



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 543 OF 2015

GIDRAPH N. CHEGE MWANGI.....CLAIMANT

-VERSUS-

FAMILY BANK (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

JUDGMENT

The claimant filed a statement of claim on 02.04.2015 through Kubai Musyoka & Company Advocates. The claimant was employed by the respondent effective 11.12.2004 as a bank clerk. The claimant served with a clean record, he was confirmed to permanent and pensionable service, was promoted through the ranks and enjoyed salary increment. On 11.02.2011 he was transferred from Kiambu Branch to Head Office in Nairobi to act as Credit Relationship Manager effective 01.03.2004 and as per the movement order No.HR/02/2011 of 01.02.2011. He was paid an acting allowance of Kshs.10, 000.00 per month alongside his monthly salary. On 23.09.2011 the claimant was advised that his role had changed to Assistant Manager – Policy M&C effective 01.09.2011 and in line with the new respondent's structure. He was placed at Management Grade FBG4 and all other terms remained the same. On 28.03.2012 the claimant took additional mortgage loan of Kshs.1, 300, 000.00 raising the loan to Kshs.4, 000, 000.00.

The claimant's case is that without warning or notice he was informed that the respondent's Board of Management had decided to send him on early retirement effective 25.05.2012. Further the claimant was not consulted on the terms of early retirement and the respondent unilaterally decided to give him 2 months' salary in lieu of notice and one month salary for every completed year of service. The early retirement came barely 2 months after the increase of the mortgage loan to Kshs. 4, 000, 000.00. The respondent computed the claimant's final dues and applied it to offset the loan leaving the claimant with Kshs.2, 649, 065.30 being outstanding loan with the respondent. It is the claimant's case that he was terminated and left poorer than he was prior to joining the respondent's service.

The trade union reported a trade dispute on 01.10.2013 and the dispute was not resolved resulting in the certificate of unsettled dispute dated 29.01.2014. The claimant's claims are as follows:

- a. Payment for 15 years being remainder of years of service before retirement worked out Kshs.118,104.00 x 12 months x 15 years = Kshs.21, 258, 720.00.
- b. Payment of pension the claimant would have earned after age of 50 years until death at 5% of the gross salary.
- c. Waiver of entire loan with interest facility effective the date of termination.
- d. Damages for unfair termination.
- e. Salary and house allowance underpayments per collective agreement for period 01.03.2005 to June 2012.
- f. Compensation for leave days in 2011 and 2012 Kshs.54, 498.00.
- g. Compensation for paternity leave 14 days in January 2008 Kshs.55, 489.00.
- h. Unpaid transfer allowance in 2006, 2007, 2008, and February 2011.

The claimant prayed to be paid the claimed amounts, a declaration the early retirement was unlawful and wrongful, a declaration circulating the claimant's name to credit reference bureau diminished the claimant's chances of getting equivalent employment in the finance industry to mitigate his losses, the early retirement at 40 years of age being 15 years prior to official retirement age was unfair and award full compensation of 12 months' salaries at Kshs.118, 104.00 x 12 x 15 years = 21, 258, 720.00; pension at 50% of gross pay of 118, 104 per month then transferred to wife for life after claimant's death, costs and any other reliefs the Honourable Court deems just and necessary to award.

The respondent filed the memorandum in reply to the claim on 08.06.2015 through Wamae & Allen Advocates. The respondent urged that the collective agreement relied upon applied to unionisable staff and the claimant was in management. The respondent admitted it employed the claimant and promoted him through the ranks as pleaded for the claimant. Further that the claimant was bound by the respondent's policies, procedure and terms and conditions of service including the Human Resource Manual and which prescribed a termination notice of one month for staff in grade FBG 1 – 4 and 2 months for staff in grade FBG and above per clause 2.1.13(i). Clause 2.1.13(i) provided that the bank could terminate the contract forthwith by giving the notice or pay in lieu of notice. The Court finds that the policy clauses cited for the respondent applied and the claimant being in management and not unionisable, the collective agreement had not been incorporated in his individual contract of service so that the collective agreement did not apply.

The respondent urged that the claims for leave days, compensation for paternity leave and transfer allowance prior to 25.05.2012 were time barred. The cause of action accrued on retirement date on 25.05.2015 and 3 years of limitation of action under section 90 of the Employment Act, 2007 had lapsed. The Court finds that the claims for underpayment and other continuing claims were indeed continuing injuries and the cause of action lapsed 12 months after 25.05.2012. Further and as submitted for the respondent, belated claims after lapsing of the 3 years of limitation are also time barred. The claims and prayers will therefore fail as the preliminary objection is upheld.

The respondent has pleaded and established that under clause 4 of the mortgage loan facility, it was provided that upon leaving employment, any payments due to the claimant from the respondent would be applied to repay any loan balances. Further in clause 7 interest rate offered for the facility was strictly for members of staff and would change to commercial rate prevailing at the time of leaving employment. The Court finds that the terms of the loan facility were partially part of the contract of service and the Court has jurisdiction in that regard in so far as it relates to defining the rights and obligations of the parties as employer and employee. The Court further finds that the parties are bound by the terms of the mortgage loan facility and the claimant's prayer that the loan is waived effective the date of termination was unfounded and will fail. If the claimant failed to repay the loan then circulation of his name to the credit reference bureau cannot be said to have been unfair.

The respondent has further established that the contract of service was terminated by early retirement in accordance with termination by notice pay and it was therefore lawful and not unfair. The termination was with the contractual package including full salary for May 2012; 2 months' salary in lieu of notice; one salary for each complete year served; prorated pay for unutilised leave days; staff loan discounted at 20%; enjoyment of inpatient medical benefit until 31.08.2012; and pension dues to be paid per applicable rules. The claimant has failed to establish breach of the contract of service and the prayers made on account of unfair termination were unfounded. The Court finds that as submitted for the respondent the retirement package was generous and better than the strict contractual terms and the respondent cannot be culpable as claimed and prayed for the claimant.

The Court has considered all the material on record. It could be that the sudden termination by early retirement unsettled the claimant but it has been found to have been in compliance with the contract of service and the loan agreement properly upheld in application of terminal dues to partially settle the outstanding loan. The taking of the loan did not suspend the terms of the contract of service and it was terminated accordingly. The learning by employees from the findings in this case is that in signing contracts with an employer, provided the contracts do not offend the constitutional and statutory provisions, the contractual terms and conditions are binding and a cautionary approach must be exercised in self-interest in dealings with an employer just in case the employer were to suddenly invoke any of such binding terms and conditions.

The claimant's suit is liable to dismissal and taking into account all the circumstances, each party to bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.

BYRAM ONGAYA

JUDGE