

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E079 OF 2025

SGA SECURITY SOLUTIONS LTD APPELLANT

VERSUS

DAVID MULONGO KASANYA RESPONDENT

**[Being an appeal from the judgment of Hon. J. B. Kalo delivered on 10 April 2025 in
Mombasa CMELRC No. E418 of 2023]**

JUDGMENT

The appeal arises from the judgment delivered on 10 April 2025 in Mombasa CMELRC No. E418 of 2023. The appellant, aggrieved by the judgment, asserts that the learned magistrate erred in finding that there was unfair termination of employment and by holding that the respondent had not attained the retirement age at the time of the end of his employment. The award of Ksh. 154,224.60, being 6 months' salary compensation, was not justified. The award of gratuity at Ksh. 174,716.28 was without merit since the appellant had already paid Ksh. 204,942 as gratuity, and the respondent admitted this.

The respondent's case was that he was employed by the appellant as a night security guard on 1 March 1997, earning a wage of Ksh 25,704.10 per month. He worked until 30 December 2020, when he retired. His work hours were 6 pm to 6 am. On 1 July 2020, the appellant issued the respondent a retirement notice, effective 30 December 2020. The appellant indicated that he was due for retirement at 55 years. At the time the notice was issued, he was 54 years old, having been born on 15 July 1966. His retirement date is 15 July 2021. This resulted in early retirement, and his terminal dues were tabulated at Ksh. 204,942 for the 24 years of service. The respondent claimed the following;

- a) Compensation for 6 months to retirement Ksh. 154,224.60;
- b) Unpaid overtime from 1 March 1997 to December 2020 Ksh. 1,747,296;
- c) Gratuity pay for 24 years Ksh. 174,716.28;
- d) Unpaid allowances during public holidays Ksh. 256,248.96
Less Ksh. 204,942 paid at the end of employment.

In response, the appellant admitted to having employment from 1 March 1997 to 30 December 2020, when the respondent retired. His wage was KSh. 25,704.10 per month. He worked 6 days a week. Through a notice dated 1 July 2020, he was advised of his retirement date, effective 30 December 2020. The notice issued pursuant to the Pensions Act and company policy and hence lawful and justified.

The learned trial magistrate heard the parties and held that there was an unfair termination of employment before the respondent had attained the retirement age of 55 years. There was the ward of;

- a) 6 months' salary compensation Ksh.154,224.60;
- b) Gratuity pay Ksh.174,716.28;
- c) Costs and interests.

On appeal, the appellant submitted that the respondent retired lawfully and received his terminal dues. Under section 45(2) of the Employment Act, there was no case of unfair termination of employment as alleged. Notice issued for 6 months for retirement at 55 years. Having been born in 1966, the notice to retire on 30 December 2020 was procedural.

Under the Regulation of Wages (Protective Security Services) Order, the company policy on the retirement age applies to all employees. Regulation 17(2) allows retirement at 55 years. Born in 1966, the respondent turned 55 years old in January 2021. In the case of **Kenneth Onialo v Majilis Resort Lamu t/a Majilis Ltd [2020] eKLR**, the court held that under section 35 of the Employment Act, the employee should have been issued with notice before termination of his employment due to attaining the retirement age.

The appellant submitted that the trial court failed to address the facts and made double allocations for compensation after the respondent had been correctly retired, and also awarded gratuity that had already been paid.

There are no submissions by the respondent.

Determination

The respondent's case was that he had retired six months early. He was born on 15 July 1966, and will turn 55 on 15 July 2021. The notice dated 15 July 2020, retiring him effective 30 December 2020, was premature by 6 months.

The appellant's case was that, under the Pensions Act and the company's policy, the respondent was due to retire in 2020, and notice was issued accordingly. He was paid his terminal dues, and the claims made are without merit.

The long practice in government and its agencies is to retire at 55 years under the Pensions Act unless this is enhanced through government policy, as held in **Teachers Service Commission v Henry Kamau Ngari & another [2020] KECA 217 (KLR)**.

Through government policy, the retirement age has been enhanced to 60 years or 65 years for persons registered and having a disability under the Persons with Disabilities Act.

However, the law on employment relations in Kenya does not provide for a mandatory retirement age for employees in the private sector. The retirement age is only fixed for public sector employees under sections 80 and 81 of the Public Service Commission Act, as read with regulations 70 and 71 of the Public Service Commission Regulations, 2020, and Article 167 of the Constitution.

In the case of **Nduru v Avenue Service Station Ltd (Employment and Labour Relations Cause 839 of 2018) [2025] KEELRC**, the court held that;

... if parties to an employment contract in the private sector wish to fix a retirement age for the employee, they ought to do so expressly either in the contract instrument

or in the applicable Human Resource Manual. However, if they omit to speak to the matter in either of the instruments above, the court will look at their conduct to infer if they had an implied agreement as regards the retirement age.

This position is reiterated in the case of **Robert Kithinji Kiugu v AAA Growers Limited [2019]eKLR** and **Steel Makers Limited v Joshua Nzuki [2016]eKLR**.

In this case, the applicant has not filed the employment contract defining the retirement age. There is no company policy addressing the requisite retirement age for the night guards.

The appellant does not contest that the respondent was born on 15 July 1966 and was due to attain the age of 55 in July 2021. The policy applied to other night guards employed by the appellant is not discussed.

The submissions by the appellant that under the Regulation of Wages (Protective Security Services) Order allow for retirement at 55 years are correct. However, there is no record that the respondent was on the board in January 1966. His assertion that his date of birth is 15 July 1966 is not challenged.

Simple arithmetic would place the respondent at 55 years old on 15 July 2021.

The learned magistrate analyzed the facts and the law and correctly held that there was an early retirement of the respondent through notice dated 15 July 2020. The respondent was ready and willing to serve until the age of 55, ending on 15 July 2021. He was denied a fair chance to earn a living, and the award of 6 months' pay is hereby found justified, save that it ought to reflect the 6 months period he was not allowed to serve before retirement.

On the claim for unpaid overtime and work during public holidays, indeed, these claims were not particularized. The general claim for overtime for 24 years is pure exaggeration. In **WKR v Timaflo Limited [2025] KEELRC 97 (KLR)** and **Kenya Union of Commercial, Food and Allied Workers v Magunas Supermarket Limited [2025] KEELRC 251 (KLR)** the court held that where an employee makes exaggerated claims, these should be declined.

Further, where the alleged claims accrued daily, weekly or monthly, these should be claimed in the context of continuing injury under section 90 of the Act. Claims such as overtime or work during public holidays have been defined as continuing injury. Waiting 24 years to make such claims renders them time-barred.

In this regard, the public holidays are without particulars. These are declined. The learned magistrate well addressed these claims and arrived at a correct finding.

On the claim for gratuity, unlike other sectors, in the protective industry, the Regulation of Wages (Protective Security Services) Order cited by the appellant allows for payment of gratuity at the end of employment. Shall apply a rate of 15 days' pay for every full year worked.

The respondent worked from March 1997 to December 2020, a period of 23 full years, at the last gross wage of basic pay and house allowance at Ksh. 15,142 for 23 years, based on 15 days each, the due gratuity pay is Ksh. 174,133.

There is an admission that the respondent has already been paid the sum of KSh 204. 942 in terminal dues.

Accordingly, the appeal analyzed above, judgment in Mombasa CMELRC No. E418 of 2023 is confirmed to the extent that;

- a) 6 months' pay in Compensation is Ksh. 154,244.60;**
- d) Gratuity pay Ksh.174,133;**
- b) The payments (a) and (b) above to be paid less what is received at Ksh.204,942;**
- e) Costs as awarded by the trial court, for the appeal, each party to bear its costs.**

Delivered in open court at Mombasa, this 2nd day of October 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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