



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 380 OF 2016**

*(Formerly CMCC 10741 of 2005)*

**ALEXANDER MUNGAI MUCHUKU..... CLAIMANT**

**VERSUS**

**FAMILY BANK LIMITED..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a Clerk vide the offer letter dated 27.9.1999 and rose through the ranks to become Acting Branch Manager at Gatundu where he worked until 31.12.2004 when he was retired verbally on medical grounds. He appealed against the early retirement which was ignored. He then filed this suit initially in the Chief Magistrate's Court on 28.9.2005 before being transferred to this court on 2.5.2017. The claimant seeks the following reliefs:

- a) A declaration that the defendant's premature retirement of the Plaintiff is unlawful.
- b) A declaration that the early retirement of the plaintiff on medical grounds is illegal.
- c) General damages for breach of the plaintiff's statutory rights.
- d) An order of compensation for the plaintiff for loss of his career.
- e) A declaration that the defendant has retired plaintiff in breach of the Employment Act.
- f) Punitive damages for malicious termination of the plaintiff's employment.
- g) Any other relief that the Honourable Court deems fit, just and expedient to grant.
- h) Costs of this suit.

2. The Respondent filed its Defence on 2005 denying that the Plaintiff's early retirement was based solely on medical grounds and therefore unlawful. It averred that the termination was lawfully done based on both medical grounds and his performance, and potential for future performance under increased responsibilities. It therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 7.11.2018 when the claimant testified as CW1 and the respondent called its Head of HR Mr. Elijah Kamau Kariuki who testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's case**

4. Cw1 testified that he was employed by the respondent as Clerk from 1.10.1999 and worked till 31.12.2004 when he was retired on medical grounds while serving as the Branch Manager Gatundu. He further testified that on or about the 19th September 2004 he was admitted at Agha Khan Hospital, Nairobi where he was diagnosed with mild diabetes and was discharged after two weeks. Thereafter the Respondent's Chief Executive Officer, Mr. Titus K. Muya called him to the Head office on 3rd November 2004 where he met with the CEO, Operations Manager Mr Simon Nguchu and HR Manager Mr. Muniu. That in the meeting the CEO informed him that it had been decided that he should be sent home in early retirement on medical grounds.

5. Cw1 further testified that he verified that there was no correspondence between Aga Khan Hospital and the Respondent and that the Respondent never sent him for medical examination before retirement. He testified that after his retirement, he went for medical examination at the Hospital and in the Medical Report, the Hospital stated that diabetes was not a ground for his early retirement.

6. Cw1 further testified that he served diligently never he had any performance issue and that is the reason why he rose through the ranks from a Clerk to Branch Manager within a span of 5 years and his salary increased to Kshs. 54,000 at the time of his retirement. He contended that his Certificate of Service dated 3rd August 2015 is the confirmation that he was retired on medical grounds and not the loss of Kshs. 99,000.

7. Finally, he testified that on 5.11.2004 he appealed against the early retirement on ground that he had not contracted a terminal disease and that he had fewer chances of securing another job after the retirement but the appeal was ignored. He maintained that the retirement was unfair and unlawful and prayed for the reliefs sought in the suit because before retiring an employee on medical grounds the employee must be unable to work. He however confirmed that he was given a Certificate of service dated 29.3.2005 after the separation.

8. In cross-examination the Claimant testified that though there had been a loss of Kshs. 99,000 occasioned by a teller in his branch, he is the one who reported the loss of the money and that this incident occurred before he was diagnosed with Diabetes. He further testified though the Respondent calculated his retirement dues, the same was not full and final, and he disputes the amount by bringing this suit.

### **Respondent's Case**

9. Rw1 stated that the Claimant's early retirement was not solely based on medical grounds but also based and influenced by the Claimant's poor work performance, and a broad consideration of the performance of his job, potential future performance and his capacity to handle increased responsibility. He further contended that the retirement was lawful pursuant to clause 3(b) of the contract of service, which provided for termination of the contract by either party giving one month notice or paying salary in lieu of notice.

10. Rw1 further testified that between July 2003 and April 2004 Kshs.99,000 was stolen from client's account due to laxity or negligence of duty by the claimant as the acting Branch Manager. That contrary to the bank policy, the claimant allowed the client's account to be operated without a Smartcard and that is when the fraud was committed by a Teller in his branch, Mr. Patrick Muchai Kiarie. He admitted that the Claimant appealed the decision to retire him but his appeal was unsuccessful. He further testified that the Claimant was paid all his dues after the separation including Kshs.126,958 on 7.2.2005 plus Kshs.262,685 on 31.3.2005 being terminal dues and pension contributions less liabilities and statutory deductions.

11. In cross-examination Rw1 stated that there was an audit report in respect of the loss of Kshs. 99,000 but the audit report was not produced in Court.

He however admitted that the report never recommended the Claimant's retirement. He testified that the Claimant was to blame for the loss of the client's Kshs.99,000 but instead of dismissing him the bank gave him a soft landing through early retirement. He further admitted that the Claimant never requested for retirement on medical grounds.

## Claimant's submissions

12. The Claimant submitted that he was purely dismissed on medical grounds as evidenced by the Certificate of Service dated 3rd August 2005 which states that the Plaintiff was retired on medical grounds with effect from 1st January 2005. He further submitted that it is a fact that the Plaintiff did not request for an early retirement from the Respondent and that the Respondent arbitrarily and unlawfully decided to send the Claimant on early retirement. He relied on the case of **Benson N. Irungu v Total Kenya Limited [2015]eKLR** where the Court held:

*“a serious matter of early retirement ought to have been properly documented by an employee initiating it in writing and the employer to accept the request in writing. Lack of a letter of request and a letter of consent to the request makes the Respondent’s version highly unlikely and untrue. The court finds that the Claimant has proved his case on a balance of probabilities and that the Claimant was unlawfully and unfairly retired at age 55 years and as a result lost five (5) years of service and has suffered loss and damage.”*

13. The Claimant submitted that the Claimant was forced into retirement under the guise of medical grounds, which constituted a violation of the Claimant’s protection from inhuman treatment contained under section 74 of the now repealed Constitution. The Claimant further submitted that his early retirement was unfair and/or unlawful and was fueled by discrimination. The Claimant also submitted that the early retirement was orchestrated by the Respondent to avoid its obligations to provide him with medication under section 12 of the Employment Act (repealed).

He relied on the case of **Paramount Bank Ltd v Mohammed Ghias Qureshi & another [2005] eKLR**.

14. The Claimant further submitted that the contract of employment did not provide conditions upon which the Claimant would be dismissed but only provided for termination of the contract by one month notice in the event of dissatisfaction of either party. He relied on the decision in **McClelland v N. Ireland Health Board [1957] 2 ALL E.R.T.**

15. The Claimant concluded by submitting that because his contract of employment was wrongfully terminated he is entitled to the prayers sought. He relied on the Court of Appeal decision in **Alfred J. Githinji v Mumias Sugar Company Civil Appeal No. 194 of 1991** and section 15 (1) of the Trade Disputes Act (repealed) which provided for reinstatement or compensation, to urge that he should be awarded compensation against the Respondent for unlawfully subjecting him to an early retirement.

## Respondent's Submissions

16. The Respondent submitted that the Certificate of Service issued on 29th March 2005 did not identify the reason why the Claimant left employment. It further submitted that the contract of employment having been founded on the offer letter dated 27th September 1999 and the Employment Act Cap 226 (now repealed) the Claimant was lawfully terminated. That Clause 3 of the Letter of Offer of Employment provided for the notice period of one month but the Claimant was notified of the decision to retire him in November, which retirement was take effect in January 2005 and he remained in employment upto the end of December 2004. The Respondent relied on the decision in **Paramount Bank v Mohammed Qureshi & Another [2005]eKLR** where the Court held:

*“A contract of service must be terminated by notice, unless the hiring is for a definite period...”*

17. The Respondent further submitted that it was all through compliant with section 12 of the Employment Act Cap 226 (repealed) as it supported to the Claimant at all times by granting him sick leave and provided medical cover to him.

18. As regards the reliefs sought, the Respondent submitted that general damages are not payable since the claim arises out of the termination of employment before the commencement of the current Employment Act.

The respondent relied on the decision in **Gitau v East African Power and Lighting Co. Limited** which was cited in **Otieno v Stanbic Bank Kenya Limited [2012] eKLR**.

19. The Respondent further submitted that the order for compensation of the Claimant's career takes the nature of general damages and the same are not payable. The Respondent relies on the decision in **Bachitter Singh Chase v Barclays Bank of Kenya Ltd [1990] eKLR**.

### **Analysis and determination**

20. There is no dispute that the claimant was employed by the respondent from 1.10.1999 until 31.12.2005 when he was terminated on an early retirement. The issues for determination are:

- a. Whether the Claimant's early retirement was unlawful.
- b. Whether the Claimant is entitled to the reliefs sought.

#### **Whether the Claimant's early retirement was unlawful**

21. The Claimant contends that he was sent on early retirement due to medical reasons but the Respondent alleges that the decision to retire the claimant early was not only due to medical reasons but also his performance. Rw1 testified that the Claimant was retired based on his performance and capability to handle increased roles. The termination notice was not in writing. The certificate of service and a recommendation letter produced as exhibit and which were both signed by the respondent's HR Officer Mr. J.N. Muniu on 29.3.2005 and 5.8.2005 respectively sharply contradict on the matter. The former never stated the reason for the early retirement of the claimant but the latter stated that the retirement was on medical grounds.

22. I have carefully considered the evidence and the submissions on this issue.

It is fact that the claimant's contract of service was for an indefinite period terminable by one month notice or payment of salary for the said notice period. It also a fact that section 14 of the repealed Employment Act, provided in mandatory terms that a notice to terminate a contract of service of more than 6 months period was to be in writing. It is also a fact that the respondent retired that the claimant by a verbal notice of more than one month. It is the violation of the said section 14 that has caused the dispute now before the court as to what reason(s) caused the early retirement. Although the respondent denied that the only reason for the early retirement of the claimant was medical, there are a number of facts that persuade me that that was the only reason.

23. First the claimant's appeal against the verbal notice given on 3.11.2004 through his letter dated 5.11.2004 only respond to the issue of medical ground and concur with the management appreciation that he had worked for the bank hard, honestly and with commitment. Second, the claimant has produced as exhibits and without any objection several letters dated 22.5.2002, 25.5.2003 and 31.5.2004 showing that his salary was steadily increased due to his good performance from Kshs.36,500 to 54000 per month. Third, the respondent confirmed that the reason for the early retirement was medical grounds through her letter dated 3.8.2005. The said letter has not been disputed and was indeed produced as exhibit 8 by the claimant without objection. I therefore return that the reason for the early retirement of the claimant was medical grounds.

24. The question that arises is whether the reason was valid in the circumstances of this case. The burden of proving that the claimant was medically unfit to continue serving rested with the respondent to prove the same using expert opinion. The respondent never produced as exhibit, any medical certificate showing that the claimant was not capable of performing his duties any more. Consequently, I return that the Claimant's early retirement on medical grounds was unlawfully because the said reason was not backed by any medical certificate from medical expert.

25. In addition to the foregoing, the Claimant contended that his early retirement was undertaken by the Respondent in order to avoid the obligation to meet her medical expenses under section 12 of the Employment Act Cap 226 (now repealed). In particular the Claimant stated that the Respondent did not provide any medicines as required under Section 12 (1) of the Employment Act. Section 12 provides thus:

*“12. (1) Subject to subsection (2) every employer shall ensure the provision for his employees of proper medicines during illness and (if procurable) medical attendance during serious illness, and shall take all reasonable steps to ensure that the illness is brought to his notice as soon as reasonably practicable after the first occurrence thereof.*

*(2) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was so brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.”*

26. The respondent, however contended that she had complied with section 12 of the repealed Act after the claimant completed his probation. It observed that Clause 5 of the Claimant’s Letter of Offer of Employment dated 27th September 1999 provided that upon his successful completion of his probation and confirmation to permanent staff status the claimant was eligible to join the Company’s pension, medical and group life scheme. Further, in the letter dated 24th April 2001 informing the Claimant of his salary increment the Operation Manager stated that the board of Directors had discussed the staff medical scheme and decided to enhance staff benefits and upgrade scheme management. Consequently,

I return that, having provided a medical cover to the Claimant, the Respondent had indeed complied with section 12 (1) of the Employment Act Cap 226 (now repealed), since the claimant had access to medical attention. In addition, the claimant did not deny that the Respondent had supported him by giving him sick leave when the need arose.

#### **Whether the Claimant’s is entitled to reliefs sought.**

27. In view of the finding herein above that the early retirement of the claimant was not justified by any valid reason, I make a declaration that the retirement was premature, unlawful and a breach of the contract and therefore wrongful.

28. As regards the claim for damages, there is no dispute that the claimant was paid his terminal dues inclusive of one month’s salary in lieu of notice and pension contribution. He, however, prayed for compensation for the loss of career, general damages for breach of statutory rights and punitive damages for malicious termination. The Respondent submitted that the Claimant was not entitled to general damages or compensation since that remedy was not provided for in the repealed Employment Act as in the current Employment Act.

29. After considering the rival submissions on the matter, I am persuaded by the claimant’s case that before the Employment Act 2007 provided for compensation for wrongful and unfair termination of employment contract, the remedy was enacted under Section 15 (ii) of the Trade Disputes Act. The section provided that compensation equivalent to 12 months’ salary may be awarded for wrongful termination. The section provided as follows:

***“In any case where the Industrial court determines that the an employee has been wrongfully dismissed by his employer, the court may order the employer to reinstate the employee in his former employment, and the court may in addition to or instead of making an order for reinstatement, award compensation to the employee:***

***Provided that such compensation shall not exceed-***

***(i) in any other case, where the reinstatement is ordered, the actual pecuniary loss suffered by the employee as a result of wrongful dismissal;***

***(ii) in any other case, twelve months’ monetary wages.”***

30. Having found that the Claimant early retirement was unlawful and therefore wrongful, I award the Claimant 12 months’ salary compensation under section 15 (1) (ii) of the Trade Disputes Act being Kshs.

54,000 x 12 months = Kshs. 648,000. In awarding the said relief, I have considered the 5 years' service and the reasonable expectation that the claimant had to continue serving and making an income.

**Conclusion and disposition**

31. I have found that the claimant was prematurely and unlawfully retired on medical grounds and therefore he is entitled to compensation for the wrongful termination of his contract. Consequently, I enter judgment for the claimant in the sum of Kshs.648,000 plus costs and interest at court rates from the date hereof. The said award is subject to statutory deductions.

**Dated, Signed and Delivered at Nairobi this 8th day of March, 2019.**

**ONESMUS MAKAU**

**JUDGE**