



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1476 OF 2015

CONSOLIDATED WITH

CAUSE NO. 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475 of 2015 & 1629 of 2016

FRANCIS M.P. NYAMU.....1ST CLAIMANT
MERCY WAIRIMU WAITHAKA.....2ND CLAIMANT
JOSELINE MAREGU NYAGAH.....3RD CLAIMANT
JOSIAH MWAURA NJOROGE.....4TH CLAIMANT
PERIS WAIRIGU KIGUTA.....5TH CLAIMANT
JOSEPH KIPROP BARTOCHO.....6TH CLAIMANT
JACKSON J. SOPHAS KHOLE.....7TH CLAIMANT
BRETTA MWIKALI MWOLOLO.....8TH CLAIMANT
JEDDAH KISIAVUKI LODENYI.....9TH CLAIMANT
WILSON NYARANGA MIMA.....10TH CLAIMANT
PETER MUSEMBI MUTHAMA.....11TH CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by the respondent on diverse dates between 1982 and 1999 and while still in service the Respondent issued Circular 1/2014 dated 19th February 2014 inviting all eligible employees to apply for Voluntary Early Retirement (VER) and get the following terminal benefits-

- a. Pension benefits in accordance with the Respondent pension rules;
- b. One month's salary in lieu of notice;
- c. Purchase of leave days earned but not taken up to the last day of employment;
- d. Severance pay equivalent to half a month's salary for each completed year of service; and

e. Rebates amounting to up to 40% on outstanding loans by the member to be repaid within a period not exceeding the normal retirement age of 60 years.

2. The claimants were eligible but they opted against the VER and continued with their employment. However, their employment was terminated by the respondent vide the letter dated 2nd June 2015, effective 1st July 2015. The basis of the termination was the early retirement clause in Respondent's HR Policy Manual and the claimants were offered the following benefits-

a. Pension benefit in accordance with the Respondent's pension scheme.

b. Lump sum payment of 3 months' gross salary.

c. Purchase of leave days earned but not taken up to the last day of employment.

d. 10% rebate on the outstanding loan amounts to be repaid within the years remaining to normal retirement age of 60 years, save for the 1st Claimant who was granted 20% rebate on the outstanding loans, upon his request.

3. The Claimants were aggrieved by the termination and the package offered, and brought separate suits which were later consolidated under this file. They prayed for the following reliefs: -

a. A declaration that the termination of the Claimant's employment on different terms compared to members who took voluntary early retirement was discriminatory contrary to section 5 of the Employment Act, 2007.

b. A declaration that the termination of the Claimant's employment on different terms compared to other members selected for termination within the same period was discriminatory contrary to section 5 of the Employment Act, 2007.

c. A declaration that the termination of the Claimant's employment was unfair and unlawful contrary to section 43 of the Employment Act 2007 and international labour practice.

d. A declaration that the Respondent did not act in a just and equitable manner by selectively applying the termination process to the Claimants, while leaving out, without any valid reasons, other employees who are within the same age bracket of fifty years and above.

e. Severance pay of one and a half months' basic salary for every completed year of service.

f. A refund equivalent to 40% rebate in the loan outstanding from the Claimant as at the time of termination.

g. An order for general damages-

(i) On the grounds of unfair and unlawful termination in breach of the Employment Act, 2007.

(ii) On the grounds of discrimination in breach of section 5 of the Employment Act, 2007 and Article 27 of the Constitution.

h. An order for payment of costs of this claim.

i. Interest on (e), (g) and (h) above at court rates from the date of filing of this claim until payment in full.

j. Such other orders as this Honourable Court may deem fit in the interest of justice.

4. In response to the said claims, the Respondent denied that she unfairly terminated the claimants' employment and averred that the termination was lawfully done in line with the terms of the contract of service. She further averred that paragraph 3 of the Claimants' letter of appointment indicated that their terms would be as laid out by the Respondent from time to time and that they were subject to her Human Resource Manual. She also averred that, her Manual provides for normal retirement age of 60 years but there is an option of early retirement from the age of 50 years at her sole discretion or at the employee's request.

5. The respondent denied that she discriminated against the claimants by sending them on early retirement and leaving their peers who were also 50 years and above. She further denied that she discriminated against the claimants by paying them an early retirement package which was less than what she paid the former employees who exited under VER in 2014, and averred that the circumstances for the VER retirees were different. She therefore prayed for the claimants' suits to be dismissed with costs.

The Claimants' Case

6. Francis M.P. Nyamu testified as Cw1 and gave evidence on behalf of all the other Claimants herein contending that the Claimants' cases were similar save for the years of service. He relied on his witness statement filed on 18.10.2016 and his bundle of documents filed on 20.8.2015. He stated that as at the time he was given the termination letter dated 2.6.2015, he had 3 years and some months to his retirement and was earning a gross monthly salary of KShs. 209,918.00. He contended that after the termination, he took home nothing because all his terminal dues were withheld by the employer to offset his loan.

7. He denied knowledge of the respondent's HR manual of June 2012 upon which he was sent on early retirement, and contended that he was never informed of its existence. He contended that the only documents he was given as proof of employment were his letter of appointment dated 12.10.1982 and his confirmation letter dated 18.5.1983.

8. He further testified that his retirement was discriminatory because amongst the employees who had attained the age of 50, only 26 people were selected for the early retirement in 2015; and also because the package given to them for the early retirement was less than what the 2014 VER retirees were given. He supported his allegation by comparing the retirement packages set out in the VER Circular dated 19.2.2014 and the Early Retirement Notices to the claimants dated 2.6.2015.

9. He stated that his retirement exposed him to suffering as he had nothing to pay school fees for his children. He prayed for the reliefs set out in his Claim because that is in harmony with what the respondent paid to the VER retirees in 2014.

10. Upon cross examination, he admitted that his appointment and confirmation letters indicated that he was to be bound by the general rules of the Respondent. He further admitted that the said letters never made provision for normal retirement or VER. He also admitted that the 2014 VER invited all staff to apply even those below 50 years but he never applied even though he was 52 years of age. He further admitted that even without the VER, he could still retire upon attaining the age of 50 years because there was a scheme permitting the same.

11. He admitted that the termination letter dated 2.6.2015 gave him a retirement package which he used to offset his loans. He further admitted that the letter dated 7.7.2015, granted him a 20% rebate on total outstanding loans but contended that the same was granted after he wrote the letter dated 25.6.2015 asking for a 40% loan rebate. He also admitted that he was paid 3 months' salary in lieu of notice plus his accrued leave. He contended that he is entitled to the retirement package given to the 2014 VER retirees because that was the practice in the respondent bank and also because the termination was unexpected. However, he admitted that he did not have evidence to prove that the VER retirees were paid 1 ½ months' pay per year of service but contended that the same was in the Respondent's records.

The Respondent's Case

12. Tabitha Mutwa is the Respondent's Employee Advisor, and she testified on behalf of the Respondent as Rw1. She adopted her witness statement dated 19.6.2019 and the documents annexed to the Respondent's defence, as her evidence. In brief, she testified that all the claimants were issued with appointment letters and knew all the terms of the employment contract. She contended that none of the Respondent's employees wrote to her to inform her that they did not know or have the terms and conditions or the HR Manual or the contract.

13. She further testified that the bank granted the employees loans as per clause 3.5.1 of the HR Manual. She contended that Early Retirement is provided under clause 9.4.1 of the HR Manual and the Respondent has the discretion to send her employees on early retirement. However, she testified that VER is a separate arrangement which requires the consent of both the employer and the employee and it is not contained in the HR Manual.

14. Upon cross examination, she admitted that the 1st Claimant's appointment and confirmation letters referred to the bank's terms and condition of service but did not annex the HR Manual. However, she contended that the HR Manual was in the Respondent's website which was accessible to her employees and which was the only way the manual could be accessed.

15. She admitted that the letter of 2.6.2015 gave the Claimants 1 months' notice as opposed to the 3 months' notice required under clause 9.4.2 of the Manual, but contended that the Claimant was eventually paid 3 months' pay in lieu of notice. She further admitted that the Respondent never consulted the Claimants before writing the retirement notice and contended that, the Claimants were selected for early retirement because they had attained the age of 50. She further contended that the bank had the discretion on who to send on retirement provided they had reached the age of 50.

16. She confirmed that the 1st Claimant's net pay after the separation was zero because he had loan obligations. She contended that the Respondent's employees were aware that their loans had to be paid whether they were in her employment or not. She further contended that if the Claimants had taken the offer given under the VER programme, then they would have benefitted from it. She explained that the VER was an incentive to the Respondent's employees to retire early. She denied that the Claimants' early retirement was a punishment for failing to choose the VER of 2014.

17. Finally, she contended that the Claimants never protested against their early retirement but only against the issue of loan rebates, which was addressed by the letter of 7.7.2015.

The Claimants' Submissions

18. In their submissions filed on 7.8.2019, the Claimants submitted that their attainment of 50 years and above was not a valid reason for the Respondent to send them on early retirement. They rely on the case of **Banking, Insurance & Finance Union (Kenya) vs. National Bank of Kenya Limited [2015] eKLR** where the Court held as follows: -

"... Without going into the merits of the case, the human resource policy manual of the Respondent cannot be construed to be superior to the applicable statute herein, the Employment Act with regard to the termination and/or retention of the employment of the grievants who are Claimant's members."

19. Thus, it is their submissions that the Respondent's reliance upon clause 9.4.1 to send them on early retirement before they attained the age of 60 was tantamount to unlawful termination. They relied on the case of **Banking, Insurance & Finance Union (Kenya) vs. National Bank of Kenya Limited [SUPRA]** where the Court was of the opinion that the idea of early retirement was not legal and could only occur

with an employee's consent since if left to the discretion of an employer, it could be arbitrarily used against the employees. They also relied on the case of **Leonard Gethoi Kamweti vs. National Bank of Kenya Limited & 2 Others [2016] eKLR**, **Evans Kamadi Misango vs. Barclays Bank of Kenya Limited [2015] eKLR**, **Kenya Plantation & Agriculture Workers Union vs. Del Monte Kenya Limited [2016] eKLR**, **Ezekiel Nyangoya Okemwa vs. Kenya Marine & Fisheries Research Institute [2016] eKLR** and **Naftali Ayot Okanja vs. Rai Plywoods Kenya Limited [2017] eKLR**.

20. The claimants submit that the respondent did not follow the procedure on early retirement as set out in clause 9.4.2 of the manual. They rely on the case of **John Kipkirui Cheruiyot vs. Equity Bank Limited [2012] eKLR** where the Court was of the view that an employer ought to consider substantive and procedural fairness before terminating the services of an employee. They also relied on the case of **Walter Ogal Anuro vs. Teachers Service Commission [2013] eKLR**.

21. The Claimants further submit that the Respondent's act of giving them a different package compared to those who opted for VER was discriminatory and is contrary to section 45 (4) (b) of the Employment Act and article 41 (1) of the Constitution.

The Respondent's Submissions

22. In her written submissions filed on 28th September 2019, the Respondent submits that the early retirement option was the Respondent's right under the HR manual and the Claimants' terms of service as stipulated in their appointment letters, whereas the VER was a separate programme outside the manual and the terms and conditions. The Respondent relies on the case of **William Barasa Obuti vs. Mumias Sugar Company Limited [2006] eKLR**. As such, the Claimants were not unfairly terminated but released on early retirement as they had attained the age of 50, a fact which has not been disputed.

23. The Respondent submits that the testimony of CW1 that he was not aware of the existence of the HR Manual is contradictory since he requested for better rebate terms from the Respondent under the same policy. Further, the Respondent submits that, in failing to access the manual on the her website, the Claimants were indolent and should not be aided by the law. No one ever informed the Respondent that they were unable to get a copy of the manual. It is her position that the Claimants cannot approbate and reprobate and relies on the decision by the Supreme Court of India in **State of Punjab & Others vs. Dhanjit Singh Sandhu – Civil Appeal 5698 – 5699 of 2009**.

24. The Respondent submits that her separation with the Claimants was based on operational requirements hence not unfair as envisaged in section 45 (2) (a) (ii) of the Employment Act and relies on the case of **Elton Barasa vs. One Acre Fund [2018] eKLR**. As such, she submits that the claims should be dismissed as the Claimants have failed to discharge their burden of proof as required under section 47 (5) of the Employment Act and relies on the case of **Moses Ochieng vs. Unilever Kenya Limited [2018] eKLR** where the Court reiterated the provisions of section 47 (5).

25. To support her case for a fair separation with the Claimants, the Respondent submits that though the Claimants were not issued with a 3 months' notice as required by clause 9.4.2 of the manual, they were paid 3 months' salary in lieu of notice. In conclusion she relied on **East African Airways vs. Knight [1975] EA 165 at page 173**, **Krystalline Salt Limited vs. Kwekwe Mwakele & 67 Others [2017] eKLR** and **National Bank of Kenya Limited vs. Hamida Bana & 103 Others [2017] eKLR** where the respective Courts were unanimous that a contract of employment is governed by the general principles of contract under common law and regulated by statutes, and the function of the court is only to interpret the contract as it is and not to improve on it.

26. The Respondent submits that the selection criteria on who to send on retirement was not discriminatory because it was based on age. She further submits that the Claimants could not enjoy the benefits of the VER programme because it was a programme not founded by the HR manual and which they opted against it. It is her further submission that the Claimants did not contest their early retirement and as such, they should not be allowed to approbate and reprobate. She therefore urged that the Claimants had failed to demonstrate that they were discriminated against and as such the claim for discrimination should fail.

27. The Respondent submits that the Claimants' are not entitled to any compensation for unfair termination because they were sent on early retirement in accordance with the Respondent's policies. She further contended that the claim for severance pay is not merited because termination herein was not on account of redundancy. For emphasis, she relied on the case of **Bamburi Cement Limited vs. Farid Aboud Mohammed [2016] eKLR**.

28. The Respondent further submits that the Claimants are not entitled to the claim for loan rebates as the same was extended with utmost good faith and was not a compulsory right. She further denied the claim for damages contending that the claimants were only entitled a salary equivalent to the notice period. She urged the Court to consider the fact that employment is not a commercial relationship and an employer should be insulated from an employee's unreasonable demands, if the Court decides to award damages. For emphasis she relied on **Abraham Gumba vs. Kenya Medical Supplies Authority [2014] eKLR**. She prayed for suit to be dismissed with costs.

Issues for determination

29. After carefully considering the pleadings, evidence and submissions by both parties, I find no contention that the Claimants were sent on early retirement vide the letter dated 2.6.2015 under clause 9.4 of the respondent's HR Policy Manual and were paid 3 months' salary in lieu of notice. It is further not in contention that the Respondent's employees who opted for VER in 2014 were given a better package than that of the Claimants. The main issues for determination therefore are-

a. Whether the Claimants' employment was unlawfully terminated.

b. Whether the difference in termination packages granted to the Claimants and those under the VER programme amounted to discrimination.

c. Whether the Claimants are entitled to the remedies sought in the claim.

d. Who should bear the costs of this suit.

Analysis and Determination

(a) Whether the Claimants employment was unlawfully terminated.

30. On 2.6.2015 the Respondent issued the Claimants with a retirement notice which read as follows-

“We wish to advise you that in accordance with the Bank’s Separation Policy and the rules of the National Bank of Kenya Staff Retirement Benefits Scheme, one can separate from the Bank on early retirement either at the Bank’s discretion or on employee’s request upon attaining 50 years of age.

The purpose of this letter is to inform you that the Bank has exercised its discretion to release you on early retirement. The Bank therefore gives you a one month notice which runs from the date hereof. Subsequently, your last day in the service of the bank shall be 1st July 2015.”

31. The basis of this notice was clause 9.4 of the Respondent’s HR manual which states as follows-

“9.4.1 Official Retirement Date

The Bank’s official retirement age is 60 years. However, there is an option of early retirement from age of 50 years either at the Bank’s discretion or employee’s request. The Bank may accept or decline an employee’s request for early retirement at its sole discretion.

9.4.2 Notice to Retire

The Bank will give an employee at least three months’ notice prior to attaining the retirement date (age). Either party will give three months’ notice in case of early retirement.”

32. The Claimants oppose their early retirement because they were never consulted and they were not served with 3 months notice. They do not dispute the provisions of clause 9.4 but rather the Respondent’s failure to follow the procedure stipulated therein.

33. Section 45 of the Employment Act provides as follows-

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(iii) that the employment was terminated in accordance with fair procedure.

34. The Respondent submitted that the reason the Claimants were sent on early retirement was due to the Respondent’s operational requirements. The retirement notice did not cite any reason for sending the Claimants on early retirement. However, RW1 testified that the criteria used by the Respondent to select the Claimants for early retirement was their attainment of age of 50 years. She further contended that the Respondent had the discretion to send the Claimants on early retirement pursuant to clause 9.4.1.

35. The issue of applicability of the Respondent’s HR Manual was addressed by this Court in the case of ***Banking, Insurance & Finance Union (Kenya) vs. National Bank of Kenya Limited [SUPRA]*** where the Court held that the Respondent’s HR Manual was not superior to statute. As such, the Respondent cannot use the manual to disguise its act of unfairly terminating the Claimants’ employment. The Court in the case stated-

“11. It is admitted here that the grievants were unionised employees and subject to the CBA between the parties and the legal consequences of the terms and conditions of the CBA is therefore binding. The Respondent as the employer equally has the human resource manual that was part of the contracts of employment. The contest then becomes on how the parties interpret the human resource manual with regard to the provisions for early retirement. On the one hand the Respondent takes the position that such retirement is discretionary on their part as set out under clause 9.4.1 of the human resource manual whereas the claimant’s contest is that such retirement should be subject to the applicable employment law provisions set out under section 41,

43, and 44 of the Employment Act....

13. Without going into the merits of the case, the human resource policy manual of the Respondent cannot be construed to be superior to the applicable statute herein, the Employment Act with regard to the termination and or retention of the employment of the grievants who are claimant's members. Equally, the existing CBA and the recognition of the Claimant by the Respondent as the representative of the grievants is a matter regulated by the Labour Relations Act and once such a relationship exists, any termination of the employment of the grievant must be in terms agreed upon between the Claimant and the respondent. To seek to apply the human resource manual suo motto on the basis that the Respondent has the discretion under the human resource manual is to defeat the very purpose of collective bargaining in matters that affect the employment of the Claimant members. To allow such a practice and application of discretion when it only suits the Respondent's the employer (sic) is tantamount to sanctioning an unfair labour practice. Even where a matter such as early retirement is not specifically outlined in the CBA and only exists in a subsidiary policy to the employment contract, the resultant effect of the same is termination of employment that I find is regulated in law by the Employment Act that in this case is superior and should form the basis of reference."

36. My understanding of the foregoing opinion by my sister Mbaru J is that an employer's HR Policy cannot supersede the express provision contained in a mutually agreed term of contract contained in a written contract (read CBA) or an express provision in a statute. In this case, however there is no CBA involved but appointment letters which did not provide for retirement age. The retirement age and the procedure are only stipulated in the HR Policy Manual which forms part of the contract of employment between the parties herein and the claimants know the mandatory and the optional early retirement age and the procedure.

37. The claimants admitted that the appointment letters indicated that their contract shall be governed by the general terms and conditions of service formulated by the bank from time to time. Cw1 admitted that there was a scheme for early retirement after attaining 50 years through which one could exit the bank even without VER. What Cw1 didn't say is that the right to invoke early retirement clause accrued equally to both the employer and the employees and that the employer had the discretion to reject an employee's request for early retirement.

38. Having made the foregoing observation that the respondent's HR policy Manual formed part of the claimants' contract of service and the claimants were aware of the clause for early retirement, I return that both the employer and the employee were bound by the said early retirement clause. It is the same Clause 9.4.1 that prescribed the mandatory retirement age as 60 years and also the optional early retirement as 50 years and as such the claimants cannot approve one portion of the clause and denounce the other. In any event the claimants never challenged the said clause either through the respondent's internal mechanisms or in court before they were retired. It follows therefore that, the respondent just like the claimants had the right to invoke the early retirement clause upon the claimants after reaching 50 years.

39. As submitted by the respondent, the function of the court in relation to employment contracts is only to interpret and give effect as agreed by the parties thereto. In **Krystalline salt Ltd v Kwekwe Mwakele & 67 others [2017] e KLR** the Court of Appeal held that-

"It is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs"

40. In the **National Bank of Kenya Limited v Hamida Bana & 103 others [2017] e KLR** the Court of appeal explained the function of the court vis a vis employment contracts and affirmed its earlier decision in **Damondar Jihabhai & co Ltd v Eustace Sisal Estates Ltd [1967] EA 153** where it held that:

"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English court of Appeal case above – Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & others (supra) – Lord Justice Beatson stated as follows:

"Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties are free to determine for themselves what obligations they will accept]. The parties have freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth or by conduct."

41. Again, the appellate court further cited its earlier decision in **Kenya Airways Limited vs Aviation & Allied Workers Union & 3 Others [2014] eKLR** where it held that: -

"The function of the Industrial court is limited to interpreting and enforcing only those obligations which the parties to the employment contract have agreed to assume.

There is no legal obligation express or implied for the implication into the employment contract of terms that the parties have not agreed to be binding conditions for the mere reason that the court considers it reasonable to do so."

42. In **Leonard Gethoi Kamweti vs National Bank of Kenya Ltd & 2 Others [2016] e KLR** whose facts in the pleadings were on all fours with the instant case, Wasilwa J stated as follows concerning the said Early Retirement clause 9.4 of the respondent's HR Policy Manual:

"49. From the wording of the Respondent's HR Manual, though early retirement could be initiated by either party, the Respondent retained the right to accept or reject an employee's retirement and this in my view was skewed to favour the respondent which was sanctioning servitude" [emphasis added]

43. I agree with the learned judge to the extent that she acknowledged that the employer had the same right to initiate early retirement as the

employee, and that the employer had discretion under clause 9.4 of the HR Policy Manual regarding early retirement over her employee of 50 years old and above. However, it is trite that where a person is given discretion by the law or a contract like clause 9.4 of the HR Policy Manual, such discretion can only be exercised upon reasonable factual and legal grounds, and any person against whom the discretion is exercised or who will be affected negatively by discretionary decision is entitled to a prior hearing. It follows therefore that the respondent's discretion to send her employee on early retirement or to reject an employee's application for early retirement under Clause 9.4 of the HR Policy Manual must be founded on valid and fair reason(s), which must be explained to the concerned employee and the employee accorded an opportunity to respond to the reasons cited.

44. The said clause in my view is not in consonance with section 36 of the Employment Act which entitles either party to an employment contract to terminate the same by serving the other party with the requisite notice or paying him/her commensurate salary in lieu of notice. The said provision neither requires the terminating party to cite any valid grounds and accord fair hearing to the other, nor does it give any party discretion to veto the desire by the other to separate.

45. In this case the respondent never explained the reason for the early retirement to the claimants, before the decision to send them on early retirement was made neither were they accorded a hearing. The reason was disclosed during the hearing by Rw1 when she stated that the reason for sending the claimants to the early retirement was due to the respondent's operational requirements and not a punishment for the claimants' refusal to take the 2014 VER. Such reason in my view is valid and fair within the meaning of section 45(2)(b)(ii) of the Employment Act, taking judicial notice that the respondent had showed her desire to reduce her staff under the said VER which did not interest the claimants. However, the said reason was given too late in the day and the claimant were denied the chance to air their representations before the discretionary decision was made to retire them before the normal retirement age. Consequently, I return that the respondent's discretion to send the claimants to an early retirement under Clause 9.4.1 of the HR Policy Manual was not properly exercised and the said early retirement amounted to unfair termination of employment within the meaning of section 45 of the Employment Act.

Discrimination

46. The Claimants submitted that they were discriminated against as the Respondent gave their colleagues who had opted for VER better terms than what they were given. Save for the 1st Claimant, none of the Claimants adduced evidence to prove that they had contested the terms of their early retirement. However, the 1st Claimant requested for a review of his rebate terms and it was increased from 10% to 20%.

47. The Claimants admitted that they opted not to apply for VER and as such, they were not entitled to benefit from the VER package. The VER terms applied only to those who applied for the VER. The Claimants cannot therefore rely on the terms they opted out of, to hold the Respondent liable for discrimination.

48. On the other hand, the Claimants' did not produce the names of the persons who were not issued with early retirement notice yet they were in the same age bracket or of the same status, to prove their case for discrimination. It is not enough to just allege that the act was discriminatory. Consequently, I find that the Claimants have not proved on a balance of probability that the respondent discriminated against them.

Remedies

49. Having found that the Claimants' employment was terminated for a cause and without being accorded an opportunity to air their representations, I make a declaration that their employment was unfairly terminated as prayed. However, in view of the finding that the terms of claimants' early retirement were not the same as that of the VER which they declined to take advantage of, I decline to make declaration that they were discriminated against, as prayed.

50. Under section 49 (1)(c) of the Employment Act, I award each claimant ten months' salary as compensation for the unfair termination considering their long service of over 25 years and the fact that they did not contribute to their termination through misconduct. I have also considered the fact that being over 50 years they are unlikely to secure alternative jobs.

51. However, in view of the finding that the early retirement was not discriminatory and further that the claimants were not entitled to the same retirement package as their VER counterparts, their claim for damages for discrimination and equal exit package as VER retirees falls on its face. Likewise, the claim for severance pay must fail because the separation was not on account of redundancy. Finally, the claim for gratuity must also fail because the claimants were paid pension and they did not prove that they also belonged to a gratuity scheme.

Conclusion and disposition

52. I have found that clause 9.4 of the respondent's HR Policy Manual formed part of the claimants' contract of employment with the respondent and both parties to the contract had equal right to terminate the contract through early retirement, by a notice of 3 months or payment of 3 months' salary in lieu of notice. I have further found that the early retirement was at all times subject to the respondent's discretion and as such she had an obligation to give valid and fair reasons for exercising the discretion, and a further obligation to accord a hearing to the claimants before exercising the discretion. I have also found that the early retirement of the claimants by the respondent amounted to unfair termination of their employment and as such the claimants are entitled to compensation. Finally, I have found that the claimants were not entitled to the same benefits as their colleagues who exited under the VER and proceeded to dismiss their claim for damages for the alleged discrimination.

53. In the end, I enter judgment for the claimants against the respondent in the following terms and based on their respective gross salary: -

FRANCIS M.P. NYAMU (1^S CLAIMANT)

KShs. 209,918.00 x 10 = KShs. 2,099,180.00

MERCY WAIRIMU WAITHAKA (2ND CLAIMANT)

KShs. 325,625.00 x 10 = KShs. 3, 256, 250.00

JOSELINE MAREGU NYAGAH (3RD CLAIMANT)

KShs. 223,855.00 x 10 = KShs. 2,238,550.00

JOSIAH MWAURA NJOROGE (4TH CLAIMANT)

KShs. 213,994.00 x 10 = KShs. 2, 139, 940.00

PERIS WAIRIGU KIGUTA (5TH CLAIMANT)

KShs. 347,506.00 x 10 = KShs. 3, 475, 060.00

JOSEPH KIPROP BARTOCHO (6TH CLAIMANT)

KShs. 323,215.00 x 10 = KShs. 3, 232, 150.00

JACKSON J. SOPHAS KHOLE (7TH CLAIMANT)

KShs. 290,746.00 x 10 = KShs. 2, 907, 460.00

BRETTA MWIKALI MWOLOLO (8TH CLAIMANT)

KShs. 327,135.00 x 10 = KShs. 3, 271, 350.00

JEDDAH KISIAVUKI LODENYI (9TH CLAIMANT)

KShs. 203,526.00 x 10 = KShs. 2, 035, 260.00

WILSON NYARANGA MIMA (10TH CLAIMANT)

KShs. 347,616.00 x 10 = KShs. 3,476,160.00

PETER MUSEMBI MUTHAMA (11TH CLAIMANT)

KShs. 281,964.00 x 10= 2,819, 640.00

The above awards are subject to statutory deductions but in addition to costs and interest at court rates from the date hereof. The Respondent shall also issue the 2nd Claimant with a Certificate of Service in accordance with the provisions of section 51 of the Employment Act.

Dated and delivered at Nairobi this 24th day of January, 2020

ONESMUS N. MAKAU

JUDGE