



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 164/2013**

*(formerly NRB 513/2012)*

(Before Hon. Justice Hellen Wasilwa on 31<sup>st</sup> March, 2014)

CHARLES KOBAYA ..... CLAIMANT

**-VERSUS-**

WAKENYA PAMOJA SACCO SOCIETY LTD ..... RESPONDENTS

**JUDGMENT**

The claimant herein filed his Statement of Claim on 28.3.2012 through the firm of Oguttu – Mboya & Co. Advocates. It is the claimant's case that he was employed by the respondents on 1.2.1996 and remained as such an employee upto and including 22.12.2010 when the respondents directed the claimant to take and/or proceed on terminal leave pending retirement. Subsequently, the claimant was indeed retired at respondents instance having only attained the age of 55 years and not the statutory age of 60 years in line with a Circular relating to mandatory retirement age.

It is the claimant's contention that his retirement prior to reaching and/or attaining the mandatory statutory retirement age was pre-mature, irregular and thereby illegal and therefore he suffered loss and now claims for damages. The claimant further contends that the retirement was undertaken by the respondents contrary to the obtaining statutory provisions of law as well as contrary to the advise issued and/or communicated to all the Co-operative Societies by the Commissioner for Co-operative Development vide letter dated 30th November, 2009.

The claimant stated that at the time he was retired, he was earning Ksh 79,068/= as per his payslip plus other allowances. He sought the intervention of his CEO but the CEO didn't solve the matter. He then took up the matter with his lawyer who wrote a demand letter to the respondents. The respondents responded through their advocates. Others retired with him filed a case No. 1A of 2013 and the court ordered them reinstated. The claimant now wants this court to order that he be paid salary for the lost employment period of 5 years and costs and interest.

In cross – examination the claimant stated that when he was retired, he processed his retirement benefits and was paid accordingly. He further stated that at the time he ceased working for the respondents there was no Human Resource Policy governing his employment.

The respondents on the other hand filed their statement of defence on 7.6.2013 through the firm of Orina Riechi & Co. Advocates. They also filed an amended statement of defence on 25.9.2013 through

the same firm. The respondents called 2 witnesses who told court that the claimant was a chief cashier of respondents and was in management staff. However RW1 stated that they have a Human Resource Policy which governs how staff join and exit employment and the retirement age is 55 years. That the claimant was informed when his retirement age reached and he was informed that if he wished to work longer, he could apply to work on contract. He denies knowledge of any circular extending age of retirement to 60 years.

In cross – examination, he stated that the Human Resource Policy in their list of documents is dated 15.12.2011 and claimant retired on 22.12.2010. That the Collective Bargaining Agreement in their record is dated 9.7.2013. The letter of Commissioner of Co-operatives he referred to is dated 30.11.2012 and it refers to a previous circular. By 10.8.2011, the claimant was not a staff of the respondent.

RW2 is a State Counsel working in Department of Co-operatives. He informed court that there were 2 circulars from Commissioner of Co-operatives addressing the issue of retirement age. In the letter of 30.11.2009, the government raised retirement age of public officers to 60 years. The circular was received late by a circular dated 30.11.2012. It is his evidence that staff of public officers as such they are not governed by the circulars.

After hearing the parties herein and upon considering their respective submissions, the issues for determination are as follows:-

1. **Whether the respondents retirement at 55 years was in breach of the claimant's contract of employment.**
2. **Whether the claimant is entitled to remedies he sought.**

On the 1st issue, it is apparent that the claimant was appointed on permanent basis with effect from 1st February 1996. He was then retired on 22.12.2010 upon attaining the age of 55 years. This, the claimant contends was against the circular from the Head of Public of Service dated 20.3.2009 (*App 13*) which had raised the retirement age to 60. the contents of this circular had been communicated to respondents on 30th November 2009 by the Commissioner of Co-operative Development as per *App 15* in which he stated as follows:-

**“We have received several inquiries regarding the retirement age for Co-operative Movement Staff in light of the extended retirement age for public servants to 60 years.**

**The public officer Ethics Act 2003 under Section 2 defines a Public Officers to mean any officer, employee or member including an unpaid, part-time or temporary officer, employee or member of a Co-operative Society established under the Co-operative Societies Act. This section thus recognizes a Co-operative Society as a Public Institution.**

**In this regard, it has been deemed necessary to review the retirement age for the Co-operative Movement employees from 55 years to 60 years so as to be in tandem with the current retirement age police for public officers.**

**Please communicate the contents of this circular to all Co-operative organizations under your jurisdiction.**

**Signed**

**F. F. Odhiambo, MBS**

**Commissioner for Co-operative Development.”**

It is clear that this circular did apply to the claimant herein who was in service then but the respondents still went ahead and retired him in December 2010. This was therefore in breach of the express provisions of this circular.

There was an attempt to reverse this circular via another one dated 30.11.2012 which in this court's opinion did not apply to the claimant who had since been retired in December 2010 and the same could not apply retrospectively.

The respondents also referred this court to their by-laws dated 10.8.2011 which also did not apply to claimant who had since been retired in December 2010. Another document the respondents have sought to rely upon is their Collective Bargaining Agreement which Banking, Insurance & Financial Institutions Union dated 1.7.2012 which also does not apply to the claimant.

It is therefore the finding of this court that the respondents did retire the claimant before the retirement age of 60 years which move was unlawful and unjustified.

In his prayers, the claimant has asked this court to order that he be compensated in terms of lost salaries arising from the attendant pre-mature retirement amounting to 5 years salary.

When the claimant gave his evidence in court, he was cross – examined at length and he stated that when he was retired, he processed his retirement benefits and was paid accordingly. In the letter retiring him, the claimant had been informed that he could apply to work on contract if he chose to and he didn't. He has not therefore shown this court that he attempted to go back to work and he was denied the chance. He has not even exhibited before this court his communication with the respondents on the same attempt soon after being retired and pocketing his retirement package until 6.2.2012 more than a year later when his counsel wrote a demand letter to the respondents.

His action seems to be an afterthought in the circumstances. His demand to be paid for 5 years for which no services have been rendered is untenable. I will therefore treat the early retirement as a normal termination and order he be paid as follows:-

1. **1 month salary in lieu of notice = Ksh 79,068**
2. **12 months salary as damages for unlawful termination**  
**= Ksh 79,068 X 12 = Ksh 988,816**

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**TOTAL = KSH 1,027,884**

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Less statutory deductions. The respondents will pay costs of this suit.

**HELLEN WASILWA**

**JUDGE**

**31/3/2014**

**Appearances:-**

Claimant present in person

Orina for respondents present

CC. Wamache