



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 85 OF 2016

ABINJA KINA IRERI.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT, S.A

KYENI GIRLS SECONDARY SCHOOL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 9th June, 2017)

JUDGMENT

The claimant filed the statement of claim on 06.05.2016 through Munene Wambugu & Kiplangat Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's action in terminating the claimant's employment was unlawful and unfair.
- b) Payment of her terminal benefits and sums that were deducted from her dues being Kshs. 277, 200.00 and one month pay in lieu of termination notice.
- c) General damages for unlawful or unfair termination.
- d) Costs of the claim.

The statement of response was filed on 17.06.2016 through the Attorney General. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as a copy typist as per the letter of appointment dated 01.03.1983 and effective 01.03.1983. By the letter signed 08.04.2015, the respondent's secretary conveyed to the claimant that by a minute of the respondent held on 08.04.2015, the claimant was reminded that his retirement date was 10.05.2015.

The claimant replied by her letter dated 07.05.2015 by referring to the respondent's letter of 08.04.2015 and requested to retire at her official age of 60 years. She stated that her date of birth was 26.10.1960.

By the letter dated 08.05.2015 the secretary conveyed an apology for mistaking the claimant's date of retirement. It was conveyed that the respondent's records had an identification card but which did not bear the claimant's date of birth but the baptismal card stated 26.10.2015 as the claimant's date of birth. Thus, the earlier communication of 08.04.2015 was cancelled and the official retirement date conveyed as

26.10.2015 as per respondent's memo dated 03.09.2014 to all employees and staff of the respondent. The letter further stated that the claimant had indicated that he wished to retire at the age of 60 years as the official retirement age but the respondent demanded a letter from the claimant showing that the respondent had stated that the claimant could retire at 60 years.

The respondent issued to the claimant the letter dated 27.10.2015 stating that the claimant had retired effective 27.10.2015 and the claimant had to clear with the school by 06.11.2015. The respondent further issued the letter of 13.11.2015 confirming that the claimant had retired from the school's service on 27.10.2015.

The **1st issue** for determination is whether the termination of employment by way of retirement for attaining alleged age of retirement was lawful and fair. It is submitted for the claimant that the letter of appointment did not stipulate retirement age. It was submitted that by circular OP.CBA.2/7A dated 20.03.2009 it was stipulated that retirement age for civil servants would be 60 years of age and that was the age at which the claimant ought to have retired. It was submitted that the respondent did not consult the claimant in setting her retirement age at 55 years as envisaged in section 10(5) of the Employment Act, 2007 and the same was therefore not binding upon the claimant. The claimant relied upon **Elizabeth Kwamboka Khaemba –Versus- BOG Cardinal Otunga High School Mosochi and 2 Others [2014]eKLR** where **Wasilwa J** held that the section was in mandatory terms and the end result of changing the claimant's contract without consultation with her was tantamount to terminating the existing contract and therefore amounted to unfair and unjustified termination.

The court has considered the submissions. The respondent filed no opposing submissions. The court returns that there was no agreed mandatory retirement age and there was no consultation in the respondent's fixing of the retirement age at 55 years. The respondent has not denied that the communicated age of retirement in the public service is generally attainment of 60 years of age. The court has considered that under section 5 (1) (a) of the Employment Act, 2007 the cabinet secretary for labour, labour officers and the court are obligated to promote equality of opportunity in employment in order to eliminate discrimination in employment. Accordingly, the court finds that it was discriminatory and therefore unlawful to have the claimant retire at 55 years of age. The court returns that the termination was unfair for want of a valid reason under section 43 as read with section 45 (2) of the Employment Act, 2007. The court has considered the long clean service and that the claimant had 5 more years to serve and finds that maximum 12 months' pay under section 49 (1) (c) in compensation will meet justice in the case making **Kshs. 125, 100.00** at Kshs. 10, 425.00 as submitted. As notice for retirement had been issued, the court returns that prayer for a month's pay in lieu of termination notice will fail.

The **2nd issue** for determination is whether the claimant is entitled to Kshs. 277, 200.00 being refund of the money unfairly deducted from her final dues. The respondent's witness (RW) being the principal one Catherine Wanja Karanja confirmed that the money was deducted from the claimant's final dues. She testified that the deduction was for rent since the claimant's date of employment in 1983 but she could not tell the rent that was due in 1983 as there was no policy for housed staff to pay rent. RW confirmed that the deducted money was rent from 1983 at Kshs.700.00 per month (the Kshs.700.00 being the monthly house allowance at the time the claimant retired). RW produced no minutes at which the respondent made a decision that the claimant was to pay rent from 1983 or any other time. The court finds the claimant's testimony to be credible that the policy to pay rent was introduced in 2011 by the respondent but she was paid house allowance and not deducted rent because she was allocated a mud house that was not worthy any rent. In any event there was no tenancy agreement between the parties. Further the record shows that in 1983 the claimant was paid Kshs. 510.00 per month and the court returns that it was most unreasonable for the respondent to recover Kshs. 700.00 per month in rent effective the date of employment and without the relevant tenancy arrangements. Thus, the court returns that the claimant is entitled to the refund of the **Kshs. 277, 200.00** as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment upon forced retirement on attaining 55 years of age was unfair and unlawful.

b) The respondent to pay the claimant **Kshs.402, 300.00** by 01.08.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 9th June, 2017**.

BYRAM ONGAYA

JUDGE