



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

AT NAIROBI

CAUSE NO.1302 OF 2014

JOSEPH ONYANGO.....1ST CLAIMANT

JOSEPH MURAGE KAMUNYA.....2ND CLAIMANT

CATHERINE MUTHIORA.....3RD CLAIMANT

SIMON MASADIA.....4TH CLAIMANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

JUDGEMENT

1. On various dates, the Claimants were employed by the Respondent, a commercial bank operated under the provisions of the Banking Act. The Claimants were placed in various positions in the business countrywide. The Claimant was on contracts of service and their employment was also regulated by the terms and conditions of the Management Human Resource Manual (Manual).

2. The Claimants worked diligently but on 19th February, 2014 the Respondent made an offer for voluntary early retirement (VER) which provided that where the Claimants applied for VER they would be entitled to pension benefits; one month notice pay; purchase of leave days not taken; and severance pay at half month's salary.

3. By individual applications, the Claimant applied for VER offer and which took effect on 30th April, 2014. The Respondent accepted the applications on terms communicated on 2nd april, 2014 that there would be payment of one month's salary in lieu of notice; leave days earned; severance pay at half a month's salary; and that the retirement dues would be paid in accordance with the respondent's rules. That the respondent's communication that the VER would take effect on 30th april, 2014 but kept the Claimant until 6th May, 2014 was unfairly keeping them in employment and thus subjecting them to great anxiety, stress and lost. This was malicious on the grounds that the Respondent failed to apply the terms of the Manual; failing to give the Claimants equal treatment with other former employees; discriminating against the Claimants as against other employees of the bank; retiring the Claimants on unfavourable terms; treating the Claimants unfairly; and subjecting the Claimants to late clearance and humiliation.

4. The Claimants are seeking;

Notice pay for 2 months unpaid;

Pay in respect to half month salary for every year of service;

Tax rebate;

Payment in respect of severance pay;

Damages for wrongful and unfair termination; and

Costs.

5. In evidence, the 1st claimant, Joseph Onyango testified for and on behalf of all the Claimants that on 2nd July, 1979 he was employed as a Clerk in a subsidiary of the Respondent but the companies merged in 1999 – Kenya Capital Corporation.

6. By 19th February, 2014 he had served the Respondent for 34 years and aged 57 years and had hoped to retire at 60 years. There was an offer for VER with set terms to which the Claimants applied for. The Claimants being in the Clerical positions were unionised. There was a CBA and manual which set the terms and conditions of employment. The CBA benefits had notice pay at 3 months while the Respondent offer was for one month; severance pay was for a full month for each year served but the Respondent paid half a month for each year served.

7. The Claimants were paid in the less favourable offer and left. The dues payable for time served in the subsidiary company were not put into account. That previously the Respondent had retired employees and was paid for all years worked for the Respondent and the subsidiary. All the claimants' time at the subsidiary was left out in the computation of termination dues;

1st Claimant had served for 34 years;

2nd Claimant for 20 years;

3rd Claimant for 24 years; and

4th Claimant for 25 years.

8. All the Claimants were paid for 14 years. The Claimants are seeking the difference of terminal dues unpaid. The other employees who left under the VER were paid all their dues putting into account the years of service in full. The Claimants were discriminated against in the computation of their VER terminal dues. Damages are due.

9. In cross-examination Mr Onyango testified that he applied and accepted the VER and was paid. That there were rebates on the loan facilities to the claimants. The Claimants were unionised but the union was not involved in the VER process. That he signed the acceptance of the VER by duress, when the offer was made it was like a storm and the issue was a matter of course. The Claimants had the option to bring the union to negotiate but the matter was rushed and was forced to sign acceptance but opted to bring the claim to court.

Defence

10. The Respondent admits that the Claimants were their employee but denies the Claimants that they undertook to carry forward the years of service in the records. On the circular issued on 19th February, 2014 the Claimants with haste accepted the VER and the benefits due were paid. The offer made and paid was not discriminatory of the Claimants and there is no such evidence. There is no factual or legal basis for the claim of discrimination against the claimants.

11. The offer of VER was not in breach of the manual as paragraph 9.4.1 allows for early retirement of employees either at the respondent's or the employee discretion and the acceptance of the offer made was purely on voluntary basis.

12. The defence is also that by letters dated 2nd April, 2014 the Claimants accepted the VER terms and the Respondent released them with effect from 30th April, 2014. The remedies sought are not due and the Respondent paid all the terminal dues arising from the VER.

13. In evidence, the Respondent called Ms Linnet Arika, working in the Human Resource department of the respondent. That she joined the Respondent in November, 2015 and has all the Claimants records. The Respondent by circular of 19th February, 2014 invited all employees to a VER, there was no compulsion and the Claimants elected to apply. The terms of the offer were set out and the Claimants applied. The Respondent accepted the applications from individual Claimants and the Claimants have signed in acknowledgement to the terms. There was no promise to make any other payment other than the ones set out in the letter of offer.

14. In cross-examination, the witness testified that when she joined the Respondent in November, 2015, the human resource manual had been phased out and none was in force. The manual in place in 2014 gave notice pay at 3 months and service pay at 15 days for each year worked. The CBA at clause A7.1.6, the clause on redundancy gave severance pay at one month's pay for each year worked. In the offer made by the Respondent the notice was paid at one month and severance at half month's pay. Such payments were lower than the manual and CBA rates.

Submissions

15. The Claimants submit that the VER terms flouted the manual that set the terms and conditions of service within the Respondent bank. In the offer made vide circular dated 19th February, 2014 the terms in force did not set apart the manual as being inapplicable. Clause 9.4.2 of the manual made provision for 3 months' notice pay in retirement. When the Claimants applied for VER they were only paid for one month's notice and the balance of two months is due. The underpayment is not justified and is discriminatory.

16. The Claimants also submit that they were paid severance at half month's salary for each year worked. The CBA terms applicable to other employees were a severance pay at one month's salary for each year of service. The balance in half month's pay is due. That time served under Kenyac and not put into account should be considered as follows;

The 1st Claimant served for 20 years at KENYAC but was paid for 14 years work at the respondent;

The 2nd Claimant worked for 6 years at KENYAC but was paid for 14 years at the respondent;

The 3rd Claimant worked for 10 years at KENYAC but was said for 14 years at the respondent; and

The 4th Claimant worked for 10 years at KENYAC and was paid for 14 years at the respondent.

17. That the Claimants suffered discrimination by being given less favourable terms and should be paid damages. The Claimants have cited the following cases – **Gladys Muthoni and 20 others versus Barclays Bank of Kenya, Petition No.25 of 2016; Christopher Onyango & Others versus Heritage Insurance Co. Ltd, Cause No.781 of 2015; and Leonard Gethoi Kamweti versus NBK, Cause No.273 of 2014.**

18. The Respondent also submits that the offer inviting employees to apply for VER was a scheme outside the manual. Clause 9.4 of the manual provides for retirement and clause 9.4.1 an employee was entitled to apply for early retirement at age 50. In the invitation of 19th February, 2014 all employees even

those below 50 years were to apply. The only way the parts could change the terms of the manual was by agreement. The claimants made application and there was acceptance. This was to recognise that the manual and CBA did not apply.

19. In **National Bank of Kenya versus Pipeplastic Samkolit (K) limited, Civil Appeal No.95 of 1999** the Court of Appeal held that the court cannot rewrite terms of contract between parties and in this case parties have by agreement agreed to a VER which is not covered in the manual or CBA. In **William Barsa Obutiti versus Mumias Sugar Company, Civil Appeal No.198 of 2004 (Kisumu)** the court held that an employer and employee during the currency of a contract of employment can terminate it by agreement. In this case the respondent made an invitation which as accepted by the Claimant and there was agreement.

20. The Respondent also submits that there was no discrimination against the Claimant as alleged and article 27 and 41 of the constitution were not violated. The Claimant submission of letter dated 24th July, 2013 does not give evidence on discrimination on the variance in retirement package offered to Leonard Kamweti and what they were offered. Mr Kamweti was not retired on VER where the claimants were invited to apply but kamweti was above 50 years as under clause 9.4.1. He was also retired 9 months earlier and the Claimants retired later by making an informed choice to apply for VER.

21. The Claimants were paid all there lawful dues in terms of the offer, application and acceptance and agreement between the parties and not in accordance with the manual and CBA which did not contemplate VER. The period which the Claimants served under Kentac, a subsidiary of the Respondent cannot form the basis of the claim against the respondent as the respondent is only a shareholder. There was no evidence of transfer of service of the Claimants to the respondent. Any claims that arise against Kentac should be against such entity.

Determination

22. The main issues set out by the Claimants relate to the terminal dues paid to them following the offer for VER which they accepted under the set out terms. The Claimant have challenged the VER terms on the grounds that it was discriminatory; was unfair as some dues were paid less than what was provided for under the manual and CBA; and that the years the Claimants had worked in KENYAC before there was a merger with the Respondent were not put into account in the computation of the terminal dues.

23. The Claimants have attached letter at page 56 to the Memorandum of Claim. A circular from Kenya National Capital Corporation Limited (KENYAC) and dated 12th april, 1999 and provides that;

Staff

When the merger of operations of this nature takes place, it obviously has an impact on staff in many ways and in particular their future in the new scenario. It is expected that once decisions are made regarding this important area, staff will be advised.

In the meantime I urge you to continue with your normal duties because the business of KENYAC is not coming to a stop, but rather it is going to be transferred and subsequently continue under the umbrella of NBK.

24. What seems to follow this communication of 12th april, 1999 by KENYAC is letter dated 31st May, 1999, a letter of Appointment of the 1st claimant, Joseph Onyango. The letter states;

RE; LETTER OF APPOINTMENT

Further to the letter from the General Manager Kenyac dated 31st May 1999, we now wish to confirm the bank's offer of appointment on the following terms and conditions of service.

1. *Date of commencement:*

The date of commencement of employment with the National Bank shall be deemed 1st June 1999, however you will be expected to take up your position as and when Kenyac releases you.

2. ...

7. *Probation*

You will initially be called upon to serve a probationary period of three (3) months...

...

12 *liabilities to Kenyac*

The bank has agreed to take over loans you owe Kenyac who were until date of commencement of your employment herein your employers.

25. The merger between the Respondent and Kenyac was obviously to the disadvantage of the claimants. Despite the communication of 12th May, 1999 upon the merger, the Claimants got new letters of appointment with the Respondent without putting into account the time served with the former employer. The new employment can be discerned from the letter of appointment the probation period; and the terms under which liabilities from Kenyac were to be held by the respondent. The Claimants therefore effectively lost their years of service with the former employer when the Respondent commenced a new employment relationship vide letters of appointment.

26. The Claimants were unionised and the Respondent has asserted that the offer for VER was not a redundancy. However, the dues paid to the Claimants in the offer for VER was that;

One months' salary in lieu of notice;

Payment of leave days;

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

Retirement benefits

The respondent's case is that these terms were based on the manual at clause 9.4.1 which provides that;

Retirement

9.4.1 *Official Retirement Date*

The bank's official retirement age is 60 years. However there is an option of early retirement from age of 50 years either at the bank's discretion or employee's request. The bank may accept or decline an employee's request for early retirement at its sole discretion.

9.4.2 *Notice to Retire*

The bank will give an employee at least three months' notice prior to attaining the retirement date

...

27. In this context, save for the benefit of three months' notice or payment in lieu thereof, the clause does not relate to service of severance pay at all. Such provisions for a service pay or severance pay can be traced from the CBA between the Respondent and BIFU. At clause A7, redundancy and severance pay is

payable where there is the involuntary loss of employment *through no fault of the employee caused either by an excess of manpower or by the financial inability on the part of the employer to continue paying salaries*. Indeed where such a scenario does arise, severance pay is payable at the rate of *one month's pay for every completed year of service*.

28. On what basis then did the Respondent offer to pay the Claimants a severance pay?

29. In the letters of acceptance dated 2nd April, 2014 the set out entitlements for the Claimants were that;

i. One months' salary in lieu of notice ...

ii. ...

iii. Severance pay of half a month's salary for every completed year of service ...

iv. ...

30. I find no error or mistake in the above communication. The severance pay terms were directly lifted from clause A7 of the CBA. The manual, letters of appointment had no such provisions. To pay a severance pay, the implication is clear in fact and in law. Such a payment is not due in terminal dues unless there is a redundancy. Such redundancy is regulated under section 40 of the Employment Act.

31. Where the Claimants were unionised, the terms and conditions of employment negotiated and set out in the CBA, the same had to be addressed in the termination of the claimants. To ignore the CBA and proceed to terminate the Claimants through whatever method, retirement or through payment of a severance pay and fail to inform the union, fail to pay the dues set out in the CBA and the manual, such is unfair in terms of section 40, 41 and 45 of the Employment Act.

32. The Claimants are therefore entitled to the unpaid notice period and severance pay due under the manual and the CBA. Such is due for two months' pay in notice pay and half a months' pay for every year of service to severance pay.

33. With regard to the claim for discrimination against the claimants, though not pleaded, the Claimants witness testified that they were subjected to discrimination when the respondent failed to treat them equally with other employee and that they were only paid their terminal dues for 14 years instead of the full term of employment when they were with the subsidiary, Kenyac. Pleading discrimination is very important as the court is able to delve into the subject and also allow the respondent in defence to articulate their case. On the material evidence before court, the circumstances leading to the claimants retirement well addressed herein, and the finding that there was unfair termination of employment, such will be put into account in assessing the compensation due.

Remedies

34. On notice pay, the Claimants are entitled under the manual for the two months unpaid in the retirement. There is no justification as to why this entitled was not included in the computation of terminal dues. To allow the Respondent to apply the one month notice pay would be to sanction an injustice at the work place. The Claimants are each awarded two months' notice pay.

35. On the basis of the applicable CBA, even where the Respondent failed to inform the union over the retirement of its members, the VER offer did not negate the terms of the CBA. Such remains applicable to the parties to it and where the claimants re unionised, the benefits under the CBA should apply. Severance pay due and payable at full months for every year worked is due. The claimant was paid half and the other half is due.

36. Each Claimant served the respondent for 14 years since leaving their former employer, Kentac. Even though the Claimant did not articulate the circumstances of the merger and what transpired when they

moved from one employer to the next in the same entity but under different legal personalities, it is apparent from the claims that the Claimants feel the bulk of the employment time was not put into account. As set out above, the context here remains that of employment between the claimants and the respondent. For the unfair termination, each Claimant is awarded 10 months gross pay in compensation.

37. Had the respondent treated the claimants fairly and paid all owing due in terms of the applicable manual and CBA this suit would have been unnecessary. Costs are therefore due.

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

(a) A declaration that the claimants were unfairly terminated;

(b) Compensation awarded at 10 months' salary for each claimant

i. 1st Claimant is awarded Kshs.1,605,110.00;

ii. 2nd Claimant is awarded Kshs.3,024,830.00;

iii. 3rd Claimant is awarded Kshs.3,058,400.00;

iv. 4th Claimant is awarded Kshs.2,373,600.00;

(c) Notice pay of two months' salary for each claimant;

i. 1st Claimant awarded Kshs.321,022.00;

ii. 2nd clamant awarded Kshs.604,966.00;

iii. 3rd caliamnt awarded Kshs.611,680.00;

iv. 4th Claimant awarded Kshs.474,720.00;

(d) Severance pay at Half month salary for each year worked;

i. 1st Claimant awarded Kshs.1,123,577.00;

ii. 2nd clamant awarded Kshs.2,117,381.00;

ii. 3rd caliamnt awarded Kshs. 2,140,936.00;

iv. 4th Claimant awarded Kshs.1,661,520.00;

(e) 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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