

**IN THE COURT OF APPEAL
AT NAKURU**

(CORAM: WARSAME, MATIVO & GACHOKA, JJ.A.)

**CIVIL APPEAL NO. NAK 29 OF
2020 BETWEEN**

PETER NJUGUNA CHEGE.....APPELLANT

AND

TIMSALES LIMITED.....RESPONDENT

(Being an appeal arising from the judgment issued by the Employment and Labour Relations Court of Kenya at Nakuru (Mbaru, J.) dated 27th April 2020

in

ELRC Cause No. 58 of 2019).

JUDGMENT OF THE COURT

1. This is an appeal against the judgment rendered by *Mbaru, J.* on 27th April 2020 in Nakuru Employment and Labour Relations Court (ELRC) Cause No. 58 of 2019. The said proceedings were instituted by the appellant (Peter Njuguna Chege) against the respondent (Timsales limited).
2. The relevant background to this litigation is that in July 2018, the respondent's employees demanded payment of their salary which had been delayed since June 2018. On 25th July 2018, the grievants were locked out from their place of work by the respondent on allegations that they

had participated in an

unprotected strike and/or absconding from duty. Aggrieved by the lock-out, the appellant's union instituted **Nairobi ELRC Cause No. 1282 of 2018, Kenya Building, Construction, Timber & Furniture Industries Employees' Union vs Timsales Limited** (Cause number 1282 of 2018) challenging the lockout. In a ruling delivered on 21st June 2019, *Onyango,*

J. dismissed the appellant's claim with costs to the respondent and directed the appellant to proceed with the disciplinary hearings against the grievants.

3. Following the said ruling, the appellant issued notices dated 1st July 2019 to the grievants including the appellant requiring them to show cause why they had absconded from duty and to answer allegations of malicious damage of the appellant's property. Ultimately, the grievants including the appellant were dismissed from employment vide letters of dismissal dated 1st August, 2019.
4. It is the appellant's case that he resolved not to continue his employment with the respondent and he opted to retire in accordance with clause 18 of the collective bargaining agreement (CBA) which entitled him to retire at the age of 47 years. He claimed that he communicated his

retirement vide

letter dated 30th June 2019 addressed to the Respondent. However, on 30th June 2019 when he went to the respondent's premises to deliver his notice of retirement, he was denied access by the respondent's watchman. Nevertheless, he delivered the notice to the labour officer, Nakuru on 1st July 2019. Also, he claimed that he forwarded the retirement notice through his advocates on 5th July 2019 by post but the respondent declined to receive it. He maintained that his advocate sent the retirement notice *via* email and in response the respondent's advocate indicated that they were in the process of completing disciplinary process and they would notify the appellant of the outcome. He averred that the respondent's advocate denied receiving the retirement notices and/or obstructing any person from accessing its premises to deliver the notice and urged that the appellant had not attained the age stipulated by the CBA.

5. It was also the appellant's case that the respondent refused to pay his retirement benefits plus his gratuity and leave days. He alleged that the respondent refused to issue him with a letter to the National Social Security Fund (NSSF) to enable him claim for his benefits.

6. Before the disciplinary proceedings could be concluded, the appellant instituted ELRC Cause No. 58 of 2019 seeking the following orders: (a) a declaration that he had been in the Respondent's continuous employment from 1st December 1997; (b) a declaration that any disciplinary process initiated against him and the resultant decision made after his retirement from the respondent's employment is null and void; (c) a declaration that the Respondent's refusal to pay him his retirement benefits amounts to an unfair labour practice; (d) a declaration that his rights to dignity; fair labour practices, remuneration, reasonable working conditions and economic and social rights guaranteed and protected by Articles 28, 41 and 43 of the Constitution had been violated by the Respondent; (e) Kshs.516,805/= being retirement benefits/gratuity and leave pay; (f) compensation in terms of Article 23 (3) (e) of the Constitution; (g) a Certificate of Service; (h) costs of the suit and interests on the above amounts; (i) any other or further relief the court may deem fit to grant.
7. After considering the parties' evidence and submissions, *Mbaru, J.* addressed the following issues, namely: (a)

whether the termination of employment was in violation
of the

Constitution and the law; and (b) whether the claimant should be paid his retirement benefits.

8. Regarding the first issue, the learned Judge held that since the retirement notice is dated 30th June 2019 which is days after the ruling that allowed the respondent to continue with the disciplinary proceedings against the appellant and bearing in mind that the appellant admitted receiving the notice to show cause, the appellant squandered the opportunity to be heard by refusing to attend and show cause why his employment should not be terminated for being absent from work and destroying company property. Therefore, his retirement notice could not sanitise gross misconduct. It was the trial court's finding that allowing the retirement notice to stand amounts to sanctioning and rewarding misconduct. It was the trial court's finding that there was no violation of the Constitution or any right under the Employment Act, 2007 since the appellant authored his own termination of employment with the respondent.
9. Addressing the question whether the appellant was entitled to the remedies sought, the learned Judge held that with the termination of employment, a Certificate of Service should

issue in accordance with section 51 of the Employment Act, 2007 and where the claimant requires a letter to the NSSF to access his work benefits, a request to the respondent ought to issue and the same addressed administratively.

10. Aggrieved by the above verdict, vide memorandum of appeal dated 18th June 2020, the appellant raised 4 grounds of appeal mainly faulting the learned judge for: (a) failing to consider the evidence before the court, the applicable law, his submissions and thus arriving at an erroneous decision; (b) finding that the respondent had the jurisdiction and or/authority to discipline and or dismiss the appellant who had already retired and or terminated the employment contract; (c) failing to find that the disciplinary process and the resultant decision was null and void; (d) failing to grant the reliefs sought.
11. The appellant prays that: (a) his appeal be allowed with costs and the impugned judgment be set aside; and, (b) a declaration that the disciplinary process and the resultant decision is null and void.
12. During the virtual hearing of this appeal on 27th May 2025, learned counsel Mr. Magata appeared for the appellant, while learned counsel Mr. Muli appeared for the

respondent. Both

parties relied on their written submissions which they orally highlighted. The appellant's submissions and case digest are dated 19th February 2024. The respondent's submissions, case digest and list of authorities are dated 11th March 2024.

13. In support of the appeal, Mr. Magata maintained that the CBA provided that an employee who attains 47 years shall be entitled to retire with full benefits and resignation being a unilateral act by an employee, the employer's concurrence, approval or acceptance of the resignation is not a condition precedent for resignation to take effect. He cited the **ELRC** **decision in Edwin Beiti Kipchumba vs. National Bank of Kenya Limited [2018] eKLR** in support of the position that a notice of termination of employment does not have to be accepted by the recipient party, to become effective.

14. Counsel also submitted that an employer's jurisdiction to exercise disciplinary control over an employee is based on the existence of an employment relationship. Therefore, an employer cannot reject a valid resignation and proceed with disciplinary process. To buttress his submission

counsel cited the ELRC decision in **Kenya Hotels & Allied
Workers Union**
vs. Mara Siria t/a Safari Camps (K) Ltd [2016] eKLR,
in

support of the position that it was not open to the Respondent to refuse the resignation and summarily dismiss the appellant. Counsel cited the case of **Kennedy Obala Oaga vs. Kenya**

Ports Authority [2018] eKLR in submitting that there is no limitation imposed on an employee who desires to terminate his contract of employment under Section 35 and 36 of Employment Act 2007, except that termination is preceded by a written notice, or pay in lieu of notice and that the existing legal framework enables employees to resign, and place themselves beyond the disciplinary authority of their employers. Therefore, the purported summary dismissal effected on 1st August 2019, long after his resignation after the employer-employee relationship had ceased lacked legal effect.

15. Mr. Magata contended that since the appellant had attained the age of 52 years, he was entitled to retire with full benefits as per Clause 18 (2) (b) of the CBA. Counsel faulted the trial court's failure to pay the appellant's retirement benefits, a violation of the appellant's right to dignity and fair labour practices. He submitted that the appellant was entitled to gratuity under Clause 18 (a) of the

CBA and accrued leave of Kshs.32,243.50/-

16. Regarding compensation under Article 23 (3) (e) of the Constitution, counsel prayed for damages in the sum of Kshs. 1,500,000/= to vindicate breach of the appellant's constitutional rights. He cited **County Government Workers**

Union vs. Narok County Government & Another [2021] eKLR, where the ELRC awarded Kshs.1,000,000/= as damages for breach of an employees right to fair labour practices.

17. On costs, Mr. Magata urged this Court to award the appellant costs of the proceedings before the superior court and this Court. He cited the Supreme Court in **Jasbir Singh Rai & 3**

others vs Tarlochan Singh Rai & 4 Others [2014] eKLR in support of the position that costs follow the event.

18. Regarding interests, Mr. Magata maintained that the justification for an award of interest on a liquidated sum (gratuity and leave pay) is, generally speaking, to compensate a party for the deprivation of any money through the wrong act of another. He cited the case of **Prem Lata vs. Peter Musa**

Mbiyu [1965] 1 EA 592 (CAN) in support of the position

that a party who has been deprived of the use of goods or money to

which he is entitled should be compensated for such deprivation by the award of interest.

19. In opposition to the appeal, the Respondent's counsel Mr. Muli submitted on two issues, namely, whether the appellant's retirement from employment is valid and whether the appellant merited the reliefs sought.

20. Regarding the first issue, Mr. Muli maintained that no resignation notice was received by the respondent. He contended that the Respondent only received a letter from Konosi & Company Advocates listing names of employees who allegedly resigned from employment but whose notices they had not received. Mr. Muli argued that the alleged retirement (if at all) was in bad faith since it was meant to defeat the disciplinary process after the delivery of the ruling which allowed for the resumption of disciplinary process against the appellant and to confer a benefit to himself having participated in an unlawful and unprotected strike.

21. Mr. Muli maintained that the appellant's last working day was 25th July 2018, yet he purported to retire close to one year later. Further, there is no evidence that the alleged retirement notice was ever received by the respondent.

Therefore,

upholding the appellant's retirement in the circumstances is tantamount to allowing an employee to commit an offence while in employment, evade a disciplinary process, then retire leaving the employer without a recourse. Counsel cited **Eckla**

Jesang Kirop & 3 Others vs. Kenya Ports Authority [2015] eKLR in support of the position that an employer has an unfettered right to discipline his employees provided that he adheres to the rules of fairness established under the rules of natural justice and the law.

22. It is the respondent's case that the alleged retirement notice was tendered when the appellant was not in active service after he had participated in an unlawful and unprotected strike. Further, the appellant's retirement was necessitated by the dismissal of ELRC Cause No. 1282 of 2018 which the appellant and his colleagues had hoped would shield them from the disciplinary process. Counsel argued that the appellant's retirement notice was dated 30th June 2019 pursuant to which he was to retire on 1st July 2019 without giving any notice to the respondent. Therefore, the authorities cited by the appellant are distinguishable since his retirement was not valid, it was in

bad faith and done to circumvent a lawful

disciplinary process and evade the consequences of his misconduct.

23. Addressing the question whether the appellant merits the reliefs sought, Mr. Muli maintained that the appellant remained out of employment between 25th July 2018 until August 2019 when he was dismissed from employment. Nevertheless, during his employment, he was paid the agreed remuneration, he was provided with a reasonable working condition, his economic and social rights were not in any way violated and during the disciplinary hearing, he was afforded the opportunity to be heard but he opted not to attend the disciplinary proceedings. Therefore, there is no material in support of his claim for compensation under Article 23 (3) (e) of the Constitution, since he failed to demonstrate the respondent's conduct that would amount to unfair labour practice or in any other manner violated the Constitution. Counsel maintained that the issue of Article 23(3) of the Constitution was never raised before the superior court and cited the case of **Wanga & Company Advocates vs. APA Insurance Limited [2014] eKLR** in support of the position that a party should not be allowed to raise a new

point and

put his case in an entirely different way as a matter of law to defeat a successful party who would probably have fought the case differently if the point had been raised before the inferior court.

24. Mr. Muli urged that even if this Court were to find that the claim for payment of gratuity is merited, the non-payment thereof would not amount to violation of the cited Articles of the Constitution since an order for payment of the amount and perhaps interest would return the appellant to the place he would have been in had he been paid.

25. Addressing the claim for salary and allowances, (that is housing allowance), counsel maintained that the respondent was not under obligation to provide the appellant with housing and or guarantee any economic and or social rights especially after cessation of employment whether by retirement or termination.

26. Addressing the claim for gratuity, Mr. Muli submitted that whereas clause 18 (b) (ii) of the CBA allows an employee to retire with full benefits at his election upon attaining 47 years of age, the facts of this case do not point to a retirement as contemplated in the CBA. Instead, this is a case where the

employee retired to escape disciplinary proceedings put in motion due to his acts of gross misconduct and it is absurd that the appellant prays for gratuity from an employer he did not serve for a period of one year prior to the alleged retirement. Therefore, if the claim for gratuity were to be allowed then it would mean that employees can commit misconduct, retire to evade the consequences and proceed to draw a benefit from it. The result would be inequitable and would in effect entrench indiscipline at the place of work.

27. Regarding the pay in lieu of leave in respect of an undisclosed period, Mr. Muli maintained that special damages should be specifically pleaded and that parties are bound by their pleadings and that pleadings should support reliefs sought by a litigant. To buttress his submission counsel cited the case of

David Sironga Ole Tukai vs. Francis Arap Muge & 2

Others [2014] eKLR in support of the position that in an adversarial system such as ours, parties are the ones who set the agenda and courts will not grant a remedy which has not been applied for and that it will not determine issues which the parties have not pleaded.

28. Lastly, on costs and interests, counsel maintained that awarding costs and interests in a case of this nature would perpetuate indiscipline and take away an employer's managerial prerogative of maintaining order and discipline at the work place. Therefore, this Court should decline the appellant's prayer for costs and interest both before the trial court and this Court.

29. This being a first appeal, it is our duty to re-assess the evidence on record and arrive at our own independent conclusions. (See **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212**). However, this Court will not lightly differ from the findings of fact of a trial judge who, unlike us, had the benefit of seeing and hearing the witnesses, and we will only interfere with such findings if they are based on no evidence, or the judge is demonstrably shown to have acted on wrong principles in arriving at the findings. (See **Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278**).

30. From our analysis of the evidence on record, the impugned

judgment, the grounds of appeal, the parties submissions
and the law, we find that this appeal will stand or fall
on the

following issues: (a) whether the appellant's retirement from employment was valid; (b) what reliefs was the appellant entitled to.

31. In order to properly resolve the first issue, it is important to note that *Onyango, J.*'s ruling delivered on 21st June 2019 was to the effect that all the grievants who were represented by the appellant's union were only to be allowed back to work after undertaking the disciplinary processes as contained in the parties CBA and the Employment Act. It is important to stress that this judgment was never appealed against. Therefore, the disciplinary process was backed by the law and a court decision. Therefore, the trial court's finding that the appellant was engaged in an unprotected strike remains unchallenged. Under Section 80 (1) (a) of the LRA, an employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with the Act is deemed to have breached the employee's contract and is liable to disciplinary action. The appellant cannot escape from the confines of this provision and the court decision. Therefore, the appellant had a valid reason to subject the appellant to a disciplinary process as

provided in the CBA and the Employment Act, 2007.

32. The appellant contends that he opted to retire as per his letter dated 30th June 2019. He claims he sought to communicate his decision to the respondent but he was prevented from delivering his retirement notice by the watchmen at the gate prompting him to serve the notice upon the labour officer on 1st July 2019 and to the respondent by courier by a registered mail on the 1st July 2019.

33. It is noteworthy that following the ruling delivered on 21st June 2019, the respondent issued notices dated 1st July 2019 to all the grievants who had participated in the unprotected strike to show cause why they absconded from duty and to answer allegations of malicious damage of the appellant's property. When an employee faces termination due to misconduct, the law requires the employer to provide notice and conduct a fair hearing. The employee has the right to be heard and to present a defense before termination. The foregoing principles are embodied in section 41 (1) and (2) of the Employment Act, 2007. Therefore, by issuing the notice to show cause, the respondent lawfully commenced the disciplinary process. As was held by the Supreme Court of

**India in Union of India vs. K.V. Jankiraman [1991] 4
SCC**

109, it is only when a charge memo is issued to the employee that it can be said a disciplinary proceeding is initiated against the employee.

34. Even if we are to accept the appellant's version that his notice of retirement dated 30th June 2019 was served upon the respondent on 1st July 2019, the notice raises a pertinent question on its validity. The question here is whether an employee seeking to retire, (which is by all means a termination of employment), can wake up and retire without notice to the employer. In our considered opinion, an employee can not escape the disciplinary process by tendering a resignation or a retirement "*with immediate effect.*" There exists nothing like "*resignation with immediate effect*" in the employment context unless the employer waives the notice period. Our reading of the record leaves us with no doubt that the CBA does not provide for retirement without notice nor does it contemplate it. The appellant had not attained the mandatory retirement age such that he could argue his continued being in employment was not tenable. He sought to retire under a provision in the CBA which allowed an employee to retire at 47 years. The provision does not

provide for

automatic retirement to be invoked without notice. It is silent on the question of notice. Where the employment contract is silent on the question of notice to terminate the employment contract, the governing law comes into play. Under the Employment Act, 2007, an employee seeking to terminate his employment must provide notice in accordance with the contract of employment. If the contract does not specify a notice period, the law provides default periods based on the pay circle. (See section 35 of the Employment Act). Therefore, it is our finding that the appellant was mandatorily required to issue a notice to his employer communicating his intention to retire at 47 years. The period of the notice must accord with the pay circle in strict conformity with section 35 of the Employment Act, 2007.

35. We find merit in the respondent's assertion that the purported retirement letter issued one year after the appellant had stopped going to work and served the same day it was to take effect without notice, which happens to be the same day the respondent issued the notice to show cause upon the appellant was geared to evade the disciplinary process. An employee's retirement notice

aimed at evading a disciplinary

process is unacceptable. The key legal principle here is the need to avoid subverting due process. This is because such a retirement notice can be lawfully disregarded if it is a tactic to escape disciplinary proceedings. (See

Supreme Court of

India in Mahanadi Coalfields Ltd. Vs. Rabindranath

Choubey, [2020] 18 SCC 71).

36. In the end, we affirm the trial court's finding that the appellant's purported retirement notice cannot be allowed to evade lawful disciplinary proceedings which is tantamount to sanitizing gross misconduct. Accordingly, we find that the charges against the appellant were issued before his retirement, his subsequent purported retirement without notice was invalid and it did not preclude him from being subjected to the disciplinary hearing. The consequence of the appellant's actions is that he squandered the golden opportunity to defend himself before the disciplinary proceedings. Our finding could have been different had the appellant submitted a valid notice of retirement because an employee cannot be subjected to disciplinary proceedings after the employer-employee relationship has lawfully ceased to exist.

37. Arising from our conclusions arrived at on each and every issue discussed above, we find that the appellant has failed to prove his grounds of appeal highlighted earlier. Therefore, the prayers sought in his memorandum of appeal are unmerited. The upshot of the foregoing is that this appeal is devoid of merit. Accordingly, we dismiss it with costs to the respondent and affirm the trial court's judgment rendered by *Mbaru, J.* on 27th April 2020 in Nakuru Employment and Labour Relations Court (ELRC) Cause No. 58 of 2019. It is so ordered.

Dated and delivered at Nakuru this 21st day of October, 2025.

M. WARSAME

.....
JUDGE OF APPEAL

J. MATIVO

.....
..... **JUDGE OF APPEAL**

M. GACHOKA CARb, FCIArb

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..... **JUDGE OF APPEAL**

*I certify that this is a true copy of the original.
Signed.*

DEPUTY REGISTRAR.