



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

AT NAIROBI

CAUSE NO. 245 OF 2012

ELIZABETH HALWENGE.....CLAIMANT

- VERSUS -

KENYA BUREAU OF STANDARDS.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th April, 2018)

JUDGMENT

The claimant filed the statement of claim on 16.02.2012 through Letangule & Company Advocates. The claimant prayed for judgment against the respondent for:

1. A declaration that the conduct of the respondent against the claimant in terminating her employment on account of retirement amounted to a violation of the claimant's constitutional rights and in particular Article 41(1) of the Constitution.
2. A declaration that terminating the claimant's services without observing the Government Regulations was in breach of the claimant's contract of employment.
3. A declaration that the claimant is entitled to be compensated for:
 - a. Violation of her constitutional rights as envisaged under Articles 23(3) and 41 (10) of the Constitution.
 - b. Violation of her employment, legal and contractual rights.
 - c. Neglect and refusal by the respondent to fulfill its contractual obligations.
 - d. Injury to the claimant on account of the respondent's breaches.
4. An order that the claimant be refunded all her pension contributions.
5. An order that the claimant be compensated as follows:
 - a. Salary in lieu of 6 months notice at Kshs. 49, 940.00 a month making Kshs. 299, 640.00.
 - b. 6 days' pay in April 2005 Kshs. 9, 988.00.

- c. Allowances for April 2005 Kshs. 77, 310.00.
- d. Salary for the period remaining till retirement at age 55 Kshs.6, 692, 391.00.
- e. Payment of gratuity for the claimant's excellent service Kshs.1, 000,000.00.
- f. Fifteen days' basic salary for every completed year of service Kshs.449, 460.00.
- g. Lost pensionable years Kshs.344, 551.00
- h. Total claim of Kshs. 8, 873, 340.00

6. Interest on above compensation at the rate of 20% per annum from the date of termination of service to the date of payment in full.

7. Costs of the suit.

8. Any other or further reliefs the Honourable Court may deem necessary to award.

The respondent filed the response to the statement of claim on 04.04.2012 through Wachakana & Company Advocates. The respondent prayed that the claim be dismissed with costs to the respondent.

It is not in dispute that the respondent employed the claimant as a Legal Officer by the letter dated 05.01.1987 and effective 02.01.1987. The claimant successfully served the contractual probationary period of 6 months and was confirmed in appointment in the same position on permanent terms of service.

By the letter dated 04.05.1999 the claimant was promoted to the post of Corporation Secretary effective 07.04.1999 at salary scale BE 3. By the letter dated 27.07.2000 the respondent conveyed to the claimant that by reason of re-organisation, the position had been upgraded to salary scale BE2. The respondent delivered to the claimant the "**Long Service Award Certificate**" dated 11.12.2002 in appreciation of the claimant's service to the respondent.

In circumstances the claimant describes as, "**...strange twist and without proper reason,**" the respondent published in the print media, sometimes in June 2004, an advertisement for the position of Corporation Secretary which at the material time was held by the claimant. The claimant's case is that notwithstanding the absurdity of the advertisement, she submitted her application for the position as advertised. The respondent carried out the interviews and another person was appointed by the respondent to the position. The Court finds that by applying and participating in the recruitment and selection process, the claimant had thereby clearly condoned her impending removal from the position – and the court will revisit the consequence of the finding in this judgment.

The respondent addressed to the claimant a letter dated 07.04.2005 terminating her employment on account of retirement under the 50 years rule. The letter stated as follows:

"REF: RETIREMENT UNDER THE 50 YEARS RULE

This is to inform you that the Board has decided to retire you with immediate effect pursuant to the Kenya Government Code of Regulations G 44 read along with G 46.

You should, therefore, immediately hand over your duties to the new Company Secretary, Mrs. Rose A. Ochanda.

Your benefits will be paid according to Kenya Bureau of Standards Staff Regulations.

Yours faithfully,

Signed

Eng. J.M. Masila

Managing Director

The claimant complied and handed over on 13.04.2005. At termination the claimant's monthly basic pay was Kshs. 49, 940.00. The claimant instructed her advocates to demand for her final dues and the respondent paid her Kshs. 433, 713.95 as the retirement package.

The claimant's case is that the retirement violated Article 41 (1) of the Constitution against unfair labour practices; the retirement violated the cited regulation G.46 on retirement upon attainment of the age of 50 years because the 6 months' notice was not issued as was prescribed; she was paid salary up to 07.04.2005 being the date she received the retirement letter yet she had handed over on 13.04.2005; and the retirement placed her in financial embarrassment because she failed to repay her bank loans on due dates.

The respondent's case is that the claimant was paid full terminal dues of Kshs. 433, 713.95 as retirement package. Further the claimant accepted the retirement as per the retirement letter and also accepted the payment of the retirement package computed per the staff regulations. The respondent's further case is that the court lacks jurisdiction to give a constitutional declaratory order in a case of a private body or public body with respect to contractual rights and obligations between the parties.

The main issue for determination in the suit is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1. It has been established that the claimant was paid up to 07.04.2005 but she handed over on 13.04.2005. Accordingly the court returns that her last day at work was on 13.04.2005 and she is entitled to pay for a further 6 days as prayed for making **Kshs.9, 988.00**.
2. The claimant prays for 6 months' pay at Kshs. 49, 940.00 per month making Kshs.299, 640.00 in lieu of the alleged 6 months' termination notice. It was pleaded for the claimant that Regulation G 46 under which the claimant was retired under the 50 year rule required the respondent to give a six months' retirement notice. The claimant did not exhibit that regulation. There were no submissions made for the claimant in that regard. The Court returns that the claimant has failed to establish the prayer by way of evidence as the same has not been justified. Further, the last pay certificate shows the claimant was paid salary in lieu amounting to Kshs. 299, 640.00 and there is no reason to doubt the respondent's submission that 6 months' salaries had been paid in lieu of the termination notice. Accordingly, the prayer will fail.
3. The last pay certificate shows that the claimant was paid monthly allowances up to 07.04.2005 but she had handed over on 13.04.2005. The court returns that she would be entitled to further pay up to 13.04.2005 and she is awarded **Kshs.15, 462.00** as the proportionate unpaid allowances for 6 days.
4. The claimant prays for Kshs. 6, 692, 391.00 being salary for the period remaining till retirement at age 55. The claimant has not established any diminished capacity to engage in gainful employment or other engagement attributable to the respondent or consequential to the retirement. The Court finds that the claimant was a professional of long standing and great experience and nothing has been shown that would have barred her from mitigating her changed income circumstances consequential to the retirement. The prayer will therefore fail as unjustified. Similarly and upon the Court's findings on the claimant's opportunity to mitigate her circumstances consequential to termination, the Court returns that the prayer for payment for lost pensionable years will fail. Submissions were made for the claimant invoking the Pensions Act Cap. 189 but the Court returns that there was no case pleaded or evidence suggesting that the claimant's service was a pensionable service under the Act. Thus, the Court returns that the Act was not shown to apply to

the claimant's retirement.

5. There were no submissions made for the claimant on the prayer for gratuity for the claimant's excellent service. The Court considers that the prayer was abandoned as unjustified and without contractual or other basis. Similarly 15 days' basic salary for every year of service was not justified by way of submissions or evidence to support the prayer and the same will fail.

6. The claimant prayed for a declaration that the respondent had violated her rights as protected under Articles 41(1) of the Constitution of Kenya 2010. It is clear that as at time of retirement the cited Article was not in operation. Further, the Court returns that the claimant's injury clearly fell within the claim for breach of the contract of employment and the claimant did not establish transgressions by the respondent beyond the contract of employment. The Court returns to the earlier finding that the claimant condoned her removal from employment by participating in the recruitment and selection process for the post she already held. The Court finds that by that conduct the claimant must have accepted the circumstances of her removal because she failed to promptly oppose the advertisement and the subsequent recruitment, selection and appointment of another person in the position. As submitted for the respondent, the claimant must have accepted the retirement and the retirement package that was subsequently paid. In such circumstances, the Court finds that the allegations of violation of fundamental rights and the prayer for compensation in that regard were unfounded. Thus, the Court returns that the prayer for the declaration and compensation as was made for the claimant will be declined.

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

- a. Payment of **Kshs.25, 450.00** plus interest at court rates from the date of the suit till full payment.
- b. The respondent to pay 25% of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 13th April, 2018**.

BYRAM ONGAYA

JUDGE