



Kibet v Clerk (Civil Appeal 261 of 2015) [2021] KECA 280 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 280 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 261 OF 2015
RN NAMBUYE, MSA MAKHANDIA & KI LAIBUTA, JJA
DECEMBER 3, 2021

BETWEEN

JACINTA KIBET APPELLANT

AND

**WEST POKOT COUNTY FORMERLY COUNTY COUNCIL OF POKOT 'THRO'
ITS COUNTY CLERK RESPONDENT**

*(An appeal from the Judgment and Orders of the Employment & Labour
Relations Court of Kenya at Nakuru (Stephen Radido, J) dated 31st day of
October, 2014 in Nakuru Employment & Labour Relations Case No. 227 of 2013)*

JUDGMENT

Background

1. This appeal arises from the judgment and decree of Radido J delivered on 31st October 2014 in Nakuru ELRC Case No. 227 of 2013 in which the appellant, Jacinta Kibet had sued the respondent, West Pokot County (formerly County Council of Pokot) seeking judgment for –
 - a. a declaration that the appellant was discriminated against by the respondent and was thereby unfairly, prematurely and wrongfully retired;
 - b. an order reinstating the appellant to employment to complete her full term of employment;
 - c. compensation for premature and unlawful retirement;
 - d. in the alternative, payment of all the lawful terminal benefits, including –
 - i. payment in lieu of notice;
 - ii. payment of 5 years of service to retirement;



- iii. leave allowance for 2007 – 2012;
 - iv. refund of moneys deducted from the appellant’s salary but not remitted to the superannuation fund;
 - v. salary arrears owed to the appellant by the respondent;
 - vi. damages;
 - e. cost of the suit and interest thereon; and
 - f. interest on the sums awarded at court rates.
- 2. The respondent filed its defence and denied the appellant’s claim, contending that the appellant’s retirement was proper and lawful. It prayed that the appellant’s suit be dismissed with costs and interest thereon.
- 3. The suit proceeded to plenary hearing at the conclusion of which Radido J delivered his judgment on 31st October 2014 holding that the appellant’s retirement was premature and unlawful. However, the learned Judge dismissed the appellant’s claim for reinstatement, compensation for premature and unlawful retirement, payment of 5 years of service to retirement, leave allowance from 2007-2012, refund of moneys deducted and not remitted to the superannuation fund and salary arrears, but awarded the appellant –
 - a. 6 months salary in lieu of notice;
 - b. The equivalent of 6 months wages as damages for unlawful retirement; and
 - c. Costs of the suit.
- 4. Aggrieved by the decision, the appellant filed this appeal praying that –
 - a. This appeal be allowed;
 - b. The judgment and orders of the ELRC dated 31st October 2014 in ELRC Cause No. 227 of 2013 be set aside, varied or reviewed;
 - c. The appellant be awarded the prayers relating to her claim for damages, reinstatement, compensation for premature and unlawful retirement, payment of 5 years of service to retirement, leave allowance from 2007-2012, refund of moneys deducted but not remitted to the superannuation fund, and salary arrears; and
 - d. That costs of the appeal be awarded to the appellant.

The Parties

- 5. The Appellant was at all material times working for gain as an employee of the respondent, the West Pokot County Government (the successor to the now defunct County Council of West Pokot),

Dispute and Judgment of the Superior Court

- 6. The appellant was employed by the respondent (formerly the County Council of West Pokot) as a typist on 22nd February 1972 at a salary of £330 per annum in the scale of £330 x 30-£570 with the incremental date being 1st January 1973.



7. The appellant continued in service of the respondent until retirement on 22nd January 2007 as notified by the respondent vide its letter of the same date on account of having allegedly attained the retirement age. In its letter, the respondent cited the then Ministry of Local Government's Permanent Secretary's letter Ref. No. MLG/308-92/ty dated 12th January 2007 and the PLGO Ref. No. 1118/111 dated 4th January 2007, and a letter Ref. No. 1118/111/157 dated 15th January 2007. The issue of the appellant's age on which her early retirement was based had been raised in a letter dated 11th January 2007 from the Ministry of State for Immigration and Registration of Persons and addressed to the Permanent Secretary, Ministry of Local Government, stating the appellant's date of birth as 15th February 1949, which she disputed vide her letter dated 26th January 2007.
8. By a letter dated 23rd April 2007, the Permanent Secretary in the Ministry of Local Government addressed to the appellant through the County Clerk of the County Council of Pokot had this to say:

“Whereas, you disputed your retirement on age grounds as premature, it has been established by the Principal Registrar of Persons that, your date of birth is 15th February 1959. Going by the said records, your age is beyond the mandatory retirement age for civil servants and should have been retired two years earlier. The County Clerk was therefore right in retiring you.”
9. Following her retirement with effect from 27th January 2007, the appellant reported her grievance to the Ministry of Labour and Human Resource sometime in 2007. After investigations, the Ministry issued its final report on 28th June 2012 by way of Certificate of Disagreement to the effect that the Appellant had attained retirement age, leaving the appellant with no option but to lodge a claim in the trial court for the reliefs specified above.
10. Having heard the appellant and the respondent, and having considered submissions by respective counsel, the learned Judge as already stated dismissed the appellant's claim for reinstatement, compensation for premature and unlawful retirement, payment of 5 years of service to retirement, leave allowance from 2007-2012, refund of moneys deducted and not remitted to the superannuation fund, and salary arrears, but awarded the appellant 6 months salary in lieu of notice, the equivalent of 6 months wages as damages for unlawful retirement, and costs of the suit.
11. Aggrieved by the decision of Radido J, the appellant instituted this appeal on 5 grounds, which we need not reproduce in full here. However, we take the liberty to summarise and reframe them, that the learned Judge –
 - a. erred in holding that the termination of the appellant's employment was lawful but unfair contrary to the evidence adduced before the court and the provisions of section 45 of the *Employment Act*;
 - b. erred in dismissing the appellant's claim relating to the heads specified above without considering the merits thereof, and without giving reasons for dismissal; and
 - c. failed to appreciate the law and guiding principles relating to award of damages in the nature of those claimed by the appellant.
12. On these grounds, the appellant requests this Court to allow this appeal with costs to the appellant, and set aside the judgment and decree of the Radido J aforesaid.

Appeal, Submissions by Counsel and Findings



13. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on our findings on the following issues of law and fact in respect of which learned counsel filed written submissions:
 - a. Was the appellant retired prematurely and, if so, did such retirement amount to unlawful or unfair dismissal?
 - b. If the answer to (a) is in the affirmative, what relief was available under statute and common law?
14. We need to point out at the onset that this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter.
15. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123.
16. In *Selle's* case (*ibid*), the Court held:

“An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Premature Retirement

17. Learned counsel for the appellant and for the respondent adopted their written submissions in the trial court and drew our attention to the relevant pages and paragraphs in the record of appeal relating to the appellant’s date of birth and retirement. The evidence on the record suggests that the appellant was born sometime in 1954. In her examination-in-chief, she exhibited her national Identity Card (“ID”) that bears the date of birth as 00 00 1954. Which, in the absence of a Certificate of Birth, was the only documentary evidence of her year of birth relayed on the proceedings. Except for the year 1954, the month and date of birth are unascertainable. On the weight of the ID Card, and in the absence of a Certificate of Birth, the learned Judge was correct in making a finding of fact that the appellant was born in 1954 and should have retired in 2009 or thereabouts on attaining the age of retirement then set at 55 years. In our considered view, the appellant’s ID Card supersedes the information contained in the letter dated 11th January 2007 from the Ministry of State for Immigration and Registration of Persons and addressed to the Permanent Secretary, Ministry of Local Government, stating the appellant’s date of birth as 15th February 1949. Accordingly, we find nothing to fault the learned Judge’s holding that the appellant’s retirement was premature and, therefore, wrongful and unfair. The only issue remaining for our consideration is what relief ought to have been awarded by the trial court.

Available Relief under Statute and Common Law

18. Having found, as the trial court did, that the appellant’s retirement was premature, we turn to the propriety of the various heads of relief sought by her in the trial court and in this appeal. First among



the prayers rejected by the learned Judge was her prayer for reinstatement. Section 49(4)(a) to (m) of the *Employment Act*, 2007 gives a host of remedies that the court can give in case of unlawful and unfair termination, among them is reinstatement.

19. With regard to when it is practical to order reinstatement, the court in *New Zealand Educational Institute v Board of Trustees of Oakland Normal Intermediate School 16* [1994] 2 ERNZ p.414 (CA) stated that

“whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.”

20. The appellant’s case is one in which reinstatement would be inappropriate and impracticable. Born in 1954, the appellant was 60 years of age in 2014 when the learned Judge dismissed her claim for reinstatement. She comes on appeal seeking the same relief at the age of 67. Even if the circumstances of her case made it practicable to grant her wish to be reinstated, it would not be at her age. In the circumstances, we find that the learned Judge correctly dismissed her claim on this account. That leaves us with the relief for compensation or damages sought in the trial court and on appeal to this Court.
21. In her appeal, the appellant seeks compensation for premature and unlawful retirement. In the alternative, she prays for, among others, payment of “... all the lawful terminal benefits,” including payment of salary in lieu of notice. On this head alone, the learned Judge awarded the appellant 6 months salary in lieu of notice together with an equivalent of 6 months wages as damages for unlawful retirement. In our considered judgment, this was adequate compensation for premature retirement, which was tantamount to unfair dismissal without notice. Moreover, her retirement benefits remained recoverable under the contributory superannuation fund, and any sums deducted but not remitted to the fund were recoverable. There being nothing on record to ascertain how much had been withheld on this account, we make no finding in that regard. The same applies to the alleged salary arrears, if any remained unpaid as at the date of retirement.
22. Finally, the appellants claim for what she terms as “payment of 5 years of service to retirement” and “leave allowance for 2007 – 2012” are unfounded. We fail to see how leave allowance would become due and payable subsequent to termination of an employee’s service as was the case here. Neither is “payment of 5 years service to retirement” (usually computed at 15 days pay for each year of service) recoverable after termination of the appellant’s employment. Those claims fail. That settles the remaining issue. In conclusion:

- (a) with the exception of the sums awarded by the trial court, we find that the appellant’s appeal fails and the same is hereby dismissed;
- (b) the judgment and orders of the Employment & Labour Relations Court of Kenya at Nakuru (Radido, J) dated 31st day of October, 2014 be and is hereby upheld;
- (c) the parties do bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021



R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

