



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2292 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM MALII MWANZIA

CLAIMANT

VERSUS

ISUZU EAST AFRICA LIMITED

(FORMERLY GENERAL MOTORS EAST AFRICA LIMITED)

RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 23rd December 2014 and amended on 18th January 2019. It is the claimant's averment in the amended memorandum of claim that he was employed by the Respondent herein, on or about 27th February 1978 in the position of Paint Shop Artisan.

The Claimant further averred that at the time of his appointment the retirement age as stipulated in the Company manual and regulations was 60 years and therefore he expected to work for the Respondent until his attainment of the mandatory retirement age of 60 years.

The Claimant averred that on or about 17th December 2015 he received a retirement notice from the Respondent indicating that he was due to retire on 1st January 2015 at the age of 56 years instead of the mandatory age of 60 years.

He further averred that the retirement age of 55 years was introduced in the Collective Bargaining Agreement (CBA) dated 10th February 2013, 36 years after he started working with the Respondent. He further averred that this decision was contrary to the company policy as contained in the Retirement Scheme hand book.

The Claimant maintained that the said retirement notice was issued to him was illegal, null and void ab initio. He further maintained that he did not at any time in the course of his employment apply to proceed on early retirement and therefore any attempt by the Respondent to retire him prematurely prior to his attainment of the mandatory retirement age is unfair and unlawful.

In his Amended Memorandum of Claim the Claimant seeks the following reliefs:

a) A declaration that the intended premature retirement of the

Claimant at the age of 56 years instead of the mandatory 60 years on 31st December 2018 on 1st January 2015 is illegal, unlawful, malicious and null and void.

b) A Permanent Injunction restraining the Respondent from retiring the Claimant from service on 1st January 2015 before reaching the mandatory retirement age of 60 years on 31st December 2018.

c) In the alternative an order compelling the Respondent to pay the Claimant his retirement benefits of up to the year 31st December, 2018 plus Kshs.2,695,912.65 being Retirement benefits as of 31st December 2014, salary and allowances for the 48 months which the Claimant would have earned up to the year 31st December, 2018, annual employer's contribution to the pension scheme at 20% of basic salary of four years up to 31st December, 2018. 3 months' salary in lieu of notice, one month salary baggage, full compensation for premature retirement all totalling to Kshs.7,647,968.56.

- d) Retirement benefits from 1st January 2015 to 31st December, 2018.
- e) Certificate of Service to be issued to the Claimant within 14 days in case of retirement on 1st January, 2015.
- f) Costs of this cause.
- g) Interest of the cause at Court rates.
- h) Any other relief which the Court deems fit, just and expedient to grant.

The Respondent in its Amended Statement of Defence dated 2nd April 2019 and filed on 3rd April, 2019 admitted having engaged the Claimant in the manner stated in his Amended Memorandum of Claim. It however, maintained that the Claimant's employment was subject to the terms and conditions agreed between the Kenya vehicle Assemblers Association and the Amalgamated Union of Kenya Metal Workers in the Collective Bargaining Agreement signed on 19th February 2013.

The Respondent averred that pursuant to clause 22(a) of the aforementioned CBA the retirement age was capped at 55 years. That in compliance with the said provisions it held several discussions with the Claimant on the issue at which it was mutually agreed that his retirement would commence on 31st December, 2014.

The Respondent maintained that the Claimant's retirement was justified and in accordance with the provisions of Clause 22(a) of the CBA force at the time of the said retirement.

The Respondent maintained that the Claimant being a unionizable employee and a member of Amalgamated Union of Kenya Metal Workers, he is bound by the terms of the CBA signed between his union and the Respondent.

It is on this basis that the Respondent maintained that it rightfully and lawfully exercised its right to retire the Claimant and that it did so in accordance with both the Law and the CBA in force.

The Respondent states that the assertion that the Claimant was forced to proceed on early retirement is therefore misguided, misleading and contrary to the provisions of Clause 22 (a).

The Respondent further states that the Claimant is not entitled to the reliefs sought in his Amended Memorandum of Claim terming the same as frivolous, vexatious and an abuse to the Court process. It therefore urged this Court to dismiss the same in its entirety with costs to the Respondent.

The Claim was disposed of by way of written submissions.

Submissions by the Parties

The Claimant submitted that Clause 22(a) of the CBA that the Respondent relies upon for the basis of his retirement is invalid and contrary to the provisions Section 9 of the Labour Relations Act as it contradicts the existing employment contract between the Claimant and the Respondent.

The Claimant further submitted that the CBA of 2013 is similarly illegal as it purports to apply retrospectively to the Claimant who had worked for the Respondent for a period of 35 years before it came into force. The Claimant further submitted that Clause 22(a) of the CBA signed on 10th February, 2013 cannot be applied retrospectively as the same did not exist at the time of entering into his contract of employment in the year 1978. The Claimant cited the Court of Appeal decision in the case of **Mary Wakhabubi Wafula v British Airways PLC (2015) eKLR** where the Court held that retrospectivity of application of the law will not ordinarily be permitted as new laws look to the future.

For further emphasis the claimant cited the cases of **Municipality of Mombasa v Nyali Limited (1963) E.A 371**, **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR** and **Keroche Industries Limited v Kenya Revenue Authority & 5 Others (2007) eKLR** where the Courts maintained that retrospective operation of the law would not be permitted unless there is a clear intention to that effect.

The Claimant submitted that the CBA in question made no specific applicability especially to employees who were already working at the time. He maintains that there was no provision made for prospective or retrospective application of the CBA.

The Claimant maintained that the Retirement Notice was therefore premature, illegal and unlawful and amounted to unfair termination of employment by way of forced early retirement. The Claimant relied on the case of **Robert Githua Githaka v SAAB Kenya Limited (2018) eKLR**.

The Claimant further submitted that the Respondent is estopped from relying on provisions of the CBA as the Claimant's employment contract was entered into in 1978.

He further maintained that his premature retirement was in the circumstances discriminatory as all previous employees retired at the age of 60 years. The Claimant maintained this was contrary to the provisions of Section 5(2) and (3) of the Employment Act, 2007 and Article 27

of the Constitution of Kenya, 2010. The Claimant relied on the case of **Banking, Insurance and Finance Union Kenya v Bank of Baroda (K) Limited (2019) eKLR** where the Court found that the Applicant had established a prima facie case for discrimination where a grievant was forced to retire before attaining the mandatory retirement age of 60 years. The Claimant further cited the cases of **Geeta Joshi v Pandya Memorial Hospital (2019) eKLR** and **Kenya Union of Domestic Hotels, Educational Institutions & Allied Workers Union v M.P Shah Hospital (2018) eKLR**.

The Claimant further submitted that he had Legitimate Expectation to work for the Respondent until age 60 years as represented in his employment contract. He submitted that in the circumstances his forced retirement is in violation to Sections 41, 43 and 45 of the Employment Act, 2007 and he is therefore entitled to the reliefs sought in his Amended Memorandum of Claim. the Claimant cited the case of **Pravin Browry v Ethics and Anti-Corruption Commission (2013) eKLR**.

The Claimant further submitted that the respondent ought to be denied audience by this Court having failed to comply with the Court Orders issued on 23rd December, 2014 and confirmed on 3rd April 2015 staying the retirement of the claimant. He relied on the authority of **Hadkinson v Hadkinson (1952) 2 ALL ER 567**.

The Claimant submitted that the assertion that he absconded duties is therefore untrue and is not supported by any documentary evidence. He urges this Court to disregard the same. the Claimant relied on the case of **Abdi Halake Garamboda v Fidelity Security Services Limited (2015) eKLR** where the Court held that the Respondent failed to display to the Court through production of its attendance book that the Claimant had indeed absconded duties and therefore such an assertion is untrue.

It is on this basis that the Claimant maintained that he is entitled to all the reliefs sought in his Amended memorandum of Claim and therefore urged this Court to allow his claim as prayed.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant being a unionisable employee is bound by the decisions of this Court in **ELRC Cause No. 1174 of 2015, Amalgamated Union Kenya Metal Workers v General Motors East Africa Limited** and **ELRC Cause No. 2209 of 2015, Daniel Thuo Kabi & 8 Others v General Motors East Africa Limited** in which the Court pronounced itself on the applicability of the 2013 CBA to employment contracts.

The Respondent further submitted that the Claimant's contention that the said CBA contravenes Section 9 of the Labour Relations Act is an attempt to mislead this Court and that the Claimant has failed to demonstrate the said contradictions. It is further maintained that the 2013 CBA does not in any way contradict Section 9 of the Labour Relations Act.

The Respondent further submitted that the Claimant's retirement was lawful, legal and in accordance with Clause 22 (a) of the CBA between the Claimant's Union, the Amalgamated Union of Kenya Metal Workers and the Respondent herein dated 10th February, 2013.

The Respondent further submitted that it did not discriminate against the Claimant in any way as alleged by the Claimant. It is submitted that the Claimant has failed to single out any acts of discrimination allegedly committed by the Respondent. The Respondent relied on the cases of **Kenya Medical Research Institute v Samson Gwer & 8 Others (2019) eKLR** and **Federation of Women Lawyers FIDA Kenya & 5 Others v Attorney General & Another (2011) eKLR**.

The Respondent further submitted that the Claimant has failed to prove that he has any valid cause of action against it. It is further submitted that the entire Claim fails completely and as a result the Claimant is not entitled to the reliefs sought therein.

In conclusion the Respondent submitted that the instant Claim does not disclose a valid cause of action against it and therefore urged this Court to dismiss the same in its entirety with costs to the Respondent.

Analysis and Determination

It is not contested that the claimant's letter of appointment provides for a retirement age of 60 years. It is further not in dispute that the claimant was a member of the union which negotiated a CBA on behalf of its members, the claimant included, in which the parties agreed on a retirement age of 55 years. It is further not in contest that the claimant enjoyed all the terms of the CBA.

What appears to have happened here is that the terms of the claimant's employment in relation to retirement age changed but the parties overlooked the amendment of the terms in the letter of appointment. It is not clear whether either the claimant or the respondent was aware of this lapse before the claimant was issued with the notice of retirement. Be that as it may, the claimant cannot choose to benefit from some clauses in the CBA that are beneficial to him and decline those that are not beneficial to him. For example, in his Amended Memorandum of Claim, he prays for annual increment as per CBA. He cannot approbate and reprobate. Either he is bound by all clauses of the CBA or he is not.

The notice of retirement dated 17th December 2014 refers to discussions between the claimant and management regarding the claimant's retirement plans. There is no evidence that upon receiving the letter, the claimant discussed the apparent conflict between the letter and his letter of appointment with the respondent. He has further not denied that there were discussions between him and the respondent regarding the retirement prior to the letter being sent to him as has been pleaded by the respondent and as stated in the letter of retirement.

The foregoing notwithstanding, this court has previously pronounced itself on the same issue in **Amalgamated Union of Kenya Metal Workers v General Motors East Africa Limited (2016) eKLR** and **Daniel Thuo Kabi & 8 Others v General Motors East Africa Limited (2018) eKLR** in which suits both trial Judges held that the 2013 Collective Bargaining Agreement and specifically the retirement

clause, was to apply to all members of the Union under the Respondent's employment. In the former suit, Abuodha J. held –

“Clause 27 of the Collective Bargaining Agreement on effective

date provides that in the event a new agreement has not been concluded between the parties, the terms of service shall continue in force in all respects until the date on which any such new agreement is signed. It is not disputed that clause 22 of the current Collective Bargaining Agreement sets retirement age at 55 years. It is the operating Collective Bargaining Agreement until a new one is signed. The enhancement of retirement age from current 55 years to 60 years is one of the proposals put forward by the claimant. It has not been agreed upon. Being a proposal it cannot confer any right capable of being injured hence be protected by an order of injunction.

The parties are bound by the terms of current Collective Bargaining Agreement until a new one is signed either voluntarily or through an order of this Court upon hearing the parties.

Changes have always occurred in employment such as salary increment, enhancement of retirement age and improvement in general terms and conditions of employment. Not all employees get to benefit from these changes. Some will always retire or leave employment without benefitting from them. That is what the applicant is there for. To continuously negotiate for better terms and conditions of service for its members. It would not be right to interdict an employer from enforcing the terms of an existing Collective Bargaining Agreement simply because there is hope that the Court could order in favour of the applicant in the new one. The operational Collective Bargaining Agreement is the one signed on 1st January 2013 and which sets retirement age at 55 years.”

In the latter claim, Makau J. held –

“I have found that the dispute herein is founded on the Claimants' invalid contention that the Collective Bargaining Agreement concluded by their able union in 2013 does not apply to them. I have also found that the said Collective Bargaining Agreement was at all material times applicable to them and the terms of service contained therein including the retirement age of 55 years were binding on them until a new Collective Bargaining Agreement was signed and registered in this Court.”

Having found that the claimant's terms were covered under the Collective Bargaining Agreement, which provides for retirement age of 55 years, I agree with the said decisions and hold that the same applies herein. This court finds no merit in the claim herein.

The same is accordingly dismissed with no orders for costs.

The respondent is however advised to harmonise the provisions of the CBA with both the letters of appointment of its employees and the Staff Retirement Scheme so that this matter does not become the subject of yet another dispute in this court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE