



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1254 OF 2015

TERRY MUIGAI.....CLAIMANT

VERSUS

SKF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent on 20th July 2015. The Claimant was amended severally and the gist of the averments are that she was employed on 22nd June 1987 as a secretary and worked until her promotion to Quality and EHS Manager. She averred that on or about 19th June 2014 she was served with a pre-retirement notice dated 24th May 2014 by the Managing Director of the Respondent. She averred that on 7th July 2014 she was served with a retirement notice intimating that she was due for retirement on 11th October 2015. She averred that the Respondent was guilty of (i) retrospective application of Retirement Policy, (ii) Developing a retirement Policy solely aimed at axing the Claimant. (iii) Discriminating the Claimant (iv) Arbitrary application of retirement policy. (v) Harassing the Claimant at the place of work. She averred that the Respondent's actions were unlawful, illegal and discriminatory and cannot stand the test of constitutionality in light of the stringent constitutional and statutory protections obtaining in the country. She averred that the actions of the Respondent caused her mental anguish and have adversely affected her general enjoyment of life. The Claimant averred that she felt socially rejected on account of the Respondent's racial and gender discriminatory practices in the management of the organisation. She thus sought the following reliefs:-

- a) Permanent Order restraining her from retiring her until she attains the age of 75 years which is the current highest retirement age.
- b) In the alternative an Order compelling her to pay the her all her entitlements that would otherwise have accrued to her for the remaining fifteen years until she attains the age of 75.
- c) Interest in (a) or (b) above whichever is granted.
- d) The costs of this Claim
- e) Any other orders that this Honourable Court may deem fit to grant under the circumstances.

2. The Respondent filed a defence on 3rd October 2015 in which the Respondent averred that it employed the Claimant on 22nd June 1987 as a secretary earning a consolidated salary of Kshs. 7,000/- plus transport allowance of Kshs. 600. The Respondent averred that at the time of leaving its employ, the Claimant was serving the Respondent as a Quality/EHS Manager at a consolidated salary of Kshs. 419,632/- and a car allowance of Kshs. 116,000/-. The Respondent averred that it had established a retirement benefits scheme for its employees. It averred that in the Staff Retirement Benefits Scheme Trust Deed and Rules, the normal pension date is the first day of the month coincident with or next following the 60th birthday of the member. The Respondent averred that in February 2014 it developed a Retirement Age Policy effective 1st February 2014 and provided that the retirement age per the policy is 60 years. The Respondent averred that when it came up with the policy the it was circulated to all the employees including the Claimant on 6th February 2014 and that the Claimant confirmed she had read the policy. The Respondent averred that following the establishment of the policy various employees who had already attained the age of 60 years or were to attain the age of 60 years in the year 2014 were notified of their upcoming retirement dates. The Respondent averred that the employees included the Stores Controller, Customer Service, Accountant, Customer Service Executive, Regional Manager – East Africa Region, Reliability Systems Manager – East Africa Region and the Messenger/Driver. The Respondent averred that it held a farewell party in October 2014 for the staff. It averred that on 18th June 2014 it offered the Claimant a pre-retirement package in which she would be on paid leave of absence from 1st November 2014 till 31st October 2015 and that the Claimant would remain on the Respondent's payroll up to 31st October 2015 and would continue to enjoy her benefits until retirement on 31st October 2015. The Respondent averred that on 1st July 2014 the Claimant responded to the pre-retirement package offer and acknowledged the Respondent's efforts to ensure a smooth transition to retirement. The Respondent averred that the Claimant declined the pre-retirement offer stating *inter alia* that it was prompted by a hidden

agenda. The Respondent averred that on 7th July 2015 the Claimant was issued with a three month retirement notice and informed the Claimant of her upcoming retirement on 11th October 2015. Upon receipt of the notice the Claimant indicated that it was unacceptable and that she would revert in due course. The Respondent asserts that after the promulgation of the retirement policy seven employees were retired and some were retained on short term contracts to hand over or for transition purposes and that the Respondent did not discriminate against the Claimant as it retired the employees regardless of race, sex or age if they were over 60 years. The Respondent denied that the pre-retirement package was an attempt to force the Claimant out of office.

3. The Claimant and the Respondent's witness David Baiya testified. The Claimant stated that she was discriminated against as there were other employees who were allowed to work beyond the age of 60 such as Mr. Patrick Brian Plumbe (75 years), Samuel K. Nduva, Dickson Twitty Kisinjulu (63 years), Grace Njeri Maitha (62 years), Vitalis Opiyo (62 years), Julius Ndegwa (66 years) and Samuel Kioko (67 years). She stated that some of the employees left after the farewell party but others continued to work and did not leave after attaining the age of 60. She further stated that there was never any further notification of her employment terms as contemplated in the said clause. She testified that the only known channel of communication by the Respondent is through physical letter. She further testified that in her employment she has received 2 communications involving increment of salaries which communication indicated that the rest of her employment terms remains the same. She stated that Retirement of the Respondent was guided by the Respondent scheme which allowed an employee to either retire early on pension date or later as had happened for some of her colleagues. She testified that she was never personally notified of her change of employment terms. She further testified that regard to the pre-retirement offer she protested her forced retirement. She also indicated to court that the staff mentioned in her claim filed on 20th July 2015 did not retire after 3 months' Notice.

4. The Respondent's witness testified that the Respondent was not unfair in that the Claimant was not discriminated against. He stated that the Respondent followed all the processes and that they followed all the procedures in the retirement of the Claimant. He testified that the ages for the staff who retired were all different and that some got contracts to help with transition. He stated the Claimant was the eighth person to retire.

5. The parties were to file submissions and the Claimant filed submissions in which it asserted that the issues for determination were

(a) Whether the Claimant is entitled to 12 months compensation of Kshs 6,477,584/- at a monthly salary of Kshs 535,632/-; and

(b) Whether the Claimant is entitled to 12 months compensation for discrimination at a monthly salary of Kshs 535,632/-

The Claimant submitted that the Respondent's Retirement Age Policy circulated for readership on 30th January 2014 and effective 3rd February 2014 required a further notification to the Claimant personally which was not done. The Claimant submitted that Section 9 and 10 of the Employment Act 2007 has set with the particulars of contract of service and that further Section 10(5) of the Act makes it mandatory that the employer in consultation with the employee shall revise the Contract to reflect the change and notify the employee of the change. The Claimant submitted that none was done in circumstance. She submitted that it was the testimony of both the Claimant and Respondent witness that no personal notification of change of employment particulars were done. She submitted that considering that there were 8 employees who had attained over 60 years and were in service it is clear the Claimant was forced to retire. The Claimant relied on the case of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 Others [2014] eKLR** as well as the cases of **Benson N. Irungu v Total Kenya Ltd [2015] eKLR**. The Claimant also cited the case of **Michael Kaguma Maina v Kenya Police Service & 2 Others [2013] eKLR** where the Court declined to permit the retrospective effect of a retirement age and forced retirement. The Claimant placed reliance on the case of **Robert Githua Githaka v SAAB Kenya Ltd [2018] eKLR** where the Court granted 6 months compensation on forced retirement. The Claimant submitted that the respondent retirement age policy was not in conformity with Sections 10(5) of the Employment Act and to that extent is unlawful. The Claimant cited the case of **Kenya University Staffs Union & Another v Masinde Muliro University of Science and Technology [2018] eKLR** where the Court restrained early retirement and directed the Respondent to reengage the employees. The Claimant cited the case of **Bakery Confectionery Food Manufacturing and Allied Workers Union Kenya v the Wrigley Co. (EA) Ltd [2013] eKLR** where the Court ordered for compensation for 8 months' salary for early forced retirement. She also cited the case of **Michael Kaguma v Kenya Police Service & 2 Others [2013] eKLR** where Ongaya J. stated:-

"In the absence of the general constitutional or statutory mandatory retirement age in Public or private sectors or any other employment, the age of mandatory retirement is a form of the contract of employment to be agreed between the parties or varied by the employer in constitution with the employee as engaged in section 10(5) of the Employment Act 2007."

6. The Claimant submitted that Clause 9 of the Respondent's Retirement Policy was not complied with and did not meet the threshold of Section 10(5) of the Employment 2007. The Claimant cited the case of **Greta Joshi v Pandya Memorial Hospital [2019] eKLR** where the court found that the Claimant's early retirement amounted to unlawful and unfair termination and was awarded 12 months compensation. The Claimant called in aid the case of **Joshua Nzioka v Steel Makers Ltd [2015] eKLR** and submitted that she was entitled to a finding that the Respondent was liable to compensate for the unfair early retirement. The Claimant submitted that under Section 5(6) of the Employment Act, the burden of disproving an allegation of discrimination lies with the Employer. The Claimant submitted that in the instant case, the Respondent was under an obligation to prove that the retirement notice issued to her was not discriminatory against her, on the basis of her being a female employee. The Claimant submitted that the Respondent neither produced any policy document to the contrary nor did not call any witness to dispel the Claimant's assertion. The Claimant cited the case of **Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers v M.P. Shah Hospital [2018] eKLR** where the Court stated as follows:-

"It should be recalled that all human beings irrespective of race creed or set have the right to pursue both their material wellbeing and spiritual, development in condition of freedom and dignity of economic security and equal opportunity to have two sets of retirements for union sable and management staff would fit in the definition of discrimination which Constitution a violation of rights enunciated by the Universal Declaration of Human Rights. In order to be in compliance with the both practices and in particular the ILO Convention No. 111 on Discrimination (Employment and Occupation) I recommend the Uniform Retirement of 60 years for all employees except that parties consider the Inclusion of an early retirement clause to cater for both sides so that an employee who feels like exiting before the retirement age ranging between 50-60 years. This subject to the nature of work and as well as the medical and physical capacity of the employee."

In conclusion the Claimant submitted that she had proved her case and was entitled to 12 months salary for unfair termination amounting to Kshs 6,427,584/-, compensation for discrimination amounting to Kshs 6,427,584/- making a total of Kshs 12,855,168/- as well as the cost of the suit.

7. The Respondent on its part submitted that it's not in dispute that the Claimant was an employee of the Respondent. Further it's not in dispute that the Claimant exited from employment through retirement. The Respondent submitted that the only issue for determination by this Court is whether the retirement was carried out in accordance with the law and policy. The Respondent submitted that the Claimant had mentioned discrimination in her pleadings, but she led no evidence to prove the allegations. The Respondent submitted that even in her submissions she has avoided to comment on the allegation. The Respondent submitted it would not dwell on that issue since it was not proved. The Respondent submitted that it demonstrated that the it was guided by documents which had been agreed by parties to the employment relationship. The Respondent recited the history of the retirement policy and how it was developed. The Respondent submitted that the aim of the policy was to set out the way in which Respondent was to manage normal retirement within its workforce and that under clause 4 of the said policy the normal retirement was capped at 60 years old. The Respondent submitted that pursuant to Section 10(5) of the Employment Act 2007, the policy was circulated to all employees including the Claimant and on 6th February 2014 the Claimant confirmed that she had read and understood the contents of the policy. The Respondent submitted that the policy was self-regulating in terms of notice and exit and the notice period was 3 months before the date of retirement, and that this was done in respect of the Claimant. The Respondent submitted that it was not true and at no point had the Respondent tried to retire the Claimant before the policy came into place. It submitted that to enable it comply with the law and for better management of the contracts, it was thought to have a policy to guide both parties on separation based on age and that this was agreed by all parties. The Respondent submitted that the Claimant retired with among other 8 employees who have never complained of the policy at all.

8. The Respondent submitted that it is trite law that as soon as parties have agreed and consented into some agreement, that agreement is enforceable without interfering with the terms unless either party is able to show that the same was procured through misrepresentation of facts as was held in the case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR**. The Respondent submitted that the decision stated:- *the Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act which seeks to merely the weaker of the bargaining partners, not to deprive the employer the power to run its business altogether.* The Respondent submitted that the question the Court is to answer is whether the document that was designed to manage separation on retirement met the minimum threshold or not. The Respondent submitted that when the Claimant joined the Staff Retirement Benefits Scheme understood the terms of retirement. The Respondent submitted that the Policy defined pension date was indicated to be 60 years and normal retirement has been defined as attainment of pension date. The Respondent submitted that the Claimant having attained 60 years she was eligible to exit on retirement. The Respondent submitted that the policy on retirement was to provide for the roadmap on how to carry out the retirement and upon sharing it with the Claimant the terms are therefore binding. The Respondent cited the case of **Storer v Manchester City Council [1974] 1 WLR 1403** per Lord Denning MR –

'In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed where there is, to all outward appearances, a contract. A man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.'

The Respondent submitted that Section 5 of the Employment Act, 2007 provides *inter alia*:

“(1) (a)

(b)

(2) *An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

(3) *No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –*

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;

The Respondent submitted that the Claimant has not mentioned any of the above mentioned grounds of discrimination. The Respondent submitted that it is not enough to mention discrimination without specifying the ground(s) upon which one is asserting discrimination. Application of the retirement policy is not discrimination. she is not the only one who was retired in any event. The Respondent cited Article 1 of Convention No. 111 - Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 defines discrimination thus;

"For the purpose of this Convention the term discrimination includes; Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;"

The Respondent submitted that this is similar to what the employment Act contains and none of the grounds is being raised to support discrimination. The Respondent submitted that the Court upholds the decision to retire the Claimant and that the process was fair the claimant having received all her terminal benefits as per the contract of employment and staff retirement scheme rules.

9. The Court has considered the corpus of pleadings and documents the Claimant and Respondent have availed as well as the evidence adduced, the submissions filed and the authorities cited by the parties in making this decision. The Claimant was retired upon attainment of the age of 60. She asserts that she retired unfairly by the Respondent as she was discriminated against. She asserts that there were other officials who were allowed to work past the age of 60. **ILO Convention No. 111 - Convention Concerning Discrimination in Respect of Employment and Occupation, 1958** defines discrimination under Article 1 of Convention as follows:

"For the purpose of this Convention the term discrimination includes; Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;".

Further, **Black's Law Dictionary Tenth Edition** defines discrimination as *inter alia* **the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or disability**. I would add the word right to the phrase so as to have it grouped with privileges. The Claimant had the burden of showing that she was treated differently on account of her age. The policy from my reading of it did not target the Claimant. It was promulgated when a few staff were above the age of 60 and I would have expected those to be the one complaining here. Instead, it was the Claimant who one year plus prior to her attainment of the age of retirement even acceded to the document by signing it on 6th February 2014. She was even given what would have amounted to preferential treatment as she had the pre-retirement notice where she could enjoy a whole year of preparation for retirement with no loss of salary where she could stay at home or come to work as she pleases to enable her ease off work. She instead received the document and protested and indicated it was unfair. Nevertheless, in October 2014 she participated in a staff farewell party where her colleagues who attained the retirement age of 60 prior to the promulgation of the policy (a majority had actually exceeded that by a margin) were sent off. A few were later retained, it would seem, on contract. She thereafter was given the equality of treatment due to a retiree when she got the 3 month pre-retirement notice in July 2015. Instead she moved the Court seeking to stop her retirement. There is nothing for her to recover from the Respondent as the Respondent neither discriminated against her nor treated her any differently as the policy she acceded to applied and had effect in 2014 and her retirement in October 2015 was regular. Suit is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE