



**Gichobi v Teachers Service Commission (Cause E019 of 2023)  
[2024] KEELRC 725 (KLR) (5 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 725 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E019 OF 2023  
ON MAKAU, J  
APRIL 5, 2024**

**BETWEEN**

**MARY WAMBURA GICHOBI ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. By the Amended Statement of Claim dated 9<sup>th</sup> October 2023, the claimant alleged that she was prematurely retired from employment by the respondent. Therefore, she sought the following reliefs: -
  - a. A declaration that the retirement of the claimant from her employment on 31/06/2023 was unlawful, arbitrary, unfair and amounts to a forced early retirement.
  - b. An award of damages for wrongful termination equivalent to twelve (12) months' salary in accordance with section 49 of the *Employment Act*, 2007 at the rate of Kshs.1,085,760.00.
  - c. Costs of this cause.
  - d. Interest at the court rate on (b) and (c) above.
  - e. Any other remedy or relief that this Honourable Court may deem just and expedient to grant.
2. The respondent denied liability and averred that the claimant's retirement was lawful and therefore, the suit to be dismissed with costs.

**Factual background**

3. The facts of the case are fairly straight forward. The claimant averred that she was appointed as a trained teacher by the respondent in May 1990 vide TSC No.218862. She worked until 3<sup>rd</sup> May 2023 when



- she received a compulsory retirement notice on account of age. The last day for her service according to the notice was given as 30<sup>th</sup> June 2023.
4. The claimant is the holder of National Identity Card No.5086225 and Birth Certificate Serial Number 9751566 which indicate 9<sup>th</sup> December 1963 as her date of birth. Accordingly, she contended that her age of compulsory retirement was 9<sup>th</sup> December 2023.
  5. The claimant contended that the attempt to retire her before that time was unlawful and unfair termination of her employment. She averred that the unlawful termination has negative effect on her financial, social and mental well-being. As at the time of the said retirement notice, she was earning a gross monthly salary of Kshs.90,480.00. Her letters to the respondent protesting the premature retirement went unanswered. Hence the instant suit.
  6. During the hearing, she admitted that she was first employed by the respondent in 1985 as an untrained teacher. She further admitted that she filled Application Forms in 1984 indicating her year of birth as 1963 and failed to state the date and the month. She further admitted that she supplied the employer with her National Identity Card showing her year of birth as 1963 without indicating the month and the date of birth.
  7. She further admitted that she obtained her birth certificate on 4<sup>th</sup> October 2023 after retirement date. she further admitted that she never presented any birth certificate to the respondent during the 39 years she served the respondent. She also admitted that when she appealed to the employer against the retirement notice, she only attached a copy of National Identity Card and no birth certificate.
  8. She denied being aware that birth certificate was the only recognised proof of date of birth under the Code of Regulation for Teachers (CORT). She also denied being aware of Government Policy when the date of birth is not known. She contended that retirement notice dated 3<sup>rd</sup> May 2023 cancelled the earlier notice dated 1<sup>st</sup> March 2023, which stated that her records with the employer indicated her birth day as 1<sup>st</sup> April 1964.
  9. She testified that her first-generation Identification Card expired in 1989 and she obtained a second-generation card indicating her date of birth as 9<sup>th</sup> December 1963 which is the same date indicated in her Birth Certificate. She provided the employer with the new identification card during her promotional interview, but not a birth certificate because it was not required. She maintained that her appeal against the retirement was never heard by the employer.
  10. The respondent on the other hand averred that it employed the claimant on probationary terms on 4<sup>th</sup> January 1985 and thereafter rose through the ranks in the teaching service on permanent and pensionable terms. Her terms of service were subject to the CORT, 2005 as well as various administrative policy guidelines from the Government and the respondent. It maintained that the claimant exited teaching service lawfully upon attaining the compulsory age of retirement from Public Service.
  11. It averred that in the Employment application forms filled by the claimant before engagement in 1985, she indicated her year of birth as 1963 with no date or month of birth. The claimant further supplied a National Identification Card No.5086225 also indicating the date of birth as 1963 with no date or month of birth being shown.
  12. The respondent averred that according to the practice in Government, whenever an employee declares the year of birth minus the date and month, the retirement date is taken to be 1<sup>st</sup> July. Hence the retirement of the claimant effective 1<sup>st</sup> July, 2023.



13. It further averred that Government Circular Ref No.PSC/ADM/13 (9) of 19<sup>th</sup> November 2020, directed that an employee's official date of birth is the date of birth declared by the employee on application for employment and not the date of birth shown on the National Identification Card or any other document. It averred that the said information in the Government record cannot be varied except on production of a Birth Certificate issued before 15<sup>th</sup> November, 1982.
14. The above facts were repeated by the Respondent's HR Practitioner, Erica Kipsoi Soi who testified as RW1. He produced copies of claimant's Application for Employment and her first-generation National Identification Card, the Government Circular dated 19<sup>th</sup> November 2020, Code of Regulation of Teachers (CORT), 2005, Retirement Notice dated 3<sup>rd</sup> May 2023, claimant's letter dated 6<sup>th</sup> May 2023 and claimant's last payslip.
15. RW1 testified that in 1984 the claimant filled Application for registration as a teacher, and also Application for employment in which she indicated her date of birth as 1963. She also provided a National Identification Card showing 1963 as her year of birth. She contended that the failure to declare the date and the month of birth is a common occurrence in the public service. As such, the practice in the Public Service has been to adopt 1<sup>st</sup> July as the operative date of birth which is the middle of the calendar year.
16. She further testified that the Government Circular dated 19<sup>th</sup> November, 2020 directed that an employee's date of birth is the one declared by the employee at the time of appointment and it cannot be changed except by production of a Birth certificate issued before 15<sup>th</sup> November, 1982. She contended that the claimant never supplied her Birth Certificate to the respondent during her service and she never attached any copy to her appeal against the retirement.
17. On cross examination, she admitted that the current CORT in 2015 version and that the 2005 edition was obsolete. She further admitted that the retirement notice dated 1<sup>st</sup> March, 2023 indicated that claimant's records in the office indicated her date of birth as 1<sup>st</sup> April, 1963. However, she contended that that notice was erroneous and hence the retirement notice dated 3<sup>rd</sup> May 2023 which corrected the error on the date of birth. She admitted that she corrected the error without talking to the claimant.
18. She admitted that from February 2010 to May 2023, the claimant's payslips indicated her date of Retirement (ROD) as 30<sup>th</sup> April, 2024. However, she clarified that the error was noted in May 2023 and it was corrected in the payslip for June 2023 without calling the claimant for clarification. She clarified that going by Birth certificate date of 9<sup>th</sup> December 1963, the retirement would have been 8<sup>th</sup> December 2023 and not 30<sup>th</sup> April 2024. Finally, she stated that the claimant's appeal was not responded to because she was aware of the law and the policy and failed to provide her Birth certificate before her retirement.

## Submissions

19. The claimant submitted that the retirement notice does not meet the threshold of fair administrative action because the respondent changed her retirement date from 31<sup>st</sup> March 2024 to 1<sup>st</sup> March 2023 without giving her a chance to explain the discrepancy in her date of birth as it appears in her birth certificate and National Identification Card. For emphasis, she relied on the case of Republic v Judicial Service Commission & 2 others Ex parte (Erustus M.Githinji (2019)eKLR where the court held that a certificate of birth is presumed genuine under Section 26 (4) of *Births and Deaths Registration Act*, and Section 83 (1) of the *Evidence Act* unless otherwise proved to be not genuine or based on false evidence.



20. In this case the claimant submitted that he was denied participation in the administrative process that changed her retirement date and forced her to an early retirement. She contended that in the case of *Rufus Osotsi Olefa v Nairobi City Water & Sewerage Company Limited (2028)* eKLR the court held that an employee should be entitled to opt for the most favourable option. She concluded that in this case, the retirement notice was based on non-existent records and policy and as such it did not meet the threshold of fair administrative action. Therefore, in her view the retirement amounted to unlawful termination of her employment.
21. In view of the above conclusion, the claimant submitted that she is entitled to the reliefs sought. She contended that her payslips indicted her retirement date as 1<sup>st</sup> April 2024 and therefore she prayed for compensation for unfair termination under Section 49 of the *Employment Act, 2007* equal to 12 months salary being Kshs.1,085,760.00. she contended that due to her advanced age, she could not secure an alternative gainful employment.
22. The respondent, on the other hand submitted that the retirement of the claimant was lawful and the claimant is not entitled to the reliefs sought. It contended that the CORT provides that a teacher shall exit teaching service on attaining compulsory age of retirement being 60 years. It contended that at the time of appointment in January 1985, the claimant declared her year of birth as 1963 without indicating the date and month of birth.
23. The respondent submitted further that it adopted 1<sup>st</sup> July 2023 as the claimant's retirement date based on the Government practice that where an employee declares the year of birth without indicating the date and the month, the retirement date is 1<sup>st</sup> July. It further submitted that the Government Circular No.2 of 15<sup>th</sup> November 1982 directed that an officer's official date of birth is declared by the employee on application for employment and not the date shown in the National Identity Card or any other document.
24. It further submitted that Regulation 11 of the CORT provides that where there is doubt on the date of birth, a certified copy of Birth Certificate issued before 15<sup>th</sup> November 1982 shall be acceptable. It further submitted that the foregoing position was tinkered by the court decision hence paving the way to Government Circular dated 19<sup>th</sup> November 2020 on the determination of the date of birth for public officers.
25. The respondent submitted that throughout her teaching career from 1985 to 2023, and even after receipt of the retirement notice, the claimant never sought to regularise the retirement date. She never supplied the employer with her Birth certificate for verification until 1<sup>st</sup> July 2023 when she retired. Consequently, it submitted that the retirement of the claimant on 1<sup>st</sup> July 2023 was lawful and not forced or malicious and it did not violate *the Constitution* or any statute.
26. For emphasis, it relied on the case of *Abdinoor Sheikh Takoy v Kenya National Highways Authority (2022)* eKLR and *Daniel Wambugu Ngururi v Teachers Service Commission (2020)* eKLR where the court upheld retirement of officers who did not provide Birth certificate to rectify their employment records before retirement.
27. In view of the foregoing matters, the respondent submitted that the claimant is not entitled to the reliefs sought. Accordingly, it prayed for the suit to be dismissed with costs.



## Issues for determination

28. Having considered the pleadings, evidence and submissions, it is a fact that the claimant was employed by the respondent as a teacher from January 1985 to 1<sup>st</sup> July, 2023 when she was retired by a notice dated 3<sup>rd</sup> May 2023. The issues for determination are: -
- a. Whether the retirement was unlawful.
  - b. Whether the Claimant is entitled to the reliefs sought in the claim.

## Unlawful retirement

29. The claimant contends that her retirement date was changed by the employer from 1<sup>st</sup> April, 2024 to 1<sup>st</sup> July, 2023 unilaterally and therefore her retirement vide the notice dated 3<sup>rd</sup> May 2023 was unlawful. However, the respondent's case is that at the time of appointing the claimant in January 1985, she declared her year of birth as 1963 without indication of the day and month of birth. The said date of birth was declared in her application for employment and application for registration as a teacher. The same year was also indicated in her National Identity Card which she presented together with the said applications.
30. I have perused the said application forms and the National Identity Card alluded to above by the respondent. The applications are dated 28<sup>th</sup> November 1984. They all indicate the year of birth as 1963 with no date or month. The same is repeated in the first-generation Identity Card No.5086225.
31. The claimant has admitted that she filled the said application forms before employment and declared her year of birth as 1963. She has admitted that she presented the said first generation Identity Card. However, she contended that the said Identity card lapsed in 1989 and she obtained second generation National Identity card in 1999 indicating her date of birth as 9<sup>th</sup> December 1963.
32. She further contended that from February 2010 to May 2023, her pay slips indicated her retirement date as 30<sup>th</sup> April 2024. Considering the documents alluded to by both sides, it is clear that the date of birth for the claimant was not certain. It is also clear that through her entire period of service she never supplied the employer with her Birth Certificate. She also never did so after receipt of the retirement notice on 3<sup>rd</sup> May 2023 until 1<sup>st</sup> July 2023 when she retired.
33. The Respondent relied on the date of birth declared by the claimant at the time of appointment to determine her date of retirement. It was also guided by its CORT, and Government Circular of 19<sup>th</sup> November 2020. The said circular replaced the earlier one following the court decision which declared the same null and void for being inconsistent with the *Births and Deaths Registration Act* and the *Evidence Act*.
34. Accordingly, the new circular directed that: -
- “The date of birth for a public officer is the date on his/her certificate of Birth, pursuant to the provisions of the *Births and Deaths Registration Act* and the *Evidence Act*.”
35. Without any certificate of Birth, the employer was justified to rely on the information given by the claimant at the time of appointment. The information was contained in the application for registration as a teacher and the application for employment in which the claimant declared her year of birth as 1963 and left out the date and month. The same year was contained in her first-generation National Identity Card which was issued to her before seeking employment.



36. The emerging jurisprudence from our courts support the practice in public service that where an employee declares the year of birth as the date of birth, the operative date of birth is presumed to be 1<sup>st</sup> July. In the case of Abdinoor Sheikh Takoy, supra Onyango J held that: -
42. “As pointed out by the respondent, the Employment Act requires employers to keep records of particulars of employees, and among the particulars to be kept is the age of an employee according to information supplied by an employee.
43. It is my view that the respondent was within its right to use the date of birth in its records to determine the date of compulsory retirement for the petitioner in view of the fact that he had not, during his long service spanning 1986 to 2020 when he received the retirement notice, informed the employer of any change in particulars of his date of birth.”
37. In the case of Daniel Wambugu Ngururi, supra Mbaru J held that: -
- “In this case the claimant only obtained his birth certificate on 28<sup>th</sup> June 2012 and only notified the respondent vide letter dated 27<sup>th</sup> December 2016 after the notice to retire was issued on 6<sup>th</sup> April 2016. Based on the circulars and Regulations applicable at the time, without the respondent having the knowledge of the Birth certificate issued following its notice to the claimant, the court finds no illegality. The respondent acted rationally, within reason and the decision taken to retire the claimant was legitimate.”
38. The above decisions answered the question, what should happen when the employee only declares the year of birth and fails to supply the employer with a Birth certificate before or after a retirement notice is issued. I find the practice in the public service of using 1<sup>st</sup> July fair to both the employer and the employee because that is the middle of the year.
39. There is no doubt that the claimant obtained her Birth certificate on 4<sup>th</sup> October 2023 after the retirement took effect on 1<sup>st</sup> July 2023. The document was obtained from the Registrar of Births and Deaths after the employment relationship between the parties had ended. The move was therefore too late as the horse had already bolted.
40. Accordingly, I find that the employer acted fairly on the basis of the information held in its records, that showed that the claimant had attained the age of compulsory retirement. I therefore hold that the retirement was lawful and did not amount to forced early retirement.

### **Reliefs**

41. In view of the foregoing conclusion, I find that the claimant is not entitled to a declaration that her retirement on 1<sup>st</sup> July 2023 was forced. For the same reason, I find that she is not entitled to compensatory damages under Section 49 of the Employment Act. On the contrary, the suit is devoid of merits and it is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 5<sup>TH</sup> DAY OF APRIL, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.



**ONESMUS N MAKAU**  
**JUDGE**

