



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

CAUSE NO 940 OF 2014

[FORMERLY HCCC NO 203 OF 2009]

ESAU RODGERS MUMIA.....CLAIMANT

VERSUS

CENTRAL BANK OF KENYA.....RESPONDENT

JUDGMENT

Introduction

1. This claim was initially filed in the High Court as HCCC No 203 of 2009. It was transferred to this Court on 5th May 2014, by consent of the parties. Subsequent to the transfer, the Claimant filed a Memorandum of Claim on 20th August 2014 and the Respondent filed a Memorandum in Reply on 10th September 2014.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Legal officer, Elizabeth Njogu.

The Claimant’s Case

3. The Claimant was employed by the Respondent as a Clerical Officer in 1974. He was confirmed in 1975 and rose through the ranks to the position of Senior Bank Officer II.

4. At the time of the Claimant’s employment, the compulsory retirement age was 55 years. The Claimant however states that being a person with disability, his retirement age ought to have been 60 years as provided under the Persons with Disabilities Act, 2003.

5. On 18th August 2004, the Claimant received a letter from the Respondent notifying him that he was required to retire from employment on 31st July 2005, upon attainment of 55 years. The Claimant states that by retiring him, the Respondent denied him the statutory right to work until the age of 60 years. He further states that the Respondent’s decision was unlawful, discriminatory and an infringement of his rights under the Persons with Disabilities Act, 2003. He therefore claims the following:

- a) General damages
- b) Loss of salary for 60 months.....Kshs. 9,827,325
- c) Loss of leave allowance for 5 years.....282,750

d) Costs plus interest

The Respondent's Case

6. In its Memorandum in Reply dated 8th September 2014 and filed in Court on 10th September 2014, the Respondent admits having employed the Claimant sometime in 1974. The Respondent however denies knowledge of the Claimant's disability.

7. The Respondent further admits writing to the Claimant on 18th August 2004 notifying him that he would retire from service effective 31st July 2005 in accordance with Rule 6.14(a) of the Staff Rules and Regulations. By the said letter, the Claimant was advised to exhaust all his leave days before the last day of service in accordance with Rule 16.5 of the Staff Rules and Regulations.

8. The Respondent states that in the course of his employment, the Claimant was not a person with disability and any disability if at all did not fall within the definition of 'disability' under Section 2 of the Persons with Disabilities Act.

9. The Respondent avers that at the time of joining its employment, the Claimant was found to be in good medical condition and did not during his term at the Bank, suffer from any health problems and was otherwise physically fit. He was never at any one time certified as a person with disability by the National Council for Persons with Disabilities.

10. The Respondent admits that after his retirement, the Claimant wrote to the Bank on 18th July 2007 requesting for re-employment on the ground that he had been unlawfully retired. The Respondent wrote back to the Claimant on 2nd July 2008 notifying him that his request for re-employment had been declined.

11. It is the Respondent's case that the Claimant's claim is an abuse of the court process as it seeks compensation in circumstances where the Claimant had voluntarily acquiesced to the retirement.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant's retirement was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Retirement

13. The Claimant was notified of his retirement by letter dated 18th August 2004 stating as follows:

"Dear Sir,

RETIREMENT AT PENSIONABLE AGE OF 55 YEARS

As you are aware, you will attain the compulsory retirement age of 55 years on July 31 2005, having served the Bank for a period of 30 years as at that date.

*The Bank wishes to thank you for your long service and hereby informs you, in accordance with **rule 6.14(a)** of the Staff Rules & Regulations, that you will retire from the Bank's service with effect from **July 31, 2005**. Regarding your pension status/benefits, please liaise with the Administrator of the CBK Pension Fund.*

*As per Administrative Circular No 522 dated August 11, 1986 and **rule 6.15** of the Staff Rules &*

Regulations, retiring employees are required to exhaust all their leave before their last day of service with the Bank, unless they are authorized in writing by the Bank not to do so.

In this regard, therefore, please make necessary arrangements to exhaust your leave before your last day of service. Please note that your leave entitlement for 2005 will be 17 days.

With regard to clearance and pension matters, please arrange to get in touch with the Deputy Director, Administration & Human Resources and the Pensions Administrator, respectively, about a week before your retirement date.

Yours faithfully

P.K. ROTICH

DEPUTY DIRECTOR, ADMINISTRATION & HUMAN RESOURCES”

14. Pursuant to this letter, the Claimant retired from the Bank on 31st July 2005. Almost two years later, he met a lawyer friend who advised him that being a person with disability, his retirement age ought to have been 60 years. He therefore wrote to the Bank on 18th July 2007 as follows:

“Dear Sir

REF: PERSONS WITH DISABILITY ACT NO. 14 OF 2003

I write with reference to the above act and would like to state that at the time I was notified of my retirement date, I was unaware of this act that was already in force. According to this act, persons with disabilities like me should be allowed to retire at the age of sixty.

I am therefore requesting you to kindly reconsider my position and advice me accordingly.

Yours faithfully

Esau Mumia”

15. The Claimant’s request was not granted hence this claim. The Claimant’s disability is in contention. While the Claimant maintains that his disability was a fact always within the Respondent’s knowledge, the Respondent denies any such knowledge.

16. Article 260 of the Constitution of Kenya, 2010 defines disability as:

“any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long term effect on an individual’s ability to carry out ordinary day-to-day activities.

17. Section 2 of the Persons with Disabilities Act on which the Claimant’s claim is premised defines disability as:

“a physical, sensory, mental or other impairment including any visual, hearing, learning or physical incapability, which impacts adversely on social economic or environmental participation.”

18. How then does one become certified as a person with disability for purposes of accessing the rights and privileges under the Act? In my view, the answer lies in Section 7(1)(c) which provides for registration of persons with disabilities by the National Council for Persons with Disabilities.

19. This was the holding in *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others* [2016] eKLR where the Court stated as follows:

“For purposes of determining whether any person is suffering from disability as defined in the Constitution and the Persons with Disabilities Act, section 7(1)(c) of the Act provides for registration of persons with disabilities.....to determine whether any employee.....is subject to disability as so defined.

20. Similarly in *Suleman Angolo & another v Executive Officer Teachers Service Commission* [2015] eKLR the Court rendered itself as follows:

“Persons with Disabilities enjoy certain rights and benefits as provided in the Persons with Disabilities Act. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement.”

21. The gist of these decisions with which I fully agree, is that disability as defined in the Persons with Disabilities Act is not an internal matter between an employee and their employer. For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the National Council for Persons with Disabilities relying on duly completed medical reports.

22. It is not in dispute that at the time the Claimant retired, the Persons with Disabilities Act had come into effect. He was however not registered by the National Council for Persons with Disabilities until 2013. The effect is that at the time of retirement, the Claimant was not a certified person with disabilities and his employer cannot therefore be faulted for retiring him at the age of 55.

23. For the foregoing reasons, the Claimant’s claim fails and is dismissed.

24. Each party will bear their own costs.

25. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JUNE 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Keyonzo for the Claimant

Mr. Ngonde for the Respondent