



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1510 OF 2010

ZACHARY OCHAKO CLAIMANT

VERSUS

KENYA BROADCASTING CORPORATION RESPONDENT

JUDGEMENT

1. On 6th December 2010 the claimant, Zachary Ochako filed claim for unfair termination by the respondent, the Kenya Broadcasting Corporation. This claim was amended and filed on 5th February 2013. The respondent filed their defence on 24th January 2011, a supplementary defence on 16th February 2011 and an amended defence on 23rd April 2013. Since commencement of the claim, there were various interlocutory applications and proceedings that all culminated in the consent drawn by the parties herein and filed on 6th February 2013 setting aside the previous court award dated 16th December 2011, agreed to commence full hearing and the parties herein to amend their pleadings. At the hearing, the claimant gave his own evidence while the respondent's case was supported through the evidence of Pius Mutuku Mueke the respondent Human Resource officer. Both parties filed their written submission filed on 28th March 2014 and 7th April 2014 for the claimant and respondent respectively.

Claimant's case

2. The claimant was employed by the respondent on 1st December 1992 as Personnel Officer and from his diligent performance rose through the ranks to Administration Manager. On 15th April 2008 the claimant requested to be promoted to scale BE2 ad n on 23rd April 2008 the respondent replied indicating that the issue was to be addressed together with 50 other pending cases but on 30th October 2009 the respondent terminated the claimant's employment with them citing the 50-year rule outlined under the respondent's regulations and Code of conduct. It was noted that the respondent board had met and a decision made to retire the claimant under the 50-year rule. That this decision was illegal in that the claimant was not aware of the meeting to retire him, the rule cited was optional and not mandatory, the rule was applied on the claimant unilaterally, no notice was given to the claimant, this was against the rule of natural justice, the applicable law and the respondent rules of regulations and code of conduct.
3. At the time the claimant was terminated, he was earning Kshs.147, 414.69 per month and due to the termination he has suffered damage. The claimant lost income from 1st November 2009 to date; the termination was unlawful and is seeking to be reinstated or compensation for lost income and damages for unfair termination together with costs and interest.
4. In support of his case the claimant testified that since his employment with the respondent he was diligent in service where he earned promotions to become the Administration Manager. All his

earning amounted to kshs.21, 630.00 per months at the time of termination. He was a senior officer reporting to the respondent Managing Director. The claimant was due for a promotion and in 2008 he made a request for the same but the respondent replied indicating that this would be considered as he had remained in the same grade for over 8 years. The claimant was not promoted but terminated on 30th October 2009 which was retirement under the 50-year rule which shocked him as it was not expected as what he had requested for was a promotion. No reasons were given for the termination other than the citation of the 50-year rule. The claimant wrote back to the respondent seeking reasons for the retirement and termination but there was no response. On 24th December 2009 the respondent wrote to the claimant and indicated that there was no reason for termination, the retirement notice was sufficient.

5. The claimant was 50 years old at the time and was not the only employee of the respondent who was 50 years old as there were many other such employees who were not subjected to the same rule and termination. The claimant being the Administrator of the respondent was aware of the 50-year rule and was the Chair to the review that led to the Board of respondent passing the 50-year rule and was therefore aware that for the rule to apply, the same was to be subject to the provisions of the applicable law subject to the option of a request by an employee otherwise retirement, otherwise retirement was at 60 years.
6. The claimant also stated that he was on permanent and pensionable terms of employment where his retirement was stated to be at 60 years of age but had the option to apply to retire upon giving 6 months' notice. The notice of 6 months also applied to the respondent. In this case no notice was given as the claimant's termination was to take immediate effect.
7. That the respondent's justified the termination of the claimant on staff reorganisation in their defence to the claim but they have not indicated the basis for the same. There is no indication that the claimant's performance was wanting or his department underperforming in the 18 years he served the respondent. Despite the termination, he claimant stated that his terminal dues were never paid. The claimant was to receive pay of 6 months but this too has not been paid.
8. Following the termination, the claimant stated that he was unable to pay school fees for his 3 children who were at university and therefore is seeking for reinstatement and damages for unlawful termination and his entire pension. The claimant also had 40 days of leave not taken as well as the travel allowance that should have been paid upon his termination and claim the same to be paid by the respondent.

Respondent's Case

9. In defence, the respondent stated that while terminating the claimant they followed the law and the terms of service applicable to him and that all dues and benefits were paid following laid down procedure. This followed a Board of Director's meeting which held a confidential meeting and in execution of the decisions made by the board, the claimant was terminated which was lawful. That the claimant was retired pursuant to his contract and has therefore not suffered any loss or damage that can be attributed to the respondent. That the contract of employment between the claimant and the respondent stipulated that he was to retire at 50 years or more at the initiation of the claimant or respondent by giving 6 months' notice and thus on 30th October 2009, the respondent took this option when the claimant became 50 years.
10. To support the defence, Pius Mutuku Mueke gave evidence for the respondent that as the senior human resource officer of the respondent, he was conversant with the claim lodged by the claimant who was his senior before his termination under the 50-year rule. The witness further stated that the respondent now has a policy that once an employee is at age 50 years the respondent can retire such an employee without giving reasons or the employee choose to give notice to retire. This rule has been used on other employee including senior manager. In this case the board decided to retire the claimant and issued a communication to the claimant. As human resource manager, the witness was aware of the provisions of the 50-year rule which provided that;

One was to get 6 months' notice or pay in lieu of such notice;

A payment of 2 months basic salary for transport;

A payment of the pension dues;

Other accrued benefits; and

Any due leave days not taken.

11. That the claimant was informed of these rights but the respondent could not pay as the same was payable subject to the claimant doing clearance with all departments. This was to ensure that if the claimant had any liabilities, the same were to be factored before final terminal dues became payable. That the respondent is ready to pay the claimant once clearance is done.
12. On the claim for accrued leave days, this will be reflected on the clearance form and will be paid if found to be due. This is outlined in each staff file. Pension was also processed but the claimant failed to provide his banking details for the deposit as the respondent is willing to make this payment. The witness also stated that under the 50-year rule, the Board of the respondent had the discretion to give the 6 months' notice or payment in lieu of such notice. That this is a common trend in human resource to give 6 months' notice or opt to pay for the 6 months.
13. The claimant is seeking to be reinstated but his position has since been replaced and not open to his reinstatement. All dues have been computed waiting for the claimant to collect upon his clearance with the respondent and thus the claimant is not entitled to any dues from the claimant.
14. Upon cross-examination, the witness stated that the claimant was retired upon attaining the age of 50 where he too had the option to retire. The respondent has no particular policy on how to address the 50-year rule but in the claimant's case, the Board decided that he was 50 years and could be retired under that provision. The rule is dependent on the decision of the board and the employee serve at the discretion of the board which can apply the 50-year rule upon considering other factors. The respondent was also reorganising at the time and thus decided to retire the claimant with immediate effect. When such an employee is retired by the Board, the same takes effect immediately and given 6 months' pay as notice unless the board directs otherwise. In this case there was no notice to the claimant for the 6 months.

Submissions

15. Both parties made their written submissions. The claimant on his part submitted that on 30th October 2009 the respondent unilaterally terminated the claimant from his employment under the 50-year rule that was to take effect immediately. When the claimant applied for a review of this decision, the same was rejected and is now seeking reinstatement to his position with the respondent. That the decision to retire the claimant was unfair, the same was based on the respondent's regulations where one could retire at 50 years voluntarily or upon 6 months' notice. That the 50-year rule was voluntary or upon 6 months' notice but in this case, the respondent justify the retirement on the ground that they had looked at the performance of the departments and found the claimant had not performed satisfactorily and thus decided to retire him under the 50-year rule. No notice was given and this rendered the termination unlawful under section 41 of the Employment Act.
16. That this 50-year rule was discriminatory as applied to the claimant as not all employees who had reached 50 years were retired, his age was used against him, and there was no policy guideline in the application of the rule and the same open to abuse by the respondent. The rule is contrary to the applicable law, the Employment Act. The claimant should have retired at 60 years and thus lost 10 years which he had hoped to serve after working for the respondent for over 18 years. The claimant is seeking the maximum compensation of 12 months' pay. The claimant was earning Kshs.211, 835.00 and is claiming total of kshs.1, 786,762.00 as general damages. He is further seeking 6 months' notice pay, accrued leave, pension benefits and costs.
17. The respondent on their part submitted that the claimant was retired under the respondent's 50-year rule pursuant to a board resolution where the rule could be used by either party upon 6 months' notice or payment in lieu of such notice. The respondent opted to pay for the 6 months' notice in lieu of notice and for any accrued leave upon clearance and the respondent has already been ready and willing to settle these dues. The respondent also submitted that their failure to give the claimant notice and pay instead for the notice was not wrong as the same complied with

section 35 of the Employment Act. Thus there is no justification to the claim for damages for unfair termination as the respondent followed the law in offering to pay in lieu of notice. The respondent acted within the law and should not be found to have unfairly retired the claimant. That in the event the court finds there was unfair termination, the award for damages should factor that the respondent is a state corporation state funded and hence use discretion to only pay for 2 months' salary only. The respondent admits the 6 months' pay is due, accrued leave is admitted all payable upon the claimant undertaking the required clearance with the respondent. The pension claimed is handled by a different body and this should not be directed at the respondent. Upon settlement of terminal dues, the claimant is entitled to his certificate of service and each party should bear their own costs.

Determination of the issues

Whether the claimant was unfairly retired; and

Whether there are any remedies.

18. The claims for leave days due and notice pay for six months' have been admitted by the respondent in evidence and in their submissions. The substantive issue that remains is the issue of unfair termination arising from the retirement of the claimant under the respondent's regulations upon attaining 50 years of age.

19. As the respondent has submitted, under section 35 of the Employment Act, an employer should give an employee notice before termination or pay in lieu of such notice as under section 38 of the Act. However, this is not a standalone section of the Employment Act; the same is subject to other parts particularly where it relates to the reason for such termination and need to give notice. In this regard, an employer while giving the termination notice, the reason for such termination must be indicated as under section 41 of the Act. This is important to note as in a case where the employer justify the termination on performance of an employee, such an employee has the right to be heard and defend himself before such termination can be found to be fair and reasonable and more fundamentally, comply with section 43 of the Act outlined as;

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

20. Therefore there must be a genuine reason that must exist to cause the termination of an employee which reason must be proved and where an employer fails to do so; such termination is flawed and unfair. The measure of a genuine reason is to be found at section 45(2) of the Act thus;

(2) A termination of employment by an employer is unfair if the employer fails to prove?

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason?

(In) related to the employees conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

21. So, even where there is a valid reason for termination, the same must be weighed against its validity, fairness, application, need and the procedure used at arriving at the termination of the particular employee. It is not just enough for an employer to state that there is a rule that exists and once this rule is present, and then the same is taken a used upon any employee. To the contrary, where such a rule exists, the same must be subjected to the law particularly with regard to its validity, fairness and the procedure applied to any employee. Otherwise, an employer can abuse their internal regulations to victimise an employee for not valid reason that lacks fairness. This is why the Employment Act now exists to protect such employees prone to unilateral decisions of an employer.

22. It is also important to mention that, whatever regulations an employer may formulate for the regulations of work place practices, the same cannot be applied to the detriment of any employee, this are to be only applied to enhance, enhance of affirm any terms and conditions of work existing at any given time. This is what is envisaged under section 26(2) of the Act thus;

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

23. In this case, the claimant was a senior officer of the respondent at the rank of Administration Manager after serving for a period of 18 years and at the time of his retirement on 30th October 2009; he had applied and was awaiting his promotion. In the retirement letter issued to the claimant on 30th October 2009, the respondent gave the reason for the same as the application of the 50-year-rule in terms of s. B16 (II) of the KBC Code of Regulations, 2009 as well as the KBC Staff Retirement Benefits Scheme Rules. The retirement was to take effect immediately and the claimant was to receive a pay of 6 months in lieu of notice.

24. The respondent therefore relied on their Code of Regulations in arriving at the decision to retire and hence terminate the claimant. The applicable part at B16 (II) read;

Subject to provisions of any law, a permanent employee may retire with pension benefits under the following conditions:

- a. ***Mandatory retirement on attaining sixty (6) years; subject to Corporation's [respondent] discretion.***
- b. ***Optional retirement at the age of fifty (50) years or more at the initiation of the employee or employer by giving the other six months 'notice.***

25. The respondent's regulations provided for two different modes of retirement, the mandatory and optional. Under the optional retirement, there were set conditions that had to be met being a notice of 6 months and where the respondent gave notice an employee could lodge an appeal against such retirement. The claimant lodged his appeal against his retirement; the same was rejected without giving the reasons.

26. On 30th October 2009 when the claimant was retired, was there a genuine reason upon which his retirement and termination could be based upon? Was this a valid reason that was also fair? As outlined above, the regulations formulated by the respondent for work relation regulations could not operate to the detriment of any employee as to do so would an unfair labour practice and contrary to the law. The provision that the any optional retirement was to be preceded with a notice of 6 months I find to be a reasonable practice as where an employer were to give this notice, the same would give the affected employee time to lodge an appeal and await resolution as they remained at work. This is a legitimate expectation. To give such notice and ask the affected employee too immediately to vacate office is to be avoided as this is not commensurate to the operative law as under section 35, 43 of the Act and Article 41 of the Constitution. The use by the

respondent of the 50-year rule has no place in law and to apply it as outlined in the regulations is draconian.

27. Further to the above, even where an employer has a valid reason upon which to terminate an employee, such an employee is to be subjected to the provisions of section 41 of the Act. The claimant should have been well advised by the respondent that the Board was considering his retirement under the applicable regulations and offered him a chance to defend his suitability. As the claimant gave evidence, he had been waiting for his promotion for 8 years, he had received training to this effect only to be retired and his appeal rejected. This I find to be an unfair labour practice contrary to section 45 of the Employment Act. It was immaterial that the respondent offered to pay in lieu of notice; the decision to retire the claimant without due process was unfair and cannot be justified with an offer to pay in lieu of notice.

Remedies

28. On the remedies, the claimant is seeking reinstatement and in the alternative compensation. Upon the finding that the claimant was unfairly terminated on 30th October 2009, it has been over 4 years now since and in the circumstances of the case; I find compensation as the appropriate remedy. The claimant gross pay at the time of termination was Kshs.211, 835.00. The claimant is therefore awarded the gross monthly salary at the time of termination for 12 months pursuant to the provisions of section 49(1) (c) and subject to statutory deductions.

29. On the claim for leave days due and 6 months' notice pay, though admitted, nothing stopped the respondent from depositing these payments with the claimant. I also find it good practice that an employee upon termination should undertake the good practice of clearance with their employer in the event there are any liabilities that may be outstanding. With the finding that the claimant was not given a chance to remain with the respondent upon his retirement, this I find affected his process of clearance and had the 6 months' notice been given, this would have given him ample time to clear. The claimant will therefore attend at the respondent's offices for the purpose of clearance within the next 14 days; his accrued leave days and notice pay of 6 months will be paid with interest. The claimant is also awarded costs of this suit.

30. Pensions are by law to be administered by a body separate from an employer. This is however to be accessed by a retired employee upon facilitation by the employer. This to be undertaken within 14 days' notice issued by the claimant to the respondent indicating how he wishes his pension to be managed.

In conclusion, I enter judgement for the claimant against the respondent in the following terms;

- a. **A declaration that the claimant was unfairly terminated;**
- b. **The claimant is awarded compensation of 12 months' pay of his gross salary at the time of termination.**
- c. **All accrued leave days;**
- d. **Notice pay of 6 months' of gross pay;**
- e. **Costs of the suit awarded to the claimant; and**
- f. **The claimant to proceed and give the respondent 14 days' notice on how he wishes his pension dues to be handled.**
- g. **Interest on (c) and (d) above.**

Dated at Nairobi this 7th day of May 2014.

M. Mbaru

Judge

In the presence of:

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