



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO.1938 OF 2017

TOM FRANX MZALIWA OSIRO.....CLAIMANT

-VERSUS-

THE KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed this suit on 28<sup>th</sup> September, 2017, alleging that he was employed by the respondent from 1<sup>st</sup> January 1988 until 2<sup>nd</sup> September, 2017 when he was wrongfully and unfairly dismissed by the respondent through involuntary early retirement and his benefits withheld. He averred that he was subjected to unfavourable working conditions and his terms of service changed to his disadvantage. He therefore seeks the following remedies:

**a. Declaration that the termination without benefits was wrongful, unfair and adversely discriminatory.**

**b. The equivalent of 2 months' salary for each complete year of service with respect to part VI of the Respondent's Regulations being damages for redundancy; thus  $378,727.50 \times 2 \times 29 = \text{Kshs } 21,966,195.00$**

**c. 3 months' salary in lieu of Notice of Kshs. 1,136,182.50.**

2. The respondent entered Appearance on the 13<sup>th</sup> October, 2017 and filed a response to the claim on 28<sup>th</sup> May, 2018 admitting that it employed the claimant in the year 1988 but denied that it unfairly dismissed him from service. On the contrary it averred that the claimant voluntarily requested for early retirement at the age of 53 years after being transferred to Maralal and the request was accepted. It further averred that the claimant was reminded of his liabilities to the company and was also notified that the same would be recovered from his terminal dues. It prayed for the suit to be dismissed with costs because the claimant terminated his employment voluntarily.

3. The suit proceeded to hearing on the 17<sup>th</sup> June, 2021 when both parties gave evidence and thereafter filed written submissions.

#### Claimant's Case

4. The claimant testified as CW-1 and basically adopted his witness statement and lists of documents dated 25.9.2017 and dated 23.1.2020 which were marked as Ex-1 and 2 respectively.

5. In brief he testified that that he wrote a letter dated 2.6.2017 requesting for early retirement on medical ground, changed job content and changed economic and operational environment. The said letter was accepted by the Respondent vide its letter of 13.7.2017 affirming that he was entitled to Three Months' Notice and Pension only as opposed to Kshs. 23,000,000 which he expected. The Respondent failed to process and pay his retirement benefits despite him having paid all the liabilities assessed by the employer being Kshs.1,776,251.85.

6. On cross examination by **Ngesa Advocate**, he stated that he had a problem with the transfer to Maralal based on medical reason. He also stated that he was served with several transfers which he believed was on redundancy reason. He also testified that he requested the Human Resource manager to release him on redundancy basis because when he was taken to Maralal there was no work for him. Instead he found that he had been demoted to do tasks which he was supposed to oversee as a manager. The only other job there was reading newspapers.

7. He stated that the Employer accepted his retirement request and therefore it ought to pay him his terminal benefits as per the Staff Regulations and Procedures. In his view, he is entitled to redundancy package because he requested for the early retirement due to redundancy circumstances.

8. On re-examination, CW-1 testified that he considered his transfer to Maralal a demotion since his initial position required him to perform managerial duties which were not there in his new office. He maintained that the employer knew his medical condition and his family was away.

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

9. The Respondent's, Human Resource Manager, **Anne Kwambai**, testified as **RW-1**. She also adopted her witness statement of 28.5.2019 and the 3 documents filed on the 28.5.2019 as her exhibit1-3 respectively. She was the Human Resource officer in the year 1988 when the Claimant was employed by the Respondent. She stated that the claimant was first employed by the Respondent as Technician Grade II and served in several ranks in various places in the country being Kindaruma power station, Isiolo station, Turkwel Power station, Thika Station, Nairobi Station, Eldoret station, Mombasa Station and finally Maralal Station.

10. She testified that the Claimant's issue started when he was posted to Mombasa, and after serving for 2 years, he sought for a transfer to another favorable station on medical basis and need to be close to his family. However, since three years had not lapsed as per the Respondent's Regulations, the Claimant's request was acted upon on 1.9.2015 after completing 3 years in Mombasa by being transferred to Nairobi.

11. She further testified that on 30.3.2017, the claimant was re-designated from Assistant Superintendent to Senior Marketing Officer on salary scale MG 08 and he was transferred from Nairobi to Maralal. However after serving for about 3 months he requested for an early retirement and the same was approved but all his terminal dues were used to offset his liabilities to the company totaling to Kshs. 1,778,251.

12. On cross examination by **Murambi Advocate**, she reiterated that the claimant sought for early retirement in his letter and it was approved by the management. She admitted that the claimant also sought for his retirement benefits under the redundancy clause. She stated that any exiting employee is entitled to dues. She then stated that the calculation of the claimant dues was done by another department but not the Human resource. However, she did not know whether any dues were paid to the claimant.

13. On re-examination, she testified that she declined to allow the transfer by the claimant from Mombasa since 3 years had not lapsed and the reason given of medical was not supported by any medical documents. She concluded that employees who exit on redundancy are paid differently from the ones who retire.

#### **Claimant's submissions.**

14. The claimant submitted that when the Respondent transferred him to Maralal, Samburu County, his duties were reduced from being a manager of a regions with 5 teams to being the one who is tasked to do the grounds work of power metering, ring fencing of sub-stations and doing marketing and customer relations task. He argued that the change of duties meant that his position was not available in Maralal as such he was redundant within the meaning of section 2 of the Employment Act read with the Respondents Human Resource Administration Division, staff Regulations Procedures at page 13. Therefore he argued that he ought to be paid for the said redundancy having worked for the Respondent for close to 29 years.

15. The Claimant submitted that the transfer was tantamount to demotion by the Respondent which was unfair forcing him to request for the early retirement. For emphasis he relied on the case of **Peter Ndirangu v Teacher service commission [2014] eKLR**.

16. The claimant further submitted that he was constructively dismissed from employment by the Respondent when the Respondent transferred him to Maralal after serving in Nairobi region for only 2 years and contrary to the Respondents staff regulations and procedures policy which provides that an employee can only be transferred to a different station after serving for at least three years. He reinforced his argument by citing the case of **Bob Vincent Maru V Amica Savings & Credit [2020] eKLR**.

17. The claimant further submitted that when the Respondent accepted his request for early retirement, his benefits were calculated and he was notified that he will only be sent home with his final day salary. As result he cancelled the request vide the letter dated 23<sup>rd</sup> July, 2017 which letter was never accepted by the Respondent as such he was forced to proceed with the retirement, which according to him was unfair, considering also that he was never paid his terminal dues.

18. On whether the claimant is entitled to the reliefs sought, it was submitted that as much as the claimant has not sought for compensation for the unfair termination, this Court can make the award *suo moto* when the claimant is deserving of the same. On this he cited the case of **James Chege & 6 other v Aqua Plumbing Company Limited [2013] eKLR**.

19. On whether the said retirement was voluntary, it was submitted that the claimant sought for early retirement on condition that the same be accepted and payment be effected under the redundancy package, which the Respondent accepted and went silent on the issue of payment of terminal dues. He then argued that the Respondent's acceptance of the early retirement was in part and his follow up letter requesting for cancellation of the retirement ought to have been considered since the Respondent had not complied with its part of the acceptance that's on the payment of the terminal dues. He then contended that the fact that the respondent did not accept the offer to retire with the terms therein invalidated the request for early retirement. For emphasis he cited the case of **Kenindia Assurance Company Limited v New Nyanza Wholesales Limited [2017] eKLR**.

20. It is the claimant's submission that he is entitled to the reliefs sought since, the Respondent has failed to demonstrate to the Court that it paid him terminal dues. On the liabilities owed to the Respondent, the claimant submitted that all loans were paid to the Respondent as confirmed by the email dated 21<sup>st</sup> March, 2018. He therefore prayed for his claim to be allowed as prayed.

#### **Respondent's Submissions**

21. The Respondent submitted on four issue: whether the claimant was unfairly and discriminatively terminated from employment, whether the claimant is entitled to severance pay on account of redundancy, whether the claimant is entitled to the reliefs sought and who should bear costs of this suit.

22. On the first issue, it was submitted that, the claimant vide the letter of 2<sup>nd</sup> June,2017 applied for early retirement, citing medical grounds, changed job contents and changing economic and operational environment. That this request was accepted by the Respondent who advised the Claimant to follow up his benefits from the Retirement benefits scheme, by forwarding a future contact address and bank card to the trustee secretary, Kenya Power Pension fund. Through the same letter the claimant was to be paid up to and including 2<sup>nd</sup> September, 2017 which was Three (3) months' pay.

23. Accordingly, it was submitted that the termination process was initiated by the claimant who requested for an early retirement and therefore the allegation of payment of severance pay on account of redundancy is without any basis.

24. The Respondent also submitted that the claimant was paid the 3 months' salary of Kshs 1,549, 340.48 which monies was used to offset his debt to the company totaling to Kshs. 1,556,611.47 as at 22<sup>nd</sup> November, 2017. The claimant's retirement benefits were however to be collected from the Respondents pension fund but he has failed to go for it.

25. On the second issue, it was submitted that the claimant is not entitled to severance pay for the reason that his termination was commenced by his request early retirement and not on the basis of redundancy as contemplated under part VI of the Employment Act as read with section 2 and 40 of the Employment Act. In addition, the respondent argued that Redundancy process is by law initiated by the employer and not the Employee as seen in this case. For emphasis they cited the case of **Barclay Bank of Kenya Limited & Another v Gladys Muthoni & 20 others [2018] eKLR** and the case of **Aviation & Allied Workers Union V Kenya Airways Limited and 3 others [2014] eKLR**.

26. In conclusion, the respondent submitted that the claimant has failed to prove his case on a balance of probability and therefore prayed that the claim be dismissed with costs.

#### **Issues for determination and analysis**

27. Having carefully considered the pleadings, evidence and submissions, the issues for determination are: -

**a. Whether the Claimant voluntarily retired from his employment or he was constructively dismissed by the Respondent.**

**b. Whether the Claimant is entitled to the orders sought.**

#### **Voluntarily retirement or constructively dismissal**

28. Under Section 47(5) of the Employment Act, the employee has the burden of proving that termination of his employment was unfair while the employer's burden is to justify the reason for the termination. It is now trite law that termination of employment contract is unfair and therefore unlawful if it is not grounded on a valid and fair reason, and if the procedure followed is not fair. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility, or if based on the employer's operational requirement. On the other hand, procedure is fair, if the employee is accorded a chance to be heard.

29. The Claimant contends that his request for early retirement was prompted by the Respondent's action of transferring him to Maralal, a harsh climatic zone which was acting against his health coupled up with the fact that there was no work for him in the said office. He argued that the Respondent's actions forced him to request for an early retirement. He also submitted that the transfer from Nairobi to Maralal was done before the lapse of three years after his transfer from Mombasa.

30. In addition the claimant contends that he requested for early retired on condition that he be paid a redundancy package. However, the employer approved that retired but gave another package and he withdrew the request for the early retirement. Therefore it is his case that his retirement on 2.9.2017 was a unilateral decision by the employer and it amounted to unlawful dismissal of his employment.

31. The respondent maintains that the claimant retired voluntarily from service and his dues were computed and used to offset his liabilities with the company. It is the employer's case that the claimant had worked in worse climatic conditions in Isiolo and Turkwel where he had no issue. It further contends that there is no medical record showing that the claimant was suffering from a condition that required him to be transferred to a less harsh environment.

32. I have considered the contentions by the two sides and the question at hand is whether the claimant's request for early retirement was indeed due to the unbecoming conduct by the employer, which either amounted to a repudiation of the contract or which rendered the performance of the contract impossible on the part of the claimant.

33. It has not been disputed that the claimant was transferred from Nairobi to Maralal before the required period of 3 years lapsed. He came to Nairobi on 1.9.2015 and he was transferred to Maralal on 30.3.2017. His request for transfer from Mombasa on account of Medical condition, hot climate and the need to be close to his family was rejected until the required minimum period of 3 years lapsed. It follows that his transfer to Maralal before the lapse of the 3 years was discriminatory and contrary to the Staff Regulations.

34. Again it has not been rebutted by evidence that the claimant never found the job he was supposed to do as a manager and instead he spent much of time reading newspapers or doing tasks which he was supposed to supervise as a manager. Such circumstances made him deem that he was demoted or his position in Maralal was redundant and therefore he requested for the early retirement.

35. In **Milton M Isanya v Aga Khan Hospital [2017] eKLR** the court expressed itself as follows concerning constructive dismissal:

**“In constructive dismissal the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate but frustrates the employee to the extent that the employee tenders resignation.”**

36. Black’s Law Dictionary 10<sup>th</sup> Edition describes constructive dismissal as

**“An employer’s creation of working conditions that leave particular employee or group of employees with little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment;”**

37. Having carefully considered the evidence on record, it is evident that the claimant was willing to continue working for the respondent but the employer acted with hostility towards him by posting him to stations with harsh climatic conditions without ascertaining his alleged medical condition, and also by posting him to a station where there was no work to do. Further, the employer was quick to transfer the claimant to said harsh climatic areas without observing the Staff Regulations which requires an officer to serve in a station for at least 3 years before transfer to another station. Therefore, I agree with the claimant that his request for the early retirement was not voluntary but a culmination of the hostile working conditions created by the employer.

38. The case of **Milton M Isanya v Aga Khan Hospital** is distinguishable from the instant case because in that case the employee resigned to pursue education and he never blamed the employer for any wrong doing in his resignation letter. However in this case the claimant set out the grounds for the request for early retirement which pointed an accusing finger on the employer. The letter stated that:

**“The early retirement request is attributable to the following factors:**

**1. Medical grounds**

**2. Changed job content, and**

**3. Changing economic and operational environment of the company; which, evidently appears to be adversely affecting both the organization and me at the same time.”**

39. The other question that arises is whether the claimant could withdraw his request for early retirement after the employer’s approval. In response to the said request by the claimant, the respondent stated as follows in the letter dated 13.7.2017:

**“Kindly note that your request for early retirement has been accepted. By a copy of this letter the paymaster is advised to pay your salary up to & including 2<sup>nd</sup> September 2017.**

**... Please let us know how you intend to settle your liabilities of Kshs. 1,776,251.85.”**

40. The claimant was aggrieved by the above response and rejected the early retirement vide his letter dated 23.7.2017, thus:

**“I have received a response from the management to the effect that I can embark on preparation to retire. Unfortunately, my request – to that effect had been enormously misconstrued.**

**I expect my application to be considered in full. ...**

**With due respect, therefore, please consider your letter (allowing me to proceed) dishonoured. The offer is rejected in totality. ...”**

41. The claimant never received any response to the above letter and his employment was terminated and the salary in lieu of notice used to offset his liabilities to the company.

42. Having agonized over the said issue I must agree with the claimant that the retirement request was not handled fairly, and to a proper conclusion. However, unlike a resignation which takes effect at the date appointed by the employee, and which can be recalled and withdrawn before the effective date, the issue of early retirement is different in my view because it is not an absolute right but one that is dependent on the discretion of the employer. Consequently, once the employer has considered the merits of the application for early retirement and accepted, the matter is sealed. The only issue that may arise is the retirement package and not reversal of the separation.

43. It follows from the foregoing that, even if the request for early retirement was hostile or miserable working conditions created by the employer, the employee cannot sue for constructive dismissal, as he would have done had he resigned. In my view retirement whether premature or mandatory presupposes an amicable separation and the employee cannot sustain a cause of action for unlawful dismissal, though he can sue for damages related to the retirement package. Therefore I find and hold that the claimant was not constructively dismissed but he was given an early retirement.

44. He was also not dismissed on account of redundancy as he purports. Section 2 of the Employment Act defines redundancy to mean:

**“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;”**

45. Despite the fact that there was an alleged redundancy situation with respect to the claimant’s position at Maralal station, the employer did not terminate his employment on that ground. As properly submitted by the respondent and confirmed by the above provision, redundancy occurs only at the instance of the employer and not the employee.

#### **Reliefs**

46. When the Respondent accepted the claimant’s request for an early retirement, it was bound under the law and its Human Resource Staff Regulations and Procedure to pay him the entire package due to all early retirees under the Staff Regulations. Part IV of the Staff Regulations and Procedure provides that an employee may take an early retirement provided that he has attained the age of 50. It also gives the following two alternative retirement packages payable to any staff taking early retirement: -

#### **“TERMS OF PAYMENT**

##### **OPTION I**

- 1. Notice payment of three months last gross salary (basic salary plus House Allowance).**
- 2. Pension at current age plus lump sum payment.**
- 3. 15 days salary for every year worked.**

##### **OPTION II**

- 1. Notice payment of three months last gross salary (basic salary plus house allowance).**
- 2. Refund of both employee's and employer's contributions plus accrued interest.**
- 3. 15 days salary for every year worked.”**

47. It is not in dispute that the claimant met the minimum requirement for an early retirement and that is why the employer accepted his request. He was 53 years and had worked for 29 years before retirement. The Respondent paid the claimant the three months’ salary on the 1<sup>st</sup> December, 2017 as evidence in the Claimant Bank statement, and further directed him to pursue his pension from the Pension Scheme. However, the Respondent did not pay the claimant the other retirement benefit of 15 days’ salary for every year worked as provided for in its Staff Regulations and Procedure.

48. The Respondent did not give the Court any explanation as to why it withheld the said benefit from the claimant which is expressly provided in the said Staff Regulations and Procedures. Having accepted the request for early retirement, the respondent brought herself within its contractual obligation to pay the claimant what is due to any employee of the company who is placed under an early retirement. The purpose of the court in the circumstances is to enforce the contract between the parties herein and I hereby do so by compelling the respondent to pay the claimant 15 days’ pay for every year served.

49. The claimant was earning a monthly salary of 378, 727 at the time he retired. He is therefore awarded 15 days’ salary for 29 years completed in service at Kshs. 378,727.50 divided by a maximum of 26 working days in a month = 6,336,210.

50. Further, I make declaration that denying the claimant the said retirement benefit was wrongful, unfair and discriminatory because it amounted to treating the claimant differently from what the Staff Regulations provides for all the staff who take early retirement.

51. However, the claim for severance pay of 2 months’ pay for each complete years served must fall on its face because as correctly submitted by the respondent, the separation herein was not through redundancy but early retirement.

52. Likewise, the claim for 3 months’ salary in lieu of notice is declined because the claimant confirmed that he received that payment through his Bank Account.

53. In conclusion and for the reasons set out above, I enter judgment for the claimant for the sum of Kshs. 6,336,210. The award is subject to statutory deductions but the claimant is also awarded interest on the award plus costs at court rates from the date of filing the suit.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**ONESMUS N 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 15<sup>th</sup> 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**