



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 234 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2018)

BANKING, INSURANCE & FINANCE UNION (K)CLAIMANT

VERSUS

BANK OF BARODA (K) LTD 1ST RESPONDENT

KENYA BANKERS ASSOCIATION..... 2ND RESPONDENT

JUDGEMENT

BACKGROUND.

1. This matter was first filed in court on 28th February, 2018 under Certificate of Urgency by the Claimants herein seeking to restrain the 1st Respondent herein from unfairly, unlawfully and prematurely retiring employees from the bank's employment before attaining the age of sixty (60) years.
2. The Certificate was accompanied by a Notice of Motion dated 28th February 2018 together with a Supporting Affidavit signed by Mr. Joseph Ole Tipape together with the Memorandum of Claim.
3. The inter-party hearing was scheduled for 6th March, 2018 on which date the Court directed that parties proceed and prepare for the hearing of the claim since the prayers in the Notice of Motion and the claim were almost similar.
4. In the main claim, the Claimant sought the following reliefs from the Court:-
 1. That the Honourable Court should find and declare that all the employees of the 1st Respondent bank shall retire at the age of sixty (60) years but may be allowed to opt for early retirement on attaining the age of fifty (50) years with full Retirement benefits.
 2. That Claimant also prayed to the Honourable Court to find and order that the parties in this suit do adopt retirement age as a negotiable item and include it in the CBA for future negotiations.
 3. The Claimant finally prayed for the costs of the suit.
5. The Claimant led evidence and called two witnesses. CW1 testified that he works for the 1st Respondent herein and is the chairman of the central staff committee and chairman of medical scheme in the bank and a member of the joint negotiating council.
6. He stated that the 1st Respondent has been discriminating against the workers in the bank in Kenya as compared to those who work in India. He contended that workers in Kenya retire at 55 but their colleagues in India at 60 years or more. He exhibited a list of names under general information and was able to point out the discrepancies in the retirement age as stated.
7. C.W 1 also pointed out that the 2nd Respondent has a membership of 35 banks and all the members had their retirement age at 60 years save for 3 banks inclusive of the 1st Respondent whose staff in Kenya retire at 55. It was therefore the duty of the 2nd Respondent to negotiate this issue which they have failed to do yet it is a negotiated item as per the CBA between the union and 2nd Respondent.

8. The Respondents opposed this claim. They filed their respective Memoranda of Reply through their counsels Gathaiya and Associates and J N Namasake and CO Advocates respectively. The 1st Respondent called a witness the R.W 1 who testified that he is the Human Resources Manager of the respondent bank and that the retirement age that has been set out in the Human Resources manual is 55 years. He stated that upon employment, staff are informed that the retirement age is 55 years and all the staff are aware of the 1st Respondent's retirement age policy and therefore there is no option to retire earlier or longer.

9. He further testified that retirement age is not one of the negotiable items that have been set out in the Collective bargaining Agreement. He also stated that the 2nd Respondent has not given any policy directive to its members on retirement age.

10. He stated that retirement age has been left to individual bank management to decide discretionally within the law and within their financial means. He also stated that Retirement age is not nor has it ever been included in the Collective Bargaining Agreements for the last 18 years since the Plaintiff was recognized by the 2nd Respondent.

11. RW1 further stated that "retirement age" is linked to pension schemes and that is why it is one of the non-negotiable items set out under "Appendix "B" (4) namely Pension and Provident Funds/Gratuities. Accordingly, there is no directive or guideline given by the Kenya Bankers Association binding on its members to enhance the retirement age to 60 years.

12. The 1st Respondent avers that the essence of having non-negotiable items is to allow the management of individual banks to exercise their own discretion. RW1 also stated that the retirement age is not an item that is subject to negotiation between the Union and itself. He also stated that there was no discrimination on the retirement age of Kenyan Indians and locals who are employed by the 1st Respondent and that they all retire at 55 years.

The 2nd Respondent's case

13. The 2nd Respondent also called one witness who testified as RW2. She testified that she is the head of Human Resources and Industry Relations. She stated that each individual member Bank of the 2nd Respondent has varying retirement age varying from 55 to 65 years. She stated that that KBA has had a Recognition Agreement with BIFU since the year 2005 and that the Collective Bargaining Agreement signed by the two bodies sets out negotiable and nonnegotiable items. Retirement age is not a negotiable item.

14. On cross-examination, RW2 stated that BIFU had sought to include retirement age as a negotiable item but they were informed by KBA that under the CBA this was not a negotiable item. She stated that KBA does not recommend retirement age to Banks and leaves it to management to decide. She also stated that KBA had not received any complaint of discrimination of the 1st Respondent's employees. She stated that it was not discriminatory for staff who had been seconded from different countries to have different retirement ages from locals as their contracts of employment were signed in different countries that had different minimum retirement ages.

15. The parties files their respective submissions in this matter.

16. The Claimant submitted that during the hearing of the main claim, it is not in dispute that the bank's employees of **Asian origin** who work in Kenya retire at the age of sixty (60) and above and those of Kenyan origin are retired at the age of fifty five (55) years.

17. The Claimant also submitted that all parties before the Court confirmed that out of the 43 member banks of Kenya Bankers Association only three (3) banks retire their employees at the age of fifty five (55) years and these are the 1st Respondent in this suit (Bank of Baroda (K) Ltd), Bank of India, and Guardian Bank (K) Ltd. In percentage, this comes to 6.9%, which means that 93.02% of the banks which are members of the 2nd Respondent retire their employees at 60 years and above.

18. The Claimant submitted that the acts of the respondents were discriminatory and against the Employment Act No. 11 of 2007 Section 5 (2) states as follows: -

"An employer shall promote equal opportunity in Employment and strive to eliminate discrimination in any Employment policy or practice."

19. The also submitted that this is against Article 27 of the Constitution of Kenya which states as follows:-

"Every person is equal before the law and has the right to equal protection and equal benefit of the law".

20. They averred that the discrimination was also against the Claimant's Appendix 7 at page 139 of the Claimant's bundles filed in court on 28th February 2018 which is a circular from the office of the President where Kenya adopted an official retirement age of sixty (60) years.

21. Although the Respondent's counsel insist that this circular was only meant for civil servants, it is the Claimant's submission that since Kenya adopted the official retirement age of sixty (60) years this should apply across the board and not only to the civil servants.

22. The Claimants also submitted that Article 2 (5) and (6) of the Constitution of Kenya states as follows:- **(5) (ii) – "the general rules of International Law shall form part of the law of Kenya"**

(6) "Any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

23. They therefore submit that since Kenya has ratified the East African Community Treaty, which has adopted an official retirement age of sixty (60) years, the Respondents should follow suit.

24. The Claimants cited Civil Appeal No. 42 of 2015 between **OLPEJETA RANCHING LTD (APPELLANT) AND DAVID WANJAU MUHORO – (RESPONDENT)** where the Court of Appeal noted at page 20 that the comparator must actually exist;

“Usually, the comparator must be employed by the same employer although some legal systems take into account a comparator at an associated employer. There is some support for the view that the comparator need only be in the same service. A complainant has also been allowed to use a comparator in another organization that is funded from the same public funds.

The above guidelines appear well founded, applicable and reasonable. We do not think they can be said to be conclusive or exhaustive. In our view, the comparators chosen were not far-fetched and were sufficient for the purpose.

They were in the managerial cadre as the Respondent and in the same organization. The Appellant has not demonstrated that the comparators used were not the proper ones or were remote in the circumstances of this case. It’s also not the business of the court in any event to fill in the gaps left by the Appellant in the prosecution of its defence. The Appellant cannot therefore fault the learned judge as having failed to conduct an in depth analysis of the comparators job.

Taken as a whole, the evidence adduced in this case leads to a reasonable conclusion that there was discrimination against the Respondent based on Race.”

25. They also cited Civil Appeal No. 207 of 2012 between **TELKOM KENYA LTD (APPELLANT) AND JOHN O. OCHANDA AND OTHERS.**

26. The Court of appeal observed as follows at page 10 paragraph 33.

“Obviously, those employees who have served longer than others and whose grades are higher and in receipt of higher Basic pay will in the final analysis, receive more money as severance pay. The right to work is a basic human right where as here, the employer decides to retrench its employees, it is under a duty to do so fairly and equitably. In such a situation, equality treatment is key. The application of the correct formula cannot amount to discrimination.

But where as in this case, the Appellant deliberately decided to use a formula which resulted in preferential treatment of employees, the action amounted to blatant discrimination.”

27. The Claimants submitted that in the case before this court the 1st Respondent’s action resulted into preferential treatment to the employees of Asian origin by allowing them to work longer and having employees of African origin retired earlier. They ask the court to find that the actions of the respondents were discriminatory and correct the position and order as prayed as follows:-

- 1. That the Honourable Court to order the 1st Respondent to enhance the normal Retirement Age to sixty (60) years.**
- 2. That the Honourable Court to order the 2nd Respondent to include Retirement Age as a negotiable item in the forthcoming CBAs.**
- 3. They also pray for costs of this suit**

28. The 1st Respondent submitted that the Employment Act 2007 makes no provision for retirement age of employees and that the NSSF Act sets 50 years as the minimum age where an employee can seek for payment of the age benefit. They therefore submit that there is no constitutional or statutory mandatory retirement age in the private sector. The aver that age of mandatory retirement is a term of the employment contract’s to be agreed between the employer and employee as envisaged by Section 10(5) of the Employment Act.

29. The 1st Respondent also submitted that the Claimant and the 2nd Respondent have signed a recognition Agreement in the year 2005 and since then the parties have been negotiating and executing a collective Bargaining Agreement every 2 years. They aver that retirement age has not been a negotiable item in all these years and it is left to the individual Bank to set out its retirement policy. The current CBA runs upto 2019 and retirement age is not one of the items that is contained in it.

30. They submit that there is no requirement of law or provision of the Collective bargaining Agreement or practice in the Banking Industry that compels any employer in the private sector including the 1st Respondent to raise the retirement age of its employees to 60 years.

31. They also submitted that that KBA has not set out a policy to its members on retirement as this is an individual bank management decision based on to internal policies and pension schemes contracts. The retirement age of employees by members of the Kenya Bankers Association is discretionary and contractual and members of the Association are not collectively bound to one retirement age. Accordingly, there is no directive or guideline given by the Kenya Bankers Association binding on its members to enhance the retirement age to 60 years.

32. The Respondent therefore submitted that there was no discrimination on the retirement age of Kenyan Indians and locals who are employed by the 1st Respondent and that they all retire at 55 years. They aver that it is not discriminatory for staff who had been seconded from different countries to have different retirement ages from locals as their contracts of employment were signed in different countries that

had different minimum retirement ages.

33. They also submitted that there is nothing discriminatory in having different categories of workers with different terms and conditions of employment, especially for those on expatriate terms. The 1st Respondent further avers that it is not discriminatory where an organization with its headquarters in a country abroad to have a branch in Kenya and have different retirement ages for staff.

34. The Respondent cited **ELRC NAKURU CAUSE NO. 49 OF 2013 Michael Kagoma Maina-Versus- Kenya Police Service, Public Service Commission & Honourable Attorney General.**

35. Where Hon. Justice Byram Ongaya opined as follows:-

“The Court holds that in absence of the general constitutional or statutory mandatory retirement age in public or private sectors or any other employment, the age of mandatory retirement is a term of the contract of employment to be agreed between the parties or varied by the employer in consultation with the employee as envisaged in section 10(5) of the Employment Act, 2007.”

36. They also cited **Nairobi High Court Cause 1476 of 2011 James Kabengi Mugo Vs Syngenta East Africa Limited** where the Hon Court held as follows:-

” Employers and employees in the private sector are free to fix the retirement age of the employee. The popular retirement age, mainly due to the influences of public sector employment, and a succession of Collective Bargaining Agreements in both the private and public sector, is 60 years. This however is not a legal provision contained in the Employment Act 2007. It does not govern all employment relationships. A party advancing the position that he/she would have retired at the age of 60 years must direct the mind of the Court to the relevant Statute; Regulation Order; Employment Policy; Individual Contract of Employment; Collective Bargaining Agreement; or the Employer’s Internal Rules and Regulations. The Claimant just came up with a popularized retirement age, and asked the Court to adopt it as the minimum standard. There was no evidence whatsoever that the Claimant was to retire at the age of 60.”

37. The Respondent asked this Court to dismiss this claim accordingly.

38. I have examined all the evidence and submissions of both parties. The issues for determination are as follows:-

1. Whether the employees of the 1st Respondent who are not of Asian origin have been subjected to discrimination in terms of their retirement age?

2. Whether the Collective Bargaining Agreement (CBA) between the Claimant and the 2nd Respondent should include Retirement Age as a negotiable item or not.

39. The fact that employees of the 1st Respondent who are of Asian origin retire at 55 years and those of Asian origin at 60 years is a foregone fact as seen from the evidence tendered before this court. The Respondent contend that this fact is not discriminatory because the employees from India are usually given their contracts in India where the retirement age for bank employees is already set at 60 years. The Respondents also submitted that this is not a discriminatory practice especially for expatriate employees.

40. Indeed the laws of Kenya and the Constitution forbid any form of discrimination on whatever grounds as per Art 27 of the constitution of Kenya which states as follows:-

“27. Equality and freedom from discrimination:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

41. Discrimination can be of various forms. If employees are working for one employer, the fact that some of the employees retire at different ages, this can be perceived as discrimination. ILO 1958, Convention NO 111 also provide at Article 1 as follows:-

“1. For the purpose of this Convention the term discrimination includes:-

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.”

42. Kenya ratified this convention on 7th May 2001 and this has since been domesticated in our constitution and even in The Employment Act 2007 that no form of discrimination in employment and any other sphere can be condoned. From the admission of the respondent themselves the fact of the two-tier retirement age is in existence and this in my view is discrimination. The Claimants members work for the same bank. It beats logic that some workers retire at 55 and others at 60 years.

43. The Respondent averred that the discrimination is due to the facts that the contracts are signed in India. This too cannot stand the test of time because India too ratified this convention on 3rd June 1960 and Art 6 of con 111 also state as follows:-

“Each Member which ratifies this Convention undertakes to apply it to non-metropolitan territories in accordance with the provisions of the Constitution of the International Labour Organisation”.

44. It is also evident that in Kenya we have various bank and many foreign banks. The 1st Respondent has a membership of over 40 banks and this Court was informed that only 3 of these members have their retirement age at 55 years. There are no special circumstances that would necessitate a difference in retirement for employees in the same sector. Going by the above observations, it is my finding that the employees of the 1st Respondent who are not of Asian origin have been subjected to discrimination in terms of their retirement age.

45. On the second issue for determination, the Claimant have sought inclusion of the issue of retirement age as a negotiable item. I do not wish to belabor this issue. I have looked at the CBA between the 2nd respondents and the Claimants made on the 16th August 2017. Appendix A lists areas which are subject to negotiation. Under item 4, duration of individual contracts is included as a negotiable item. This confirms that retirement age is an item for negotiation because retirement ages informs the duration of an individual contract. That then settles issue no 2 above for consideration. For avoidance of doubt then, I confirm that retirement age is a negotiable item as per the CBA between the parties and hence should be a subject of negotiation.

46. The upshot is that this Court finds the action of the 1st Respondent to subjecting certain employees to a retirement age of 55 and others at 60 is discriminatory and should henceforth be reviewed accordingly. The retirement age should therefore be viewed as a negotiable item as per the parties CBA.

47. Costs of the claim to the Claimants.

Dated and delivered in open Court this 4th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mildred Anyika holding brief for Odera for Claimant – Present

Namasake for 2nd Respondent – Present

Gathaiya for 1st Respondent – Present