



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

CAUSE NO. 158 OF 2014

BENSON N. IRUNGUCLAIMANT

VERSUS

TOTAL KENYA LIMITED.....RESPONDENT

Claimant in person

Mr. Munje for the Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 6th March, 1975 in a unionisable category but was promoted to a non-unionisable cadre with effect from 1st January, 1995 at a monthly salary of Ksh.14,000.00 and a house allowance of Ksh.2,400.00.
2. The Claimant's terms and conditions of service were stipulated in the Respondent's rules, regulations and operating procedures.
3. The Claimant worked continuously and diligently up to 14th December, 2004 when the Respondent put the Claimant on early retirement at age 55 years.
4. In terms of the conditions of service of the Respondent the official retirement age was 60 years.
5. The Claimant states that the early retirement was unlawful and unfair and was not initiated by himself as alleged by the Respondent, or at all.
6. The Claimant seeks compensation for the lost five (5) years of service arising from the early retirement and in the alternative reinstatement.
7. The matter was filed on 9th May, 2005 at the High Court and was transferred to the Industrial Court in 2014.
8. The Claimant was subsequently granted leave to file an amended plaint which was duly filed on 20th June, 2007.
9. An amended Statement of Defence was subsequently filed on 6th August, 2007.

Defence

10. The Respondent states that whereas the official retirement age at the Respondent's workplace is 60 years, there was an existing policy which stipulated that an employee may opt to retire before the attainment of 60 years but the early retirement must be with the employer's consent.

11. That during an annual appraisal interview carried out on 17th November, 2004, the Claimant stated that if granted a good retirement package, he would consider it. Subsequently, in accordance with Article 1.8 of the Staff Policy, the company granted its consent. The Respondent avers that the early retirement was initiated and commenced solely at the Claimant's request.

12. That the Claimant was paid full terminal benefits and on 17th January, 2005, the Claimant accepted Ksh.392,265.00 in full and final settlement of his dues and the Claimant is estopped in law to make this claim.

13. The Claimant did not suffer any loss or damage and the suit be dismissed with costs.

14. At the time of early retirement the Claimant earned Ksh.37,000.00 per month and was a Senior Clerk.

Amended Claim

15. The Claimant claims;

a. loss of salary for 5 years in the sum of Ksh.2,220.00

b. medical insurance calculated at Ksh.200,000.00 x 5 years – Ksh.1,000,000.00

c. house allowance calculated at 15% of Kshs.37,000.00 for 5 years in the sum of Ksh.27,750.00

d. Leave allowance for 5 years in the sum of Ksh.185,000.00

Total claim – Kshs.3,472,750.00

16. In the alternative he be reinstated in his previous capacity and he be paid costs of the suit and interest at court rates on the award.

Testimony

17. The Claimant filed a Witness Statement on 21st April, 2011, which he adopted as his evidence in court. He relied on the plaint, list of documents and written submissions. He was not represented at the hearing.

18. The Claimant told the court that during the annual review, the immediate supervisor, the Administration Manager, Mrs. Margret Wairegi suggested to him that he should go on early retirement. He told the supervisor that his children were still in school and had a company loan and since he was still strong to work, he did not wish to retire early.

19. The Claimant told the court that Mrs. Wairegi refused to allow him to continue working. He then went to the Human Resource Manager, Mr. Thura to explain his grievance on the matter as he was not ready for early retirement.

20. The Human Resource Manager indicated that a decision had been made to retire the Claimant early at age 55.

21. The Human Resource Manger told the Claimant that he would be paid his terminal dues and go

home.

22. The Claimant said he did not retire voluntarily and the Respondent violated company policy of mandatory retirement at 60 years by forcing him to go on early retirement.

23. The Claimant said that he was performing his work well and he was in good health and did not understand why he had to be retired early. He received a letter of retirement dated 14th December, 2004 and was paid;

a. salary up to 31st December, 2004

b. one month's salary in lieu of notice

c. 16½ days pro rata leave

d. ex-grata payment of one month salary for each completed year of service

24. At the time, the Claimant had served 29 years and 10 months. He claims payment as prayed as his employment was unlawfully and unfairly terminated.

25. When shown the appraisal form where it is indicated that he would like to improve on his skills and if given good retirement package he would also take it, the Claimant stated that he was forced to sign the report on 17th January, 2014. That he had not opted to retire at all. That this was written by his supervisor but not himself.

26. He was shown the discharge dated 20th January, 2005. He said that he was left with no alternative by the Respondent but to sign the document.

27. That is the reason why he came to court.

28. Kshs.408,045.75 was deducted from his terminal dues being a loan owed to the Respondent. The signing took place in the office of the Personal Assistant to the Managing Director. He had no choice in the matter. He withdrew all other claims except salary for the 5 years uncompleted term.

29. The Respondent called RW1, Mbithe Senyo, Employee Relations Manager of the Respondent. He was not employed by the Respondent at the time the Claimant left on early retirement. He relied wholly on the Human Resource file of the Claimant.

30. As such, RW1, was not in a position to refute the allegation by the Claimant that he did not opt to retire early and was forced to do so by his immediate supervisor and the Human Resource Manager.

31. He however, relied on the appraisal form and the discharge signed by the Claimant. The Claimant stated that he was forced to sign the documents and did not retire voluntarily.

32. RW1 was not in a position to refute the allegation by the Claimant that he did not initiate the early retirement process as was the requirement by the company policy.

33. However, RW1 insisted that based on the records, the Claimant must have initiated the early retirement and the same was therefore voluntary.

34. RW1 admitted that the file did not have a letter by the Claimant requesting to be retired early.

Determination

35. The issues for determination are;

- i. Whether or not the Claimant initiated the early retirement process
- ii. If the answer to (i) is in the negative, what remedy is available to the Claimant?

Issue 1

36. A careful evaluation of the evidence presented to court by both parties has led to the following conclusion of facts;

- a. the company policy required that an employee who wished to retire early to initiate the process
- b. the policy also required that the employer grant consent to the request for early retirement
- c. there was no written request from the Claimant, by way of a letter to the employer requesting for early retirement
- d. the employee purported to derive such a request from an appraisal form produced in court. The information in the appraisal form does not constitute an express application to the employer to grant the Claimant early retirement
- e. the Claimant was aged 55 years at the material time and had high financial burden arising from a loan to the company and school fees for his children
- f. the evidence by the Claimant that he was forced to retire early and sign the discharge voucher was not seriously contested by RW1 who had no firsthand information on the matter but relied on secondary evidence
- g. The evidence by the Claimant appeared credible and true to the court. Having served the Respondent for 29 years and 10 months and with only 5 years to go to the retirement age of 60 years, it is unlikely that he would have chosen to take an early retirement and immediately sue his trusted employer of longstanding for forced retirement.
- h. a serious matter of early retirement ought to have been properly documented by an employee initiating it in writing and the employer to accept the request in writing. Lack of a letter of request and a letter of consent to the request makes the Respondent's version highly unlikely and untrue.

37. The court finds that the Claimant has proved his case on a balance of probabilities and that the Claimant was unlawfully and unfairly retired at age 55 years and as a result lost five (5) years of service and has suffered loss and damage.

Remedy

38. This termination took place in 2004, more than 10 years ago. The remedy for reinstatement is not appropriate in the circumstances of the case.

39. The erstwhile Employment Act, Cap 226 of the Laws of Kenya was in operation when this suit was filed and the Trade Disputes Act, Cap. 234 was applicable in the adjudication of employment disputes then.

40. Forced retirement of employees who have served an employer royally and diligently for long period is a conduct that needs to be discouraged by this court.

41. In the Industrial Court at Nairobi Cause Number 2020 of 2011, Benson Githinji Vs. the Attorney General & 4 Others, Rika J. explored the issue of compensation for lost years of service as a result of an unlawful termination of service and stated as follows;

“A fair and equitable compensatory award, should satisfy the Claimant’s deprivation for the 10 years he expected to go on working. This court does not think that the premature termination, even upon finding of the Respondent to have acted unfairly, entitles the Claimant to salary he expected to earn for the years taken away from him before the mandatory age of retirement. Employment relationships are not commercial contracts, and the court must strive to achieve the delicate balance between the need for our national economic development and the protection of the dignity and economic well-being of an individual employee.”

42. The court largely agrees with this expose by the Learned Judge.

43. The court however, notes that it is difficult to quantify anticipated loss of income, especially if same is based on anticipated salary increments during the unserved period.

44. In this case, the matter has taken many years to conclude, and the salary of Ksh.37,000.00 per month the Claimant earned has been greatly eroded in value by inflation trends such that even a lumpsum payment will not greatly benefit the Claimant vis a vis, the satisfaction of employment and monthly remuneration he would have enjoyed but for the premature, unlawful retirement.

45. The Trade Disputes Act, Cap 234 that was applicable to this matter placed a maximum cap of twelve (12) months’ salary as compensation for the unlawful and unfair dismissal prior to the enactment of the 2007 labour legislation.

46. This court is bound by this statutory capping in awarding the Claimant in this matter even though the maximum award may not fully compensate the Claimant for the loss incurred.

47. The court further notes that the Claimant was paid an exgratia payment of one month salary for each completed year of service (29 years) in total which was a substantial lumpsum to partly ameliorate the loss he suffered as a result of the wrongful early retirement.

48. Accordingly, the court awards the Claimant;

(i) maximum compensation of 12 months for the unlawful and unfair early retirement in the sum of Ksh.444,000.00

(ii) interest at court rates from date of this Judgment till payment in full

(iii) Costs of the suit

Dated at Nairobi this 23rd day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered by Hon. Hellen Wasilwa on 24th day of April, 2015.

In the presence of