



**Olunga v Mumias Sugar Co .Ltd (Employment and Labour Relations Cause
23 of 2023) [2024] KEELRC 2661 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2661 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 23 OF 2023**

**JW KELI, J
OCTOBER 31, 2024**

BETWEEN

FORD SENGU OLUNGA CLAIMANT

AND

MUMIAS SUGAR CO LTD RESPONDENT

JUDGMENT

Representation

C/A Macheso

Claimant – In person

For Respondent- Munyao Muthama & Kashindi Advocates

1. The Claimant instituted suit vide undated Statement of Claim filed on 10th March 2015 seeking the following reliefs:-
 - i. A declaration that the Claimant was unlawfully retired with the benefits of persons with disability accorded under the law of Persons with Disability Act.
 - ii. A declaration that the claimant falls under the persons with disabilities and that he should be retired under no other scheme other than that of persons with disability which fall under 60 years.
 - iii. A declaration that the claimant be reinstated to his former work and position with the Respondent and the Respondent be ordered to pay the claimant his salary dues and owing in the current scale as from 1st July 2013 to present and or within the extended period under persons with disability Act.



- iv. A declaration that the claimant be reinstated to his former job and enjoy all his full benefits until his claim is heard and determined and in the alternative be paid his benefits, salary and other benefits accrued within the age of 60 years computed from 1st July 2013.
 - v. Any other relief the court may deem just and fair to grant.
2. The Statement of Claim filed on 10th March 2015 was filed alongside the Verifying Affidavit sworn by the Claimant on 27th February 2015; the Claimant's Witness Statement dated 27th February 2015; the Claimant's List of Witnesses dated 27th February 2015; and the Claimant's List of Documents dated 27th February 2015.
 3. The Respondent entered appearance in the matter through the law firm of S.M. Onyango & Associates Advocates and filed a Statement of Defence dated 4th July 2016. They also filed a List of Witnesses dated 4th July 2016; Respondent's Witness Statement of one Matthew Gae dated 4th July 2016; and Respondent's List of Documents dated 4th July 2016. Upon being granted leave to substitute their witness by the Court on 12th June 2024, the Respondent filed the Witness Statement of Patrick Mutuli dated 5th July 2024. They also filed a Supplementary Bundle of Documents 4th July 2024.
 4. Following the directions of the Court issued on 15th July 2024 after the oral hearing that parties file their respective submissions, the Claimant filed submissions dated 12th September 2024, while the Respondent filed submissions dated 18th September 2024.

Hearing

The Claimant's case

5. The Claimant's case was heard on 15th July 2024, when the Claimant testified under oath. He adopted his written witness statement dated 27th February 2015, and produced the documents listed in his List of Documents dated 27th February 2015 as the Claimant's exhibits 1-11. He was cross-examined by the Respondent's Counsel, Ms. Songok.
6. During the hearing of the case, the Claimant (CW1) testified that he was engaged by the Respondent in 1984 through an appointment letter dated 17th May 1984 as a Harvesting Clerk. He retired at the age of 55 years on 1st July 2013. At the time of his retirement, the Claimant held the rank of supervisor in the Agronomy section. The Claimant confirmed that at the commencement of his employment, he did not have a disability. However, he sustained an injury on 29th November 1996 in the course of his duties, which caused him to subsequently become disabled in his left elbow. The Respondent was aware of his injury since they were the ones who settled his medical expenses. Further, in 2009, the same elbow developed a complication in that it developed sepsis necessitating the removal of wires that had been used to set the said elbow. The medical expenses for this procedure were also met by the Respondent. After the procedure, the Claimant contends that his left hand became lame with restricted room for movement and was numb.
7. The Claimant testified that he was not aware of his disability until the year 2012 when he was advised by his doctor on the same. A disability assessment was carried out on him by one Dr. Anyira of Butere District Hospital, and the documents sent to the National Council for Persons with Disabilities with a recommendation that he be registered as a person with disability. The Claimant was recommended for disability status on 2nd August 2012 and issued with an ID and letter confirming that he had qualified for disability status by the National Council for Persons with Disabilities. He forwarded the letter



to the Respondent. The Claimant stated that his disability status was confirmed shortly before being issued with the 6 months' notice of retirement on 1st February 2013 by the Respondent.

8. The Claimant states that he took the position that upon being made aware of his said disability status, the Respondent should have extended his retirement age/date. Despite receiving a letter from the National Council for Persons with Disabilities on or about 7th February 2013 confirming the Claimant's status, the Respondent still retired the Claimant on 1st July 2013. The Claimant testified that he was subjected to authentication of his disabled status at Moi Referral Hospital in November 2013. The Respondent indicated that this authentication would assist them to reach a final decision regarding the issue of his disability. He was again assessed in 2016 and found to be disabled. In fact, the Respondent does not deny that he is on the register of disabled persons.
9. It was the Claimant's testimony that he was aware that the Respondent Company was placed under receivership after he was retired from employment.

The Respondent's case

10. The Respondent's case was heard on the same day 15th July 2024, when its witness Patrick Mutuli (RW1) testified under oath, and was cross-examined by the Claimant acting in person. He adopted his Witness Statement dated 5th July 2024 as his evidence in chief and produced the documents attached to the Respondent's list of documents dated 4th July 2016 as Respondent's exhibits 1-7, and the document attached to the Respondent's Supplementary List of Documents dated 4th July 2024 as Respondent's exhibit 8.
11. RW1 testified that the Claimant was registered as disabled in the year 2012, but did not notify the Respondent company, contrary to a notice issued by the Respondent company in 2010 requiring all employees with disabilities to declare them. This was evidenced by the fact that his disability was not reflected in his payslip. He therefore maintained that the company was not aware of the Claimant's disability at the time of his retirement notice of 1st February 2013, and only learned of the same on 27th February 2013 when the Claimant claimed disability benefits. When cross-examined on the reason for the Claimant's re-assessment in the year 2013, RW1 stated that he was not aware of the reason for the same. He was, however, adamant that the letter from the National Council for Persons with Disabilities dated 27th February 2013 which confirmed the Claimant's disabled status to the Respondent, was sent 26 days after his retirement notice had been issued.

Determination

Issues for determination

12. The court having considered the parties' pleadings, oral and documentary evidence and submissions, identifies the following issues for determination: -
 - a. Whether the retirement of the Claimant on 1st July 2013 at the age of 55 years was unlawful;
 - b. Whether the Claimant is entitled to disability benefits under the *Persons with Disabilities Act*; and
 - c. Whether the Claimant is entitled to the orders sought in his Statement of Claim dated 10th March 2015.

Whether the retirement of the Claimant on 1st July 2013 at the age of 55 years was unlawful;

13. The facts of the case are outlined above.



14. It was not in dispute that the Claimant was employed by the Respondent as Harvesting Clerk vide a letter dated 17th May 1984. At the time of employment, the Claimant did not have any disabilities. He was issued with retirement notice on the 1st of February 2013. He was certified as disabled on the 27th of February 2013 and the employer was notified. He was retired on 1st July 2013 once he attained the age of 55 years, as per Company policy and not the *Persons with Disabilities Act*.
15. The Claimant told the court that it was his expectation that having been made aware of his said status, the Respondent would have extended his retirement age to 65 years. Despite receiving a letter from the National Council for Persons with Disabilities on or about 27th February 2013 confirming the Claimant's status, the Respondent still retired the Claimant on 1st July 2013. The Claimant testified that the Respondent subjected him to authentication of his disabled status at Moi Referral Hospital in November 2013. The Respondent indicated that this authentication would assist them to reach a final decision regarding the issue of his disability. He was again assessed in 2016 and found to be disabled. In fact, the Respondent does not deny that he is on the register of disabled persons. The retirement age of persons living with disability was 65 years.
16. It was not in dispute that the Claimant was employed by the Respondent as a Harvesting Clerk vide a letter dated 17th May 1984. At the time of employment, the Claimant did not have any disabilities. He became disabled in the course of work following an accident of which the employer paid the medical expenses. The Respondent stated that the claimant was retired on the 1st July 2013 once he attained the age of 55 years, as per Company policy.
17. RW1 testified that the Claimant was registered as disabled in the year 2012, but did not notify the Respondent company, contrary to a notice issued by the Respondent company in 2010 requiring all employees with disabilities to declare them. This was evidenced by the fact that his disability was not reflected in his payslip. He therefore maintained that the company was not aware of the Claimant's disability at the time of his retirement, and only learned of the same in February 2013 when the Claimant made a claim for disability benefits. When cross-examined on the reason for the Claimant's re-assessment in the year 2013, RW1 stated that he was not aware of the reason for the same. He was, however, adamant that the letter from the National Council for Persons with Disabilities dated 7th February 2013 which confirmed the Claimant's disabled status to the Respondent, was sent 26 days after his retirement notice had been issued.
18. The court finds that the issue to determine is whether the notification of disability while the notice for retirement was running was valid for the employer to disregard the entitlement of the claimant to work to 65 years of retirement as a person living with a disability.
19. The claimant in written submissions reiterated facts already analyzed above.

The respondent's submissions

20. It was only after the claimant was notified of his impending retirement that he presented a letter dated 27th February 2013 from the National Council for Persons with Disabilities to the respondent certifying he was a person living with disability and that he was entitled to disability benefits and a later retirement age.
21. The respondent submits that had not been made aware of the disability which the claimant alleges he had since 1996. The claimant had not bothered to notify the respondent of his alleged disability up until the point he was notified of his impending retirement. By this time, the company had already begun the separation process with the claimant and once the notice of retirement ran out, the claimant retired from employment on 1st July 2013. Following his retirement, the claimant began to receive



payment of his pension under the respondent's pension scheme as indicated in the letter dated 2nd September 2014 at page 7 of the respondent's bundle.

22. The Respondent contends that from the claimant's own evidence, he was examined for disability on various dates in 2012. His registration card as a person with disability is dated 19th October 2012. The claimant has not explained the delay in notifying his employer of his state which was confirmed 6 months before he was notified of his retirement. In *Banking, Insurance & Finance Union (Kenya) v Barclays Bank* [2014] eKLR the court dealt with a matter where an employee claimed that he had been ill when his employer terminated him and had filed suit for unlawful termination. The court held at paragraph 27: "That the employment relationship is based on agreement between parties so as to enhance productivity. Therefore parties undertake consultations, notification and hearing of each other side of view even in serious cases where there may be a case of misconduct. Hearing and giving the other party a chance to be heard before sanctions or drastic action is undertaken is the cornerstone of an employment relationship. Therefore even in a case of sickness, an affected employee has a duty that is mandatory to bring to the attention of the employer as soon as is reasonably practicable of any absence due to sickness or illness."
23. The Respondent submitted that the court ought to apply a similar reasoning, as above, to the case at hand where the employee's lack of diligence in bringing his condition to the respondent's notice disentitles him to a claim for unfair and unlawful termination.
24. The respondent submitted that the claimant was lawfully retired when he reached the retirement age of 55 years. It denied that the claimant was discriminated against or treated unfairly. The claimant's lack of diligence in notifying the respondent of his disability precluded him from alleging that he was discriminated against. The Respondent relied on the decision in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR where it was observed: "Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches."
25. The Respondent further contended that the claimant was not entitled to the remedies sought due to his failure to notify the respondent of his condition, and only doing so after he had been notified of his impending retirement. For this reason, the claimant was not entitled to any remedies for salaries or benefits from 1st July 2013 until 60 years, or to date.

Decision

26. The court finds that the issue of implementation of the retirement date of persons living with disability has been determined with consistency by several judges of the court. The issue of timing of registration as a person with a disability was dealt with in the case of *Margaret Martha Byama v Alice A. Otwala & 3 Others* [2016] eKLR where the Justice Abuodha held:-

"Under the Act disability is defined as "a physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity which impacts adversely on social economic or environmental participation. Once a person has been certified to be one



with disability as provided in the Act that person qualifies to be registered in accordance with section 7(1) (c) of the Act. 16. The Act does not make any provision on when a person must register once certified to be a person with disability. What the Court can deduce from this deliberate omission in the Act is that disability can either be congenital or as a result of subsequent illness or incidental injury. The latter aspect can occur to anyone at any stage in life. Therefore Parliament in its wisdom saw the mischief or injustice which would occur if timelines were set on when to register as a person with disability.” This decision was applied with approval in *Kenya County Government Workers Union v Nairobi City County Government & another* [2021] eKLR and in *Engineer Samwel Ogola Ogege v Cabinet Secretary, Ministry of Transport and Public Works (State Department of Infrastructure) & another; Public Service Commission (Psc)& another (Interested Party)* [2022] eKLR. I equally uphold the said decision.

27. The respondent submitted that from the claimant’s evidence, he was examined for disability on various dates in 2012. His registration card as a person with a disability is dated 19th October 2012. The claimant has not explained the delay in notifying his employer of his state which was confirmed 6 months before he was notified of his retirement. It was only after the claimant was notified of his impending retirement that he presented a letter dated 27th February 2013 from the National Council for Persons with Disabilities to the respondent claiming that he had a disability and that he was entitled to disability benefits and a later retirement age. The Respondent submitted the claimant was guilty of laches and was not entitled to retire at 60 years for lack of communication to employer.
28. The Claimant submits the process of certification as a disabled person took a long period following tests in 2012 and that he was issued with D/P/118636 a medical certificate dated 27th February 2013 to the effect of his being disabled and a copy of the report was sent to the respondent. The court returns that the fact the Claimant issued a certificate of registration of disablement 26 days post the 6 months’ notice of retirement did not invalidate the Claimant’s right to retire at 65 years as a person living with disability. Disablement has no timelines and the right of a disabled person to retire at 65 years under the *Persons with Disabilities Act* cannot be faltered by policies or practices of the employer. The Court upholds the observation by Justice Nelson Abuodha in *Margaret Martha Byama v Alice A. Otwala & 3 Others* [2016] eKLR where the court held:-

“Under the Act disability is defined as “a physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity which impacts adversely on social economic or environmental participation. Once a person has been certified to be one with disability as provided in the Act that person qualifies to be registered in accordance with section 7(1) (c) of the Act. 16. The Act does not make any provision on when a person must register once certified to be a person with disability.” The Court does not agree with the Respondent that the failure to notify the employer of the disability before the notice of retirement, defeated the claimant’s right to retire as a disabled person, as the *Persons with Disabilities Act* does not provide any time limitations on its application as relates to retirement.

29. In the instant case, the only defence advanced for not according the claimant the right to retire at 65 years as per letter of the National Council of Persons with Disabilities of 27th February 2013, was the failure of the claimant to communicate his disability to the employer before issuance of retirement notice. The Claimant informed the respondent of his registration as a disabled person vide letter of 27th February 2013, 26 days after notice of retirement and the employer notwithstanding the said certification of the Claimant as a disabled person under the *Persons with Disabilities Act* still retired him on the 1st July 2013. The court finds that indeed the respondent still subjected the claimant to



more tests post retirement and confirmed he was disabled but failed to extent his retirement age. The letter communicating the disability of the claimant dated 27th February 2013 referred to a Government Circular of 29th May 2012 providing the retirement age at 65 years. The Court holds that the retirement of the Claimant at 55 years was unlawful and in violation of the provision of section 15(6) of the [Persons with Disabilities Act](#) providing for minimum age of retirement of persons living with disability as 60 years.

Whether the Claimant is entitled to disability benefits under the [Persons with Disabilities Act](#);

30. The answer is yes. However, the benefits as regards employment to 65 years are overtaken by events the claimant having been retired at 55 years in 2013. The court regrets the long delay in hearing the case which could be substantially attributed to the receivership and administration proceedings on the respondent before the High Court at Nairobi.

Whether the Claimant is entitled to the orders sought in his Statement of Claim filed in court on 10th March 2015.

31. The claimant sought the following reliefs :-

i. A declaration that the Claimant was unlawfully retired with the benefits of persons with disability accorded under the law of Persons with Disability Act.

32. The court returned this prayer in the affirmative.

ii. A declaration that the claimant falls under the persons with disabilities and that he should be retired under no other scheme other than that of persons with disability which fall under 60 years.

33. The Court returns that the prayer was overtaken by events.

iii. A declaration that the claimant be reinstated to his former work and position with the Respondent and the Respondent be ordered to pay the claimant his salary dues and owing in the current scale as from 1st July 2013 to present and or within the extended period under persons with disability Act.

34. The Court returns that the prayer unfortunately as at time of judgment had been overtaken by events.

iv. A declaration that the claimant be reinstated to his former job and enjoy all his full benefits until his claim is heard and determined and in the alternative be paid his benefits, salary and other benefits accrued within the age of 60 years computed from 1st July 2013.

35. The court returns that reinstatement was not available to the claimant as at the time of judgment due to lapse of more than 3 years post termination of employment pursuant to the provisions of section 12 (3) (vii) of the Employment and [Labour Relations Act](#) to wit:- “an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;”. Further there was alternative remedy available under section 49 of the [Employment Act](#). A worker cannot be paid for period not worked. They can only be awarded compensation for unlawful termination.

v. Any other relief the court may deem just and fair to grant.

36. The court taking into account that the Claimant was unlawfully retired as a person living with disability at 55 years instead of the retirement age of 65 years for persons living with disability



as per letter of 27th February 2013 communicating his registration as a person with disabilities to the employer, the court holds that the claimant was wronged and compensation for unlawful determination was just and fair to grant. The claimant could have worked for another 5 years which was denied unfairly. In the case of Kenya County Government Workers Union v Nairobi City County Government & another [2021] eKLR the court awarded 12 months compensation for expected period of service of extra two years. The court observed:- “From the pleadings, it is clear that the Claimant’s main wish and prayer is reinstatement and that the prayer for damages has been pleaded as an alternative. The circumstances of the case confirm that the Grievant was entitled to an extension of his retirement age. However, the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination militates against granting this prayer. The Grievant has already turned sixty two years and is only left with three years before reaching the extended statutory retirement age for persons living with disability. Further, in his letter dated 1st November 2017, in which he sought extension of his retirement age, the Claimant only requested for 2 years which have lapsed. As such the circumstances of this case do not meet the exceptional threshold for reinstatement. Owing to the lengthy duration of service the Grievant offered his services to the Respondents, the court awards him compensation equivalent to 12 months’ salary, that is: 73,290.85 x 12 months..... Kshs.879,490.20” I uphold the said decision to apply in the instant case.

37. Then Respondent submitted, that should this court make an award in favour of the claimant, the claimant would be in queue to recover any judgment sum after the debt owed to the secured creditors has been cleared.
38. The Court holds that compensation for unlawful termination on account of age equivalent of 12 months’ salary is fair and just. As per the payslip produced by the claimant of June 2013 when he retired, his last gross salary per month was Kshs. 95,750.80. Thus compensation for unlawful termination through retirement of employment being a person certified as with disabilities is awarded for Kshs. 95,750.80 x 12 thus Kshs. 1,149,009.60/-

Conclusion and disposition

39. The Court holds that the claimant being a person certified as with disabilities was retired unlawfully at 55 years instead of 65 years. The claimant cannot be reinstated as 3 years have since lapsed and the employer has since been placed on receivership. Execution of judgment is at the liberty of the claimant and the court has no business advising the claimant on getting his judgment on how to proceed to execute. The court rejects the submission by the respondent to inform the claimant to queue with other unsecured creditors.
40. In the upshot, the statement of claim filed in court on the 10th March 2015 is allowed as follows:-
 - a. A declaration is hereby issued that the Claimant was unlawfully retired without the benefits of persons with disability accorded under the law of Persons with Disability Act.
 - b. A declaration is hereby issued that the claimant falls under the persons with disabilities and that he should have been retired under no other scheme other than that of persons with disability which fall under minimum 60 years.
 - c. Compensation for the unlawful termination of contract is awarded equivalent of 12 months’ salary as at June 2013 when the Claimant was unlawfully retired for the sum of Kshs, 1,149,009.60/-.
 - d. Costs to the Claimant



41. It is so Ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER
2024**

JEMIMAH KELI

JUDGE

In The Presence of

C/A – Caleb

Claimant – absent

For Respondent: absent

