



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1708 OF 2012

CHRISTOPHER MELLY KIPKOECH.....CLAIMANT

VERSUS

K-REP BANK LIMITED.....RESPONDENT

JUDGMENT

1. The claimant in this suit was employed by the respondent on 3rd June, 2008 to serve as Internal Security Manager Investigations. He worked until April, 2012 when his services were terminated.
2. According to him, by a letter dated 30th April, 2012 the respondent unlawfully purported to retire him without any justifiable reason thereby causing the claimant great mental stress. The claimant therefore sought an order for compensation from the Court against the respondent as set out in his memorandum of claim.
3. The respondent on its part averred that due to the re-organization within the respondent's structure, the claimant was laterally transferred from Banking Services to Internal Audit Department with all other terms and conditions of service remaining the same except changes to the resignation and termination clauses to the claimant's contract, which were duly acknowledged and accepted by the claimant before taking up the transfer.
4. Regarding the termination, the respondent averred that this was conducted fairly and procedurally pursuant to the respondent's re-organization and alignment of jobs. According to the respondent sometime around early 2012, it commenced internal re-organization and alignment of jobs in line with the respondent's operational and administrative goals and initiatives.
5. Meetings were held between departmental heads and the respondent's management to discuss internal re-organization and consideration of retrenchment of employees. A list was compiled and a send home package was agreed upon based on the Employment Act, 2007 and Human Resources Manual Policy and approved by the Board of Directors.
6. The affected employees were called to the Human Resource Department and informed about the retrenchment by the Head of Human Resource during which they agreed to the terms thereof and suggested that reasons for exit be indicated as early retirement to enable them secure jobs elsewhere. The final dues were then calculated in accordance with the prevailing labour laws and the affected staff collected them after undergoing normal clearance procedures. The respondent therefore prayed that the Court dismisses the claim as wrongly conceived and did not lie in law.

7. During the trial, the claimant reiterated the averments in the memorandum of claim and added that his performance was exceptionally good since he reduced fraud cases to zero unlike before he joined the respondent when they were many. He denied receiving any communication about re-organization of the bank and that he never applied to leave the Bank.

8. It was his contention that the Human Resource Policy on early retirement required that the process be initiated by the employee upon attaining 50 years. He was 41 years when he was retired. It was his evidence that appraisal at 3.5 points meant he achieved the set objectives and was competent. It was thus his view that the removal from the Bank was malicious and in bad faith. Concerning the reduction of the notice of termination period, he stated that he was never consulted about it.

9. On its part the respondent called as witness, one Leah Githiomi who stated she was the Human Resource Manager of the respondent. It was her evidence that the claimant was appraised from time to time and that the rating of 3.5 meant the claimant needed improvement.

10. According to her, the claimant was not unfairly removed from the Bank. She stated that in 2010 there was re-organization of the Bank. It was not the first time this was done. A similar exercise had been conducted previously and was informed by the loss-making path the respondent was on. The lateral transfer arose out of merging of departments. She stated that the retrenchment was communicated to the claimant and his colleagues at a discussion called by one of the respondent's Managers Mr. Karichu. The discussion she said, was intended to enable the staff affected get jobs elsewhere hence the letter was headed as early retirement, but the payments to the claimant and his colleagues affected were redundancy payments.

11. It was her evidence that there were salary adjustments in 2012 May, but this was after the claimant had left employment. It was further her evidence that the medical cover was a non-cash benefit enjoyed by serving employees. She denied any malice in ending the claimant's services and that services offered by the claimant were outsourced on a needs basis.

12. In cross-examination she admitted that the claimant never applied to exit his employment. She stated that she was not sure when the meetings on retrenchment were held and that she had no minutes. She further stated that she neither had a letter nor a memo informing the claimant he had been earmarked for retrenchment.

13. In her closing submissions Mrs. Guserwa for the claimant submitted that the claimant never applied for early retirement as provided under paragraph 3.7.5 of the respondent's Human Resource Manual and Policies as he was only 39 at the time of purported retirement hence application of this clause was erroneous and could not aid the respondents. According to Counsel, the respondent never received any application for early retirement from the claimant to warrant his retirement from the respondent's service as purported by letter dated 30th April, 2012. Counsel therefore submitted that the respondent took a prejudicial decision against the claimant without giving him any hearing at all.

14. The claimant, according to counsel was not given an opportunity to show cause why he should not have been prematurely retired. She contended that the rules of natural justice require that one is accorded audience to explain his or her case and answer issues if any before action is taken. Counsel therefore urged the Court to find and declare that the claimant suffered unlawful, unfair and premature retirement and should be reinstated to his job. In the alternative counsel submitted that the claimant be paid.

- (a) for remaining years to reach 60 years when he expected to retire.
- (b) One years' salary for unfair dismissal
- (c) Bonus awarded on 1st May, 2010 (10% salary increment)

(d) Retirement package

(e) Medical benefits.

All these she computed at Kshs.59,469,833.40.

15. Mrs. Omondi for the respondent submitted that the claimant's services were terminated on account of redundancy in accordance with clause 3.7.4 of the respondent's Human Resource Policies and Procedures which provided that:-

“An employee will be laid off when his/her position is temporarily suspended or permanently eliminated by the Bank. Employee may also be declared redundant if as a result of an official structural realignment within the organization the position he/she is holding ceases to exist. The Bank will adhere to the appropriate laid down procedures as provided for in the Employment Act.”

16. According to counsel, the respondent's witness testified that the reason for termination of the claimant's services was due to an internal re-organization and alignment of jobs in line with the organizations' operational and administrative goals. This process had a resultant effect of rendering some of the positions held by the respondent's employees redundant including the claimant. Counsel therefore submitted that contrary to the claimant's claims that he was terminated on account of early retirement, the true meaning and purpose for his termination was redundancy.

17. To support this position further, the proposed entitlements to the claimant as set in the termination letter were in accordance with redundancy entitlements as stipulated under section 40(1) of the Employment Act. It was Mrs. Omondi's position therefore that the claimant's termination was conducted fairly and procedurally, pursuant to the respondent's re-organization and alignment of jobs programme following financial losses the respondent had been making since 2009.

18. On reinstatement, Counsel submitted that the Court ought to consider the practicability of making the order since after restructuring of its systems and services, the position held by the claimant at respondent had ceased to exist.

19. Regarding 12 month's salary as compensation, counsel submitted that this is awardable for wrongful dismissal and unfair termination which did not happen to the claimant. According to Counsel, the claimant failed to discharge the burden placed on him by section 47(5) of the Employment Act that unfair termination took place.

20. Regarding salary inclusive of allowances and benefits for the remainder of the period the claimant could have worked, counsel submitted that the general principle is that Courts will, in awarding damages, compensate an employee for reasonable period of time as to enable him secure alternative employment or source of income. If the Courts were to award such compensation such award ought not to exceed 12 months wages.

21. Regarding bonus, counsel submitted that a bonus is paid to employees in addition to what is due or expected, it is neither a gift or a gratuity but paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given.

22. According to Mrs. Omondi, there would be no basis for payment of bonus and or any other benefit unless specifically agreed upon in a contract or Collective Bargaining Agreement. The same submissions went for medical benefits where counsel submitted that these are only enjoyed by those in actual employment since some of the emoluments are not paid for services rendered but as a means of enabling an employee to perform his services.

23. Having reviewed, the pleadings, evidence as well as submissions by Counsel, the critical issues which if decided would reasonably resolve this dispute appear to me to be first; was the claimant retired early or declared redundant as envisaged under section 40(1) of the Employment Act? Second; in carrying out either, did the respondent follow the laid down procedure as stipulated in its Human Resource Policies and Procedures Manual and or the Employment Act? Third, should the Court reach a finding that in terminating the claimant's services either by way of early retirement or redundancy, the respondent did so wrongfully and or unfairly, what would be the appropriate remedy(ies).

(a) Was the claimant retired early or declared redundant?

24. The respondent in its pleadings, oral evidence in Court and submission by Counsel, consistently maintained that the claimant was declared redundant alongside others due to what the respondent described re-organization within its structure in line with its operational and administrative goals and initiatives.

25. The claimant on the other hand has consistently maintained that he was retired prematurely and that such retirement was without his consent and further that the respondent neither entered into discussions nor let him know that his early retirement was being considered prior to effecting the same. According to the claimant, under paragraph 3.7.5 of the respondent's Human Resource Manual and Policies, early retirement was optional and upon attainment of 50 years. He argued that he never applied for early retirement and that by the time of his retirement he was 41 years.

26. As a rejoinder to this argument, the respondent argued that the claimant and his colleagues were declared redundant and the only reason why their redundancy letters were headed "retirement" was upon their request as they thought that would improve their prospects of securing jobs elsewhere more than if they were issued with redundancy letters.

27. The claimant's retirement letter read in material part as follows:-

30th April 2012

Christopher Melly Kipkoech

C/o Ourselves

RE: EARLY RETIREMENT

Following the re-organization and alignment of jobs in the Bank, it has been found necessary to allow you to leave the Bank's employment with effect from 30th April 2012.

However, in view of your service to the Bank, you will be paid the following:-

(1) Service Pay at one (1) month salary for each completed year of service.

(2) One (1) month salary in lieu of notice

(3) Leave days earned and not taken as at 30th April 2012.

Arrange to see the Head-Credit Risk to agree on a proposal of how you will service the loan.

This letter is issued in duplicate, please acknowledge receipt and return to HR Office.

Yours sincerely

For and on behalf of K-Rep Bank Ltd

Wilson Muthaura

Human Resources Manager

28. Clause 3.7.4. of the respondent's Human Resource Policies and Procedure provides as follows:-

An employee will be laid off when his/her position is temporarily suspended or permanently eliminated by the bank. Employees may also be declared redundant if as a result of an official structural realignment within the organization the position he/she is holding ceases to exist. The bank will adhere to the appropriate laid down procedures as provided for in the Employment Act.

29. The procedure for redundancy is laid down under section 40 of the Employment Act. The section provides in the relevant part as follows:-

40(1) an employer **shall not** terminate a contract of service on account of redundancy unless the employer complies with the following conditions (underlining added)

(a)

(b) where an employee is not a member of a trade union, the employer notifies **the employee personally in writing** and the labour officer; (underlining added)

(c) the employer has in selection of employees to be declared redundant had due regard to seniority in time and to the skill ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d)

(e)

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

30. As can be observed from the foregoing provisions of the Employment Act, redundancy and its procedure is strictly regulated by the Act. An employer is therefore prohibited from terminating employment on account of redundancy unless such employer adheres to the provisions of section 40 of the Act in so far as applies to employee(s) to be affected by the redundancy.

31. The respondent in this case maintained throughout that it declared the claimant and his colleagues redundant and settled their dues in accordance with the Act and that the heading of their redundancy letter as early retirement was for the claimant's mental comfort and did not change the declaration of redundancy by the respondent.

32. The claimant disputed that he was declared redundant and instead argued that he was retired early involuntarily. The claimant further argued that whether redundancy or early retirement, he was never involved in the decision to retire or declare him redundant. The Act requires that an employee be declared redundant must be notified in writing as well as the labour officer.

33. The respondent's witness Ms. Leah Githiomi informed the Court that the retrenchment/redundancy was communicated to the claimant and his colleagues at a discussion called by one of the respondent's managers Mr. Karichu. She however did not produce any minutes of such meeting where the issue was discussed. She further did not produce any letter to the claimant personally, informing him of intention to declare him redundant as stipulated under section 40(1) (b) of the Act.

34. The purpose of the notification under section 40(1) (b) of the Act is to ensure transparency on the redundancy process in terms of reasons for declaration of redundancy as well as criteria used in the selection of the affected employees as provided in section 40 (1) (c) of the Act. Further redundancy being a form of termination of employment the onus is on the employer to justify the reason for it and ensure a fair procedure is adopted in carrying it out. Further, the notification ensures that the employees view are heard prior to carrying out the exercise.

35. From the foregoing, the Court reaches a finding that whereas the intention of the respondent may have been to declare the claimant and his colleagues redundant, there was failure of procedure as strictly provided under section 40(1) of the Employment Act making the process wrongful and unfair within the meaning of 35 as read together with section 45 of the Employment Act.

36. On the issue of early retirement this cannot be said to have taken place since the claimant himself denied ever applying to leave the respondent's employment earlier than stipulated in his contract besides the respondent too denied retiring the claimant early.

37. This disposes of the 1st and 2nd question as framed.

(b) **Appropriate remedies**

38. The claimant sought an order that he be declared to have been prematurely retired and be reinstated back to employment. In the alternative Counsel sought an order for compensation for the remaining years of work until retirement at 60 years, one year's salary as compensation for unfair dismissal, bonus awarded in May 2010 at 10%, retirement package and medical benefits. All these came to the sum of Kshs.59,469,833.40.

39. Mrs. Omondi in resisting these claims submitted that reinstatement was impracticable since the position held by the claimant had ceased to exist. Regarding 12 months' salary as compensation, counsel had submitted that this was only awarded in cases of wrongful dismissal or unfair termination of employment which did not happen in the claimant's case.

40. On the issue of salary and allowances including benefits till retirement, Mrs. Omondi had submitted that this can only be awarded for a reasonable period of time to enable the employee concerned secure alternative employment and that medical benefits are only enjoyed by those in actual employment since some emoluments are not paid for services rendered but as a means of enabling an employee to perform his services.

41. Reinstatement is a remedy that this Court can order in appropriate cases but it should be ordered taking into account the parameters set out in section 50 read together with section 49 of the Employment Act more particularly the practicability of reinstatement and the common law principle against making an order of specific performance in contracts of service except in very exceptional circumstances.

42. Save for procedural lapses, the respondent stated that it had intended to declare the claimant and his colleagues in other positions redundant in line with what it described as re-organization within its structure in line with its operational and administrative goals and initiatives. It was further Ms. Leah Githiomi's evidence that the services the claimant was offering the respondent had since been outsourced.

43. Redundancy is a common organizational phenomenon and is usually undertaken to improve organizational efficiency and profitability. It is a process sometimes resorted to circumvent the possibility of a firm sliding down the path of insolvency due to operational costs occasioned by services which are no longer core to the organizations operations occasioned by change in technology or market dynamics.

44. Where conducted in accordance with the provisions of the law, this Court has no business questioning or recalling redundancy once declared, for purposes of interrogation since to do so would amount to the Court substituting its views with those of Boards of Directors of firms over decisions made in furtherance of their business operations and sustainability as going concerns in their spheres of influence.

45. Taking the foregoing into account, the respondent was within its right to declare the claimant and his colleagues redundant except that in attempting to do so they omitted to observe the strictures set by the law. The Court will not in the circumstances order reinstatement as no compelling reason has been presented to warrant the order besides the respondent has stated that the position formerly held by the claimant has ceased to exist.

46. The Court having found that the claimant was wrongfully, hence unfairly declared redundant it will award the claimant three months' salary in lieu of notice as stipulated in his letter of appointment, nine months' salary for unfair termination of employment. The claimant will further have costs of the suit and he shall be issued with a certificate of service.

47. The Court has chosen to award the claimant 3 months' salary in lieu of notice as contained in his original letter of appointment since the down-grading of the notice period contained in the letter dated 19th July, 2010 was a fundamental variation of an essential term of contract which the respondent ought to have asked the claimant to agree to by appending his signature as was the case of the initial letter of appointment. Failure to do so rendered the variation unilateral and a breach of contract for which the claimant was entitled to drop the contract and sue for damages.

48. Regarding the issue of compensation for the remainder of the claimant's working life till retirement at 60 years, the Court declines to make this order since there is no proprietary interest in an employment contract. In fact the term permanent employment is a misnomer since no employment can be described as permanent. What usually pass off as permanent employment are open ended contracts as opposed to fixed term contracts of employment. Therefore a contract of employment whether open ended or fixed term, can be brought to an end by invoking any of the reasons contained in the termination clause or the Employment Act or further still by repudiation or breach.

49. Where an employee is terminated from his or her employment, there is generally an obligation on the part of such employee to mitigate his or her loss by seeking alternative employment. It is for this reason that the Court is empowered in appropriate cases to award as compensation, up to twelve months wages. Unlike the previous Act where the quantum of compensation was limited to the notice period the current Act caps compensation on grounds of unfair termination to twelve months wages. This is not to say the Court cannot award compensation more than twelve months wages where in the process of termination the claimant's rights protected by the Constitution or other statutes is found to have been violated.

50. In conclusion the award of the Court will be as follows:-

Kshs.

(a) Three months salary in lieu of notice

@174,900 per month.....524,700.00

(b) 9 months' salary as compensation for

unfair dismissal.....1,574,100.00

2,098,800.00

(c) Costs of the suit.

51. This award shall be subject to statutory deductions and any terminal dues already paid and received by the claimant as well as loans disbursed to him.

52. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge