



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.80 OF 2014**

**ESTHER CHEPKORIR RONO.....CLAIMANT**

**VERSUS**

**EGERTON UNIVERSITY.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in the year 1998 as Chief Internal Auditor. His contract was also governed by the Terms and Conditions of Service, 2008 (terms of service) and which provided for retirement age at 60 years with an option to retire at 50 years.

The claimant was aged 58 years and by letter dated 5<sup>th</sup> July, 2012 the respondent terminated her services on what was referred to as on attaining early retirement age. Such term does not exist in the terms of service or under the contract of service.

The claimant was not given a hearing before termination of employment or reasons why such action had been found necessary. There was no disciplinary case facing the claimant. The claimant was not to exercise her right for optional retirement under clause 12 of the terms of service.

The claim is also that the claimant had planned her life to retire at 60 years and had therefore had financial commitments for the upkeep of her family. Despite informing the respondent that the fact of unfair termination of employment she was not given a hearing. Such violated her rights under section 41 of the Employment Act, articles 28 and 27 of the constitution on the right to dignity and non-discrimination. Such acts are contrary to section 45(2) of the Employment Act and thus there was unfair termination of employment.

The claimant is seeking to be paid her due salaries up to age 60; general damages for the violation of her constitutional rights and in the alternative payment of damages for unfair termination of employment.

The claims are that for the remainder of the employment term the claimant is seeking  $2 \times 188,620 \times 12 = 4,552,800/=$

3 months' Notice pay at Ksh.565,860.00.

The claimant was earning Ksh.188,620.00 at the time of his termination.

The claimant testified in support of her claims that upon employment by the respondent as Chief Internal Auditor she worked diligently and her retirement was at 60 years of age however she was issued with letter of retirement with effect from 5<sup>th</sup> July, 2012. The terms of service allowed for optional retirement at 50 years or mandatory at 60 years. The claimant had worked for 14 years in the audit department with a clean work record. The claimant was due for promotion, an interview had been conducted and instead she was retired without notice or reasons being given.

Upon retirement the respondent paid 6 months in notice, pending leave days, 3 months' salary but the termination of employment was done in a discriminatory manner as other colleagues in the department were left behind and she had financial commitments which put her life and that of her children at risk.

The claimant also testified that the respondent in defence have stated that her department was restructured and that she did not fit in the new structure but such information was not shared or there would be termination of employment instead of a redeployment and the respondent took the option of their choice to retire her from service. The claimant had skills which could have been used by the respondent. She felt badly treated to the extent of suffering embarrassment and at a time when she had hoped to be promoted following a successful interview with the respondent. She felt her dignity lowered and treated with discrimination.

In cross-examination, the claimant testified that she was paid in lieu of notice for 3 months. She is seeking for damages for the loss suffered

following early retirement.

## Defence

The response is that the claimant was the chief internal auditor for the respondent and was accorded early retirement with effect from 5<sup>th</sup> July, 2012 and the allegations made with regard to rights violation and unfair termination of employment does not arise.

On 18<sup>th</sup> August, 2011 the respondent's council requested the inspector general of State Corporations to undertake a special management Audit of the finance functions of the respondent and in the report it was noted that the respondent did not have any coherent organisation structure and establishment of the finance functions the structure presented did not match the approved establishment thereby rendering the same inconsequential.

Upon receiving the inspector general's report, the council during its meeting on 9<sup>th</sup> February 2012 resolved to form a restructuring committee to undertake restructuring of the finance and audit departments. The committee was to review operations and determine the appropriate organisational structure in the accounts department and capacity and sustainability of the existing employees.

On 16<sup>th</sup> April, 2012 the respondent received a report on the forensic audit on accounts for the years 2004 to 20<sup>th</sup> June, 2011. Part of the audit was to determine the accuracy of figures appearing in the respondent's account for genuine recoverable, receivables and payables. It was found that some figures availed to management were merely made up by staff. This affected general creditors and payables. The overall conclusion was that there were inherent risks which affected the effectiveness of the internal controls and reliability of the accounting controls and systems.

The respondents restructuring committee met on 2<sup>nd</sup> May 2012 to discuss progress and it was decided that the internal audit staff in the accounts department who were not interviewed by the committee to remain in office for a month and thereafter be redeployed in other departments.

On 23<sup>rd</sup> June, 2012 the restructuring committee report included methodology used in the restructuring process. All employees were briefed on the restructuring of the finance and audit departments before the exercise started. All available positions were internally advertised. The report also noted that two employees including the claimant who did not fit in the restructuring of the department and expected to retire under the 50 years rule. The committee recommended the retirement of the claimant on attaining 50 years in accordance with clause 12(a) of the terms of service. This was adopted by the council on 29<sup>th</sup> June, 2012. By letter dated 5<sup>th</sup> July, 2012 the claimant was informed of the decision to retire her on attaining the retirement age. She was also informed that she would be paid 3 months' notice and outstanding leave days.

By letter dated 13<sup>th</sup> July, 2012 the claimant lodged an appeal on the decision to retire her early. On 26<sup>th</sup> July, 2012 the claimant as invited to attend before the grievance handling appeals committee on 30<sup>th</sup> July, 2012 and where she gave her evidence and the committee rejected the appeal.

The defence is that the terms of service allow for early retirement and which the respondent applied. Such application of the claimant on the claimant was not discriminatory as all employees were interviewed and there was deployment in accordance with committee recommendation and as the claimant had attained the age of 50 was retired accordingly. The pan by claimant to retire at age 60 was not binding on the respondent.

Upon retirement the respondent paid the claimant for 3 months in lieu of notice and her outstanding annual leave days. These benefits were accepted by the claimant. This was not a case of unfair termination of employment as alleged. The claim for redundancy does not apply to the claimant and such has no legal grounds.

In evidence Dr Thomas Kiprono Serem testified that he is director of human capital at the respondent university. He testified that the claimant was the chief internal auditor and had no disciplinary case save that in the year 2011 there was an assessment of the finance department by the inspector general of state corporations and a report done identifying various anomalies in the audit department. The report was presented to the council and a decision taken to restructure the entire department and also to retire the claimant.

Dr Serem also testified that under the terms of service retirement can be optional at the instance of either party on account of age. The claimant was aged 58 years and thus retired on age grounds and paid the due notice of 3 months. There is no **requirement to pay until the age of 60 years**. The claim that there was unfair termination of employment is not justified and should be dismissed with costs to the respondent as retirement on age grounds is lawful and a term of employment.

Dr Serem also testified that the claimant's case did not relate to a dismissal from employment as it did not relate to any misconduct. Before her retirement she was called by the vice-chancellor and given the details of her retirement. The letter of early retirement gives the reasons for the same. The claimant or the respondent had the option to retire early. The claimant was allowed an appeal which she filed and was heard on merit but dismissed.

Before the claimant was retired she had been invited for a promotion interview but this was not done following the decision to retire her early.

At the close of the hearing both parties filed written submissions.

The issues which emerge for determination are;

Whether the claimant was unfairly terminated from her employment by the respondent;

Whether there are constitutional violations;

Whether general damages are payable; and

Whether general damages for unfair termination of employment are payable.

By letter dated 5<sup>th</sup> July, 2012 the respondent retired the claimant early from her employment on the grounds that;

*Re: early retirement*

*During the University Council meeting held on Friday 29<sup>th</sup> June 2012, it was decided that you be retired on attaining early retirement age. The retirement is with effect from 5<sup>th</sup> July, 2012.*

*You are eligible for the following*

- 1. Payment of six months' salary in lieu of notice*
- 2. Payment of outstanding leave days.*

The claimant asserted in her evidence that she was 58 years old at the time and the retirement age was 60 years. There was optional retirement at age 50 and for which she had not applied.

The respondent defended its decision to retire the claimant early on the grounds that either party had the option to retire the claimant from age 50. The respondent also gave the reasons that following an audit and findings of need to restructure the finance department, council met and decided the restructure the internal audit department and which affected the claimant and other employees in the department. A decision was therefore taken to retire the claimant early.

The respondent filed the report by *Inspectorate of State Corporations* on the *special Management Audit of the Finance Function of Egerton university* dated November, 2011adn which has divers recommendations and part of which includes that internal audit department (i) *Council should restructure the operations of the internal audit unit with a view to having proper conventional internal audits undertaken.*

Following the *inspectorate of State Corporations* report, a forensic audit was conducted on accounts in April, 2012. This audit also had far-reaching recommendations with regard to account receivables and accounts payable for 8 financial years from July, 2003 to June, 2011. With regard to internal audit, it was noted that upon review, accounts did not agree with internal audit reports and upon a follow up with the internal auditors and review of bank reconciliations to determine the actual position there was a conclusion that the internal auditors were correct but they appeared to be powerless to ensure their recommendations were properly followed. See B2 *review of internal audit reports.*

Following these reports and recommendations a *Report on the Restructuring of Finance and Audit Departments* was done and dated June, 2012. This was in consideration of the long history and status of the finance department status of the accounts department, the audit department and the recommended restructuring of finance, accounts and audit departments.

Under part 5.4 of the restructuring report is a structure for the audit department with recommendation that;

*Mr Robert K Kirui be deployed in an acting capacity as Chief Internal Auditor.*

*Damaris Njuguna in Grade 11 will perform the duties of grade 13.*

From the existing structure at table 5 the claimant is ranked highest at grade 14 and the next person, Robert Kirui at grade 12 and Damaris Njuguna at grade 9.

In the Council meeting held on 29<sup>th</sup> June, 2012 restructuring was part of the substantive agenda. Reference was also made to council meeting on 18<sup>th</sup> August, 2011 which had requested Inspector General, State Corporations to carry out a special audit of the respondent.

The council adopted the report on restructuring and decided that;

*That the finance Officer, Mr James Mwathi Nguri and the Chief Internal Auditor, Mrs Esther Chepkorir Rono be retired on attainment of fifty years of age.*

On the first issue as to whether there was unfair termination of employment, from the analysis above it is apparent that the respondent

council had recommended for a restructuring of the finance and audit departments and a process followed and recommendations made on deployments and then the early retirement of the claimant on the 50 years rule.

A restructuring in its nature is an operational requirement of a business or enterprise to allow for to reorganisation and restructuring of functions to ensure efficacy both functionally and financially. This is well defined under the Employment Act, 2007 as a redundancy;

*“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;*

Whatever name an employer or business apply, where there is reorganisation, rearrangement, reshuffle or lay off of employees to ensure operational efficacy and sustainability, this in law is treated as a redundancy. see **Gerrishom Mukhutsi Obayo versus Dsv Air and Sea Limited [2018] eKLR**. in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** it was held that;

*The employer must demonstrate that there exists a genuine reason that requires the business to reorganize, reduce staff or restructure the business to viability, the same must be found as valid and fair. The Court must look at the circumstances of each case based on the available evidence and make a finding..... It is not a genuine redundancy, where the requirements of the business for the affected employees continue, just the same as before and the only change is the location.*

Indeed a restructuring is allowed under section 40 of the Employment Act, 2007 and though called a *redundancy* the context of reorganisation is given. in the case of **Kenya Airways Corporation Ltd versus Tobias Oganya Auma & Others**, where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations and the applicable la. In this case it is section 40 of the Employment Act, 2007.

This concept is well appreciated in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** that in the case of ensuring business efficiency the employer is required to;

*... notifying them [the employees] that it was facing major challenges in balancing the high operating costs, caused by escalating employee and fuel cost, among other overheads, which had continued to rise disproportionately when compared to decreasing revenues. As such, a restructuring exercise would be undertaken that would result in staff redundancies, and where applicable, to outsourcing of labour. ...*

The respondent thus faced with a restructuring cannot hide behind the terms of service for the early retirement of the claimant. The court reading of clause 12 on early retirement was that the claimant had a mandatory retirement age of 60 years and the option to retire upon attaining age 50.

*... the optional retirement age is 50 years for [not legible] ... members of staff.*

*Retired members of stay may be re-engaged on contract appointment subject to availability of a vacancy ...*

The option to retire at age 50 is therefore elective. It is not compulsory. What is optional is not at the choice of the employer and only available to the employee. The respondent is not given a prerogative under the terms of service to apply these provisions at will. to do so is to engage in unfair labour practices as *the option to retire* is for the benefit of the employee.

The application of the retirement clause under the terms of service was applied to deny the claimant the benefits under the redundancy clause. Clause 14 allowed for the respondent to declare a redundancy following restructuring with notices to affected employees being for a period equivalent to the termination notice required under the letter of appointment; payment of a severance pay at the rate of *one month's current pay for each completed year of service*; and such an employee to be given priority of re-engagement when work becomes available.

Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

*"(2) A termination of employment by an employer is unfair if the employer fails to prove—*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason—*

**(i) Related to the employee's conduct, capacity or compatibility; or**

**(ii) Based on the operational requirements of**

**the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.**

In this case, by retiring the claimant under clause 12 of the terms of service was to terminate her employment unfairly. This is contrary to section 40 read together with section 45 of the Employment Act, 2007.

The claimant had worked for the respondent from 21st October, 1998 to 5th July, 2012 a period of 13 full years. On the terms of service at clause 14 and proper application of the redundancy benefits due the claimant was entitled 13 months' pay based on the gross pay at the time all at Ksh.188, 620.00 being Ksh.2, 452,060.00 which is hereby awarded.

This addresses the claims for unfair termination of employment.

With regard to constitutional violations, the court finds no evidence of discrimination against the claimant and on the basis the respondent was faced with a restructuring which was addressed with the internal audit department where the claimant was the chief internal auditor was laid off and other employees in the department redeployed. Faced with a redundancy and the prerogative to restructure and bound by section 40 of the Employment Act, 2007 and clause 14 of the respondent's terms of service, such is not discriminatory against the claimant.

The claimant has since been paid a generous notice pay under the alleged retirement provisions and this should suffice to address the notices due under the redundancy clause and which ought to have applied in her case.

**Accordingly, the court finds the claimant was unfairly terminated in her employment by the respondent in a case of redundancy and therefore severance pay awarded at Ksh.2, 452,060.00 together with costs of the suit.**

**Delivered at Nakuru this 24<sup>th</sup> day of October, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....

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