



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1453 OF 2017

IAN NOBERT MGENYI.....CLAIMANT

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 25.07.2017 through M/S Guserwa & Company Advocates. The amended statement of claim was filed on 12.10.2018. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant was discriminated against.
- b. Damages for discrimination.
- c. Damages for wrongful and unfair retirement.
- d. Pay in lieu of 3 months' notice at Kshs.408, 283.75 per month Kshs. 1, 224, 849.00.
- e. Pay in respect of 1 month's salary for each of the 38 years of service Kshs.15, 514,782.50.
- f. Total claim of Kshs.16, 739, 631.50.
- g. Costs of the suit plus interest thereon.

The claimant has pleaded as follows:

- a. He was employed by the respondent on 02.03.1977 and rose through the ranks to the position of Legal and Company Secretary.
- b. On 02.06.2015 the respondent through a letter dated 02.06.2015 forced the claimant to retire upon the stipulated terms that the claimant accepted based on the information availed to him at the time.
- c. Prior to processing of the claimant's exit, the claimant learned that the package offered to him exposed him to discrimination and disadvantage as compared to unionisable cadre and management staff who had been paid superior terms when compared to what the claimant was offered on early retirement. The particulars of discrimination included failure to pay 3 months' pay in place of one month in terms of clause 9.4 of the Human Resource Manual, 2012; failure to pay severance pay per the collective bargaining agreement (CBA) and as per the bank's previous practice; failure to consider the claimant's appeal against early retirement; and forcing the claimant into early retirement against his will.
- d. The claimant alleges that the early retirement was malicious without regard to his rights and welfare. The particulars of malice included failure to consider the provisions of the bank's Human Resource Manual on the claimant's retirement; forcing the claimant into early retirement on unfavourable terms compared to other employees; failure to consider the claimant's appeal against unfavourable terms of retirement; treating the claimant unfairly with contempt; failing to give the claimant equal treatment with other former employees of the bank; and retiring the claimant on unfavourable terms.

The respondent's statement of response was filed on 20.02.2019 through M/s Oraro & Company Advocate. The respondent admitted that it employed the claimant as pleaded and that at termination of the contract the claimant held the position of Legal and Company Secretary. The respondent further pleaded that the suit be dismissed with costs. The respondent further pleaded as follows:

- a. The respondent denied that the claimant was forced into early retirement. The respondent offered the claimant early retirement by the letter dated 02.06.2015 per set terms and in line with clause 1.7 of the Separation Policy.
- b. The claimant appealed against the decision to retire him early by a letter dated 16.06.2015 and instead proposed to be allowed to work until he attained the age of 60 years or in alternative the respondent to review the terms of the early retirement as proposed therein. The claimant's appeal was considered and the respondent reviewed the terms by granting ex-gratia loan rebate of 20% on all the outstanding loans. The appeal was considered accordingly and the claimant was misleading the Court in alleging it had not been decided. Further the respondent offered the claimant extension of the contract by one month and it was accepted. Thus the claimant's last day at work was 01.07.2015 he was offered a fresh contract dated 06.07.2015 for a term of one month effective 02.07.2015 to 01.08.2015 to allow business continuity and for handover process.
- c. The applicable notice period was one month and not 3 months per revised notice period in December 2013.
- d. The claimant was in management cadre and therefore not entitled to terms in the CBA. Further, severance pay did not apply in normal retirement cases under the Separation Policy.
- e. The respondent denied that the claimant had been discriminated against as was alleged. Similarly the alleged malice is denied.
- f. By the letter dated 04.05.2017 the respondent replied to the demand letter.

The claimant testified to support his case and the respondent's witness (RW) was Tabitha Mutwa, the respondent's Employee Relations Advisor.

The Court has considered the pleadings, the evidence, and the submissions and makes findings as follows.

To answer the **1st issue** for determination there is no dispute that the claimant was employed by the respondent for the tenure and in positions as pleaded for the claimant. The parties were undisputedly in a contract of service.

The **2nd issue** for determination is whether the early retirement amounted to unfair termination of the contract of service. Clause 9.4.2 provides the respondent's separation policy provides thus, "**The Bank will give an employee at least three months notice prior to attaining the retirement date (age). Either party will give three months notice in case of early retirement.**" By the letter dated 02.06.2015 the respondent purported to invoke that clause. In so far as the separation policy was not disputed, the Court returns that the respondent was entitled to invoke the separation clause on early retirement and there was no unfair termination. The Court finds that under the clause either party would initiate early retirement and the respondent was entitled to invoke the clause. In so far as the clause was invoked, the Court returns that the termination was by agreement because the clause was binding upon the parties.

The **3rd issue** for determination is whether the terms on early retirement were unfair and discriminatory or malicious. First the claimant says he was treated differently from those who were unionisable and the CBA applied. The Court returns that there was no dispute that the claimant was in the management cadre and the Court returns that the claimant has not established why the terms in the CBA would be applied to his early retirement. Second the claimant says he was treated differently from those in the management cadre and who had retired early prior to his early retirement. The Court has revisited the evidence and the claimant gave no evidence to show that an employee in management had retired early prior to his retirement and given a different retirement package. In such circumstances the claimant has failed to establish the allegations of discrimination, malice and unfair treatment. The related prayers are found unjustified. In particular the prayer for one month salary for every year served will fail as was based on the inapplicable CBA or it was unjustified in view of the Contract of service.

The **4th issue** for determination is whether the claimant is entitled to 3 months' pay in lieu the three months' termination notice at Kshs.1, 224, 849.00 as prayed for. Clause 9.4.2 of the respondent's separation policy prescribed the three months' termination notice. The early retirement letter dated 02.06.2015 gave a one month notice lapsing on 01.07.2015. It is pleaded for the respondent that the three months' notice was changed to one month notice by the revised notice period in December, 2013. The revised notice period has not been exhibited. RW does not mention such revision in her witness statement or her oral evidence. Instead RW stated that the 3 months' pay was given. The Court considers that the contract was that three months' notice is given by either party. The Court finds that the respondent clearly failed to give the agreed 3 months' notice but it is also not in dispute that the claimant was paid three months' salaries. The Court considers that the respondent purged the breach in that regard. It cannot be assumed that the respondent was generous without compliance with the terms of separation in that regard. However, the Court notes that mix-up and the respondent's failure to be express in that regard may have encouraged the claimant to sue. Accordingly, each party will bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for:

- a. Dismissal of the suit.
- b. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 19th December, 2019.**

BYRAM ONGAYA

JUDGE