



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC NO. 73A OF 2019**

**DR, CLEOPHAS K. SEREM.....CLAIMANT**

**VERSUS**

**MAASAI MARA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1.The Claimant sued the Respondent seeking for the Court to quash the retirement Notice issued by the Respondent and he be retained in the same position without loss of any benefits till his retirement age of 65 as captioned in his contract of employment and in the alternative he be compensated for unfair termination.

2.The background of this claim was that the Claimant was employed by the Respondent as a medical officer vide an employment contract dated 8<sup>th</sup> September, 2009 on permanent and pensionable terms with retirement age capped at 65 years.

3.The Claimant states that his gross monthly pay as at 22<sup>nd</sup> November, 2018 was at Kshs.316,522/-.

4.It is averred that on 28<sup>th</sup> May, 2014 the Respondent issued a general circular purporting to unilaterally vary the contract of employment of its staff which would operate retrospectively. Subsequently on 22<sup>nd</sup> November, 2018 the Respondent issued a notice of retirement that changed the retirement age from 65 years as per the contract to now 60 years.

5.He stated that the change of the retirement age will affect several parts of his life including his pension scheme that had marked his retirement to be on 5<sup>th</sup> July, 2024 and therefore the payment of his pension will be due in the year 2024 when his contributions to the scheme will be cut short by the change of the said contract.

6.He stated that he has taken a personal unsecured loan with cooperative Bank of Kenya, Faulu Bank and a salary advance and as at 30<sup>th</sup> August, he was indebted to the tune of Kshs. 8,6 Million.

7.That the forced retirement is likely to cause him financial embarrassments and dehumanize him as he will be unable to meet his financial obligation when he had legitimate expectation to meet them same as per the retirement age of 65 that expires in the year 2024.

8.That the Claimant has not appealed against the unilateral restructuring of age of retirement since the Respondent has not provided any mechanism for such an Appeal.

9.The claimant therefore prays for judgment against the Respondent for; -

**a)A declaration that a notice of retirement dated 22<sup>nd</sup> November, 2018 varying the contract of employment is unlawful and unfair.**

**b)The claimant be retained in his current employment position with all benefits and terms as per the Contract of employment. IN THE ALTERNATIVE, compensation for the prospective future earnings for the remainder of the contract period based on the last gross salary.**

**c)A maximum compensation for wrongful/illegal termination of employment contract as per section 49(c) of the Employment Act.**

**d)A certificate of service as per section 51 of the Employment Act.**

**e)Costs and interest**

**f)Any bother relief this Honourable Court may deem fit to grant.**

10.The Respondent filed a statement of defence on 2<sup>nd</sup> March, 2020 denying all the contents of the claim and putting the claimant to strict proof.

11.The Respondents contends that the claimant is an employee of a state corporation and the retirement age for all public servants is at the age of 60.

12.When the matter came up for pre-trial directions on the 18<sup>th</sup> May, 2021, the advocates for the parties took directions to proceed with the main claim by way of written submissions and the Application filed together with the Memorandum of claim was compromised to the effect that the Claimant was allowed to continue working for the Respondent till this matter was determined.

**Claimant's submissions.**

13.The Claimant submitted that under the common law, for variation of employment contract to be valid, there should be mutual agreement between the parties that is the employer and the employee and cited the case of **Rigby –v- Ferodo Ltd [1987]** where the court held that variation of the employment contract of an employee without consent of the employee would amount to breach of contract or repudiation.

14.He submitted that section 10(2) of the employment Act, provides that a written contract of service should states among other factor the duration of the contract and section 10(5) require the employer to consult the employee in case of any changes to the contract of employment.

15.It was submitted that the Respondent issued the claimant with a retirement Notice based on a circular OP.CABB2/7A dated 20<sup>th</sup> March, 2009 from the permanent secretary specifying retirement age of all public servants to be 60 years and the Respondent instead of consulting the Claimant unilaterally issued internal Memo of the said change of retirement contrary to the law.

16.The Claimant reinforced his submissions by citing the case of **Kenya County government workers Union –v- Wajir County Government and another [2020] eKLR** where the Court held that;

**“Further in my view the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and breach of contract and the statutory requirement to consult with an employee where there is any variation to the Employment contract and more specifically to an essential term such as the duration of remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practices principles.”**

17.He submitted that the claimant has demonstrated before this court that the Notice of early retirement that changed the age of retirement from the agreed 65 as per the contract to 60 was done unilaterally by the Respondent without any consultation as such exposing the Claimant to financial difficulties making it illegal in the eyes of the law and buttressed his argument by citing the case of **Jackson K. Barege –v- Maasai Mara University [2015] eKLR**.

18. The Claimant in conclusion submitted that he has proved his case on a balance of probability and prayed that the Claim be allowed as prayed.

19.I have examined the evidence and submissions of the parties herein. The main issue for this court's determination is whether the respondent has breached the contract with claimant and whether the claimant is entitled to the remedies sought.

20.The claimant exhibited his appointment letter dated 8/9/2009 wherein he was appointed a medical officer by the respondent. The appointment stated that the terms and conditions of service specified in the terms of service document together with the appointment letter shall constitute the contract of employment between the claimant and the university college.

21.He also exhibited a memo dated 20<sup>th</sup> March 2019 indicating that the retirement age for non-teaching staff is 60 years. He exhibited other documents i.e. letter dated 23/8/2013 introducing him to NBK indicating that his retirement age is 65 years.

22.The claimant produced the terms of service for non-teaching staff in Senior Administrative, catering, clerical, hospital, library and technical categories which covered staff on Grade NT 5 to 14 which at clause 6.5 indicated that the retirement age shall be 65 years.

23.By virtue of the claimant's position and salary scale he was in Grade No.12 which was covered by this terms of service for non-teaching staff document.

24.In fact the claimant signed this document on 17/2/2010 accepting the terms of this document. In essence the appointment letter, contract of service of the claimant and terms and conditions of service indicated that the retirement age of the claimant was 65 years.

25.On 22/11/2018, the respondent issued the claimant with a Notice of Retirement from service indicating that the claimant was due for retirement on 30<sup>th</sup> June, 2020 upon attaining his retirement age as per clause 6.5 of his terms of service.

26.Clause 6.5 of the terms of service indicates that the retirement age shall be 65 years. If the claimant was born on 5/7/1959, then in 2020 June his age would not be 65 years as per the retirement notice letter.

27.It is therefore clear that the respondents breached the contract of service of the claimant by issuing him with a retirement notice and intending to retire him from service before attaining the age of retirement of 65 years.

28.Section 10(5) of the Employment Act 2007 states as follows;

***“(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”.***

29.By virtue of the law then, the respondent could not unilaterally proceed to make changes to the claimant’s contract without consulting with the claimant.

30.**In Kenya County Government Workers Union vs Wajir County Government and Another (2020) eKLR**, the learned Judge relying on **Ronald Kamps Lugaba VS Kenol Kobil Ltd (2016) eKLR**, **Jackline Wakesho vs Aroma Case (2014) eKLR** and **Maxwell Miyawa & 7 Others vs JSC (2017) eKLR** held that;-

**“Further in my view the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and a breach of contract and the statutory requirement to consult with an employee where there is a variation to the employment contract and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair Labour Practice Principle.....”**

31.The respondents having failed in attempting to vary an employment contract without consultation, I find the attempt unlawful and illegal. I find the claimant has established his case against the respondent and I therefore declare the Notice of Retirement dated 22<sup>nd</sup> November, 2018 varying the contract of employment is unlawful and unfair.

32.I order that the claimant be retained in his current employment position with all the benefits and terms as per his contract of employment.

33.The respondent to pay cost of this suit.

**DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gakinya for respondent – present

Oumo for claimant – present

Court Assistant - Fred