



**Lusuli v Nuclear Power & Energy Agency (NUPEA) (Cause E1051 of 2024) [2025] KEELRC 1181 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1181 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1051 OF 2024  
BOM MANANI, J  
APRIL 24, 2025**

**BETWEEN**

**DR ANTHONY LUNG'AHO LUSULI ..... CLAIMANT**

**AND**

**NUCLEAR POWER & ENERGY AGENCY (NUPEA) ..... RESPONDENT**

**JUDGMENT**

1. The dispute between the parties arises from the circumstances which surround the closure of the employment relation between them. Whilst the Claimant contends that the relation was unfairly terminated, the Respondent avers that the Claimant left service on attaining the mandatory retirement age.

**Claimant's Case**

2. The Claimant avers that the Respondent employed him as its Supply Chain Manager as from 1<sup>st</sup> July 2020. He contends that the contract of service was for a fixed term of three years.
3. The Claimant contends that when the first contract lapsed, the Respondent issued him with a fresh contract for a further three years effective from 6<sup>th</sup> June 2023. He avers that this latter contract was to run until June 2026.
4. The Claimant avers that on 12<sup>th</sup> January 2024, the Respondent issued him a letter notifying him that his employment was due to lapse in June 2024 on account of the mandatory retirement age. He contends that the notice was without regard to the reality that his fixed term contract was to run until June 2026.
5. The Claimant avers that on 13<sup>th</sup> June 2024, the Respondent relieved him of his duties. He contends that the Respondent asked him to handover his docket to someone else.



6. The Claimant avers that on 2<sup>nd</sup> September 2024, the Respondent offered to reinstate him back to work. He asserts that the offer was conditional on his withdrawing a suit which he had filed in court to challenge termination of his contract of service.
7. The Claimant contends that the Respondent reinstated him to work with effect from 2<sup>nd</sup> September 2024 where-after he worked for two months. However, on 29<sup>th</sup> October 2024, the Respondent allegedly wrote to him to rescind the reinstatement.
8. The Claimant avers that he had legitimate expectation that he was to serve the Respondent for the entire of the three years under the renewed contract. He contends that this expectation was dashed when the Respondent terminated his services midstream.
9. The Claimant avers that on the strength of his employment, he had secured financial accommodation with the hope of servicing the facilities using his salaried income. He fears that these obligations will be jeopardized if the Respondent is permitted to close the employment relationship between them.
10. The Claimant contends that at the time of renewal of his contract of service, the Respondent was aware of his age. As such, it is estopped from terminating the contract on account of retirement age.
11. The Claimant similarly contends that the law provides for a scenario where one may continue to serve in public office after attaining the retirement age. He contends that when this happens, it is deemed that the retirement age limit has been extended.
12. Having regard to the foregoing, the Claimant avers that the Respondent unfairly terminated his services. As such, he prays for the various reliefs in the Memorandum of Claim.

### **Respondent's Case**

13. The Respondent does not admit the claim. Whilst admitting that the parties had a fixed term contract for three years from June 2023, the Respondent avers that the contract was subject to the mandatory retirement age.
14. The Respondent contends that from the records in its possession, the Claimant was born on 13<sup>th</sup> June 1964. As such, he attained 60 years on 13<sup>th</sup> June 2024.
15. The Respondent contends that the Public Service Commission Regulations and its (the Respondent's) Human Resource Manual place the retirement age for persons in public service at 60 years. As such, the Claimant was expected to retire at that age on 13<sup>th</sup> June 2024.
16. The Respondent contends that having regard to the foregoing, it issued the Claimant with a six months retirement notice dated 12<sup>th</sup> January 2024. The Respondent further contends that when the Claimant was issued with this notice, he filed suit vide Nairobi ELRC No. 478 of 2024 to challenge it (the notice). He however withdrew the suit on 17<sup>th</sup> June 2024.
17. The Respondent further contends that the Claimant filed yet another case vide Nairobi ELRC 609 of 2024. However, he allegedly withdrew it as well after it (the Respondent) reinstated him back to work on 2<sup>nd</sup> September 2024.
18. The Respondent avers that the decision to reinstate the Claimant to employment was informed by an advisory from the Public Service Commission. It (the Respondent) contends that this advisory was later discovered to have been premised on incomplete documents and was therefore inaccurate.
19. The Respondent avers that when it realized that the aforesaid advisory was erroneous, it issued the Claimant with a letter dated 29<sup>th</sup> October 2024 rescinding the impugned reinstatement. As a result, it



- (the Respondent) contends that the Claimant was legitimately relieved of his employment on account of retirement age.
20. The Respondent contends that it is not the business of courts to re-write contracts between parties. As such, the court has no mandate to issue the orders which the Claimant seeks.
  21. The Respondent further contends that the doctrine of legitimate expectation operates within the confines of law. As such, the Claimant cannot rely on it to revive a contract which was legitimately terminated on account of retirement age.

### **Issues for Determination**

22. After evaluating the pleadings and evidence on record, the following emerge as the matters for determination in the suit:-
  - a. Whether the Claimant's contract of service was properly terminated on account of attaining the retirement age or whether it was improperly terminated.
  - b. Whether the Claimant had legitimate expectation to serve beyond the retirement age.
  - c. Whether the Claimant is entitled to the reliefs that he seeks through the Memorandum of Claim.

### **Analysis**

23. Section 80 of the *Public Service Commission Act* provides that when a public officer attains the mandatory retirement age as may be prescribed in regulations made under the Act, the officer shall retire from service with effect from the date of attaining the mandatory retirement age. The provision further states that the Public Service Commission (hereafter referred to as the Commission) or other appointing authority shall not extend the service of such retired officer beyond the mandatory retirement age.
24. Section 80 (2) of the Act provides that notwithstanding the edict that an officer who has attained retirement age shall not continue in service, the Commission or other appointing authority may engage the officer for service after the retirement age if:-
  - a. The officer possesses rare knowledge, skills and competencies for the time being required in the service;
  - b. The officer is willing to be engaged on contract; and
  - c. The retired officer's performance shall not be impaired by age.
25. Regulation 70 of the Public Service Commission Regulations, 2020 provides that subject to *the Constitution*, section 80 of the *Public Service Commission Act*, any other written law or specific government policy, the mandatory retirement age in public service for persons living without disability is 60 years and 65 years for persons living with disability. However, the Commission is given leeway to set the retirement age for lecturers and research scientists serving in public universities and research institutions beyond the aforesaid age limit.
26. The circulars issued by the Commission dated 19<sup>th</sup> November 2020 and 4<sup>th</sup> April 2023 require all authorized officers to ensure proper succession plans in their respective dockets. The intention is to give meaning to the requirement that persons retire at age 60 and 65 as aforesaid without the need for extending their term of service.



27. Clause D 21 of the Commission's Human Resource Policies and Procedures Manual for the Public Service, 2016 sets the mandatory retirement age for officers in public service at 60 years for persons without disabilities and 65 years for persons living with disabilities or such other age as may be prescribed by government from time to time. On the other hand, clause 13.3 of the Respondent's Human Resource Policy and Procedures Manual states that an employee of the Respondent can retire on attaining the mandatory retirement age of sixty (60) years.
28. The standing orders clause in the Claimant's contract of service provides that the Respondent's staff rules and regulations (including those in the Human Resource Manual) will form part of the Claimant's terms and conditions of service. As such and by this clause, the terms and conditions of service in the Respondent's Human Resource Manual are deemed to have been incorporated into the Claimant's contract of service.
29. During trial, the Claimant contended that his contract was renewed for three (3) years from 6<sup>th</sup> June 2023. As such, he anticipated that he will remain in service until June 2026.
30. The Claimant contended that the letter of renewal of the contract of employment which was issued to him did not subject the three (3) year term to the mandatory retirement age of sixty (60) years. As such, he averred that he did not anticipate that the Respondent would disrupt his employment midstream on this account.
31. On the other hand, the Respondent maintained that the Claimant's renewed term was subject to the mandatory retirement age. It contended that the contract which was issued to the Claimant specifically spoke to this requirement.
32. In support of their contrasting positions, the parties produced two sets of contracts which speak differently on the subject under consideration. On the one hand, the Claimant produced a document which, whilst indicating that the Respondent had engaged his services for three (3) years with effect from 6<sup>th</sup> June 2023, does not state that this period was subject to the mandatory retirement age of sixty (60) years. On the other hand, the Respondent produced a document which states that the Claimant's contractual term of three (3) years was subject to the mandatory retirement age of sixty (60) years.
33. Clearly, one of the two documents had been manipulated. However, it is not possible to discern which one was manipulated. This is because the page on which the controversial provision is embedded in the two documents was not countersigned by the parties to the contract. Absent this, there is no way the court can authenticate either of the documents.
34. Despite the fact that one of the documents had been tinkered with, neither of the parties subjected the two documents to forensic examination to determine which one of them represents the true contract between them. Neither did either of them (the parties) object to the other producing the instrument in his custody in evidence on the basis that it was falsified.
35. The role of the court in an adversarial system is to decide disputes on the basis of the evidence that is placed before it. Other than the obligation to exclude evidence that may have been illegally acquired where production of such evidence will prejudice a fair trial or be detrimental to the administration of justice, the court has no general responsibility to advise parties to a dispute on the kind of evidence they should tender in order to establish their respective cases.
36. Where parties present in evidence two conflicting documents as a result of manipulation of one of them without presenting further evidence to assist the court to discern which of the two is genuine, the court is entitled to hold that neither of the documents been proved nor disproved. As such and in view of the contradiction in the two documents which the Claimant and the Respondent produced in evidence



- to speak to whether or not the Claimant's fixed term contract was subject to the mandatory retirement age, I arrive at the conclusion that the impugned documents did not either prove or disprove this fact.
37. The foregoing notwithstanding, it is noteworthy that both instruments produced by the parties as representing the purported contract between them for the period 2023-2026 contain a clause which incorporated the terms and conditions of the Respondent's Human Resource Manual into the Claimant's contract. The clause, which is titled "Standing Orders" provides as follows:-
- "You are required to make yourself conversant with and abide by staff rules and regulations currently in force or as may be issued from time to time. These rules will form terms and conditions of service contained in the Human Resource Manual."
38. Clause 13.3 of the Respondent's Human Resource Policy and Procedures Manual, 2020 provides, inter alia, as follows:-
- "an employee can retire....on attainment of mandatory – 60 years..."
39. As such, even though the Claimant's letter of appointment dated 28<sup>th</sup> February 2023 may not have spoken explicitly about retirement age as he contends, the above provision in the Respondent's Human Resource Manual on retirement age was incorporated into his (the Claimant's) new contract by virtue of the clause in the letter on "Standing Orders". In this sense, it is arguable that the Claimant's contract spoke to the retirement age.
40. However, it is important to note that the retirement clause in the Respondent's Human Resource Manual is not couched in mandatory terms. By using the phrase "an employee can retire", the provision renders the requirement to retire at age sixty (60) entirely discretionary perhaps in recognition of the fact that section 80 (2) of the *Public Service Commission Act* entitles the Respondent to retain an employee beyond the retirement age if the employee is deemed to possess special skills which the Respondent requires.
41. Whether or not the contract between the parties had a clause which expressly rendered it (the contract) subject to the retirement age of sixty (60) years, it is apparent that the Respondent allowed the Claimant to serve beyond this age when it reinstated him back into employment through its letter of 2<sup>nd</sup> September 2024 after it had retired him on account of having attained the retirement age. As noted earlier, the Respondent as an appointing authority, has powers under section 80 (2) of the *Public Service Commission Act* to allow its officers to serve beyond retirement age if it has reason to believe that the officers possess special skills which it still requires.
42. In the court's view, once the Respondent reinstated the Claimant back into employment through its letter of 2<sup>nd</sup> September 2024 for whatever reasons and allowed him to work for two months, this generated legitimate expectation in the Claimant that the Respondent had acceded to an arrangement where he was to continue in service beyond sixty (60) years. As such, it was not open to the Respondent, for whatever reasons, to unilaterally recall the reinstatement as it purported to do through its letter of 29<sup>th</sup> October 2024.
43. The Respondent asserts that its incongruent actions were because of an inaccurate advisory it had received from the Commission. It further contends that after it realized that the advisory was inaccurate, it rescinded the Claimant's reinstatement to employment. However, it is noteworthy that it (the Respondent) did not tender in evidence the purported advisory. As such, the court cannot establish whether the alleged missteps by the Respondent in reinstating the Claimant only to unilaterally rescind the decision a few months down the line were occasioned by inaccurate advice as alleged.



44. The court has scrutinized the minutes of the Respondent's meeting of 24<sup>th</sup> September 2024 at which the decision to rescind the Claimant's reinstatement to employment was made. It is noteworthy that the Claimant was not invited to attend the said meeting. Yet, the decision that was taken during the session adversely affected his employment rights.
45. The Respondent having reinstated the Claimant into service, the least that was expected of it was to notify him that it (the Respondent) was considering to rescind its decision and to ask him to offer his views on the proposition, if at all. This requirement is informed by the provisions of section 4 of the *Fair Administrative Action Act* as read with article 47 of *the Constitution*. Anything short of this would be an affront to the principles of fair administrative action and natural justice.
46. In the premises, the court arrives at the conclusion that by the Respondent reinstating the Claimant back into employment through its letter of 2<sup>nd</sup> September 2024, it aroused legitimate expectation in him that he will continue in service for the balance of his contractual terms (see *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR on the principle of legitimate expectation). As such, if the Respondent was to rescind this decision for whatever reasons, it was obligated to do so in consultation with the Claimant in terms of the principles of natural justice and fair administrative action. To the extent that the Respondent failed to do so, it illegitimately terminated the Claimant's reinstated contract of service.
47. The next issue for determination is whether the Claimant is entitled to the various reliefs that he seeks in the Memorandum of Claim. These include: salary for the unexpired term of his contract; gratuity; fringe benefits; medical cover; cost of lost employment opportunities; reinstatement; interest on the amounts claimed; and costs of the case.
48. In determining the reliefs to grant the Claimant, the court will be guided by sections 49 and 50 of the *Employment Act*. The provisions, inter alia, provide for compensation for unfair termination of an employee's contract of service, reinstatement and re-engagement.
49. The Claimant has prayed for reinstatement to his employment. This remedy can only be granted where there is evidence that the position in question is still vacant and that the employee will be able to resume duty without undue friction at the workplace.
50. Employer-employee relations are built on mutual trust. Where parties to the relation have had differences which have impacted on the relation, an order for reinstatement will seldom issue except in exceptional circumstances.
51. In the instant case, the court was not provided with evidence to demonstrate that the position which the Claimant seeks to be reinstated to is still vacant. There was also no evidence to demonstrate that should an order for reinstatement issue the parties will be able to resume the employment relationship without undue friction at the workplace. In the premises, I decline to issue the order for reinstatement.
52. The court takes note of the fact that prior to the dissolution of the employment relation between the parties, the two had been in the relation for more than three years, albeit under different contracts. This is a considerably long time.
53. When the Claimant's contract was closed on 29<sup>th</sup> October 2024, he still had more than one year to serve under the impugned contract. Taking these factors into consideration, I award the Claimant compensation for unfair termination of his contract which is equivalent to his gross salary for three (3) months, that is to say, Ksh. 523,642.00 x 3 = Ksh. 1, 570,926.00.



54. The Claimant has prayed for salary for the period between June 2024 and May 2026. However, the court can only award him salary for the duration he worked but was not remunerated. According to the evidence on record, the Respondent reinstated the Claimant's employment on 2<sup>nd</sup> September 2024. However, this decision was rescinded by the Respondent's letter of 29<sup>th</sup> October 2024. By this date, the Claimant had been on duty for the months of September and October 2024.
55. The Claimant contends that his salary for this period was not paid. The Respondent did not tender evidence to controvert this contention.
56. Evidence regarding payment of an employee's salary is ordinarily expected to be within the special knowledge of the employer. As such and by virtue of section 112 of the *Evidence Act*, when there is controversy on the issue, the burden of proof lies with the employer to provide evidence to resolve the controversy.
57. The Respondent did not tender evidence to demonstrate that it remunerated the Claimant for the two months that he was at work after he was reinstated on 2<sup>nd</sup> September 2024. As such, the Claimant is entitled to be paid salary for the two months, that is to say, Ksh. 523,642.00 x 2 = Ksh. 1,047,284.00. Accordingly, the court awards the Claimant the aforesaid sum.
58. In addition to the foregoing, the Claimant has claimed for gratuity for the term he would have served under the impugned contract. However, the provision in the contract on this benefit stipulates that it was only payable upon conclusion of the contractual term. As such, the court is unable to award gratuity for the entire term as demanded.
59. However, during the trial, the Respondent's witness stated that the Claimant was entitled to gratuity of approximately Ksh. 1,100,000.00. In the Respondent's final submissions to court, it offered to pay the Claimant gratuity of Ksh. 1,150,664.12.
60. Based on the foregoing, I arrive at the conclusion that the Respondent is amenable to paying the Claimant gratuity as aforesaid. Proceeding on this concession, I enter judgment for the Claimant for gratuity for Ksh. 1,150,664.12.
61. With respect to the fringe benefit of airtime allowance, the court notes that the same is not expressly provided for in the contract of service of 2023. Neither is it clear from the Claimant's pay slip how much he was receiving in respect of this benefit.
62. However, during trial, the Respondent's witness admitted that the Respondent owed the Claimant Ksh. 4,000.00 in respect of this allowance to cover thirteen (13) days. This means that the Claimant's daily airtime allowance was Ksh. 308.00.
63. The airtime allowance which the Respondent's witness alluded to during trial is for the thirteen (13) days the Claimant worked in June 2024 before he was retired. However, it is noteworthy that the Claimant worked in September and October 2024 after his contract was reinstated. He is therefore entitled to airtime allowance for this period, that is to say Ksh. 308.00 x 58 days = Ksh. 17,864.00 + Ksh. 4,000.00 = Ksh. 21,864.00. Accordingly, I enter judgment for him for Ksh. 21,864.00 to cover the airtime allowance for the duration he was at work.
64. The Claimant has prayed for medical cover. However, this benefit was pegged on his being in employment. In effect, it was lost the moment the Respondent terminated his services. As such, the court declines to award the relief.
65. The Claimant has prayed for salary for the balance of his contractual term. However, such a relief would be irregular since it is not anchored on any provision of statute or in the contract between the



parties. (see Catherine Misikhu Khatimba v Mt. Elgon Orchards Limited [2017] eKLR and Ambogo v Sameer *Agriculture and Livestock (Kenya) Limited (Employment and Labour Relations Cause 199 of 2022)* [2023] KEELRC 2257 (KLR) (29 September 2023) (Judgment)).

66. Irrespective of how the Claimant's contract was terminated, the fact of the matter is that he did not serve the balance of his term. As such, he cannot seek to be paid for this period. Accordingly, the prayer for salary for the unexpired term of the contract between the parties is declined.
67. The Claimant also prayed for compensation for the cost of lost employment opportunities. However, the employment law regime does not contemplate such a relief. As such, it is declined.
68. The amount awarded to the Claimant representing his gross salary and other benefits is subject to the applicable statutory deductions.
69. The Claimant is awarded interest on the amount ordered in his favour at court rates from the date of this decision.
70. The Claimant is awarded costs of the case.

### **Summary of Decision**

71. After evaluating the evidence and submissions by the parties against the applicable law, the court makes the following findings and orders:-
  - a. The Respondent aroused the Claimant's legitimate expectation that he will remain in its service after the retirement age when it reinstated his contract of service vide its letter dated 2<sup>nd</sup> September 2024.
  - b. The Respondent illegitimately (and in disregard of the Claimant's aforesaid legitimate expectation) terminated the Claimant's employment when it unilaterally rescinded the contract of service between them through its letter dated 29<sup>th</sup> October 2024.
  - c. The court declines to grant the Claimant the primary relief of reinstatement to his employment with the Respondent.
  - d. The court awards the Claimant the alternative relief of compensation for unfair termination of his contract of service equivalent to his gross salary for three (3) months, that is to say, Ksh. 523,642.00 x 3 = Ksh. 1,570,926.00.
  - e. The court awards the Claimant Ksh. 1,047,284.00 being unpaid salary for the months of September and October 2024.
  - f. The court awards the Claimant gratuity of Ksh. 1,150,664.12.
  - g. The court awards the Claimant airtime allowance for the duration he was at work in the sum of Ksh. 21,864.00.
  - h. The court declines to grant the Claimant's request for medical insurance cover.
  - i. The court declines to grant the Claimant's prayer for salary for the unexpired term of the contract.
  - j. The court declines to grant the Claimant's plea for compensation for lost employment opportunities.



- k. The court directs that the amount awarded to the Claimant representing gross salary and other benefits is subject to the applicable statutory deductions.
- l. The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
- m. The court awards the Claimant costs of the case.

**DATED, SIGNED AND DELIVERED ON THE 24<sup>TH</sup> DAY OF APRIL, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

