



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE 1885 OF 2014**

**FRANK N. KAMAU.....CLAIMANT**

**VERSUS**

**TUSKER MATTRESSES LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed the Memorandum of Claim dated 24th October 2014 alleging that he was wrongfully/unlawfully dismissed from employment by the Respondent through premature and on forced retirement and prayed for the following remedies:

- a) A declaration that the Claimant's termination, dismissal and/or forced retirement from his employment was unlawful and unfair and that he is entitled to damages.
- b) An order for the Respondent to compensate the Claimant with damages for wrongful termination/forced retirement at the equivalent of twelve (12) months gross salary being Kshs.12,213,348.
- c) Special damages for the sum of Kshs. 73,186,276.
- d) General damages for discrimination and bias due to illness and loss of reputation
- e) An order that the Respondent issues the Claimant with a Certificate of Service.
- f) Costs of the Claim.
- g) Interest on prayer 2,3,4 and 6 above.
- h) Any other relief that this Honourable Court may deem just and expedient to so grant.

2. The Respondent filed its Statement of Response dated 17th November 2014 denying the allegations in the Claimant's Memorandum of Claim and prayed that the Claim be dismissed with costs. She averred that the mandatory retirement age for all her employees is 60 years and denied that the claimant was wrongfully and unlawfully terminated through forced retirement. She further averred that after the retirement, she paid the claimant all his rightful dues and denied owing him anything more.

3. The suit was heard on 22.2.2018 and 5.4.2018 when the Claimant testified as CW1 and the Respondent's Managing Director, Mr. Stephen Mukuha Kamau testified as the RW1. Thereafter both parties filed written submission which I have carefully considered herein alongside the evidence tendered.

**Claimant's Case**

4. The Claimant in his testimony stated that he was employed by the Respondent from September 1999 up to December 2013. He was initially employed by the Respondent as an Account and thereafter held several positions as the General Manager and the Director Finance and Administration pursuant to a Shareholders Resolution dated the 20th February 2013. He testified that he was in charge of the Respondent's entire Finance docket both internal and external audit, leases, cashflows and managing daily administrative tasks. It was his testimony that over the years his monthly salary was increased from Kshs. 13000 to a sum of Kshs. 1,017,779.

5. Cw1 stated that his work was both in Kenya and abroad and by the nature of this work it meant that he worked for long hours including over the weekends but was never paid overtime. During the course of his work, he experienced lower back ailment that extended to the left leg becoming numb on the left TOE. He went for physiotherapy and the symptoms were attributed to his long sitting hours as stated in his medical report.

6. Cw1 further testified that he had been away on leave from 26th September 2013 to 26th October 2013 and upon his return from leave, the Human Resource Manager called him to his office and served him with a letter dated 28th October 2013. The contents of the letter were that the Respondent had sent him on 2 months unpaid leave until 28th December 2013 pending his retirement. According to the Claimant he was to retire upon the attainment of 70 years but in December 2012 he was 60 years.

7. He stated that after the termination he was only paid his October salary and his Pension but the Pension was from a contributing only pension. He was however not paid any bonus for the year 2013 yet he was entitled to bonuses which were payable before Christmas.

8. In cross examination the Claimant stated that he claimed overtime amounting to Kshs. 68,690,160 in respect of the 90 hours worked every month for the 11 years. He further stated that he had shown the medical records to the Managing Director and discussed his illness with RW1 since 2003 and gave him copies of the medical report in 2013. However, the medical reports were not acknowledged by signing and stamping by the Respondent. He contended that, the physiotherapist never recommended for any sick off but only advised him to reduce his work load. In respect of the Director's allowances, the Claimant stated that he took minutes of the Board Meetings and was never paid his allowances.

9. In his written submissions, the Claimant stated that the reason he was unlawfully terminated was his illness. Consequently, in his view, this amounted to discrimination and bias. In support of this the Claimant relied on the case of **GMV vs Bank of Africa Kenya Limited [2013] eKLR**.

### **The Respondent's Case**

10. Stephen Mukuha Kamau, **RW1**, stated that he is a Director at Tusker Mattresses Limited, the Respondent herein. He confirmed that the Claimant as the Respondent's Finance Director and earned more than the other directors. He testified that the Claimant never claimed any overtime pay during his service. Rw1 denied that bonuses were paid for the year 2013 and contended that Bonuses are only paid when the Company makes profit. He further contended that the Respondent never made any profit in the year 2013.

11. In respect of the Claimant's medical condition, the Respondent stated that the Claimant never notified the Respondent of any medical condition and the Medical Reports produced as evidence were neither received by the Company nor brought to his attention.

12. On cross-examination Rw1 stated that the Claimant's Letter of Appointment indicated that the working hours as from 8.00 am to 5.00pm and that the Claimant did not work any extra hours. In addition, he did not have any records indicating the Claimant's working schedule. He further stated that the Claimant retired in October 2013 after attaining 60 years. He admitted that there was no written policy requiring retirement at the age of 60 years neither did the Claimant's contract provide for retirement at 60 years. He further admitted that there was no complaint against the Claimant's performance during the 14 years he served and that it was not true that the Respondent used retirement as a disguise to fire the Claimant.

13. The Respondent in its written submission stated that its case was fairly simple that the Claimant was not unfairly or unlawfully terminated but that like all other employees the Claimant retired upon attainment of the retirement age of 60 years. The Respondent only relied on the case of **Capital Fish Kenya Ltd v The Kenya Power & Lighting Company Ltd [2016] eKLR**.

### **Analysis and determination**

14. There is no dispute from the evidence and the submissions that the claimant was employed by the Respondent as the Director Finance and Administration until December 2013 when he was retired by the Respondent. The issues for determination arising herein are:

- a. Whether the Claimant was unfairly terminated through forced or premature retirement.
- b. Whether the Claimant was entitled to the other reliefs sought.

### **Whether the Claimant was unfairly terminated through forced retirement.**

15. The Claimant herein contended that his termination was unfair because his contract of service never provided for retirement at the age of 60 years. He maintained that his termination was effected after the Respondent was made aware of his medical condition, that is, Lumbar Spondylosis with multilevel degenerative disc disease. He contended that on 28th October 2013 the Respondent addressed to him a letter stating that she had accepted his request for two months' unpaid leave pending his retirement. According to the Claimant this letter was served upon him on the same day he reported back from annual leave and denied that he had made any such request to the Respondent.

16. The Respondent on the other hand stated that the Claimant was retired by her after he attained the age of 60 years because that was the mandatory retirement for her employees. She contended that other 19 employees were retired with the Claimant at the same age in December 2013. Rw1 denied that the Claimant was retired after it was learned that he was sick and contended that his medical condition was never communicated to the respondent. He further contended that the Claimant had no disciplinary or performance issues and denied that the retirement was a form of punishment.

17. I have carefully considered the evidence and submissions presented to the court but I did not see any proof that the retirement age for the

claimant was 60 years. The appointment letter dated 8.4.2001 produced by Rw1 did not provide for any retirement age. Clause (h) stipulated that there were other terms of employment to follow as and when necessary but the Rw1 never proved that retirement age was later communicated to the claimant before serving him with the letter dated 28.10.2013. The Respondent also never produced any HR Policy Manual to prove that the retirement age for her staff is 60 years. It therefore obvious that, in absence of any written evidence that the Claimant was to retire at 60 years, the natural inference to draw is that, he was to continue working indefinitely as long as he remained capacitated to do so. The Claimant maintained that he was strong enough to continue working and that the physiotherapist did not recommend for his sick off but rather the reduction of his work load. Consequently, I find and hold that the retirement of the Claimant without his consent and/or for any just cause amounted to unfair and unlawful termination of his contract of service.

18. The foregoing view is fortified by **Joshua Nzuki v Steel Makers Limited [2015] eKLR** where Rika J held;

**“There are elements of unfair termination in this line of thinking. There was no document shown to the Court or the Claimant by the Respondent, setting the mandatory retirement age at 58. No policy document was availed to the Court. It is not enough for an Employer to come to Court and say this is our mandatory retirement age, without proof of the underlying policy document. The claim about the Claimant’s physical fitness level was not supported by any medical evidence. The fact that the Claimant had previously had a medical procedure, which Mr. Johnson described as hip replacement, was not shown to result in inability to perform. There was no evidence tabled before the Court on the inability of the Claimant to perform. There was no record of performance appraisal.”**

19. Under Section 45 (2) of the Employment Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A reason is fair if it relates to the employees’ conduct, capacity and compatibility, or the employer’s operational requirements. The procedure is fair if it complies with section 41 and 51 of the Act, which basically entails, granting of the employee a hearing before termination and issuing him/her with certificate of service.

20. Section 43 of the Employment Act, on the other hand, provides that an employer ought to prove the reasons for termination failure to which the termination shall be deemed to be unfair within the meaning of Section 45 of the Employment Act. RWI having admitted that there was barely any complaint with respect to the Claimant’s performance the termination of the Claimant was unfair for reasons that he was prematurely forced to the retire by the Respondent. In **Benson N. Irungu v Total Kenya Limited [2015] eKLR** Nduma J. held:

**“Forced retirement of employees who have served an employer royally and diligently for long period is a conduct that needs to be discouraged by this court.”**

21. As regards the procedure followed, I return that the procedure was unfair because the Claimant was not accorded any fair hearing of issued with a certificate of service. Instead he was served with a letter sending him to an unpaid leave for 2 months pending the premature retirement. According to the Rw1, the unpaid leave was meant to ensure smooth transition because the claimant had resisted the retirement. The foregoing procedure is not only uncalled for but also not befitting the claimant’s status in the respondent.

#### **Whether the Claimant is entitled to the reliefs sought. Declaration**

22. In view of the finding herein above that the retirement of the claimant was premature, forced and without any just cause, I make declaration that the said retirement was unlawful and unfair.

#### **Salary in lieu of notice**

23. The Claimant seeks 3 months’ payment in lieu of notice for his unfair termination. There is no provision for the payment of the 3 months salary in lieu of notice as the Claimant’s Letter of Appointment dated 8th April 2001 provided for the payment of one months’ pay in lieu of notice. No other contract of employment was given to the Claimant even after the revision of most of the terms of his contract from 2001 to 2013 when he was terminated as the Director of Finance and Administration. I therefore award him one month salary in lieu of notice.

#### **Compensation for unfair termination**

24. In view of the finding herein above that the Claimant’s contract of service was unfairly and unlawfully terminated I award 12 months’ salary compensation being Kshs. 12,213,348. In awarding the said compensation I have considered the length of service by the claimant and the fact that he never contributed to the termination through misconduct. I have also considered the fact that at 61 years he had no good chances of getting an alternative job of a proportioned pay.

25. The Claimant stated that he was entitled to director’s allowances since his appointment as the Director of Finance and Administration on the 4th of June 2009 having sat in the Board meetings for the Respondent. Neither the Claimant nor the Respondent provided any evidence on the remuneration of the directors. Consequently, that claim fails.

26. The Claimant stated that as was the norm and having received his 2012 Bonus pay at the end of the year, he was expected to receive his 2013 bonus. It was RW1’s testimony that the Respondent was not in a position to pay any Bonuses having made losses in the year 2013. According to the Claimant he was accustomed to receiving his bonus pay annually during Christmas as evidenced by his payslips. Despite the Respondent stating that it had made losses in 2013, it did not provide any financial statements in support of the allegation and this therefore was only an allegation. Further, the Respondent did not provide any bonus policy setting out the requirements for the payment or non-payment of any bonus annually. It would only therefore be understood that bonus pay was payable annually in the absence of any set guidelines and that the Claimant is entitled to claim the 2013 bonus pay. Never the less, I appreciate that unless otherwise stipulated in a contract of service, payment of bonuses is discretionary and falls within the realm of managerial prerogative where the court should steer clear from. This claim must also fail.

## **Overtime**

27. The Claimant seeks the payment for the overtime hours worked. The Claimant in cross examination admitted that he never clocked in and out of the work place and neither did the Respondent's employees claim the overtime hours worked. It is therefore uncertain on the number of extra hours worked in the absence of any evidence. It is however to be appreciated that the Claimant being a Director and with the diverse roles he played as a senior manager, he was expected to work extra hours. His contract did not provide for payment for the extra hours worked. Consequently, I find that the Claimant had negotiated sufficient salary to compensate for the extra hours worked and I dismiss the claim for accrued overtime pay.

## **General damages**

28. The Claimant contended that he was discharged after notifying the employer of his ill health. He therefore contended that he was discriminated on grounds of ill health and age. The Respondent has denied that allegation and maintained that the retirement was on ground of age and not ill health. After careful consideration of the evidence adduced, I find that the claimant has not proved on a balance of probability that he was retired on ground of ill health. The Claimant has not produced any written evidence to support that allegation. I therefore dismiss the claim for damages for discrimination.

## **Conclusion and disposition**

29. I have found that the retirement of the claimant was premature, unfair and unlawful. I therefore enter judgment for him in the following terms:

**a) One month notice Kshs. 1,017,779**

**b) Compensation for unfair termination Kshs. 12,213,348**

**Total Kshs. 13,231,127**

30. The Claimant is also granted the prayer for certificate of service as provided by section 51 of the Employment Act.

31. The Claimant will also have costs plus interest at court rates from the date hereof. The sum awarded will be paid less statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 16th day of November 2018**

**ONESMUS N. MAKAU**

**JUDGE**