



**Kenya Power and Lighting Company v Osiro (Civil Appeal  
E595 of 2022) [2024] KECA 854 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KECA 854 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E595 OF 2022  
P NYAMWEYA, A ALI-ARONI & JM MATIVO, JJA  
JULY 12, 2024**

**BETWEEN**

**THE KENYA POWER AND LIGHTING COMPANY ..... APPELLANT**

**AND**

**TOM FRANX MZALIWA OSIRO ..... RESPONDENT**

*(An appeal from the Judgment and Decree of the Employment and Labour Relations Court  
at Nairobi (Makau, J.) delivered on 19th November 2021 in ELRC Cause No. 1938 of 2017)*

**JUDGMENT**

1. This is an appeal arising from the judgment of the Employment and Labour Relations Court at Nairobi (Makau, J) delivered at Nairobi on 19<sup>th</sup> November 2021, in Cause No. 1938 of 2017, Tom Franx Mzaliwa Osiro vs. The Kenya Power and Lighting Company.
2. The respondent in this appeal filed a memorandum of claim dated 25<sup>th</sup> September 2017 in the Employment and Labour Relations Court citing unlawful and illegal termination of his employment with the appellant, without dues, and benefits payable. He sought a declaration that the termination without benefits was wrongful, unfair, and discriminatory; payment of 2 month's salary for each year served amounting to a total of Kshs. 21,966,195, and 3 months' salary in lieu of notice Kshs. 1,136,182.50, all totaling to Kshs. 23,102,377.50.
3. In its response to the claim dated 28<sup>th</sup> May 2019, the appellant denied that it had unlawfully and illegally terminated the respondent's employment, contending that the respondent had requested an early retirement, which the appellant accepted. Further, the appellant denied the allegation that it failed to pay the appellant dues and benefits he was entitled to. The appellant argued that it paid the respondent 3 months' salary in lieu of notice and informed him how he was to access his interest in the Retirement Benefits Scheme.



4. To contextualize the dispute, we shall briefly set out the facts of the case. The respondent was employed by the appellant on the 1<sup>st</sup> of January 1988 as a Technician Grade II and initially deployed to the Kindaruma Power Station, to deal with power station maintenance. He worked at that station for two years and was transferred to various other stations in his 29 years of service. His last station of work was Maralal in Samburu where he was transferred vide a letter dated 30/3/2017 requiring him to report on 1/4/2017, and where he worked until the 2<sup>nd</sup> September 2017. From the record, it appears that the respondent was not happy with the transfer to Maralal which he thought was too remote, insecure, with very high temperatures, and very far from his home.  
  
He narrated to the court that on reporting he realized that there was no job for a manager and he deemed the transfer as demotion. He was also of the view that his health condition could not allow him to stay and work there. After what appeared to be a soul-searching exercise, the respondent wrote to the appellant requesting an early retirement in a letter dated 2<sup>nd</sup> of June, 2017 citing medical grounds, changed job content, and changing economy and operations of the company. In the said letter, he requested to be retired with full benefits under Part VI of the Human Resource and Administration Division - Staff Regulations and Procedures Manual 1999 (Staff Manual 1999).
5. In a letter dated 13<sup>th</sup> of July 2017 the appellant responded to the respondent's, accepting the early retirement request. The letter enumerated the liabilities of the respondent to the company amounting to Kshs. 1,775,251.85 and sought to know how the respondent intended to settle the same. Further, the respondent was informed that his interest in the Retirement Benefits Scheme will be advised to him under a separate cover.
6. The hearing in the trial court proceeded by way of viva voce evidence. The respondent adopted his statement dated 26<sup>th</sup> April 2017 where he at length enumerated the various places he served while in employment. He informed the court that his first posting was to Kindaruma Power Station for two years, Isiolo from 1990 to 1992, Turkwel between 1992 and 1994. Between 1994 and 1998, he was deployed to Thika, from 1998 to 2001 Nairobi CBD. He was subsequently posted to North Rift from 2004 to 2012, and from 2012 to 2015 he was transferred to Mombasa and back to Nairobi from 2015 to 1<sup>st</sup> April 2017. Before he was transferred to Maralal.
7. In addition, the respondent stated that in the course of his duties, he encountered a lot of difficulties and made several sacrifices. Upon his transfer to Mombasa, he wrote a complaint letter requesting a re-transfer on account of health, without any success, and after his term in Mombasa ended he was transferred to Nairobi briefly and before the 3 years ended he was re-directed to Maralal in Samburu County, a remote, hot area far from home where there was no befitting job for him and he deemed the transfer to be a demotion. Further, his health conditions could not allow him to work in the Samburu climate.
8. He stated further that with the working conditions, he decided to request an early retirement guided by the staff regulation. He contended that the response from the appellant was wrong as it amounted to unlawfully dismissing him. He was denied access to the appellant's premises and removed from the system and the appellant failed to process his dues. He wrote to the appellant seeking clarification but his letters were not responded to, leading to the claim before the court. He attributed his termination to his illness which in itself was discriminatory and hence unlawful and unconstitutional.
9. He further asserted that since his retirement was for personal and compassionate reasons he ought to have been paid Kshs. 23,000,000 which the appellant has refused to pay though it had accepted his request. In cross-examination, the respondent claimed that he sought to be paid under the redundancy



- clause as he had received communication that he had been declared redundant. He admitted that the appellant in its reply did not state that he would be paid benefits under the redundancy clause.
10. The appellant's case was based on the statement dated 28<sup>th</sup> May 2019 of Anne Kwambai, a Human Resource Officer with the appellant and who was conversant with the facts of the case. The respondent was employed on 1<sup>st</sup> January 1988 and worked in various places. Further, in 2012 the respondent was transferred to the Coast in the Marketing & Customer Relations Department where he worked until 2015. On 30<sup>th</sup> May 2014, the claimant wrote raising concerns that his stay in Mombasa was unfavorable, as he needed to be close to his family and children who were then adolescents and needed his attention; his projects at home had stalled and the weather in Mombasa impacted on his health. The appellant's view was that the complaint did not raise any serious issues warranting an immediate transfer as the appellant was guided by its Staff Manual 1999 which outlines the transfer policy. Further, the respondent had already served in Mombasa for two years which was 1 year short of the recommended 3 years, and he had also failed to provide a medical report from the company's doctor recommending urgent attention.
  11. The witness confirmed that the respondent was issued with a letter of transfer on 27<sup>th</sup> August 2015 to Nairobi where he was to report on 1<sup>st</sup> September 2015 and that on 30<sup>th</sup> March 2017, he was transferred to Maralal and re-designated from 1<sup>st</sup> Assistant Superintendent to Senior Marketing Officer on salary scale M008 where he worked until 2<sup>nd</sup> June 2017, when he sent a letter requesting for an early retirement which was approved in the company's response dated 13<sup>th</sup> July 2017.
  12. In cross-examination she said that an employee leaving the company is entitled to terminal dues. The claimant was entitled to benefits which were to be calculated by a different department. Further, as a Human Resource officer, she had no reason to decline the retirement sought by the respondent. On redundancy, she contended that an employee cannot declare himself redundant. Further, there is a difference between an employee who retires and one who is declared redundant in terms of benefits payable.
  13. In determining the matter, the trial court crafted two issues for determination as follows;
    - i. Whether the claimant voluntarily retired from his employment or was constructively dismissed by the respondent.
    - ii. Whether the claimant is entitled to the orders sought for.
  14. On the 1<sup>st</sup> issue the trial court found that the respondent's transfer to Maralal before the lapse of 3 years was discriminatory and contrary to staff regulations. Further, there was no work of a manager in Maralal; the respondent spent more time reading newspapers or doing tasks that he was supposed to supervise making him feel that the transfer was a demotion leading to his request for early retirement. The court was further of the view that the respondent was willing to work but for the employer's hostility towards him by posting him to stations with a harsh climate, without ascertaining the respondent's medical conditions thus agreeing with the respondent that the early retirement was not voluntary but as a result of the hostile conditions created by the employer.
  15. The trial court further agreed with the respondent's contention that his request for retirement was not fairly handled. The court was of the view that since the appellant accepted the request for early retirement, the deal was sealed making a finding that the respondent's exit from the company was not a dismissal but an early retirement such that the respondent was to be paid the entire package due to all early retirees under the Staff Manual, 1999. The court further observed that no explanation was given as to why the respondent was not paid the entire retirement package.



16. In the end the trial court was of the opinion that failing to pay the respondent the entire early retirement package was wrongful, unfair, and discriminatory. The court awarded the respondent 15 days' salary for 29 years of service based on a salary of Kshs. 378,727.50 by a maximum of 26 working days in a month which totaled to Kshs. 6,336,210.
17. Aggrieved by the judgment the appellant preferred this appeal on grounds that; -
  - i. The learned judge erred in law in misconceiving and misapplying the provisions of the *Employment Act*, 2007 in so far as the same relates to the duties of an employer.
  - ii. The learned judge erred in law in misconceiving and misapplying the principle of discrimination as conceived under Section 5 of the *Employment Act*, 2007.
  - iii. The learned judge erred in law in fact in conflating the provisions of the Staff Regulations Procedures Manual, 1999 on promotion and redundancy.
  - iv. The learned judge erred in law in delivering a judgment that is incoherent, contradictory, and inconsistent.
  - v. The learned Judge erred in law and fact in arriving at findings that were not supported by evidence.
18. The matter before us proceeded on the Go-To virtual meeting platform by way of oral and written submissions. The appellant's counsel filed submissions dated 22<sup>nd</sup> February 2024. On the first ground learned counsel submitted that the trial court made an erroneous finding that the employer was under a duty to ascertain the employee's condition before effecting a transfer. Neither the provisions of the *Employment Act* nor the appellant's Staff Manual 1999 impose such an obligation on the employer. Neither is there evidence that the respondent objected to his transfer to Maralal on medical grounds nor was the evidence that the respondent had previously worked in areas with adverse temperature controverted.
19. On the second ground, learned counsel argued that discrimination must be specifically pleaded. Further, no evidence was placed before the court in support of the allegation, and the trial court misconceived the provisions of section 5 of the *Employment Act*, 2007 on discrimination. In support of this assertion learned counsel relied on the case of *OI Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] e KLR and *Package Insurance Brokers Ltd vs. Simon Gitau Gichuru* [2019] eKLR.
20. Further it was submitted that the learned judge misapplied the provisions of the Staff Manual 1999 in awarding the respondent Kshs. 6,336,727.50, by erroneously referring to Part IV of the said manual, yet the case did not fall under promotion or redundancy. In addition, learned counsel contended that the judgment was incoherent and self-defeating; in that the learned judge in paragraphs 44 and 45 of the impugned judgment was convinced that the respondent was not declared redundant but proceeded to make an award of Kshs. 6,336,727.50 under the head of redundancy; the two positions are conflicting and untenable, therefore warranting this Court's interference.
21. Learned counsel for the respondent filed submissions dated 19<sup>th</sup> of April 2023 affirming the trial court's decision as relates to the duties of an employer. Learned counsel contended that the finding of the trial court that the appellant transferred the respondent to stations with harsh climatic conditions, without ascertaining his health conditions should be read with the judge's findings that the respondent was transferred to Maralal without having completed three years in Nairobi.
22. Further learned counsel contended that the appellant having accepted the respondent's request for early retirement ought to have been paid by the Terms of Payment Option I & II as this was the



designated package for early retirees under the Staff Manual 1999 Part VI. In support of this argument learned counsel relied on the case of Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers vs. M.P. Shah Hospital [2018] eKLR a case that considered the ILO Convention recommending retirement at 60 years and early retirement between 50-60 years subject to the nature of work, as well as the medical and physical capacity of an employee, meaning that the trial judge did not misapply the provisions of the Staff Manual 1999 which provided that an employee aged 50 and above may retire early and it gives two retirement options. That in awarding the respondent Kshs. 6,336,210 the trial court did not err.

23. Learned counsel further submitted that parties are bound by contracts they freely and consciously enter into. To propound this argument learned counsel relied on the case of Tom Ukiru Kamaliki vs. Centres for International Programs Kenya [2021] eKLR which quoted the case of *National Water Conservation & Pipeline Corporation vs. Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014* (UR) where this Court held that a court cannot re-write a contract entered into freely by parties; that the court should seek to give meaning where an issue arises on the same.

24. This is a first appeal and we are required to consider the evidence afresh, analyze, and re-assess the same to reach our independent conclusion. This is the approach of the court as stated in the case of *Selle vs. Associated Motor Boat Co.* [1968] EA:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

25. Having considered the record, the rival submissions filed by respective parties, authorities cited and the law, we are of the view that there are two issues for consideration as follows: -

- i. Whether the respondent applied for an early retirement;
- ii. Whether the respondent is entitled to be paid dues under the early retirement arrangement.

26. It is on record, that the respondent was employed as a Technician Grade II on the 1<sup>st</sup> of January 1988 and rose through the ranks so that at retirement on or about the 2<sup>nd</sup> of July, 2017 he had worked for the appellant for 29 years in various places in the country. In evidence also is that the respondent was unhappy during the 2<sup>nd</sup> year term in Mombasa and sought a transfer based on a host of reasons including health reasons. It is also on record that the appellant did not find his reasons plausible and more so because no medical report of a company doctor as required by the staff manual was made available.

27. After his three-year stint in Mombasa the respondent was transferred to Nairobi in 2015 and after a two-year stay, he was re-designated as Manager Sales and transferred to Maralal in Samburu County. The appellant’s Staff Manual 1999 provided as follows on the transfer policy:

“An employee should have served in one station for at least three years before being transferred to another station, except where there are justifiable business reasons to effect the transfer.

No employee should serve in a gazette hardship station for a period exceeding three years, except where an employee prefers to continue staying in the station. Sympathetic considerations will be given to staff



requesting to be transferred on compassionate grounds like joining their families; especially where there is a staff of equivalent grade willing to cross-transfer with him/her. However, costs for such transfers will not be borne by the company. Staff recommended by company appointed doctors to be transferred out of station on medical grounds shall be transferred at the company's expense.”

28. From the above-quoted extract from the Staff Manual of 1999, two things emerge for consideration concerning the relationship between the appellant and the respondent. Firstly, the respondent worked in Mombasa for two years and sought a transfer inter alia due to health concerns and because he wanted to oversee his adolescent children's growth. Evidence on record indicates that the appellant did not find the grounds serious especially because the respondent did not provide any medical evidence in support of his health claim and that he had one more year to complete his term in Mombasa.
29. In our view when applying for consideration based on compassionate grounds, one should appreciate that this consideration is discretionary. We do not think that the appellant can be faulted for declining the Mombasa transfer. We find that the reasons given are reasonable more so in the absence of a medical report having been placed before it, in the manner suggested in the manual. We do not think either that Mombasa can be classified as a county with harsh climatic conditions and this may have informed the decision by the appellant in the absence of a medical report.
30. The respondent accepted the re-assignment of his job and the transfer to Maralal where he worked there for two years. Further, there was no medical report indicating the respondent's deteriorating health, or evidence to show that the respondent was treated differently compared to his fellow employees, and therefore the complaint based on discrimination cannot be sustained.
31. The appellant is a government agency providing services all over Kenya. The staff manual is clear that one may be re-considered for transfer from an undesired place if there is a medical report supporting a claim or on compassionate grounds. In any event, the respondent did not plead particulars of discrimination and we fault the trial court for having come up with an issue based on discrimination, determined the same, and made a finding.
32. The next question for consideration is whether the respondent's employment was terminated by way of actual or constructive dismissal. It is common ground that the respondent was not happy working in Maralal and wrote to the appellant on 2<sup>nd</sup> June 2017 requesting an early retirement. His letter stated:

“Subject: Early Retirement

Dear Sir,

I wish to earnestly register my application for early retirement. The early retirement request is attributed to the following factors:

1. Medical grounds.
2. Changed job content; and
3. Changing economic and operational environment of the company; which evidently appears to be adversely affecting both the organization and me; at the same time.

Accordingly, I submit that I should be favoured with the full benefits of Part VI – Redundancy (existing subject company policy) as illustrates at General No 1 to No 4b Senior Standard; where, item (IV) accurately applies. You might, as well notice that I am perfectly affected by conditions 1 & 2 explained under Employees of 50 years or above....”



33. By a letter dated 13<sup>th</sup> July 2017 the appellant responded to the respondent's early retirement letter as follows:

“ .....

RE: Early Retirement

We are in receipt of your letter dated 2<sup>nd</sup> June 2017 on the above subject.

Kindly note that your request for early retirement has been accepted. By a copy of this letter the paymaster is advised to pay your salary up to and including 2<sup>nd</sup> September 2017.

Please note that you owe the company the following liability:

Car loan 1,736,617.72

Domestic appliance loan 35,548.63

Employee sales 1,300.00

Medical excess loan 2,497.50

Safari advances 288.00

Total 1,776,251.85

Please let us know how you intend to settle your liabilities of Kshs. 1,776,251.85.

As regards your interest in the Retirement Benefit Scheme you will be advised under a separate cover and for this purpose, forward your future contact address and a copy of your bank account to the Trustee Secretary Kenya Power Pension Fund. A bank clearance form is attached....” (Emphasis added)

34. We have deliberately outlined verbatim, the letters exchanged between the parties. The respondent requested to be considered for early retirement under the Redundancy Clause that equally deals with a sub-clause on early retirement for those of 50 years and above and who wish to exit under the said clause. The appellant accepted the resignation and has complied with 2 out of the 3 conditions under the early retirement sub-clause. The respondent was to be paid three months in lieu of notice and he was referred to the Pension Scheme Fund for his retirement benefits. The appellant has however been silent on condition 3. Part VI of the Staff Manual 1999, deals with Redundancy where there is a sub-heading “employee of 50 years and above”. The subheading appears misplaced and confusing under the heading of redundancy but nonetheless, it deals with the issue at hand and states:

“Employee from 50 years and above may retire early on the following conditions:

1. For the purposes of facilitating improvement of the organization of the department to which he belongs, by which greater efficiency of economy may be affected.
2. Abolition of office.

### **Terms Of Payment Option I**

1. Notice payment of three months last gross pay (basic salary plus house allowance).
2. Pension at current age plus lump sum payment.
3. 15 days' salary for every year worked. OPTION II



1. Notice payment of three months last gross salary (basic salary plus house allowance).
  2. Refund of both employee's and employer's contributions plus accrued interest.
  3. 15 days' salary for every year worked."
35. Notable is that the respondent became ambitious in his claim and wanted to be paid as if he were declared redundant. Evidence is clear that he was not declared redundant and his claim based on redundancy has no basis. On the other hand, the appellant has chosen what to pay of the benefits payable upon early retirement which is contrary to the Staff Manual 1999 and therefore unlawful.

In the case of *National Water Conservation vs. Jayne Kanini Mwanza, Civil Appeal No. 178 of 2014* (UR) this Court stated as follows:

"The general principle, as we understand it, is that a fixed-term contract will terminate on the sunset date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise." (Emphasis added)

In *Pius Kimaiyo Langat vs. Bank of Kenya Ltd* [2017] eKLR the court equally dealt with the issue by stating as follows:

"We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

36. Having found that the Staff Manual provides for early retirement, we are of the view that the two letters dated 2<sup>nd</sup> June 2017 and 13<sup>th</sup> July 2017 were a request for early retirement and an acceptance respectively. In its judgment, the trial court in Paragraph 46 and 47 stated as follows in this regard:

46. When the Respondent accepted the claimant's request for an early retirement it was bound under the law and its Human Resource Staff Regulations and Procedure to pay him the entire package due to all early retirees under the Staff Regulations. Part IV of the Staff Regulations and Procedure Provides that an employee may take an early retirement provided that he has attained the age of 50....'

47. It is not in dispute that the claimant met the minimum requirement for an early retirement and that is why the employer accepted his request. He was 53 years and had worked for 29 years before retirement. The Respondent paid the claimant the three months' salary on the 1<sup>st</sup> December, 2017 as evidenced in the Claimant Bank Statement, and further directed him to pursue his pension from the Pension Scheme. However, the Respondent did not pay the claimant the other retirement benefit of 15 days' salary for every year worked as provided for in its Staff Regulations and Procedure."

37. The trial court further observed that the appellant did not place before its reasons for non-payment. The court went further to observe that the respondent was earning Kshs. 378,727 at the time he retired and ought to have been awarded 15 days of the 29 years worked.

38. We are in total agreement on this score and do not fault the trial court in making a finding that the respondent was denied part of his entitlement and that the entire package of early retirement had to be



fulfilled. An obligation was placed on the appellant once it accepted the early retirement request and it ought not to have picked and paid what suited it.

39. We are however of the view that the sum payable as condition 3 of both options is 15 days' salary and for the entire 29 years of the respondent's employment. Employees who are on permanent terms are paid for all days of the month including their rest days so that a salary is computed for a whole month and not working days. As such 15 days' salary of the monthly pay of Kshs. 378,727.50 amounts to approximately Kshs. 183,255.24. When multiplied by the 29 years worked, the amount payable to the respondent would have amounted to a total of Kshs. 5,324,402.

40. In the end, we accordingly order as follows:

- a. The award of Kshs. 6,366,210 made by the Employment and Labour Relations Court at Nairobi (Makau, J) in the judgment on 19th November 2021 in Cause No. 1938 of 2017 is hereby substituted with an award of Kshs. 5,314,402 subject to any liabilities due and payable to the appellant.
- b. The appeal is dismissed on all other grounds.
- c. The costs of the appeal to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY, 2024.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**ALI-ARONI**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

***SIGNED***

**DEPUTY REGISTRAR**

