



Mugo Hsc v Mugo & 2 others (Employment and Labour Relations Cause E001 of 2024) [2024] KEELRC 1273 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1273 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E001 OF 2024
ON MAKAU, J
MAY 23, 2024
IN THE MATTER OF ILLEGAL TERMINATION AND RETIREMENT

BETWEEN

JANE WANJIRU MUGO HSC CLAIMANT

AND

FRANCIS MURIITHI MUGO 1ST RESPONDENT

BOARD OF DIRECTORS BINGWA SACCO SOCIETY LIMITED 2ND RESPONDENT

BINGWA SACCO SOCIETY LIMITED 3RD RESPONDENT

JUDGMENT

1. The Claimant was employed by the 3rd Respondent, as the Chief Executive Officer and an ex officio member of the Board. She alleges that she was sent on compulsory annual leave of 76 days from 2nd March 2022 and while there she received a suspension notice dated 3rd June 2022. The suspension was on half pay with no allowances. The suspension and disciplinary proceedings were, however, stayed by the Court in Nyeri ELRC Petition E006 of 2022 Jane Wanjiru Mugo HSC vs Bingwa Sacco Society Ltd.
2. On 29th December 2023, the 1st Respondent issued her with a one-day retirement notice taking effect on 31st December 2023. According to her she was born on 20th August 1964 and therefore the retirement was premature and amounted to illegal termination. She averred that the Respondents deducted secured performing loans from her terminal dues and only disbursed Kshs. 157,046.15 to her. She was aggrieved and brought this suit against the Respondents seeking the following reliefs:
 - a. A declaration that the Claimant's termination is indeed wrongful, unlawful, and grossly unfair termination and a violation of the Claimant's Constitutional rights and fundamental



freedoms and an abuse of the fair labour practices under Articles 25(c), 41(1), 47, 48 and 50 of *the Constitution* and further violates the provisions of the *employment Act* on dismissal of employees from employment in unfair manner.

- b. An order do hereby issue directing the Respondents herein to unconditionally and immediately reinstate the Claimant to her employment and pay her all her outstanding dues and allowances.
 - c. Damages for unlawful and unfair termination of employment equivalent to 12 months, dues/ salaries unpaid, monthly contribution savings, 1 month's salary in lieu of notice and interest thereon.
 - d. Interest on iii above.
 - e. Cost and interest of this claim.
 - f. Any other order that this Honourable Court will deem just and fit to grant.
3. The Respondent responded to the claim vide their response to claim dated 1st February 2024. They averred that the Claimant was legally suspended and the process stayed by the Nyeri Petition E006 of 2022 which is pending determination. They averred that the Human Resource Policy and Procedure Manual provided for retirement age at 60, which the Claimant attained and thus was mandatorily retired on 31st December 2023. They contended that the Claimant's record showed that her date of birth was 1/1/1964 and thus they acted on the documents on record. That the letter of 29/12/2023 was a notification of the impending retirement and any dues owing to her would be paid within 14 days, which was the case.

Evidence

4. At the hearing, the claimant indicated that she was born on 20th August 1964 and that she had documents to prove. She relied on her national identity card issued on 15/6/2022, a birth certificate issued on 6/2/1995 and passport issued on 3/3/1995. She stated that before employment, she obtained an ID that indicated her date of birth as 1964, and which she used to secure employment. The said ID expired and she took a new one. She stated that her retirement is 20th August 2024 as all her documents indicate her birth date as 20th August 1964.
5. During cross examination, she admitted that she made application for employment in 1993 in her own handwriting which is among the respondents' documents. She further admitted that she indicated her age then as 28 years old. She also admitted that she attached School Leaving Certificate from Nyeri Technical to the application. she was also supposed to avail National Identity card and birth Certificate and she supplied in 1995. She reiterated that her initial ID card indicated her date of birth as 1964 and it expired in 1996 and she obtained another on in 1997 ID also indicating her date of birth as 1964.
6. She admitted that she further obtained another ID card in 2017 indicating her date of birth as 1.1.1964 and supplied the employer with a copy of the same. She stated that while on suspension she lost her ID card and obtained another ID on 15/6/2022 indicating date of birth as 20.8.1964. She defended the changed date of birth stating that the registrar rectified the date of birth and her district of birth to match her birth certificate. She further stated that while still on suspension, she forwarded the new ID to the respondents vide letter dated 8th November 2022 for purposes of rectification of record but she never requested for anything. She also enclosed copy of her certificate of Birth issued in 1980. She contended that the birth certificate is the same one she presented upon appointment in 1993. She admitted that she obtained another certificate in 1995 which corrected only an error on her name and



her parents'. As regards the terminal dues computed, she contended that the same was only in respect of accrued leave.

7. In re exam, she stated she did not have a passport at the time of appointment but the respondents assisted her to acquire in order to travel abroad for the official assignments. She stated that the employer paid for the expenses and thus had copies of the passport and the visas. She stated that the validity of ID and birth certificate that she produced have not been challenged. She stated that there was no law that prevented her from rectifying errors in her ID while on suspension. She stated that on receipt of the retirement letter, she wrote a demand letter complaining that she was not issued with one-year notice as per HR Manual.
8. The respondent called its HR Manager, Ms. Jackline Wangari Mbogo who testified as RW1. She adopted her witness statement and bundle of documents as her evidence in chief. In brief, her evidence was that the claimant applied for employment vide a letter dated 6th August 1993 indicating that she was 27 years old. She attached a copy of School Leaving Certificate dated 31st December 1973 from Nyeri Technical Secondary School indicating that she was born in 1965, and a National Identity Card No. 5774311/68 which went missing from the file.
9. Rw1 further stated that as at the time the claimant was suspended, there were two copies of the ID cards for the claimant issued on 16th September 1997 indicating her date of birth as 1964 and the second one issued on 2nd February 2017 indicating date of birth as 1st January 1964. Rw1 further stated that as at the time of proceeding on the suspension, there was no copy of birth certificate but while still on suspension the claimant wrote a letter dated 8th December 2022 forwarding copy of her birth certificate issued on 10th January 1980 showing her date of birth as 20th August 1964 and the place of birth as Kirinyaga. She also enclosed copy of another ID card issued on 15th June 2022 indicating her date of birth as 20th August 1964. Rw1 stated that upon receipt of the said letter, she forwarded it together with the claimant's personal file to the Sacco chairman.
10. Rw1 further confirmed that on 29th December 2023, she notified the Finance Manager about the impending retirement for the claimant so as to prepare for her dues. On the same date, the claimant was served with a letter informing her of her retirement and thereafter her dues were computed and deposited in her account. Thereafter the claimant's lawyer challenged the retirement by a letter dated 3rd January 2024 annexing a birth certificate issued on 6th February 1995 which indicated her date of birth as 20th August 1964 and the place of birth as Nairobi. Rw1 stated that the contradictions in all the said documents provided by the claimant manifested a desperate claimant trying to extend her life in employment illegally and fraudulently. She therefore prayed the court not to condone that behavior.
11. In cross examination, she reiterated that, she notified the finance manager on 28.12.2023 that the Claimant was due for retirement. She did that because she is the one who prepares the payroll and she knew the claimant's retirement dates. She confirmed that there was no other retirement notice save for the one received on 31/12/2023. She stated that there was a copy of claimant's ID card in the respondent's record but no birth certificate. She confirmed that she was employed by the Sacco in 2019 but she couldn't tell whether the birth certificate was always in the claimant's file as there was none.
12. In re-exam, she stated that she had access to all HR records but there was no birth certificate in the claimant's file.

Claimant's submissions

13. The claimant raised the following issues for determination:
 - a. Whether the claimant was born on 24th August 1964 or 1st January 1964.



- b. Whether the claimant's retirement was unfair, unlawful and illegal.
 - c. What are the orders as to costs?
14. On the first issue, it was submitted that claimant was born on 20th August 1964 as indicated in her birth certificate, ID and passport although it was acknowledged that her initial ID cards didn't capture the date and month of birth. It was further submitted that by the letter dated 8th November 2022 the Claimant supplied the 3rd Respondent with her birth certificate and passport, as proof of date of birth but the employer failed to rectify records. It was submitted that the employer failed to rectify the records and further failed to comply with clause 2.1.7 of the Sacco HR policy which provides for inquiry to be held in case of an error in the date of birth of an employee.
 15. It was further submitted that as an employer the respondent had a statutory obligation to keep employees' records and was also bound by its own HR Manual. For emphasis reliance was placed on the case of Susan Khakasa Oyatsi v Judicial Service Commission [2022] eKLR and Heritage Insurance Company Limited v Christopher Onyango & 23 Others [2018] eKLR.
 16. It was further submitted that the birth certificate is conclusive proof of date of birth as was held in the case of Joel Gituire Mwangi v Kenya Civil Aviation Authority [2017] eKLR and Republic versus Judicial Service Commission & 2 Others Ex parte Erastus M. Githinji [2019] eKLR. It was submitted that the Claimant served the employer with her birth certificate to clarify her date of birth but the same was rejected leading to premature retirement.
 17. On the second issue, it was submitted that the said premature retirement was unfair and unlawful. It was argued that the claimant was prematurely retired without following due process and without a fair hearing as her clarification on the dates was disregarded. It was argued that the premature retirement was perpetuated by the 1st respondent who maliciously wanted the claimant out of office. The actions were termed to be in breach of clause 10.2.2(c) of the HR manual which provided for a one-year retirement notice. Reliance was placed on the case of Grace Gacheri Muriithi versus Kenya Literature Bureau [2012] eKLR in arguing that there was no contrary report or birth certificate to dispute the claimant's date of birth thus the retirement was illegal and unlawful.
 18. On the third issue, reliance was placed on section 27 of the *Civil Procedure Act* that provides for payment of costs to the successful part in a suit. Reliance was also placed on the case of Little Africa Kenya Limited v Andrew Mwiti Jason [2014] eKLR. This Court was urged to grant the prayers as prayed.

Respondents' submissions

19. The Respondents raised the following issues for determination:
 - a. Whether the Claimant was born on 1st January 1964 or 24th August 1964.
 - b. Whether the Claimant's retirement was justifiable, lawful, fair and legal.
20. On the first issue, it was submitted that the Claimant produced four different ID cards before the Court that provide contradictory information concerning her date and place of birth. The first two provided for no date or month of birth and indicated two different places of birth, namely Nairobi and Kirinyaga. The third and fourth indicated different dates and months also places of birth being 1st January 1964 in Kirinyaga and 20th August 1964 Nairobi.
21. It was also submitted that the two birth certificates produced differed on place of birth where one indicated Kirinyaga and the other Nairobi. Reliance was placed on section 28 (1) and (2) of the *Births*



and Deaths Registration Act which allows for correction of errors in birth registers. It was contended that the Claimant did not provide valid reason for the discrepancies in her identity documents and neither did she produce evidence of the procedure undertaken in making the changes on the documents.

22. In arguing that the respondents did not have a duty to ask for the claimant's birth certificate reliance was placed on the case of *Hafidhi Muhsin v Teachers Service Commission* [2021] eKLR. It was submitted that the respondents relied on the ID card submitted in 2017 to ascertain the date of birth to be 1.1.1964 as the ID card submitted prior didn't have dates. It was argued that the respondents relied on the date of birth in the ID card to determine when the claimant was to retire as per clauses 3.38 and 10.2.2 of HR policy manual.
23. Reliance was also placed on the case of *Abdinoor Sheikh Takoy v Kenya National Highways Authority* [2022] eKLR to submit that the respondents could therefore not be faulted for relying on the documents in their records. It was argued that the explanations by the claimant on the reasons for changing her National ID cards and birth certificates did not hold water, especially the change of the date of birth in 2022 while on her suspension. Reliance was placed on the case of *EKT (suing through her father and next friend JKK) v Poa Links Services Limited and 2 others* [2022] eKLR to urge this court to be guided by the equity maxim that he who comes to equity must come with clean hands.
24. On the second issue, it was submitted that vide letter dated 22/11/2022, the respondent rejected the claimant's ID card enclosed with letter dated 8/2/2022, and thereby made the claimant reasonably aware that the respondents would establish the time of retirement on basis of the existing records. It was also argued that the claimant ought to have reasonably anticipated her retirement. It was submitted that the letter of 29/12/2023 merely acted as a notification of the processing of her terminal dues.
25. It was further submitted that by withdrawing the retirement dues on 3/1/2024, the Claimant concurred with the respondent on the age of retirement. It was therefore argued that the retirement was constitutional, mandatory, legal, procedural and thus the respondents denied violating any of the claimant's rights.

Analysis

26. The issues that fall for determination by this Court are as follows:
 - a. Whether the claimant was retired prematurely.
 - b. Whether the retirement amounted to unfair and lawful termination.
 - c. Whether the claimant is entitled to the reliefs sought.

Premature retirement

27. The claimant alleged that she was retired before her time as her date of birth was 20th August 1964 as per the certificate of birth and ID card which she supplied to the employer on 8th November 2022. However, the respondents maintained that the claimant had provided a contradicting information about her date of birth through four ID cards indicating the date as 1964 and 1st January 1964.
28. I have carefully considered the documents produced by both sides. There is no dispute that at the time of her appointment the claimant provided National ID card indicating her date of birth as 1964. The date and month of birth were not indicated. It is also not in dispute that during her time of service, the claimant supplied the employer with four ID cards with conflicting information on her date and place of birth.



29. Although, the respondent denied that the claimant had supplied it with her birth certificate as at the time of proceeding on suspension, Rw1 admitted in evidence that the claimant supplied her Birth Certificate and an ID card vide the letter dated 8th November 2022 captioned “CONFIRMATION OF DATE OF BIRTH”. She further confirmed that she forwarded the letter together with the claimants file to the Sacco Chairman. The birth certificate and the ID card indicated her date of birth as 20th August 1964. The documents were produced without objection and their authenticity is not challenged.
30. This court is not seized of jurisdiction to inquire into the legality of the multiple ID cards and Birth Certificates. What is material to me is whether the employer was supplied with a birth certificate by the employee to confirm her date of birth. Rw1 admitted as such. The certificate states as follows:
- “This certificate is issued in pursuance of the Birth and Deaths Registration Act which provides that a certified copy of any entry in the register or return purporting to be sealed or stamped with the seal of the Registrar-General shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.”
31. In the case of Republic v Judicial Service Commission & 2 others Exparte Erastus M. Githinji [2019] eKLR the court held that:
- “Thus the court presumes that the applicant birth certificate is the true evidence of 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.”
32. I agree with the judge in the foregoing case that the date of birth is the date provided in the employees Certificate of Birth and in the absence the date indicated by the employee as the date of birth at the time of appointment. In this case the claimant indicated her date of birth as 1964 at the time of appointment but one year before her retirement, she supplied the employer with a certificate of Birth and ID card indicating the date of birth as 20th August 1964. The employer did not challenge the authenticity of the Certificate of Birth but declined to rectify the claimant’s employment records. On the basis of the said Certificate of Birth, the claimant’s date of birth was 20th August 1964 and her 60th birth day will be on 20th August 2024. Consequently, I find and hold that her retirement on 31st December 2023 vide the letter dated 29th December 2023 was premature.

Unlawful and unfair termination

33. The Claimant’s claim is that she was unfairly and unlawfully retired, because the new Sacco Chairman maliciously wanted her out of the office. The reason for the termination was that the claimant had reached 60 years which was the mandatory age of retirement. I have already made a finding that the claimant was not yet 60 years old and therefore the reason cited for the termination was invalid.
34. She further contended that the procedure for retirement set out in Clause 10.2.2. (c) of the respondent’s HR Policy Manual was not followed. The said clause states as follows:
- “One year before retirement date of an employee, the SACCO shall write and notify the employee of the impending retirement. The letter should include all information pertaining to the retirement which includes all the benefits due to the employee at the time of retirement.”



35. The above procedure is unambiguous and no reason has been shown to justify the failure to comply with the same. It has been argued that the court had stayed suspension and disciplinary process against the claimant, however, the said court order did not extend to retirement.
36. Section 47(5) of the *Employment Act* places the burden of proving wrongful dismissal on the employee whereas the burden of justifying the grounds rests on the employer. It states as follows:
- (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
37. I have already made a finding of fact that the Sacco retired the claimant prematurely. In addition, the Claimant has shown that the retirement was also not done in accordance with the procedure provided by the respondent’s own HR Policy Manual which requires that retirement be preceded by a prior notice of one year. Consequently, I find and hold the claimant’s premature retirement amounted to unlawful and unfair termination of employment within the meaning of section 45(1) and (2) of the *Employment Act* which provides that:
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason -
- i. Related to the employee’s conduct, capacity or compatibility, or
- ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”

Reliefs

38. In view of conclusion reached above that the claimant was prematurely retired for no valid reason and without following the procedure set out in the respondent’s HR Policy Manual, I find that the claimant is entitled to a declaration that the her termination was indeed wrongful, unlawful, and grossly unfair termination and also a violation of the Claimant’s Constitutional rights and fundamental freedoms under Articles 41(1) and 47 of *the Constitution* and the provisions of the *Employment Act*.
39. The claimant prayed for reinstatement to her employment without loss of benefits. However, it is apparent that her relationship with the Directors and other officers of the Sacco is toxic and it is no longer practicable for her to continue serving. I say so because there is another case pending judgment where she is challenging a suspension due to alleged misconduct. Consequently, the only reasonable remedy for her in the circumstances is damages under section 49(1) of the Act being salary in lieu of notice plus compensation for unfair termination.
40. The claimant worked for 30 years and did not contribute to the termination through misconduct. She was only retired on account of age but before her time. She expected to work for eight months before



reaching mandatory retirement age. At her age she is not reasonably expected to secure another job before the said retirement age. Having considered the above factors, I award her six months' gross salary as compensation for the unfair termination.

41. As regards salary in lieu of notice, the claimant's Appointment letter provided for a termination notice of one month but when it comes to retirement, Clause 10.2.2 (b) of the Sacco HR Policy Manual provides for a notice period of one year. The claimant prayed for one-month salary in lieu of notice and I award the same. Since the claimant did not plead her salary, I will direct the employer to compute and pay the amount based on her gross salary as at the time of separation.

Conclusion

42. I have found that the claimant was prematurely retired from employment for no just cause and without following fair procedure. In view of the foregoing reasons I have found that the claimant is entitled to relief under section 49 read with 50 of the *Employment Act*. I have however found that the reinstatement is not a proper remedy in this case and awarded damages. Therefore, I enter judgement for the claimant in the following terms:
- a. A declaration is hereby issued that the retirement of the claimant amounted to wrongful, unlawful, and unfair termination of her employment and it was a violation of the Claimant's Constitutional rights and fundamental freedoms under Articles 41(1) and 47 of *the Constitution* and provisions of the *Employment Act*.
 - b. Award of six (6) months gross salary as compensation for unlawful and unfair termination.
 - c. Award of one month's salary in lieu of notice.
 - d. Cost for the claim plus interest at court rate from the date hereof.
 - e. The award of damages is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 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

