



**Easy Coach Limited v Olwenyi (Appeal E093 of 2022)
[2024] KEELRC 2554 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2554 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E093 OF 2022
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

EASY COACH LIMITED APPELLANT

AND

PAUL OUMA OLWENYI RESPONDENT

((Being an appeal from the Judgment at Nairobi Milimani Chief Magistrate's Court of Hon. Selina Muchungi, Senior Resident Magistrate on 10th June 2022))

JUDGMENT

1. Through a Statement of Claim dated 9th February 2021, the Respondent moved the Chief Magistrate's Court at Milimani seeking declaratory orders to the effect that his termination from employment was unfair and unlawful. He further sought an order to compel the Appellant to pay him maximum compensation in the sum of Kshs 424,788/= for unlawful and unfair termination.
2. It was the Respondent's case at the trial Court that he was employed by the Appellant as a Security Officer on 1st September 2008 at the age of 56 years and that he executed his tasks to the satisfaction of the Appellant. That on 13th August 2020, the Appellant abruptly issued him with a one and a half month's retirement notice which was to take effect on 15th August 2020. That the termination notice did not indicate any reason for the abrupt termination. The Respondent further averred that during his 12 year period of employment with the Appellant, he was not supplied with an employment contract setting out the retirement age at 68 years or any other age.
3. The Respondent further averred that he was not given an opportunity to show cause why he should not be sent on retirement abruptly and neither was he given reasons for the decision to retire him at the age of 68 years and not any other age. He appealed against the decision to retire him abruptly and sought for reasons and or at least sufficient time to transition and relocate to his rural home but the Respondent declined his request and rejected the appeal.



4. According to the Respondent, his termination was unlawful, unfair and irregular to the extent that it did not comply with the stipulated procedures under the *Employment Act*.
5. The Appellant countered the Claim through its Statement of Defence dated 21st June 2021, in which it averred that the notice given to the Respondent was not abrupt and not only complied with statute but went beyond the statutory provisions for retirement. The Appellant further averred that its retirement provisions are set out at 55 years age for voluntary retirement and 60 years for compulsory retirement.
6. It was the Appellant's case that the Respondent was retired and not dismissed from his duties having reached the age of 68 way beyond the Respondent's compulsory retirement age of 60. The Appellant further contended that the notice to show cause does not apply to retirement matters and that it observed all relevant statutory provisions governing retirement. To this end, the Appellant urged the trial Court to dismiss the suit with costs.
7. At the trial Court, both parties called oral evidence and after close of the hearing, they filed written submissions. Thereafter, the trial Court evaluated and analyzed the evidence on record, and in the end, allowed the Respondent's Statement of Claim. In her decision, the learned Magistrate found that the Respondent had proved that he was wrongfully terminated from employment and that the Appellant had failed to prove that the reason for termination was a valid reason or was based on their operational requirements. The learned Magistrate further held that the termination of the Respondent was not in accordance with fair procedure and that he was not given an opportunity to give reasons why he should not be retired before the decision to retire him was reached. It was the trial Court's further finding that the decision to alter the terms of the contract was made without consulting the Respondent.
8. Having found in favour of the Respondent, the trial Court awarded him compensation equivalent to four months of his salary being the sum of Kshs 141,596/=. The Respondent was further awarded the costs of the suit plus interest at court rates.

The Appeal

9. The Appellant was aggrieved with the foregoing determination, hence lodged the instant Appeal through which it raises the following nine grounds: -
 1. The learned Magistrate erred in holding that the claimant (sic) was unlawfully terminated by the respondent.
 2. That the Learned Magistrate misdirected herself in law and fact by disregarding that the claimant (sic) was past his retirement age and was adequately compensated as required under law.
 3. The Learned Magistrate erred in law by disregarding the Protective Service Wage Order that provides for retirement of security guards at age 55.
 4. The Learned Magistrate erred in law by awarding four months' salary as damages for unlawful and unfair dismissal.
 5. The learned Magistrate erred in law by holding that the contractual one month's notice was not adequate for retirement.
 6. The Magistrate erred in law and fact by holding that a Notice to Show Cause letter and procedure ought to have been adopted prior to retiring the claimant(sic).
 7. The learned Magistrate erred in law and fact by disregarding the fact that the claimant (sic) was 68 years of age at the time of his retirement, considerably beyond the statutory laid out age.



8. The Learned magistrate erred in law by disregarding the fact that the respondent operated its business on a non-discriminatory basis between union and non-union employees especially on retirement age which is set at 60 years of age.
9. The learned magistrate erred in holding that the retirement of the claimant (sic) was on the basis of poor performance.
10. Accordingly, the Appellant seeks the following orders from this Court:
 - a. The Appeal herein be allowed and the subordinate Court's Judgment be reversed.
 - b. That the Appellant do have the costs of the Appeal.

Submissions

11. Pursuant to the directions of the Court issued on 2nd May 2024, the Appeal was canvassed by way of written submissions. The Appellant while placing reliance on the case of Samuel Omutoko Mabinda vs Riley Security Services Limited (2019) eKLR, submitted that the 1.5 months' notice was not only sufficient but complied with statute.
12. The Appellant further urged that the subordinate Court erred in holding that the Respondent's retirement was unlawful and awarding damages. It was the Respondent's position that the relevant governing statute was the Regulation of Wages Order and that it complied with the retirement requirements as stipulated by law.
13. It was the Appellant's further submissions that it was wholly unnecessary to conduct a hearing when the procedure is stipulated in subsidiary legislation.
14. In conclusion, the Appellant urged the Court to reverse the judgment of the trial Court as prayed in the Memorandum of Appeal.
15. The Respondent on the other hand, submitted that there was no evidence of valid, fair reason, his shortcomings and his unsuitability to fulfill Sections 43(1) and 45 of the *Employment Act*. The Respondent further posited that the Appellant had no basis to retire him and the age factor was a ploy. That further, he was employed after he attained the statutory age of retirement and this reason was not available to the Appellant. He further argued that the oral contract did not stipulate the retirement age and none had been attained. It was further submitted by the Respondent that the Appellant had retained in its employment employees of over 68 years and any age cap under the CBA did not apply to him. In the Respondent's view, the provisions of the Protective Service Wage Order are inapplicable.
16. It was the Respondent's position that the Appellant failed to show that the procedure followed was proper and that the termination was just and equitable. It was his submission that the Appellant failed to consult or notify him in writing contrary to the *Employment Act*. He further posited that there is no notice inviting him to give his views on possible retirement.
17. The Respondent urged the Court to dismiss the Appeal and enhance the award of compensation for unlawful termination from 4 months' salary to 12 months salary and to award him damages for discrimination and costs of the Appeal.

Analysis and Determination

18. This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion whether or not to uphold the decision of the trial Court.



In so doing, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

19. That said, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but noting that I did not see or hear the witnesses as they testified.
20. Having considered the record before me, I have isolated the following issues for determination: -
 - a. Whether the trial Court erred in finding that the Respondent was unfairly and unlawfully retired from employment;
 - b. Whether the remedies awarded lie in law.

Whether the trial Court erred in finding that the Respondent was unfairly and unlawfully retired from employment?

21. It is discernible from the record that the Respondent's employment was terminated on account of retirement. At the heart of this dispute is the said retirement which according to the Respondent, amounted to unfair and unlawful termination of his employment.
22. Under Section 45 (2) (a) and (b) of the *Employment Act* (Act), termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on its operational requirements. In addition, Section 45(2) (c) stipulates that such termination ought to be in line with fair procedure.
23. The question that begs for an answer is whether the said termination was unfair and unlawful in light of the statutory requirements under Section 45 (2) of the Act.
24. With respect to the reasons for termination, it is evident that the Respondent was notified of his retirement through a letter dated 13th August 2020. The said letter is partly couched as follows:

“ Re: Retirement From Employment

The Company has the pleasure and honour to notify you that we have decided to retire you from employment at the age of 68 years after having your dedication (sic) service of 12 years. You are hereby given one and a half months' notice in writing effective from 15th August 2020...”
25. It is common ground that the Respondent was employed at the age of 56 and that he was not issued with a written contract of service at the time of his employment until his retirement 12 years later. In essence, the Respondent's expected age of retirement was not documented.
26. It is also apparent that the Appellant did not adduce any evidence in whatever form or manner at the trial Court indicating the Respondent's expected age of retirement. As such, the Respondent's retirement was not certain and was an event that could occur at any point in time during the subsistence of the employment relationship.
27. Notwithstanding the fact that the Respondent's retirement age was not stipulated, it would not be realistic to expect that he would serve in the Appellant's employment for an indefinite period. If I may add, the Respondent did not indicate let alone suggest the age he expected to retire.



28. On this score, my thinking aligns with the determination by the Court of Appeal in the case of Steel Makers Limited v Joshua Nzuki [2016] eKLR, where the learned Judges reckoned as follows:

“In order to impeach this reason, the burden shifted back to the respondent to show in what manner the appellant acted against the policy. Instead, he merely asserted that 58 years was not the right age of retirement. In the absence of any documentary proof under contract, the conduct of the parties has not supported any other conclusion than, that the retirement age was 58 years. The respondent did not even assert what he considered to be the ‘right’ retirement age. Was he to work in perpetuity?”

29. All in all, I have not discerned anything from the record that would invalidate the reason given for the separation hence render the Respondent’s retirement substantively unfair within the meaning of Section 45(2) (a) and (b) of the Act.

30. Ultimately, it is this Court’s finding that the learned trial Magistrate fell into error when she found that the retirement of the Respondent did not constitute sufficient reason for termination of his employment contract.

31. On the question of procedure, the Respondent’s case at the trial Court was that he was not given an opportunity to be heard and to show cause why he should not be dismissed from employment.

32. As stated herein, the Respondent exited employment on account of retirement. In the letter of retirement, there was no indication that the Respondent was being retired on grounds of misconduct, poor performance or physical incapacity. This being the case, it is this Court’s view that the statutory requirements under Section 41 of the Act were not applicable.

33. As to the adequacy of the notice period, I find it imperative to apply Section 35 (1) (c) of the Act, which provides that where the employee receives salary on monthly intervals like in this case, the contract is terminable by 28 days’ notice in writing.

34. In this case, it is factual that the Respondent was given one and a half months’ notice prior to his retirement. In my view, this notice was sufficient having met the minimum statutory notice period under Section 35(1) (c) aforementioned.

35. Ultimately, this Court finds that the Respondent’s retirement did not amount to unfair and unlawful termination within the meaning of Sections 41, 43, and 45 of the Act.

36. Having so found, the award made in favour of the Respondent by the trial Court cannot be sustained.

37. Before I pen off, I find it worth mentioning that moving forward, the Respondent ought to act as a prudent employer and as by law required, by reducing into writing, all contracts of service exceeding three months. In addition, the employees’ age of retirement ought to be incorporated in their individual contracts of service or in a policy document. This will go a long way in creating certainty in the employment relationship and consequently, reducing disputes as the one herein.

Order

38. In the final analysis, the Court finds that the Appeal is meritorious and is hereby allowed.

39. Accordingly, the Judgment of the trial Court in Milimani CMEL No. E393 of 2021 delivered on the 10th of June, 2022 is hereby set aside.

40. Each party to bear its own costs in this Court and at the trial Court.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant Mr. Munene

For the Respondent Dr. Omondi Owino

Court Assistant Millicent Kibet

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 had 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 *Civil 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.

STELLA RUTTO

JUDGE

