



**Francis v Laikipia University (Cause E027 of 2022)
[2024] KEELRC 75 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 75 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E027 OF 2022
HS WASILWA, J
JANUARY 30, 2024**

BETWEEN

DANSTAN KITHINJI FRANCIS CLAIMANT

AND

LAIKIPIA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant instituted this suit by a Memorandum of claim dated 13th July, 2022 and filed on 15th July, 2022, claiming to have been retired before he turned the age of 60. He prayed for the following reliefs;-
 - a. A declaration that the termination of the claimant's employment by the Respondent before the retirement age was wrongful, unlawful and unfair.
 - b. A declaration that the termination of the claimant's employment by the Respondent infringed his constitutional rights to fair labour practice under Article 41 of the *Constitution* of Kenya.
 - c. A declaration that failure of the Respondent in recognizing the claimant as disabled person pursuant to the *Persons with Disabilities Act* No. 14 of 2003 and extension of his retirement age is a violation of his constitutional rights.
 - d. The claimant be reinstated back to employment with the Respondent forthwith and without loss of benefits and continuity of service.
 - e. Kshs 1,491,948 being compensation for unfair and unlawful termination of employment.
 - f. General damages for unfair labour practices.
 - g. The costs of these proceedings be borne by the Respondent.
2. The summary of the claimant's case is that he was employed by Laikipia Teachers Training College in the year 1988 and later absorbed into employment of Egerton University-Laikipia Campus.



3. He states that when he was first employed, he filed a personal data form, which indicated his date of Birth as 1960 as was stated in his National Identity card. However, in 2006, the claimant got his birth notification and Baptismal card that showed his birth certificate as 13th January, 1963 and subsequently, he processed his birth certificate and applied to the office of Registrar of Persons to be issued with a new National Identity card, which was issued afresh with the new birth date captured as 00.00.1963.
4. It is the claimant's case that upon receiving his new National Identity card number, he presented it together with the Birth certificate to the Respondent's Human Resource office to enable Respondent update its records. He was directed to fill in another personal data form, which he did and assumed that the new date of birth was factored in his personal data that would eventually alter his retirement date.
5. He stated that he continued serving the Respondent as usual until 5th April, 2019, when he received a letter from the Respondent informing him that he would be retiring on 1st July, 2020 upon reaching the age of 60. Consequently, he wrote to the Respondent asking it to consider the date of retirement as per his personal details furnished to it in 2006 that changed his date of birth from 1960 to 1963 as such requiring him to continue in employment till 1st July, 2023.
6. The claimant states that he did not get any response from the Respondent, prompting him to write another letter dated 12th October, 2020 addressed to the Vice Chancellor informing the vice chancellor of the changes of his birth that were not effected by the Human Resource office.
7. On 2nd November, 2020, he received a letter by the Registrar of the university, declining to effect changes of his date of birth and maintaining that the initial date of birth was the one the university was following in effecting the retirement.
8. The claimant stated further that prior to employment, in 1987 he was involved in a road traffic accident that caused him physical disability. Due to this disability, he wrote a letter dated 21st February, 2020 to the Registrar (AHC) to favour him with an acknowledgement letter, affirming his disability, which letter was also required by Council for Person Living with Disability(PWD) to ensure completion of registration.
9. While he was following up for his registration with council of PWD, he was served with another letter dated 25th February, 2022, indicating that he would retire on 1st July, 2020.
10. In response to this letter, the claimant wrote to the Acting Deputy Vice Chancellor on 7th August, 2020 to follow up on his letter and for reinstatement of his employment for a further Five years pursuant to provisions of Persons with Disabilities.
11. The office of The Registrar wrote him back on 22nd September, 2020, informing that his request for extension of service on grounds of disability after retirement was not approved.
12. The claimant stated that though he has now retired, the Respondent has not paid him all his dues as a result of which he has suffered immensely.
13. He stated that the termination of the claimant before reaching the required retirement age of 65 on account of disability is unconstitutional and unlawful.
14. During hearing, the claimant testified as CW-1 and adopted his witness stated dated 15/7/2022 and produced the list of documents dated 13/7/2022 as exhibit 1 to 17 respectively and prayed for the claim to be allowed as prayed.
15. Upon cross examination by Ndichu Advocate, the claimant admitted that when he was employed by Laikipia TTC and later absorbed by the Respondent and in both occasions he gave his date of birth as



1960. He also confirmed that there was a circular that confirmed that the date of retiring is informed by the initial date given at the date of employment.
16. He testified that on 19th November, 2020, another circular was issued that stated that the date of retiring should be as per the date of Birth certificate, however that he was already retired from employed.
 17. Upon further cross examination, the claimant testified that he had indicated that he did not have any disability at the time of employment and subsequent documents. He admitted that he was involved in an accident in 1987 before employment and at the time of employment he was on treatment and only raised the issue of disability with his employer upon being notified of the retirement date. Also that he was issued with the new ID on 10/2/2020, when he had already received a notice of retiring in April, 2019.
 18. The witness admitted that he did not ask for tax exemption on account of the said disability.
 19. Upon Re-examination by Mutonyi Advocate, the claimant testified that he forwarded his Birth certificate and Baptism card in 2006. On the alleged disability, he testified that he indeed stated that he was not suffering from any disability because, he was expecting to get healed but the doctor confirmed later that he will suffer disability.

Respondent's case.

20. The Respondent entered appearance on 15th August, 2022 and filed a response to claim on 20th September, 2022. In the Response the Respondent stated that the claimant was employed following the documents that he presented to the employer, being his national Identity card number, which clearly showed the date of birth as 1960. Further that the claimant was the one that personally filed the personal data form and indicated the date of birth as 1960 and not 1963 as stated in the claim.
21. The Respondent denied the allegations that the Respondent updated his personal documents and presented the same to the Respondent as alleged and maintained that the personal details of the claimant remained as they are and the issue of new I.D card was only presented to the Respondent upon notifying the claimant of his date of retirement by the letter dated 5th April, 2019.
22. The Respondent admitted to receiving the letter of 12th October, 2020, asking for reinstatement to employment, which letter was written after the claimant had retired. The Respondent maintained that the claimant never amended his personal data as alleged, hence they used the records in their disposal to retire the claimant upon reaching the age of 60.
23. The Respondent did not dispute the salary earned by the Claimant and stated that at the time of retirement, the claimant was earning Kshs 124,378.
24. The Respondent stated that it was not informed of the alleged disability by the claimant or the Registration therefore and that the first time it learnt of the alleged disability was through a letter written by the claimant after retiring.
25. It is stated that upon retiring in July, 2020, he was paid his pension and continued enjoying his pension till even at the time of filling this suit in July, 2022, a clear indication that this suit was an afterthought and an attempt to get double benefits from the Respondent.
26. During hearing, the Respondent called one witness; Dr. Mugo Mureithi, the Respondent's deputy Registrar department of Administration and Human Resource Management, who adopted his witness statement dated 12/9/2020 and the Respondent's list of documents as its exhibits.



27. The witness testified that upon retiring the claimant, he was paid all his dues and he is currently enjoying his pension.
28. Upon cross examination by Mutonyi Advocate, the witness told this Court that he has presented the documents kept by the Respondent, which were in the claimant's personal file and it indicates clearly that his date of birth is 1960. However, in 2006, he presented his birth certificate and Baptism card that showed the date of Birth as 19/1/1963, however that the university considered the date initially declared in retiring him in July, 2020.
29. The witness testified that there was a circular of 10/11/2020, which declared the Birth certificate as the documents that should be referred to when declaring the date of retirement, however that the circular made reference to a judgement of 28/6/2019, which was delivered when the claimant was serving his notice period before retirement.
30. On the extension of his service term due to alleged disability, the witness testified that the claimant wrote to the university for extension of his employment on account of disability after retirement as such the late reply was not unfair as alleged.
31. On re-examination by Ndichu advocate, the witness testified that as per the previous circular by PSC, the date first declared in the personal data form was the date to be relied upon and the second circular issued on 19/11/2020 was issued after the claimant was retired.

Claimant's Submissions

32. The Claimant submitted from the onset that the Respondent retired him unlawfully following the date given on 1st Appointment instead of the Birth certificate given to the Respondent in the course of employment and Secondly that the Respondent refused to extend the retirement age to 65 as is required for persons Living with disability.
33. On the date of birth, the claimant submitted that at the time of employment he only had his National Identity Card, which indicated the date of birth as 1960, however in 2006 he processed his Birth certificate which indicated the date of Birth as 13/1/1963 and furnished the Respondent with copy of this Birth Certificate to enable it update its records. Therefore, that the correct date of birth should be 13/1/1963 and the retirement date should be July, 2023 and not July, 2020. To support this argument the claimant relied on the case of *Republic v Judicial Service Commissions & 2 Others Ex parte Erastus M Gitbinji* [2019] eKLR where the Court held that:-

“In any event, the Court returns that the circulars were merely administrative policies and they could not override the clear provisions of the relevant and applicable statute. As submitted for the applicant and the 3rd respondent, section 26(3) of the *Births and Deaths Registration Act*, (Cap.149) provides that the Principal Registrar shall, on payment of the prescribed fee, furnish a certificate in the prescribed form of the birth of any person compiled in the prescribed manner from the records and registers in his custody. Section 26 (4) of the Act provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any other proof of such entry. Further section 83 (1) of the *Evidence Act* provides that the Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is:

- a) declared by law to be admissible as evidence of any particular fact;



- b) substantially in the form, and purporting to be excluded in the manner, directed by law in that behalf; and
- c) purporting to be duly certified by a public officer.

Section 83(2) of the *Evidence Act* further provides that the Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document. Thus the Court presumes that the applicant's birth certificate is the true evidence of the dates and other facts it declares and the officer who issued the certificate had the authority to issue it and he issued the certificate relying on the entries in the register and such useful and relevant information."

34. Accordingly, that the retirement of the claimant was premature, irregular and unlawful.
35. On whether the claimant was a person living with disability, it was submitted that the claimant was involved in an accident in the year 1987 and wrote to the Respondent on 21/2/2020, informing it of his disability and asked for extension of his employment period for 5 years, however that the Respondent refused to extend his retirement age to 65, even after receiving the application, medical assessment report on 21/2/2020 before retirement of the claimant on 1/7/2020. He argued that there are no time limits for application for person living with disability as was held by the Court in *Margaret Martha Byama v Alice A Otwala & 3 others* [2016] eKLR where the Court held that; -
- “The Act does not make any provision on when a person must register once certified to be a person with disability. What the Court can deduce from this deliberate omission in the Act is that disability can either be congenital or as a result of subsequent illness or incidental injury. The latter aspect can occur to anyone at any stage in life. Therefore, Parliament in its wisdom saw the mischief or injustice which would occur if timelines were set on when to register as a person with disability. The respondent has raised issue with the timing of the registration of the petitioner as a person with disability contending it was an afterthought intended to extend her retirement age. The respondents however have not disputed the fact that the petitioner was certified by a medical team to be a person with disability and consequently registered as such. They have further not subjected the petitioner to a second opinion to verify the findings by the Kiambu Medical team.”
36. Based on this case law, the claimant submitted that his application for extension of his retirement was within time and therefore the Respondent acted unlawfully by failing to extend his employment.
37. On the reliefs sought, the claimant submitted that its now past three years since the unlawful retirement as such the claim for reinstatement is no longer available, therefore that the claim for compensation for double loss of being retired before clocking 60 years as per his Birth certificate and the failure to consider is Disability and increase his retirement age to 65 , deserve maximum compensation of 12 months gross salary.
38. The claimant also prayed to be awarded general damages of Kshs 1,500,000 for alleged unfair labour practices contrary to Article 41 of the Constitution. to support this, he cited the case of *County Government Workers Union v Narok County Government & Another*[2021] eKLR where this Court awarded general damages of Kshs 1,000,000 for breach of Grievants constitutional rights under Articles 28, 41 and 47.



39. The claimant also cited the case of *Joseph Makau Munyoro & 4 others V Kenya Ports Authority & Another* [2016] eKLR where the Court awarded general damages of Kshs 800,000 for unfair labour practices.
40. On costs, the claimant submitted that costs follow event and urged this Court to award him costs of this Suit together with interest at Court rates.

Respondent's Submissions.

41. The Respondent submitted on three issues; whether the claimant was terminated or retired, whether the claimant is entitled to the reliefs sought and who bears the costs of this suit.
42. On the first issue, it was submitted that the claimant's Birth certificate was issued on 15/2/2006 and the Baptism card issued on 18/8/1963, which both indicated that he was born on 13/1/1963, however that the claimant upon appointment indicated that he was employed in 1960, then in applying for the position of library assistant on 29/5/2012 and on 30/6/2015, he indicated that he was born on 12/12/1963, which date of birth is in conflict, with the date in the ID card and Birth certificate, when the subsequent application were made after receiving the Birth certificate, raising questions on the authenticity of the said documents. Due to these confusion of date, the Respondent opted to rely on the date indicated in his first appointment as such the Respondent cannot be blamed for a mess and confusion brought by the claimant. To support this position, the Respondent relied on the case of *Simon Opondo Mwalo v Capital Elegance (EA) Limited* in Nakuru ELRC Cause No. 50 of 2019, where the Court held that; -

“These days were not addressed. The Court having addressed the taking of off days and without clarity as to when the Public holidays arose, to award in this regard would result in double allocation and in the interest of justice, the ambiguity will not be compensated.”
43. Based on the foregoing, the Respondent submitted that the claimant was retired as per the documents presented to it by the claimant as such he was not unfairly terminated.
44. On the reliefs sought, with regards to the allegations of failure to reinstate the claimant on account of disability, it was submitted that the claimant did not indicate on the application form of any disability he was suffering from, until 21/2/2020, when he wrote a letter to the Respondent raising the issue of disability, when at the time he had not be confirmed as a person living with Disability or issued with a certificate, thus the letter was late in time. The subsequent reminder letter of 7/8/2020 was also late as he was already retired, his name removed from the Respondent's system and already paid pension. Hence the application to be considered as a person living with disability was an afterthought, considering that the claimant worked for the Respondent from 1988 till July, 2020 and the letter having been made 3 months before retirement.
45. Based on the arguments above, the Respondent submitted that the claimant indicated that he was a person living with disability and the attempt to process the certificate at the verge of retirement was overtaken by events as such the claim is unfounded, an afterthought and urged this Court to dismiss the claim with costs.
46. I have examined all the evidence and submissions of the parties herein.
47. The issues for this court's determination are as follows;-
 1. What was the right age of the claimant at the time of retirement?



2. Whether the claimant was a person living with disability as per the Person Living with Disability Act.
3. Whether the claimant is entitled to the remedies sought.

Issue No. 1

48. The claimant submitted that he was born in 1963 as per his birth notification and baptismal card issued in 2006.
49. He then processed his birth certificate and got a new identity card which captured his birth date as 00-00-63.
50. The respondent content that the claimant had his employment records filled at the time of employment indicating that his date of birth was 1960 and so was retired on this basis.
51. From the records submitted before this court the claimant filled his employment records on 4th July, 1988 indicating that he was born in 1960.
52. He was issued with a letter of appointment dated 15th July, 1988.
53. His identity card No. 8307215 submitted then showed that his date of birth is 1960.
54. Later on 25/7/1990, he filled another staff information form at Egerton University indicating the same date of birth as 1960. ID Card No. indicated is 8307215/70.
55. He made his employment declaration form then on 1/7/91 and still indicated his date of birth as 1960.
56. The claimant was employed by the respondents herein on promotion in 1997 and again filled his application for employment form on 29/4/2003.
57. The date of birth indicated is again 1960 and ID Card No. given is 8307215.
58. In answer to whether he had any physical disability he said no.
59. So from the documents submitted by the claimant his date of birth was all along 1960 until 2006 when he changed tune.
60. He wrote to the respondents vide a letter dated 24th January, 2006 requesting them to issue him with a letter to the Registrar of Births and Deaths so he could now correct the errors on his birth date from 1960.
61. He attached a national identity card and baptismal card. The certificate of birth issued on 15/2/2006 now showed that he was born on 13th January, 1963.
62. The baptism card showed the same date. The ID card however showed the birth of date as 1960.
63. The claimant later submitted another ID card issued on 22/1/2007 showing that his date of birth is 00.00.1963.
64. Vide a letter dated 5/4/2019 however the claimant was served with a Notice of Retirement indicating he was due for retirement on 1st July, 2020.
65. He wrote a letter disputing this fact that he was born in 1960 which matter had since been corrected as per his ID to be 1963.



66. It was also in this response to the retirement letter that he also brought out the issue of his disability which had never been raised before.
67. From my analysis of the facts above, it is evident that the claimant had initially declared 1960 to be his date of birth.
68. He then changed this issue in 2007 when he was issued with a new ID card indicating that he was born in 1963.
69. This ID was issued on 22/1/2007. There is however no communication from the claimant to the respondent indicating that he had a new ID Card showing his date of birth was 1963 until after the retirement notice was served upon him on 5/4/2019.
70. The claimant has sought to rely on a decision by this court (J. Ongaya) in *Republic v The JSC & 2 others Ex parte Erastus M Githinji* (2019) eKLR where the court held that the documents to be relied upon in determining the birth of date of an employee are the documents issued by the Registrar of Births & Deaths.
71. Indeed that is the true position of the law but in distinguishing this authority and the claimant's case, in the case of Githinji JA cited above the applicant had cited the correct year in his employment documents, the contention only being the month of birth which had been presumed to be January because of an omission in the ID card.
72. In the current case the claimant had declared 1960 as his birth year but changed to 1963. He never wrote to his employer to make these changes and came up only with the new year of 1963 upon being served with a retirement notice.
73. He was even invited to attend pre-retirement training in year 2016 and he never raised the issue of his date of birth being 1963. This omission cannot be visited upon the respondent.
74. It is my view that the correct entry in the records of registration is what would determine a retirement of an employee as stated in the Githinji case but these documents must be brought to the attention of the employer at the earliest opportunity and prior to the notice of retirement being issued.
75. The claimant failed to submit their records and so cannot benefit from his own mistakes.

Issue No. 2

76. On issue of disability, again the claimant indicates that he was involved in an accident even before he was employed and suffered disability.
77. In the documents before court, he always indicated he had no disability.
78. The issue of disability is again raised after the retirement notice is issued.
79. The claimant actually submitted some documents for consideration on 21/2/2020 to the respondent requesting for a letter to be taken to the council for PWD to ensure completion of his registration process.
80. There is no indication that he was even registered with the council of the PWD.
81. When the matter was brought to the respondent's attention, it was rejected on account of the law. The *Public Service Commission Act* 2020 part X Clause 70(a) & (b) which in part states that;-

“a public officer shall be considered for retirement as a person with disability if the officer;-



- (a) has a disability of a permanent nature that can be perceived by significant sectors of the community and the disability has a substantial impact on the ability to carry out ordinary day to day activities.
- (b) has been registered in the public body's human resource database as a person with disability for at least three years before the date of retirement".

82. In the case of the claimant both these parameters are missing or were not exhibited before court as evidence and therefore the prayer to be considered as a person with disability for purposes of retirement is declined.

Issue No 3. Remedies

83. Considering the findings above the claim by the claimant is not merited and is dismissed accordingly.

84. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF JANUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ndichu for Respondent – present

Mbiyu holding brief for Mutonyi for Claimant – present

Court Assistant - Fred

