



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1613 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th March, 2018)

JOSEPH MOILO.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 7th October, 2013, seeking damages for unlawful termination in the form of unlawful retirement of the Claimant by the Respondent.
2. He avers that on or about 4th February 1972, by a letter of appointment dated 14th January, 1972, an Employment Agreement was entered into between the Claimant and the Respondent whereby the Respondent engaged the Claimant as a Junior Technician earning a salary of K£435 per annum.
3. The Claimant contends that he provided the necessary services as required by the Respondent executing his duties as laid in the Terms of Service and over a period of time he was promoted to the post of Principal Technologist and his salary was increased to K£ 14,934 per annum vide a letter dated 13th July, 1999.
4. Further, the Claimant contends that on 25.4.2006 in contravention of the terms of service between the Claimant and Respondent contained in the Respondent's internal memo dated 6th October 1989, the Respondent wrote to the Claimant indicating that the latter was due to retire from the service of the Respondent on 6th October 2007, which date was purported to be his last day of service to the Respondent.
5. The Claimant further avers that a letter originating from the Vice Chancellor's office dated 4th November 1997, indicated that the post of Principal Chief Technologist is equivalent to Senior Lecturer as holders of these posts are involved in teaching and research in laboratories and workshops.
6. That a subsequent circular originating from the Vice Chancellor's office dated 18.1.2005, indicated that the approved retirement age for teaching and academic staff was 70 years. In lieu of this the Respondent unlawfully terminated the Claimant 10 years ahead of the approved time for retirement of persons in his job grade pursuant to the letters of 4.11.1997 and 18.1.2005.
7. The Claimant contends that as a result of the Respondent's actions, he has suffered immensely and as such prays for the Claim to be allowed as drawn.
8. The Respondent filed a Memorandum of Response on 11.11.2013, denying the averments of the Claim and stated that the Claimant was not unlawfully retired as his retirement was in line with the Respondent's terms of service. The Respondent prayed for the Claim to be dismissed with costs.

Submissions

9. The Claimant submits that according to his pleadings and evidence in Court, he was unlawfully retired and thus the Claim should be allowed. Counsel for the Claimant cited the case of **John Danson Kibinda Vs University of Nairobi (2011) eKLR** where the Claimant in that case found himself in similar circumstances and was sent on early retirement prior to attaining his contract retirement age of 70 years and earlier than the prescribed time as per clause 20(b) of his Terms and Conditions of Service.

10. It is submitted that the Claimant proved his case on a balance of probabilities and as such pray for judgment to be entered in favour of the Claimant as set out in the Claim.

11. On behalf of the Respondent on the other hand, it is submitted that the Claimant in his submissions referred to clause 20(b) of Terms and Conditions of service which requires the retirement age to be effected on 30th June of the year following the day of attaining retirement age, which fact was not pleaded and even if it was the same was amended by a circular dated 14.7.2002, to reconcile it with the then newly enacted Retirement Benefits Act 1997 and the related Regulations of 2000 which reads:

“A member of staff who reaches the retirement age will be required to cease duty on the date he attains retirement age.”

12. It is submitted on behalf of the Respondent that the said circular has not been challenged and has been in continued implementation.

13. Counsel for the Claimant urges that the Claimant in cross-examination admitted that the Respondent notified him of his upcoming retirement on 6.1.2007 as early as 25.04.06. That he accepted the notice without qualms as indicated in his letter of 26.5.06. That he also admitted that he applied for post-retirement contractual employment which the Respondent declined and that in the same letter he acknowledged that his term of service properly ended on 6.10.2007.

14. On the circular dated 4.11.1997 it is submitted that the said memo equated the position of Principal Chief Technologist with that of Senior Lecturer only for purposes of VAT and excise duty exemption. Further that the circular of 18.1.2005, has a table that distinctly shows two broad categories of staff and their changed retirement age. The Claimant fell under the non-teaching staff whose retirement age had been harmonized to 60 years.

15. It is submitted that the Claimant has not discharged the burden of proof encapsulated under the provisions of Section 107 of the Evidence Act, Cap 80 Laws of Kenya. This is based on the fact that the documents the Claimant relies on are consistent with the fact that the Claimant retires at 60 years of age. They cite the case of **Rift Valley Textiles Limited Vs Edward Onyango Oganda, Civil Appeal No. 27 of 1992** where the Court held that a termination of Employment in accordance with the contract of employment could not possibly be unlawful.

16. It is further submitted that a Claimant cannot possibly be awarded damages to the date of retirement. They cite the case of **Elizabeth Wakanyi Kibe Vs Telkom Kenya Limited (2014) eKLR** where the Court of Appeal upheld the decision in **Engineer Francis N. Gachuri vs Energy Regulatory Commission Industrial Cause No. 203 of 2011** where it was held:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provided for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. This why the Employment Act does not mention the word “permanent employment”.

17. Counsel for the Respondent also submits that there are no damages at large in employment claims. He cites the case of **Alfred Githinji Vs. Mumias Sugar Company Limited (Civil Appeal No. 194 of 1991)** where it was held that upon wrongful termination of the employment of an employee, he is entitled only to the amount specified in his contract of service as payable to him by his employer upon the termination of his employment wrongfully or otherwise, in lieu of notice and not to general damages at large.

18. The Respondent’s Counsel is of the view that the sole authority relied on by the Claimant supports the position that there was no extension of retirement age. They pray for the Claim to be dismissed with costs.

19. I have examined the evidence of both parties. I note that the Claimant was 1st employed by the Respondent on 14.1.1972. He was promoted over time and on 25.4.2006, he was notified of his impending retirement with effect from 6/10/2007. According to the Respondent’s Preview of terms dated 6.10.1089, (Appendix JM4) the retirement age was 60 years. The Claimant was retired at the post of Principal Technologist.

20. It is his contention that this post fell in the category of Principal Lecturer as per his Appendix JM5 which is a letter from the Vice Chancellor to the Permanent Secretary, Ministry of Finance indicating that the post of Principal Chief Technologist is equivalent to Senior Lecturer and post of Chief Technologist to Lecturers post - JM6. The letter from Vice Chancellor’s office dated 18th January 2005 indicated that the approved Retirement Age for Teaching and Academic Staff was 70 years.

21. After the Claimant was retired on 6th October 2007, he filed this claim on 7th October 2013. This was more than 6 years after the alleged premature retirement.

22. When Claimant was about to reach his retirement age, he was notified of the same in 2006. He finally exited service on 6.10.2007. He never complained of the unlawfulness of the action until he filed this claim on 7th October 20.3.2013.

23. Section 14(9) (e) of the Trade Dispute Act (Repealed) states as follows:-

”The Court shall not take cognisance of any trade dispute or deal with any matter therewith unless the Court has received a certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery including statutory machinery for the voluntary settlement of disputes prior to reference to the Court has been exhausted”.

24. In the current case, there is no indication that the above conciliation process ever occurred. The matter was also filed after 6 years from the time the alleged cause of action arose contrary to Cap 22 Laws of Kenya.

25. In view of the above facts, it is my finding that this case apart from being time barred, it is improperly before this Court. I therefore dismiss this case accordingly. I direct that each party will bear its own costs.

Dated and delivered in open Court this 6th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onyango holding brief Kipkorir for Respondents

Claimant – Absent