



**Mwangero v AVC Mangement Co. Ld t/a Mnarani Club (Appeal
E007 of 2023) [2024] KEELRC 13644 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13644 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E007 OF 2023**

**AK NZEI, J
MAY 23, 2024**

BETWEEN

FREDRICK KAZUNGU MWANGERO APPELLANT

AND

AVC MANGEMENT CO. LD T/A MNARANI CLUB RESPONDENT

*(Being an appeal from the judgment of the SPM's Court Kilifi - Hon. J. B. Kituku
delivered on 17th March 2023 in Kilifi CM-ELR Cause No. E026 of 2022)*

JUDGMENT

1. The appeal herein is against the judgment of Hon. J.M. Kituku-SPM delivered on 17/3/2023 in Kilifi SPM-ELR Case No. 26 of 2022. The Claimant had sued the Respondent vide a memorandum of claim dated 27/10/2020 claiming:-
 - a. Four months' salary in lieu of noticekshs. 190,092
 - b. Severance pay.....kshs. 757,626
 - c. Unpaid salary April-October 2020 (kshs. 47,523x7 months).....kshs. 332,661
 - d. Salary arrears January-October 2020 (8% x47,523x7 months).....kshs. 45,622.08
 - e. Compensation for unfair termination (kshs. 47,523x12 months).....kshs. 570,276.
2. The Appellant had pleaded that he had been employed by the Respondent from 1/3/2004 as an Assistant Security Officer and was terminated on 7/10/2020 on account of retirement, earning kshs. 47,523 at the time of retirement. That on 7/10/2020, the Respondent declared him retired on account



of economic downturn, without notice or appraisal, and without being given the selection criteria used in terminating his employment.

3. The Appellant had further pleaded that he had been terminated unfairly and without justifiable cause on account of retirement and that the Respondent had failed and/or neglected to issue notices on the intended termination as contemplated in Section 35,41,43,45 and 49 of the Employment Act.
4. Documents filed by the Appellant in the trial Court alongside the memorandum of claim included the Appellant's written witness statement dated 27/10/2020 and an evenly dated list of documents listing 5 documents. The listed documents included copies of the Appellant's identity card, certificate of service, tabulation of the claimant's final dues, the termination letter and a payslip.
5. The Respondent filed response to the Appellant's claim on 27/11/2020, admitting having employed the Appellant. The Respondent pleaded that in retiring the Appellant, the Respondent was guided by the Collective Bargaining Agreement and provisions of the Employment Act, that the Appellant was notified of his retirement and that his contractual and terminal dues were computed and paid to him. That there was no unfairness in the retirement of the Appellant.
6. Documents filed by the Respondent alongside the response to claim were a written witness statement of Hendrick Venter, the Respondent's Resort Manager, and several documents which included Minutes of meetings with employees held on 31/8/2020, 3/9/2020 and 1/10/2020, among other documents.
7. At the trial before the trial Court, the Appellant is shown to have adopted his filed witness statement as his testimony, to have produced in evidence his filed documents and to have testified under cross-examination that he was born in 1962 and was aged 58 years at the time of termination.
8. The Respondent's witness, Hendrick Venter (RW-1), adopted his filed witness statement as his testimony and produced in evidence the documents mentioned in paragraph 6 of this judgment. RW-1 further testified that under the CBA, the retirement age was 57 years and that the Appellant was 58 years when he retired. That the Appellant had served for 16 years and 6 months, and that his retirement (dues) were calculated according to the Collective Bargaining Agreement (CBA) as follows:-
 - a. Severance pay(25% for every year worked).....kshs. 757,626
 - b. Kshs. 5,600 as a benefit.
 - c. Four (4) months' pay (notice pay).....kshs. 190,992Total kshs. 953,318
9. It was RW-1's further testimony that the aforesaid calculated dues were paid to the Appellant less taxes, and that the last payment was made on 14/4/2021.
10. In its judgment delivered on 17/3/2023, the trial Court made the following observation:-

“27..... According to the payslips and the claimant's record, the claimant was born on 21/5/1962, while according to his identity card he was born on 19/2/1962.

28. According to page 57 of the Collective Bargaining Agreement, which was produced in ELR 8/2020, an employee who had attained age of 56 as at 1st January 2019, and 57 as at 1st January 2020 may retire or was to be retired.



29. As at 7th October 2020 when the claimant retired, he was aged 58 years and therefore he was above the age of 57 years and therefore he was amenable to be retired notwithstanding the exact date of his birth...”
11. The trial Court made a finding that the Appellant had been retired pursuant to the CBA, and that the dues payable to him had been paid to him. He dismissed the Appellant’s suit with costs to the Respondent.
12. The appeal herein is against the dismissal of the Appellant’s suit, and the following grounds of appeal have been set out:-
- a. the learned magistrate erred in law and fact by disregarding the Appellant’s evidence that procedure was not followed by the Respondent before the termination.
 - b. the learned magistrate erred in law and fact by finding that the Respondent had complied with the CBA and the Employment Act before terminating the Appellant despite there being evidence in the contrary.
 - c. the learned magistrate erred in law and fact by dismissing the Appellant’s prayers by stating that he was paid, thus estopped from claiming the same, despite the evidence of the alleged payment being controverted by the Appellant.
13. The Appellant sought the following reliefs on appeal:-
- a. that the appeal be allowed and the judgment delivered on 17th March 2023 by the trial Court be set aside in its entirety.
 - b. that the Court awards the Appellant the prayers sought in the claim.
 - c. that costs of the appeal be awarded to the Appellant.
14. This is a first appeal, and the evidence presented before the trial Court is before me for fresh re-analysis and consideration. This Court, however, takes cognizance of the fact that it neither saw nor heard the witnesses testify first hand. In my view, issues that fall for determination are as follows:-
- a. whether the Respondent unfairly terminated the Appellant’s employment.
 - b. whether the reliefs sought in the trial Court are deserved by the Appellant.
15. On the first issue, it was a common ground that there existed a CBA whose terms applied to and/or formed part of the Appellant’s terms of employment. The record shows that the Appellant was retired from employment upon attaining the retirement age set out in the terms of the CBA. The Appellant admitted in evidence that he had attained the contractual retirement age as at the time he was retired. The letter retiring him/ terminating his employment, dated 7/10/2020, stated in part:-

“ According to the Collective Bargaining Agreement between the Hotel Association and the Workers Union, the following process must be followed for retirement:

An employee who has attained the age of 58 may retire or may be retired.....

Your employment ended on 30th September 2020. Based on your length of service, 16.6 years, your notice period is 4 months. Instead of receiving the notice, you will be paid the sum of kshs. 190,092, plus the retirement entitlement set out below.

.....You will be paid a retirement package of kshs. 757,626 in accordance with the Collective Bargaining Agreement 2019.



Due to the current Covid-19 Pandemic, we propose that your dues to be paid in 3 equal installments as discussed with the Works Committee and Union Representatives, to the banking records currently on your staff file....”

16. The Appellant is not shown to have controverted the contents of the foregoing letter, which is titled “termination of your employment by reason of Retirement.” I find and hold that the Appellant was lawfully retired upon attaining the contractual retirement age of 58 years stated in the Collective Bargaining Agreement (CBA) 2019, and that the Respondent did not unfairly terminate him.
17. On the second issue the claim for compensation for unfair termination of employment is declined, in view of the finding herein that the Appellant’s employment was not terminated unfairly. The terminal dues payable to the Appellant were shown to have been calculated by the Respondent in accordance with the CBA. The Appellant is not shown to have faulted the calculation. The Appellant’s claims for 4 months’ pay in lieu of notice (kshs. 190,092) and severance pay (kshs. 757,626) are shown to have been based on the said calculation by the Respondent. The claim for travelling allowance (kshs. 5,600) is also based on the Respondent’s calculation of the Appellant’s terminal dues, which the Appellant exhibited in evidence at the trial.
18. The question that arises is, were the computed dues paid to the Appellant”. The Appellant testified that payment was not made, while the Respondent’s witness (RW-1) testified that payment of kshs. 953,318 was made to the Appellant and that the last payment was made on 14/4/2021. No proof of such payment was, however, exhibited by the Respondent.
19. The primary suit is shown to have been filed less than a month from the date of termination of the Appellant’s employment on his attainment of the contractual retirement age. The Respondent is shown to have made a proposal in the termination letter to pay the calculated dues in 3 instalments. Was payment made as stated in evidence by the Respondent (RW-1), and if so, why was proof of such payment during the pendency of the primary suit not presented by the Respondent in evidence”. It is my finding that the Appellant’s benefits as computed by the Respondent upon the Appellant’s retirement in October 2020 were not paid to him, and that the trial Court fell into error by making a finding that payment had been made; and proceeding to dismiss the Appellant’s suit. The dismissal order is hereby set aside.
20. The claims for salary arrears and salary increments were not proved, in my view, and are hereby dismissed.
21. In sum, and having considered written submissions filed on behalf of parties herein, judgment is hereby entered for the Appellant against the Respondent as follows:-
 - a. Notice pay.....kshs. 190,092
 - b. Severance pay.....kshs.757,626
 - c. Travelling allowance.....kshs. 5,600Total kshs.953,318
22. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
23. The Appellant is awarded costs of the appeal and costs of proceedings in the Court below.
24. The Appellant is also awarded interest at Court rates, to be calculated from the date of the trial Court’s judgment.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD MAY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

