



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 273 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 12th October, 2016)

LEONARD GETHOI KAMWETI.....CLAIMANT APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

MUNIR SHEIKH AHMED.....2ND RESPONDENT

MOHAMED ABDIRAHMAN MOHAMED.....3RD RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 25.2.2014 and later amended his Memorandum of Claim filed on 24.12.2014 seeking damages for unlawful termination.
2. He avers that he is a Lawyer and Certified Public Secretary employed by the Respondent on permanent and pensionable term in 1996 to 30.6.2013 when his services were unlawfully terminated.
3. The circumstances leading to his termination as alleged in his Amended Memorandum of Claim are that in the year 2005 in the normal course of his duties, the Respondent became involved in a dispute with one Mr. Ahmednasir of Ahmednasir Abdikadir & Company Advocates which was the subject matter of Court proceedings in HC Misc. Case No. 753 of 2004 Ahmednasir Abdikadir & Company vs. National Bank of Kenya Limited involving illegal possession of the Respondent's documents; which also led to lodging of a complaint with the Advocates Disciplinary Committee of the Law Society of Kenya.
4. He further contends that in April 2012, Mr. Mohammed Abdirahim Hassan was nominated to the Board of the Respondent under the influence of Mr. Adan David Mohammed Chairman of NSSF a substantial shareholder in the Respondent Bank. The said Mr. Adan is apparently a shareholder in the firm of Ahmednasir Abdikadir & Company Advocates.
5. Later on, in November 2012 a Mr. Munir Sheikh Ahmed was appointed Managing Director of the Respondent under the influence of Mr. Mohamed Hassan. Mr. Munir is alleged to be Mr. Ahmednasir's cousin.
6. It is further alleged that on 26.6.2013 the Advocates Disciplinary Committee found that Mr. Ahmednasir had a prima facie case to answer on the charge of having unprofessionally come into possession and distributed the Respondent's confidential documents.

7. That on 18.6.2013 the Claimant alleges that he was called by the said Mr. Ahmednasir Advocate and the Respondent's Chairman asking him to withdraw the complaint LSK Disciplinary Complaint 083/13 and to stop using the Respondent's letterhead to issue communication in the matter, which the Claimant declined to do.
8. It is the Claimant's contention that the Chairman of the Respondent telephoned him again in yet another effort to stop the complaint failing which action leading to loss of his office in the Respondent Bank during the next board meeting which was due on 8.7.2013. The Claimant states that he was still adamant to withdraw the complaint against Mr. Ahmednasir.
9. It is alleged that during the Board meeting on 8.7.2013 the Claimant was sent out of the meeting and the board proceeded to discuss the proceedings at the LSK Advocates Disciplinary Committee and came to the decision to terminate the Claimant's services. The Claimant states that he was not given an opportunity to defend himself at the alleged hearing.
10. The Claimant contends that his termination was unlawful as the Respondent had long before issuing the termination letter made the decision to terminate the Claimant and recruited another Company Secretary. He was condemned unheard, never furnished with the charges against him, no reasons for termination were given to him and the termination was as a result of exercising his constitutional rights guaranteed under Article 50 of the Constitution 2010.
11. The Claimant alleges that he has suffered loss and damage as a result of the Respondent's actions which he cites as defamation and reduction of annuity owing to premature termination.
12. He prays for a declaration that the Respondent's actions were discriminatory and a contravention of Article 25 and 50(1), 41, 33 of the Constitution and Section 5(3) and 45(2) of the Employment Act 2007. That further, the termination was wrongful and has caused the Claimant loss and damage.
13. The Claimant prays for general damages of Kshs.8,050,728/= being 12 months' salary as at the time of dismissal, loss of earnings of Kshs.670,895, after tax annuity with Jubilee Insurance Company Limited, Gratuity of Kshs.3,019,023, exemplary damages for contravention of his constitutional rights, Certificate of Service, costs and interest.
14. The Respondent filed a Memorandum of Response through the firm of Miller & Company Advocates wherein they admit the employment relationship but deny the contents of the claim and specifically the Claimant was wrongfully terminated but rather his employment came to end by virtue of early retirement which according to the Respondent's Manual could be invoked upon attaining the age of 50 years.
15. They aver that the case High Court Misc. Civil Case No. 753 of 2004 alluded to by the Claimant had nothing to do with his termination as the issues for determination therein were whether an agreement entered into by parties was illegal by reason of undercutting and whether the said law firm could benefit from the illegal agreement.
16. The Respondent being a publicly listed company deny that it was bulldozed into appointing a nominee by persons named by the Claimant in disregard of the interests of other shareholders. Further, that no person including the Claimant ever raised a concern over appointment of the Respondent's Managing Director; moreover, his competence and appropriateness to serve the Respondent were never questioned.
17. The Respondent further deny that they were party to any complaint against Mr. Ahmednasir Advocate and any suit instituted by the Claimant against him was not sanctioned by the Respondent.
18. The Respondent avers that the information the Claimant seeks to rely on was obtained illegally and in complete violation of the Respondent's rights to confidentiality of its Board's deliberations.
19. The Respondent contend that the audio recording sought to be relied on by the Claimant is the subject of the Respondent's Notice of Motion Application in Nairobi, HCCC No. 370 of 2014 now Industrial

Cause No. 1965 of 2014 between National Bank of Kenya Limited vs. Leonard Gathoi Kamweti where injunctive Orders were issued restraining exploitation of the Respondent's confidential information. The said Order is annexed to the Memorandum of Defence as Exhibit 2.

20. Furthermore, the Respondent avers that the Claimant is estopped from using information obtained at a board meeting by virtue of advocate –client confidentiality.

21. The Respondent state that they did not terminate the Claimant but rather invoked the provision of paragraph 9.4.1 of the Human Resource Manual by separating the Claimant's services through the early retirement clause.

22. It is a further contention of the Respondent that the Claimant was paid all his dues envisaged under early retirement and these reasons were in the Claimant's knowledge at all times.

23. The Respondent allege that they did not injure the Plaintiff's reputation and ruin his marketability, but it is the Respondent which has been injured by the Claimant's actions of disclosing confidential information to the Central Bank of Kenya, the Law Society of Kenya, Capital Markets Authority and possibly to various other persons and organizations.

24. The Respondent also aver that any matter pertaining to the Claimant's pension entitlement is a preserve of the Retirements Benefit Authority and the Court should not entertain it. They also dispute the jurisdiction of the Court to pronounce itself on Constitution issues raised by the Claimant as they are not necessary to resolve the dispute between the parties.

25. The Respondent also states that they paid the Claimant three months' salary in lieu of notice, leave days earned but not taken, Retirement benefits, severance pay of one months' pay for each completed year of service, medical allowance and half months' salary for each to retirement.

26. The Respondent prays for the claim with costs.

27. Both the Claimant and Respondent put up evidence and reiterated the averments in their pleadings.

Submissions

28. The Claimant in his submissions states that his reputation was injured by the Defendant's actions of publishing false information against the Claimant which is contrary to Article 33 of the Constitution 2010 and Section 3 of the Defamation Act.

29. He submits that he did not breach the duty of confidentiality as Company Secretary of the Respondent as any information relied on touched on illegal conduct of the Respondent such as corruption and nepotism.

30. The Claimant is also of the view that the reason of early retirement advanced by the Respondent as leading to the termination of employment is null and void as was held in the case **of D.K. Njagi Marete vs. Teachers Service Commission (2013) eKLR** which is to the effect that any form of truncation of employment other than a natural retirement owing to elffluxion of time is a termination.

31. The Claimant also submits that reasons for termination were not give which is contrary to Section 45 of the Employment Act 2007.

32. It is also the Claimant's submission that the Respondent had reached the decision to terminate him long before he was handed the termination letter which amounts to unfair labour practices. He lists other conduct of the Respondent amounting to unfair labour practices as being condemned without notice, no notice of trial, never being furnished with charges against him, being expelled from the venue of the trial, never been given an opportunity to be heard and defend himself.

33. He also submits that the constitutional provisions breached during his termination are Articles 25 and 27 on equality and freedom from discrimination, Article 50(4) which encapsulates the right to a fair hearing.

34. He prays for damages in lieu of the said contraventions. He relies on the case of **Phelesia Olukunga vs. Land Husbandry & Another** Cause No. 927 of 2010 where Rika J stated:

“The Industrial Court Act, 2011, under Section 12 allows the Court to award damages as well as compensation. This Act and the Constitution of Kenya, have, freed the hand of the Industrial Court in award of appropriate remedies”.

35. The Claimant prays for his claim to be allowed as prayed.

36. The Respondents in submissions state that the Claimant was retired early in accordance to Clause 9.4.1 of the Respondent’s Human Resource Manual which provides that the Bank’s official retirement age is 60 years. The Clause also gives the option of early retirement at 50 years either at the Bank’s discretion or at the request of the employee. The Human Resource Manual does not give the employee the option to accept or decline the option of early retirement.

37. They also submit that Section 9.4.2 of the Human Resource Manual provides that either party is to give 3 months’ notice in case of early retirement. They submit that the Claimant was retired at the age of 51 years and was paid in lieu of notice. They also submit that all the Claimant’s dues were paid to him and do not owe him any more money.

38. The Respondent submits that they did not contravene the Claimant’s constitutional rights and as such no damages are due. They state that from the evidence led by the Claimant, this is a clear case of unfair and unlawful termination and as such Court should restrict itself determining on wrongful dismissal and not delve into infringement of constitutional rights. They rely on the case of **Paul Muhoro Kihara vs. Barclays Bank of Kenya Limited** Civil case No. 33 of 2002 where Court held that

“..the contract between the Claimant and the Defendant was a simple contract of employment which cannot by any stretch of imagination raise any constitutional issue.”

39. The Respondent therefore urges the Court not to make a finding on breach of constitutional rights as the evidence led by the Claimant did not support the pleadings.

40. The Respondent submits that the Claimant is not entitled to the prayers for damages sought as all his dues were paid to him. They pray for the claim to be dismissed with costs.

41. Having considered the evidence and submissions of both parties, the issues for determination by Court are as follows:

1. Whether the bank’s discretion to retire the Claimant early was fairly and properly exercised.

2. If not, whether the Claimant is entitled to remedies sought.

42. From the evidence of the Claimant, he served the Respondent bank for 17 years without any disciplinary issues and he looked forward to retiring on attaining the age of 60 years as per the bank policy. However it is his contention that due to his disagreements with some directions of his Managing Director to withdraw a complaint he had leveled against the Managing Director’s cousin, he was forced out of the bank prematurely on the pretext of early retirement.

43. The Respondents have insisted that they exercised their direction to early retire the Claimant legally as per their HR Policy and Manual. Annex LGK 22 is the Respondent’s HR Policy and Manual which at page 116 deals with retirement at Clause 9.4.0.

Under Clause 9.4 it is stated as follows:

“9.4 Retirement

9.4.1 Official Retirement age is 60 years. However there is an option of early retirement from age of 50 years either at the bank’s direction or employees’ request. The bank may accept or decline as employees request for early retirement at its own discretion.

9.4.2 Notice to Retire

The bank will give an employee at least three months’ notice prior to attaining the retirement date (age). Either party will give three months’ notice in case of early retirement.

9.4.3 Benefits

Retirement benefits will be as defined in the Employee’s Retirement Benefits Schemes’ Rules and Regulations -----.”

45. From the provisions above, early retirement is an option for employee in the Respondent’s Organization but the employer retains the right to accept or reject it.

46. The question however is whether the employer can exercise this option unilaterally without assigning any reasons. I have drawn a lot of wisdom from the finding of my brother **Hon. J. Rika in D.K. Marete vs. The Teachers Service Commission** 379/2009 where J. Rika made the following observation:-

“17 ..Termination of employment as a general term means the coming to an end of the contract of employment. The end may come voluntarily, involuntarily or consensually-----.”

47. The means by which that end come vary. The termination, as discussed by this Court is the Industrial Court Case Number 886 of 2010 between **Julie Toprian Njeru vs. Kenya Tourist Board** should always be on objective and demonstrable ground.

48. Though the Respondent had powers to early retire the Claimant, it must still be demonstrated that early retirement was done with an open mind and in a judicious manner.

49. From the wording of the Respondent’s HR Manual, though early retirement could be initiated by either party, the Respondent retained the right to accept or reject an employee’s retirement and this in my view was skewed to favour the Respondent which was sanctioning servitude.

50. The Claimant has indicated that the Respondent decided to terminate his services unfairly with the pretext that he was being retired early. The Claimant has produced boardroom proceedings held y the Respondents on 8/7/2013.

51. The Claimant told the Court that during the Respondent’s board meeting of this day he was carrying out his normal duties of recording minutes as the company secretary. He indicated that he ordinarily had a devise to record minutes on audio which he later transcribed for the record. He demonstrated to Court that he had always recorded board minutes on audio and on this day, this was not an exception.

52. The Respondent initially objected to the production of this electronic evidence but based on the provision of Section 78(A) of Evidence Act, the Court allowed the evidence as admissible.

53. Section 78(A) of Evidence Act states as follows:

“Admissibility of electronic and digital evidence

1. In any legal proceedings, electronic messages and digital material shall be admissible as

evidence.

2. The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

3. In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to:-

a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

b. the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

c. the manner in which the originator of the electronic and digital evidence was identified; and

d any other relevant factor.

4. Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

54. The Claimant demonstrated that he did the recordings of the board proceedings himself and he was able to show the authenticity of the recording by showing even previous recordings so this was what he did in the normal course of duty.

55. When the recording was played in Court, it was established that indeed the exit of the Claimant from the Respondent's employment was discussed during this meeting. At Minute 36- at 40:16.00 on page 045 of the proceedings – the Chairman was heard to state as follows:

“.....let the right procedure be followed to sort out these issues but you cannot go and say you are the one who isyou have read the letterwhose irrelevant here.....at one he is an employee of the board itself not even the employee of the company. The board has employed him at the end of the day so I was very upset and I told myself that after all these meetings we have had cautioning Kamweti we have sat here and told Munir to go ahead and caution him instructions to whateversay. I have absolutely no confidence in Kamweti if he can't read thisso me as the Chairman of the board and a director I have no confidence in Kamweti – because every time you cannot continuously do things that are unnecessary”.

56. Further discussions are made on how to handle the Claimant's exit from the Respondent and at page 052 – this is what is recorded:

“under fifty year rule

Yeah – no him he has reached fifty years

Yeah

So-----so go that way so that we don't double double

hurting double hit”

57. It is finally concluded that someone else from Kenya Re or DTB be brought in in an acting capacity.

58. It is from this transcription that the Claimant told Court that he was early retired for reasons other than the exercise of the early retirement provision in the Respondent's HR Manual and the real reasons are evidence that the Respondents felt that he was not obeying certain instructions.

59. From this reading, it emerges that the early retirement of the Claimant was not exercised fairly with as open manner and in a judicious manner and was therefore unfair and unlawful.

60. The Respondents have not demonstrated that they exercised this discretion objectively as the Respondent's witness only stated that they chose to use the HR Manual provision to retire the Claimant early and the witness was not able to assign any reason to this decision.

61. That being the finding of this Court, the next issue to determine is what remedies the Claimant is entitled to. The Claimant has told the Court that though he was paid some terminal dues, he was treated in a discriminatory manner.

62. He indicated that another employee who had earlier retired, was paid double the amount the Claimant was paid. The Claimant told the Court that on 27.10.2015, he filed and served a notice to produce a document. The document in issue was served upon the Respondent's Counsel and it was asking the Respondents to produce a Retirement Letter of a former staff Ali Noor Ismael which set out the term of his retirement.

63. The Claimant indicated that the Respondents never produced the said documents. It is from this retirement of Ali Noor that the Claimant sets out his case on discrimination. He indicated that Noor was paid double the benefits the Claimant was offered and he also stated that it is him who forwarded the retirement letter to Noor hence his knowledge of the details.

64. The Respondents didn't respond to this evidence and neither did they call evidence to rebut it that indeed another retiree was paid double what the Claimant was paid. If that is the case then it is this Court's finding that the Claimant was treated in a discriminatory manner.

65. However it is also evident that the Claimant was paid some benefits including severance pay of 1 month for every completed year of serve, medical allowance and ½ of month's salary for each year to retirement which was a reasonable settlement in the process.

66. The claim of double payment to the other retiree is not clearly explained as this Court was not told what was paid double. I will therefore not unsettle what the Claimant was offered as terminal benefits.

67. I have already stated that the termination of the Claimant was unfair and unjustified. I will therefore award him as follows:

1. 12 months' salary as damages for the unfair termination = 12 x 670,894 = 8,050,728/= Less statutory deductions

2. Issuance of Certificate of Service.

3. Respondents to pay cost of this suit.

4. The awarded amount will attract interest at Court rates with effect from the date of this judgment.

Read in open Court this 12th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Wena for Respondent – Present