



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 358 OF 2015

JUSTUS MUSOMI APOKO

1ST CLAIMANT

ERNEST IMBENZI KHAYAKA

2ND CLAIMANT

WANJERE KARANJA

3RD CLAIMANT

JOHN KAMAU NJOROGE

4TH CLAIMANT

CHRISTINE WANJIRU MWANGI

5TH CLAIMANT

v

NAKURU WATER & SANITATION SERVICES CO. LTD

RESPONDENT

JUDGMENT

1. The 5 Claimants contend that the Respondent retired them prematurely, and therefore the retirement was unlawful and amounted to unfair termination of employment.
2. The Respondent's response to the challenge is that the retirements were lawful in that the Claimants when called upon to produce documents showing their respective dates of birth produced copies of national identity cards which gave only the year of birth, but not the date and month, and therefore in terms of clause 9.8 of the Human Resource Policy and Procedures Manual they were lawfully retired.
3. After the 1st Claimant had completed his testimony, the Respondent's advocate informed the Court that the case would turn on an interpretation and application of the aforesaid clause 9.8 and that the testimony of the other Claimants would be similar, and therefore that testimony could be adopted and parties allowed to make submissions.
4. Because the Claimants advocate agreed, the Court directed the filing of submissions, which were filed.
5. The Court has given due consideration to the record and submissions and authorities cited therein.
6. After retiring to write this judgment, the Court found out that the parties had placed on record Human Resource Policy and Procedures Manual with slightly different, but nonetheless material provisions on retirement.
7. Clause 9.8 of the extract of the Manual filed in Court provides Retirement

? the company shall call upon an officer to retire from its service at any time following the officer

attaining the mandatory age of 60 years and a notice of retirement shall be given to the officer six months in advance of the 60th birthday provided that an officer may exercise the option to retire on or after attaining the age of 55 years by giving six months' notice.

? Where documentary evidence of an officer's age is unobtainable or inconclusive, his assumed age will be determined by reference to the date in his identity card and in such case the anniversary of his birthday shall be deemed to be 31st December.

8. On the other hand, the 2008 version of the Manual produced during testimony provide at clause 9.8 that the company shall call upon an officer to retire from its service at any time following the officer attaining the mandatory age of 55 years and a notice of retirement shall be given to the officer six months in advance of the 55th birthday provided that an officer may exercise the option to retire on or after attaining the age of 50 years by giving six months' notice.

? Where documentary evidence of an officer's age is unobtainable or inconclusive, his assumed age will be determined by reference to the date in his identity card together with the recommendation of the Medical Officer of Health, and in such case the anniversary of his birthday shall be deemed to be 31st December. Any appeal will be heard by an independent Medical Officer.

8. The Court will disregard the Manual produced during testimony because it appears to relate to the period before the retirement age was raised to 60 years within the public sector.

9. The Respondent's interpretation of clause 9.8 is that because the Claimants documentation indicated 1954 as year of birth, then the anniversary of the birthday for purposes of retirement was 31 December 1954.

10. The Claimants assertion on the other hand is that the first anniversary ought to be 31 December 1955 when it is supposed they turned 1 year old.

11. Black's Law Dictionary, Ninth edition defines anniversary date as

The annually recurring date of the initial issuance of a policy

12. In my view, taking cue from the definition, anniversary date for purposes of determining retirement age should be the one next from the date indicated in the identity cards.

13. The Respondent must have been alive to this interpretation for copies of the Claimants pay slips for December 2013 disclose they all had 1 year and 2 months to retirement.

14. Further, although the bill of rights is not directly implicated in the dispute presented to Court for determination, this approach would also be in consonance with the constitutional imperative of interpreting bill of rights in a way which most favours enjoyment of a right by a citizen.

Conclusion and Orders

15. The Court will therefore find that the retirement of the Claimants being premature, the same was unfair and unlawful.

16. The Court awards each Claimant the equivalent of 6 months gross wages as compensation for unfair termination of employment as hereunder

(i) 1st Claimant Kshs 201,654/-

(ii) 2nd Claimant Kshs 262,962/-

(iii) 3rd Claimant Kshs 277,470/-

(iv) 4th Claimant Kshs 311,556/-

(v) 5th Claimant Kshs 205,290/-

17. The other heads of claim relating to *leave, National Social Security Fund contributions, Laptrust contributions, uniform allowance and medical insurance cover* for the unserved period are declined as the same were appurtenant to an employment relationship which had been frustrated by the premature retirement

18. Because the dispute arose out of a not so direct interpretation of the retirement clause, the Court directs that each party bears own costs.

Delivered, dated and signed in Nakuru on this 21st day of April 2017.

Radido Stephen

Judge

Appearances

For Claimants Mr. Chege instructed by Munene Chege & Co. Advocates

For Respondent Mr. Ogola instructed Gordon Ogola, Kipkoech & Co. Advocates

Court Assistant Nixon