



Mugambi v Kenya Pipeline Company Limited (Employment and Labour Relations Cause E296 of 2022) [2024] KEELRC 2260 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E296 OF 2022
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

TIMOTHY MUTHAURA MUGAMBI CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 5th May 2022.

Claimant's Case

2. The Claimant avers that initially he worked for the Respondent as the Chief Chemist serving on permanent and pensionable terms.
3. The Claimant avers that the Respondent advertised for the position of Quality Control Manger in October 2016, and he applied for the position and was appointed on a 3-year contract renewable subject to good performance. He was required to forfeit the terms of his previous position and take up the terms offered with the new position.
4. The Claimant avers that he agreed to the termination of his permanent and pensionable position and accepted the new position on 5/1/2017.
5. The Claimant avers that vide a letter dated 13/1/2017, the Respondent purported to change the terms of the contract alleging that he would not serve for the 3 years contract as agreed but up to the period he attains the age of 60 years.



6. The Claimant avers that he wrote to the Respondent on 6/5/2019 seeking to know why his fixed term employment contract was threatened with an early termination without following due procedure but the Respondent ignored the letter.
7. It's the Claimant's case that when he attained 60 years, the Respondent unilaterally locked him out of its premises on 31/8/2019. Being dissatisfied with the manner he was treated, he wrote to the Respondent on 11/12/2019 raising the same issues he raised in the letter dated 6/5/2019, however, the Respondent failed to respond to the letters and after 6 months he wrote another letter dated 3/7/2020.
8. The Claimant avers that the Respondent responded to the letter dated 3/7/2020 stating the Claimant being a state officer therefore subject to the mandatory retirement age yet his permanent and pensionable contract subject to the retirement age was terminated when he entered into the 3-year fixed term employment contract.
9. The Claimant avers that he was left with 4 months to serve on his fixed term contract which was frustrated by his abrupt and unlawful termination and urges the court to award him his salary and benefits for the remainder of the 3-year fixed term contract which remained unserved.

Respondent's Case

10. In opposition to the claim, the Respondent filed its response dated 4th August 2022.
11. The Respondent avers that the Claimant's appointment as a Quality Control Manager on a 3-year contract renewable subject to satisfactorily performance and a written request made 6 months prior to expiry of the contract.
12. It's the Respondent's case that the Claimant was not required to forfeit his permanent and pensionable terms as a chief chemist, the conversion was voluntary upon his acceptance of the terms of engagement as a Quality Control Manager.
13. The Respondent avers that the fixed term contract was subject to the provisions of the labour laws of Kenya and the Company's Staff Rules and Regulations as issued and/or amended from time to time. The letter dated 13/1/2017 did not change terms of the contract between the parties but clarified the contract would be subject to the retirement age of 60 years.
14. The Respondent avers that the Claimant did not raise any grievance regarding the letter in accordance with the grievance procedure provided under its Staff Rules and Regulations; it only became aware of the Claimant's grievance on 3/7/2020 after the lapse of his contract.
15. The Respondent avers that the Claimant was at all times aware that his contract of employment would terminate on 31/8/2019 upon attaining the retirement age of 60 years and issued with a notice on the same.
16. It's the Respondent's case that the Claimant's contract expired by application of law upon attainment of 60 years and as its mandatory practice, it disabled all systems and facilities connected to the Claimant's employment as he was no longer its employee.
17. The Respondent avers that vide a letter dated 27/7/2020, it clearly explained to the Claimant that the contract expired by operation of law as provided in the contract. Being a public officer by dint of section 2 of the *Public Service Commission Act* notwithstanding being an employee under a fixed term contract, therefore, he was subject to the retirement age of 60 years.



18. The Respondent avers that the contract of employment lapsed by application of law and the Claimant was not terminated prematurely or due to his performance therefore there is no need to issue him a warning letter.
19. It's the Respondent's case that the Claimant's prayer for an award of salary and benefits for a period after 31/8/2019 would be tantamount to unjust enrichment. The Claimant is not entitled to any compensation as there is no unserved contract period and his contract was not terminated but the same lapsed

Evidence in Court

20. The Claimant (CW1) adopted his witness statement dated 10/5/2022 as his evidence in chief.
21. During cross examination, CW1 testified that his contract of employment dated 20/12/2016 provided under clause 24 that it is subject to the Respondent's Staff Rules and Regulations and the Laws of Kenya. The Staff Rules and Regulations provides for a mandatory retirement age of 60 years and 65 years for persons living with disability.
22. CW1 testified that he received the Respondent's letter of 13/1/2017 advising his employment will be terminated upon attaining his retirement age of 60 years which caused confusion. He wrote letters seeking clarification dated 6/5/2019 and 11/12/2019 but the same have no acknowledgment stamp or proof of receipt by the Respondent.
23. CW1 testified that he wrote the letter dated 3/7/2020 upon retiring which was received by the Respondent and responded to.
24. CW1 testified that to receive his terminal dues, he filled his exit questionnaire and cleared from the company. He was aware that upon clearance he would be locked out of the Respondent's system.
25. CW1 testified that he received his dues upon retirement and the salary earned.
26. CW1 testified that his contract was to run till December 2019 and he continued to receive assignments from the Managing Director through WhatsApp.

Respondent's case

27. The Respondent's witness, Ganira Andolo (RW1) produced his witness statement dated 24/10/2023 as his evidence in chief and bundle of documents dated 4/8/2022, further bundle of documents dated 1/10/2023 as his exhibits.
28. RW1 testified that the Claimant's letters dated 6/5/2019 and 11/12/2019 was not received by the Respondent as received letters are usually stamped and received by the registry. If they were sent through email, it will be printed and stamped.
29. RW1 testified that the Claimant signed the exit form on 14/10/2019 and was paid Kshs 3,906,000.25 as his terminal dues including his salary and gratuity at 31% of his basic salary. The duration of the terminal dues was in respect to the duration of the contract 21/12/2016 to 31/8/2019 when the Claimant attained the retirement age.
30. RW1 testified that to protect the Respondent, when an employee exits the company the system is configured so that in your last day you cannot log into the system again.



Claimant's Submissions

31. The Claimant submitted that the Respondent introduced new issues not contemplated in the contract between the parties. The retirement age was not a factor considered in the contract; the same should have been specified in the fixed term contract for the Claimant's consideration.
32. It is the Claimant's submission that the Respondent's action was unfair as it failed to resort to the contract's specific provisions but relied on extraneous provisions not indicated in the contract and which the Claimant was not aware of before he agreed to forfeit his permanent and pensionable terms and take up a fixed term contract.
33. The Claimant submitted that the Respondent's Staff Rules and Regulations do not provide for fixed contracts. The parties entered into a *sui generis* contract and ought to have been treated as such since clause 3.7 (appointment on contract) of the rules only provides for a maximum contract period of 12 months and yet the Claimant and the Respondent had entered into a fixed term contract of 3 years.
34. It is the Claimant's submission that the Respondent was obligated to follow the proper procedure to terminate his Claimant but not to lock him out of the office for whatever reason and leave him to be told by his juniors in rank that his contract of employment had been suddenly terminated.
35. The Claimant submitted that there was no invitation, to attend disciplinary proceedings or warning, hearing and/or notice to show cause all which form the tenets of a fair and just system devoid of malice and embarrassment of a senior officer for no other reason just because he had turned 60 years of age. Since the Respondent had purported to shorten the contract period and the Claimant had retorted by restating the terms of the contract the Respondent knew or ought to have known that there was a dispute and ought to have handled the Claimant's exit differently but they failed to do so.

Respondent's Submissions

36. The Respondent submitted that the Claimant was a public officer within the meaning of section 2 of the Public Officers Ethics Act, 2013 which provides that an employee includes a temporary officer in a corporation and states is a public officer.
37. It is the Respondent's submission that its operations are governed by the relevant legislations and circulars including *the Constitution*, the *Public Service Commission Act* and the Public Officers Ethics Act. Therefore, it is misleading for the Claimant to state the Respondent is a private company; it is indeed a state corporation wholly owned by the government of Kenya.
38. The Respondent submitted that the Claimant voluntarily relinquished his permanent and pensionable terms of employment when he accepted the contractual position of Quality Control Manager.
39. It's the Respondent's submission that clause 24 of the employment letter dated 20/12/2016 provided that the contract will be subject to the labour laws of Kenya and the company's staff rules and regulations as issued and/or amended from time to time. This was clarified in the Respondent's letter of 13/1/2017 that the contract would expire upon the Claimant attaining the mandatory retirement age of 60 years.
40. The Respondent submitted that the Claimant was lawfully retired from service on attainment of the mandatory retirement age of 60 years and retirement is not synonymous with termination.
41. The Respondent submitted that the Claimant's letters of objection dated 6/5/2019 and 11/12/2019 were not received by the Respondent either by way of hard or soft copy as confirmed by RW1 and the



letters are not in the Claimant's human resource file. Further, the alleged letters were written 2 years and 4 months after receiving the letter of clarification dated 13/1/2017.

42. It's the Respondent's submission that the Claimant retired from service lawfully after attaining the mandatory retirement age of 60 years as provided in the labour laws of Kenya, the Respondent's Staff Rules and Regulations, 2015 and his contract as amended on 13/1/2017.
43. The Respondent submitted that upon being issued the retirement notice of 13/1/2017 two years in advance means the Claimant was aware of his impending retirement thus he cannot claim that he was not aware that he will be separated from the Respondent.
44. The Respondent submitted that the Claimant filled the questionnaire after his exit from the Respondent and he did not allude to degrading or inhumane treatment.
45. It's the Respondent's submission that the Claimant's retirement from employment was lawful and fair thus he is not entitled to the reliefs sought in the memorandum of claim.

Analysis and Determination

46. Having considered the pleadings, affidavits, evidence in court and submissions, the issues for determination are:
 - a. Whether the Claimant's employment was prematurely terminated or lapsed on account of attainment of retirement age
 - b. Whether the Respondent subjected the Claimant to degrading and inhumane treatment
 - c. Whether the Claimant is entitled to the reliefs sought
47. It is the Claimant's case that the Respondent vide a letter dated 13/1/2017 unilaterally varied the terms of his employment contract alleging that he would not serve for the 3 years as agreed but up to the period he attains the age of 60 years.
48. The respondent terminated the claimant's employment on permanent and pensionable terms and offered him a three years fixed term contract that was to expire on 20th December 2019. The claimant's dues for the term employment were settled and so that was the end of the old term. He was now on new terms under a fixed term contract.
49. The respondent issued the claimant a letter dated 13th January 2017 and clarified that the claimant was bound by the mandatory retirement requirements and so was to retire on 31st August 2019. It is not fair that the respondent gave the claimant a fixed term contract after terminating his permanent terms and just to recant the same without involving the claimant. The respondent altered the terms of the claimants contract without consulting the claimant and obviously when they offered him a fixed contract he was aware of the mandatory retirement age and yet offered him a fixed term contract.
50. It is trite law that a fixed term contract must bind the parties until the expiration of the same. None of the parties can renege from a fixed term contract which they have voluntarily signed to bind them. In the case of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another Civil Appeal No 95 of 1995 of 1999 (2001) eKLR the court held:

“A court of law cannot rewrite a contract between the parties once ascertained that the intention was to enter into a valid contract. The parties are bound by terms of their contract unless coercion, fraud or undue influence are pleaded and proved”



51. Indeed, in fixed terms contract the same terminate only on effluxion of the term. In this case the respondent cannot claim that the retirement period was mandatory. He should have considered that before he offered a fixed term contract to the claimant.
52. It is held by courts and is now clear law that parties to a contract are bound by the terms of the contract irrespective of how unreasonable and oppressive it may be and the duty of the court in such instances is to give effect to the intent of both parties as shown in the agreement.
53. The court finds the respondent willingly offered a contract of 3 years to the claimant his age notwithstanding and so he is bound to comply with the contract.
54. The respondent in its submission claim the claimant was lawfully retired from his employment after attaining the retirement age of 60 years. However, a written contract between the parties bind the two notwithstanding any other conditions.
55. In view of the foregoing, the court finds the claimant had legitimate expectation due to a valid contract entered between the two of them that he would work until the expiration of the fixed term contract. It is therefore the court's finding that his termination due to attaining the retirement age was unfair and is the court's holding that judgment is entered in favour of the claimant.
56. The claimant is therefore entitled to the following reliefs sought as hereunder:-
 1. 4 months' salary for the expired period kshs $644,000 \times 4 = 2,576,000/-$
 2. Gratuity is not clear was not payable as the pension was also paid and so is declined.
 3. Punitive damages for sudden termination of employment will be fixed at 2 months equivalent of salary at kshs 1,288,000.
 4. Total awarded is Kshs 3,864,000/- and costs are also awarded to the claimant. Interest is also awarded at 12% p.a until full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

