



Nyabochwa v Maasai Mara University (Employment and Labour Relations Cause E024 of 2024) [2025] KEELRC 551 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E024 OF 2024
AN MWAURE, J
FEBRUARY 26, 2025**

BETWEEN

ALFRED ONGETA NYABOCHWA CLAIMANT

AND

MAASAI MARA UNIVERSITY RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a memorandum of claim dated 26th April 2024.

Claimant's case

2. The Claimant avers that he was employed on 23rd July 2010, vide a contract as a legal officer on permanent and pensionable terms.
3. The Claimant avers that his contract had a specific provision that he was to retire at 65 years.
4. The Claimant avers that on 4th April 2024, the Respondent purported to issue a notice of retirement to him which was contrary to his employment contract unilaterally varying his retirement age from 65 years to 60 years without consulting him.
5. The Claimant avers that Respondent's staff pension scheme was not involved in the decision-making to vary his contract thus he was not likely to access his pension before his contract expires nor would he be able to continue remitting his monthly contribution to the pension scheme.
6. The Claimant avers that he has not received proper notice of retirement or adequate compensation, and the termination is neither due to redundancy nor renegotiation with his involvement.



7. The Claimant avers that the Respondent proceeded to advertise his position, which made him feel dehumanized, psychologically tortured and financially embarrassed due to the financial commitment on the payslip and the possibility of not being able to access his pension immediately.
8. The Claimant avers that he did not appeal against the variation of his contract as there is no provision or structure for appeal and it would be absurd to appeal against the said decision.
9. The Claimant avers that he is willing to work until the contractual retirement age of 65 years as per his contract or compensated for prospective future earnings based on his last gross salary.
10. The Claimant avers that the actions by the Respondent are discriminatory which go against the Employment Act and the Constitution of Kenya, and void from the start, as the contract remains binding until renegotiated by both parties' agreement.
11. The Claimant avers that he deserves a dignified exit from employment.
12. The Claimant prays for:
 - a. A declaration that the Notice of Retirement dated 4th April 2024 varying the contract of employment is unlawful and unfair
 - b. The Claimant be retained in his current employment position with all the benefits and terms as per the contract of employment. In the alternative compensation for the prospective future earnings for the remainder of the contract based on the last gross salary
 - c. A certificate of service as per section 51 of the Employment Act
 - d. Costs and interest
 - e. Any other relief this Honourable Court may deems fit to grant.
13. The Respondent entered an appearance through Ms Njoroge but did not file any response to oppose the cause.

Claimant's submissions

14. The Claimant submitted that when varying an employment contract it requires mutual consent by both parties for it to be valid and lawful. In *Rigby V Feredo Ltd* (1987) IRLR 516 where the court held that changes to an employment contract without the employee's consent constitute a breach of contract.
15. The Claimant cited section 10(2) of the Employment Act (the Act) which provides for contents to be contained in a written contract and section 10(5) of the Act provides as follows:

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”
16. The Claimant submitted that he had a legitimate expectation to work until the age of 65 years, and the Respondent's forced retirement will impact his pension scheme and financial stability. This unexpected retirement will likely to cause financial embarrassment as he would be unable to meet his financial obligations which were based on the anticipated retirement age of 65 years.
17. The Claimant submitted that the Respondent's actions amounted to constructive dismissal and violation of his rights under Article 41 of the Constitution. The Claimant/Applicant relied on the case



of Jackline Wakesho V Aroma Café [2014] KEELRC 644 (KLR) and Maxwell Miyawa and 7 Others V Judicial Service Commission [2017] KEELRC 593 (KLR) (2017) eKLR where both courts held that an employer is required to involve an employee in variation of the employment contract failure to do so will amount to violation of fair labour practice.

18. The Claimant reiterated Section 10(5) of the Act and relied on the case of Kenya County Government Workers Union V Wajir County Government and another (2020) eKLR the court cited Jackline Wakesho V Aroma Café (supra) where the court held that the common law principle states that any unilateral changes to an employment contract are unlawful, constituting a breach of contract. Additionally, it is a statutory requirement to consult with employees about any variations, especially regarding essential aspects like duration and remuneration, which could adversely affect them, all of which align with the principle of fair labour practice.
19. The Claimant also relied on Nakuru ELRC Cause No. 506 of 2014 Jeremiah K. Kendagor V Maasai Mara University and Nakuru ELRC Cause No. 73A of 2019 Dr. Cleophas K. Serem V Maasai Mara University in support of that proposition.

Analysis and determination

20. The court has considered the pleadings of the Claimant and their submissions. The Respondent did not file a response. The issue for determination is as pertains to a term/fixed contract and mandatory retirement age of Public Service staff.
21. The court notes that Sections 10(2) and 10(5) of the Employment Act provides that contents of a written contract and variation of a contract that requires the employer, in consultation with the employee, shall amend the contract to reflect any changes and notify the employee of these changes in writing. The emphasis is on variation with the consent of the employee.
22. In Kenya County Government Workers Union V Wajir County Government and another (supra) the court held that:

“Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and breach of contract and the statutory requirement to consult with an employee where there is any variation to the employment contract and more specifically, to an essential term such as the duration of remuneration where the employee would be adversely affected are ingredients and are subsumed in the fair labour practices principles.”

23. Clearly changing the terms of a contract of an employee to his disadvantage constitute unfair labour practice against article 41 of the 2010 Kenya Constitution.

The claimant vide his letter of appointment dated 23rd July 2010 and in particular the section that provides that the same was applicable alongside the terms of service documents had his terms clearly stipulated. The terms of service provided in Clause 6.5 provided that the retirement age was 65 years.

The claimant therefore had legitimate expectation that his retirement age was upto the age of 65 years.

If the terms were to be changed he should have been consulted. It appears that did not happen and he was just served with a retirement notice dated 4th April 2024 where he was informed he was to retire at the age of 60 years.

24. The respondent did not file their response and therefore did not controvert the claimant’s case.



25. The court is therefore persuaded that the claimant was unfairly terminated through a retirement notice which is to expire in November 2025. The claimant is therefore still in employment to November 2025.
26. The court however cannot ignore the law on public servants as pertains to retirement.

Section 70 of the Public Service Regulations (2020) provides

- (1) Subject to *the Constitution*, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be—
 - (a) sixty years;
 - (b) sixty-five years for persons with disability; and
 - (c) such age as may be determined by the Commission for lecturers and research scientists serving in public universities, research institutions or equivalent institutions as determined by Commission in consultation with such universities, research institutions or equivalent institutions

27. The court is at crossroads in view of the legal position on retirement age of employees of Public Service and the legal position of term contracts.

In the case of CBA No. 1 of 2020 Interim Universities Council Consultative Forum of The Federation of Kenya Employers -Versus Kenya Union of Domestic Hotels, Education Institutions and Hospital Workers (Kudheiha) Union

with

Ministry of Education.....1st Interested Party

Ministry of Labour.....2nd Interested Party

Attorney General.....3rd Interested Party

Salaries and Remuneration

Commission.....4th Interested party

The court held:-

The SRC guidelines provide -

- “8. Government Policies and Guidelines Collective Bargaining Negotiations should adhere to existing policies and guidelines such as the Minimum Wage Guidelines, Public Service Commission Human Resource Policies and Procedures Manual, State Corporation guidelines and various SRC advisories.

Parties can therefore not negotiate outside public policy and guidelines.

For these reasons the proposals for amendment of retirement age are expunged from the CBAs.

The current practice as set out in the pension schemes for universities, the policies and guidelines in place and the provisions of any law that governs retirement age in the public sector shall apply.

28. The court hands are tied by the law therefore and cannot retain the Claimant to work for Public Institution beyond 60 years.



The court cannot also grant him salary for the remainder of the term as that would still be against the Public Service Regulations.

29. Having ruled that the respondent however breached the Claimant's contract it is only right the Claimant is not left without a remedy.

He is awarded damages equivalent to 12 months' salary with interest at 14 % per annum from date of judgment till full payment.

He is also awarded costs.

His certificate of service should be released to him after he serves his term.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

