



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1117 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 23<sup>rd</sup> September, 2019)

MICAH CHERUIYOT.....CLAIMANT

VERSUS

COOPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

**JUDGMENT**

1. The Claimant herein was employed by the Respondent on 22<sup>nd</sup> August 2006 as a Graduate Clerk until 5<sup>th</sup> October 2017 when he was informed of his retirement on medical grounds. He avers, in his Statement of Claim filed on 3<sup>rd</sup> July 2018, that his retirement was discriminatory as he performed his work and that the Respondent opted to retire him prematurely instead of putting in place better staff systems and structures that were sensitive to his needs as a disabled person arising out of his accident.

2. He avers that he was subjected to three show cause letters, which he sufficiently responded to but was still subjected to three disciplinary hearings within a span of 3 months. He further avers that the Respondent did not follow its own internal policy and that no medical exam was performed on him to confirm his state prior to retirement.

3. He therefore seeks the following orders against the Respondent:-

1. *A declaration that the Claimant's retirement was unlawful and unfair.*
2. *Damages for unfair termination in the sum of Kshs. 1,806,012 being 12 months gross pay.*
3. *Salary in lieu of notice in the sum of Kshs. 150,501.*
4. *Damages for discrimination on account of the Claimant's disability.*
5. *The Respondent be ordered to issue the Claimant with a certificate of service.*
6. *The Respondent be ordered to pay costs of this suit.*
7. *Interest on the awards herein at court rates.*
8. *Any further orders as the court may deem fit to grant.*

4. The Respondent filed its Statement of Response on 25<sup>th</sup> September 2018. It denies there being discrimination in its actions and avers that it has a clear policy on people living with disability and that equality also means that in the event of indiscipline, the Claimant would face disciplinary action as other members of staff irrespective of his condition.

5. It further avers that in spite of the Claimant's admitted gross misconduct during the disciplinary hearing it did not summarily dismiss him and that he was informed during the disciplinary hearing that the Respondent had received a report from Eldoret Neurosurgery Hospital which raised grave concerns about the Claimant's health and his continued employment. He maintained that the retirement was fair and lawful and that the Claimant had been paid all his dues pursuant to the terms of his employment.

### **Claimant's case**

6. The Claimant, CW1, testified that in 2009, he was transferred to the Respondent's Siaya branch and in 2013, he was involved in an accident as he was heading to Bondo. He testified that he was injured in the head, leg and lost his hearing in the right ear. He testified that he was admitted to hospital in September 2013 and after receiving treatment he was transferred to Eldoret Branch.

7. He testified that he had never been involved in any disciplinary issue, however in 2012 he was issued with a show cause letter which he responded to. He further testified that from 2006 to 2013 his appraisals were good. It is his case that after the accident he started experiencing convulsions and was regularly admitted to hospital. He testified that he has no hearing in his right ear and he has since registered with the Council of People with Disability.

8. He testified that while in Eldoret he worked as a cash officer and his role was to manage tellers in the bank but he discovered that he couldn't undertake the role he was given. He testified that he was issued with a show cause letter accusing him of absconding duty. He contended that he responded to the show cause letter and thereafter he was issued with a warning letter.

9. He averred that he contacted the Respondent's Human Resource for a transfer as the warning letter was not justified. Consequently, he was transferred to Bungoma Branch where he worked as a vault custodian. He averred that he was appraised and his results were good until 2017 when he was terminated.

10. It was his testimony that while in Bungoma he was regularly issued with show cause letters because he had recurrent convulsions and was admitted to hospital many times. He testified that he sufficiently responded to the show cause letters and that he received warning letters for each show cause letter.

11. He testified that he was subjected to a disciplinary hearing during which time his medical status continued to deteriorate and the number of convulsions and admissions increased. He testified that he was given drugs to suppress the convulsions but the drugs made him drowsy. He testified that he was issued with a warning letter for going to work intoxicated but he had never been intoxicated.

12. He averred that he was invited to a disciplinary hearing where he explained to the Respondent his neurosurgeon's report though he did not produce the neurosurgeon's report at the hearing when he was invited for the disciplinary hearing. He further averred that he was familiar with the HR Manual and was aware of the procedure for early retirement.

13. He averred that he was to make a written request to the Respondent which was to take him for an examination by its own doctor but he never made any such application and was never sent for a 2<sup>nd</sup> medical examination.

14. He further averred that the letter written by Dr. Koech was after his request to have it written so he weigh the options available to him. He averred that he was discriminated upon and urged the Court to award the prayers sought.

15. In cross-examination, he testified that at the time of the accident he was not on duty and was travelling to Bondo University to study. He averred that the Respondent gave him medical support and was given time to go for treatment. He testified that initially, the accident did not affect his performance, as his appraisal was good.

16. He averred that he attributes convulsions to his brain injury and that he got depressed and developed low self-esteem due to discrimination. He testified that he was vault custodian in Bungoma and was also managing stationary in the region. He testified that he wanted a back office job but the manager picked him to be a champion in the front office.

17. He testified that during the disciplinary hearing they did not discuss any issues of early retirement. He testified that the respondent bought him a hearing aid and that Kenya Revenue Authority invited him as a person with disability. He testified that he had a loan when he was leaving which was cleared by CIC Insurance.

18. In re-examination, he maintained that he never submitted any application for retirement and that the staff manual provides what is to be done in case of early retirement and he was never taken for a second medical examination.

### **Respondent's case**

19. Leah Kerech, RW1, the Respondent's Employee Relations Advisor testified on behalf of the Respondent.

20. She averred that she was aware that the Claimant was retired on medical grounds as he couldn't discharge his duties. She denied that the Claimant had low self-esteem due to discrimination. She averred that he turned up at work late and was issued with warnings and show cause letters.

21. It was her testimony that the bank continued being lenient on him and that the bank supports staff with disability. She testified that there was a report that indicates the Claimant could not discharge his duties. She testified that the Claimant never informed the Respondent of being unwell in good time and it is due to this that problems arose.

22. In cross-examination, she testified that she was familiar with the staff manual and that an employer cannot force an employee to proceed on early retirement. She testified that as indicated in the Claimant's appraisal, it indicated that he had met expectation. She averred that she did not have any evidence that the rating was awarded due to leniency. She further averred that she did not produce any evidence that the Claimant came to work intoxicated.

23. She testified that in 2017, the Claimant received 4 show cause letters and warning letters which were beyond those stated in the disciplinary manual and this shows that the Respondent was lenient on him. She testified that clause 14.4 of the Respondent's manual deals with issue of retirement on medical grounds and that the Respondent relied on the report by Dr. Koech and that there was certification on the Claimant's medical condition.

24. In re-examination, she maintained that the claimant exceeded his sick leave days and was given an opportunity to recuperate.

#### **Claimant's submissions**

25. The Claimant relied on Clause 1.26.4 of the Respondent's Staff Manual on retirement on ill health grounds and submitted that the procedure followed required before one was sent on early retirement on medical grounds there ought to be confirmation by a qualified medical practitioner and certification by the bank's appointed doctor.

26. He submitted that though there was a medical report recommending the Claimant to be sent on early retirement, the said report had been obtained by the Claimant from his neurosurgeon at the period he was undergoing depression due to discrimination and that he never submitted the said report or made applications to be sent on early retirement. He further submitted that Dr. Koech never certified her own medical report and if it was done the same was inconsequential.

27. He submitted that his termination was not only illegal and unlawful but was malicious, capricious, unreasonable and contrary to the rules of natural justice. He relied on section 41 of the Employment Act and submitted that the provision was not complied with as his retirement was done unilaterally.

28. He further submitted that Article 47 of the Constitution guarantees every person the right to fair administrative action and that the Respondent contravened this provision when it unlawfully and unfairly retired him on medical grounds without according him an opportunity to be heard.

29. He relied on the case of **Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR** where the Court of Appeal held:-

*“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.”*

30. He relied on section 45 of the Employment Act and submitted that his termination was unfair and unlawful as the Respondent not only flouted its own procedure as set out in the Co-operative Bank Staff Manual but also contravened the law.

31. He submitted that every time the Respondent stripped the Claimant of his duties without any explanation, or required him to do work usually designated for junior employees such as arranging boxes in the storeroom affected his self-worth and self-esteem given the fact that the Claimant was living with disability.

32. He relied on Article 41 (2), (b) and Article 54 (1) (a) of the constitution, Sections 5 (2) and (3) (a) of the Employment Act, Section 15 of the Persons Living with Disabilities Act and submitted that the Respondent was required to improve the employment prospects in the bank for people with disabilities by facilitating recruitment, return to work, job retention and opportunities for advancement.

33. He further submitted that the Respondent failed to adhere to the principle enshrined in the Persons with Disability policy and relied on the case in **Juliet Mwangeli Muema v Smollan Kenya Limited [2019] eKLR** where the Court entered judgment in favour of the Claimant against the Respondent for Kshs.1,5000,000 as compensation on account of constitutional rights violation under Article 10, 27, 28, 41 and 54 of the constitution.

34. He submitted that he is yet to be paid payment in lieu of notice and a certificate of service. He further urged the Court to award him damages for unfair termination.

#### **Respondent's submission**

35. The Respondent submitted that the Claimant was not terminated but was retired on medical grounds for justifiable reasons that he was unwell which illness affected his performance at work. It submitted that the Claimant admitted to obtaining the medical report which he voluntarily submitted to the bank. In support of this argument it relied on the decision in **Benjamin Yego v Bob Morgan Services Limited [2015] eKLR**.

36. The Respondent submitted that it was supportive towards the claimant's journey and offered him the necessary support. It relied on the House of Lord's finding in **Archibald v Fife County Council [2004] ALL ER 303** where the Court held:-

*“The critical questions therefore relate to the duty of an employer under section 6(1) to take reasonable steps to prevent any arrangements made by him placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. If the employer fails to carry out that duty, he discriminates against the disabled person under section 5(2) unless he can show that his failure to comply with the duty is justified by a reason that relates to the circumstances of the particular case and is substantial. In broad terms, the idea is that, if an employer leaves a disabled person at a substantial*

***disadvantage from his arrangements when he should have taken steps to shield her from that disadvantage, he discriminates against her.”***

37. It submitted that the Claimant was invited for a disciplinary hearing on 18<sup>th</sup> September 2017 on which date the panel and the Claimant discussed the medical report with the panel and he was informed that the report would be considered in making a decision. It argued that it had become impossible for the Claimant to discharge his duties due to his ill health and was therefore fair that he retired following a professional opinion and not have his employment terminated. It relied on the decision in **Morowa Fumo v Bamburi Cement Limited [2014] eKLR** where the Court held:-

***“Medical evidence overwhelmingly shows the Claimant is hard of hearing. The Respondent's own Doctor Mukesh Shah recommended in 2011 that the Claimant has suffered loss of hearing and should be retired. The Claimant has been moved from one department to the other by the Respondent, in attempts at reasonable accommodation. He has been treated and offered Hearing Aids, at the expense of the Company. He has been offered the option of retirement on medical grounds. The Court does not see why the Respondent would wish to retain the Claimant today, if the Respondent was ready to let him retire in the past.”***

38. It submitted that when an employer has a physically or mentally ill member of staff, it imposes a duty of care upon the employer to take all reasonable steps in ensuring the wellbeing of the employee hence the steps taken would be anything from granting a sabbatical to letting go of the employee.

39. It further submitted that the Claimant's employment was not terminated within the meaning of Section 45 of the Employment Act and that the mode of separation was a retirement, which was necessary, fair and lawful.

40. It submitted that the Claimant has made an unfounded claim that he was discriminated against and that his Constitutional rights violated under Articles 27, 28 and 41 of the Constitution, Section 5 of the Employment Act as well as Section 51 of the Persons with Disabilities Act.

41. It submitted that in justifying the alleged discrimination, the Claimant has neither specifically pleaded or particularised the particular actions that amounted to discrimination by the Bank. It relied on the decisions of **Anarita Karimi Njeru v the Republic (No.1) 1979 KLR 154** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**.

42. It argued that the claimant was retired for medical reasons and not his disability. It submitted that the Claimant merely made allegations that he was given subordinate roles which he had not proved by corroboration as they do not exist. It argued that the Claimant received very favourable treatment which is positive discrimination.

43. In respect of damages for unfair termination, it submitted that it would not be unjust to award maximum compensation, as the Claimant was unable to work. In support of this it relied on the decision in **Rift Valley Textiles Ltd v Edward Onyango Oganda (1990-1994) EA 526** and the Court of Appeal decision in **United States International University v Eric Rading Outa [2016] eKLR**.

44. It argued that awarding the Claimant salary in lieu of notice would amount to double and unjust enrichment for reason that he was awarded and paid one month's salary in lieu of notice. It submitted that the Claimant has not demonstrated the manner in which he suffered discrimination at work thus, he ought not to be awarded damages for discrimination on account of the Claimant's disability.

45. It submitted the Claimant was informed that his Certificate of Service is available for collection and that he was free to collect to it therefore this is not an issue before this Honourable Court.

46. In conclusion, the Respondent argued that the Claimant had not proved on a balance of probability that he was discriminated against. It further argued and that he had been paid all his terminal benefits and continues to receive the benefits that accrue following his retirement and therefore urged the Court to dismiss the Claimant's statement of claim with costs.

47. I have examined the evidence and submissions of the Parties herein. The issues for consideration are as follows:-

***1. Whether the Claimant's retirement was lawful and fair.***

***2. Whether the Claimant is entitled to the remedies sought.***

## **Retirement**

48. On 5/10/2017, the Respondent wrote a letter to the Claimant "letter entitled retirement on medical grounds". The letter read in part as follows:-

***“We acknowledge receipt of your medical report from Eldoret Neurosurgery recommending your retirement on medical grounds and inform you that the Bank has decided to comply with the doctor's recommendations.***

***Consequently, you are hereby retired from the bank's services on medical grounds in accordance with provisions of the Bank's Staff Manual. The Bank will pay you one month's salary in lieu of notice in accordance with the provisions of the Staff Manual and in addition, you will be entitled to the benefits accruing to this retirement. Your last day in service will be 7<sup>th</sup> October 2017.***

*Please note that your liabilities as at 5<sup>th</sup> October 2017 are as follows:-*

*Res. Prop. Loan (New) - Kshs.2,641,322.00*

*Personal Loan - Kshs. 246,546,00*

*Laptop Loan - Kshs.54,130.00*

*Land Loan (New) - Kshs 1,952,944,00*

*You are required to handover all Bank inventory and/or documents that are under your control together with the staff identification card to the Manager, Bungoma Branch prior to your departure.*

*We take this opportunity on behalf of the Management and the staff of the Bank to thank you for your services and wish you success in future endeavors.*

*Any monies due to you less liabilities shall be determined and paid to you as soon as possible on receipt of the duly completed Forms HRD/2 and Pension Claim Notification form attached hereto.*

*Please note that your Certificate of Service is available for collection from this office.*

*Signed*

*EVELYNE MUNYOKI DIRECTOR*

*HUMAN RESOURCES DIVISION*

49. The Claimant's position is that he had never requested to be retired on medical grounds and that the Respondent did not follow provisions of their own Staff Manual.

50. The Claimant cited Clause 1.26.4 of their Manual on retirement on health grounds which states as follows:-

**i) "When Retirement on ill-health grounds is applicable**

**Retirement on ill-health grounds will be effected upon confirmation by a qualified medical practitioner and certification by the Bank's appointed doctor, that on account of infirmity of body or mind, an employee is unfit to remain in the service of the Bank.**

**ii) Eligibility**

**a) That one will have served the Bank continuously for a minimum period of five (5) years.**

**b) That one is confirmed to be unfit for continued service with the Bank as provided under clause (i) here above.**

**iii) Benefits Payable**

**Upon retirement on ill-health grounds the employee so affected, is eligible for a cash lumpsum and a monthly/quarterly or yearly (whichever is desired) pension payable for the life of the employee. These payments enable the employee to retire and recuperate in the comfort of their homes.**

**iv) Effective date of Scheme**

**The scheme takes effect from 1st January 1997.."**

51. Before this retirement on medical grounds, the Claimant avers that he worked for Respondent well discharging his duties from 2006 as a graduate clerk and worked in different branches. However, in May 2013, he was involved in an accident and was admitted in hospital to September 2013.

52. He indicated that after the accident he started experiencing convulsions and was regularly admitted and he had no hearing in his right ear and was even registered with the Council of People with disability (35% disability).

53. He contends that when he was taken to Eldoret branch, he was managing cash distribution which was a very critical role and so he could not do it well in his condition. Accusations were made against him that he had absconded duty and he responded accordingly and requested for a transfer. He was then transferred to Bungoma.

54. He averred that even in Bungoma his problems did not cease as he still got recurrent convulsions and was admitted in hospital many

times. He was issued with several warning letters and show cause letters and even subjected to a disciplinary hearing.

55. He sought help from a neurosurgeon and requested for a medical report. He was then weighing options for retirement. He avers he however kept the report and only showed it to the Respondent during the disciplinary hearing but he contends that it was never an application for early retirement.

56. He referred Court to the Minutes of the disciplinary meeting held on 18/9/2019 at page 59 to 62 of his documents, which show he had attached the neurosurgeon report to his response to the show cause letter to clarify the issues he was going through but not to indicate that he wanted to be retired on medical grounds.

57. From the reading of the above minutes, the Claimant indeed never submitted a letter requesting for retirement on medical grounds. This is indeed clear from the minutes of the disciplinary hearing.

58. The Respondent picked up this report from the neurosurgeon on their own. They actually wrote to the Claimant referring to the medical report produced during the disciplinary hearing and indicated that they were following the doctor's recommendation and had decided to retire him on medical grounds in accordance with provisions of the Bank's Staff Manual.

59. The Respondent's Staff Manual provides as follows at Clause 1.26.4:-

**i) "When Retirement on ill-health grounds is applicable**

**Retirement on ill-health grounds will be effected upon confirmation by a qualified medical practitioner and certification by the Bank's appointed doctor, that on account of infirmity of body or mind, an employee is unfit to remain in the service of the Bank".**

60. One qualifier is a report from the Banks appointed doctor confirming that the employee is unfit to remain in the service of the bank.

61. The Claimant submitted that he never applied to retire on medical grounds and neither is there evidence that he was subjected to another bank appointed doctor for another independent examination. No report from an independent appointed bank doctor has been submitted before this Court. It is therefore not clear whether the Respondent had valid reasons to retire Claimant on medical grounds.

62. In the circumstances, I find that the Respondent had no valid reasons to retire the Claimant on medical reasons. The Respondent failed also to follow due process as envisaged in their own Staff Manual above.

63. I note however that the Respondent had been very supportive of the Claimant during the time he worked with them and took him through several disciplinary hearings which may have warranted dismissal but in which they treated him leniently due to injuries suffered in the accident. I will therefore find compensation equivalent to 10 months' salary will be payable to the Claimant on account of the unlawful termination =  $10 \times 150,501 = 1,505,010/=$ .

64. The Claimant is also entitled to 1 months' salary in lieu of notice = 150,501/=

**Total – 1,655,511/=**

65. Claim for discrimination is not proved and not awarded.

66. The Respondent is ordered to pay costs plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 23<sup>rd</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant – Present

Respondent – Absent