



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1814 OF 2014**

**GODFREY KANGASHI ALUDAH.....CLAIMANT**

**-VERSUS-**

**METAL CROWNS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant as employed by the respondent from 6.2.2007 as a machine operator and his salary was Kshs.22,370 per month. He worked well until 11.5.2013 when he was served with a letter terminating his services on account of redundancy. Aggrieved by the unlawful redundancy, he reported the matter to his trade union and on 3.6.2013 the redundancy was revoked. He was however sent on a paid leave pending the restructuring of the respondent.

2. On 4.11.2013, he allegedly was coerced by the respondents HR Manager to write a letter requesting for an early retirement or risk termination without benefits. After writing the letter the respondent paid his rightful terminal dues plus on ex-gratia payment of Kshs.100,000 which he acknowledged by signing certificates discharging the respondent from any other or further claims.

3. After one year the claimant filed this suit alleging that his coerced retirement amounted to wrongful and unfair termination of his employment and prayed for:-

(a) 12 months salary in lieu of notice .....Kshs.268,440

(b) Compensation of 12 months salary

for unlawful termination.....Kshs.268,448

(c) Salary arrears from the date of retirement upto date of judgment.

(d) Full settlement of the loan from Barclays

guaranteed by the respondent.....Kshs.399,190

(e) Full settlement of the interest on the said loan

(f) Costs and interest.

4. The respondent denied that she coerced the claimant to resign from his employment and averred that the retirement was lawfully done at the claimant's own voluntary request. She further averred that after the retirement, the claimant was paid all his rightful separation dues including salary for the days worked, outstanding leave days, 45 days pay in lieu of notice plus severance pay at the rate of 21 days pay for every completed year of service. She therefore prayed for the suit to be dismissed with costs because it lacks merits, it is frivolous, vexatious, scandalous and on abuse of the court process.

5. The suit was on 6.5.2018 and 14.6.2018 when the claimant testified as Cw1 and the respondent called her HR Manager Ms. Carolyne Moraa who testified as Rw1. Thereafter the claimant filed written submission on 16.10.2018 but the respondent never filed any.

**Claimant's case.**

6. Cw1 testified that he worked for the respondent as a Machine Operator from 6.2.2007 to 11.5.2013 when he was served with a letter terminating on account of redundancy since all the machine were being transferred to Tanzania. That, he report the matter to his union and he was given a letter to serve the respondent's HR Manager.

7. He further testified that on 3.6.2013, he was served with another letter by the respondent revoking the redundancy letter. However, the letter never instructed him to report back to work. After waiting for 6 months the HR called him and other employees to talk but he (Cw1) declined.

8. Cw1 further testified that he was later surprised to receive the letter dated 7.11.2013 from the respondent accepting his request for early retirement. He denied ever writing any letter requesting from early retirement. He however contended that he and his other colleagues were paid some dues and signed letters under pressure from the respondent. He denied that he made a voluntary request for retirement. He therefore prayed for the reliefs sought by the Statement of Claim.

9. On cross examination by the defence counsel, Cw1 admitted that the redundancy letter was revoked by subsequent letter dated 3.6.2013 after his union wrote a letter to the respondent. He further admitted that he wrote the letter dated 6.11.2013 requesting for an early retirement. He also admitted that he never lodged a complaint anywhere that he was forced to write the letter dated 6.11.2013. he further admitted that after writing the letter dated 6.11.2013, his dues were computed and paid to him including services pay, salary for October 2013, leave days and 40 days salary in lieu of notice plus ex-gratia payment of Kshs.100,000 and signed a discharge certificate. He further admitted that he was given a certificate of service after separation.

10. Cw1 further stated that the letter dated 3.6.2013 revoked his redundancy but directed him to remain on a paid leave pending re-organization. He admitted that he was paid all his leave during the 5 months he was on leave.

11. As regards the loan from Barclays Bank, Cw1 admitted that he had no documents to prove that the respondent had guaranteed its payment. He further admitted that the scheme of Loan Check off Authority indicated that he was to make his own arrangement to repay the loan if his services by the respondent were terminated.

12. On further cross examination, Cw1 disowned that the signature appended on his verifying Affidavit filed together with the claim. He also denied the signature during re-examination by his counsel.

#### **Defence case**

13. Rw1 testified that he was new in the respondent and as such, he only testified based on the documents she interacted with in the office in addition to the witness statement recorded by her predecessor Mr. Stephen Muriithi on 8.12.2015. She testified that the claimant was employed by the respondent until 6.11.2013 when he resigned through the letter dated 6.11.2013 by which he requested for an early retirement.

14. Rw1 further testified that the request for early retirement was accepted by the respondent and his terminal dues were computed at Kshs.76,419 and paid to him. That in addition, he was paid Kshs.100,000 as ex-gratia payment plus a certificate of service. That after the said payment, the claimant signed a certificate that the said payment was his final dues and thereby discharged the respondent from further claims.

#### **Analysis and determination**

15. After considering the pleadings, evidence and submissions by both parties, there is no dispute that the claimant was employed by the respondent from 6.2.2013 till 7.11.2013 when he exited through early retirement. The issues for determination are:

- a) Whether the suit is incompetent due to forged signature on the verifying affidavit.
- b) Whether the claimant was lawfully retired or he was unfairly terminated.
- c) Whether the reliefs sought should be granted.

#### **Incompetent suit**

16. The claimant disowned the signature appended on his Verifying Affidavit, during cross examination and re-examination. By the said denial, he meant that the signature on that affidavit was forged and therefore the facts in the statement of claim were not verified as required by the rules of procedure. No judicial precedents were presented to me to prove that in such circumstances the suit would be a nullity. In my view, the pleadings in the claim are separate from the verifying affidavit and the letter cannot render the former invalid.

17. Rule 6 of the ELRC procedure Rules 2016 does not seem to emphasize on a verifying affidavit during the filing of the suit by an individual(s) it states as follows:

***“6. Where a claim is referred to the court in accordance with the provisions of any written law other than the Labour Relations Act under Rule 5, the statement of Claim shall :-***

***(a) Be signed by the claimant or by the Advocate of the Claimant; or***

***(b) If the claimant is a body corporate, be signed by an authorized officer of the body corporate or its Advocate.”***

18. Considering the foregoing provisions of the law, I will not strike out the claim and especially because the issue is coming too late in the day. I will therefore proceed to consider the matter on merits.

#### **Voluntary retirement or unfair termination**

19. The claimant admitted that he wrote the letter dated 6.11.2013 requesting for retirement. He however contended that he wrote the letter under pressure from the respondents HR Manager. He stated that he was called by HR Manager together with other employees who were facing similar problems. He however never called any of those other employees as his witness to confirm his allegation. He also did not write any protest or report anywhere that he had been forced to write the resignation letter.

20. In my considered view the claimant's conduct during the events of 6th and 7th November 2013 is betrayed by his conduct after the unlawful redundancy in May 2013. Whereas in May 2013 he rushed to report the redundancy to his trade union, in November 2013 he never reported the alleged forced retirement to the union or anywhere else. Consequently, I return that on a preponderance of evidence, the claimant has not proved that he wrote the request for early retirement dated 6.11.2013 through coercion or undue influence from the respondent. The answer to the second question for determination herein is therefore that the claimant was lawfully retired after his own voluntary request.

#### **Reliefs**

21. The claim for salary in lieu of notice for 12 months is not backed by any evidence. The contract of employment produced by the employer indicates that either party could terminate the same by serving one month notice or paying the other party salary in lieu of notice. In this case, the claimant was paid salary for 45 days in lieu of notice as evidenced by the certificate of discharge and the computation of dues produced as exhibits by the defence. I therefore find the claim for 12 months salary in lieu of notice to be devoid of merits.

22. The claim for 12 months salary as compensation for unfair termination is also dismissed in view of the finding herein above that the claimant was retired lawfully and not through unfair termination.

23. The claim for full settlement of his personal loan from Barclays Bank plus interest, by the employer under an alleged repayment guarantee is dismissed. The alleged loan guarantee was not produced and as such, the court is persuaded by the Check off Authority Form, produced by the defence as exhibit, that the claimant had committed himself to paying the loan from other means in case his employment ended before clearing the loan.

24. Finally, the claim for salary from the dates of retirement to date must also fail. He is not entitled to any pay under a contract that had ceased to exist. In any case, he is an able bodied man who should have moved on in life and sought another job to do and earn a living.

#### **Conclusion and disposition**

25. I have found that the claimant retired from employment voluntarily and he was paid all his rightful dues plus more. Consequently, I dismiss the suit with no order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019**

**ONESMUS N. MAKAU**

**JUDGE**