



**Ndundu v Jitegemee Sacco Society Ltd (Cause E53 of 2021)
[2024] KEELRC 1532 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1532 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E53 OF 2021**

**AK NZEI, J
JUNE 13, 2024**

BETWEEN

EDNA NDUKU NDUNDU CLAIMANT

AND

JITEGEMEE SACCO SOCIETY LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant against the Respondent herein vide a memorandum of claim dated 31/5/2021 and filed in this Court on even date. The Claimant sought the following reliefs:-
 - a. One month salary in lieu of notice kshs. 105,313
 - b. Retirement benefits calculated at 2 ½ months' salary for each year completed in service, that is 33 years – kshs. $105,313 \times 2 \frac{1}{2} \times 33 \text{ years} = \text{kshs. } 8,688,322.5$
 - c. 12 months' damages for unfair termination.....kshs. $105,313 \times 12 \dots\dots\dots \text{kshs. } 1,263,756$.
 - d. One year's salary for the 1 year remaining before the Claimant attained normal retirement age of 55 years – ksh. $105,313 \times 12 - \text{kshs. } 1,263,756$
 - e. A declaration that termination of the Claimant's employment was illegal, unlawful, unfair and contrary to provisions of the *Employment Act*.
2. The Claimant pleaded that she was employed by the Respondent as a Copy Typist/Receptionist on 24/7/1985 and was confirmed on 9/9/1987, and worked diligently for the Respondent for a continuous period of 33 years – until 31/5/2018 when the Respondent unlawfully and unfairly terminated her employment without notice.
3. The Claimant further pleaded:-



- a. that on 27/3/2018, the Claimant received a letter from the Respondent sending her on compulsory leave for allegedly requesting (for) and receiving her Insurance Pension Savings from Pan African Life Assurance in the year 2015/2016 without Board authorization.
 - b. that the Claimant was invited to show cause, which she did on 4/4/2018, and clarified that what she had received from Pan African Life Assurance was her savings, deducted from her salary, and not her retirement benefits.
 - c. that the Claimant was later invited to a disciplinary hearing on 30/4/2018, which was held on 3/5/2018, and on 25/5/2018 the Respondent informed her that its Board had resolved to retire her for having attained the age of 55 years in the year 2014 and for having received pension benefits in the year 2016, and that the retirement was to take effect on 31/5/2018.
 - d. that the Claimant's terms of service provided that upon retirement, the Claimant would be entitled to 2 ½ current monthly salary for each year completed in service, and that she had completed 33 years in employment, for which the Respondent had refused to pay.
 - e. that on 30/5/2018, the Claimant appealed against the decision to retire her pre-maturely on the basis of having attained 55 years of age, as her actual age was 59 years, just a year away from the normal retirement age of 60 years. That the appeal did not elicit any response from the Respondent, despite a reminder by the Claimant on 3/9/2018 re-stating unfairness in retiring her and failure to pay her retirement dues.
 - f. that termination of the Claimant's employment for having attained 55 years was unfair as she was 59 years at the time of termination, and that if 55 years was the retirement age, then there was a 4 year delay in retiring her.
 - g. that it was strange that the Respondent's Board raised the issue of her having received her pension contribution from Pan African Life Assurance more than 2 years after she had received the said benefits, that if the Claimant had committed any breach, the Respondent would not have waited for more than 2 years before taking action.
 - h. that it was not coincidence that action on the allegations were taken just 1 year from the Claimant attaining the normal retirement age of 60 years, as it was a premeditated pretext by the Respondent to abscond paying the Claimant's retirement dues.
4. Documents filed by the Claimant alongside the memorandum of claim included the Claimant's written witness statement dated 28/5/2021 and a list of documents dated 31/5/2021, listing 10 documents. The listed documents included the Claimant's appointment and confirmation letters dated 24/7/1985 and 9/9/1987 respectively, a compulsory leave letter dated 27/3/2018, the Claimant's reply dated 4/4/2018, invitation to a disciplinary meeting dated 30/4/2018, retirement letter by the Respondent dated 25/5/2018, the Claimant's appeal dated 30/5/2018, the Claimant's appeal reminder dated 3/9/2018, the Claimant's payslips and copies of a Collective Bargaining Agreement (CBA) between the Respondent and Kenya Union of Commercial, Food, and Allied Workers Union.
 5. The Respondent entered appearance on 4/6/2021 and filed a memorandum of Response on 24/6/2021, admitting having employed the Claimant on 24/7/1985 and pleading to having lawfully dismissed her summarily on 31/5/2018. The Respondent further pleaded:-
 - a. that the Claimant's employment contract was strictly governed by the Respondent's Human Resource and Administration Policy 2011, the Memorandum of Agreement between all employees under Management and Jitegemeo Sacco Society on salaries and terms and



conditions of service, the Sacco Society Regulatory Authority, the terms in the letter of appointment and the *Employment Act*.

- b. that the Respondent summarily dismissed the Claimant on 31/5/2018 for gross misconduct and in strict adherence to the law and rules governing the Claimant's employment.
 - c. that the Claimant was summarily and fairly dismissed for gross misconduct, gross misappropriation of funds, carelessness and abuse of office.
 - d. that the Claimant received her pension retirement benefits in 2016 from the Respondent's pension scheme – Ms. Pan African Life Assurance without the Respondent's Boards approval and knowledge.
 - e. that upon receiving her pension/retirement benefits, the Claimant remained in the Respondent's employment illegally, drawing salaries and benefits despite attaining the mandatory retirement age of 55 years and her contract having expired, an act that constituted gross misconduct.
 - f. that the Claimant was on 27/3/2018 sent on compulsory leave to allow the Board to investigate the matter and on 3/5/2018, the Claimant was invited for a hearing. That on 31/5/2018, the Respondent made a decision to summarily dismiss the Claimant as it was established that she had attained 59 years which was past the retirement age of 55 years as per the Respondent's policy, and that she had already collected her retirement benefits without the Board's approval and knowledge.
 - g. that the Claimant was a member of Pan African Life Assurance Scheme, a scheme established by the Respondent for its employees, and an NSSF member, hence the Respondent contributed towards the Claimant's pension, and as such the issue of payment of service of 2.5 months' salary for each year worked did not arise.
 - h. that under the Respondent's policy, the normal retirement age for its employees was 55 years, with an option of early retirement at 45 years; and that the Claimant was past the age of retirement at the time of termination.
6. By way of counter-claim, the Respondent claimed kshs. 341,875.86, which the Respondent pleaded was made up of several loans taken by the Claimant during employment. The Respondent also prayed for costs and interest at Court rates.
 7. Documents filed by the Respondent alongside the memorandum of Response and counterclaim included a written witness statement of Dola Mbale dated 21/6/2021 and an evenly dated list of documents listing 11 documents. The listed documents included the Claimant's letter (of appointment) and a letter of confirmation dated 24/7/2018 and 9/9/2018 respectively, the Claimant's identification card, member's account statement from Jitegemee Sacco Limited, Form of discharge from Pan African Life Assurance dated 25/4/2016, withdrawal of benefits computation schedule from Pan African Assurance, letters dated 27/3/2018, 25/5/2018, and 8/9/2018 respectively, a copy of Jitegemee Sacco Society's Policy and a Memorandum of Agreement and salaries and terms and conditions of service.
 8. At the trial, the Claimant adopted her filed witness statement as her testimony, and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that she was 59 years old when she was unfairly terminated/retired and was not paid anything.
 9. Cross-examined and re-examined, the Claimant testified that her retirement age was to be 60 years according to her terms and conditions of employment, and that she continued working and receiving



her salary until she was 59 years of age, and that withdrawal of her pension funds was done with the Respondent's approval. That she had pending loans which were to mature at her retirement age of 60 years; and that the Respondent took the Claimant's shares regarding the same. That according to paragraph (clause) 23(1) of the Memorandum of Agreement between Kenya Union of Commercial Food and Allied Workers and the Respondent, which formed the Claimant's terms and conditions of employment, the Claimant's retirement age was 60 years.

10. The Claimant further testified that the said Union was her Union, and that she (the Claimant) was a junior unionisable employee of the Respondent.
11. The Respondent called one witness, Dala Mbale (DW-1), an elected Director of the Respondent, who adopted his filed witness statement and produced in evidence the Respondent's documents referred to in paragraph 7 of this judgment. DW-1 testified that according to the Respondent's Human Resource Manual, an employee was supposed to retire at 55 years of age. That when the Claimant was 57 years of age, the Respondent realized that she had collected her pension benefits and that she was still earning her salary. That the Respondent had realized that the Claimant had not retired when she was 59 years old, upon which the Claimant was sent on compulsory leave and thereafter taken through a disciplinary process, which culminated in her termination on the ground of her having attained retirement age of 55 years. That the Claimant's salary for May was paid, but the Claimant's (loan) balance of kshs. 341,000 had not been paid.
12. It was DW-1's further evidence that the Claimant was above subordinate, and was not entitled to service pay as she was in a pension scheme and was also an NSSF contributor. That the Respondent was also claiming from the Claimant Ksh. 3,262,802 being the salary earned by the Claimant after she attained retirement age.
13. Cross-examined, DW-1 agreed that the Respondent had not produced in evidence the whole volume of its Human Resource Manual, but had exhibited pages that were neither dated nor signed; and that the Respondent did not have evidence that the Claimant had requested to be paid her pension benefits. That the Respondent realized that the Claimant had attained retirement age when she was 57 years old, but did not terminate the employment until she was 59 years old. That the Respondent's Board did not take any action in 2015 when the Claimant attained 55 years of age; but continued paying her salary, until 2018 when the Claimant was terminated.
14. It was DW-1's evidence that the Claimant was a Receptionist and had been unionisable before her promotion. That the Claimant's payslip for May 2018 showed that union dues were being deducted from her by the Respondent. DW-1 further stated in evidence that the compulsory leave letter dated 27/3/2018, signed by DW-1 stated that a retiring employee due for retirement was entitled to 3 months' notice; and that the Claimant was paid one month salary in lieu of notice. That there was a CBA between the Respondent Sacco and Kenya Union of Commercial Food and Allied Workers and that there was an agreement between the Respondent Sacco and the Union which was part of the documents exhibited herein by the Claimant (page 21 of the Claimant's bundle of documents). That the Claimant was a member of the provident fund for only 8 years (Respondent's exhibit 6). That pursuant to Clause 22(b) of the Respondent's Staff Provident Fund, workers in employment prior to inception of the provident fund were to be paid 2 ½ months' salary for each completed year of service.
15. That under the CBA, all forms of separation regarding unionisable employees were to be governed by the CBA.
16. It was the evidence of DW-1 that the employer initiates the retirement process by issuing a 3 months retirement notice. That the Claimant was working during the period between her attainment of 55



years and the time of termination. That union dues are deducted from an employee's salary by the employer and transmitted to the union.

17. Having considered the pleadings filed and evidence adduced thereon by both parties, issues that fall for determination, in my view, are:-
 - a. whether termination of the Claimant's employment by the Respondent on 31/5/2018 was unfair.
 - b. whether the reliefs sought by the Claimant are deserved.
 - c. whether the Respondent's counter-claim is merited.
18. On the first issue, evidence presented by both parties shows that the Claimant was employed by the Respondent as a Copy Typist/Receptionist vide a letter of employment dated 24/7/1985, and that she was confirmed to the said position vide a confirmation letter dated 9/9/1987. No evidence of the Claimant's promotion to a higher job grade was placed before this Court. The Claimant testified that she was a unionized employee of the Respondent, and evidence on record herein shows that the Claimant remained a unionized employee of the Respondent until May 2018 when her employment was terminated by the Respondent. RW-1 confirmed in evidence that even in May 2018, the Respondent deducted union dues from the Claimant's salary and remitted the same to the Claimant's Trade Union. A copy of the Claimant's payslip for May 2018 attesting to the foregoing was produced in evidence by the Claimant.
19. It is to be noted that both the Claimant's letter of employment and letter of confirmation were silent on her retirement age, but the letter of employment dated 24/7/1985 stated in part:-

“...You will be required to contribute at the rate of 5 per cent of your salary to the National Social Security Fund.

The appointment is subject to the terms and conditions of service of the Society applicable to employees in salaried Grades as amended from time to time.”
20. The Respondent produced in evidence some undated pages of what it referred to as its Human Resource Manual, which run from Clause 9.12 thereof. The preceding clauses and/or pages of the alleged Manual were not produced, and the Respondent's witness (RW-1) confirmed in evidence (under cross-examination) that the Respondent had only exhibited/filed herein the said undated pages. Clause 9.12 of the alleged Manual contained in the said undated pages states that employees would retire at 55 years or 45 years optional.
21. On the other hand, the Claimant produced in evidence only a part of the Respondent's Provident Fund Rules/document, which both parties testified so much about. Indeed, only two pages of the said document, containing paragraphs 20 to 24 thereof, were exhibited. I must express the Court's disapproval of the practice by parties to litigation of producing in evidence only pages or part's of documents that they refer to or even rely on in their respective cases. A Court of law will, more often than not, want to look at any document produced in evidence as a whole, and to draw conclusions therefrom as may be appropriate. In most cases, a clause in a particular document can only be understood better if looked at within the context of the other and/or preceding clauses. were both parties herein trying to keep some information away from the Court.” Be that as it may.
22. RW-1 testified that under Clause 23 (2)(b) of the Respondent's Staff Provident Fund (document), workers in employment before inception of the provident fund were to be paid 2 ½ months' current



salary for each completed year of service (on retirement). Clause 23 (1) and (2) of what the Court was told by both parties was the Respondent's Provident Fund Rules/document provides as follows:-

- “(1) All employees are liable to contribution of NSSF as laid down in (an) Act of Parliament and will be operated strictly according to the Government's requirements. The employee will only claim benefits after reaching sixty (60) years of age.
- (2) Staff Provident Fund
 - (a) For the purpose of administration of the Fund, employees who have been employed and confirmed in their appointments by the employer shall become members of the Provident Fund.
 - (b) For the workers who were in employment before the inception of the Provident Fund, the workers to be paid 2 ½ months' current salary for each year of completed service.

24. This agreement shall come into effect from 1st February 2012....”
23. The Respondent (RW-1) testified that the foregoing document was an agreement between the Respondent and its employees. That the Respondent did not initiate the process of retiring the Claimant when she attained 55 years of age, or even 57 years of age. That the Respondent commenced disciplinary proceedings against the Claimant for gross-misconduct in March 2018 for failing to retire on attaining 55 years of age, and for having received her provident fund benefits in 2016. The Respondent (RW-1) did not, however, tell the Court what instructions had been given by the Respondent to the Provident Fund Administrator (Pan African Life Assurance) on release to employees of benefits from the fund/ scheme, and whether the Claimant had breached any laid down rules in receiving payment of her said benefits from the provident fund, which were, in any case, her entitlement.
24. I am convinced, based on the evidence presented herein by both parties, that based on the aforesaid agreement between the Respondent and its employees, the agreed retirement age as from 1/2/2012 was 60 years. On a balance of probability, that is why the Respondent did not initiate the process of retiring the Claimant when she attained the age of 55 years, and still did not retire her at 57 years of age when the Respondent realized that the Claimant's provident fund benefits had been paid to her. The Claimant continued working and lawfully earning her salary until 27/3/2018 when the Respondent commenced the process of dismissing her for allegedly failing to retire upon attaining the retirement age of 55 years.
25. The Respondent (RW-1) testified that retirement of an employee could only be initiated by the Respondent/employer by giving 3 months retirement notice, which the Respondent never did in the Claimant's case. The Claimant was taken through a disciplinary process for alleged gross misconduct of failing to retire, and her employment was terminated on ground of retirement, without the requisite 3 months' notice, vide a letter dated 25/5/2018, by which termination was to take effect on 31/5/2018.



26. As stated by the Court of Appeal in the case of Steel Makers Limited -vs- Joshua Nzuki [2016] eKLR, there is no set mandatory retirement age for persons working in the private sector. Courts will look at the conduct of parties to ascertain their true intention. The Court stated as follows:-

“But what happens where the termination on account of retirement is not provided for in the contract or under the law? Indeed, it is clear that our statutes do not have a set mandatory retirement age for persons working in the private sector.

It is also a common ground that the appointment letter dated 20th August 1986, issued to the Respondent, made no mention of the retirement age. Then, in that instance, we take the view that the issue falls purely within the realm of the law of contract.

As with any other contract, the Courts will look at the conduct of the parties to ascertain their true intention.”

27. Still on the same issue, it was stated as follows in Robert Kithinji Kungu -vs- Aaa Growers Limited [2017] eKLR:-

“Quite evidently, there is no mandatory retirement age specified in statute within the private sector.

More often than not, the retirement age is specified in the individual contract of employment in the private sector.”

28. In the instant case, and as already stated in this judgment, the Claimant’s letter of employment/ appointment and the letter of confirmation of the appointment were silent on retirement age. The agreement between the Respondent and its employees regarding a Provident Fund Scheme that came into operation on 1/2/2012 mentioned 60 years of age. This together with the conduct of the Respondent and the Claimant pointed to an intention that the Claimant would retire at the age of 60 years. The Respondent even advanced loans to the Claimant that the Claimant testified were to mature on her attainment of 60 years of age. The Respondent did not rebut this evidence, but rather confirmed the same by counter-claiming the amount of loans that were outstanding at the time of the Claimant’s termination at the age of 59 years.

29. I find and hold that termination of the Claimant’s employment on account of retirement before her attainment of the agreed and/or intended age of 60 years was unfair, and I so declare.

30. On the second issue, and having made a finding that termination of the Claimant’s employment was unfair, I award the Claimant the equivalent of six (6) months’ salary being compensation for unfair termination of employment. It was a common ground that the Claimant’s monthly salary at the time of termination was kshs. 105,313. The equivalent of six months’ salary is therefore kshs. 631,878, which I award to the Claimant as compensation for unfair termination of employment. I have taken into account the circumstances in which the Claimant’s employment was terminated, and the fact that the employment was terminated 1 year to the agreed and/or intended retirement age of 60 years.

31. The Claimant claimed 1 month salary in lieu of notice, which is shown in the termination/retirement letter dated 25/5/2018 to have been paid and applied towards liquidation of the outstanding loans. The claim is declined.

32. Regarding the claim for retirement dues made up of the equivalent 2 ½ months’ salary for each completed year of service, I have noted from the evidence presented by both parties, that the Claimant’s retirement dues for 8 years of service payable under the provident fund were paid. I have also noted that



payment of the equivalent of 2 ½ months' current salary for each completed year of service applied as from 1/2/2012 backwards upto the date of confirmation of the Claimant's employment (9/9/1987), which is 24 years. The equivalent of the Claimant's 2 ½ months' salary as at the time of termination for 24 completed years of service is kshs. 6,318,780 (kshs. 105,313x2 ½ x24 years = kshs. 6,318,780), which I award to the Claimant being her contractual terminal dues.

33. The claim for the remaining one year before the Claimant attained the retirement age is declined, in view of the award already made in compensation for unfair termination for employment.
34. In sum, and having considered rival written submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Compensation for unfair termination of employment.....kshs. 631,878
 - b. Retirement/contractual terminal dues..... kshs. 6,318,780Total kshs. 6,950,658
35. On the third issue, the Claimant did not deny the sum of kshs. 341,875.86 counter-claimed by the Respondent in its counter-claim herein. The counter-claim is therefore allowed in the sum of kshs. 341,875.86 as prayed. The said sum shall be off-set from the amount decreed herein in favour of the Claimant.
36. Each party shall bear its own costs of the counter-claim.
37. The Claimant is awarded costs of the claim.
38. The Claimant is also awarded interest, to be calculated at Court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH 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

