



**Mini Bakeries (Nairobi) Limited v Ramadhan (Appeal E074 of 2024)
[2025] KEELRC 578 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 578 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E074 OF 2024
JK GAKERI, J
FEBRUARY 27, 2025**

BETWEEN

MINI BAKERIES (NAIROBI) LIMITED APPELLANT

AND

ASMAN OTIENO RAMADHAN RESPONDENT

JUDGMENT

1. This is the judgment in an appeal against the decision of Hon. E. A. Obina dated 31st October, 2024 in MCELRC No. E244 of 2021, Asman Otieno Ramdhani V Mini Bakeries (Nairobi) Ltd.
2. The brief facts of the case are that respondent was employed by the appellant as an Oven man on 1st January, 2012 at Kshs.15,768 until 3rd July, 2020 when he was declared redundant due to the COVID-19 pandemic but recalled vide letter dated 19th August, 2020 and retired in the same year after attaining the age of 60. He sued for Provident Fund contributions at 12% Kshs.181,647.36 and Retirement benefits under Clause 32(3)(ii) of the Collective Bargaining Agreement (CBA) between the Bakery Confectionary Food Manufacturing and Allied Workers Union (Kenya) and Mini Group of Companies, Kshs.1,009,152.00
3. The court dismissed the two claims but awarded the respondent Kshs.94,608 equivalent to 6 months salary on the premises that since the appellant allowed the respondent to work past the age of 60 and retired at 61 years, he had a legitimate expectation that he would work for another 6 months if not a full year.
4. The court also awarded costs and interest till payment in full.
5. This is the judgment appealed against.
6. The appellant faults the judgment on the grounds that:



1. The trial court erred in law and fact in introducing and determining claim of legitimate expectation which had not been pleaded.
2. The trial court erred in law and fact in finding that the unpleaded claim of legitimate expectation is applicable in private law matters or applicable on the facts before him.
7. The appellant prays for the appeal to be allowed and the judgment and decree dated 31st October, 2024 be set aside and be substituted with an Order dismissing the suit with costs.
8. The court gave directions on the filing and exchange of submissions on 19th December, 2024 and by 30th January, 2025 only the appellant had filed and served its submissions. The respondent had not done so by the morning of 17th February, 2025 when a judgment date was given, but did so in the afternoon.

Appellant's submissions

9. As regards unpleaded matters, the appellant's advocate relied on the decision in Independent Electoral and Boundaries Commission & Another V Mule and 3 Others [2014] eKLR to urge that a court sits to determine issues pleaded by the parties and the respondent's case was grounded on unpaid provident fund contributions and unpaid retirement benefits. According to the appellant's advocate, the issue of the respondent having worked after 60 years did not arise and the question of expectation only emerged in the court's final Orders and the learned trial magistrate had no jurisdiction to venture in that direction.
10. Concerning invocation of the principle of legitimate expectation, the appellant's advocate cited the Court of Appeal decision in Heineken East Africa Import Co. Ltd and another V Maxam Ltd [2024] KECA 625 (KLR) to urge that the principle applies in the domain of public law and had no application in matters private law as the learned trial magistrate did.
11. Counsel submitted that even if the principle applied in private law matters, an ambiguous promise was essential and no evidence to that effect was adduced and the trial court misapplied the principle.

Respondent's submissions

12. On legitimate expectation, the respondent's advocate cited the decision in Teresa Carlo Omondi V Transparency International [2017] eKLR where Rika J applied the principle as well as the decision in Kenya Revenue Authority & 2 Others V Darasa Investment Ltd [2018] eKLR on the basis of legitimate expectation to urge that a person can have a legitimate expectation where the employer allows the employee to continue working beyond the time stipulated.
13. On unpleaded issues, counsel submitted that a court may consider such an issue in certain circumstances and cited the Court of Appeal decision in Maithene Malindi Enterprises Ltd V Kanik Kansa & 2 Others [2018] eKLR.
14. Reliance was also made on the sentiments of the court in Odd Jobs V Mubia [1970] EA 476, to urge that the trial court was within its mandate to ground its judgment on legitimate expectation.
15. This being a first appeal, the duty of the court is to re-evaluate and re-assess the evidence and arrive at its own conclusions bearing in mind that it neither saw nor heard the witnesses as held in Selle & Another V Associated Motor Boat Co. Ltd & Others, Peter V Sunday Post Ltd [1968] EA 123, Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR among others.



16. In *Peter M. Kariuki V Attorney General* [2014] eKLR. The court held:

"We have also as we are duty bound to do as a first appellate court to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial Judge are consistent with the evidence. See *Ngui V Republic* [1984] KLR 729 and *Susan Munyi V Keshar Shiani Civil Appeal NO. 38 of 2002* (unreported)".

17. The facts in this case are largely uncontested, save for the issue of service after attaining the age of 60.

18. On cross-examination, the respondent confirmed that he left employment because he had attained retirement age of 60 and was a member of the Jubilee Insurance Pension Scheme and the appellant would deduct and remit pension deductions to the Insurance Company.

19. He also testified that he was a member of the union and was paid Kshs.274,00.00 by Jubilee Insurance Co. Ltd as pension.

20. It was his testimony that he was not paid for his services by the respondent but had received retirement benefits and was claiming service by virtue of the CBA.

21. The he was paid under the National Social Security Fund (NSSF).

22. Mr. Stephen Mutinda, the respondent's Human Resource Officer confirmed that the claimant was paid his pension dues by Jubilee Insurance Company and the CBA provided for payment of benefits to employees.

23. On re-examination Mr. Mutinda testified that the respondent was not entitled to any other benefit as he had been fully paid.

24. Instructively, although the appellant maintained that the claimant was fully paid, it did not avail verifiable evidence of payment other than the sum of Kshs.274,173.20 by Jubilee Insurance Company Ltd.

25. From the evidence on record, the claim for Provident Fund contributions amounting to Kshs.181,647.38 was not supported by any evidence and had been fully paid by Jubilee Insurance Co. Ltd, and thus unsustainable.

26. The claimant admitted as much on cross-examination.

The trial court's finding at this issue cannot be faulted

Although the appellant's witness testified that the respondent had been fully paid he tendered no evidence on how much was paid and when, the fact that the respondent admitted having received payment for his services as retirement benefits notwithstanding.

26. Significantly, although Mr. Stephen Mutinda testified that the CBA had provisions on benefits, he did not confirm that the undisclosed amount paid to the respondent was computed in accordance with the relevant clauses of CBA which was part of the employment contract.

27. Clause 32(3)(ii) provided;

Subject to clause 38(b) of this Agreement, an employee on retirement shall be entitled to be paid by the Group, retirement benefits at the rate of twenty (20) days pay for each year of service based on the employee's earnings at the time of retirement.

28. Clause 38(b) provided that;



Once the Group has made payment to all employees for the past services, it shall be discharged fully from any liability related to terminal and/or retirement benefits.

29. Under the CBA for the period 1st May, 2014 to 30th April, 2017, payment for Past Service Benefits under clause 38 referred to services rendered up to and including 31st July, 2003 and thus did not apply to the respondent who was employed in January 2012 which would appear to suggest that the respondent was entitled to retirement benefits under clause 32(3)(ii) of the CBA as acknowledged by the appellant's witness during the hearing.

In its submissions before the trial court, the appellant computed the amount due to the respondent as Kshs.101,885.28

30. Strangely, the trial court reasoned that Clause 38(b) and Clause 32 of the CBA related to pension which had already been paid by Jubilee Insurance Co. Ltd and held as much.
31. This, in the Court's view was a misdirection as the monies paid by Jubilee Insurance Co. Ltd was from the Provident Fund Scheme under Clause 37 of the CBA, which was a contributory provident scheme at 5% contribution by employers and employee.
32. Clearly, Clause 32(3) and 37 and 38 of the CBA are different. While Clause 32(3) AND 38 deal with service benefits, Clause 37 was a Provident Scheme constituted by contributions of employer and employee.
33. The trial courts justification that the claim for pension and service pay was tantamount to double payment is not borne by facts as the two are different and are captured differently under the CBA.
34. While it is trite law that service pay is not payable to employees whose employment is terminated under Section 35 of the *Employment Act* by virtue of Section 35(6), it is payable in a retirement if it is a contractual undertaking as was the case in the instant case. The terms of the CBA were integral to the respondent's employment contract.

The respondent was entitled to service pay as computed by the appellant for the 8 years served Kshs.101,885.28

35. On unpleaded issues, it is trite that a court ought not as a general rule deal with unpleaded issues in its judgment.
36. In *Maithene Malindi Enterprises Ltd V Kaniki Kansa & 2 Others* (supra), cited by the respondent, the Court of Appeal held:

"As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by the parties. This position was restated by this court in *Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others* [2014] eKLR–

"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce..."

37. However, in *Odd Jobs V Mubia* (Supra) the Court of Appeal for Eastern Africa held that a court may base its decision on an unpleaded issue;
- a. if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision;



- b. on the facts, the issue has been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.
38. See, *Vyas Industries V Diocese of Meru* [1976] eKLR.
39. In the instant case, while the appellant urges that the court had no jurisdiction to venture outside the pleadings, the respondent submitted that the court acted within its mandate.
40. It is common ground that the issue of service by the claimant after the age of 60 was not pleaded and did not arise in evidence. Paragraph 7 of the respondent's witness statement stated that he retired in "2020 after attaining the age of retirement which is 60 years".
41. There is no indication of the claimant having worked beyond 60 years and the respondent's submissions before the trial court did not address the issue either.
42. Since the issue of service after 60 years did not arise in evidence and was not addressed by the respondent at any point, the trial court could not originate the same as it was not part of the respondent's case and did not fall under the exceptions in *Odd Jobs V Mubia* (Supra).
43. The court is in agreement with the appellant's submissions that the trial court had no jurisdiction to venture there let alone make an award on it.
44. With regard to the applicability of the doctrine of legitimate expectation, while the appellant submitted that the doctrine has no application in the realm of private law, and in any event its ingredients were not proved, the respondent urged that it could be relied upon in fixed term contracts where an employer permitted an employee to continue working beyond the stipulated time.
45. It is trite that the doctrine of legitimate expectation has its origins and justifications in public law, specifically administrative law and is typically applicable in public law. The Court of Appeal appears to endorse this position in *Heineken East Africa Import Co. Ltd & Heineken International B V Maxam Ltd* (Supra) where the court held that
- "At this stage it suffices to emphasise that the doctrine of legitimate expectation was inapplicable to the contractual relationship between Heineken EA, Heineken B. V. and Maxam Ltd and the learned Judge fell into error in basing the continued operations of the Distribution Agreement on the said doctrine...
- We in this respect find that our law of contract is sufficient in the adjudication of contractual cases when applied in the context of the procedural imperatives contained in Article 159(2) (d) (without undue regard to procedural technicalities) and Article 10 (natural values) of *the constitution*".
46. However, in *Transparency International Kenya V Teresa Carlo Omondi* [2023] KECA 174(KLR), the Court of Appeal expressed the view that the doctrine of legitimate expectation could be relied upon in fixed term contracts of employment.
47. The court stated;
- "Concomitantly, the scenario would have been different if there was an indication by an act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent's appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation".



48. Relying on the decisions in *Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 5 Others* [2014] eKLR, the Southern African cases of *South African Veterinary Council V Szymanski* (4) S.A. 42 (SCA) at paragraph 28, as well as *Walele V City of Capetown Town & Others* 2008 (6) S.A. 129 (C.C), paragraph 41, the Court of Appeal catalogued the emerging principles of legitimate expectation as follows:
- a. “There must be an express, clear and unambiguous promise given by a public authority.
 - b. The expectation itself must be reasonable.
 - c. The representation must be one which it was competent and lawful for the decision maker to make and
 - d. There cannot be a legitimate expectation against clear provisions of the law or *the constitution*”.
49. Granted that the respondent did not adduce any evidence of any form of representation or promise by the appellant on which a reasonable expectation could be grounded, and that the other principles were also met, it is unclear unclear to the court how the learned trial Magistrate came to the conclusion that the doctrine of legitimate expectation was applicable and fashioned a remedy the respondent had not prayed for.
50. In *Bell & Another V.I.L. Matterelo Ltd* [2023] KECA 168 KLR, the Court of Appeal held:
- “In *Ephantus Mwangi* [1981 – 1988] 1KAR 278 – an appellate court is not bound to accept and act on the trial court’s finding of the fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence, (b) a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did...”
51. In the instant case the appellant has demonstrated a case for interference with findings of the trial court in that the application of the doctrine of legitimate expectation was not based on any evidence and the trial court misapprehended the evidence by treating pension and service pay as one and the same, contrary to the provisions of the CBA.
52. In the upshot the appeal is partially successful as follows:
- a. The award of Kshs.94,608.00 as 6 months salary as compensation for breach of the respondents legitimate expectation that he would work for 6 months or one year is set aside.
 - b. The respondent is awarded Kshs.101,885.28 as retirement benefits pursuant to clause 32(3) (ii) of the CBA.
 - c. The finding that the respondent was not entitled to Provident Fund contributions is upheld.
53. As the appeal is partially successful parties shall bear their own costs in the lower court and the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE



Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

