



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 88 OF 2018

ROBERT KITHINJI KIUGU.....CLAIMANT

VERSUS

AAA GROWERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for purportedly retiring him without reason despite the fact that he was a permanent employee aged 56 years old. The Claimant averred that he was employed by the Respondent as a security manager on 1st March 2005 and was Kshs. 55,000/- a month. He averred that his services were terminated on 31st October 2017 by the Respondent on grounds that the Claimant had attained the age of retirement. He averred that however, he was 56 years at the time and he was willing to continue working until he attained the retirement age of 60 years. The Claimant averred that the Respondent owed him a sum of Kshs. 4,050,667/- at the time of the said termination. The Claimant thus sought compensation for unfair termination – Kshs. 660,000/-, salary for the remaining term of service until attainment of the retirement age of 60 years – Kshs. 2,640,000/-, refund of uniform expenses and security apparels for 12 years – Kshs. 10,000/-, unpaid arrears for 82 public holidays worked – Kshs. 300,667/-, service pay for 12 years worked – Kshs. 330,000/- and costs of the suit plus interest on the sums claimed.

2. In its defence, the Respondent admitted employing the Claimant as head of security and that the Claimant was retired from employment upon attainment of the statutory age of 55 years as envisaged under Section 17(2)(b) of the 1989 Regulations of Wages and Conditions of Employment Cap 229. The Respondent averred that the Claimant is not entitled to any compensation for unfair or unlawful termination or salary for the remaining term as he had attained the retirement age. The Respondent averred that the Claimant has not rendered any services to the Respondent to be entitled to the sums sought in the claim. The Respondent averred that he is also not entitled to the refund of uniform expenses and security apparels as those were provided by the employer as outlined under the employment contract. The Respondent averred that the Claimant was a member of NSSF and therefore not entitled to service pay. The Respondent thus prayed that the Claimant's suit be dismissed with costs to the Respondent.

3. The Claimant testified while the Respondent called the head of payroll Mr. Aggrey Kiboi to testify on its behalf. The Claimant testified that he was employed on 1st March 2005 and worked for the Respondent until 4th November 2017 when the Respondent decided to retire him. He stated that he was 56 years at the time and that he was a permanent employee. He therefore expected to work up to 60 years. He stated that he was supposed to be issued with uniforms but he used his own clothes for the 12 years he was employed and that he was only issued with uniforms for one year. The Claimant testified that he used to work on holidays and was never paid prior to 2013. He stated that he was given the dismissal but was not given time to clear. He said that he never requested to retire and that he was to go on leave after receiving the letter retiring him. He testified that he did not receive any indication of the dues that the Respondent alleged to have calculated and stated that the termination affected him a lot as he had loans to repay and his children were in school. He stated that for all the 12 years he never had any disciplinary issue while working for the Respondent. On cross-examination he confirmed that other managers never wore uniform but he required uniform because he used to train the other staff. He stated that he was never given time to prepare as he was told to retire at the end of the day after work. He testified that he was sent on retirement due to company restructuring which was allegedly going to affect the security department.

4. The Respondent's witness was the head of payroll for the Respondent and he testified that the Claimant was issued with a letter of retirement as he had attained 55 years being the retirement age as envisaged by the Regulations of Wages and Conditions of Employment Cap 229. He stated that the Claimant was the head of security and managers did not wear uniforms. On cross-examination he stated the he did not have anything to show that the Claimant was presented with the document computing the Claimant's dues. He testified that the Claimant was given a notice of one month. He stated that the letter was titled as a dismissal letter and it informed the Claimant about the company restructuring.

5. The parties were to file submissions and the Claimant filed submissions on 26th March 2019. He submitted that he was purportedly dismissed due to structural changes in the Respondent and that the Respondent therefore ought to have followed the guidelines of Section 40 of the Employment Act on redundancy. He submitted that failure to follow the said laid down procedure rendered the termination unfair and

unlawful. He submitted that the reason of attaining the age of retirement as used by the Respondent is contrary to Section 10(5) of the Employment Act as it amounts to forced retirement and was a change to the Claimant's contract of employment. He submitted that he was to retire at the age of 60 years and that by the mere fact that the Respondent had allowed him to work for an extra year having said that the Claimant ought to retire upon attaining the age of 55 meant that the Respondent ratified the contract by its conduct thus creating a legitimate expectation that he would retire at the age of 60. He submitted that the Respondent was estopped from changing the terms of employment without consulting him. He relied on the case of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 Others [2014] eKLR**. He sought the full compensation for 12 years for unlawful termination as guided by the principle in the case of **Benson Githinji v The Attorney General & 4 Others [2014] eKLR**.

6. The Respondent submitted that the Claimant was retired from employment as he had attained the mandatory retirement age for a security officer as envisaged in Regulation 17(2) (b) of the Regulation of Wages (Protective Security Services) Order which provides that 'the normal retirement age shall be fifty-five years'. The Respondent submitted that the Claimant's argument that the Regulation relied on had been repealed is erroneous. It relied on Section 24 of the Interpretation and General Provisions Act Cap 2 and submitted that no evidence was led by the Claimant to prove that the Regulation of Wages (Protective Security Services) Order was repealed or revoked. The Respondent submitted that the Claimant came up with a popularized retirement age and asked the court to adopt it without leading evidence to prove that he was to retire at the age of 60. The Respondent cited the case of **James Kabengi Mugo v Syngenta East Africa Ltd [2013] eKLR**. The Respondent submitted that the Claimant did not prove any of the prayers sought and therefore urged the court to find the entire claim had no merit and dismiss it with costs.

7. The issues that fall for determination from the foregoing pleadings, testimony and submissions are:-

- i. Whether the termination/retirement of the Claimant's employment by the Respondent was wrongful, unfair and unlawful.
- ii. Whether the Claimant is entitled to the reliefs sought.

As to whether the termination/retirement of the Claimant's employment by the Respondent was wrongful, unfair and unlawful, the fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, the Claimant would only be entitled to damages for the unprocedural termination or lack of substantive reasons for the termination. The Claimant was appointed as a security manager by the Respondent through a letter dated 1st March 2005 and the Respondent sought to terminate the employment through a letter dated 31st October 2017 which indicated that the Respondent was undergoing restructuring that would affect the Claimant's docket. The Respondent informed the Claimant that he had reached the retirement age of 55 years and the letter was his retirement notice. The Respondent placed reliance on Regulation 17(2)(b) of the Regulation of Wages (Protective Security Services) Order which provides that the normal retirement age shall be fifty-five years. The Claimant's employment contract did not provide for a retirement age. It only provided for termination as follows:-

"Either the parties can terminate their employment by giving one month's notice or one month's salary in lieu of notice." In the case of **Steel Makers Limited v Joshua Nzuki [2016] eKLR** the Court of Appeal held as follows:-

"But what happens where the termination on account of retirement is not provided for in the contract or under the law? Indeed, it is clear that our statutes do not have a set mandatory retirement age for persons working in the private sector. It is also common ground that the appointment letter dated 20th August 1986, issued to the respondent, made no mention of the retirement age. Then in that instance we take the view that the issue falls purely within the realm of the law of contract. As with any other contract, the courts will look at the conduct of the parties to ascertain their true intention on the unwritten aspects."

Quite evidently there is no mandatory retirement age specified in statute within the private sector unlike the public sector. More often than not, the retirement age is specified in the individual contract of employment in the private sector. The Respondent in this case chose to rely on Regulation 17(2)(b) of the Regulation of Wages (Protective Security Services) Order on the normal retirement age and gave the Claimant a one month's notice of such retirement in line with the employment contract. The Claimant has argued that the said Regulation 17(2)(b) has been repealed. Although the Labour Institutions Act was indeed repealed in 2007, Regulation 17(2)(b) is saved by Section 24 of the Interpretation and General Provisions Act which provides as follows:-

"when an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder".

8. The Claimant was given sufficient notice of one month for the retirement. The retirement letter was issued on 31st October 2017 it was to take effect on 30th November 2017. In my view the retirement of the Claimant's employment by the Respondent was not wrongful, unfair and unlawful. As to whether the Claimant is entitled to the reliefs sought. Since the court has found the termination to have been fair, there is no relief in respect of the damages sought. Regarding the refund of uniform and security apparel this is a specific damage that requires to be properly pleaded and strictly proved. The Respondent's position was that as head of security, the Claimant was not required to wear uniform. To the extent that the Claimant failed to prove this claim. As regards the prayer for unpaid arrears for 82 public holidays worked there is no proof to substantiate the claim and the same is dismissed. The Claimant was a member of NSSF and Section 35(6) of the Employment Act precludes a member of NSSF like the Claimant herein to receipt of service pay. Although the Claimant sought the alleged unpaid arrears for 82 public holidays worked and sought a composite sum of Kshs. 300,667/- he neither proved nor explain how he arrived at the figure. The upshot of the foregoing is that the claim is not merited and the suit is dismissed without orders as to costs.

It is so ordered.

Dated and delivered at Nyeri this 17th day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar