



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1301 OF 2014

CHRISTINE MUNGUTI & 21 OTHERS CLAIMANTS

VERSUS

NATIONAL BANK OF KENYA LTD RESPONDENT

JUDGEMENT

1. The Claimants are all adult males and females formerly in the employment of the Respondent bank, registered under the provisions of the Banking Act. The Claimants were employed by the Respondent in various dates to serve within the business countrywide. The Claimant enjoyed varied terms and conditions of employment that applied to unionisable staff of the Respondent as negotiated between the Respondent and the Banking Insurance Finance Union (BIFU) from time to time.

2. The Claimants diligently served throughout their employment with the Respondent and were willing continue with such service were it not for the respondent's offer of Voluntary Early Retirement vide the bank managing director circular of 19th February, 2014 which provided that;

For those who will be exiting the bank the last day of work will be communicated directly to them. They will be entitled to the following dues:-

- 1. Pension benefits in accordance with the scheme rules*
- 2. One month's salary in lieu of notice*
- 3. Purchase of leave days earned but not taken up to the last day of employment*
- 4. Severance pay equivalent to half a month's salary for each completed year of service.*

3. Through various individual letters, the Claimants applied to the Respondent to take the VER offer which was to take effect on 30th april, 2014. The Respondent accepted the applications on the terms that were set out by them vide letters of 2nd April, 2014 and setting out the due benefits as;

- i. One months' salary in lieu of notice;*
- ii. Payment of your leave days earned but not taken as at 30th april, 2014;*
- iii. Severance pay of half a month's salary for every completed year of service; and*
- iv. Your retirement benefits will be handled in accordance with the National bank of Kenya Staff*

Pension Fund Rules.

4. The offer made by the Respondent was discriminatory; in breach of the bank Human Resource Manual (manual); articles 27 and 41 of the constitution; and the Employment Act and therefore biased and unfair to the Claimants. The offer was in breach of the Collective Bargaining Agreement (CBA) in force between the Respondent and BIFU.

5. The VER was to take effect on 30th April, 2014 but the Respondent unlawfully and unfairly kept the Claimants in employment until the 6th May, 2014 therefore subjecting them to great anxiety, stress and loss. This was malicious on the grounds that the Respondent failed to apply the terms of the manual and the CBA to the claimants' retirement; the Respondent failed to give the Claimants equal treatment with other employees; there was discrimination against the Claimant as against other employees retired by the Respondent on better and favourable terms; the Claimants were treated with contempt; and the Claimants were subjected to late clearance and humiliation. The Claimants have suffered great financial loss and damage as a result.

6. The Claimants are seeking special loss and damage for;

Pay in lieu of two months' notice;

Pay in respect of ½ month salary for every year of service;

Tax rebate; and

Damages.

7. The Claimants are seeking judgement for a declaration that they were discriminated against; damages for discrimination; damages for wrongful and unfair retirement; payment of all lawful terminal dues as set out in the claim; and costs of the suit.

8. In evidence the claimant's case was set out by Christine Kalekye Munguti the 1st claimant. She testified that she was employed by the Respondent on 1st November, 1984 as Banking Clerk and served diligently until the offer for VER vide circular of February, 2014. At the time she was 52 years and remained a Bank Clerk.

9. All the Claimants were unionised. On 19th February, 2014 the Respondent sent a circular with an offer of VER and the Claimants applied. The given terms were that each would be paid one month in notice pay; pay for leave days due; and severance pay at half month salary for each year served. These terms were not in accordance with the manual or the CBA which had favourable terms of 3 months' notice pay; severance pay at a full month for each year served and thus the offer was not inclusive of CBA and manual terms.

10. Ms Munguti also testified that she was not happy with the VER terms and refused to sign the acceptance but she was never paid. The Respondent still owes 2 months in notice pay and ½ month salary for each year worked. She had a loan and there was a rebate.

11. That there was discrimination against the Claimant as the Respondent failed to follow the manual and the CBA and gave less favourable terms of VER and termination of employment. The claimed dues are therefore owing together with damages for discrimination against the claimants.

12. Upon cross-examination the witness testified that Claimant No. 9 Linda Kimori on the schedule in blank and maybe she got satisfied with her payments. The offer letter was communicated to all the employees and the claimant's responded in acceptance of the VER terms; accepted payment of one month salary in notice pay; purchase of leave days and severance pay. These terms are outside the manual and CBA. When she accepted the VER she was aware that the dues under the manual and CBA were

protected and that is why the claim herein has been filed against the respondent.

Defence

13. In defence the respondent's case is that the issue in dispute is whether the claimants' acceptance of an offer for VER was discriminatory and if the Claimants are entitled to damages and payment of additional terminal dues.

14. The Respondent had employed the Claimants and on 19th February, 2014 they acted with haste and accepted the VER and did receive benefits arising therefrom. The Claimants wilfully applied for VER on the terms set out by the Respondent on 2nd April, 2014. The offer made was not discriminatory as there is no factual or legal basis for such a claim. The offer for VER was not in breach of the manual and paragraph 9.4.1 of the same allow early retirement of employees either at the respondent's or employee discretion and by the Claimants acceptance of the offer made, this was purely voluntary.

15. The entitlements set out by the Respondent in the memo of 19th February, 2014 and the terms under the letters of acceptance for VER dated 2nd April, 2014 were all accepted by the Claimants. The Claimant accepted to a release from 30th April, 2014. The monies due to the Claimants were paid.

16. There is no cause of action and the suit should be dismissed with costs.

17. The Respondent did not call any witness.

Submissions

18. The Claimant submits that they worked for the Respondent between 1994 to April, 2014 in various capacities. The Claimants served diligently and were willing to continue in service were it not for the offer by the Respondent for VER on 19th February, 2014. The Claimants were covered by the manual that had the terms and conditions of service and which document were binding. Such terms and conditions remained in force and were never changed. The manual gave provisions for termination on retirement upon 3 months' notice pay. There was also a CBA the Respondent and BIFU, the union representing the employee which had a severance pay of one (1) full month for every year worked. In the VER offered by the respondent, the terms in the manual and CBA were not followed.

19. The Claimants were unfairly treated by the Respondent in the VER as the sole purpose was to rid of them through redundancy but veiled as a VER scheme. The Respondent initiated the process of VER on its own and lured the Claimant to take the offer knowing that they would benefit from similar terms as the employees who had left the Respondent employment earlier under similar circumstances and were paid in accordance with the manual and the CBA.

20. The Claimants also submit that in the offer for VER the Respondent did not change the term of the existing manual. Clause 9.4.2 provides;

Notice to retire

The bank will give an employee at least three months' notice prior to attaining the retirement date (age). Either party will give three months' notice in case of early retirement.

9.4.3 Benefits

Retirement benefits will be defined in the employees' Retirement Benefits Scheme's Rules and Regulations.

21. When the Claimants applied for VER, there was no reference to the manual. By paying for notice at one month salary; severance pay at half a month's salary; the Claimants were underpaid in view of agreed

terms in the annual and CBA. This was discriminatory and unfair.

22. The Claimants also submits that they were offered unfavourable terms on retirement that denied them the full benefits of their entitlement from the respondent. The Respondent violated article 27 and 41 of the constitution as read together with section 5(2) and (3) of the Employment Act. By paying the Claimants less in terms of notice and severance pay than set out under the manual and CBA the Respondent acted in breach of the law and should pay damages. Employees who resigned from the Respondent were paid notice pay at 3 months. The Claimants should be paid the difference of what was paid and what owes at 2 months' salary for notice; 15 days' pay in severance pay; and service pay for the 4 Claimants who worked for the subsidiary company, Kenya National Corporation Ltd.

23. The Claimants also submitted that in the case of **Gladys Muthoni & 20 Others versus Barclays Bank of Kenya, Petition No.25 of 2016** the court held that an employee who is not unionisable should not be treated unfavourably simply because they are not unionised. The Respondent failed to adhere to fair labour practice and should compensate the employees. In the case of **Christopher Onyango & Others versus Heritage Insurance Co. Ltd, Cause No.781 of 2015** the court held that where an employer fails to promotes equality of opportunity of employment or fails to guarantee equality of opportunity and proceeds to terminate an employee in a manner that is discriminatory this is in violation of article 27 of the constitution and section 5 of the Employment Act. In **Leonard Gethoi Kamweti versus National Bank of Kenya & 2 other, Cause No.273 of 2014** the court found the Respondent had discriminated against the Claimant in a VER and awarded him Kshs.8 million in damages.

24. The Respondent submits that the Claimants made individual applications to the Respondent to take VER offer which was to take effect on 30th April, 2014 which the Respondent accepted on the terms that the early retirement would comprise payment of;

One month salary in lieu of notice;

Payment of leave earned but not taken;

Severance pay of half a month salary for every completed year of service;

Retirement benefits in accordance with the respondent's Staff Pension Fund Rules;

40% rebate on the outstanding loans should the loan account be settled immediately;

20% rebate if settlement of 50% and above but less than 100% of the outstanding loan is done immediately;

All balances outstanding thereafter would not qualify for rebate and would be consolidated into one loan account and repaid at 10%;

The securities held would be consolidated to continue securing the consolidated loans; and

The repayment period would not exceed the normal retirement age of 60 years.

25. The Respondent initiated the VER by inviting the employees to apply. The terms upon which the VER was based upon were set out in the offer letter. All the Claimants applied for the VER and were paid in terms of the offer letter.

26. The Respondent submits that the offer to early retirement was a scheme outside the manual.

27. The offer for early retirement was made to all employees irrespective of age as the manual provided at clause 9.4.1 that the employees entitled to take early retirement were those at 50 years. To therefore retire before the age set out in the manual, this could only be by way of agreement hence the invitation dated 19th February, 2014. The invitation made was in recognition that the manual and CBA did not have a

provision for early retirement and by the acceptance of the Claimants, an agreement was made.

28. In **National Bank of Kenya versus Pipeplastic Samkolit (K) Limited, Civil Appeal No.95 of 1999** the court held that it is not the duty of court to rewrite terms of contract between the parties. In **William Barasa Obutiti versus Mumias Sugar Company, Civil Appeal 198 of 2004 (Kisumu)** the court held it is open to an employer and employee at any time during a contract of employment to terminate the contract by agreement. That VER can be such a termination agreement.

In this case the Claimants under the VER were given more terms with regard to the loan facilities they had with the respondent, which terms and benefits thereof were not available under the manual or CBA. The claim for discrimination and application of unfavourable terms of employment does not arise. The Claimants accepted their terms of VER unlike the case cited in **Leonard Kamweti versus National Bank of Kenya**, cited above.

30. The provisions of the manual and CBA do not apply in this case as these documents do not contemplate early retirement before an employee is 50 years and hence the agreement of the parties. The Claimant were granted rebates on their loans which are not available under the manual and CBA. The Claimants have no case set out and their claims should be dismissed.

Determination

Whether the Claimants were discriminated against by the respondent;

Whether there are any terminal dues unpaid; and

Whether the remedies sought are due.

31. It is common cause that the Claimants were all employees of the Respondent Bank until the VER offer vide circular dated 19th February, 2014. It is also not in dispute that the Claimants accepted the VER offer and by letters of 2nd April, 2014 the individual terms and dues payable were set out, which the Claimants accepted. It is also agreed that the Claimant were unionised under BIFU and there was a CBA between BIFU and the Respondent governing the terms and conditions of employment of its members. A human resource manual also governed the work place terms and conditions of employment.

32. Termination of employment through whichever means – retirement, dismissal, by agreement, by notice, by resignation – is a matter addressed by the Employment Act. Whichever mode of termination, where an employee is aggrieved, recourse is to this court.

33. Where an employee is terminated from his/her employment, and the terms and conditions for the same or the terminal dues paid are found as unfair, such an employee is by law allowed to challenge the termination of employment. Section 47 of the Employment Act provides;

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.

(4) The right of an employee to make a complaint under this section shall be in addition to any right an employee may enjoy under a collective agreement.

34. As set out above and admitted by the parties, the claimants' employment was governed by a CBA and the manual. Such are critical documents in the employment of the claimants' employment and where there was termination of the same; reference must be made to the manual and CBA provisions. The agreement stated by the Respondent to have been made upon the VER offer on 19th febraury, 2014 cannot negate the manual and CBA without specific reference to the employee with regard to applicable terms in the manual and CBA. To do so would be to remove the operation of key instruments negotiated between the employer and employee and which governed the employment relationship.

35. In any event, even where the Claimants had the capacity to make agreement to changes in the manual, which is not the case here, the CBA applicable was between the Respondent and BIFU where the Claimant derived specific benefits cannot be negated by the mere invitation to the employees to apply for VER. To do so would be to remove BIFU from the employment relationship that is recognised by the Respondent as key in terms of negotiated terms and conditions of employment for its members in the employment of the respondent.

36. The CBA between BIFU and the Respondent can therefore not be altered, changed, repealed or set aside by agreement of the Respondent and the Claimants in the absence of their union. The effect of having a CBA in force is to ensure BIFU as the recognised union is able to negotiate for its members with the respondent. As a rule, the termination of the employment of the Claimants who are members of BIFU ought to have been negotiated and or with the participation of BIFU. That is the purpose of a CBA. To remove BIFU and directly engage the Claimants and then proceed to terminate their employment through whichever means even by agreement would be to negate the provisions and purpose of the Labour Relations Act and to go contrary to the recognition given to the union as the body recognised by the Claimants to negotiate their employment terms and conditions with the respondent/employer. The offer for VER having been initiated by the Respondent without the involvement of the claimant's representative union, BIFU was to engage in unfair labour practice.

37. The rationale for unionisation can be traced in the preamble to the Labour Relations Act that provides;

AN ACT of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. [Emphasis added].

38. Therefore, where an employer has recognised a union such as in this case, and a CBA registered with the Court spelling out terms and conditions of employment applicable to the unionised members, the employer cannot circumvent the CBA and directly engage the employees on a matter negotiated with the union to the detriment of the employee and without consultations and notice to the union. To do so is in utter breach of the recognition of the union and to further go and opt out of the CBA terms is to engage in unfair labour practice.

39. The essence of unionisation is lost where an employer goes round the same to bring the individual employee on the table to agree on termination of employment outside the CBA without first addressing the terms applicable and negotiated with the union. The purpose of having the Labour Relations Act is lost as a result. The effect of having a CBA is equally lost. An employee who is dissatisfied with the unfair treatment and conduct of the employer has recourse to this court.

40. In this case the Respondent went contrary to the CBA and manual. The notice pay and severance pay due to the Claimants should apply the provided and negotiated rates at 3 months of notice pay and a full month for every year worked for severance pay.

41. The Claimants are entitled to the unpaid 2 months in notice pay and to ½ month pay not paid in severance. Such payments are commensurate to terms agreed upon in the manual and the CBA.

42. On the question of discrimination against the Claimants, Section 5 of the Employment Act 2007 which contains antidiscrimination law requires Employers to promote equality of opportunity and strive to eliminate direct and indirect discrimination. It also specifies what discrimination is not. It is not discrimination for instance if the acts or decisions of the Employer are based on the inherent requirements of the job. See **David Wanjau Muhoro versus Ol Pejeta Ranching Limited [2014] eKLR.**

43. Once the Employee has established a *prima facie* case, the burden shifts to the Employer to show articulate, specific, and non-discriminatory reasons for the disparity that is set out. In **G M V versus**

Bank of Africa Kenya Limited [2013] eKLR the court held;

Once the employee has established a prima facie case, the burden shifts to the employer, to show a legitimate explanation for termination. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reason for termination. The employee's duty is to provide evidence, which would permit the Court to conclude the explanation proffered by the employer, is pretextual. Pretext can be established by showing that the asserted neutral basis for termination was so riddled with error, that the employer would not honestly have relied on it. The obligation of the employee is not to establish that she has been discriminated against, on strict proof, as demanded by the Respondent in this case; the employee needs only to show that she has a prima facie case, and that the reasons advanced by the Respondent, are unworthy of credence. Under our law, specifically Section 5(6) of the Employment Act 2007, the burden rests on the shoulders of the Respondent, to show that discrimination did not take place.

44. In line with the above findings, the court in **Frederick Kariuki versus Bank of India, Cause No.2424 of 2012**, held that where differentiation of an employee against another employee is found to be unjustified, the same is discriminatory and unfair. Section 5 of the Employment Act therefore requires an employer to give the reason(s) and the justification for setting out an employee aside and separate from other employees so as to deny them a legal right. Section 5(7) provides;

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

45. The case here is that the Claimants were discriminated against in the offer for VER as against other employees who were terminated in similar circumstances. The Claimants have given the case of Leonard Gethoi Kamweti, a former employee of the Respondent and who filed **Cause No.273 of 2014 Leonard Gethoi Kamweti versus National Bank of Kenya & 2 others**. In the case, from the set out proceedings I can gather that Mr Kamweti was terminated from his employment with the Respondent herein for refusing to withdraw a complaint he had made with the LSK Advocates Disciplinary Committee but in defence the respondent's case was that they terminated the him under the provisions of paragraph 9.4.1 of the human resource manual on early retirement and paid the dues owing in early retirement. The court then made a finding that Mr Kamweti had been retired early and the terms applicable under the human resource manual were to pay 3 months' notice.

46. The claimants' case is that they were unfavourably treated by the Respondent in their VER as against other employees retired in similar circumstances and that this was discriminatory. On this evidence, the Respondent submitted that the case of Mr Kamweti did relate to VER but to early retirement upon attaining 50 years in terms of clause 9.4.1 of the manual. The Respondent did not call any evidence or witness in this case. I find no challenge to the evidence by the Claimants that they were discriminated against on the basis that they were given an unfavourable terminal package for their retirement. The submissions made by the Respondent have not discharged the burden required of them in terms of section 5 of the Employment Act of setting out the rationale for the differentiation of the Claimants against another employee who was retired and paid more for notice and why the Claimants received unfavourable and different treatment. To state that one employee did not take a VER but took early retirement is not a justifiable reason that is objective.

On the evidence set out by the Claimants, their case being based on unfair treatment in the payment of their terminal dues in retirement, to be treated different from employees who had been previously retired and such employees being known to them, such I find is discriminatory in terms of section 5 of the Employment Act.

47. I find the Respondent discriminated against the Claimants on the basis that the retirement pay was unfavourable as against what other employee previously retired were paid and there is no justifiable cause

for the different treatment. To discriminate against an employee is an offence in terms of section 5(6) read together with section 88 of the Employment Act. On such finding the employer is liable to pay a fine of not more than Kshs.50, 000.00, an imprisonment or both. In this case, the fine due of Kshs.50, 000.00 shall be paid to each claimant.

Remedies

48. On the findings that the Respondent engaged in unfair labour practice, such being a prohibited ground under article 41 of the constitution read together with section 45 of the Employment Act, the remedies due under section 49 of the Employment Act are due. I find a compensation of 10 months gross pay to each Claimant is an appropriate compensation.

49. The Claimants are also entitled to the unpaid dues for retirement in terms of the manual and CBA. I hereby award the Claimants the unpaid notice pay of 2 months and the ½ month pay in severance pay.

50. As set out above, for the discrimination visited against the Claimants by the respondent, on the sanction due under the Employment Act, each Claimant is awarded Kshs.50, 000.00.

51. Were it not for the unfair treatment of the Claimants in the payment of retirement dues owing, this suit would have been unnecessary. The Respondent shall pay the costs due together with interests on the due notice pay and the ½ month pay in severance.

Judgement is hereby entered for the Claimants against the Respondent in the following terms;

- (a) A declaration that the Claimants were unfairly terminated by retirement;**
- (b) A declaration the Claimants were discriminated against;**
 - (i) Compensation is awarded at 10 months gross pay to each Claimant per the attached schedule A;**
 - (ii) An award of Kshs.50,000.00 to each Claimant for discrimination suffered;**
- (c) Each Claimant is awarded 2 months’ notice pay per attached schedule B;**
- (d) Each Claimant is awarded ½ month pay for each year served per attached Schedule B;**
- (e) Interests are due under (c) and (d) above;**
- (f) Costs of the suit.**

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 22nd day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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SCHEDULE – A

NAME	Compensation
1. CHRISTINE MUNGUTI	1,639,590.00
2. SIMON N. NG'ANG'A	906,800.00
3. MILTON K. EKESA	823,920.00
4. MARY MUTUKU	1,476,450.00
5. DANIEL MUIA	1,047,040.00
6. SUSAN NGUGI	1,605,110.00
7. JENNIFER KINUTHIA	1,562,210.00
8. CHARLES M. MUSAU	1,692,300.00
9. LINDA K. KIMORI	962,360.00
10. LEAH GIATHI	1,605,100.00
11. NGINA JOSEPHINE	1,645,100.00
12. JOHN WERE	761,020.00
13. RAHAB KIHU	1,605,110.00
14. MIRIAM MICHUKI	802,100.00
15. CHARITY MUGO	802,900.00
16. JEMIMAH KUNGA	3,010,000.00
17. RUTH AKINYI	1,605,110.00
18. REGINA MUNYOKI	2,626,250.00
19. JAMES KABOGO	802,900.00
20. EUNICE MUNYOROKU	1,605,110.00
21. SAMUEL GATHU	1,605,110.00
22. MARGARET TEMBULA	373,410.00

SCHEDULE – B

NAME	HALF SALARY FOR	TWO MONTHS

	EVERY YEAR WORKED	NOTICE PAY
23. CHRISTINE MUNGUTI	2,377,409	327,718
24. SIMON N. NG'ANG'A	1,586,917	181,361
25. MILTON K. EKESA	494,352	164,784
26. MARY MUTUKU	1,181,160	295,290
27. DANIEL MUIA	366,467	209,409
28. SUSAN NGUGI	1,765,621	321,022
29. JENNIFER KINUTHIA	1,562,211	312,442
30. CHARLES M. MUSAU	2,200,000	338,461
31. LINDA K. KIMORI	288,708	192,472
32. LEAH GIATHI	2,808,942	321,021
33. NGINA JOSEPHINE	1,640,215	328,043
34. JOHN WERE	799,081	152,205
35. RAHAB KIHU	1,444,599	321,022
36. MIRIAM MICHUKI	1,124,060	160,580
37. CHARITY MUGO	1,043,770	160,580
38. JEMIMAH KUNGA	5,267,500	602,200
39. RUTH AKINYI	1,605,110	321,022
40. REGINA MUNYOKI	4,464,637	525,251
41. JAMES KABOGO	1,164,205	160,580
42. EUNICE MUNYOROKU	2,728,687	321,022
43. SAMUEL GATHU	2,568,176	321,022
44. MARGARET TEMBULA	672,138	74,682