



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 2160 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 2nd July, 2019)

JOSEPH OKOTO AJWANG.....CLAIMANT

VERSUS

KENGEN COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 7th December, 2015, seeking damages for wrongful, unfair and unlawful forced early retirement leading to his summary dismissal, violation of his Constitutional Rights to privacy, human dignity, labour relations and right to hearing on Summary dismissal and unlawful and unfair withholding and/or refusal to pay the Claimant's dues on involuntary retirement by the Respondent herein.

2. The Claimant states that he was employed by the Respondent herein since 7th April, 2003 and that he performed his duties dutifully and to the Respondent's satisfaction leading to his promotion to the position of Administration Manager at the time of separation.

3. The Claimant contends that his services were unlawfully, unfairly and wrongfully terminated by the Respondent on 17th July, 2015 vide an email communication to all staff which culminated in the unlawful, forced and involuntary retirement of the Claimant without notice, hearing, reason, privacy and consultation in violation to his Constitutional rights as protected by the Constitution as well as all other enabling laws.

4. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

a) Declaration that the Claimant was unfairly, wrongfully and unlawfully summarily dismissed.

b) Declaration that the Claimant was unfairly, wrongfully and unlawfully forced/involuntarily retired.

c) An Order for the payment to the Claimant for the actual pecuniary loss suffered as the result of the wrongful forced retirement from the date of such offence to the date of determination of this cause as detailed below:-

i. Tabulation on Breach of Term to retirement age (Breach of Employment Contract)

Loss equivalent to 1 month pay x Months to lawful retirement Kshs. 614,551x 63 Months = 38,716,713/=.

ii. Tabulation on Pension Contribution lost due to unlawful Early Retirement

Employer (Company) as per policy contributes 20% of the employee salary equivalent to 20% x salary 8 months to lawful retirement Kshs.614,511x20/100x63=Kshs.7,743,342.60

iii. Tabulation of compensation on unlawful retirement leading to unfair and unlawful summary dismissal

Tabulation as per Section 49 of the Employment Act, 2007

1 month pay x 12 months

Kshs. 614,551x 12 = 7,374,612/=

Total loss and compensation= Kshs. 53,834,667/=

d) A declaration that the Claimant is entitled to be compensated for violation of his Constitutional rights as envisaged under Article 31, 41 (1) and 47 of the Constitution of Kenya.

e) An Order for the payment of interest to the Claimant by the Respondent

f) An order on general damages

g) An order for the payment of legal costs

h) An Order for the payment of other costs and any other relief this Court may deem fair and fit to grant.

5. The Respondent in its Statement of Response dated 12th February, 2016 and filed in Court on 15th February, 2016 deny having engaged the Claimant in the manner as alleged. They further deny that the Claimant's terms of engagement were permanent and pensionable as alleged.

6. The Respondent contends that the Claimant is not entitled to the sum of **Kshs. 53, 834,667** and urged this Court to dismiss the same.

7. The Respondent further contends that the Claimant was lawfully retired vide the letter dated 17th July, 2015 and was in accordance with the Respondent Company's Human Resource Manual and that his terminal dues were computed at **Kshs. 4,322,873.28** and were duly paid to the Claimant less taxes, which payment was duly acknowledged by the Claimant herein.

8. The Respondent urged this Honourable Court to dismiss the instant Claim with costs.

9. This matter was thereafter fixed for hearing on 25th February, 2019 when parties agreed by consent to proceed with the matter by way of written submissions.

Submissions

10. It is submitted by the Claimant that he was indeed forced into early retirement as he did not at any time make a request with the Respondent herein for early retirement. The Claimant further submitted that the forced/early retirement was un-procedural and highly irregular as the Employment Contracts provided for his retirement age as 60 years, the Constitution and the Respondent's Employment Policy. For emphasis the Claimant cited and relied on the **Michael Kagoma Maina Vs Kenya Police Service & 2 Others (2013) eKLR.**

11. The Claimant further submitted that the Respondent in complete violation to the provisions of Clause 1.11.6.6 of its Employment Policy forced the Claimant to retire from his employment and he contended that that action was un-procedural and was in violation of the rules of natural justice. The Claimant for emphasis relied on the case of **James Mwathi Nguri vs Egerton University (2013) eKLR.**

12. The Claimant further submitted that the Respondent's actions were in breach to his constitutional right to privacy as it dismissed the Claimant vide email communication that was shared to all staff at 10.40 pm on 17th July, 2015. He further contends that the Respondent's actions of widely circulating his forced early retirement was contrary to the provisions of Article 28 and 31 of the Constitution of Kenya, 2010.

13. The Claimant admits having received in protest as part payment of his early retirement a cheque of Kenya Shillings Two Million Nine Hundred and Sixty Five Thousand Five Hundred and Ninety Nine Only (Kshs. 2,965,599.00) and that was further issued with several cheques while this matter was on-going totalling to Kenya Shillings Three Million, Five Hundred Thousand Only (Kshs. 3,500,000.00) which he contends is part of his lawful retirement package. The Claimant submitted that the said amounts are however not complete and urged this Court to allow his claim as prayed. For emphasis, the Claimant relied on the Authority of **John Benson Githinji Vs Attorney General & 4 Others (2014) eKLR.**

14. In conclusion, the Claimant contended that he is entitled to the reliefs as sought in his Memorandum of Claim and urged this Honourable Court to allow the same as drawn.

Respondent's submissions

15. The Respondent on the other hand submitted that the Claimant is not entitled to the reliefs he seeks as they followed due procedure as set out in its Human Resource and Administration Policies Clause 1.11.6.6 while sending the Claimant on early retirement and relied on the cases of **Paul Muhoro Kihara Vs Barclays Bank of Kenya Limited (2008) eKLR** and **Kenya Airways Corporation Limited Vs Tobias Oganya Auma & 5 Others (2007) eKLR** for emphasis.

16. It is further submitted that the Claimant was duly notified and all dues owing to him paid at the time of separation. It is the Respondent's contention that it has paid the Claimant a total of Kshs. 7,028,939.00 as terminal dues upon early retirement.

17. The Respondent contends that having paid the Claimant his dues at the time of separation it is not indebted to the Claimant in any way

and urged the Court to dismiss the instant Claim. For emphasis the Respondent relied on the findings in the cases of **Civil Appeal Number 72 of 2017, National Bank of Kenya Limited Vs Hamida Bana & 103 Others (2017) eKLR** and **Caleb Bw'auma Manyaga Vs Kenya Pipeline Company Limited (2019) eKLR**.

18. The Respondent further contends that it did elect to exercise its right to send the Claimant to Early Retirement and that it did so in accordance with the Company Policy and the Employment Act. For emphasis the Respondent cited the Authority of **Joel Kibet Rotich Vs Kenya Power and Lighting Co, Ltd & Another (2017) eKLR**.

19. The Respondent further submitted that the Claimant has not demonstrated that his Claim meets the Constitutional threshold as was highlighted in the decision in **Paul Muhoro Kihara Vs Barclays Bank of Kenya Limited (2008) eKLR**. Further that the instant claim does not meet the principles for Constitutional violation as set out in the case of **Anarita Karimi Njeru (No. 1) (1979) 1 KLR 154** and as such the Constitutional remedy is not available to the Claimant as pleaded.

20. In conclusion, the Respondent submitted that the Claimant's early retirement was lawful, regular and justified and that the same was done as per his Contract as well as the Human Resource and Administration Policies Clause 1.11.6.6. It is further submitted that the Claimant having duly been compensated for the early retirement is not entitled to the reliefs as sought in his Memorandum of Claim. The Respondent urged this Honourable Court to dismiss the instant Claim with costs.

21. I have examined the pleadings and documents of the Parties herein plus the submissions filed.

22. On 23/2/2009, the Claimant was appointed to the post of Administration Manager with effect from 16.2.2009. The terms of engagement are not clearly spelt out in the letter appointing (Appendix JO2).

23. However, the Claimant had been initially employed on 7th April 2003 but his appointment letter has not been annexed to his documents.

24. From Appendix JO2 – the post of Administration Manager was in the Respondent's Executive Terms of Service, which were enclosed to the Claimant for information together with a copy of the Corporate Code of Ethics.

25. From the Respondent's Human Resource & Administration Policies and Procedure Manual Clause 1.11.5.1, normal retirement age was 60 years.

26. There was also an early retirement provision, which is at 1.11.5.2 and which states that an employee may request for early retirement upon attaining the age of 50 years. Clause 1.11.6.6 provide for early retirement at the employer is instigation and which provide as follows:-

“Employees from 50 years and above may be requested to retire early on the following conditions:-

i) Performance has stagnated despite training and performance counselling

ii) Where personal issues effect productivity of an employee.

iii) At the discretion of management payment terms:-

i) Payment of three months last gross salary in lieu of notice including accrued leave days.

ii) Fifteen (15) days salary for every year worked.

iii) Applicable pension as per the Retirement Benefits Scheme”.

27. From the above provision, early retirement could be instigated by the employer upon meeting the above conditions.

28. In the case of the Claimant herein, he was retired early under Clause 1.11.6.6 with effect from 17th July 2015 vide a letter dated the same day. On the same day, a memo was issued to all staff informing them of the early retirement of the Claimant amongst others.

29. From this memo, the factor that may have led to the early retirement could be restructuring which means that there was no consideration of poor performance or lack of productivity on the Claimant's part.

30. From the Human Resource Manual again, the employer could instigate an early retirement of any staff above 50 years old at their own discretion which could be what the Respondent proceeded to do here.

31. The question then is whether the Respondent exercised their discretion lawfully and procedurally. For whatever reason an employee may wish to terminate services of an employee, issuance of notice or notice pay was of necessity.

32. Section 36 of the Employment Act 2007 provide as follows:-

“Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment .to the other party of the remuneration which would have been earned by that other party, or paid by him as the case

may be in respect of the period of notice required to be given under the corresponding provisions of that section”.

33. The Respondent on their part terminated the Claimant’s services on account of retirement. They paid him as per Clause 1.11.6.6 which is the early retirement package. They however never issued him with any notice before the retirement. Given that the Respondent retired the Claimant as provided for under the Human Resource Manual, the only omission is notice which they failed to issue to him and which I now grant being Kshs.614,557 plus costs of the suit.

Dated and delivered in open Court this 2nd day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mochana for Respondent – Present

Ondego holding brief Onyony for Claimant