



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 860 OF 2014

(Consolidated with CAUSE 861 OF 2014)

JAMES MUTISYA NZOKILA & 8 OTHERS.....CLAIMANTS

VERSUS

KENYA NUT COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants filed the suits herein separately on 27.5.2014 but consolidated them under this file on 24/11/2014. They averred that they were all employed by the respondent between 2004 and June 2013 when they were retired on account of age. They however contended that the retirement amounted to unfair and unlawful termination of their employment and prayed for the following reliefs:

- a) The court does examine the reasons and merit of termination of the Claimant's employment and find that the termination was unlawful.
- b) The court do find that the Respondent's action of continued withholding, failing, refusal and or neglecting to compute and disburse the rightful terminal benefits, unpaid dues and underpayment is unlawful and untenable.
- c) The Respondent has been in breach of the Employment Act, Cap 226 and other relevant labour laws.
- d) As a result, the court do Order that the Respondent to pay the Claimants all their terminal benefits and other unpaid dues as computed in the two Claims from sub-clause (i) to (ix) for the ELRC 840 of 2014 and from sub-clause (i) to (xii) for ELRC 841 of 2014.
- e) Costs of this claim
- f) Interest on a, b, c and d above at court rates
- g) Any other relief as this Honourable Court may deem just and fit to give.

2. The Respondent denied the alleged unfair termination of the claimants' employment and averred that they were lawfully terminated after attaining the mandatory retirement age of 55 years in accordance with the Collective Agreement (CBA) which governed their contract of service. She further averred that under **Clause 13(a) of the CBA** the Claimants' mandatory retirement age was 55 years and as such she issued a six months' notice of retirement to all its employees who had attained the age of 55 years including the claimants. She further averred that the claimants never raised any objection to the retirement notices and she paid all their terminal dues. She therefore contended that the claimants are not entitled to the reliefs sought and described them as an afterthought, misadvised, unmerited, brought in bad faith and an abuse of the court process.

3. The main issues for determination arising from the pleadings are whether the retirement of the claimants amounted to unfair and unlawful termination of their contracts of employment and whether they are entitled to the reliefs sought. To answer the said questions, the 1st claimant gave evidence on behalf of the rest while the respondent called two witnesses. Thereafter both parties filed written submissions.

Claimant's evidence

4. James Mutisya Nzokila testified as Cw1. He contended that all the claimants were employed by the respondent from diverse dates from

2004 but they were all retired by the respondent on 30.6.2013. He further stated that the retirement was done through a six months' notice dated 2.1.2013 which was a unilateral decision by the respondent. He admitted that all the claimants were aged between 50 and 60 years. He contended that they were employed without any written contract and there was no agreed age of retirement.

5. He further stated that the said retirement amounted to unlawful termination of their employment which occasioned on them much suffering due to loss of their livelihood. He contended that all his colleagues were general labourers earning Kshs. 5,537 per month and he was a supervisor earning Kshs.7,907 per month. He further contended that after the separation, they were not paid their rightful terminal dues as provided by the Employment Act and their contract of employment including leave allowances and service pay. He therefore prayed for the reliefs sought in the Claim.

6. In cross examination, he denied that there was a CBA in force during their employment by the respondent. He described the CBA filed by the respondent as strange to him but admitted that it set retirement age as 55 years. He denied being a member of the Union that negotiated the CBA but admitted that his payslip for March 2013 indicated a deduction of union dues. He further admitted that he never wrote any letter to protest forced union membership or against the retirement notice. He also admitted that his Job card indicated his job titled as General Worker.

7. He further stated that they used to ask for their annual leave but it was denied. He however admitted that they never protested in writing after being denied their annual leave and contended that they told that things would be better after the union represents them. He further admitted that the CBA provided for 24 days' annual leave. He maintained that they were entitled to leave travelling allowance when going for annual leave and contended the Shop Steward Mr. Kimeu had explained to them about the allowance in 2013.

8. He admitted that they were paid all their salary for January to June 2013 and further that there was no written agreement for payment of gratuity for their service. He however contended that they were entitled to gratuity/service pay whether or not it was provided in the CBA.

Defence evidence

9. The respondent's Head of Employee Relations, Mr Kenneth Ojoro, testified as Rw1. In brief, he stated that all the claimants were formally employed by the respondent and their terms and conditions of service were governed by CBA. He further stated that Clause 13(a) of the CBA provided that normal retirement age shall be 55 years. He contended that in accordance with the said clause, the respondent issued retirement notice dated 2.1.2013 to all her employees who had attained the 55 years. He further stated that none of the employees protested against the said notice and she paid them all their terminal dues in full.

10. He contended that the CBA did not provide for payment of gratuity to the claimants on retirement. He further contended that the claimants had exhausted their annual leave and they confirmed that by their respective leave application forms just after service of the retirement notice. He also contended that leave travelling allowance was paid when the claimants were going for leave. He therefore denied the reliefs sought and prayed for the suit to be dismissed with costs.

11. In cross examination, Rw1 admitted that he joined the respondent in February 2017 after the claimants' retirement. He however contended that his evidence was derived from the office records. He contended that the claimants were not entitled to any other benefit other than salary. He maintained that the claimants were going for all their leaves but produced no leave records to support that allegation. He admitted that the claimants were not given any written contract but maintained that there was a CBA that provided for a normal retirement age of 55 years. He contended that the claimants were members of KUCFAW which had negotiated the CBA. He however admitted that there was another union, KPAWU which also had recruited some of the claimants as union members. He contended that KUCFAW was the only union which had signed a Recognition Agreement with the respondent. He contended that the CBA herein was registered within 14 days after signing and it bound the claimants. He however admitted that there was no CBA before 2012 or any written contract. Finally, he contended that the claimants worked in different municipalities and sectors and as such their salaries were not the same.

12. Feliciter Mwihi Mususa, testified as Rw2 and she also adopted her written statement dated 1.3.2019. In brief she stated that she was employed by the respondent in 2005 as a general worker and all the claimants were her colleagues at the respondent. She further stated that KUCFAW came to the respondent in 2012 and she was elected Shop Steward. She added that her roles included welfare ,and the terms and conditions of service for the workers. She contended that before 2012, there was no set retirement age and one used to work until he felt to be old enough to exit. However, she explained that a CBA dated 13.3.2012 was signed which provided for retirement age of 55 years.

13. She opined that the said retirement age was good because the work at the company was hard and the employees would be too weak to continue working beyond the said age. She contended that as the Shop Steward, she explained the said retirement age to all the workers after the signing of the CBA. She further contended that the claimants never brought any complaint to her after being served with the retirement notice of six months in January 2013.

14. In cross examination, Rw2 confirmed that she is still the Shop Steward and that her age was 53 years. She contended that the negotiations for the CBA started in 2012 but it was sealed in 2013. She admitted that the retirement notice was given in January 2013 before the claimants joined that union. However, she contended that the CBA started in 2012 and ended in 2013. She concluded by stating that from 2012, the staff were informed that retirement age was 55 years.

Claimants' Submissions

15. The Claimants submitted that they have demonstrated that their employment was wrongfully and unlawfully terminated and urged the court to award them the reliefs sought. They contended that they were not members of KUCFAW which negotiated the CBA that provided for retirement age of 55 years. They further contended that the respondent has not proved that they were notified of the CBA and the said age of retirement. They submitted that since they were not members of any trade union when the letters of retirement were being issued to them, the CBA cannot be said to have been binding on them.

16. The claimants further submitted that the respondent never proved that the said CBA was ever registered by this court as required by **Section 60 of the Labour Institutions Act** which provides that, “Every collective agreement shall be submitted to the industrial court for registration within fourteen days of its conclusion.” They relied on **Section 107 of the Evidence Act** which provides that he who alleges must prove. Further, they contended that the Respondent cannot be allowed to be selective in applying the alleged CBA in terms of the provision on retirement age on one hand while not applying the minimum wages payable to them under the alleged CBA on the other.

17. They maintained that the reason for terminating their services is invalid, unlawful and unfair as against **Sections 43 and 45 of the Employment Act** because the CBA in issue was not applicable to them and the respondent has not produced any evidence to prove that they could not perform the work after attaining the age of 55 years. They contended that some of them were recruited while past 55 years and worked beyond the age of 73 years. They further contended that they were general workers whose work did not require specialised skills and urged the Court to take judicial notice that most farmers in the country are old people of up to more than 70 years like them. They also submitted that no records of absenteeism and/or frequent sickness, or poor performance were produced to prove that their retirement was warranted.

18. In addition, the claimants submitted that the Respondent breached their right to fair administrative action as envisaged under **Article 47 of the Constitution**. They further contended that the Employment Act does not fix any retirement age but rather leaves it to the discretion of the parties in their individual or collective agreements. They relied on **James Omwoyo Nyang’au vs. The Heritage Insurance Co. Ltd, Industrial Cause No. 299 of 2019** for emphasis.

19. Finally, the claimants submitted that they are entitled to damages/ remedies for wrongful termination under **Section 49 of the Employment Act** including the maximum compensation of 12 months’ gross salary based on their last payslips produced in court by the Respondent. They relied on **ELRC No. 863 of 2015, Teresa Carlo Omondi –v- Transparency International Kenya** where the court found there was wrongful and unfair acts on the part of the respondent in terminating the claimant’s contract and granted her 12 months’ salary in compensation.

20. As regards claim for the accrued leave days, they relied on **Mombasa Industrial Cause No. 22 of 2014, Gilbert Kasumali Kithi –v- Nyali Beach Holiday Resort** to argue that the respondent’s failure to produce employment records for the claimants meant that she failed to disprove claim for the accrued leave.

21. In addition they submitted that they were entitled to gratuity because the Respondent did not produced any evidence to prove that she registered them with any provident fund. They relied on **Jane Njeri Wanyoike & 23 others vs. Pan Africa Insurance Company Limited & 2 others, ELRC No. 2001 of 2015** to emphasize that even where statutory deductions are effected and not remitted the claimants are entitled to service pay. They urged the Court to award the same for each of the Claimant as claimed.

Respondent’s submissions

22. The Respondent submitted that the Claimants being unionizable employees working for the Respondent and they were bound by the terms of the said CBA by dint of **Section 59(1) of the Labour Relations Act** as was observed by Radido J in the case of **Said Ndege –v- Steel Makers Ltd [2014] eKLR**. That the Judge also observed that by dint of section 59(3) of the Act the terms of the collective agreement are to be incorporated into the contract of employment of every employee covered by the collective agreement.

23. The respondent further submitted that the Claimants have not tendered any evidence to prove that they were forced to join the union. On the contrary, she observed that by their own documents (**App E1-E9 of Memorandum of Claim in Cause 860/2014**), the claimants have shown that they were remitting union dues as early as March 2013. She further observed that the Claimants are indeed seeking remedies arising from the CBA including leave travelling allowance and safari allowance yet they dispute having been bound by the CBA.

24. She further submitted that even if the CBA was not registered as purported by the claimants, it would remain valid based on the basic tenets of common law contracts as was reiterated by the Court in the **Said Ndege case above**. She added that in **Ali Joha Tsuma –v- Corrugated Sheets Ltd [2014] eKLR**, the court upheld the validity of a CBA which it found not to have been registered by holding that notwithstanding the lack of registration the court was to resolve the applicability of the CBA to the case by assuming that the CBA was registered.

25. On the other hand, the respondent submitted that **Clause 13(d) of the CBA** provided that an employee who had completed up to 5 years of unbroken service was entitled to 30 days’ termination notice while **Clause 13(e)** provided that an employee who had completed over 5 years of unbroken service was entitled to 45 days’ termination notice. She however contended that as a sign of good faith she gave the Claimants 180 days’ notice (6 months’ notice). She further submitted that the termination forms served indicated the reason as being retirement on account of age and not poor performance as misconstrued by the Claimants in their submissions.

26. Finally, she submitted that the Claimants are not entitled to the reliefs sought because they were lawfully retired and paid their rightful benefits. She contended that under **Section 35(6) of the Employment Act** the claimants are disqualified from claiming gratuity since she duly made regular payments of their social benefits to the NSSF during their employment.

Analysis and determination

27. There is no dispute that the claimants were employed by the respondent as general workers. It is also common knowledge that they were served with a six months’ retirement notice which took effect on 30.6.2013. The issues for determination are:

- a) Whether the Claimants were bound by a CBA entered into between the Respondent and KUCFAW.
- b) Whether the Claimants were unlawfully and/or wrongfully terminated from their employment by the Respondent.

c) Whether the Claimants are entitled to the reliefs sought.

a. Whether the Claimants were bound by the CBA negotiated between the Respondent and KUCFAW.

28. The Respondent produced a bundle of the Claimants' payslips for the months of April, May and June 2013 to prove that the claimants were members of a trade union and they were paying monthly subscription through check off system. The claimants also produced their payslips for March 2013 to prove that it was the first time they were deducted union dues. Finally, the respondent produced copy of the CBA, referred to as Memorandum of Agreement between the Respondent and KUCFAW indicating that it was for period of 24 months from 1.1.2012 to 31.12.2013. In my view, all the said documents demonstrate that the claimants were unionisable staff and they were bound by any CBA negotiated between the respondent and any union that she recognized as the representative of her unionisable staff. Section 2 of the Labour Relations Act defines unionisable employee as:

“the employees who are eligible for union membership of that trade union.”

29. The preamble to the CBA produced by the respondent herein stated that:

“In the matter of WAGES AND OTHER CONDITIONS of Employment. The Company and the Union, meeting together in free heart and voluntary association agree to enter into the foregoing agreement negotiated between them at the joint negotiating Committee which will apply to all unionsable workers covered by the recognition agreement.”

30. I agree with **Said Ndege v Steel Makers Ltd [2014] e KLR**, where Radido J held that:

“ Under section 59(1) of the Act, a collective agreement binds the parties to the agreement, all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement, while section 59(3) of the Act provides that the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

31. Based on the said section 59(1) and (3) of the LRA, I find that the CBA produced by the respondent formed part of the claimants' contract of service and they were all bound by the terms agreed between their employer and KUCFAW. It follows therefore that by dint of Clause 13(a) of the CBA all the unionizable staff of the respondent were to retire at the age of 55 years unless the period of service was extended at the employer's sole discretion. In my view, it is immaterial whether or not the claimants were members of the union that negotiated the CBA. All that matters under section 59(3) of LRA is whether they were covered by the CBA.

b. Whether the Claimants were unlawfully and wrongfully terminated from their employment by the Respondent.

32. Under section 45 of the Employment Act, termination of the employee's employment is unfair if the ground upon which it stands is not valid and fair and if a fair procedure was not followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Under section 47(5) of the Act, the burden of proving unfair termination lies with the employee.

33. The claimants contended that their retirement amounted to unfair and unlawful termination because there was no valid reason and fair procedure was not followed. According to them the retirement based on the CBA between the respondent and KUCFAW was not a valid reason and they were not accorded a hearing under section 41 of the Employment Act. The respondent has however contended that the retirement was justified because the claimants were all above 55 years old and that they were all served with a longer termination notice than what they were entitled to under the CBA.

34. In view of the finding herein above that the claimants were bound by the terms of the said CBA, I agree with the respondent their retirement on ground of age was justified. The claimants admitted that they were all above the mandatory retirement age of 55 year provided under clause 13(a) of the CBA. I also agree that a fair procedure was followed because Clause 13(e) of the CBA provided for a notice period of 45 days while the claimants were given 180 days' notice. Consequently, I find that the claimants have not discharged their burden of proving that unfair termination of the employment and proceed to return that their retirement fell within the four corners of fair termination of employment set out under section 45 of the Employment Act.

c. Reliefs

35. In view of the finding herein above that the retirement was justified and fair, I dismiss the claim for compensation for wrongful termination of their employment.

36. The claim for gratuity is also dismissed because it was not provided for in the CBA or any other written contract. In addition, both parties produced Payslips showing that the claimants were registered for NSSF and contributions were deducted and remitted to the Fund. Consequently, I find that under section 35(6) of the Employment Act, the claimants were disqualified from claiming service pay.

37. The claim for accrued leave is also dismissed because the employer has filed leave application forms showing that the claimants had no outstanding leave days at the time their exit. The forms were duly signed by the claimants and no evidence has been adduced to prove that they did not sign them voluntarily. Finally, the claim for leave travelling allowance is also dismissed for lack of merits because that right accrued to the claimants from 1.1.2012 when the CBA became effective. They admitted that there was no written contract before 1.1.2012 and as such, it is clear that the allowance was not available to them.

38. In the end the suit is dismissed for lack of merits. Each party shall bear his/her own costs.

Dated and delivered at Nairobi this 18th day of October 2019

ONESMUS N. MAKAU

JUDGE