



Nyatigi v Kwale International Sugar Company Limited (Cause E099 of 2023) [2024] KEELRC 950 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E099 OF 2023
M MBARŪ, J
APRIL 11, 2024**

BETWEEN

GODFREY JUMA NYATIGI CLAIMANT

AND

KWALE INTERNATIONAL SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as shift chemist from 16 December 2014 earning a gross salary of Kshs. 92,000 per month.
2. The claim is that on 4 January 2016, the claimant took over as Deputy Chief Chemist and held the position until his employment was unfairly terminated on 30 April 2023 while earning the same amount. This was contrary to clause 9.1 of the company human resources policy and procedures manual (Policy). Despite the respondent placing the claimant in an acting capacity as deputy chief chemist refused to appoint him in writing thereby denying him acting allowances as required under the policy.
3. The deputy chief chemist's salary ought to be Kshs. 111,000 per month.
4. On 31st April 2023, the claimant was unfairly terminated from his employment by the respondent on account of reaching the mandatory retirement age of 60 years. This was contrary to clause 15.3 of the policy which required a 12 months' notice be issued in advance of retirement. Instead, the respondent issued a one-month notice dated 25 February 2023.
5. The claimant, while working as a specialist expected to be treated as per clause 15.3 of the policy which provided that upon reaching the mandatory age of retirement, he would be engaged on contractual terms renewable after every two years. Failure to issue the claimant with 12 months' notice created an expectation that the claimant's employment would be retained on a contractual basis.



6. The claim is that during his employment, the claimant was never paid a house allowance which was 15% of his monthly basic salary. He was not given an alternative accommodation as required by law.
7. The claim is also that the respondent acted unlawfully by deducting the NHIF and NSSF monthly remittances from April 2022 until 31st April 2023 but failed to remit the same. There was a salary deduction but no remittance to the Kenya Revenue Authority and it stands in tax arrears at Kshs. 600,000.
8. The claimant is seeking the following dues;
 - a. House allowances Kshs. 1,393,800;
 - b. Service pay for 9 years Kshs. 477,692;
 - c. Compensation for unfair termination of employment Kshs. 1,104,000;
 - d. Acting allowances from 4 February 2016 to 30 April 2023 based on the salary for deputy chief chemist at ksh.111,0000 less paid Kshs. 92,000 x 7 years all at Kshs. 1,596,000;
 - e. Certificate of service;
 - f. Costs.
9. The claimant testified that he was employed as shift chemist on 16 December 2014 and upon the exit of the deputy chief chemist he took over his duties. He was never issued with written notice for acting or appointment in the position of deputy chief chemist but he was undertaking all roles and duties in such position. his colleagues and communications related to his role as acting deputy chief chemist. He ought to have been earning the due salary for the position at Kshs. 111,000 but he remained on his salary at Kshs. 92,000. He took note of the salary of the position from records left behind by his successor in the position of deputy chief chemist.
10. The claimant testified that the practice and policy of the respondent was to issue a notice of retirement 12 months in advance in his case, he attained 60 years in April 2013. He never got retirement notice until 25 February 2023 which was shocking because all along he had expected that his employment would be retained on contract terms as was the practice. The fact of not being issued with a 12-month notice created in him an expectation that as the deputy chief chemist, he would be issued a two-year contract. Case 15.3 of the policy allowed the respondent to remain specialists on contract after attaining retirement age. Other employees who had attained such age enjoyed preferential treatment and were issued with contract. The respondent engaged in unfair labour practices by failing to issue the claimant with a 12-month retirement notice and further was discriminatory by singling out the claimant for retirement without the option of a contract.
11. The claimant testified that at the time he retired, he still had financial obligations to his family that were pending. He had legitimately expected that he would continue in his employment beyond 60 years but was denied such an opportunity which was unfair. Upon termination of his employment, he noted that the respondent deducted his statutory dues but never remitted to KRA, NSSF or NHIF and the claim made should be awarded.
12. Upon cross-examination, the claimant testified that his appointment was for the position of shift chemist. His letter of appointment was not varied or reviewed. No written notice was issued. At the end of his employment, he made the demand and noted the human resources did not sign the handing over notes. He only knew of the salary due to the deputy chief chemist from pay slips he found in his drawer relating to the office.



13. The claimant testified that on 25 February 2023, he was issued with the retirement notice. He wrote seeking for extensions of his employment through a letter dated 12 April 2023. He asked for a 2-year contract on the grounds that he had a financial obligation still pending. He relied on company policy but the policy submitted is not stamped by the respondent.
14. In response, the respondent admitted the claimant was appointed as shift chemist through a letter dated 11 December 2014 at a gross salary of Kshs. 92,000 per month until 30 April 2023 when he retired after attaining 60 years of age. The claimant never applied to be appointed as deputy chief chemist from 4 January 2016 as alleged. He is not entitled to an acting allowance for such a position. there was no unfair termination of employment as alleged, the claimant attained the mandatory retirement age and his last day was 30 April 2023.
15. The respondent issued the claimant with notice dated 25 February 2023 and he received it without protest. Later, through a letter dated 12 April 2023, the claimant requested a two-year contract for personal reasons which had no nexus with the company policy. The request was not approved. On 26 April 2023, the claimant signed the clearance form in anticipation of his retirement and all his due were settled in full.
16. The response is also that the claimant had a consolidated salary inclusive of house allowance as was the case for all employees. All statutory deductions were remitted to the relevant statutory bodies which have the necessary procedures in the event of non-remittance by the respondent.
17. The claimant was well aware of his retirement age at 60 years and the respondent had not created any expectation that there would be an extension. There is no evidence in this regard. The claim for acting allowance is not justified. Notice for retirement was issued and all terminal dues have since been settled.
18. The respondent called Anne Ituku the human resources and administration manager who testified in support of the respondent's case. The claimant retired upon attaining the mandatory retirement age of 60 years and was paid all his terminal dues. for the entire period of employment, the claimant was the shift chemist and was never appointed in any other position or that of deputy chief chemist as alleged. The documents produced to support his case were not issued by the respondent and had no official stamps by the respondents. The claimant compared himself to various officers including Manianya Sifuna but they held different positions. The emails submitted do not confer a title to the claimant. There was no written notice appointing him as acting or as the substantive holder of the position of deputy chief chemist.
19. Ms Ituku testified that a retirement notice was issued as required and upon receipt, the claimant applied to seek a two-year contract but this was not approved. This letter of request ought to have been sent to the human resources office. He was cleared and his terminal dues were paid.
20. At the close of the hearing, both parties agreed to file written submissions.
21. The claimant submitted that he was entitled to a house allowance as his salary was regulated under the law and Wage Orders as held in *Charity Wambui Muriuki v M/s Total Security Surveillance Limited* [2017] eKLR. That an employee is entitled to reasonable accommodation or an allowance in lieu thereof. The payment statement issued only indicated a basic salary without a house allowance.
22. The claimant submitted that upon taking over the duties of the deputy chief chemist, he ought to have been paid the acting allowances and difference from the 111,000 that the position had. Internal communications were referring him as deputy chief chemist but he never earned the due salary for the position. In the case of *Kennedy Machino Wafula v Gumdit Sign Shop* [2022] eKLR the court held that under Section 74 of the *Employment Act*, the employer must keep work records and failure to do



- so should apply to the advantage of the employee. In this case, the respondent has not submitted any records of payment of a house allowance. Under the law, such allowance is due for the duration of employment as no housing was provided.
23. There was an unfair termination of employment leading to loss and damage and the claimant is entitled to compensation as held in *Oshwal Academy Nairobi & Another v Indu Vishwanath* [2015] eKLR. The claimant had a legitimate expectation that his employment would be extended after attaining 60 years. Other employees had benefited from such provisions.
 24. The respondent submitted that the claimant was retired upon attaining 60 years and at the time he held the position of shift chemist at a monthly salary of Kshs. 92,000. He was not appointed to any other position as alleged. Notice issued before retirement and the claim that this ought to have been for 12 months is not supported by any evidence. The fact that the claimant is applying for contract employment confirms that he was aware of his retirement on 30 April 2023. The claimant relied on documents not signed by the respondent as the employer. He cannot rely on such records as held in *Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneers) & 2 others* [2019] eKLR.
 25. The respondent submitted that under Section 47(5) of the *Employment Act*, the claimant had the burden of proof that there was an unfair termination of employment which he failed to discharge. He had no proof that he was the deputy chief chemist and could not rely on the assertion that he held such a position and hence was entitled to the salary due for this position. There was a gross monthly salary inclusive of house allowance as held in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR. The claim for a house allowance is not justified.
 26. The claims made are not justified and the suit should be dismissed with costs.

Determination

27. On the pleadings, evidence and written submissions, the issues which emerge for determination are what position the claimant held at the time employment was terminated; whether there was unfair termination of employment; and whether the remedies sought should be issued.
28. The claimant was employed as a shift chemist through a letter dated 11 December 2014. Under the *Employment Act*, 2007 (the Act), his employment was regulated under a written letter. Under the Act, any change to his employment status should and ought to have been in writing as required under Section 10(5) of the Act read together with Section 13 thereof. There was no change in employment status in writing.
29. In the case of *Margaret Wanja Muthui v Ministry of Transport, Infrastructure Housing, Urban Development and Public Works & 2 others* [2022] eKLR the court held that a change in employment terms must be communicated in writing. Where employment is regulated under a written contract or letter of appointment, any change thereof must be in writing. It cannot be inferred or assumed.
30. With regard to the claimant, he testified that the deputy chief chemist exited in the year 2016 and from 4 February 2016 he took over the office. However, there is no written communication for his acting in this position or an appointment as the substantive office holder. His letter of employment remained as a shift chemist. A claim for acting allowance, or the difference in the salaries from one office to the higher one has no justification.
31. Did the respondent's conduct create a legitimate expectation on the claimant that he had been appointed as deputy chief chemist? In the case of *Civil Appeal No. 18 of 2018 Transparency International Kenya v Teresa Carlo Omondi* [2023] eKLR the Court of Appeal held that a legitimate



expectation must be based on the conduct of the parties. Such expectations must be reasonable in the given circumstances.

32. The party claiming in legitimate expectation must therefore demonstrate such a matter. Legitimate expectation only arises when a person responsible for making a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted as expected. Such an expectation may arise, either from an express promise given on behalf of the entity or from the existence of a regular practice which the claimant can reasonably expect to continue. Therefore, the law cannot protect every reasonable expectation. Each case must be addressed on its merits.
33. In the case of Civil Appeal No. 58 of 2015: Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited, the Court of Appeal held that legitimate expectation can only operate within the confines of the law and it can only be legitimate if founded in the law.
34. In Communications Commission of Kenya & 5 others V. Royal Media Services Limited & 5 others [2014] eKLR the Supreme Court held that for legitimate expectation to arise, there must be an express, clear and unambiguous promise given. That the expectation itself must be reasonable, and that the representation must be one that the decision maker was competent to make. There cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.
35. In this case, on the one hand, the claimant asserts that he took over the office of deputy chief chemist. He was referred and communication was issued to him under such title. On the other hand, the respondent denies that there was no appointment of the claimant to the position of deputy chief chemist. He remained a shift chemist and was paid for such a role for the entirety of his employment.
36. The court finds no promise, direct or remote suggesting, proposing or appointing the claimant as deputy chief chemist. His role, salary and retirement are related to the single position of shift chemist. The office communications via email or other communications were not directed to him in his appointment as deputy chief chemist. He cannot rely on such communications to assert or claim that these created a reasonable expectation that he had been appointed to such a role.

The claim for acting allowances is not justified.

37. With regard to the claim that there was unfair termination of employment, the claimant does not contest that he attained 69 years in April 2023. He was issued with notice before the retirement date. The policy he has relied upon in his assertion that he ought to have been issued with 12 months' notice was denied as the official policy of the respondent. In employment and labour relations, the employer is the lawful custodian of all work records in terms of Section 10(7) of the Act. The record of the respondent in this regard stands that the claimant attained his retirement age and notice of retirement was lawfully issued.
38. The claimant confirmed that upon receipt of the retirement notice, he applied for an extension on the grounds that he had a pending personal commitment. He thus appreciated that he was due to retire at the age of 60 years and hence requested a contract of two years. This was in recognition of the notice issued for retirement. The respondent had the discretion to issue a contract post-retirement.

Compensation is not due as claimed.

39. On the remedies sought, through letter dated 11 December 2014 the claimant was allocated a gross salary of Kshs. 92,000 per month. The position held is not regulated under the Wage Orders to claim



a house allowance outside the allocated gross salary. The claimant's employment is not based on a minimum wage.

40. Service pay is only due when the employer fails to apply the provisions of Section 35(5) and (6) of the Act. The claimant confirmed in his pleading and evidence that his NSSF and NHIF dues were being remitted to the statutory bodies until the year 2022. Service pay is not due in this case. Where the respondent failed to make any statutory remittances deducted from the claimant, recourse is to the statute bodies for the applicable penalty. A report to the Labour Officer to initiate inspection is a mechanism available to the claimant.
41. Certificate of Service is due at the end of employment in terms of Section 51 of the Act. the best practice is to clear with the employer and the certificate to issue. The respondent's witness Ms Karanja testified that the claimant had been cleared in all departments. Such clearance ought to have concluded with the issuance of a Certificate of Service.
42. On the claim for costs, the claim herein is not successful, each party bears its costs.
43. Accordingly, the claim herein is found without merit and is dismissed. Save the claimant shall be issued with a Certificate of Service per Section 51 of the Employment Act, 2007 if this has not been issued. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

