



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 5 OF 2020**

**FAIYADH AHMED MOHAMED.....CLAIMANT**

**- VERSUS -**

**BOLLORE TRANSPORT &**

**LOGISTICS KENYA LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> November, 2021)**

**JUDGMENT**

The claimant filed the memorandum of claim on 05.02.2020 through Anaya & Company Advocates. The claimant was employed by the respondent in June 1988 as a Tally Clerk. In 1993 he was promoted to the position of Supervisor. He served in that position until early retirement on 07.01.2020. The letter of early retirement was dated 17.01.2020 and it referred to the meeting between the respondent's management and the claimant on 20.12.2019 and the respondent's notice dated 20.12.2019. The letter advised the claimant that his last date of service would be 20.01.2020 upon the expiry of the notice. The letter stated the retirement package as follows:

- a) 20 days' salary for days worked in January.
- b) Leave earned and not taken.
- c) Service prior to joining the pension scheme at 26 days for each completed year of service.
- d) Six months' pay.
- e) Pension savings in accordance with the law.

The letter was signed by Jason Reynard, the Managing Director and Mary Chemas, Human Resource Manager, Kenya.

The claimant's case is that at termination he earned Kshs. 161, 112.83. A demand letter was served on 28.01.2020 but the respondent had failed to settle the claim. The claimant alleged that the retirement was unfair for want of sufficient notice per clause 46(1) and (iv) of the CBA which provide that the normal age of retirement from the service of the company shall be on the attainment of 60 years for both men and women; earlier or later retirement will be through mutual agreement between the company and the employee; and, a retiring employee shall be entitled to a minimum of twelve months' notice before actual date of retirement. The claimant's case is that there was no mutual agreement and despite inducement to sign the discharge voucher the claimant declined to do so. The claimant further pleaded that he rescinded or revoked the respondent's letter of early retirement dated 07.01.2020. The claimant pleads that the respondent ought to have terminated the employment on account of redundancy and paid the redundancy dues as per the Employment Act, 2007. Further the claimant claims denial of house allowance, leave traveling allowance, and amenities he ought to have enjoyed. The claimant alleges that the respondent breached the contract by failing to pay benefits under employment, punishing the claimant for no good reason, failing to pay the claimant his terminal dues, failing to adhere to procedural fairness under the CBA, and, otherwise engaging in unfair labor practices.

The claimant claimed for:

- a) Notice pay Kshs. 161, 112.83.
- b) Compensation for unfair termination Kshs. 1, 933, 353.00.
- c) Unpaid leave traveling allowance from 1993 to retirement 26 years x 9, 600.00 Kshs. 249, 600.00.

- d) Unpaid house allowance since 1993 Kshs. 161, 112.83x15% =24, 166.92 x12months =290, 0003 x 26 years = Kshs. 7, 540, 080.00.
- e) Payment for 10 years prior to retirement expected but lost income 161, 112.83 x 12 x 10 = Kshs. 19, 333, 539.00.
- f) Service pay prior to joining pension scheme at 26 days for each completed year served 26-days x 6, 196.61 = 161, 112.86 x 32years Kshs. 5, 155, 611.00.
- g) Total Kshs. 35, 209, 077.00.
- h) Costs of the suit.
- i) Certificate of service.

The respondent filed on 10.03.2020 the response to the memorandum of claim through Ameli Inyangu & Partners Advocates. The respondent admitted that it employed the claimant for the period and positions as pleaded for the claimant. The respondent admitted the termination was by letter of 17.01.2020 and further pleaded as follows:

- a) Parties held a meeting on 20.12.2019 at which parties agreed to claimant's early retirement upon the terms set out in the letter of early retirement. On 20.12.2019 the claimant received the respondent's letter being the notice of early retirement. The termination effective 20.02.2020 was voluntary as agreed between the parties.
- b) The claims for redundancy are unfounded because the position held by the claimant never became redundant.
- c) The claimant has since been paid all the agreed terminal dues.

The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. He stated that he was invited to a meeting by the memo dated 11.12.2019. The memo scheduled the meeting for 20.12.2019. The claimant attended the meeting though union representatives were absent. The minutes of the meeting are exhibited. They show that the respondent informed the claimant about reduced transactions and the respondent's hard financial times leading to consideration of separation with staff upon mutual agreement. At the meeting there were about 50 employees to be affected and those targeted had worked for over 20 years with the respondent. The claimant testified that he had served for over 31 years. After the meeting the claimant received a letter being the notice of early retirement. He testified that at the meeting he asked why early retirement whereas he was working. He testified that the early retirement was the respondent's unilateral decision. His further evidence was that in 2018 almost 400 employees had left and they were paid redundancy package. Reason given for early retirement was that the respondent was not performing well financially and the claimant testified that the reason amounted to redundancy rather than early retirement. He testified that he was entitled to pay of service for all 31 years in severance pay. He signed the letter of 20.12.2021 to acknowledge the receipt but he never signed to agree to early retirement. He testified that the respondent employed him on 01.03.1988 to 20.01.2020 and the respondent forced him to retire early. The claimant admitted that he signed minutes of the meeting of 20.12.2021 but he protested and did not agree to retire early. He testified that he also signed the termination letter dated 17.01.2020 and retirement forms because he had no choice. He also signed clearance forms politely and peacefully because he had been told he was going out. Further by his letter of 24.01.2020 he rescinded the letter of 17.01.2020 because he had signed the letter without knowing the content.

The respondent's witness (RW) was Michael Ndungú Kariuki, the respondent's Senior Human Resource Officer. He testified that the claimant was not in grade A1 – A3 who were unionisable. Further the claimant was in management and ineligible to join the union. RW further testified thus, **"But CBA was borrowed to retire him early. Employment contract did not say CBA applied."** And further, **"The early retirement procedure applied to him pursuant to the CBA. He was not a union member. We borrowed favorable CBA provisions. He was aware of it. He relies on the CBA. There was agreement he retires early. He protested after he left. Prior to leaving he did not protest. There had been early redundancies. The position was not abolished. He was not suited for redundancy."**

Final submissions were filed for the parties. The Court has considered the evidence, the pleadings and the final submissions. The Court makes findings as follows.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the parties were in employment relationship as pleaded for the claimant. The evidence is that the claimant worked for the respondent from 01.03.1988 to 20.01.2020.

The **2<sup>nd</sup> issue** for determination is whether the parties separated by mutual agreement. The evidence is that the claimant was not unionisable but parties decided and agreed to apply the CBA provision on early retirement. That was the evidence by RW reproduced earlier in this judgment. The claimant confirms that position when he pleads at paragraph 7 of the memorandum of claim that the respondent failed to give him sufficient notice per clause 46 (i) and (vi). By that pleading and evidence, the Court returns that the parties were in agreement that they were separating per that clause of the CBA.

The second consideration is whether the parties agreed that the claimant would go for early retirement. Did the parties separate under mutual agreement? The evidence is that the claimant received the invitation and then attended the meeting of 20.12.2019. The minutes were signed including by the claimant and they show that parties discussed early retirement and if agreeable the process would commence. The claimant received the one-month notice after the meeting and dated 20.12.2019. He did not protest. He attended a counselling session on 10.01.2020. He signed the letter dated 20.01.2020 advising his last day at work was to be 20.01.2020. He did not protest up to that point. Accordingly, the employment relationship ended on 20.01.2020. The Court finds that the parties are bound by their actions and agreements. The Court further

finds that the claimant's letter dated 24.01.2020 purporting to rescind the separation by letter dated 17.12.2020 was a pure afterthought coming long after the voluntary early retirement by mutual agreement - and which had already taken effect on 20.01.2020. While it may be true that in earlier years, staff may have left through redundancy, the Court finds that in the claimant's case it was clear that parties had agreed to separate in the manner they did. The claimant signed the discharge on 20.01.2020 confirming the separation agreement and that he had no further claim, past, present or future arising from employment with the respondent. The Court finds that he was bound accordingly. The termination was not unfair and the claimant is not entitled to the claim and prayer for compensation in that regard.

To answer the 3<sup>rd</sup> issue for determination the Court finds that the claimant is not entitled to the other remedies as prayed for except the certificate of service but already delivered after the suit was filed. The claimant admitted payment in lieu of notice but after the suit was filed. The contractual basis for leave travelling allowance was not established, the claimant testified he was not eligible, and, the same will collapse as unjustified. As submitted for the respondent parties agreed on consolidated monthly pay of Kshs. 161, 112.82 and the Court finds that the amount reasonably included a provision for rented housing as envisaged in section 31(1) of the Employment Act, 2007. The claim for housing appears not to have been raised as a grievance throughout the service and the claimant has not established the contractual basis for the claim. The claimant confirmed that he was paid service pay for 6 years of service prior to joining the pension scheme. Having joined the pension scheme for the rest of the service, the claimant has not justified the basis for further payment upon that heading. As it was not a case of redundancy, there was no justification for severance pay and which the Court declines to award. The claimant has not established a reason attributable to the respondent which prevented him from engaging in alternative gainful activities after the early retirement. The Court finds that the prayer for lost earnings of 10 years prior to the attainment of 60 years of age was misconceived and is hereby declined.

While the claimant has substantially not succeeded, the respondent satisfied some of the claims after the suit had been filed. To balance justice for parties, each will bear own costs of the suit.

In conclusion, the claimant's suit is hereby determined with orders:

- 1) The suit is dismissed.
- 2) Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5<sup>TH</sup> NOVEMBER, 2021.**

**BYRAM ONGAYA**

**JUDGE**