



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2228 OF 2014**

**JOSEPHAT KAMAU KAMAU.....1ST CLAIMANT**

**ERASTUS TATUA GICHEHA.....2ND CLAIMANT**

**JOHN NJUGUNA CHEGE.....3RD CLAIMANT**

**-VERSUS-**

**NATIONAL BANK OF KENYA.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 8th January, 2020)

**JUDGMENT**

The claimants filed the statement of claim on 16.12.2014 through J.A. Guserwa & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) A declaration that the claimants were discriminated against.
- b) Damages for discrimination.
- c) Damages for wrongful and unfair retirement.
- d) Payment of all the lawful terminal dues set out in schedule 1.
- e) Cost of the suit with interest thereon.

In the schedule 1 to the statement of claim the claimants claimed on the headings of half salary for every year served and two months' notice pay making summing up as follows:

- a) 1st claimant Kshs.2, 771, 535.00.
- b) 2nd claimant Kshs.596, 528.00.
- c) 3rd claimant 5, 890, 852.00.

The claimants' case is that the respondent by a circular dated 19.02.2014 offered its employees Voluntary Early Retirement and those employees willing to exit under the offer would be entitled to:

- a) Pension benefits in accordance with the scheme rules.
- b) One month 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.

The applicants applied for the voluntary early retirement and by respective letters dated 02.04.2014 the respondent accepted to retire them early upon the following terms:

- a) One month salary in lieu of notice.
- b) Payment of your leave days earned but not taken as at 30.04.2014.
- c) Severance pay of half a month's salary for every completed year of service.
- d) Your retirement benefits will be handled in accordance with the National Bank of Kenya Staff Pension Fund Rules.

The claimants' case is that the offer as was made to them was discriminatory and in breach of the respondent's Human Resource Manual and violated Articles 27 and 41 of the Constitution and section 26 of the Employment Act, 2007 and was therefore biased. Further, the claimants allege that whereas the retirement was to take effect on 30.04.2014 the respondent unlawfully and unfairly kept the claimants in employment until 06.05.2014 and thereby subjected them to great anxiety, stress and loss.

The respondent filed on 24.04.2015 the memorandum of reply through Oraro & Company Advocates. The respondent admitted that it offered the claimants voluntary early retirement, they applied and they were to retire effective 30.04.2014 upon the terms as pleaded by the claimants. The computed retirement and terminal dues were notified to the claimants and each claimant was paid accordingly. The claimants were not retired upon discriminatory or less favourable terms and the respondent pleaded that it complied with all the provisions of its Human Resource Manual. The terms included:

- a) One month salary in lieu of notice.
- b) Payment for leave earned but not taken as at 30.04.2014.
- c) Severance pay of half a month's salary for every completed year of service.
- d) 40% rebate of the outstanding loans to be granted if the amount is settled immediately.
- e) 20% rebate if settlement of 50% and above but less than 100% of the outstanding loan is paid immediately.
- f) Enjoyment of medical cover offered by the respondent to continue up until the end of the year 2014 or upon exhaustion of their respective medical cover limits.

The respondent prayed that the claim lacked merit and the same be dismissed with costs.

Parties consented that the suit be determined on the basis of the pleadings and the documents on record. Parties filed their respective submissions.

The only issue for determination is whether the claimants are entitled to the remedies as prayed for. The Court makes findings as follows:

- a) There was no dispute that the claimants were in the management cadre and the Court returns that as submitted for the respondent the exhibited collective bargaining agreement and its provisions did not apply to the claimants.
- b) The claimants have not pleaded particulars of the alleged discrimination or particulars of the alleged breach of the respondent's Human Resource Manual (except whether the three months' notice on early retirement as per the Human Resource Manual applied and to which the Court will return to later in this judgment). In the circumstances, the claimants are bound by their pleadings and in any event there is no evidence to establish the alleged discrimination or otherwise breach.
- c) The material on record show that the claimants voluntarily applied to participate in the Early Retirement Scheme, they accepted the final payment and prior to that acceptance they did not raise objections or other concerns such as discrimination or breach of the Human Resource Manual. In accepting the claimants' respective applications to retire early, the respondent expressly notified that the Human Resource Division was available to answer any questions that the claimants may have wished to raise and that all the respondent's communication channels were open during the transition period. The Court finds that the claimants never invoked such avenues as were open to raise the concerns now alleged in the suit. Further, the Human Resource Manual simply provided for 3 months' notice by either party in event of voluntary early retirement. The Manual did not provide for such matters as severance pay, rebate on loans and enlarged benefit on medical scheme. In absence of any other material before the Court, the Court returns that the claimants did not only voluntarily participate in the early retirement scheme but also enjoyed, to a considerable extent, more advantageous benefits. They have not therefore established the unfair treatment as it was alleged for them and they have not therefore established a case for award of damages as prayed for. The termination of the contracts of service by way of the early retirement did not amount to unlawful or unfair termination.
- d) It was submitted for the respondent that the terms of the voluntary early retirement at the respondent's instance were as set out in the circular and the individual letters and not the general provisions of the Human Resource Manual. The respondent cited the holding of the Court of Appeal in that regard in the judgment in **Hamida Bana & 102 Others –Versus- National Bank of Kenya Limited, Civil Appeal No. 72 of 2017 at Nairobi** (Visram, Karanja, & Koome). The Court of Appeal stated, “**22. What were the terms of the VER scheme? Unlike the trial Judge we find that the applicable terms were those set out in the circular and**

repeated in the acceptance letters. In our view, the circular and acceptance letters made no mention of the incorporation of the terms under HR manual or the CBA as alluded to by the respondents....” Further the Court of Appeal upheld its decision in **William Barasa Obutiti –Versus- Mumias Sugar Company Ltd (2001)eKLLR** that parties are at liberty to contract outside the instruments governing the employment relationship – so that the parties were bound by the terms of Voluntary Early Retirement Scheme and the Court cannot rewrite the contract between the parties. The Court finds that while the terms of the voluntary early retirement were as per the circular and the individual letters, the respondent pleaded that it as well complied with all the provisions of the Human Resource Manual and the respondent is bound by that pleading. It is therefore the finding by the Court that in the instant case the terms and conditions of the voluntary early retirement were as spelt out in the circular and individual letters as well as the relevant terms and conditions in the Human Resource Manual - unless it is shown that the terms and conditions in the Human Resource Manual were expressly varied or set aside or waived by the provisions in the circular and the individual letters.

e) The Court holds that the statutory provision on change of the written terms and conditions of service is section 10(5) of the Employment Act, 2007. The section requires the employer to consult the employee, to revise the contract to reflect the changes and to notify the employee in writing. In the present case the Court considers that the parties expressly entered the contract on “**Early Voluntary Retirement**”. Did the early retirement contract have the effect that the provisions in the Human Resource Manual on “**Early Retirement**” did not apply or were accordingly modified by the early retirement contract? In particular, did the terms of the early voluntary retirement effectively erase the need for the respondent to give the three months’ notice as prescribed in the Human Resource Manual? It is the claimants’ case that the Manual’s provision applied.

f) In **Ian Norbert Mgenyi –Versus- National Bank of Kenya [2019]eKLLR** the Court held thus, “**The 4th issue for determination is whether the claimant is entitled to 3 months’ pay in lieu the three months’ termination notice at Kshs.1, 224, 849.00 as prayed for. Clause 9.4.2 of the respondent’s separation policy prescribed the three months’ termination notice. The early retirement letter dated 02.06.2015 gave a one month notice lapsing on 01.07.2015. It is pleaded for the respondent that the three months’ notice was changed to one month notice by the revised notice period in December, 2013. The revised notice period has not been exhibited. RW does not mention such revision in her witness statement or her oral evidence. Instead RW stated that the 3 months’ pay was given. The Court considers that the contract was that three months’ notice is given by either party. The Court finds that the respondent clearly failed to give the agreed 3 months’ notice but it is also not in dispute that the claimant was paid three months’ salaries. The Court considers that the respondent purged the breach in that regard. It cannot be assumed that the respondent was generous without compliance with the terms of separation in that regard. However, the Court notes that mix-up and the respondent’s failure to be express in that regard may have encouraged the claimant to sue. Accordingly, each party will bear own costs of the suit.**” The issue for determination is whether by the Early Voluntary Retirement agreement in the instant case, the duty for the respondent to give the claimants the 3 months’ notice was thereby varied. It is clear that the voluntary early retirement had been initiated by the respondent and not the claimants. The Court has revisited the circular No.1/2014 dated 19.02.2014 by the Managing Director. Nowhere does it vary the duty by the respondent to give the 3 months’ notice on early retirement as prescribed in the Human Resource Manual. The Court is bound by the holding in **William Barasa Obutiti –Versus- Mumias Sugar Company Ltd (2001)eKLLR** that parties are at liberty to contract outside the instruments governing the employment relationship. The Court considers that in contracting outside the instruments, any desired changes to the terms of the instruments should be subject of express consultation and notification as envisaged in section 10(5) of the Employment Act, 2007. The Court’s opinion is that the change cannot be presumed or the provisions in the instrument be automatically subsumed in the “**outside contract**” without compliance with section 10(5) of the Employment Act, 2007. In the instant case there is no suggestion, express or implied, that the parties waived or were accepting to do away with the three months’ notice so that in the Court’s opinion, nothing in the circular and as subsequently concluded in the contract of early retirement varied the 3 months’ contractual notice. To that extent, the Court finds that the claimants were entitled to claim the 2 months’ pay in lieu of notice as the respondent had only paid the one month in lieu of such 3 months’ notice that was agreed upon in the Human Resource Manual. Thus to the 1st, 2nd and 3rd claimant is awarded **Kshs.426, 390; Kshs.596, 528.00; and Kshs.604, 190.00** respectively being two months’ notice pay as prayed for. While making that finding the Court follows trite law that it cannot rewrite the contracts of service in issue. As submitted for the respondent the parties were at liberty to contract outside the Manual and the regular instruments on the terms and conditions of the contract of service but the Court finds that in doing so, the parties’ intention to shift, modify or waive the 3 months’ notice as had been agreed upon in the Human Resource Manual has not been established at all. The Court further considers that the issue not having been expressly addressed in the terms of the voluntary early retirement contract (the circular or the individual letters), the claimants had no reason to invoke the internal channels prior to the separation as there was no grievance in that regard or, the parties were mutually guilty of not addressing the issue in view of the looming separation by voluntary early retirement. The Court holds that while parties to a contract of service are at liberty to contract outside the regular or prevailing written instruments on the terms or conditions of the contract of service, there must be an express or an obviously (necessarily) implied intention that the parties are varying or waiving or setting aside any such relevant term and condition in such regular or prevailing written instruments and failing which, the Court holds that such relevant term or condition in the regular or prevailing written instruments shall remain binding upon the parties despite the purported and further “**outside contract**”.

g) The Court has considered the parties’ margins of success and the complexity as well as the uniqueness of the matter in dispute which has operated towards development of jurisprudence and returns that the respondent will pay 50% of the claimants’ costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

(a) Payment to the 1st, 2nd and 3rd claimant **Kshs.426, 390; Kshs.596, 528.00; and Kshs.604, 190.00** respectively being two months’ notice pay as prayed for and to pay by 01.03.2020 failing interest to be payable thereon at Court rates from the date of filing the suit till full payment.

(b) The respondent to pay 50% of the claimants’ costs of the suit.

**Signed, dated and delivered in Court at Nairobi this Wednesday, 8th January, 2020.**

**BYRAM ONGAYA**

**JUDGE**