



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 399 OF 2015**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 16<sup>th</sup> September 2019)*

**SAMSON MUTINDA NGUI.....CLAIMANT**

**VERSUS**

**SOCIAL SERVICE LEAGUE**

**M.P. SHAH HOSPITAL.....RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit vide the Memorandum of Claim filed on 17<sup>th</sup> March 2015, challenging his retirement and the Respondent's failure to pay his terminal dues. The Claimant seeks the following reliefs:-

***a. Service pay for 35 years in the sum of KShs. 607,461.00***

***(KShs. 35,733/2 x 34).***

***b. A notice of 8 months as per the CBA terms KShs. 285,864.00.***

***c. Salary for 3 years in the sum of Kshs.1,286,388.00 (35,733 x 12 x 3).***

***d. Long service award for 9 months 700 x 7 = 4,900.00.***

***e. Maximum compensation.***

***f. Costs of the suit.***

***g. Any other remedy the Court deems fit to grant.***

2. On 8<sup>th</sup> February 1978, the Claimant was employed by the Respondent as a house keeper, a position he held until he retired. On 3<sup>rd</sup> May 2013, he received a retirement notice informing him that he had attained the retirement age and his last day of working would be 31<sup>st</sup> December 2013. At the time of his alleged unlawful retirement, he was earning a salary of Kshs.35,733.00 inclusive of house allowance.

3. It is the Claimant's case that he protested the alleged unlawful retirement because it was a violation of the provisions of the CBA and the conditions for employment. He avers that at the time of his retirement, he had attained the age of 56 years and was remaining with 1 year to attain the retirement age of 57 years as stipulated in the CBA, and 4 years to attain the retirement age of 60 years as stipulated in the Respondent's employees' handbook.

4. The Claimant posits that he has suffered loss of income, trauma and inability to meet his obligations due to the alleged unlawful retirement.

5. During cross-examination, the Claimant conceded that he never opposed the retirement and that he had no objection to having his terminal dues remitted to Huduma Sacco. He also conceded to the fact that long service award was included in their monthly pay. It was his testimony that the Respondent was not a government institution where the mandatory retirement age was 60 years and that nurses and the management

had their own union.

6. In re-examination, the Claimant maintained that he had complained about the retirement notice to the Human Resource and the Conciliator, the Human Resource told him they had no powers. It was his testimony that he did not know how his terminal dues were computed and that he was never informed that they would be deducted against his loan.

7. Vide its Response filed on 27<sup>th</sup> October 2017, the Respondent contends that the Claimant was employed on 2<sup>nd</sup> September 1977 and served the Respondent until 31<sup>st</sup> December 2013, when he retired. Having attained the age of 57 years, the Claimant was issued with an 8-month retirement notice in accordance with Clause 21 of the CBA while placing reliance upon the date of birth provided in his personal records.

8. The Respondent further contends that the Claimant never protested the retirement once he was issued with the retirement notice. It is the Respondent's position that the Claimant was a unionisable employee subject to the provisions of the prevailing CBA of 23<sup>rd</sup> April 2014. Further, that the provision under its handbook only applied to an employee not covered under the CBA as a unionisable employee.

9. It is the Respondent's case that the Claimant was paid all his dues, KShs. 489,200.00 was deducted on account of the loans owing to Huduma Co-operative Savings and Credit Society Limited, to which he consented and he was to be paid KShs. 159,209.00 which he has never collected.

10. On cross-examination, RW1 Willy Njuguna, confirmed that the employees' handbook indicated that the retirement age was 60 or as provided in the CBA. It was his testimony that this was not discrimination as manual labourers retired early.

11. He stated that the computations of the Claimant's salary were demonstrated in Appendix 4 of the Respondent's documents. He maintained that there was no evidence that the Claimant had objected about his retirement to the Human Resource.

12. On re-examination, RW1 stated that computation of employee benefits was standard and that the issue of discrimination had never been brought to his attention. It was also his testimony that the employee handbook was not signed off from the workplace.

#### **Submissions by the Parties**

13. The Claimant in his submissions filed on 15<sup>th</sup> May 2019 submits that having the option of two retirement ages amounts to discrimination and no evidence was adduced by the Respondent to justify them having two retirement ages for their employees as required by Section 5 (3) of the Employment Act and therefore contrary to section 5(2) of the Employment Act. He relies on the case of **Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers vs. M.P. Shah Hospital; Cause 401 of 2018**. As such, the process and procedure adopted by the Respondent was a scheme orchestrated to unlawfully retire the Claimant.

14. The Claimant further submits that the Respondent's witness was unable to demonstrate how his terminal dues were calculated. It is the Claimant's submissions that the witness testimony amounts to hearsay since he was not in employment during the Claimant's tenure.

15. In its written submissions filed on 29<sup>th</sup> May 2019, the Respondent submits that the Claimant cannot disown its own terms and conditions of employment and introduce a new policy that was not known even to the management.

16. The Respondent's position is that the Claimant cannot claim that he was not part of the CBA and will therefore not want to benefit from it. The Respondent relies on the case of **Kenya Chemical and Allied Workers Union vs. Bamburi Cement Limited [2017] eKLR**.

17. I have examined all the evidence and submissions of the parties. Indeed the Claimant was employed by the Respondent in 1978 8<sup>th</sup> February as indicated. He was a unionisable employee whose terms were governed by the Collective Bargaining Agreement (CBA) between the Union and Respondent. Under clause 21 of the CBA, the retirement age was 57 years with an option to retire early at 50 years.

18. At the time the Claimant was retired, he was 57 years as per the Parties CBA. The Claimant contends discrimination, which I do not find to be the position, the Parties having agreed with this issue in the Parties' CBA.

19. When the Claimant was cross-examined in Court, he indicated that he was given notice of retirement which he never objected to and also that he had no objection to his terminal dues being remitted to Huduma Sacco. Having considered this fact, I do not find the retirement of Claimant to have been illegal or unfair in anyway.

20. He contends that he did not know how his terminal benefits were calculated. The CBA explain how the benefits were to be calculated at 24 days' salary for each year worked.

21. Appendix 5 of Respondent's Memorandum of Defence indicate how this amount was calculated leaving a balance Kshs.159,209/= which Claimant refused to collect. It is my finding that the Claimant has no case against the Respondent and he should proceed to pick his cheque of Kshs.159,209/=.

22. The case is otherwise dismissed with no orders as to costs.

Dated and delivered in open Court this **16<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Masese for Respondent – Present

Mbeche holding brief Bosire for Claimant