



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 299 OF 2012

BETWEEN

JAMES OMWOYO NYANG'AUCLAIMANT

VERSUS

THE HERITAGE INSURANCE COMPANY LIMITEDRESPONDENT

Rika J

Cc Leah Muthaka

Mr. Nyangito instructed by Nyangito & Company, Advocates for the Claimant

Mr. Waweru instructed by B. Mbai & Associates, Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL TERMINATION

AWARD

1. This Claim was transferred from the High Court of Kenya at Nairobi, through an Order issued on 17th February 2012. It was registered at the High Court as Civil Case Number 248 of 2008. It was registered as Cause Number 299 of 2012 upon transfer to the Industrial Court. The Claimant filed an Amended Statement of Claim on 24th April 2012, while the Respondent filed its Statement of Reply on 31st January 2013.
2. The Claimant testified on 1st February 2013, and on 12th April 2013 when his case was closed. The Respondent called its Finance Director Mr. Stephen Lugalia who gave evidence on 17th May 2013 when the Respondent's case closed. The dispute was last mentioned on 5th July 2013, when Parties confirmed the filing of their Final Submissions, and were advised by the Court Award would be delivered on notice.
3. The Claimant states that he was employed by the Respondent Insurance Company on 2nd May 2002, as Deputy Head Accounts, Grade 8. He was entitled to a monthly salary of Kshs. 43, 195; taxable housing subsidy of Kshs. 6,179; and was expected to retire at the age of 55 years. The Claimant states that this has

now been adjusted to 60 years by the new Employment Act. He could also retire consensually at any other age. The Respondent would cease employing the Claimant on the last working day of the month during which the Claimant attained retirement age, unless the Parties consented to extension of the retirement age. The Respondent, contrary to the contract of employment, retired the Claimant on 23rd November 2007. The decision was made unilaterally, contrary to the Respondent's Personnel Manual paragraph 7.7. The Claimant holds that the Respondent acted in breach of the contract of employment. The details of breach are listed as below:-

- Premature retirement of the Claimant before attaining 60 years;
- Failure to adhere to express terms of an agreement, especially paragraph 9 of the letter of employment;
- Failure to accord the Claimant fair hearing;
- Failure to serve the Claimant formal notice; and
- Retiring the Claimant without his consent.

4. The Claimant was, as a result of the breach, deprived of salary he would have earned until he reached the age of 60 years; benefit of participating in retirement benefits plan or schemes of the Respondent; opportunity of rising to senior manager; and loss of lucrative employment. He was 37 years old on the date he was retired. The Claimant seeks:-

- a. Loss of salary from the date of retirement to the age of 60, a period of 22 years, at the rate of Kshs. 90,000 per month = Kshs. 27,760,000;
- b. Loss of school fees allowance of Kshs. 10,000 x 22 years= 2,640,000;
- c. Three months' salary in lieu of notice at Kshs. 270,000;
- d. One month salary for every year worked at Kshs. 540,000; and
- e. Refund of personal pension contribution at Kshs. 397,000

Total Kshs. 27,607,000

The Claimant seeks these as special damages. Additionally he seeks general damages, interest, costs, and any other relief the Court may deem fit to grant.

5. He states that he was advanced a mortgage facility by the Respondent, which was pegged on a repayment period of 18 years, a period which supports his position that the Parties did not intend he would be retired early. The loan repayment was to be done through salary check off. The dispute over the mortgage is the subject matter of another High Court Civil Case.

6. Mr. Nyang'au testified he was heading the Credit Control Section as of the date he was retired early from employment. He reported directly to the Respondent's Chief Executive Officer. He discharged his duty diligently. He issued demand before action, which the Respondent did not answer to. As a result of the Respondent's decision, the Claimant's mortgage property at Rongai was auctioned. He was forced to relocate to his upcountry home. His family suffered. He could not get comparable job. He was re-employed by Jubilee Insurance in a far much lower position and was not confirmed. His relationship with the Respondent's CEO was good; but the relationship with the Finance Manager and the Human Resource Manager, was bad.

7. Nyang'au testified on cross-examination that he was not aware of the early retirement package offered to him by the Respondent. He conceded he wrote a letter to the Respondent dated 21st November 2007, which reads-

"I hereby request your office to authorize me to stay in the property for four months so that I can organize myself. This is purely in consideration for my young family and they are school going, whom I need to arrange for alternative relocation.

Without any funds on me, this is not possible in one month time.

Kindly this is for your consideration.

Thanking you in advance.’’

According to him, this letter was a request to the Respondent, to let him retain the property at Rongai. The Respondent wanted to recover the loan by auctioning of the property. The Minutes of 21st November 2007, recorded a meeting held on 20th November 2007. The Claimant denied that he attended this meeting. The person referred to by the initials JON in the minutes, was not the Claimant. Nyang’au denied the contents of the minutes. He could not confirm that he had received Kshs. 2.8 million from the Respondent in loan disbursement. There were no external factors discussed at the meeting. He agreed that his Brother-in- Law James Onsongo had written to the Finance Director of the Respondent on 3rd October 2007, alleging that the Claimant had failed to pay the sum of Kshs. 500,000 collected in a fundraising event where the Claimant was a Guest of Honour. The money was meant to assist in meeting Onsongo’s son’s University fees. The Claimant testified that this issue was dealt with at a different forum. There was a request from a junior employee Kennedy Mongare, for the Human Resource Manager to assist in arbitration between Mongare and Nyang’au. The junior employee complained that the Claimant had borrowed Kshs. 100,000 from the Claimant, and issued dud cheques to Mongare when required to repay. The issue of financial impropriety did not arise. He had worked with AON Minet Company before joining the Respondent; there were no issues of financial impropriety raised. He had a car loan which he had not cleared as of 20th November 2007. He received Kshs. 556, 810 as early retirement package. He signed acknowledgement, and discharged the Respondent from further liability. The breakdown of payments was given.

8. He was employed by Jubilee Insurance in November 2008, as an Accounts Assistant based in Kisumu City. He served in that position for 3 years and 3 months. It is not true that he was dismissed by Jubilee Insurance in November 2011. It is not true that he was dismissed for having stolen Kshs. 1.2 million from Jubilee Insurance Company. He conceded that Jubilee placed a public notice in the National Print Media, warning the public that the Claimant was not authorized to carry any transactions in the name of Jubilee Insurance. The Claimant attended a meeting of 18th June 2007 in Mr. Lugalia’s Office. The Claimant had been asked to have his property valued. Valuation reports had given the property a value of Kshs. 1.5 million. The Claimant was advanced Kshs. 2.8 million by his employer on the security of this property. The excess of Kshs. 1.3 million was to be recovered from his salary. Lastly the Claimant testified on cross-examination that he was marked absent without leave on certain occasions, in the attendance register. He never wrote to the Respondent explaining his absence.

9. Redirected, the Claimant told the Court Kshs. 2.8 million was a mortgage plan, to assist him purchase a plot and build a house. It was a scheme for all Managers. It was to be recovered through salary check off. He asked for time to stay in the plot, but this did not signify his consent to being retired early. He was being harassed because he did not retire early. He was paid Kshs. 556,810 in July 2012, after he had already filed this Claim. It was a statutory payment, made after the Claimant sought the intervention of the Retirement Benefits Authority [RBA]. It is not part of what is claimed before the Court. The debt owed to Mongare was a personal issue between him and the Claimant. The money was repaid to Mongare. The Claimant never absented himself without his employer’s leave. If he was marked as absent, it was at a time when he would be out on official duty. Employees who were absent without leave would have deductions made from their monthly salaries; this never happened to the Claimant. He was never reprimanded. He was never charged with stealing any money from Jubilee Insurance. The mortgage money and the car loan were being offset from his salary. The money was released to the Claimant with the sanction of the Finance Director. He lived on the Rongai property for four years with his family. It was not true that he received any money on behalf of his Brother-in- Law. The Claimant prays the Court to grant his Claim.

10. The Respondent’s case is that there was a contract of employment concluded with Mr. Nyang’au as stated in his Claim; the Respondent did not breach this contract. Clause 4 of the letter of appointment allowed either Party to terminate the contract by giving one month notice, or one month salary in lieu of notice. Termination was lawful and justifiable and followed several meetings between the Parties where

the subject was discussed. The contract did not carry an expectation of permanency of service until the age of retirement, hence the inclusion of the termination clause. The Claimant went ahead and obtained employment with Jubilee Insurance. The Claimant was paid his dues, and discharged the Respondent from further obligation. The Respondent had the legal authority to repossess the property in accordance with the terms of the mortgage. The Claimant had several cases involving financial impropriety, which impacted negatively on his ability to discharge his role in the Accounts Office. He was absent from duty on various occasions, without the leave of the employer. These incidents were discussed between the Claimant and the Respondent; it was determined to have the Claimant exit through early retirement, rather than through summary dismissal.

11. Stephen Lugalia testified he is the Finance Director of the Respondent. The Claimant worked under Lugalia. Lugalia filed a Witness Statement in Court on 17th May 2013. It was not true that Nyang'au did not know he was going to be retired. There were discussions between the Parties preceding retirement. The Claimant participated fully in the discussions. The appointment letter set the retirement age at 55 years. One could be retired early by consent. This was what happened in the Claimant's case. It was provided for in the Personnel Manual also. The Claimant did not protest retirement. He was not sacked, but retired early. He secured another job.

12. On cross-examination Lugalia testified the Management was involved in consultation on the Claimant's retirement. The Claimant did not write a letter consenting to early retirement. He was employed as a Deputy Section Head, and left as Manager Grade 1. He was not a good performer. He was good the first 3 years in employment. From 2005, his performance deteriorated. There were no letters given to him on poor performance. He was availed loans. Employees were entitled to loans. It was not a crime to have a loan. He had a car loan of Kshs. 280,000 and a mortgage of Kshs. 2.8 million. These were to be recovered by salary check-off. He had set up a tin structure on the plot. Lugalia could not say if this was demolished after the plot was auctioned. The car was repossessed in accordance with the company policy. The retirement was fair. The Board of Directors was not involved, as this was not necessary. The letter of confirmation had a termination clause and a retirement clause. The dispute herein is not about termination; it is about early retirement.

13. The letter on early retirement stated the Management Board had made the decision. The Staff Handbook provided that the Management Board would make the final decision. The letter is based on advice given to the Management Board by Lugalia and other Management Staff who were involved in the matter. The Claim is not about pension; this was a right under the Retirement Benefits law. It is true the Claimant lodged a complaint with the Retirement Benefits Authority before he was paid. Lugalia did not follow the Claimant to Jubilee Insurance. The Witness was not aware that Nyang'au lost his position because he was being followed there by the Respondent. Mongare was an employee of the Respondent. He complained to the Human Resource Manager about the debt of Kshs. 100,000 owed by Nyang'au. Re-examined, the Witness stated that the Parties discussed the external factors- about people complaining they were owed money by the Claimant before retirement. The Claimant was running the Respondent's Credit Section, and these issues raised concerns about his integrity. He was allowed to stay in his property after he requested the Respondent to do so. He was treated fairly. The option was to sack him; he was instead offered a soft early retirement landing. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

14. The Claimant was employed by the Respondent Insurance Company on 2nd May 2002, as Deputy Head of Section in Accounts, Grade 8. He started off with an initial gross salary of Kshs. 49,374. He was issued a letter of appointment dated 2nd May 2002. He was retired early, with effect from the 26th November 2007. By this time he had risen to the position of Head of Credit Control Section, answerable to the Chief Executive Officer of the Respondent. His salary was Kshs. 100,000 all-inclusive, at the time of leaving. He Claims special damages calculated at Kshs. 27,607,000, the bulk of which comprise anticipatory salaries for the expected period of 22 years left before he was to retire. The Claim raises the following broad issues, as understood by the Court:-

- a. Whether the Claimant was retired lawfully, fairly and in accordance with the contract governing

- his terms and conditions of employment; and
b. Whether he is entitled to the pleaded remedies.

15. The Employment Act 2007, contrary to the pleadings filed by the Claimant, has not increased the mandatory retirement age from 55 years to 60 years. It does not fix any retirement age. The Act leaves the fixing of the mandatory retirement age to the discretion of the parties. It is an item that is negotiated by the Parties in their individual or collective agreements. The age of 55 applied mostly in the Public Service, and the change to 60 years was made through the Circulars issued by the Head of the Public Service. It has nothing to do with the Employment Act 2007, but is a contractual term, regulated under Public Service Labour Instruments, and in the case of Private Sector through Individual and Collective Bargaining Agreements, and other quotidian workplace regulatory regimes such as Human Resources Procedures and Policies Manuals. It was incorrect for the Claimant therefore, to invoke the Employment Act 2007, as the source of his mandatory retirement age of 60 years. Having been retired in November 2007, it is clear the Employment Act 2007, enacted on 2nd June 2008, even had it provided for a mandatory retirement age, would not be applicable to the Claimant.

16. The relevant instruments which regulated his retirement were the letter of appointment under clause number 9, and the Personnel Manual under clause 7.7. The clause 9 of letter of appointment states,

“ Unless otherwise agreed between yourself and the company, the retirement age is 55 years, and the company will cease to employ you on the last working day of the month during which you attain that age”

Clause 7.7 of the Manual states,

“All persons employed by the Heritage Insurance Limited [hereinafter referred to as the company] shall be expected to retire from the service of the company on attaining 60 years of age, except that a person-:

- i. May with the consent of the company and at his / her own request retire before the normal retirement date;*
- ii. May at the request of the company, and his/ her consenting to the same retire before the normal retirement date;*
- iii. May at the request of the company and his/ her consenting to the same have his period of service extended by the company beyond the normal retirement date;*
- iv. May be retired by the company on medical grounds before the normal retirement date subject to production of the medical certificate from qualified practitioner.....”*

17. These are the contractual terms that governed the subject of retirement of an employee from the Respondent. The Respondent argued that under clause 8 of the letter of appointment the Parties were entitled to terminate the contract by issue of one month written notice, or payment of one month salary in lieu of notice. Although retirement is a form of termination of employment, the presence of a separate termination clause, which is common in most contracts of employment, intends that Parties distinguish retirement from regular termination. The rules governing different forms of termination, be it redundancy, retirement, death of an employee, or summary dismissal, are distinguishable. The dispute in this matter is not on regular termination; it is on a specific mode through which the Claimant left employment- early retirement. It was not proper therefore for the Respondent to posit that as there was a termination clause, it cured all other problems that may have been occasioned by the way it handled early retirement of the Claimant. Clause 8 of the contract was not implicated.

18. The Respondent justified early retirement of the Claimant on certain allegations, and asserted that there were discussions between the Parties where these allegations were discussed, leading to some form of consent between the Claimant and the Respondent, on his early retirement. He was 37 years on the date he was retired prematurely on 26th November 2007. The allegations made against the Claimant were properly in the domain of acts of gross misconduct, and the Respondent stated as much. Rather than summarily dismiss the Claimant, the Respondent gave him a soft landing and retired him early.

19. The mandatory retirement age may be conclusively taken as the 60 year upper limit, granted under the Manual. The Court is bound to adopt the term that would confer on the employee superior benefit, where there is more than one interpretation that may be assigned to a term or condition of employment. The letter of appointment states the retirement age is 55 years, unless otherwise agreed. The Manual which is part of the whole contract states an employee *shall be expected to retire at the age of 60 years*. The Claimant correctly adopted 60 years as the age he would have expected to retire, but relied on the Employment Act wrongly. The Personnel Manual is the proper instrument regulating the retirement age.

20. The Respondent suggested that the Claimant gave consent by implication, to retire early and avoid summary dismissal. The Claimant wrote to the Managing Director of the Respondent on 21st November 2007, requesting to be allowed to stay in the property for 4 months after retirement to enable him relocate. He wrote on 22nd November 2007 proposing how he was going to clear his loan balance. It was the position of the Respondent that there was a meeting held on 20th November 2007, between the Claimant on one side and a Management Team comprising Steve Lugalua, and Mary Mati the Human Resource Manager on the other side. In the meeting it was alleged there were discussions on external factors such as the debt the Claimant owed his Brother-in- Law, as well as internal factors such as those revolving around the Claimant's mortgage facility, car loan and poor performance. It was here that a decision was made to retire the Claimant early. The Respondent's position was that the conduct of the Claimant by writing of the letters and participation in the meeting with the Management amounted to implied consent to retire early.

21. The Court is not convinced that there was consent, either expressly written or by word of mouth, or at the very least by implication, given by the Claimant. The Respondent expressed the retirement to have been a decision arrived at by the Management in the meeting of 20th November 2007. The conclusion in the minutes recording that meeting states, “ *The Management Board has decided that with the above three factors [loan, external factors, and work performance] that everyone was uncomfortable with JOH [Claimant] continuing to work as a Manager in the Finance Department. The decision is to retire JOH early. The company shall make available early retirement package. His last working day is Friday 23rd November 2007.*” The letter of 23rd November 2007, similarly advised the Claimant that “ *the Management Board has decided to retire you early from the Company employment with effect from 26th November 2007.* This was therefore a decision made by the Respondent to retire the Claimant early, not an early retirement arrived at consensually, or a regular termination made within the contract of employment. Under the contract of employment, the Respondent could only make a decision to retire the Claimant prematurely, on medical grounds. Other forms of premature retirement, called for the consent of the employee, not a decision or a decision without such consent, made by the employer. The Respondent breached the terms of the contract of employment, on premature retirement.

22. The accusations leveled against the Claimant were without doubt serious employment offences. But there is nothing to suggest that early retirement was meant to be a punishment for acts of gross misconduct. There was nothing in writing to show the Claimant, as a consequence of the allegations against him, was requested by the Respondent to retire early and consented to do so. He did not at any time agree that he should be retired early. His letters of 21st November 2007 and 22nd November 2007 do not express any consent to retire early. They are in the nature of a call for the decision of the Respondent to be tempered with consideration for the Claimant's financial and family obligations. The actual decision was made by the Respondent on 20th November 2007, as captured in the minutes of 21st November 2007. The letters by the Claimant followed that decision, and were not in any way an expression of his consent to leave employment early. The Respondent had the option to terminate the Claimant's contract regularly or summarily dismiss the Claimant; it opted for none of these exit routes, but specifically invoked early retirement. That option must be seen within the context of the contract. It is irrelevant to argue that other forms of termination such as summary dismissal or regular termination could have suitably been the vehicles through which the Claimant exited the workplace. The Respondent made a deliberate choice to terminate the Claimant's contract through early retirement, and must be judged on the standards specific to that form of termination.

23. The issues raised about the Claimant's inadequate loan security; the financial improprieties seen

against his role as the Head of Credit Section; and the alleged poor performance and absenteeism were not issues which could be dealt with under early retirement. The activities of the Claimant after he retired are not relevant to the question whether early retirement was carried out lawfully and in accordance with the contract of employment. The Court does not have an obligation to examine if the Claimant was guilty of gross misconduct while in employment, or guilty of other criminal offences and employment offences such as were alleged against him with regard to Jubilee Insurance Company. The focus is on the early retirement. The Respondent appears to have veered off the subject matter and raised extraneous matters. The Court is not concerned about the character of the Claimant. Whether he stole or did not steal money from Jubilee Insurance, and was placed in the Newspaper Advertising Pages as most wanted, is not relevant to the early retirement that took effect on 26th November 2007. Focus is on the early retirement and whether it conformed to the contract concluded between the Parties. The Court's view is that the decision by the Respondent was not made in accordance with the contract of employment.

24. The Respondent compounded the breach, by not paying the Claimant his benefits as promised in the letter of retirement. The letter stated that the Respondent would pay to the Claimant three months' salary in lieu of notice at Kshs. 270,000; one month salary for every year worked amounting to Kshs. 540,000; and employee's contribution under the staff pension scheme, the amount which was to be advised by the Fund Manager. The letter communicating these payments is dated 23rd November 2007. The Claimant filed suit against the Respondent at the High Court in 2008. Transfer to the Industrial Court was made on 17th February 2012. The Respondent paid a sum of Kshs. 556, 810 in early retirement package only on 13th July 2012, almost 7 years after the Claimant left employment, and when the dispute was already in the docket of the Industrial Court. This was not acceptable conduct on the part of the Respondent, particularly considering that pursuant to the breach of the contract of employment the Claimant's home and vehicle were auctioned at the instigation of the Respondent. The intention of the Parties, even supposing the early retirement to have been in accordance with the Claimant's contract of employment, would not be that the employee's retirement dues are retained for 7 years after his exit; retirees are by law entitled to receive their benefits without such delays. There was a discharge and acknowledgement signed by the Claimant on receiving the money. This would not have any effect on the proceedings already before the Court, and was not in the nature of a consent compromising the Claim before the Court. This Court does not attach much weight to a discharge made by an employee in such circumstances. Discharge vouchers are not meant to limit statutory obligations or diminish the obligations imposed on the Parties by the contract of employment. The Court is convinced the Respondent acted in breach of the contract of employment and exacerbated breach by the unexplained late release of the Claimant's dues.

25. What remedies does the Claimant merit? The Claimant seeks the anticipatory salaries he would have earned from 31st November 2007 to the time he attained the age of 60 years. Based on a figure of Kshs. 90,000 per month, over a period of 22 years, he seeks a total of Kshs. 23,760,000. He seeks loss of school fees allowances over the same period, calculated at the rate of Kshs. 10,000, total Kshs. 2,640,000. The Claim for three months' salary in lieu of notice at Kshs. 270,000; one month salary for every year worked at Kshs. 540,000, and employee contribution refund under the Pension Scheme at Kshs. 397,000 appear to have been the items that were the subject of the payments made on 13th July 2012, as promised in the letter of retirement. The Claimant also wishes to have general damages for breach of contract, costs and interest.

25. This Court's position is that in redressing employment wrongs, the aim is to redress the economic injury suffered by the employee as a result of the wrongful action taken by the employer. The objective is not to punish the employer, or unjustly enrich the employee. Underpinning employment remedies is the principle of a fair go all round, which broadly stated is that the demands of social justice, must be balanced against the need for economic development. Remedies availed to the employee must be proportionate to the injury suffered. This was the finding of this Court in ***Industrial Court Cause Number 611 [N] OF 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported]*** and ***Industrial Court Cause Number 1722 of 2011 between David Mwangi Gioko & Others v. Nairobi City Water & Sewerage Company Limited [2013] e-KLR***. It is not proper for the Claimant to desire salaries for the period he expects he would have gone working for the Respondent, and

at the same time seek general damages for breach of the contract. There is only one breach and the Court does not encourage replication of injuries, and multiplication of remedies. Such a trend in labour and employment relationships would distort the purpose of remedies. The Claimant has no justification in seeking special damages as well as general damages. The law of employment expects that where breach has occurred and the employee has lost his job, he should move forward and mitigate his loss, securing another job where possible. The Claimant moved on, and was employed by Jubilee Insurance Company. He mitigated his loss, and although he subsequently lost that job after 3 years in unclear circumstances. He was 37 years on retirement, and is today about 44 years. He appeared to the Court to be of robust health, and sufficiently skilled in his calling as an Accountant, to be able to move on. He is not entitled to anticipatory salaries for the period of 22 years. To grant damages based on the sanguine prospects of continued service would be injudicious, as stated in *the H.C.C.C Number 1139 of 2002 Mengiya Salim v. Kenya Revenue Authority [2008] e-KLR*. The expectation that he would have risen to the position of Senior Manager, or would continue working in the same position in the remaining 22 years, all fall in the category of sanguine prospects. The Court is satisfied that the Claimant merits damages under one head, which the Court assesses at Kshs. 700,000. He has already received Kshs. 566,810 as service pay, notice pay and pension. In sum-

[a] The Claimant was wrongfully retired early, and is entitled to general damages for breach of contract;

[b] General Damages granted at Kshs. 700,000; and

[c] No order on the costs and interests.

Dated and delivered at Nairobi this 7th day of February 2014

James Rika

Judge