



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 270 OF 2016

ROBERT GITHUA GITHAKA.....CLAIMANT

VERSUS

SAAB KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed suit on 2nd December 2016 seeking recover on account of a dismissal that was meted out on 16th September 2016. The Claimant averred that he was vide a letter dated 16th September 2016 directed to proceed for retirement immediately. He averred that the retirement notice issued was unlawful, premature and unfair since he had not attained the retirement age. The Claimant averred that the retirement notice amounted to unfair labour practice and denied him an opportunity to retire at the age of 60 years and amounted to unlawful and unfair termination of his employment. The Claimant sought a declaration that the retirement notice dated 16th September 2016 was premature, unlawful and unfair, that by conduct the Respondent had led the Claimant to believe he was to retire at the age of 60 years and should be estopped from reneging from that position, a declaration that the Respondent is guilty of unfair labour practice, full indemnity and compensation for the premature retirement Kshs. 2,073,528/-, damages for unlawful termination of employment Kshs. 691,176/-, payment of 12 months salary for premature retirement notice 691,176/-, unpaid wages for days worked in September 2016 and leave days Kshs. 86,397/-, six months retirement gratuity Kshs. 355,625/-, field allowance and per diem Kshs. 66,000/-, costs of the suit and interest.

2, The Respondent filed a defence on 20th March 2017 and in the defence averred that the Claimant was employed as a driver earning a consolidated salary of Kshs. 52,067/- and at the time of dismissal was earning Kshs. 59,271/- a month. The Respondent averred that the date of birth per the records was 28th December 1959. It was averred that the Respondent came up with a retirement policy in July 2016 and the purpose was to set out a transparent process and allow staff to make a smooth transition and assist the Respondent undertake workforce planning including succession planning. The Respondent averred that under clause 3 of the retirement policy the retirement age was set at 55 years and that the Claimant was issued with a retirement notice on 16th September 2016 informing that he would be retired with effect from that date and at the time the Claimant was 57 years old and had surpassed the retirement age of 55 years under the policy. The Respondent prepared the Claimant's retirement dues as 1 month paid leave, retirement gratuity of 6 months' pay, 15 days field allowance, 6 months flat rate field allowance, any owed leave and overtime (nil), employer reference, assistance in curriculum vitae, financial planning guidance if required, counselling if required, retirement event and photograph, access to pension fund contribution. The Respondent averred that the Claimant was paid his retirement dues amounting to Kshs. 387,325/- which consisted of 1 month notice pay, gross pay for September 2016, 6 months gratuity and field allowance. He was also given access to his pension fund contribution. The Respondent denied that the Claimant had a legitimate expectation to retire at 60 years as his letter of employment did not contain that expectation. The Respondent denied that it attempted to coerce the Claimant to sign a discharge as averred by the Claimant. The Respondent denied the Claimant was entitled to the declarations sought or that he was entitled to receive any payment as claimed since the Respondent had made payment for his retirement dues.

3. The Claimant filed a reply to defence on 25th April 2017 and a list of issues on 30th May 2017. The issues were 7 in number and could be collapsed to the following

- i. Whether the retirement of the Claimant was agreed or implied to be at 60 years
- ii. Whether the Respondent is estopped from reneging from the position in i) above
- iii. Whether the retirement notice dated 16th September 2016 was unlawful, unfair and premature
- iv. Whether the Claimant is entitled to relief sought and who is to bear the costs of the suit

4. The Claimant testified on 8th February 2018 and in his oral testimony was that he was relieved of his post on 16th September 2016 when

he was required to deploy to the field alongside the British Army for an exercise. He was called at around 7.00am and notified that he would not be leaving the camp with the rest of the team and he was given other tasks till 10.30am when he was summoned to the office and met the Manager and HR who had come from Nairobi. He was given the letter indicating that he was retiring. He confirmed that he was paid some Kshs. 387,325/- and that the retirement policy was from 27th July 2017. He stated that he was 57 at the time of retirement and he was to retire at 60 years. He confirmed that the contract did not indicate the retirement age at 60 year and that the documents he had with the Respondent are what indicated the retirement at 60 years. He stated that the pension certificate showed the retirement age as 60 years. He also referred to the letter the Respondent had written to his bankers indicating that the Claimant had 6 more years of service for a check off for a loan. He testified that he did not get adequate notice before the retirement and that he was to get 12 months' notice under clause 3.2 and that he was just dismissed. He admitted that the Respondent paid his salary for the month of September.

5. The Respondent called Mr. Russel Isaac Thuma the HR Manager of the Respondent and stated that he was a HR officer at the time of the incident precipitating the suit. He stated that the Respondent did not have a policy for retirement at 60 years and that the Respondent came up with a policy on retirement to ensure a smooth transition process. He testified that because of the nature of work which entailed long hours of travel, staying away from base for many days in harsh conditions infested with hazards such as snakes and hostile environment, such as intense heat, and the Respondent therefore came up with a policy for retirement at 55 years on this account. The Claimant was aware of the discussions and therefore knew there was a policy change in the offing. He stated that the policy change was affixed on the notice board and parties were notified of the same. He testified that the Claimant was 57 at the time the policy came into force and he received *ex gratia* payment for 6 months and one months' notice and an additional one month after the discussion at the Labour Office. He stated that the *ex gratia* payment was not provided for but they made the payment nevertheless out of goodwill. He testified that the policy was targeting the employees who had not attained 55 years of age and that the Claimant had already attained the age of 57 years. He stated that the Respondent decided to treat his case differently as he had exceeded the retirement age. He stated the minutes of the discussions held were not availed and that it was the pension administrator who had indicated the age of 60 years on the pension policy document. He confirmed that the letter which had indicated that the Claimant had 6 years from 2015 was from the Respondent.

6. The parties filed submissions on 29th March 2018 for the Claimant and 26th April for the Respondent. The Claimant submitted that the retirement of the Claimant was abrupt as he was served with the notice on 16th September 2016 and sent home. The Claimant submitted that the letters to the bank and the pension fund certificate clearly indicate the intent of parties and relying on the case of **Nicholas Mbuya and 4 Others v Alice Gesare Moninda [2015] eKLR** the Claimant submitted that the court should uphold the true intent of parties as was held by the Court of Appeal. He submitted that on the authority of **Storer v Manchester City Council [1974] 1 WLR 1403** per Lord Denning MR – *'In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed where there is, to all outward appearances, a contract. A man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.'*

The Claimant submitted that under Section 10(5) of the Employment Act the Respondent is estopped from changing the retirement age of the Claimant from 60 years to 55 years as this amounts to a change in the contract of employment. The Claimant relied on the case of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosocho & 2 Others [2014] eKLR** and also on the cases of **Benson N. Irungu v Total Kenya Limited [2015] eKLR** and **Michael Kagoma Maina v Kenya Police Service & 2 Others [2013] eKLR** where the courts declined to permit the retrospective effect of a retirement age and forced retirement.

7. The Respondent submitted that there was no document submitted into evidence by the Claimant that indicated that the retirement age was 60 years. The Respondent submitted that the documents produced by the Claimant impliedly impose an obligation on the Respondent to be bound by 3rd parties and to which the Respondent is not privy to. The Respondent submitted that it had the obligation to reduce the terms of service into writing and that the right was inalienable as alluded to in the case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** where the court held *'The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act which seeks to merely the weaker of the bargaining partners, not to deprive the employer the power to run its business altogether.'*

The Respondent submitted that the Claimant was consulted before the retirement policy came into force and therefore had a chance to participate prior to the implementation. The Respondent submitted that the Claimant was not entitled to the remedies and declarations he had sought and that further the Claimant was not entitled to salaries he would have earned till the age of 60. Reliance was placed on the case of **John Benson Githinji v Attorney General & 4 Others [2014] eKLR** where the court held *A fair and equitable compensatory award, should satisfy the Claimant's deprivation for the 10 years he expected to go on working. This Court does not think that the premature termination, even upon finding of the Respondent to have acted unfairly, entitles the Claimant to salary he expected to earn over the years taken away from him before the mandatory age of retirement. Employment relationships are not commercial contracts, and the Court must strive to achieve the delicate balance between the need for our national economic development, and the protection of the dignity and economic well-being of an individual employee. The law presumes an employee is paid for actual work rendered, and irrespective of the manner of exit, the Claimant would not have rendered any service to the Police Force for 10 years, so as to merit the entire salary for the 10 years he feels were taken away from him. The law applicable in commercial contracts on recovery of damages is qualified in employment relationship by the special nature of the employment relationship.* The Respondent urged the court to disallow the claim.

8. The Claimant was employed under a contract of service for an indefinite period in terms of clause 1 of the contract entered into on 1st April 2010. The contract ran on until the Claimant received the notice of retirement on 16th September 2016. The retirement was effective immediately. In the Respondent's defence and testimony of its sole witness, it was stated that there was participation of the Claimant in the discussions prior to the retirement. The Claimant acknowledged having read the notice board but asserted that he did not know that the announcement would affect him. He was preparing to go on a trip out of town when he was told to fall out and was assigned other duties which he performed till 10.30am when he was handed the retirement letter. In my view, though the Respondent had a prerogative to determine various aspects of the employment contract, the sudden and abrupt retirement was not in keeping with the prerogatives. In the Respondent's defence and submissions, the issue of a retirement date not having been fixed in the contract was repeated. Despite this assertion, the Respondent did not explain why the Claimant was still working for it despite attaining the age of 57 years which is past the normal retirement age of 55 years. Inference can be drawn from the pension scheme the Respondent maintained with Britam Insurance which indicated the retirement age of the Claimant as 60. In addition the Respondent had guaranteed payment of a loan from the earnings of the

Claimant for a period of 6 years in 2015. That could only mean that the Respondent contemplated service by the Claimant for a period in excess of the age of 57 years. In the claim before me, the Claimant received a payment for gratuity, salary for September 2016 and salary in lieu of notice. The Claimant sought pay for the years he would have worked till retirement. I decline to award the sums sought as the Respondent correctly pointed out the principle enunciated by Rika J. in **John Benson Githinji v Attorney General & 4 Others** (*supra*). I agree with his reasoning and hold that though Respondent acted unfairly, the action of the Respondent does not entitle the Claimant to earn a salary he expected to earn over the years taken away from him before the mandatory retirement forced upon him by the Respondent. In Section 49 of the Employment Act, the Claimant is entitled to compensation for the unlawful termination, in this case retirement. The Respondent feels it was generous enough but its own policy was clear. A notice of one year was to be given (ostensibly to prepare the staff going on retirement). The Respondent turned what should have been a seamless exercise into a farce and unnecessarily litigious escapade. Had the Respondent taken time to prepare the Claimant and even offer counselling, genuinely and not on the retirement letter as it did, the outcome would have been different. In view of the unfair retirement process herein, the Claimant will recover 6 months salary as compensation. He will also have costs of the suit. The other prayers in his claim fail and are dismissed. In the final analysis, I enter judgment for the Claimant against the Respondent for

i. Kshs. 355,626/-

ii. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 4th day of June 2018

Nzioki wa Makau

JUDGE