



**REPUBLIC OF KENYA**

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

**PETITION NO. 17 OF 2012**

**(Formerly HC Petition No.274 of 2011 at Nairobi)**

**NANCY WAIYEGO IRUNGU.....PETITIONER**

**- VERSUS -**

**OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> June, 2018)

**JUDGMENT**

The petitioner filed the petition on 25.11.2011 in the High Court at Nairobi through Naikuni, Ngaah & Miencha Company Advocates. The petition was titled in the matter of Articles 27(1), (2), (3), (4) and (5), 28, 41(1) and 54(1) (a), (b), (c), (d) and (e) of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) and High Court Practice and Procedure Rules; in the matter of sections 12 and 15 of the Persons with Disabilities Act No.14 of 2003; and in the matter of alleged contravention of fundamental rights and freedoms under Articles 27(1), (2), (3), (4), and (5), 28, 41(1) and 54(1), (a), (b), (c), (d) and (e) of the Constitution regarding forced and imposed early retirement on grounds of disability.

The petitioner prayed for judgment against the respondent for:

- a) A declaration that the actions of the respondent are unconstitutional and in contravention of Articles 27(1), (2), (3), (4) and (5), 28, 41(1) and 54 (1) (a), (b), (c), (d) and (e) of the Constitution as the acts of the respondent were discriminatory on disability and women.
- b) An order that the respondent forthwith and constitutionally reinstate the petitioner back to her employment position terms and conditions stipulated thereof.
- c) An order that the respondent do pay damages to the petitioner for loss of earning, humiliation and inconveniences suffered as a result of the respondent's illegal, unlawful and wrongful actions.
- d) An order that the respondent do pay costs of the application.

The petition was supported by the attached petitioner's affidavit and exhibits. The petitioner filed a supplementary affidavit on 01.02.2012. The petitioner also filed the further supporting affidavit on 26.03.2018.

The respondent opposed the petition by filing on 22.12.2011 the replying affidavit of William Muchangi Wambugu, the respondent's head of human resource.

It is not in dispute that the respondent employed the petitioner as a telephone operator effective 01.03.1994. The petitioner successfully served on probation and was confirmed in appointment on permanent and pensionable terms on 12.05.1995. The petitioner was promoted to a cashier and finally to the mail department, as per the petitioner, in the capacity of Mail Room Administrator. It is disputed between the parties whether the deployment amounted to a promotion but it is clear from the evidence on record that the petitioner's last station of work was at the mail registry or room. It is not in dispute that the petitioner was a person with disability.

The petitioner's case is that she was terminated from employment on account of the physical disability she had right from birth. It is her case that trouble had started when the officer deployed as her assistant to assist in distributing mails to various respondent's departments and sections was withdrawn. The respondent denies that account and states that in any event there were several members of staff deployed at the mailroom at all material times. Further, the respondent has stated that the respondent never discriminated against the petitioner, she was promoted through the ranks, her full salary and benefits were paid, and she was given all the necessary support throughout the service. The

record is clear that prior to the circumstances of the termination as alleged for the petitioner, the petitioner has not alleged or established discrimination on account of the physical disability.

The **main issue** in this case is to determine the factual reason for termination of the petitioner's employment with the respondent. The respondent's case is that the contract of service between the parties was terminated when the petitioner willingly and voluntarily signed a letter requesting to retire early and which was accepted by the respondent. The petitioner's case is that she was discriminated against on account of disability and required to sign the request for early retirement if she was to safeguard her terminal benefits. The petitioner has clarified the circumstances of her termination in the further supporting affidavit as follows:

a) On 10.12.2009 at around 9.00am she was summoned by the assistant human resource officer one Angela Wangenye and told that the human resource officer one George Muiruri wanted to see her immediately.

b) She complied and found the said Muiruri together with the chief operations officer one Tom Juma who informed her that the respondent's management had decided to lay her off. The reason that was given was that there were changes in the organization that were being brought in the respondent company and which changes could not accommodate the petitioner. No further explanation was given. The said Muiruri then asked the petitioner to prepare a letter requesting the respondent to grant the petitioner early retirement and to request the chairman of the provident fund to pay her benefits on physical or medical condition. It is the petitioner's case that she was required to do so against her will. She resisted doing so partly because she was repaying a mortgage with the respondent which stood at a balance of Kshs.1, 900,000.00. That the chief operations officer told her that if she did not sign the letter she would anyway leave employment with the respondent and lose benefits due to her. At that point the human resource manager turned his computer and showed the petitioner a letter dated 08.12.2009 confirming and accepting the petitioner's voluntary resignation but at that time she had not written a letter to resign (for the early retirement). She then reluctantly prepared the letter of resignation dated 10.12.2009. The letter signed by the petitioner was titled "**Request for Early Retirement**" and was addressed to the group human resource stating "**This is to kindly request you to consider my early retirement request after 15 years of service with Old Mutual. By a copy of this letter I also wish to request you as the chairman of Old Mutual Provident Fund to consider paying my employer's contribution on medical/physical condition. Thanks for period you have given me to serve the Old Mutual.**"

c) That she handed in the letter at around 11.00am and immediately, she was given an acceptance letter signed by the respondent's chief executive officer and dated 10.12.2009. That letter confirmed acceptance of the petitioner's request, set out the terminal dues payable and concluded, "**You have had 15 years of dedicated and committed service with Old Mutual Life Assurance Company. On behalf of management, I want to wish you well in your future endeavours as you make this memorable transition in your career.**" The copy of the letter filed for the respondent shows that the petitioner signed confirming the letter as an agreement between the parties and final settlement.

d) On 14.12.2009 the petitioner reported at the office. The human resource officer summoned the petitioner and told her that her earlier letter had been misplaced and asked the petitioner to disregard the earlier letter but to sign another letter dated 08.12.2009, being the one she had seen on computer on 10.12.2009. The petitioner stated that she signed it and dated it 14.12.2009 and it stated that she would retire on 31.12.2009.

At paragraph 6 of the supplementary affidavit filed on 01.02.2012 the petitioner states that the human resource officer informed her that the management had resolved to lay her off on medical or physical conditions since they felt that the petitioner had difficulty in discharging her duties. At paragraph 10 of the supplementary affidavit the petitioner states that she completed the exit interview questionnaire under pressure and undue influence.

The Court has considered the evidence on record. There is no doubt that the petitioner signed requesting to retire early and the respondent accepted the request. By that parties' agreement, the petitioner's contract of service with the respondent ended on 31.12.2009. The Court returns that the termination was on account of that written agreement on early retirement with agreed terminal benefits. The petitioner's allegations to the effect that the reason for retirement was discrimination on account of disability have not been established in view of the material on record. The Court finds that after the agreement to retire, the petitioner completed the exit interview questionnaire and took the agreed terminal benefits. By that conduct, the petitioner was clearly acting of her own will and voluntarily so. If indeed there had been discrimination as was alleged on the part of the petitioner, nothing precluded her from refusing to condone the respondent's alleged discrimination. Thus, discrimination on account of disability has not been disclosed in this case as a reason for termination or a ground for denial of equal opportunity during the subsistence of the employment.

As submitted for the respondent, the Court follows its opinion in **Steve Mutua Munga –Versus- Homegrown (K) Limited & 2 others [2013]eKLR**, thus, "**As submitted for the respondent, by duress is meant the compulsion under which a person acts through fear of personal suffering as from injury to the body or from confinement actual or threatened (Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 9 Paragraph 296). As further submitted for the respondent, coercion means compulsion by physical force or threat of physical force (Black's Law Dictionary 8<sup>th</sup> Edition)....the claimant has failed to establish the same in the circumstances of this case. On two occasions namely, on 15.06.2009 the claimant signed the resignation letter, and on 24.06.2009 again signed the disclaimer. The court finds that the parties engaged in voluntary contractual arrangements and they were accordingly bound. The court therefore, finds that the resignation was voluntary, valid and lawful. There is no evidence on record to show that at all material time the respondent did anything that vitiated the claimant's will to remain in employment and to instead resign. The evidence on record shows that the claimant being a highly experience medical doctor deliberately entered into agreements and arrangements culminating into the termination of his employment. At no point did the claimant protest against the respondent's acceptance of the resignation and payment of the terminal dues except after he had conclusively terminated the employment and consumed the benefits of the termination.**"

While making that finding, the Court has considered the petitioner's case that her assistant at the mail registry had been removed. The Court finds that there was no evidence of a grievance by the petitioner against the respondent in that regard at the time of termination or prior to the termination. Thus, that allegation as a forerunner to the ensuing alleged termination on account of discrimination will fail. Further, the Court

has considered the long service and promotions the petitioner enjoyed in the respondent's service and returns that the record of service does not suggest discrimination on account of disability but shows that the respondent accorded the petitioner equal opportunity throughout the employment.

**Finally**, the Court follows Kyengano –Versus- Kenya Commercial Bank Limited & Another [2004]1 KLR (Njagi J) thus, “**Contracts are made by the parties themselves. Courts come in to construe these contracts and arbitrate any disputes concerning or touching upon them, but not to make those contracts for the parties. Parties to a contract are at liberty to negotiate whatever conditions they like. If a condition is harsh or unfair, then the other party is at liberty to reject it. However, once parties have agreed to terms, it would be unfair thereafter for one of them to claim that some conditions was or were unfair.**” In the present case, the parties agreed to end the contract of employment by way of the claimant's early retirement. The parties are bound accordingly. The reason for the termination was the agreement and the petitioner's alleged discrimination as the reason for the termination of the contract of service between the parties was not established as it was not anywhere to begin emerging as the proximate cause of the termination.

In view of the Court's finding on the main issue for determination, it follows that there would be no need to delve into the issues of the alleged violation of rights and freedoms, and, the remedies as prayed for. The Court has considered the circumstances of the proceedings including the reconstruction of the Court file and each party shall bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with orders each party to bear own costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday 22<sup>nd</sup> June, 2018.**

**BYRAM ONGAYA**

**JUDGE**