



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.37 OF 2016**

**EVELYN KAGWIRA MUTHAMIA.....CLAIMANT**

**VERSUS**

**SOLUTION SACCO SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 30<sup>th</sup> September, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 19.02.2016 through Mbaabu M’Inoti & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Full and prompt payment of the claimant’s retirement benefits.
- b) Costs of the suit.
- c) Interest on (i) and (ii) above at court rates until payment in full.

The respondent filed the statement of defence on 10.05.2016 through Mwirigi Kaburu & Company Advocates. The respondent prayed for dismissal of the claimant’s claim with costs.

The respondent employed the claimant on 22.02.1988 as a messenger. The claimant served for 26 years and by the letter dated 17.02.2015 addressed to the respondent’s chief executive officer the claimant applied for early retirement because she had attained 50 years of age. In the application to retire early she surrendered her pending leave days in lieu of the relevant notice to retire early. As at the time she applied for early retirement the claimant was 52 years old.

On 16.03.2015 the respondent’s chief executive officer wrote to the claimant thus,

**“RE: EARLY RETIREMENT**

**This is to confirm that you have been working with us from 1988 to 2th February 2015 when you took your early retirement.**

**Thank you for the service you rendered.**

**Yours faithfully,**

**Signed**

**CHIEF EXECUTIVE OFFICER”**

After the retirement the claimant demanded her retirement dues but she was not paid. She was then invited to appear before the respondent’s board on 26.05.2015 on allegations that on several dates and being a teller the claimant withdrew various amounts of money from members’ accounts and paid that money to a staff member who was later terminated. The claimant replied by her letter dated 25.05.2015 stating that she declined to appear before the board on 26.05.2015 because she had ceased being an employee of the respondent. The claimant stated that her letter of early retirement had been acknowledged and a discharge form signed by the trustees on 3.03.2015 for her provident fund benefits and all she was waiting for was her retirement benefits. It was her case that as a teller she obeyed the credit manager who was her senior and the credit manager who had all the relevant powers had authorised the claimant to make the withdrawals on behalf of the member and the credit manager had signed all the cash withdrawal slips to show that indeed he had received the cash withdrawals in issue. The claimant in that replying letter further directed the respondent that all further communications to the claimant be addressed through the union (BIFU).

The claimant relied on exhibit EKM8 being the letter by the Director of Public Prosecutions that the culprit in the alleged fraudulent cash withdrawal and who was to be prosecuted with the offence of stealing by servant was one Patrick Gitonga and that the prosecution had informed the claimant that she would be a witness in the intended prosecution. The claimant testified that the said Gitonga, the credit manager, had approached her and he had received a sum of Kshs.770,000.00 being withdrawals from members’ accounts when the claimant served as a teller. The claimant testified that the said Gitonga had said the members from whose accounts the cash was withdrawn were in serious need and they had asked him to deposit the cash in their accounts; and the claimant testified that such was a usual practice by the credit manager- the said Gitonga. Further, the claimant confirmed that the procedure for withdrawals from members’ accounts by a teller required the presence of the member and signing of the withdrawal slip by the member. The claimant’s further evidence was that she had been diabetic and hypertensive since 2003 and the early retirement was in the best interests of her health and not to avoid the allegations of fraud that subsequently emerged. Further, the claimant stated that despite her health conditions she had retired early on account of age and not her prevailing health circumstances.

The respondent’s case was that after the claimant breached the operational policies by aiding the alleged fraudulent withdrawals, in order to escape the simmering disciplinary action, she opted to retire early. Later the respondent discovered that the retirement was not genuine. The respondent’s witness RW being the respondent’s chief executive officer confirmed that as at time the respondent summoned the claimant to appear before the board, the claimant was not in the respondent’s employment. RW confirmed that after his letter to the claimant dated 16.03.2015, he did not expect the claimant to continue in the respondent’s employment.

The court has considered the evidence, the pleadings and the submissions on record and makes the following findings on the matters in dispute:

- a) The court finds that the claimant was initially employed as a messenger and at the time of her retirement she served as a teller.
- b) There is no dispute that after the chief executive’s letter to the claimant dated 16.03.2015, the claimant thereby ceased to be the respondent’s employee. Clause 12(a) of the CBA is clear that the employer shall allow any employee wishing to retire early to do so voluntarily at the age of fifty (50) years. Thus the court returns that in any event, the respondent had to allow the claimant to retire as was requested by the claimant because under that clause, the respondent had no option but to allow the claimant to retire. In view of that retirement, under clause 12(c) of the CBA the claimant’s retirement benefits are provident fund plus 2 months’ salary for each year of completed service based on the current monthly salary. The claimant would also be entitled to gratuity under clause 44 of the CBA which provides that an employee on permanent employment and has

completed 10 years and over is entitled to gratuity equivalent to one and half years basic salary for every 5 years worked; and that applies to those who opt to retire or are retired by the employer. The respondent's letter of 16.03.2015 confirmed that the claimant had retired on 28.02.2015 and the court returns that the claimant would be entitled to the benefits as prayed for.

While making the findings the court upholds its opinion in **Henry Kamau Ngare –versus- Teachers Service Commission [2016]eKLR** thus,

**“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee's right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35 (5) and section 40 (1) (g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee's crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer's resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee. The court has further considered and persuaded itself that every person is entitled to social security under Article 43 (1) (c) of the Constitution of Kenya, 2010 and provisions that deny eligible employees from receiving their service pay or pensions benefits would undermine that right to social security. While that provision was not in force at the time of the cause of action in the present case, the court holds that in event of established poor performance, misconduct, gross misconduct or other adverse ground that would justify the dismissal of the employee, it is sufficient that the employer terminates the employment relationship and, where the grounds bear a criminal element, like it appears to have been the allegation in the present case, the matter should be remedied under the criminal justice system without depriving the employee the accrued pension benefits or service pay. The court therefore holds that contractual or statutory provisions that attach disciplinary action to depriving the employee pension benefits or service pay the employee has become eligible to be paid are unconstitutional because it amounts to unfair deprivation of the employee's property and is unfair labour practice.”**

The court has carefully revisited the record. Initially an incomplete copy of the CBA was filed and then a copy purporting to be the complete set of the CBA was produced by RW as exhibit R1. The court has examined exhibit R1 which forms the basis of the claimant's otherwise generous pay under clauses 12 and 44 of the CBA and which in the claimant's submissions puts the claimant's benefits at Kshs.10,441,076.80. That CBA appears to give the claimant generous double benefits as submitted for the respondent and if the parties have agreed as much, there would be nothing to stop the court from making the award. However the copy of the CBA exhibit R1 is not dated and is not signed for the respondent and the union, the Banking Insurance and Finance Union (Kenya). The claimant's case would therefore collapse and the remedies prayed for declined on the account that exhibit R1 is of diminished probative and evidential value as to justify the award of the remedies as prayed for and on the basis of the alleged terms and conditions of service founded upon the purported and unsigned document referred to as a CBA by the witnesses at the hearing of the suit. As parties appeared not to dispute the document referred to as the CBA, the claimant would be at liberty to apply for review towards ends of justice if the copy of the CBA duly certified by the union's General Secretary or the Registrar of this Court is filed to support such a review.

In conclusion, and in view of the court's findings, the claimant's suit is hereby dismissed with orders as follows:

- a) Each party to bear own costs of the suit.

b) The parties at liberty to apply within 14 days from the date of this judgment as may be appropriate.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 30<sup>th</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**