



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 526 OF 2013

JOHN NGUGI WANJAU.....CLAIMANT

V

MULTIPLE HAULIERS (E.A.) LIMITED.....RESPONDENT

JUDGMENT

1. John Ngugi Wanjau (Claimant) was employed by Multiple Hauliers (EA) Ltd (Respondent) as a *trucker driver* through a letter dated 18 September 2006.
2. On 31 July 2012, the Respondent wrote to the Claimant informing him that it had been decided to retire him with effect from that date because he had attained the retirement age.
3. The parties thereafter engaged in correspondence on the question of retirement which the Claimant contended was unfair, but no resolution was reached.
4. On 10 April 2013, the Claimant instituted legal proceedings against the Respondent and he stated the Issues in Dispute as
 - (a) Unlawful termination of services.
 - (b) Non-payment of terminal dues.
5. The Respondent in a Response filed in Court on 14 May 2013 pleaded that it is the Claimant who requested to be retired due to his health and that he was paid all terminal dues.
6. For reasons which are not clear from the record, it was not until 6 February 2018 that the Cause proceeded to hearing.
7. The Claimant testified while the Respondent opted to close its case without calling any witness.
8. The Claimant filed his submissions on 13 February 2018 while the Respondent filed its submissions on 21 February 2018.
9. The Court has considered the pleadings, evidence and submissions and identified the questions arising for determination as, *whether the Claimant retired or was dismissed and appropriate remedies including entitlements accruing from the employment relationship.*

Retirement or dismissal

10. In his testimony, the Claimant disclosed that he got involved in a road accident while in the course of duty and that he was in and out of hospital over a period of time and that in June 2012 he was given sick off and that when he resumed duty, the Respondent's Personnel Manager told him to await for the return of the Managing Director who was in India at that time, for further instructions.
11. The Managing Director and the Personnel Manager held discussions as a result of which he (Claimant) was offered Kshs 60,000/- and told that his services were no longer required.
12. According to the Claimant he asked the Personnel Manager for a letter terminating his employment and was told to return the next day. He was then given the retirement letter at the gate by the guards manning the gate.

13. The Claimant stated that he had not reached retirement age as he was born in 1955 (copy of identity card was produced).

14. As to the retirement age, the Claimant testified that although he pleaded it was 60 years, his inquiries had established that it was 65 years (letter of appointment filed by Respondent provided at clause 13 for retirement at 65 years).

15. The retirement letter did not suggest that it was in response to a notice or request from the Claimant, or due to ill health. The letter expressly indicated that the Respondent had decided to retire the Claimant.

16. The testimony of the Claimant on the circumstances of separation and the textual content of the letter of retirement make it most probable that it was the decision of the Respondent to retire the Claimant and that it was not at his request.

17. Because of the provision of clause 13 of the contract that retirement age was 65 years, the Court can conclude that the retirement of the Claimant was premature, unilateral and lacking consultations with the Claimant.

18. The retirement in the circumstances obtaining was an unfair termination of employment and the Court so finds.

Remedies/Accruals from the employment relationship

Leave for years 2011 to 2012

19. In terms of sections 10(3) & (7) and 74 of the Employment Act, 2007, the Respondent had an obligation to demonstrate through employment records the leave entitlements of the Claimant. That was not done.

20. Considering the unrebutted testimony of the Claimant that he did not go on annual leave for 2011 to 2012, the Court would find that he is entitled to the equivalent in cash for the leave which he computed as Kshs 40,000/- (Respondent did not challenge the tabulation).

Pay in lieu of Notice

21. The Claimant was paid by the month and in terms of sections 35 and 36 of the Employment Act, 2007, the Court finds he is entitled to the equivalent of 1 month pay in lieu notice (basic pay was Kshs 17,632/- at point of separation).

Compensation

22. The Claimant served the Respondent for about 6 years and in consideration of the length of service, the Court would award him the equivalent of 7 months gross wages as compensation (pay slip for May 2012 filed by the Respondent indicate Claimant's gross wage was Kshs 20,277/-).

23. Before concluding, the Court notes that the Claimant was paid Kshs 65,371/- as dues (salary for June 2012, salary July 2012 and service pay) which are not claimed in the present Cause.

Conclusion and Orders

24. The Court finds and holds that the retirement of the Claimant was unfair and awards him and orders the Respondent to pay him

(i) Leave Kshs 40,000/-

(ii) Pay in lieu of notice Kshs 17,632/-

(iii) Compensation Kshs 141,939/-

TOTAL Kshs 199,571/-

25. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 2nd day of March 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Thuita instructed by Guandaru Thuita & Co. Advocates

For Respondent Mr. Diro instructed by Diro & Co. Advocates

