



Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers (KUDHEIHA) v Voi Safari Lodge (Cause 656 of 2020) [2024] KEELRC 1545 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1545 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 656 OF 2020**

**AK NZEI, J
JUNE 20, 2024**

**BETWEEN
KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS &
HOSPITALS WORKERS (KUDHEIHA) CLAIMANT
AND
VOI SAFARI LODGE RESPONDENT**

JUDGMENT

1. The Claimant, Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (Kudheiha) sued the Respondent herein vide a memorandum of claim dated 10/9/2020 claiming:-
 - a. Service gratuity for thirty five (35) years (31,411x25 days x35 years/30 days).....kshs. 916,154
 - b. Salary that would have been earned for two(2) years 31.411x12 monthsx2 yearskshs. 753,864.00
 - c. Maximum compensation for unfair retirement (31,411x12 months)kshs. 375,932
 - d. Letter of retirement.
 - e. Costs of the suit and interest at Court rates.
2. The Claimant pleaded:-
 - a. that vide a letter of appointment dated 1/8/1985, the grievant (Shadrack Kambi Chengo) was employed by the Respondent as a security guard, earning a starting monthly salary of kshs. 575.
 - b. that at the time of exit, the Claimant, who is a member of the Claimant Union, was earning a basic salary of kshs. 23,802.50 and a house allowance of kshs. 7,609.50.



- c. that on 1/7/2018, the Respondent issued a retirement notice to the grievant, giving him 5 months' retirement notice upon attaining retirement age by 31/12/2018.
 - d. that in September 2018, the grievant verbally objected to the retirement notice and stated that he would not have attained retirement age of 55 years by 31/12/2018, and produced documents as proof of his correct age.
 - e. that vide a letter dated 20/7/2018, the Respondent acknowledged having received the document supplied by the Respondent, stating his correct age, but maintained the retirement notice.
 - f. that the grievant reported the matter to the Claimant Union vide a letter dated 9/4/2019. That the matter eventually went for conciliation but parties did not agree, leading to issuance of a certificate (of disagreement) and eventual filing of the claim herein.
 - g. that the Respondent contravened Clause 27(1) of the Collective Bargaining Agreement between the Claimant and the Kenya Association of Hotel Keepers and Cateres which states that:-

“an employee who has attained the age of 55 years may retire or be retired.”
 - h. that the grievant's retirement was unfair and untimely.
3. Documents filed alongside the memorandum of claim included the grievant's written witness statement dated 7/9/2020 and a list of documents dated 10/9/2020, listing 22 documents. The listed documents included the retirement notice dated 1/7/2018, the Respondent's letter dated 20/7/2018 (stating that the retirement notice would stand despite submission of documents by the grievant), the grievant's letter to the Respondent dated 31/12/2018, the conciliator's findings and a certificate of disagreement dated 5/9/2019, copies of the grievant's KRA PIN issued on 28/11/1994, NSSF statement, NHIF Identification Card, birth certificate, Identity Card (issued on 24/1/2018), Identity Card issued on 2/7/1996 and the Claimant's affidavit sworn on 3/7/2017, among other documents.
4. The Respondent entered appearance on 11/12/2020 and filed a statement of Response on 26/5/2021. The Respondent admitted having employed the grievant upto the date of separation upon the grievant attaining retirement age. The Respondent further pleaded:-
- a. that in or about 1985 when the grievant enrolled for employment, he furnished the Respondent with a copy of his National Identification Card, which was part of mandatory documents, and that his National Identification Card Serial No. 213589621 and Identity No.8459050 bore the date of birth to be 1963.
 - b. that the said National Identity Card remained in place as the official document used to recognize the grievant, including obtaining and remittance of Retirement Benefits.
 - c. that vide an internal memo of 15/7/2013 or thereabouts the Respondent notified all its employees that retirement would strictly be pegged on one's birthday anniversary, and that the grievant did not take any initiative to either seek clarification on the memo or to furnish the Respondent with any change of registration particulars.
 - d. that upon being issued with a retirement notice, the grievant protested, noting that he had not attained the required retirement age, and concomitantly furnished the Respondent with a National Identity Card indicating his year of birth as 1965 instead of 1963.



- e. that the grievant was retired upon attaining the mandatory retirement age of 55 years as per the Collective Bargaining Agreement between the Claimant and the Respondent.
 - f. that all terminal dues owed and due to the grievant were to be collected (and are still being collected) as per the retirement notice dated 1/7/2018.
5. Documents filed alongside the Respondent's Response included a witness statement of Magdalene Achieng, the Respondent's Human Resource Manager, dated 25/5/2021 and an evenly dated list of documents listing 6 documents. The listed documents included an Identity Card of the grievant (issued in 1999), a list of the Respondent's Pensionable Staff Members, the Grievant's Benefits Statement, a memo dated 15/7/2013, a letter dated 1/7/2018 and the grievant's tabulated dues.
 6. At the trial, the grievant adopted his filed witness statement as his testimony and produced in evidence the documents listed on the Claimant's list of documents as item Nos.7-22. The grievant (CW-1) further testified that he was employed by Kenya Safari Lodges and Hotels (the Respondent) in 1985, and that he was aged 52 years when he retired in 2018, that he was to turn 55 years on 27/11/2020. That his employer ought to have known this fact as it was the custodian of the documents on the basis of which the grievant was employed.
 7. It was the grievant's testimony:-
 - a. that on being employed in 1985, he presented to the Respondent his identity card which indicated that he was born on 27/11/2965, a copy whereof he had not produced in Court.
 - b. that the grievant lost his identity card in 1995 and when he applied for another one which he got in 1996, his date of birth thereon was indicated as 1963, forcing the grievant to apply for an Identity Card yet again. That a new identity card came out in 1999, still with his date of birth as 1963.
 - c. that in 2017, the grievant made yet another application for his identity card, and that this time it came out with his correct date of birth, 1965.
 - d. that the grievant had a KRA Pin Certificate, which bore 1965 as his date of birth. That the said date of birth (1965) also appeared on the grievant's NSSF records, Pension records and Birth Certificate.
 - e. that after receiving the retirement notice, the grievant took his documents to the Respondent, but which the Respondent rejected.
 8. Cross-examined, the grievant testified that in 2017, he applied for rectification of the date of birth on his identity card, which rectification was effected on 24/1/2018, and that he thereupon gave a copy of the rectified identity card to the Respondent's Human Resource Officer. The grievant denied having received his dues on being retired.
 9. The Respondent called one witness, Magdalene Achieng (RW-1), who told the Court that she was the Respondent's Human Resource Assistant. She adopted her filed witness statement as her testimony and produced in evidence the Respondent's documents referred to at paragraph 5 of this judgment. RW-1 further testified, under cross-examination and re-examination:-
 - a. that at the time of employment in 1985, the grievant submitted to the Respondent a copy of his identity card, being the one listed on the Respondent's list of documents (Respondent's exhibit no. 1), which is shown to have been issued in 1999, and which is a second generation identity card.



- b. that at the time of employment, the grievant presented a first generation identity card, and that those old generation identity cards had since been phased out.
 - c. that it was mandatory for employees to furnish KRA PINS.
 - d. that in determining the date of retirement, the Respondent's company looks at an employees identity card.
10. It is to be noted that whereas the Respondent maintained that the grievant submitted to it a copy of a first generation identity card bearing the year 1963 as the grievant's year of birth, the grievant testified that the copy of his identity card which he presented to the Respondent at the time of his employment bore the year 1965 as his year of birth. That errors on his date of birth occurred when he applied for issuance of a new identity card after he lost the initial one, and that the said error was subsequently corrected on 24/1/2018. The Claimant testified that he did not have a copy of the initial identity card (first generation identity card), a copy whereof he presented to the Respondent at the time of employment in 1985.
 11. Under Section 10 of the Employment Act, particulars that must be included in a contract of employment include an employee's name and age. RW-1 testified that the Respondent mandatorily required employees to submit copies of their identity cards to the Respondent at the time of employment, from which the Respondent noted the employees date of birth; and that the grievant submitted a copy of his first generation identity card to the Respondent, which had 1963 as his date of birth. The grievant testified that the said old generation identity card had 1965 as his date of birth.
 12. The Respondent, being the employer, did not produce in evidence a copy of the grievant's said first generation identity card submitted to it in 1985. This despite the fact that Section 10(6) of the Employment Act, provides:-

“(6) The employer shall keep the written particulars prescribed in subsection (1) for five years after the termination of employment.”
 13. The grievant's employment was terminated on 31/12/2018 and the suit herein was filed on 10/11/2020, less than five years from the date of termination. The burden of presenting to this Court documents presented by the grievant at the time of employment was, therefore, on the Respondent/ the employer. The Respondent admitted in its pleadings and evidence to having employed the grievant in 1985 and to having been given a copy of the grievant's (national) identity card then.
 14. Documents filed and presented to this Court in evidence by the grievant, including his birth certificate, NSSF statement, NHIF Identity Card and KRA PIN, had 27/11/1965 as the grievant's date of birth. The grievant's KRA Pin certificate, whose number (PIN A002191305S) is printed on all the aforestated documents; is shown to have been issued on 28/11/2994, while the NSSF statement has the year 1987 as the date (year) when the grievant was registered/started making contributions to NSSF. The said Pin certificate is also referred to in the grievant's affidavit sworn on 3/7/2017, shown to have been sworn in support of an application for rectification (correction) of the date of birth on the grievant's second generation (“New Look”) identity Card to reflect the correct date of birth, being 27th November 1965. The said affidavit was produced in evidence by the grievant. The error is shown to have been corrected and a second generation identity card duly issued afresh to the grievant by the Registrar of Persons on 24/1/2018.
 15. The Respondent, being and having been the custodian of all the employment documents regarding the grievant's employment from 1985 to 31/12/2018, is obligated by the statute to produce in evidence



any document regarding any employment issue that may, for any reason, be in controversy. Section 10(7) of the [Employment Act](#) provides as follows:-

“If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be in the employer.”

16. Having considered the pleadings filed and evidence presented by both parties herein, issues that fall for determination, in my view, are as follows:-
 - a. when was the grievant born, and when did he attain retirement age.
 - b. whether termination of the grievant’s employment on account of retirement was unfair.
 - c. whether the grievant is entitled to the reliefs sought by the Claimant.
17. On the first issue, and in view of what is already stated in this judgment, the documentary evidence presented by the Claimant and the testimony of both the grievant and the Respondent (RW-1), the balance of probability tilts in favour of the Claimant. It matters not that the documents listed as item No. 21 on the Claimant’s list of documents (copies of the grievant’s KRA PIN certificate, NSSF statement, NHIF Card, Birth Certificate, ID Card and Aon Insurance statement) were only marked for identification after the Respondent’s Counsel insisted on the originals being produced. The suit herein went through the discovery stage and none of the documents filed by the Claimant was objected to by the Respondent. The Respondent did not call to question the validity or authenticity of any of those documents. Indeed, other than the Aon Insurance statement, all the other mentioned documents (listed under item No. 21) are public documents. This Court, being a specialized Court, is not bound and/or strictly bound by provisions of the [Evidence Act](#).
18. Under Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016:-

“The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.”
19. In the present case, there are pleadings filed, witness statements that were adopted by witnesses on oath as their respective testimonies and documentary evidence filed and produced in evidence and/or referred to by witnesses in their evidence in Court. The Court cannot ignore any of those documents, and has looked at and considered the contents of each one of them. All those documents have the grievant’s date of birth as 27/11/1965. The grievant explained, to the Court’s satisfaction, that an error on the date of his birth occurred during the issuance of his second generation national identity card in 1996 and in 1999 respectively, and that the error was eventually corrected by the Registrar of Persons on 24/1/2018.
20. I have taken note of the fact that the Respondent did not produce in evidence the copy of the grievant’s first generation identity card presented to it by the grievant at the time of employment in 1985. The grievant testified that the said first generation identity card had on it his correct date of birth, 27/11/1965. The grievant appeared to me to be a truthful and consistent witness. Documents presented/filed by him attest to his assertion that his date of birth is 27/11/1965.
21. Where else could the other employment records, including NSSF, KRA Pin Certificate and NHIF records dating back to 1987 and 1994 respectively, have gotten the grievant’s date of birth as 27/11/1965 if not from the documents presented by the grievant to the Respondent at the time of



employment in 1985". I find and hold that the grievant was born on 27/11/1965, based on the evidence on record.

22. It was a common ground that according to the CBA between the Claimant and the Respondent, the grievant was supposed to retire on attaining 55 years of age. Having been born on 27/11/1965, the grievant was set to attain 55 years of age on 27/11/2020, and to therefore retire on that date.
23. On the second issue, the Respondent's act of retiring the grievant before attaining the contractual retirement age of 55 years was wrongful and therefore unfair. The grievant took it upon himself to address the espodnent on the issue that he had not attained retirement age. This he did in July 2018 after receiving the retirement notice dated 1/7/2018. The Respondent wrote to him on 20/7/2018 acknowledging receipt of the documents that the grievant had submitted on 5/7/2018, but insisted that the retirement notice would stand.
24. On the third issue, the grievant pleaded and testified that the Respondent did not pay his dues upon retiring him before attaining the retirement age of 55 years. The Respondent did not demonstrate payment. It only exhibited its tabulation of the grievant's service gratuity. The tabulation is dated 31/12/2018, and total service gratuity payable to the grievant by the Respondent as at that date was calculated at kshs. 1,023,780.58. The Claimant claimed kshs. 916,154 as the grievant's service gratuity. Parties are bound by their pleadings. I award the Claimant kshs. 916,154 being the grievant's service gratuity.
25. Further, having made a finding that termination of the grievant's employment on 31/12/2018 on account of retirement was unfair, I award the grievant the equivalent of ten (10) months' salary being compensation for unfair termination of employment. I have taken into account the circumstance in which the grievant's employment was terminated, and the fact that the Respondent deliberately ignored the glaring fact that the grievant had not yet attained the contractual retirement age of 55 years as per the CBA in force then. It was a common ground that the grievant's gross monthly salary at the time of termination was kshs. 31,411. The equivalent of ten (10) months' salary is kshs. 314,110, which I award to the grievant.
26. The claim for kshs. 753,864 being the salary that would have been earned by the grievant for two years before attaining the retirement age of 55 years is declined, in view of the award already made herein for unfair termination of employment. Further, such an award is not available to the grievant under Section 49(2) of the [Employment Act](#).
27. In sum, and having considered written submissions filed herein on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. grievant's service gratuity.....kshs. 916,154
 - b. compensation for unfair termination
of employmentkshs. 314,110
kshs. 1,230,264
28. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
29. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH JUNE 2024



AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

****Claimant**

.....Respondent

