced to leave the Respondent through a Voluntary Exit Scheme (VES) and was discriminated against on account of his ill health. The suit seeks the following prayers

- a) A declaration that the Respondent violated Articles 10, 27, 41, 42 and 47 of the Constitution of Kenya.
- b) An order for compensation as follows:
 - i. Twelve (12) months compensation for unfair termination.
 - ii. The Petitioner's loan to continue at staff rates until payment in full, with the option of 25% discount.
 - iii. General, aggravated and exemplary damages for discrimination on grounds of health contrary to Article 27 (5) of the Constitution, distress and mental anguish.
 - iv. General, aggravated and exemplary damages for deceit, diminished employability and loss of career.
- c) Costs of this Petition be borne by the Respondent.

2. The Respondent opposed the Petitioner through a Response and Cross-Petition filed on 24.7.2018. It contended that the Petitioner voluntarily exited employment through the VES on or around 28.2.2018 and was paid Kshs. 4,637, 760.20.

3. In its Cross-Petition, it contended that it had the right to contract the Petitioner based on the clear terms set out in the VES offer dated 18.1.2018 and his representation that he was making his application voluntarily led to his exit on or around 28.2.2018 . It contended that in the event the Petition is successful, the parties will be entitled to rescind the binding contract entered into following the Petitioner's application to participate in the VES. It therefore sought the following prayers:

a) The Cross-Petition be allowed with costs.

b) The Petitioner do pay the Respondent the sum of Kshs. 4,637,760.20.

c) Interest at court rates on (a) above from 228.2.2018 until payment in full. pay

d) The Petitioner do the costs of the Cross-Petition & Counterclaim.

4. In reply, the Petitioner filed a Replying Affidavit sworn on 18.12.2018. He reiterated that he did not voluntarily apply for the VES and contended that in calculating his severance pay the Respondent intentionally used his basic pay which led to the exclusion of his car allowance of Kshs. 130,000.

5. The Petition was heard by oral evidence and thereafter the parties filed written submissions.

Petitioner's Case

6. The Petitioner testified that he was employed by the Respondent in 1996 as a clerk until 2005 when he was poached by Standard Chartered Bank. In 2007, he was called back to the Respondent to take the position of an Area Sales Manager, Grade of Vice President Card Department until 18.1.2018 when he was forced to exit the Respondent after the Managing Director (MD) issued a circular to all employees to apply for VES by 31.1.2018.

7. He further testified that he refused to apply for the VES until he was called for a meeting, on 30.1.2018, by his Line Manager to discuss his performance; that in the meeting which was attended by his Line Manager and the Senior Human Resource (HR) Business Partner he was informed that he was underperforming. When he said he will appeal against the performance rating, the HR Manager told him that the chances of the appeal succeeding were zero and the failure of his appeal would lead to his dismissal.

8. He was then reminded that he had one day to apply for the VES but he protested saying he had pending loans. As result, he was sent on off-duty to think about it and the following day on 31.1.2018 he applied for the VES and sent an email to both his Line Manager and the HR Business Partner. Consequently, he left employment at 50 years whereas he was to retire at 60 years.

9. He further testified that he had informed his line manager that he had weakness in the lower limb which required therapy every morning and that is why in December 2017 he used his vehicle to attend a meeting at Limuru because he could not board the official van; that when they got back his Line Manager wrote to him a toxic email and copied to the HR Business Partner; that on 15.1.2018 he sent an email to the Senior HR Business Partner and the Employee Relations Manager (RW1) on the toxic relations between him and his Line Manager. He therefore prayed for damages for discrimination on grounds of his ill health.

10. On cross-examination, he testified that he forwarded his Medical Report dated 2.12.2015 to the Respondent and confirmed that it did not require the Bank to make that special arrangement for him, provide for time to undergo therapy or refer him for treatment.

11. He testified that the toxic email stated that he did not have commitment to leadership but did not state that the lack of commitment was due to illness. He confirmed that he had freedom of flexible working hours which he took advantage of to attend therapy sessions. However, upon his recommendation, the flexible working hours were done away with but he retained the arrangement while his juniors lost it.

12. He confirmed that his Performance Report does not refer to his illness and he never raised the medical issue or that he required allowance.

13. He testified that his return to the Bank in 2007 was due to his good working relationship with it; that he was a high performer and quite senior at the Bank; that in 2017 he was rated as underperforming but none of his team got this rating.

14. He testified that he received a show cause letter dated 12.6.2017 on integrity of data; that he responded in a letter dated 14.6.2017 and was invited to a disciplinary hearing on 19.6.2017 which he attended and the outcome was a reprimand. He admitted that he never appealed against the reprimand because he had appealed in 2016 and did not receive any communication

15. He testified that there was no standard application for the VES and that his application was addressed to the HR Director and not his Line Manager. He however admitted that the letter dated 6.2.2018 addressed to him set out the terms of the VES which included an acceptance form to either accept or decline. He testified that he accepted the offer and indicated that he had no unsecured loans. He further admitted that he was paid Kshs. 4,637, 760.20 after filling the VES form and that the terms of the VES did not include any of the prayers that he now seeks.

16. On re-examination, he denied lacking commitment to work. He testified that no disciplinary hearing was accorded to him before the

assessment by his Line Manager. He testified that during the June 2017 performance review, his line manager noticed that he had a problem raising from his seat then asked him whether he had applied for the VES; that he replied that he had no problem in executing his duties

17. He testified that the rating of his team was good, strong, and very strong and they all reported to him. He clarified that he had been rated as underperforming at the end of the year but mid-year he was rated as “improvement needed”.

18. Florence Gichimu, Pw2, testified that she was employed as the Corporate Operations Manager at the Respondent until July 2017 when he exited under the VES. She confirmed that she applied for the VES because she was serving under a warning letter; that she felt targeted as Middle Manager and that the work environment was hostile.

19. She confirmed that the Petitioner was her colleague at the Bank and stated that she did not know any person who left the bank under VES against their wishes.

20. On cross-examination, she testified that she applied for VES because she had received a final warning letter. She denied knowledge whether the Petitioner’s VES terms were similar to hers. She testified that as at 6.2.2018 the Petitioner knew of the VES terms because the letter from the HR indicated that his VES application had been accepted and the Petitioner had signed the acceptance form.

21. She testified that the Petitioner told her that he was coerced to apply and this was the reason he applied for the VES on the last day. She testified that she had also filed a suit on grounds that the VES had many loopholes.

Respondent’s case

22. Vaslas Odhiambo Agola the Respondent’s Head of Employee Relations testified as Rw1. He stated that the Petitioner was the 2nd in the hierarchy after the Directors of the Board and had a team working under him.

23. He testified that the Petitioner’s emailed letter dated 31.1.2018 to his Line Manager ought to have been sent to him; that the letter was contradictory because it was complaining about coercion and at the same time thanking the two for their wise counsel. Rw1 contended that the two never responded to the letter because it had no basis.

24. He testified that he never received any complaint from the Petitioner regarding the VES. He explained the procedure of the VES as involving a circular from the MD giving the terms and conditions of the VES and giving 2 months application period, the application by the employees, a review of the applications and either being accepted or declined, if accepted like in the Petitioner’s case an offer is made setting out the exit terms for the employee to either accept or decline, if the employee accepts the exit terms then terminal dues were paid, and if he/she declines he/she was to continue working. He contended that the Petitioner had a chance to decline the VES offer after applying for it.

25. Upon cross-examination, Rw1 testified that he did not receive any grievance against the HR Director; that after the Petitioner’s email complaining about his Line Manager, he separately met the Petitioner and the Line Manager and informed him that the matter had been resolved and thus it did not need to go further. However he admitted that he never put this resolution in writing but the Petitioner was happy that the matter was not to proceed further.

26. He testified that though the Cross-Petition alleges that the Petitioner left through VES before the grievance between him and the Line Manager was mediated, he had resolved the issue raised in the email of the Petitioner’s late reporting. However, there were other issues on performance.

27. He testified that the minutes of the Joint Workers Council provided that consultation between the Employee and the Line Manager was to precede the VES. However, it was clarified that it was optional to consult the Line Manager.

28. He denied that the VES was targeting poor performers and contended that medical challenges were to be given preference during the VES.

29. On re-examination, he testified that the Petitioner never followed the appeal process with respect to his performance.

Petitioner’s submissions

30. The Petitioner cited sections 43 and 45 of the Employment Act and argued that there was barely no complaint against him thus the termination of his employment was unfair for reasons that he was prematurely forced to the retire.

31. He submitted that his Line Manager, Sarah Muriuki, together with the Senior Human Resource Business Partner, Christine Orono, misadvised him against appealing the unfair rating and instead asked him to apply for voluntary exit package. He argued that it was against the imminent fear of losing his terminal benefits that he opted for the package. For emphasis, he relied on **Benson N. Irungu v Total Kenya Limited [2015] eKLR** where the Court held that forced retirement of employees who had served diligently and for a long period is to be a discouraged.

32. He further argued that the procedure followed was unfair because he was not accorded any fair hearing or issued with a certificate of service. According to him, he was induced and unduly influenced to apply for the exit package. He relied on section 41 of the employment Act and the finding in **Walter the Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that the termination of the Claimant’s employment was unfair for not being done in accordance with a fair procedure.

33. It was his submission that the Respondent failed to prove the accusations against him. He relied on **Florence Kavosa Wanyaga v Kenya National Examination Council [2021] eKLR** where the Court held that though the Respondent could have retired the Claimant early without assigning reasons, section 43 of the Employment Act provided that they had an obligation to prove the reason for the same.

34. He argued that the Respondent's action was actuated by malice and discrimination against him on account of his illness attributable to a condition of *para paresis*. He argued that it was unreasonable and discriminatory to increase his targets by 7 products after he requested for help in increasing sales workshops. He submitted that the increase in targets did not apply to everyone thus there was discrimination.

35. He relied on **Rose Wangui Mambo & 2 others v Limuru County Club & 17 others [2014] eKLR**, **Peter K. Waweru v Republic [2006] eKLR** and **James Mulinge v Freight Wings Limited [2016] eKLR** on discrimination.

36. He further submitted that the requirements for terminating an employee on account of sickness was laid out in **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR**.

37. He argued that it was and still is his legitimate expectation that repayment of loan facilities acquired during the subsistence of his employment with the Respondent would remain at staff rates of 6% until payment in full while in employment. He argued that in the event this is not accorded, it will amount to discrimination. He relied on **Oindi Zaippeline & 39 others v Karatina University & ano [2015] eKLR**.

38. He relied on **Frank N. Kamau v Tusker Mattresses Ltd [2018] eKLR** and **Mutunga Nyamai v Chancery Restaurant Limited t/a China Plate [2020] eKLR** to urge this Court to order for his compensation for unlawful and unfair termination plus terminal dues.

Respondent's case

39. The Respondent submitted that the Petitioner has failed to discharge the burden of demonstrating that he was compelled by use force or threats to take up the VES. For emphasis it relied on the Court of Appeal decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & ano [2001] eKLR**.

40. It argued that the Petitioner was very senior Vice President hence he couldn't be coerced to take up the VES. It further argued that the claimant did not adduce evidence to prove the alleged coercion nor did he lodge any complaint against his colleagues who he accuses of coercing him to take up the VES.

41. It argued that the VES was not spontaneous and the process was similar to recruitment as it had 4 stages that took close to a month. It relied on **Benson Owenga Anjere v Kivati Nduoto & ano [2013] eKLR** where the Court cited **Pao On v Liao Yiu Long (1980) AC 614** that in determining whether there was coercion or will it is material to inquire if the person alleged to have been coerced did or did not protest.

42. In this regard, it submitted that the Petitioner chose and accepted the VEs on more than one occasion and on each occasion, he had the option to change his mind and remain in employment.

43. It argued that the Petitioner is estopped under section 120 of the Evidence Act from claiming that he entered into the VES through coercion or undue influence because he affirmed the terms of the contract by taking the dues arising from the VES contract.

44. It relied on **Kenya Commercial Bank Limited & ano v Samuel Kamau Macharia & 2 Others [2008] eKLR** where the Court of Appeal cited the holding in **North Ocean Shipping Co. Ltd v Hyundai Construction Co Ltd [1979] QB 705** that a party who enters into a contract under economic duress and affirms that contract then he is bound by it. It submitted that the Petitioner affirmed the VES when he accepted the monetary benefit that accrued from it.

45. The respondent submitted contended that the VES was a contract between the parties and urged this Court not to interfere with the contractual right exercised by the parties simply because one of them has changed his mind.

46. It relied on the findings of the Court of Appeal in **Krystalline Salt Limited v Kwekwe Mwakele & 67 others** and **National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR** on the instruments governing an employment relationship and the doctrine of election respectively. It further cited **National Westminster Bank Plc v Morgan [1985] 1 All WR** where the Court held that a transaction could not be set aside on grounds of undue influence unless it is manifest that it would disadvantage the person subjected to the dominating influence.

47. With respect to discrimination, it argued that the Petitioner has not demonstrated that he was treated differently from other employees. It argued that the health of the Petitioner did not feature anywhere in his performance review. It contended that the medical report did not make any mention of physiotherapy or make recommendations for treatment. It submitted that this notwithstanding it ensured that the Petitioner enjoyed flexi-hours.

48. It relied on **Package Insurance Brokers Ltd v Simon Gitau Gichuru [2019] eKLR** where the Court of Appeal held that the Respondent could not have been discriminated against as he was the only one that was sick.

49. It submitted that his employment having terminated on account of a VES he is not entitled to compensation for unfair termination. It further submitted that the prayer to have the loan facilities maintained at staff interest rates has been overtaken by events and lacks basis because staff interest rates are a fringe benefit of employment and the Petitioner has not sought reinstatement to re-establish the employment relationship.

50. In support of the above position, it relied on **Joseph Njagi Mwita & 4 others v Barclays Bank Limited [2019] eKLR** and **Lilian Rhoda Adhiambo v Barclays Bank of Kenya [2021] eKLR**.

51. It urged the Court to dismiss the Petition with costs. It further urged that, in the event it finds reason to allow the Petition, the Petitioner should be ordered to refund to it the sum of Kshs. 4,637,760.20 paid to him on account of the VES with interest from 28.2.2018.

Issues for determination

52. There is no dispute that the Petitioner held various senior positions at the Respondent with the last being a Vice President and Head of CLM Telemarketing. It is also undisputable that on 31.1.2018, the Petitioner applied to exit the Respondent by way of the Voluntary Exit Scheme (VES) and the Respondent computed and paid his exit package of Kshs. 4,637,760.20.

53. The issues for determination are:

- a) **Whether the Petitioner was coerced to apply for the VES.**
- b) **Whether the Petitioner was discriminated upon on account of his medical condition.**
- c) **Whether the Petitioner is entitled to the reliefs sought.**
- d) **Whether the Cross- Petition should be allowed.**

Whether the Petitioner was coerced to apply for the VES

54. The Petitioner testified that he was forced to exit the Bank as he never applied for the VES until he called for a meeting on 31.1.2018 to discuss this performance. It was his testimony that his Line Manager and the Senior HR Manager informed him that his appeal against his 2017 performance rating had no chances of succeeding and should it fail he would be dismissed.

55. In his Petition, he set out the particulars of malice being that he was intentionally misadvised that he stood the risk of losing his employment benefits if he chose to appeal and that he was deceived to believe that he would not succeed in the appeal. The Respondent reiterated that the Petitioner voluntarily applied for the VES.

56. The VES was communicated to the Respondent's employees on 18.1.2018. It was only open to all permanent employees within the Respondent's Head Office; those eligible were to make their applications within a 2 week window from 18.1.2018 to 31.1.2018; the Respondent reserved the right to accept or decline the applications and the target release dated was 28.2.2018

57. The Petitioner's application to exit was made through his email dated 31.1.2018 to his Line Manager and the Senior HR Manager where he stated:

"Hi Sarah/Christine

Thank you for the meeting we had yesterday regarding my 2017 performance and the way forward. After consideration of the two options provided to me, either to take the Voluntary Exit Scheme (VES) package or to go through a Disciplinary process which can have adverse outcome on me, I have decided to apply for the Voluntary Exit Scheme as per attached..."

58. In addition, the Petitioner filed the Voluntary Exit Application Form on 31.1.2018 and addressed it to the HR Director stating that he was submitting his application for VES.

59. In this instance, it seems that the Petitioner had two options to either go through a disciplinary hearing or apply for the VES. It is evident that prior to this meeting the Petitioner had not applied for the VES. However, I do not find that he was coerced to apply for the VES. This is because the Petitioner was given an opportunity to decide while on off duty if he wanted to apply for the VES. He had the option not to apply for the VES but chose to apply for it by filling the form and informing both his Line Manager and the Senior HR Manager of his decision.

60. The Court of Appeal in **National Bank of Kenya Limited v Hamida Bana & 103 others [2017] eKLR** held as follows:

"It is not in dispute that the respondents accepted the terms offered in the circular according to their respective applications as well as acceptance letters issued by the appellant. Similarly, it was open for the respondents to reject the aforesaid terms and indeed not take advantage of the VES scheme... A concomitant of the doctrine of freedom to contract is the binding force of the contracts... What matters is that the parties voluntarily agreed on the terms of the VES which ought to have been enforced."

61. The **Benson Wairegi Case** cited by the Petitioner differs from the instant suit because in that case, the decision to retire was made by the employer.

62. With respect to his appeal against the performance rating, the Respondent contended that the Petitioner pre-empted the consequences of a disciplinary process.

63. Clause 6.2.5 of the Disciplinary, Capability and Grievance Policy and Procedure provided that an employee has the right to appeal

against any formal action under the Capability Procedure. Under Clause 6.2.5.1 the appeal panel was to reach 2 decisions; to uphold the recommendation of the original capability hearing panel or review its recommendation. Therefore, an appeal against his rating must have taken into consideration the steps set out in the Capability Procedure.

64. Previously, in the email dated 24.8.2015, the Petitioner appealed and sought a review of his H1 performance rating of "Good" and a session was to be organized to discuss the issue. The Petitioner knew the procedure and outcome, if any, of an appeal against performance rating thus there was no threat issued to him for him to take up the VES. His argument that he never appealed because he did not receive a response after his 2016 appeal is not convincing because 2017 rating was a different one.

65. The Court of Appeal in **John Mburu v Consolidated Bank of Kenya [2018] eKLR held:**

"Which leads us to the second issue: was he under duress or coercion to negotiate? The definition of duress was given in the case of *Ghandhi & Another vs Ruda (1986) KLR 556*, as follows:

"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort."

A threat to sue for a civil wrong, for example, is not as a general rule, voidable for duress."

66. As argued by the Respondent, the VES was a contract between the parties which the Petitioner accepted to and this Court would only interfere where there are vitiating factors. I find that the Petitioner voluntarily applied for the VES and eventually received his exit package thus there is no reason to set aside the VES agreement.

Whether the Petitioner was discriminated against on account of his medical condition

67. The Petitioner contended that he was intentionally discriminated against as he was falsely accused of lack of commitment to leadership on account of his health and the Respondent failed to resolve a grievance on the deteriorating relationship between himself and his Line Manager. The Respondent denied that the Petitioner was treated differently because of his health condition.

68. The Petitioner raised the issue of his thermotherapy sessions in his email dated 15.1.2018 after he was informed by his Line Manager in an email dated 11.12.2017 of his lateness to the RBB Leadership Away Day. His Line Manager's email did not make reference to his illness but stated that his lateness to the event showed his lack of leadership commitment.

69. The claimant responded that he made use of the flexible working hours even after the privilege was withdrawn from other staff. He further testified that he forwarded his medical report dated 12.2.2015 to the Respondent and no special treatment was required.

70. It appears from the foregoing exchange that the Respondent was only concerned about Petitioner's lateness to RBB Leadership Away Day which was not communicated to his Line Manager. His admission to the flexi-hours shows that he had an opportunity to undergo his sessions as well as serve the Respondent. It is my view that the Petitioner has not demonstrated how he was treated differently as a result of his illness contrary to Article 27 (4) of the constitution and section 5 of the Employment Act. Consequently, I find that the alleged discrimination has not been substantiated.

71. In respect of his grievance against his Line Manager, the Petitioner in his email dated 15.1.2018 appealed for mediation with the Senior HR Manager as he felt that he had previously discussed concerns with his Line Manager but had to resend his work concerns. He stated that the issues had to be resolved before it became toxic therefore impacting on his performance. Rw1 testified that after the Petitioner complained about his Line Manager, he separately met the Petitioner and informed him that the matter had been resolved.

72. In my view, if the Petitioner felt that his grievance had not been fully resolved, he ought to have escalated the issue through the procedure on Problem Solving at Work provided under Clause 4 of the Disciplinary, Capability and Grievance Policy and Procedure.

Whether the Petitioner is entitled to the reliefs sought

73. From the above, I have found that the Petitioner has not proved that he was coerced to apply for the VES or discriminated against hence the claims for 12 months compensation for unfair termination and damages for discrimination must fail.

74. Flowing from the foregoing, the prayer to continue repaying his loan at staff rates until payment in full must fail because he is no longer an employee of the Respondent and also because that request was not part of the agreed terms under the VES. The VES contract only provided that loans would remain at staff rates for a period of 12 months from the release date then revert to the commercial rates subject to being fully secured. Consequently, this Court cannot rewrite the terms of engagement between the parties.

75. Finally, the Petitioner submitted that his basic pay was used to calculate his severance pay hence it excluded his car allowance. This claim was not pleaded and therefore it fails.

Whether the Cross- Petition should be allowed.

76. The Cross- Petition sought the sum of Kshs. 4,637,760.20 in the event the court rescinded the VES contract. Since the I have dismissed the Petition for want of merit, the Cross- Petition is now overtaken by events and it fails.

77. Each party should bear its own costs of both the Petition and the Cross-Petition.

DATED, AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2021

ONESMUS MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE