



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 97 OF 2013

(FORMERLY CAUSE NO. 1950 OF 2012 AT NAIROBI)

JAMES MWATHI NGURI.....CLAIMANT

-VERSUS-

EGERTON UNIVERSITY.....RESPONDENT

(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 20TH DECEMBER, 2013)

JUDGMENT

The Claimant **James Mwathi Nguri** filed the statement of claim on 20.09.2012 through Mutonyi, Mbiyu & Company Advocates. The claimant prayed for:

- a. **A declaration that the purported termination of services of the claimant vides the respondent's letter of 5.7.2012 is illegal, unlawful, unfair and *ultra vires* the powers of the respondent.**
- b. **An order that the claimant be reinstated to his position as the Finance Officer of the respondent with effect from 5.7.2012 with all the salary, allowances, benefits and privileges.**
- c. **A declaration that the act of the respondent is in violation of the rights of the claimant under Articles 27, 28, and 41 of the Constitution of Kenya.**
- d. **General damages for the violation and or breach of the claimant's rights in prayer (c) above.**
- e. **In alternative to prayer (b) above, an order that the respondent re-engages the claimant in work comparable to the work of a Finance Officer at the same salary, allowances and benefits.**
- f. **An injunction restraining the respondent from terminating the services of the claimant or a mandatory injunction reinstating the Applicant to his position as the Financial Officer of the respondent.**
- g. **In the alternative, general damages for unfair termination.**
- h. **Costs of the suit.**
- i. **Any other or further relief that the honourable court may deem fit to grant.**

The respondent filed the memorandum of response on 14.03.2013 through Harrison Okeche Advocate, Head of Legal services at the Federation of Kenya Employers. The respondent prayed that the claimant's suit be dismissed for lack of merit and for costs to be awarded to the respondent.

The claimant's case was heard on 24.07.2013 and the respondent's case on 26.09.2013. The claimant

gave evidence to support his case and the respondent's witness was its Deputy Vice-Chancellor Professor Njenga Munene (RW).

The claimant was employed by the respondent as an accountant on 14.09.1990. In 1993, he was promoted to senior accountant and on 21.10.1998 to the Finance Officer of the respondent, a position of the head of the Finance and Accounts Department in the respondent's establishment.

On 5.7.2012, the claimant was on duty. He applied to proceed on leave effective 6.7.2012. The application was approved and he proceeded on leave. Subsequently, he received the letter dated 5.7.2012 being **exhibit 3** on the statement of claim. The letter addressed to the claimant conveyed as follows:

“Dear Mr. Nguri

RE: EARLY RETIREMENT

During the University Council meeting held on Friday 29th June 2012, it was decided that you be retired on attaining the early retirement age. The retirement is effective from 5.7.2012.

You are eligible for the following:

- 1. Payment of six months' salary in lieu of notice.**
- 2. Payment of outstanding leave days.**

Please note that you qualify for pension in accordance with the Egerton University Retirement Benefits Scheme Regulations which will be paid to you after you have cleared with all departments of the university.

You are required to hand over your duties and responsibilities to Mr. Joel Masubo, Senior Accountant by 10th July 2012. On behalf of the University Management, I would like to take this opportunity to thank you for the services you have rendered to this institution and wish you prosperity in your future endeavours.

Yours sincerely,

Signed

Prof James K. Tuitoek Phd, EBS

VICE-CHANCELLOR”

The claimant testified that prior to his promotion to Finance Officer, the respondent's financial performance was bad as per the Auditor General's report **exhibit 5** but his good and dedicated service lead to improved performance as per report being exhibits 6 and 7 on the statement of claim.

Operationally, the claimant as Finance Officer reported to the Deputy Vice-Chancellor Finance and Administration. He served for a long time without a substantive deputy. He held grade 15 in the respondent's establishment and *clause 12* in the terms and conditions of service **exhibit 12** on the statement of claim applied to him. The clause on retirement provided as follows:

“RETIREMENT

- a. The compulsory retirement age shall be 70 years for Associate Professors and Professors, 65 years for other Academic Staff in Grade (XI – XIII) and Library Staff in Grade XII and above, 60 years for Senior Administrative Staff in Grade XIV and XV, and 55 years for other staff in grade I – XIII. The optional retirement age is 50 years for all members of staff. Retired members of staff may be re-engaged on contract appointment subject to**

- availability of a vacancy provided such engagement does not block advancement of a serving member of staff**
- b. A member of staff who reaches the retirement age will be required to cease duty on the date they attain retirement age.**
 - c. There will be a retirement notice before the retirement dates as determined by the University Management provided that non issuance of notice does not negate (b) above.**
 - d. A member of staff whose date of birth is not indicated on recruitment will be retired on 1st July of the year on which his/her birthday falls.”**

Accordingly, the claimant's case was that he was to retire upon attaining 60 years of age unless he voluntarily opted to retire upon attaining the age of 50 years but which option he did not exercise. It was not disputed that the claimant was born on 27.9.1958 and as at 5.7.2012, he was 54 years old. He also testified that he was studying with the aim of shifting to the academic staff and therefore taking advantage of retiring at 65 years of age. The claimant further stated that he had financial commitments and the sudden retirement negatively impacted on his plans including the education of his children.

The claimant testified that it was not the respondent's practice to retire those above 50 years before attaining the mandatory retirement age so that his retirement was discriminatory and calculated to injure his reputation. Persons who were older than the claimant were not retired at all and were still in the respondent's service. The claimant at the time of the hearing was on a three years' teaching contract with a private university and his testimony was that the employment offered little prospects. He urged that the respondent could re-engage him at commensurate grade and terms of service including in a teaching capacity. At the time of his retirement, he was earning a gross of Kshs.288,350.00. The claimant was a holder of the Certified Public Accountant of Kenya (CPA-K) and Masters in Business Administration (Finance). At retirement, he was never told by the respondent that he did not qualify for the job of Finance Officer and which he had properly performed over the years.

The respondent had introduced new qualifications as per exhibit 2 on the statement of defence and the claimant lacked the Bachelor of Commerce degree as introduced as a qualification for the post of Finance Officer he already held for over 14 years in the respondent's establishment. The claimant's case was that he had been admitted at Birmingham University for his Masters degree with exemption from the first degree in Commerce in view of his CPA-K qualification. The respondent had introduced the requirement of the Bachelor of Commerce as one of requirements for the office of Finance Officer under the new schemes of service issued 23.07.2010. The claimant urged that he had been discriminated against because many other employees including in the Finance Department who did not meet the new qualifications continued in the service of the respondent. The claimant particularly referred to table 5 at page 17 of exhibit 2 on the statement of defence. On the table, Nos. 3, 4, 5, 7, and 6 were all officers in the Finance Department who lacked one or other qualification, were all above 50 years of age and were not terminated on account of age of 50 years and in view of their lacking qualifications.

Clause 9 of the terms and conditions of service being appendix 12 on the statement of claim prescribed a 6 months termination notice.

RW testified that the claimant was promoted to Finance Officer in 1998 following an advertisement of the vacancy. At time of the promotion, he did not hold any degree certificate at graduate or masters levels. RW confirmed that the new scheme of service setting out the new qualifications was approved in 2010. RW testified that he did not know the prevailing set qualifications prior to 2010 schemes of service. RW further confirmed that it was the decision of the respondent that the claimant did not fit in the respondent's restructured finance department and the respondent's 78th Council meeting decided that the claimant be retired. RW testified that the claimant was retired because it was impossible to down grade him to a position lower than a head of department in the restructured department and in view of the new qualifications. The claimant had applied for the new position of head of the department but was not successful at the interviews. RW met the claimant at a Nakuru hotel on 4.7.2012 and explained the respondent's decision to retire him. The claimant had not been paid his terminal dues because, according to RW, he had not cleared as expected. RW further testified that if new and higher qualifications are introduced, the staff holding the office in issue would not be affected and such staff would continue in

office until agreed termination or retirement.

RW further testified that the respondent no longer had office of Finance Officer and instead there was established in the restructuring the office of Accounts Controller as heading the department and the holder of the office was one Moses Odero Ouma, a holder of CPA-K, and a Bachelors degree in Agribusiness and he did not hold a masters or Bachelors of Commerce degree as per the new scheme of service. Below the Accounts Controller's new office, RW confirmed that there were two vacant positions of Finance Controller at Grade 14 whereas the claimant was in grade 15. It was RW's evidence that the claimant could not be re-engaged in the vacant position because he lacked the Bachelors of Commerce degree.

The issues for determination in the suit as set out by the court at the end of the hearing included:

1. **Whether the reasons for termination were fair and valid.**
2. **Whether the procedure for termination was fair.**
3. **Whether the scheme of service approved 2010 applied to the claimant.**
4. **Whether the claimant suffered discrimination.**
5. **Whether the claimant is entitled to the remedies as prayed for.**

The court has considered the pleadings; the evidence; and the submissions filed for the parties and make the following findings on the issues for determination.

The court has considered the letter of retirement. *Clause 12* of the terms and conditions of service gives the employee who attains the age of 50 years the option to retire. The respondent as an employer could not retire and could not therefore exercise the option which was clearly vested in the employees. The court finds that the reason advanced by the respondent in the letter of early retirement as an exercise of an option to retire upon the claimant attaining the age of 50 years was a misconception. The respondent also urged the grounds of poor performance, lack of qualifications and failure of the claimant to fit in the reestablishment under the restructuring process. The court finds all these grounds to have been unfounded fishing around in the air for imagined reasons that were never in issue at all material time and in particular, were never invoked in the letter of early retirement. To answer the first issue for determination, the court finds that the reasons for termination in this case were not valid and the termination was unfair under section 43 as read with section 45 of the Employment Act, 2007.

The second issue for determination is whether the procedure for termination was fair. The claimant invented a reason for termination under a procedure that was never agreed and was not prescribed in any statutory or constitutional provision. It is settled law that the employer cannot invent the procedure for termination of employment outside the agreed, statutory or constitutional procedure. It is not disputed that prior to delivery of the letter of early retirement, the claimant was not accorded any notice of the impending action or heard in that regard. The respondent is a public body and the claimant is a public officer. They were bound by the provisions of Article 236(b) of the Constitution which provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court further holds that the respondent's administrative action to terminate the claimant's employment was subject to the claimant's right to such action that was expeditious, efficient, lawful, reasonable and procedurally fair as provided for in Article 47(1) of the Constitution. In this case, the court finds that the respondent failed to accord the claimant fair administrative action. Accordingly, to answer the second issue, the court finds that the termination procedure was not fair.

The court has found that the termination was unfair in substance and procedure and further finds that 6 months gross salaries for unfair termination being **Kshs.1,730,000.00** at a gross last monthly pay of Kshs.288,350.00 will meet the ends of justice in this case. In making the award, the court has considered that the respondent is willing to pay six months notice in lieu of the termination notice and which is hereby awarded to the claimant at **Kshs.1,730, 000.00**.

The third issue for determination is whether the scheme of service approved 2010 applied to the claimant. The court has considered the issue and finds that qualifications attached to the office an

employee is appointed to hold or act in is a term of contract subject to agreement of the parties to a contract of employment. Where an employee like in the present case holds an office and it is desired to vary the qualifications, the court holds that the employee should be consulted as envisaged under section 10(5) of the Employment Act, 2007. The court holds that where the new qualifications renders the employee not suitable to continue in employment, the resulting situation is essentially redundancy to be governed by the provisions of section 40 of the Employment Act, 2007 as part of the consequences of reorganization and restructuring for better economy in productivity. The court therefore finds that the new qualifications could not apply to the claimant except within a framework of consultation and therefore agreement between the parties or within the legal framework of redundancy. It is the further opinion of the court that where the employer introduces new qualifications for offices held by the employees, fair labour practices demand that the employer accords the employees adequate time and facilities to align by acquiring the new qualifications. The court further holds that it would be unfair labour practice to terminate employees' service on account of lack of qualifications in circumstances whereby with due diligence on the employer's part the employees would have acquired the qualifications with such employer's facilitation.

The fourth issue for determination is whether the claimant suffered discrimination. The court has evaluated the evidence on record and finds that the claimant was discriminately retired early while his workmates beyond 50 years and without this or that of the new qualifications were retained in the respondent's employment. **Section 5 (2) of the Employment Act, 2007** required the respondent to promote equal opportunity in employment and to strive to eliminate discrimination in its employment policy or practice. Whereas, the respondent would be entitled to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job, it is the court's finding that on the respondent's yard stick to so distinguish, exclude or prefer, discriminatory practice was invoked against the claimant. The respondent's action amounted to unfair labour practice in view of the underpinning and resulting discriminatory effect. It is noted that subsequent to removal of the claimant a seriously unqualified person was employed in the ensuing vacancy after the restructuring. The court has considered that the resultant discrimination does not squarely fall on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth as provided for in Article 27 of the Constitution and section 5(3) (a) of the Employment Act, 2007. However, the claimant was treated discriminately compared to the respondent's employees in similar circumstances namely over 50 years of age and without one or other new qualification as introduced by the respondent. The court finds that the respondent engaged in unfair labour practice to discriminate the claimant. Accordingly, the court finds that the respondent essentially engaged in unfair labour practice and breached the claimant's right to fair labour practice under Article 41 and the court considers that damages of **Kshs.200,000.00** will be fair in the circumstances of this case.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The respondent opposed re-engagement or reinstatement in view of the new qualifications which the claimant lacks and in view of the absence of a vacancy for that purpose. The court agrees with the respondent that there would be difficulties in implementing an order for re-engagement or reinstatement in view of the demonstrated absence of a vacancy. In event of absence of an order for reinstatement or re-engagement, for the claimant it was submitted that the termination was essentially redundancy on account of restructuring. It was submitted for the claimant that accordingly he was entitled to severance pay under section 40 (g) of the Employment Act, 2007 and specifically, under clause 14 (c) of the terms and conditions of service which states, thus **"Upon redundancy an employee shall be given severance pay at the rate of one month's pay for each completed year of services."** It was submitted for the claimant that the claimant had served for 22 completed years of service and his last monthly pay was Kshs.288,350.00 so that the claimant is entitled to **Kshs.6,343,700.00.00**. The court agrees with that submission as it has already been found that the restructuring and subsequent termination on account of what the respondent called the claimant's lacking of some of the new qualifications and failure to fit in the restructured establishment was indeed redundancy. The claimant is awarded accordingly.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the respondent's retirement of the claimant by the letter dated 5.7.2012 was

- unlawful and unfair.
2. A declaration that the respondent violated the claimant's right to fair labour practices as protected under Article 41 of the Constitution.
 3. The respondent to pay the claimant **Kshs.10,003,700.00** by 1.3.2014, failing interest to be payable at court rates from the date of the judgment till full payment.
 4. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 20th December, 2013.**

BYRAM ONGAYA

JUDGE