



Kenya Union of Commercial, Food and Allied Workers v Amritlal Shah Wholesalers Limited (Cause E015 of 2022) [2024] KEELRC 2591 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E015 OF 2022
MA ONYANGO, J
OCTOBER 24, 2024**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

AMRITLAL SHAH WHOLESALERS LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the [Labour Relations Act](#) to represent the employees in the commercial sectors as more specifically set out in the membership clause of the Union's Constitution.
2. The Respondent is described in the Memorandum of Claim as a registered company dealing in wholesale business in Uasin Gishu.
3. The Claimant is therefore the appropriate trade union for the employees of the Respondent.
4. The claim herein was instituted by the Claimant on behalf of the Grievant John Kipkoech Misoi, referred to in the Claim as an employee of the Respondent and a member of the Claimant Union.
5. The Claimant alleges that the Grievant was employed by the Respondent on 1st November 2012 as a driver earning a salary of Kshs 10,000 per month. At the time of termination of his employment, he was earning a gross salary of Kshs. 24,000 per month.
6. It is averred that on 1st April 2020, the Respondent sent the grievant on leave for 21 days and on reporting back on 1st May 2020, he was told to stay at home due to the Covid-19 pandemic noting that he was above 50 years.



7. It is contended that the Grievant received his salary for the month of April, May and June 2020 and thereafter the salary was stopped. That the Grievant went to see the Respondent's director to enquire about his employment status and was told his employment had been terminated.
8. The Claimant states that on 2nd February 2021, the grievant after asking several times to be given his termination letter, was sent to the County Labour Office where he found a letter from Kariuki & Co. Advocates dated 2nd March 2020 notifying him of his retirement.
9. It was pleaded that the Claimant tried to resolve the dispute at the shop floor but was not successful as a result of which it reported a dispute to the Minister for Labour on 9th September 2021. That parties were invited to a joint conciliation meeting on 23rd November 2021, 9th December 2021 and 11th January 2022. The Claimant states that it was after the parties failed to agree that the Conciliator issued a Certificate of Unresolved Dispute giving the Claimant the go ahead to institute this claim before this court.
10. In the Memorandum of Claim dated 15th June 2022 and filed in court on 28th June 2022, the Claimant seeks the following remedies on behalf of the Grievant:
 - a. Order that the Grievant be reinstated without loss of benefits. If reinstatement is untenable, the Claimant seek the following prayers: -
 - i. One month pay in lieu of notice Kshs. 24,000
 - ii. 8 years Leave pay
24,000x21x8/30 Kshs. 34,400
 - iii. 7 years severance pay
24,000x15x7/30 Kshs. 84,000
 - iv. 2 years Saturday overtime
3hoursx26x2x180 Kshs. 36,960
 - v. July 2020 salary Kshs. 15,000
Total Kshs.594,360
 - b. Certificate of Service
 - c. Costs of the suit to the Claimant
 - d. Any other order the Honourable Court deems fit to address the cause of justice
11. The Respondent filed a Response to the Statement of Claim dated 29th December 2022 in which it denies the allegations in the Statement of Claim.
12. According to the Respondent, it complied with the Ministry of health directive due to Covid-19 that required employees of over 55 years to work from home and since the grievant had attained the age of 60 years, the termination was in accordance with the time.
13. The Respondent maintained that the Claimant was duly paid all his dues and that the Respondent is not indebted to him.
14. The Respondent prays that the claim be dismissed with costs.



15. On 17th April 2023, the court directed parties to proceed by way of written submissions. The Claimant filed its submissions on 14th July 2023 whereas the Respondent's submissions were filed on 17th July 2023.

The Claimant's submissions

16. In its submissions, the Claimant framed the issues for determination to be:
- a. Whether the Grievant was unfairly and unlawfully terminated from employment.
 - b. Remedies available
17. On the first issue, the Claimant submitted that although the Respondent might have had a valid reason for terminating the Grievant's employment contract, the procedure followed by the Respondent was very unfair and unlawful.
18. The Claimant submits that the Respondent should have notified the Grievant of the impending retirement. That the purported retirement notice dated 2nd March 2020 that was issued to the Grievant at the County Labour Office almost 1 year after being sent on leave from 1st April 2020 is not a valid notice.
19. While citing the decision in *Kenya Airways Limited vs Satwant Singh Flora (2023) eKLR*, the Claimant submits that the Respondent cannot seek enforcement of a right through falsehood, misrepresentation or illegalities.
20. The court was urged to declare the action taken by the Respondent in issuing a retirement notice through the County Labour Office and not the Grievant himself as unfair labour practice.
21. With regard to the remedies, the Claimant submitted that the Grievant's employment was verbally terminated on 1st July 2020 but no notice of termination or retirement was issued to him until on 8th February when the letter dated 2nd March 2020 was handed over to him. It is also averred that the Grievant was not paid notice and leave dues.
22. The Claimant therefore prayed that the court grants the Grievant the remedies outlined in the Statement of Claim.

The Respondent's submissions

23. On its part, the Respondent framed the issues for determination to be:
- a. Whether the Grievant was lawfully terminated from employment
 - b. Whether the Grievant is entitled to the reliefs sought
 - c. Who is to bear costs of this suit.
24. On the first issue, the Respondent submitted that annexure 2, in the Claimant's list of documents is a retirement letter which the grievant duly received on 8th February 2021 and that the grievant not only received the retirement letter but endorsed his signature therein.
25. According to the Respondent, the Grievant went on leave during the pandemic and because of his age and in complying with the Ministry of Health guidelines that required employees over 55 years to work from home, the Respondent had no choice but to ask the grievant to stay at home after his leave was over.



26. The Respondent therefore submits that the termination of the grievant from employment was lawful as the reasons given were fair and valid.
27. With regards to the reliefs sought by the Claimant on behalf of the Grievant, the Respondent maintained that since the Claimant did not prove its case on unlawful termination of the Grievant, the reliefs sought should not issue.
28. In the end, the Respondent submitted that having established that the termination of the grievant from employment was not unfair, the court ought to dismiss the Claimant's claim with costs to the Respondent.

Determination

29. I have examined the pleadings and submissions of the parties herein. The main issues that fall for this court's determination are:
 - i. Whether the Grievant was fairly retired
 - ii. Whether the reliefs sought should be granted
30. Section 43(1) of the *Employment Act* provides that in any claim arising out of termination of contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of Section 45.
31. The Claimant contests the manner in which the Grievant left employment. According to the Claimant, the Grievant proceeded on leave from 1st April 2020 at the instance of the Respondent and remained at home while earning a salary until end of June 2020 when he was told that his services had been terminated.
32. It is averred that the Grievant followed up with the Respondent to be issued with a termination letter to that effect from July 2020 until 2nd February 2021 when he was directed to pick his retirement letter from the County Labour Office.
33. The Respondent has on the other hand maintained that it retired the Grievant following the Ministry of Health directive for employees over the age of 55 to work from home during the Covid-19 Pandemic.
34. However, the Claimant has faulted the Respondent's action of issuing a retirement letter to the Grievant on 8th February 2021 almost one year after it was written. According to the Claimant, the retirement letter is dated 2nd March 2020.
35. From a perusal of the Claimant's bundle of documents, apart from the retirement letter dated 2nd March 2020, there is also a notice of retirement letter dated 2nd March 2020 which it is indicated to have been received by the Claimant on 4th February 2021 and by the Grievant on 2nd February 2021.
36. The Retirement letter reads:

2nd March 2020

John Misoi

Id.3324215

Eldoret

Dear Mr. Misoi,



Re: Retirement From Employment

We hereby wish to inform you that you are being retired from your employment as a driver as you have attained the age of Sixty years.

You are hereby given notice that you shall be retired from employment effective 31st March 2020.

You are therefore required to clear with us after which you will be paid your salary for April 2020 and a sendoff token equivalent to your two months' salary.

We wish you a happy retirement

Yours faithfully

Signed

Kamal Shah

Director

37. The notice of retirement is reproduced hereunder. It reads:

2nd March 2020

John Misoi

Id No.3324215

Eldoret.

Dear Sir,

RE: Notice Of Retirement From Employment

Our Client: Amritlal Sojpar Shah Wholesalers Ltd.

We have been instructed by our above named client to write to you and address you as hereunder.

That as you are aware you have attained the age of Sixty (60) years and our client has the prerogative of retiring you at this age.

Pursuant to the above we have instructions to give notice which we hereby do of your retirement affective 31st March 2020.

You are therefore required to clear with our* after which you will be paid your salary for April 2020 and a sendoff token equivalent to your two months salary.

If you have any questions please feel free to contact us and kindly note that any future correspondence relating to the contents of this letter shall be channeled to us without any reference to our client.

Yours faithfully:

For Kariuki Mwaniki & Company Advocates

Signed

A.k. Mwaniki

Email:kariukimwanikiadvocates@gmail.com

Cc: Client

County Labour Office



38. From the above letters, it is clear that the Grievant herein was first notified of his retirement on 2nd February 2021 and issued with the Retirement letter on 8th February 2021.
39. It is not in dispute that as at the time the Respondent contemplated to retire the Grievant, the Grievant had already attained the age of 60 years.
40. However, the procedure undertaken by the Respondent in notifying him of the retirement almost one year after the decision to retire him was made amounts to unfair labour practice in violation of Article 41(1) of Constitution and section 35 of the Employment Act.
41. The Employment Act does not provide for a retirement age. The same is supposed to be a matter to be provided for in the contract of employment or in a policy document such as terms and conditions of employment by an employer which must be communicated to the employees.
42. In the instant case the Respondent has not referred to any provision in the Grievant's terms and conditions of service that provides for retirement at 60 years. The Respondent has not as much as disclosed the age of the Grievant at the time the decision to terminate his employment was made. There is thus no evidence that the Respondent had a policy to retire employees at the age of 60 years.
43. It is further clear that the Grievant was never given notice of termination of his employment. A notice brought to the attention of an employee almost a year after the termination is not a notice at all. The correct position is therefore that the Grievant was not given any notice of the termination of his employment through retirement.
44. It is further not clear when the letters of retirement were sent to the Labour Office. There is no evidence to show that the letters were indeed dispatched on the date indicated on the letters.
45. In any event neither the Labour Officer nor the Respondent's Advocate have authority to give termination notice to the employees of the Respondent unless there is an agreement with a particular employee to that effect. No reason has been given by the Respondent why it chose the advocate and the Labour Office as mediums of communication with its employee. It is the duty of the employer to give notice of termination to its employees.
46. The termination of the Grievant's employment is thus unfair from whichever angle one looks at it. And since it was due to Covid-19 pandemic, it was a redundancy.

Whether the reliefs sought should be granted

47. Having found that the Grievant's employment was unfairly terminated, he is entitled to pay in lieu of notice. He is also entitled to severance pay in view of the fact that the termination was due to the Covid-19 as stated by the Respondent at paragraph 6 of the Response to Statement of Claim and in paragraph 10 of its submissions.
48. The Respondent has not adduced any evidence that the Grievant went on leave. Its averment that the Grievant did not adduce evidence on the same is contrary to the provisions of sections 10(3)(a)(i), (6) and (7) and 74 of the Employment Act which provide that it is the duty of an employer to keep employment records containing information including entitlement to annual leave sufficient to enable the employee's entitlement on termination of employment to be precisely calculated. The section further shifts the burden of proof on the employer who is unable to produce such records in any legal proceedings concerning the employee.
49. Consequently, judgment is entered for the Claimant as against the Respondent in the following terms:



- i. A declaration is hereby made that the termination of the employment of the Grievant by the Respondent was unfair for want of valid reason and due process
- ii. Severance pay at 15 days per year worked for 7 years (24000x15/30x7) Kshs. 84,000
- iii. Pay in lieu of annual leave Kshs. 134,400
- iv. One months' salary in lieu of notice Kshs. 24,000
- v. The prayer for Saturday overtime is declined as the pay slips for the Grievant reflect that he was paid both normal overtime and double overtime
- vi. The prayer for July salary is not payable as the Grievant was not at work in July and has been paid in lieu of notice.
- vii. Respondent to issue certificate of service to the Grievant
- viii. Respondent to pay Claimant's costs assessed at Kshs. 50,000 in view of the fact that the Claimant was represented by a union official
- ix. Interest shall accrue from date of judgment

50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2024

MAUREEN ONYANGO

JUDGE

