



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 138 OF 2018**

**KYALO MBOTE NGOLE .....CLAIMANT**

**VS**

**BAHARI FORWARDERS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim, which is documented by a Statement of Claim dated 15<sup>th</sup> March 2018, is brought by Kyalo Mbote Ngole against Bahari Forwarders. Ngole claims that his employment was unlawfully terminated on 31<sup>st</sup> October 2017. The Respondent filed a Response on 3<sup>rd</sup> July 2018 to which the Claimant responded on 24<sup>th</sup> July 2018.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Shadrack Muthangya. Both parties subsequently filed written submissions.

**The Claimant’s Case**

3. The Claimant states that he was employed by the Respondent as a Heavy Commercial Driver initially on short term contract basis from 12<sup>th</sup> June 2012. He was employed on permanent terms by letter dated 3<sup>rd</sup> July 2015, which he executed on 28<sup>th</sup> August 2015.

4. The Claimant worked for the Respondent until 31<sup>st</sup> October 2017, when his employment was terminated. The Claimant states that the termination of his employment was unlawful and unfair for want of justifiable reason and due termination process.

5. Prior to the termination, the Claimant had been sent on leave from 7<sup>th</sup> October 2017. Upon resuming duty on 31<sup>st</sup> October 2017, he was issued with an early retirement notice dated 7<sup>th</sup> October 2017, alongside a retirement letter dated 31<sup>st</sup> October 2017. At the time the Claimant was retired, he was 51 years old. He expected to have worked until the age of 65 years. At the time of exit, he earned a monthly salary of Kshs. 34,000.

6. The Claimant claims to have worked for 15 hours 7 days a week, without overtime compensation. He adds that he was not paid his terminal dues and was not issued with a Certificate of Service.

7. The Claimant tabulates his claim as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 34,000.00
- b) 7 hours unpaid overtime daily.....1,736,437.50
- c) 8 hours unpaid overtime for Sundays.....513,187.50
- d) 50 unpaid public holidays.....224,531.25
- e) 12 months’ salary in compensation.....408,000.00
- f) Certificate of service
- g) Costs plus interest

## The Respondent's Case

8. In its Response dated 3<sup>rd</sup> July 2018 and filed in court on the same date, the Respondent states that the Claimant was employed on term contract until 1<sup>st</sup> July 2015 when he was employed substantively as a Heavy Commercial Driver.
9. The Respondent denies unlawfully terminating the Claimant's employment and states that it retired the Claimant after giving him due notice in accordance with its employment policies, which the Claimant was aware of.
10. The Respondent avers that the Claimant was given due notice of the Respondent's intention to retire him early. The Respondent denies that the Claimant was forced to go on leave.
11. The Respondent states that the Claimant was paid all his dues and further issued with a Certificate of Service.
12. Regarding the claim for overtime compensation, the Respondent states that the Claimant worked for 8 hours and was paid mileage allowance to cater for contingencies on transit and compensation for any work done on public holidays.

## Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant's retirement was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

## The Retirement

14. On 7<sup>th</sup> October 2017, the Respondent wrote to the Claimant as follows:

*"Dear Mr. Mbote,*

**Re: Early Retirement Notice**

*The above captioned matter refers.*

*Kindly take note that as per our records you have attained the age of 51 years and the company has decided to separate with you on the basis of early retirement.*

*Accordingly, this letter serves as an official notification of your retirement. This notice counts from 07/10/2017 through 05/11/2017 thus your final day of employment with Bahari Forwarders Ltd will be 06/11/2017.*

*We take this opportunity to thank you most sincerely for the years you have served the company.*

*On behalf of management and entire staff fraternity, we wish you all the best in your future endeavors.*

*Yours faithfully,*

***For: Bahari Forwarders Ltd***

*(Signed)*

***Shadrack Muthangya***

**Human Resources Manager**

*(Signed)*

***Saleem Chandbhai***

**Fleet Manager"**

15. According to this letter, the Claimant's separation from the Respondent's employment was on the ground of early retirement. The fact that the Claimant was retired at the age of 51 is not in contention. The parties differed on the obtaining normal retirement age. However, whether this was 65 years or 55 years is not the issue. The question for determination is whether in making the decision to retire the Claimant early, the Respondent acted within the law.

16. Section 45 (2) of the Employment Act, 2007 provides thus:

***(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.*

17. The Court was referred to the decision in *James Kabengi Mugo v Syngenta East Africa Limited [2012] eKLR* where my brother, Rika J rendered himself as follows:

***“Employers and employees in the private sector are free to fix the retirement age of the employee. The popular retirement age, mainly due to the influences of public sector employment, and a succession of Collective Bargaining Agreements in both the private and public sector, is 60 years. This however is not a legal provision contained in the Employment Act 2007. It does not govern all employment relationships. A party advancing the position that he/she would have retired at the age of 60 years must direct the mind of the Court to the relevant Statute; Regulation; Order; Employment Policy; Individual Contract of Employment; Collective Bargaining Agreement; or the Employer's Internal Rules and Regulations.”***

18. I agree with my brother Judge to the last word. I have however already stated that the issue here is not whether the normal retirement age was 65 or 55 years. The real issue is whether by sending the Claimant home before the normal retirement age, whatever that age was, the Respondent acted within the law.

19. Section 45(2) of the Employment Act, which I have reproduced above, sets the beacons for what would pass as a fair termination of employment. To paraphrase, there must be a valid reason related to the employee's conduct, capacity or compatibility or to the employer's operational requirements; secondly, the termination must be executed fairly.

20. The import of Section 45(2) is that there can never be a termination of employment without reason. It follows therefore that an employer who decides to retire an employee early must give reasons for the deviation.

21. In the present case, no reason was given for the Claimant's early retirement. I did not see any provision for early retirement in the Claimant's letter of employment and the Respondent did not produce any enabling policy.

22. What is more, the Court caught a detail in the testimony of the Respondent's Human Resource Manager, Shadrack Muthangya that he was instructed by the senior management to retire the Claimant early because there had been breach of trust.

23. This piece of evidence reveals that the Respondent had a collateral reason for retiring the Claimant early, which it was not willing to follow through.

24. Enough said. From the foregoing findings, I find and hold that the Claimant's early retirement amounted to unlawful and unfair termination of employment within the meaning of Section 45 of the Employment Act and he is entitled to compensation.

#### **Remedies**

25. I therefore award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service. I have further considered the Respondent's unlawful conduct in executing the termination.

26. From the evidence on record, the Claimant was paid in lieu of the notice shortfall. The claim for notice pay is therefore without basis and is dismissed.

27. The claims for overtime and public holidays, being in the nature of special damages ought to have been specifically pleaded and proved complete with actual dates worked and applicable wage rates. They were not proved to this degree and must therefore fail.

28. Ultimately, I enter judgment in favour of the Claimant in the sum of **Kshs. 340,000** being ten (10) months' salary in compensation for unlawful and unfair termination of employment.

29. This amount will attract interest at court rates from the date of judgment until payment in full.

30. The Claimant will have the costs of the case.

31. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kalimbo for the Claimant

Mr. Akanga for the Respondent