



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 415 OF 2018

NIXON MWAI KIMITI.....CLAIMANT

VERSUS

BRITISH ARMY TRAINING UNIT KENYA.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent in 1975 and in 1979 he signed a contract which provided for age of retirement age as 55 years. On 5.9.2017 he was served with Notification of Retirement effective from 1.1.2018 but he protested stating that being a person with disability registered with the National Council of Persons with Disability, his retirement age ought to be 65 years. Thereafter by the letter dated 24.11.2017, the said notification was changed to make the effective date of retirement to be 11.12.2018 and when he protested again by his lawyer's letter dated 18.12.2017, the employer started mistreating him and on 1.3.2018, he was served with first warning letter and sent for a 4 weeks retraining and instruction. On 13.3.2018, he served his resignation letter and brought this suit on 26.3.2018 contending that he was constructively dismissed and prayed for the following reliefs:-

- a. A declaration that the termination process as carried by the respondent is unlawful, illegal, and null and void.
- b. A declaration that the notice of retirement at 60 years dated 24/11/2017 made by the respondent to the claimant is premature, legally untenable, ultra vires the respondent's terms and condition of service governing the claimant's employment being a person with disability.
- c. A declaration that the decision by the respondent to retire the claimant from the service upon the claimant's attainment of the age of 60 years amounts to unfair termination of the claimant's contract of employment and he should retire at the age of 65 years not 60 years that on the effect from 11/12/2023 when the claimant will attain the age of 65 years, unless lawfully terminated.
- d. An order directing that the Respondent to unconditionally reinstate the Claimant to his employment services and former position with the Respondent without any loss of benefit or seniority.
- e. General damages for unlawful and unfair termination of employment.
- f. Costs of the suit.
- g. Any

2. The respondent admitted that she employed the claimant as Locally Engaged Civilian (LEC) until 13.3.2018 when he resigned. She averred that the claimant's employment was governed by her Standing Order 103, Regulation for Locally Engaged Civilians Staff (RLEC) and Kenya Employment Laws and best practices. She further averred that the claimant voluntarily signed a contract of service on 29.7.1979 providing for retirement age of 55 years which was later increased to 60 years vide the Standing Order 103. She further averred that the claimant had indicated his year of birth as 1958 and as such, he was notified of the approaching retirement age by letter dated 5.9.2017 but when he provided evidence that his date of birth as 11.12.1958, the effective date of his retirement was changed from 1.1.2018 to 11.12.2018. She appreciated that persons with disability in the public service retire at 65 years but contended that the claimant was not employed in the public service. She denied that the claimant was coerced to resign and prayed for the suit to be dismissed with costs.

3. The suit was heard on 6.11.2018 when the claimant testified as Cw1 while M/s Linda Hardiman testified for the respondent as Rw1. Thereafter both parties filed written submissions. The issues for determination herein are:-

- (a) What was the claimant's retirement age under his contract of service.
- (b) Whether his resignation on 13.3.2018 amounted to constructive termination.
- (c) Whether he is entitled to the reliefs sought.

Claimant's case

4. Cw1 testified that he worked for the respondent from 1975 till 13.3.2018 when he was unfairly terminated. That on the said date he was summoned to the Civilian Liaison Staff Office (CLSO) by the CLSO where he was intimidated, coerced and forced to write a resignation letter failure to which he be summarily dismissed and thereby loss all his benefits. That the CLSO dictated the contents of the letter and ordered him to sign. That thereafter the letter was typed and again he was told to sign and when he refused, he was dispossessed his gate pass and barred from reporting back to work. He contended that the forced resignation amounted to unfair termination and prayed for the reliefs sought in his claim.

5. He contended that his retirement ought to have been 65 years because he had suffered 60% disability after amputation of his right leg following an accident while in the course of employment by the respondent. He contended that the reason he was subjected to early retirement and latter coerced to resign was because he filed suit (CMCC No. 5084 of 2016) claiming compensation for the said work injury from the respondent. He admitted that clause 44 of the Respondent's Standing Order 103 provided for retirement age of 60 years. He further contended that after the termination he was paid one month salary in lieu of notice. He further contended that he took to the employer a letter from the council of people with Disability and pleaded for an extension but all in vain.

6. He contended that he was terminated at the age of 59 years without following a fair procedure. That he was mistreated by the employer and forced to resign. That his driver's gate pass was withdrawn forcing him to work with problems due to the amputated leg. He contended that he was pushed about by Warrant Officer II forcing him to write the resignation letter in the morning on the said day. That at 10.30 a.m. the same day he refused to sign the typed letter and the said officer called his Senior Major Holyman who violently pushed him out and he left with his uniform. He prayed for salary for 6 months period before the normal retirement age of 60 years.

7. In cross examination he stated that he was born on 11.12.1958 and joined the respondent in March 1977. He admitted that the contract of service provided for retirement age of 55 years but later the respondent extended it to 60 years vide her Standing Orders. He contended that he was injured while at work on 22.8.1978 and the employer met all his medical bills. That on 17.7.2017 he filed CMCC No. 5084 of 2017 and on 5.9.2017 he was served with a retirement notice taking effect from 1.1.2018. That when he availed his National Identification card showing date of birth as 11.12.1958 the effective date of retirement was moved to 11.12.2018.

8. He contended that by his letter dated 21.9.2017 he requested that he be retired at 65 years on the basis of circular by the PS Ministry of State for Public Service dated 29.5.2012 and the persons with Disabilities Act. He however admitted that the said circular concerned persons working in the public service. He further admitted that he was served with the warning letter dated 1.3.2018 after absenting himself from work due to sickness and failed to avail a sick sheet to the employer until he reported back to work.

9. He admitted that he was not forced to resign by CLSO but changed to say that it was his Line Manager Warrant Officer II who forced him. He however admitted that he never wrote any complaint that he was forced to write a resignation letter. He however maintained that his disability was never considered before the termination and he was never compensated for the said work related injury.

Defence case

10. Rw1 is the respondent's CLSO since November 2017. She testified that the claimant was employed by the respondent as a LEC from 1979 to

13.3.2018 when he resigned from employment. That the claimant's employment was governed by her Standing Order 103 and Regulations for LECs. That the said Regulations applies to the LEC in the UK MOD's Units and all the other countries where the respondent operates but the Standing Order 103 applies only to LECs working in Kenya.

11. Rw1 further testified that under the employment contract signed by the claimant on 9.7.1979, the normal retirement age was 55 years. That the retirement age was however increased to 60 years under Clause 40 Standing Order 103 and Clause 1312 of the RLECs. That clause 1312 of the RLECs provided an extension of service for a LEC by the Commander for maximum of two weeks in very exceptional circumstances to facilitate handing over.

12. Rw1 further testified that her predecessor Major Michael Farrington sent letter dated 5.9.2017 to the claimant notifying him that his retirement date was 1.1.2018 when he was expected to reach 60 years. That on 20.9.2017, the National Council for persons with Disabilities wrote a letter to the respondent requesting her to adopt the HR Policies and Procedures manual for the public service and a Government Circular dated 29.5.2012, which extended retirement age for people with disability in the public service from 60 years to 65 years. That in addition, the claimant wrote a letter dated 21.9.2017 to the respondent requesting for an extension of the retirement age to 65 years. That again on 28.9.2017, the claimant wrote to the respondent demanding for the withdrawal of the retirement notice.

13. Rw1 further testified that on 19.10.2017, the claimant met with the CLSO Major Farrington and provided proof that he was born on 11.12.1958 as a result of which the claimant was served with a letter dated 24.11.2017 informing him that his retirement date was going to be 11.12.2018. That thereafter the claimant started missing work on account of sick off for upto 2 weeks without contacting his Line Manager as a result of which he was served with a first warning letter on 1.3.2018. She however contended that the said warning letter was not related to the claimant's demands on the retirement age.

14. Rw1 further testified that on 13.3.2018, the claimant tendered his resignation but she denied that he was compelled to resign as he alleges. That the resignation was accepted and he was paid his terminal dues in accordance with paragraph 1400 and 1404 of the RLECs. That the dues included gratuity of Kshs.6,033,232, one ex-gratia, a month's salary in lieu of notice being Kshs.147,152, salary upto 12.4.2018 being Kshs.66,218.40 plus Annual leave, Travel allowance of Kshs.5,000.

That the gratuity was based on one month salary per year of service.

15. Rw1 denied ever forcing the claimant to write the resignation letter, or ever withdrawing his gate pass. She maintained that he resigned voluntarily and thereafter handed over his gate pass among other items. She contended that the RLECs 2018 were widely circulated to all the respondents employees including the claimant. She further contended that the one month salary in lieu of notice was paid to the claimant as a gift because he was having disability. She concluded by stating that the dues were paid through the claimant's account after he failed to give his approval to the computation.

Analysis and determination

(a) Retirement Age

16. There is no dispute that the contract of service signed by the claimant in 1979 provided that his retirement age was 55 years. There is further no dispute that under clause 44 of the Standing Order 103 and clause 1312 of RLECs the retirement age was increased to 60 years.

17. The claimant has however contended that his employment was subject to the Public Service HR Policies and Procedures Manual and the Government Circular dated 29.5.2012, which raised the retirement age of persons with disabilities in the public service to 65 years. He further contended that his employment was subject to the Persons with Disabilities Act under which the mandatory retirement age for persons with disabilities was set as 65 years.

18. The respondent has on the other hand contended that the claimant herein was not employed in public service and as such, the public service HR Policy and Procedures Manual and the Circular dated 29.5.2012 was not applicable to him. She submitted that the said HR Manual and the Circular applied only to persons with disabilities who were employed in the public service. She further submitted that the claimant did not show why the said Manual and Government Circular should supersede the express terms of contract and her Standing Order 103. She relied on *Kenfreight (EA) Limited Vs Benson Nguti [2016]eKLR* where the Court of Appeal held that in employment relationship the parties are bound by the terms of their contract of service. She therefore maintained that under the contract of employment, the retirement age for the claimant was 60 years as provided by the Standing Order 103 and RLECs. She concluded by observing that there was no law that provides that the retirement age for the persons with disabilities is 65 years.

19. I have carefully considered the evidence and submissions presented by both parties. There is nothing presented by the claimant to prove that the Public Service HR Manual and Government Circular dated 29.5.2012 was applicable to his contract of service. If the Government of Kenya intended to bind all employers to retain persons with disabilities upto the age of 65 years, the same could have been stated in the said Government Circular or a statute. Consequently, I return that the retirement age for the claimant was 60 years as provided under clause 44 of the standing Order 103 and clause 1312 of the RLECs of February 2018.

(b) Constructive termination

20. The claimant contended that he was frustrated by the respondent's staff and forced to resign. That his driver was denied access to the camp forcing him to walk for 4 kilometres despite his disability. That he was further forced to write and sign a resignation letter, and thereafter his gate pass was withdrawn.

21. The respondent on the other hand contended that she never coerced the claimant to resign and maintained that he resigned voluntarily. She contended that the burden of proving constructive termination is on the employee who alleges that he was so terminated. She relied on *Coca Cola East & Central Africa Limited Vs Maria Kagai Ligaga [2015]eKLR* where the Court of Appeal discussed the principles relevant to determining constructive dismissal. The respondent further submitted that claimant contradicted himself on the identity of the officer who allegedly coerced him to resign. That the claimant never called his driver to confirm that he was indeed denied access to the respondent's camp to drop and pick him.

22. After careful consideration of the evidence and the submissions by both parties I am of the opinion that the claimant has not on a balance of probability proved that he was constructively dismissed. In my own assessment, the claimant was a well informed person going by the way he used his lawyer to protest against the retirement notification. He admitted that although he wrote protests against the retirement notification, he never wrote any protest or lodged any complaint against the respondent regarding the alleged harassment and forced resignation. He also never called his driver to prove that his gate pass was withdrawn forcing him to walk with difficulties to his office.

23. In the said *Coca Cola East and Central African Limited Case*, the Court of Appeal held that the criterion for constructive dismissal is that the employee left employment without notice because of the employer's conduct. The court held that:

“The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test.

The second interpretation is that the employer's conduct is so grave that it constitutes a repudatory breach of the contract of employment– this is the contractual test.”

In this case, it is my finding that the said criteria have not been proved on a balance of probability.

(c) Reliefs

24. In view of the finding herein that the claimant has not proved that he was constructively dismissed before the retirement age, I decline to grant the reliefs sought. In making the foregoing opinion, I am alive to the fact that the claimant was paid his terminal dues after the termination a fact that was not disputed.

Conclusion

25. I have found that the retirement age of the claimant under his contract of service was 60 years. I have further found that his resignation on 13.3.2018 did not amount to constructive termination. Finally, I have found that the claimant is not entitled to the reliefs sought in his statement of claim. Consequently, I dismiss the suit with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 26th day of April, 2019

ONESMUS N. MAKAU

JUDGE