



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

**AT NAIROBI**

**CAUSE NO. 1932 OF 2013**

**ANNASTACIA N. WARUI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**ST. MARY'S SCHOOL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant brought this suit on 3.12.2013 alleging that she was unfairly, discriminatorily and prematurely retired from service by the respondent and prayed for the following:

- a) Declaration that the retirement was unlawful, unfair and unprocedural.
- b) Declaration that the failure to pay the claimant her due allowances was unlawful.
- c) General damages totaling top kshs. 5,896,680.
- d) Costs of the suit.

2. The respondent filed her defence on 12.2.2014 admitting that the claimant was her employee until 31.8.2013 when she retired upon attaining the mandatory retirement of 55 years and was paid all her terminal dues. The respondent has however denied the allegation that the retirement was unfair, discriminatory, premature and unprocedural. She averred that the claimant's contract provided for mandatory retirement age of 55 years subject to extension by 5 years at her discretion. It is the respondent's case that she served reasonable retirement notice on the claimant and declined her request for extension of the contract by 5 years. She therefore prayed for the suit to be dismissed because the retirement was legally and procedurally done as stipulated under the contract of employment.

3. The suit was heard on 19.10.2016 when the Claimant testified as CW1 and the Respondent called her principal, Mr. Benedict Otieno Odhiambo as RW1. Thereafter only the claimant filed written submission which I have carefully considered herein.

**Claimant's Case**

4. CW1 testified that he was employed by the Respondent on 1.10.1985 as a Secretary and rose the rank to become Executive secretary earning kshs. 98,278 per month. She testified that her contract provided for retirement age of 55 years with a possibility of extension for 5 years but the respondent's provident fund scheme provided for retirement age of 60 years.

5. CW1 testified that she worked for 28 years until 29.1.2013 when she was served with a retirement notice but her request for extension of the contract for 5 years was declined by the respondent. She contended that she had witnessed contracts of her colleagues extended by 5 years after attaining 55 years. She further contended that the provident fund scheme provided for the retirement age of 60 years. On the basis of the foregoing 2 reasons she contended that she had the reasonable expectation that her contract would be extended by 5 years. She therefore contended that the failure to extend her contract on attaining the age of 55 was discriminatory and unfair and prayed for the relief sought by the claim.

6. On cross-examination, CW1 admitted that her contract of service provided for mandatory retirement of 55 years and that she attained 55 years on 5.8.2013. She further admitted that she was served with retirement notice dated 29.1.2013 and applied for extension but the same

was declined by the respondent's letter dated 1.7.2013. She also admitted that she was paid all her terminal dues after the retirement. She however contended that she expected to work until she reached 60 years in August 2018 as provided by the respondent's provident fund scheme. She further contended that she was not accorded any hearing before the extension of her contract was declined.

### **Defence Case**

7. Rw1 confirmed that the claimant was employed by the respondent on 1.10.1985 under a contract which provided for retirement age of 50 year for female and 55 years for male employees. He further testified that the on 1.1.2003, she signed a new contract, which increased the retirement age to 55 years subject to renewal for 5 years at the respondent's discretion.

8. Rw1 explained that by the letter dated 29.1.2013, the respondent notified the claimant of her retirement on 31.8.2013 and she acknowledged receipt by her letter dated 14.2.2013, by which she requested for extension of her contract for 5 years because she had a child in school. The request was declined and the claimant was notified by the letter dated 1.7.2013. The claimant appealed by the letter dated 2.7.2013 but the respondent dismissed the appeal and notified the claimant by the letter dated 25.7.2013.

9. Rw1 testified that after the retirement, the claimant was paid all her dues and issued with a certificate of service. He maintained that the retirement of the claimant was procedural and lawful, and contended that clause 17 of her contract of employment provided that the mandatory retirement age of 55. He further contended that there is no time an employee's contract was extended on ground that the employee had a child in school.

10. On cross-examination, Rw1 explained that the claimant was not a member of union and as such, the terms of service provided by the CBA in force did not apply to her contract. He however admitted that, the claimant's personal statement from the respondent's staff provident fund filed herein indicated that her normal retirement age was 5.8.2018. He however contended that the provident fund was managed by an independent institution.

### **Analysis and determination**

11. There is no dispute that the Claimant was employed by the Respondent as a Secretary for 28 years until 31.8.2013 when she was retired upon reaching the mandatory retirement age under her contract of service. The issues for determination are:-

(a) Whether the retirement of the claimant at the age of 55 years and the failure to extend her contract for a further 5 years was discriminatory, unlawful, unfair and unprocedural.

(b) Whether the reliefs sought ought to be granted.

### **Unfair and unprocedural retirement.**

12. The claimant admitted that her contract of service provided for mandatory retirement age of 55 years. She further admitted that she attained the age of 55 on 5.8.2013 and that before then the employer had served her with a retirement notice dated 29.1.2013 which she acknowledged by her letter dated 14.2.2013. She also admitted that she retired on 31.8.2013 and she was paid all her dues. She however contended that her contract ought to have been extended like it happened to other employees whose contracts were extended after reaching 55 years.

13. I have perused clause 22.1 of the claimant's contract of service entered on 1.1.2003 which is copied herein below:

***“The employee shall be required to retire on attaining the age of 55 years. The school may at its discretion renew the employee's contract for a period not exceed five (5) years.”***

14. The foregoing term of the contract is not ambiguous and the claimant has not pleaded that there exists any ground to vitiate that contract.

As testified by the Rw1, the claimant's retirement was lawfully and procedurally done within the terms of her contract of service and all her dues paid. It is trite law that the court's jurisdiction is only limited to enforcing the contract between the parties and not to rewrite it. The court cannot fault the employer for failing to exercise her discretion in extending the claimant's contract after attaining the mandatory retirement age. Consequently, I find and hold that the claimant has not proved on a balance of probability that her retirement, and that the failure by the respondent to grant her request for extension was discriminatory, unfair, and unprocedural.

15. The court was asked to follow the decision by Nduma J in ***Benson N Irungu v Total Kenya Limited [2015] eKLR*** where the court faulted the employer for unfairly terminating the employee's services through forced retirement. I however find that the facts of this case are distinguishable from the cited case in that in the present case the claimant was retired lawfully after attaining the mandatory retirement age under her employment contract.

### **Reliefs**

16. In view of the foregoing finding herein above that the retirement of the claimant, and the failure by the employer to extend the contract was within the stipulations of the contract of service, I decline to make the declarations sought or grant any damages to the claimant as prayed. The claimant has admitted that she was paid all her dues upon retirement and as such she cannot earn the wages after the retirement for no work done.

**Disposition**

17. For the reasons that the claimant has failed to prove her case to the required standard, the suit is dismissed. Each party shall bear her own costs.

**Dated, signed and delivered at Nairobi this 8th day June of 2018**

**ONESMUS MAKAU**

**JUDGE**