



Thuku v National Environment Management Authority (Cause E402 of 2021) [2024] KEELRC 682 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 682 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E402 OF 2021
SC RUTTO, J
MARCH 20, 2024

BETWEEN

LUCY WAIRIMU THUKU CLAIMANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .. RESPONDENT

JUDGMENT

1. The Claimant brought the instant suit through a Memorandum of Claim dated 20th February 2021, in which she avers that she was first employed on 13th October 1987 in the Accounts Department as a Clerical Officer in the Ministry of Planning and National Development. She further avers that at the time, she was 25 years old and she filled her date of birth as 1962. Consequently, she was seconded to the Respondent Authority and her pensionable service was duly transferred.
2. It is apparent that the genesis of the instant dispute was a letter dated 20th January 2020, through which the Claimant was informed that her effective date of retirement was 18th August 2020. The Claimant's contention is that based on her correct date of birth as captured in the application for employment, she was required to retire on or about 18th August 2022.
3. The Claimant further avers that the Respondent lacked reasonable and sufficient grounds for terminating her employment. Consequently, she has termed the Respondent's actions unlawful, and as such she seeks the following reliefs:
 - a. Reinstatement of her position of work just before the notice of retirement was issued without any loss of benefits whatsoever, alternatively
 - b. A declaration that the Claimant was unfairly terminated in violation of *the Constitution* 2010, and the *Employment Act* 2007.



- c. Salary for the unexpired term of the contract set to end upon retirement on or about August 2022.
 - d. Twelve (12) month's gross salary compensation as damages for unfair termination.
 - e. 1 month's salary in lieu of terminal leave notice pending retirement.
 - f. Interest on (c) to (e) above (all inclusive), at court rates until payment in full.
 - g. Costs of this suit and interest thereon.
 - h. Any other relief that this Honourable Court shall deem fit and just to grant in the circumstances.
4. The Respondent opposed the Claim through its Statement of Defence dated 22nd May 2023, in which it avers that the Claimant was offered employment vide a letter of offer dated 14th November 2003, which she readily accepted on 27th November 2003. The Respondent further avers that the letter of offer of employment was not in response to the secondment but to a job application made by the Claimant in response to an advertisement carried in the press on 31st July 2002.
 5. That as far as the employment relationship was concerned, the Claimant's correct date of birth was as provided in the application for employment and as supported by the identification details. According to the Respondent, the Claimant's true date of birth is 18th August 1960. The Respondent further contends that it was not bound by external information in determining the age of its employees. Consequently, the Respondent prays that the entire Claim be dismissed with costs.
 6. The matter proceeded for hearing on 16th November 2023, during which both parties called oral evidence.

Claimant's Case

7. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement and the documents filed alongside the Memorandum of Claim to constitute her evidence in chief.
8. It was the Claimant's evidence that she was not a new employee at the Respondent Authority as her services had been transferred from the Ministry of Environment and Forestry.
9. She maintained that as of the year 2020, she had not attained retirement age.
10. The Claimant further stated that on 30th June 2020, the Ministry of Environment and Forestry wrote a letter to the Respondent and clarified that where there is a discrepancy in the date of birth, the effective date of retirement is as indicated on the PSC 2 application forms on first appointment.
11. The Ministry of Environment and Forestry served the Respondent with her Public Service Commission Forms filled on her first appointment confirming her date of birth as 1962.
12. She further stated that several circulars have been issued by the Government confirming the Government's position in relation to discrepancies in the date of birth.
13. The Claimant maintained that her date of birth was 1962 and contended that her employment was stopped unfairly.



Respondent's Case

14. The Respondent called oral evidence through Ms. Esther Chege who testified as RW1. She identified herself as the Deputy Director in charge of Human Resources and Administration at the Respondent Authority. RW1 adopted the Respondent's Defence and her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
15. RW1 stated that the Claimant uttered 18th August 1960 as her date of birth by way of filling out the employee detailed information form and also by providing her national identity card showing similar information.
16. That the Respondent as her employer, was not bound by any external information in determining the age of its employees.
17. That further, the Respondent relies on the various advice from the Public Service that dates of birth as voluntarily declared by officers on the first appointment shall be maintained without variation.
18. That in this case, the NEMA application form became the original job application form on which the Claimant provided her date of birth and other details willingly and conscientiously and which details do not conflict with her national identification card details provided by her.
19. That at no time did the Claimant amend her national identity card with the Registrar of Births and Persons as no documentary proof explaining the date of birth shown on her national identity card was ever presented.

Submissions

20. Both parties did not file written submissions despite the Court's directions to that effect on 16th November 2023.

Analysis and Determination

21. Flowing from the pleadings by both parties as well as the evidentiary material placed before me, the following issues stand out for determination: -
 - i. Whether the termination of the Claimant's employment through retirement was founded on valid grounds.
 - ii. Is the Claimant entitled to the reliefs sought?Whether the termination of the Claimant's employment through retirement was founded on valid grounds
22. It is common ground that the Claimant was issued with a notice of retirement dated 20th January 2020, which is partly couched:

“RE: NOTICE OF RETIREMENT

Records held in our office indicate that you were born on 18th August 1960 and this means that you will attain the mandatory retirement age on 18th August 2020.

The purpose of this letter is therefore to give you a six (6) months' notice to retire with effect from 18th August 2020...”



23. The Claimant was aggrieved by the said notice of retirement and it is her contention that her correct date of birth is 18th August 1962 as declared in the PSC 2 application form. In support of her case, the Claimant exhibited a number of Government Circulars and maintained that where there is a discrepancy in the date of birth, the effective date of retirement is as indicated on the PSC 2 application form.
24. The Claimant's averment is in sharp contrast with the information contained in her National Identity Card and her employment form with the Respondent Authority. Notably, both documents indicate her date of birth as 18th August 1960.
25. Evidently, when the Claimant joined the Respondent Authority, she applied for employment and consequently, she filled out an employment form in which she declared her date of birth as 18th August 1960.
26. It is unequivocal that a person's date of birth is a constant factor that is not subject to change. Therefore, it is not clear why the Claimant declared her year of birth as 1962 in the first place at the time she was joining employment with the Ministry of Planning and Development in 1987, only to declare 18th August 1960 as her date of birth when she was joining the Respondent Authority.
27. Indeed, I cannot help but question why the Claimant would state her date of birth as 18th August 1960 when filing out her employment forms with the Respondent Authority if at all she knew that her correct date of birth was 18th August 1962.
28. In any event, the declaration of the Claimant's date of birth as 18th August 1962, was not supported by evidence given that her National Identity Card indicates that she was born on 18th August 1960.
29. In light of the foregoing and specifically noting the Claimant's date of birth as indicated in her application for employment with the Respondent Authority and her National Identity Card, I am led to conclude that the notice of retirement issued by the Respondent was based on valid grounds hence cannot be deemed to be unfair.

Orders

30. In the end, the instant Claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of March, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Adogo for the Claimant

Mr. Abwogi instructed by Mr. Gitonga for the Respondent

Millicent Kibet Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

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