

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**CIVIL SUIT No. 107 OF 2013**

**FLORENCE OTHIENO ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**UGANDA BROADCASTING COPORATION ::::::::::::::::::: DEFENDANT**

**BEFORE: HON.JUSTICE STEPHEN MUSOTA**

**JUDGMENT**

The plaintiff, Mrs. Florence K. Othieno through her advocates M/s Enoth Mugabi Advocates & Solicitors filed this suit against the defendant Uganda Broadcasting Corporation represented by M/s Kiwanuka & Karugire Advocates for adequate compensation, special and general damages, interest and costs of the suit for unlawful mandatory retirement from her employment.

The facts constituting the plaintiff's cause of action arose as follows:

- a) The plaintiff was employed by the defendant as an accountant on an initial three year contract from 1<sup>st</sup> July 2006 subject to renewal at an emolument of 1,000,000/- gross salary per month.
- b) Following the completion of this initial period in 2009, the plaintiff's engagement was extended by mutual consent to a further term of five years to 2014 at an emolument of 1,400,000/- gross salary per month.

- c) On 29<sup>th</sup> November 2011, the plaintiff's services were terminated following her attainment of mandatory retirement age.
- d) Upon retirement, the defendant paid the plaintiff end of employment benefits with gratuity emoluments at termination. The money was deposited in the United Bank of Africa but was subsequently held by the bank to discharge the outstanding loan taken, interest and bank charges.
- e) The plaintiff however averred that the mandatory retirement by the defendant was unlawful and in breach of her engagement.

In their written statement of defence, the defendant averred that the renewal of the contract of employment was to be by mutual consent of the parties, one month before its expiry. That upon expiry of the contract of employment between the plaintiff and the defendant in July 2009 the same was not renewed because the plaintiff was nearing retirement.

During scheduling, a joint scheduling memorandum was filed in which two issues were framed for determination that:

1. Whether the mandatory retirement of the plaintiff was lawful.
2. Whether the parties were entitled to the reliefs sought.

At the hearing, the plaintiff led evidence by way of witness statement sworn by herself while the defendant led evidence through one Paul Kihika, the Managing Director of the defendant.

In her statement the plaintiff stated that she was employed on a three year contract of employment which began on 1<sup>st</sup> July 2006 to June 2009. That she asked for renewal of her contract on 11<sup>th</sup> May 2009 and she was retained by the defendant from June 2009 until 1<sup>st</sup> June 2010 when she was issued with an accreditation of her engagement for the

period ending 31<sup>st</sup> May 2013 on issuance of a staff identity card. That the letter of undertaking dated 13<sup>th</sup> July 2010 issued by the defendant was additional confirmation of her engagement with the defendant. The plaintiff further averred that on the 29<sup>th</sup> November 2011, her employment, contract/engagement with the defendant was terminated on the basis of mandatory retirement age and that this was unlawful and unfair as her employment was governed by a contract of employment and not a retirement policy.

On the other hand, Mr. Paul Kihika testified that in July 2009 the plaintiff's contract of employment expired and was not renewed since the plaintiff was nearing retirement and that he was not aware of any decision arrived at to extend the plaintiff's employment to a period of four years from 2009 to June 2013. He further stated that the identity card, PF No. 3002 issued on 1<sup>st</sup> June 2010 was for a period until the plaintiff's retirement as all employees are required to have one for a period until retirement for identification purposes.

He further testified that the identification card was not proof of renewal of the plaintiff's contract and that upon attainment of retirement age the plaintiff was retired and paid all her benefits.

Both learned counsel were allowed to file written submissions. Mr. Enoth Mugabi learned counsel for the plaintiff submitted that in as far as there wasn't any written executed contract for the period after the lapse of the period of three years in exhibit P1, there was an oral contract of employment based on similar terms and conditions under exhibit P1 that are assumed to have continued and are enforceable under S. 25 of the Employment Act No. 6 of 2006. He argued that the defendant's staff Policy Manual PID 2 at page 27 of 38 regarding retirement was inapplicable in light of the pointers and specifically in light of the policy extracts cited. That the termination of the plaintiff's

employment allegedly under a mandatory retirement exhibit P5 was without basis and was unfair and illegal.

In reply, Mr. Elton Mugabi learned counsel for the defendant submitted that there was no renewal of contract of employment between the plaintiff and the defendant as the plaintiff was nearing retirement and that the fact that the plaintiff was of retirement age is not disputed. Mr. Elton Mugabi further submitted that the UBC staff policy manual outlines the terms and conditions of employment as determined by the board under their mandate in section 13 of the Uganda Broadcasting Act 2005. That the UBC policy manual is meant to complement the contract signed by the employees and that all the terms and conditions cannot be included in the individual contracts hence the rationale for the staff policy manual.

Finally, Mr. Elton Mugabi submitted that Clause 11 of the contract of employment between the plaintiff and the defendant dated 1<sup>st</sup> July 2006 stated that the contract shall be subject to and shall comply with the provisions of the staff rules and regulations as amended from time to time without prior written notice. That the argument that UBC staff policy manual was inapplicable is to suggest that the plaintiff was not a staff of UBC.

I have carefully considered the evidence adduced by both sides and the circumstances of this case and in particular and conditions of the employment contract between the plaintiff and the defendant. I have also studied and considered the policy manual. It has been established that after the expiration of the three year contract there was no other renewal of contract. I was not convinced by the plaintiff's argument that after the expiration of the three year contract, the letter of undertaking dated 13<sup>th</sup> July 2010 issued by the defendant and the issuance of an identity card was an additional confirmation of her engagement with the defendant and/or that it extended the contract of employment for

a further four years. A mere issuance of an identity card cannot serve as an indicator that the contract was renewed. I didn't agree with the plaintiff's claim that this was the case. Issuance of an identity card didn't amount to a renewal of contract. Although the plaintiff continued working for the defendant, no sufficient evidence was led to prove that her contract was renewed.

Be that as it may, even if the contract was renewed, the defendant had a right to terminate the contract upon the plaintiff reaching the mandatory retirement age of 60 years.

The plaintiff testified that she was born in 1950 May 3<sup>rd</sup> and that in 2009 she was 59 years old. The defendant's staff policy which governed the defendant's staff including the plaintiff stipulates that the obligatory retirement age is 60 years. However a staff member may opt to retire voluntarily on full benefits at the age of 55 years. Staff may also retire or be retired on medical grounds.

Therefore the argument by learned counsel for the plaintiff that the defendant's policy manual was inapplicable does not hold water.

From the available evidence, it is clear that the plaintiff signed a contract exhibit P1. Under Clause 11.0 thereof it clearly states that:

***“This contract shall BE SUBJECTED TO AND SHALL COMPLY WITH THE PROVISIONS OF THE STAFF RULES AND REGULATIONS as mandated from time to time without prior notice.”***

Under section 58 (1) of the Employment Act;

**(1) A contract of service shall not be terminated by an employer unless he or she gives notice to the employee except**

**(a) -----**

**(b) Where the reason of termination, is attainment of retirement age. Unless the contrary is shown, the date of termination is deemed to be in the circumstances when an employee attains normal retirement age.**

The plaintiff in her submission suggested that the decision to retire her was done by the Board of Directors. She further submitted that the court was never shown or furnished with proof of a decision of the Board of Directors to undertake the effects of exhibit P5.

However Dw1 Mr. Paul Kihika testified under cross examination that the discharge was done by the Managing Director because of the powers delegated to him by the board. He further testified that the Managing Director is the overall manager.

Management headed by the Managing Director retired the plaintiff on realizing that she was of retirement age pursuant to the powers delegated to the managing director by the board in accordance with the law. Although the plaintiff tried to bring in the issue of legality of the letter of mandatory retirement dated 29<sup>th</sup> November 2011 “P5”, it is a matter which was never pleaded by the plaintiff in her pleadings.

As rightly submitted by learned defence counsel, the defendant was not given opportunity to provide evidence to prove that management had the mandate to carry out the action in exhibit P5. The legality of exhibit P5 was not pleaded in the plaint so it cannot be raised during the hearing. See: O. 6 r 7 of the Civil Procedure Rules.

I am satisfied that as part of the defendant's policy, it had a right to mandatorily retire the plaintiff as she had reached and never exceeded the mandatory retirement. I am unable to find that the plaintiff's mandatory retirement was unfair and unlawful. The plaintiff was retired in accordance with the law.

Issue 2: Whether parties are entitled to the relief sought?

(i) Payment in lieu of notice:

In his submission, learned counsel for the plaintiff sought payment in lieu of notice of two months' salary pursuant to Clause 10.1 of exhibit P1. In reply learned counsel for the defendant submitted that under the Employment Act where the reason for termination is retirement age, then there is no requirement of notice.

I agree with learned counsel for the defendant that where the reason for termination is attainment of retirement age, there is no requirement of notice. The moment the plaintiff clocked the mandatory retirement age, she was put on notice that anytime from then, she could be retired. This is the exception enacted under S. 58 (2) (d) of the Employment Act.

Therefore the prayer for payment in lieu of notice is dismissed.

(ii) Payment in respect of leave not taken:

The plaintiff in her evidence testified that she did not take two years annual leave and thus she was entitled to payment for untaken leave totaling 2.800.000=. The defendants disputed this claim.

According to S. 54 of the Employment Act it is provided that an employee shall once every calendar year with full pay at the rate of seven days in respect of each period of continuous four months' service earn leave to be taken at such time during such calendar year as may be agreed between the parties.

Section 54 (3) provides that any agreement to relinquish the right to the minimum annual holiday as prescribed in the section, or to forego such a holiday for compensation or otherwise, shall be null and void.

As rightly submitted by learned counsel for the defendant the implication of the law is leave earned has to be taken. The defendant's staff policy is that no leave accumulation is allowed or permitted.

I have looked at the pleadings and evidence adduced but I have not found evidence to prove that the plaintiff ever applied for leave and the same was denied. For a claim of compensation to be upheld, the employee must prove that she or he requested for leave and was asked not to take it. The allegation that she did not take leave due to under staffing has not been proved either. In any case, this issue was not also pleaded by the plaintiff.

According to the evidence by the defence, Dw1 testified in paragraph 19 of the witness statement that the plaintiff was asked to take leave and declined to do so. This was not rebutted. It is my finding therefore that the plaintiff has failed to prove her claim of 2.800.000= as payment in lieu of leave.

(iii) Terminal benefits unremitted to NSSF:



The plaintiff adduced evidence through exhibit P7 indicating the total amount that was due to NSSF contribution of 15,617,374/-. However exhibit D1 showed that only 13,867,374/- was remitted hence leaving a balance. As rightly submitted by the defence, any default in NSSF contribution must be claimed by the fund and not the plaintiff. It is NSSF which has to inform the defendant of any arrears in regard to the plaintiff. This claim is therefore misplaced since the plaintiff had no *locus standi* to lay a claim on behalf of the NSSF. Nevertheless should there be any outstanding contribution to NSSF in respect of the plaintiff the defendant should remit it to enable her claim anything due to her.

(iv) General damages:

Since I have held that the plaintiff's mandatory retirement was lawful and in line with her contract of engagement an award of general damages does not arise. I will not award any general damages to the plaintiff.

Consequently this suit is dismissed with costs.

**Stephen Musota**

**J U D G E**

**30 .03.2015**