



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 1089 OF 2013

JACKTON ARUMI OMBIMA.....CLAIMANT

VERSUS

STRATHMORE EDUCATIONAL TRUST

REGISTERED TRUSTEES.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 15th July, 2013 the claimant averred that he was employed by the respondent on 2nd January, 1987, 1987 as a telephone Operator II at a monthly salary of Kshs 1,100/=. He remained in employment until 2012 by which time he was earning a monthly salary of Kshs 54,114.
2. According to him on 22nd November, 2012 he received a letter from the respondent backdated to 31st May, 2012 which purported to inform him that he would retire from employment on 31st December, 2012. According to the claimant, this action was malicious and contrary to law and CBA between KUDHEIHA and the respondent. The CBA according to the claimant provided that he would retire at the age of 55 years and was ready to continue until that age.
3. The claimant therefore sought a declaration from this court that his retirement by the respondent was malicious, unlawful, discriminatory and contrary to the CBA. The claimant further sought a declaration that he was entitled to salary together with annual increments for the entire period of five years had he retired at 55 years.
4. The respondent on its part pleaded that during the course of his employment, the claimant served in various capacities. He was initially appointed as a Telephone Operator at a basic salary of Kshs 1,310 per month. On 1st June, 1996, he was appointed a purchasing officer on contractual terms. The initial contract was for 2 years. The respondent further stated that the claimant joined the respondent provident fund on 1st June, 1996 and consequently, his accumulated gratuity was transferred to this fund. According to the respondent the claimant resigned from the Union in February 1990 since unionisable staff could not join the provident scheme as the provisions in the CBA were incompatible with the Provident Fund Trust Deed.
5. The respondent further averred that on 11th October, 2011, the claimant was informed by the respondent's principal that he would leave employment on 31st December, 2012 on attaining the retirement age of 50. Further that between March, 2012 and November, 2012 the claimant and the

respondent's administration met several times to discuss ways of helping the claimant settle down in retirement. The respondent further averred that on 6th November, 2012 the claimant requested for and was given a letter to enable him follow up his dues with NSSF and Provident Fund.

6. The respondent further pleaded that on 12th November, 2012 the respondent held a farewell party for the claimant and was given a power saw worth Kshs 65,000 and it was the claimant who chose the gift and where it could be bought. The respondent therefore submitted that the claimant's retirement was lawful since he had attained 50 years, the mandatory retirement age as set out in the respondent Trust Deed and rules of Staff Provident Fund. Further the retirement age had been set out in clause 12 of the CBA.

7. The issue in this dispute appears to be the complaint by the claimant that he was retired at 50 years while he ought to have retired at 55 years. He therefore contended that he lost salary for the last 5 years he ought to have continued working and that his retirement was discriminatory and malicious because other people continued working past 50 years at which he was retired. In support of his argument on retirement age the claimant sought reliance on the CBA.

8. The respondent on its part contended that the CBA was not applicable to the claimant because he resigned from the union when she joined the staff pension fund since the CBA was inconsistent with the terms of the Staff Pension Fund Trust Deed. At page 8 of the Trust Deed Rules, it is stated that employees of Strathmore School shall retire at 50 years while those of Strathmore University retire at 55 years. Clause 12 of the CBA provided that the normal retirement age was 50 years. However, employees will be required to retire on attaining the age of 55 years unless the school considers that it is in the interest of the school to retain the employees services for a period beyond that age.

9. The respondent has averred that the claimant resigned from the union in 1990 when he joined the provident fund since the CBA with the union was incompatible with the terms of the Provident Fund Rules. The respondent however did not produce any resignation letter by the claimant from the union or exhibit the relevant portion of the deed they alleged was incompatible with the CBA. Clause 12 of the CBA above stated that the retirement age was 50 years but an employee must retire at 55 years unless the school wishes to continue the services of the employee beyond that age. It would therefore mean that an employee would normally retire upon attainment of 50 years but must retire upon attainment of 55 years unless the school opts to retain the services of such employee beyond that age.

10. Whereas the CBA does not state the rationale for these two sets of retirement age, the court would assume that at age 50 retirement is voluntary and both the employer and the employee can elect to continue the contract until age 55 when the employee has to retire. This implies that at age 50 both parties should be discussing whether such employee would be retiring or not. The claimant herein disputed his retirement and alleged that the retirement letter of 31st May, was issued to him in November, 2012 approximately one month to retirement which was scheduled for 31st December, 2012.

11. The respondent refuted the claimant's allegation stating the letter was issued to the claimant immediately in May when it was written and that there had been meetings and discussions with the claimant over his retirement. The respondent however did not annex any minutes or correspondence with the claimant concerning these meetings and discussions.

12. Retirement is a life changing state in an employees life cycle. It entails re-adjustment from a life of earning monthly salary to pension. An employee who may not have prepared well early may need reasonable time to prepare for the change. The claimant herein has disputed his retirement at 50 and the process of communicating the retirement to him. Besides the CBA gave both parties an option to continue the relationship for 5 more years. Nothing was exhibited by the respondent to show why a decision was taken to retire the claimant at 50 and not 55 years.

13. The court therefore finds the claimant's complaints merited. The court however will not award the claimant salary for the entire period of five years since his contract of employment could have been terminated through dismissal, resignation or even death. Taking into account these imponderables in life

and the fact that the maximum amount of compensation this court can award in such cases is 12 months wages, an award of 10 months salary would be reasonable in the circumstances.

14. The claimant shall further have costs of the suit.

15. It is so ordered.

Dated at Nairobi this 3rd day of November, 2017

Abuodha J. N.

Judge

Delivered this 3rd day of November 2017

Abuodha J. N.

Judge

In the presence of:-

..... for Claimant

.....for Respondent