



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 506 OF 2014

JEREMIAH K. KANDAGOR

CLAIMANT

v

MASAAI MARA UNIVERSITY

RESPONDENT

JUDGMENT

1. This Court as recently as 17 July 2015 in the case of *Jackson K Berege v Masai Mara University* (2015) eKLR pronounced itself on similar issues as arise in this Cause.
2. The Respondent gave a notice of retirement to the Claimant on 3 June 2014. The effective date of retirement according to the notice was 30 June 2015. The Claimant was serving at the time of notice as Senior Assistant Registrar (Human Resources).
3. The notice was predicated on a Circular issued by the Permanent Secretary, Office of the President on 20 March 2009.
4. The main object of the Circular was to raise the mandatory retirement age within the public sector from 55 years to 60 years.
5. In the case of the Claimant, the Respondent was purporting to reduce the retirement age from 65 years to 60 years.
6. This was contrary to expressly agreed contractual age of 65 years as indicated in the Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories.
7. There are some indisputable facts. The variation or lowering of the mandatory retirement age was not discussed with the Claimant or his Union. It was a unilateral variation.
8. It was also based on, *strictu sensu*, a Circular by a third party in the employment relationship.
9. Similarly, it was to the disadvantage of the Claimant.
10. Because the variation was unilateral and the Claimant objected to it by filing the present Cause, it was unlawful and unfair. A long chain of salutary authorities from comparative jurisdictions have held that for a variation to an employment contract to be valid or lawful, it should be by mutual consent (see *Harlow v Artemis Ltd* (2008) IRLR 629, *Rigby v Ferodo Ltd* (1987) IRLR 516 and *Security and Facilities Division v Hayes* (2001) IRLR 81).
11. In my view, the law as expressed in these authorities expresses the correct legal position even in Kenya under our constitutional and statutory framework where employees are protected now from unfair labour practices.
12. The variation was based on a Circular by a third party. In so far as it sought to affect certain employees adversely, it should have been underpinned by legislation.
13. Further, although the parties did not allude to this aspect, in my view, it is open to debate, whether the purport and object of the Circular was to reduce the mandatory retirement age where a higher age had been agreed between an employer and employee and if the Circular could be the foundation for the action taken by the Respondent to prematurely retire the Claimant.
14. The Claimant therefore succeeds and the Court finds and holds that

- i. the notice of retirement dated 3 June 2014 varying the terms of the Claimant's contract of employment was unlawful and unfair
- ii. the Claimant be retained in employment with all the benefits in accordance with the contract of employment unless lawfully varied.

15. Claimant having succeeded is awarded costs.

Delivered, dated and signed in Nakuru on this 31st day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Oumo instructed by Oumo & Co. Advocates

For Respondent Ms. Mogere instructed by S.M. Mogere & Co. Advocates

Court Assistant Nixon