



**Koimur v Egerton University (Employment and Labour Relations Cause E002 of 2024) [2024] KEELRC 2818 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2818 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E002 OF 2024  
HS WASILWA, J  
NOVEMBER 14, 2024**

**BETWEEN**

**ANN CHEPKOECH KOIMUR ..... CLAIMANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The suit herein was commenced by a Memorandum of claim dated 23<sup>rd</sup> January, 2024, seeking for the following reliefs; -
  - a. A declaration that the Respondent acted in contravention of Articles 27, 28 and 42 of the Constitution.
  - b. General damages under Article 23 of the Constitution for Violation and/or breach of the claimant's constitutional rights in prayer (a) above
  - c. Pension dues of Kshs. 2,322,105 plus interest at Court rates from the due date.i.e. 23<sup>rd</sup> May, 2023 till payment in full.
  - d. Lost earnings of Kshs 12,347,856.00 and the pension thereof for the period of 5 years that the claimant could have worked till retirement at the age of sixty-Five (65) years.
  - e. Costs of this suit and interest on all the amounts herein until payment in full.
  - f. Any other or further relief this Honourable Court may deem fit to grant.
2. The claimant's case is that she was employed by the Respondent on 29<sup>th</sup> August, 1989 as a medical Laboratory Technologist, at Njoro, within Nakuru County on permanent and pensionable basis.
3. That she worked for the Respondent with Zeal and in the year 2010, she was interviewed for the position of Chief Laboratory Technologist, which she emerged first position and was now elevated to



Job Group 12. That she served in this position until 23<sup>rd</sup> May, 2023, when he was retired on allegation of attaining retirement age of 60 years. At the time of retirement, the claimant states that she was earning a gross salary of Kshs. 257,427.

4. She states that she is a member of KUSU Union that had a CBA with the Respondent and in the CBA, employees in her cadre were retired at 65 years, while she was retired at 60 in violation of her rights under Articles 27(3) and 41 of *the Constitution* as read with sections 5(2) &(3) of the *Employment Act* and the CBA between KUSU Union and the Respondent.
5. She stated that despite being forced to retire before the retirement age, she cleared from the Respondent and left halfheartedly. She however states that even after clearing with the Respondent, they have refused to pay her pension and or terminal dues, when retirement deductions were deducted from her salary without fail throughout her employment.
6. She states that due to the breaches by the Respondent, she has suffered both financial loss of the pension and the amount she would have earned until retirement age of 65. Further that she has suffered mental and emotional anguish.
7. The Respondent entered appearance on 14<sup>th</sup> February, 2024, through the firm of Robert Ndubi and Company Advocates and filed a defence to claim on 8<sup>th</sup> May, 2024.
8. In the defence, the Respondent stated that it indeed employed the claimant on 29<sup>th</sup> August, 1989 as a laboratory Technologist on permanent and pensionable terms. That she was later promoted in 2010 to be the Chief Laboratory Technologist.
9. It is averred that the claimant was a member of the KUSU union and as per the CBA between the parties, the claimant was to retire at the age of 60 years. However, that Academic Staff falling under UASU union are retired at 65 as per their CBA.
10. The Respondent admitted that the claimant is owed a pension of Kshs 2,322,105 which is to be paid by the Government of Kenya as per the Law and thus, the Respondent is not liable for the same.
11. The Respondent denied any breach of the claimant's contract and stated that the claimant served them well and was retired as per the law on attaining 60 years. Therefore, that the claim herein is without any basis.
12. In addition, it is stated that the claimant was paid all his accumulated deferred salaries occasioned by the underfunding by the Government of Kenya and hence no salary arrears is owing.
13. In a rejoinder by the response to defence filed on 28<sup>th</sup> May, 2024, the Claimant reiterated the contents of her claim and added that she was never a party to any dealing between the Respondent and the Government and maintained that she was employed by the Respondent as such they are responsible to ensure her pension is paid.
14. During hearing, the claimant testified as CW-1 and adopted her witness statement 27/5/2024 and produced the documents which were marked as Exhibit 1-11 respectively and the further list of documents marked as Exhibit 12 to 14.
15. The claimant stated that the Respondent owes her pension benefits of Kshs 2,322,105 as per the statement at paragraph 8-11 of her list of documents. She testified that she is a member of KUSU and not UASU and clarified that KUSU is for the non-teaching staff while UASU is for the assistant lecturers all the way to the professors. She testified that Lincoln Miano was her immediate Boss who used to be the Chief Laboratory Technologist before being transferred to the faculty of Health Science. She adds that the said Miano was not a lecture but was retired at the age of 65 while she was forced



to retire at the age of 60. She maintained that she is owed and urged this Court to allow the claim in her favour.

16. Upon cross examination, she testified that she is a public servant and the retirement age of public servants is 60 years, however, that fact was not indicated in the employment letter. She confirmed that she was a member of KUSU until her retirement. she stated that it was common knowledge that Chief Laboratory Technologist retire at the age of 65. She testified that the CBA was in force at the time of her retirement. she also admitted that she was paid as negotiated by her Union. She told this Court that she did not complain to her Union when she was retired at 60 years.
17. Upon further cross examination, she told this court that Lincoln Miano, at the time of retiring, was in the teaching lab. She also stated that professors in the university retire at 70 years, while the teaching staff retire at 65 years.
18. On the claim for pension, she testified that the Respondent was deducting and remitting her pension contribution to a Pension Scheme in the University which is a corporate Body, however that the statement by the said pension scheme showed that the University was not remitting her pension contributions.
19. On re-examination, the witness testified that the Respondent did not make remittance of her pension to the Pension scheme. In fact, that they have acknowledged they owe her the said money.
20. The Respondent also called one witness, Maureen Ngala, the Acting Registrar of Human Capital who testified as RW-1. She adopted her witness statement of 2/5/2024 and produced the Respondent's documents which were marked as Exhibit 1-9 respectively.
21. RW-1 testified that she knows the claimant as a former employee of the Respondent. She told this Court that Mr. Lincoln Miano was an academic staff while the claimant was in the non-teaching department. She added that the claimant had sought to be re-designated to the teaching department but the Application was not successful.
22. On the claim for pension, she testified that the Claimant's Pension is to be paid by the Pension scheme under the Retirement Benefits Authority (RBA). She stated that there are no complaints received from RBA that some pension was not remitted.
23. Upon cross examination, she testified that the Respondent was initially unable to pay the claimant on time due to financial constraints. She told this Court that the University has three Unions. That Mr. Miano belong to KUSU until his retirement and that KUSU constitution provide for retirement at the age of 60 years.
24. On re-examination she testified that there is no claim for differed salaries made by the claimant. She also stated that the University usually makes a computation of the pension each retiree is supposed to be paid.

### **Claimant's Submissions**

25. The claimant submitted on three issues; whether the claimant has made out a case of discrimination, whether the Respondent owes the claimant pension dues of Kshs 2,322,105 and the interest thereof from the due date and whether the claimant is entitled to the reliefs sought.
26. On the first issue, it was submitted that the claimant retired at the age of 60 years in line with the CBA, however that her colleague, a former Chief Medical Laboratory Technologist, one Mr. Lincoln Miano, was retired at the age of 65, which move was discriminatory against her.



27. It was submitted that as much as the Respondent defended its move and stated that the said Mr. Miano was in the teaching department, he was not a member of the teaching team and also that it was confirmed that he was a member of KUSU union until his retirement. Therefore, that she was treated different from her male contemporaries in violation of Articles 27(3) and 41 of *the Constitution* as read with section 5(2) &(3) of *Employment Act* and the Collective Bargaining Agreement executed between KUSU and the University.

28. To support these averments, the claimant relied on the case of VMK Vs CUEA [2013] eklr where the court invoked Convention 111 of the ILO and stated that;-

“Article 1 of the Convention concerning Discrimination in Respect of the Employment and Occupation, 1958 defines discrimination thus, any distinction, exclusion or preference made on the basis of race, origin, sex, religion, political opinion, national extraction or Social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

29. It was argued that the only difference between the claimant and the Mr. Miano is that whilst the claimant worked in the medical department, Mr. Miano was transferred to the teaching department. However, that both were subscribed to the KUSU union and bound by the KUSU CBA, therefore they ought to have been retired at the age of 60 as per section 19(a) of the CBA, but since a precedent had been set for the Chief Medical Technologists to be retired at 65, the claimant had legitimate expectation to be retired at the age of 65 like her predecessor. That the failure to allow the claimant work until the age of 65 is a clear indication of discrimination against her on the only basis of gender.

30. To buttress this argument, the Claimant relied on the case of Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers V M P Shah Hospital, 2018] eklr, where the Court held that;-

“It has been submitted for the respondent that by reason of the provision in the collective agreement that the members retire at 57 years of age, the same is incorporated in individual members’ contracts of service. That is true but it is at that point that the discriminatory or inequality element in the provision becomes apparent. Thus, employees eligible to join the union but fail to do so would be differently treated in that regard as the clause on retirement age will not apply to them but yet they will for all purposes be subjected to the purported respondent’s justifications for the differing retirement age between unionisable and management cadres. Thus simply to say the parties to the collective agreement had agreed does not in the opinion of the Court, amount to a reasonable justification for a varying retirement age between the unionisable and the management cadres. The Court considers that Article 27 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. In the present case, the claimant’s members being employees of the respondent have equal protection and equal benefit of section section 5(2) of the *Employment Act*, 2007. Whereas the matter at hand does not relate to imposition of a disciplinary penalty or dismissal, the Court is guided that under section 46 (c) of the Act, it amounts to unfair reason to act against the employee on account of employee’s membership or proposed membership of a trade union. It is the Court’s view that the clause in the collective agreement that members of the trade union to normally retire at 57 years of age amounts to unequal treatment of the members as compared to the management cadre or the employees eligible to join the union but have not done so. The Court returns that such clause in the circumstances of this case is a clear



contravention of the employer's obligation in section 5(2) of the Employment Act, 2007 which provides, "(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice." The clause has an effect of treating differently and without any reasonable justification, the members of the union, the employees eligible to join the union but have not done so, and the employees in the management cadre. Thus the Court follows *Belgain Linguistics (No.2) (1979 – 1980) 1 EHRR* where it was held that for discrimination to be objectively justified it must be reasonable; assessed according to its aims and effects; considered against prevailing principles of normality in democratic societies; seen to pursue a legitimate aim; and established that there is a relationship of proportionality between the means employed and the aim sought (Discussed in Robin Allen & Rachel Crasnow, *Employment Law & Human Rights*, Oxford University Press,(2002) page 216). In the present case, the 57 years retirement clause would possibly discourage union membership and has been found to contravene Article 41 (1) and Article 27(1) of the Constitution in so far as section 5 (2) of the Employment Act, 2007 is contravened. The Court returns that the provision that the claimant's members retire at 57 years of age amounts to a discrimination that cannot be objectively justified."

31. On the claim of Pension, it was submitted that the claimant raised the issue in her letter dated 23<sup>rd</sup> September, 2022 addressed to Human Capital and Administration and another letter dated 16<sup>th</sup> August, 2023. It was argued that as much as the Respondent admitted before this Court that it owed the Claimant Pension, there is nothing to show that the said money was remitted to the Pension scheme.
32. It was argued that the Respondent in its defence admitted to owing the claimant pension amount of Kshs 2,322,105, a fact that was corroborated by RW-1 during hearing. That RW-1 stated in cross examination that the said money was not paid to the claimant because of financial constraints the Respondent was facing. This is further captured in the letter of 3<sup>rd</sup> October, 2023, therefore that by dint of the Respondent's admission of indebtedness, it should be compelled pay the said Pension money by dint of Order 13 of the Civil Procedure Rules, 2010. Moreover, that the Employer is compelled under sections 19(4)(5) & (6) of the Employment Act to pay up the said pension deducted but not remitted to the Pension scheme.
33. On the reliefs sought, it was submitted that with regard to interest sought that the Respondent admitted on oath that late remittance attracts interests and penalties, similarly, that since the said pension become due on 23<sup>rd</sup> ay, 2023, the Respondent should be compelled to pay the said pension with interest from the due date. In support of this, he relied on the case of *BOG Tambach Teachers Training College Vs Mary Kipchumba [2018] eklr*.
34. On the claim for general damages for discrimination, it was submitted that by forcing the claimant to retire at 60 years while her male colleague of the same rank retired at 65 was discriminatory and in violation of Articles 27 and 28 of the Constitution. Based on these violations of her rights, the Claimant proposed payment of the sum of Kshs. 8,000,000 as discriminatory damages, basing his argument on the case of *VMK Vs CUEA [2013] eklr* and the case of *Geeta Joshi V Pandya Memorial Hospital [2019] eklr*.
35. The claimant also urged this court to award her lost earning of Kshs 12,347,856, that she would have earned had she worked till 65 years.
36. Lastly, she urged this Court to award her costs of this suit with interest in line with section 27 of the Civil Procedure Act and reiterated by the Court in the case of *Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai and 4 Others [2014] eklr*.



## Respondent's Submissions

37. The Respondent submitted on Five issues; whether the claimant was discriminated against by the Respondent by being retired prematurely, whether the Respondent owes the Claimant pension dues of Kshs. 2,332,105, whether the claimant is entitled to lost earnings for a period of 5 years that she could have worked until the alleged retirement at 65 years in the sum of Kshs. 12,347,856, whether the claimant is entitled to an award of general damages under Article 23 of *the Constitution* and who should bear the costs.
38. On the first issue, it was submitted that the claimant was retired upon reaching 60 years being the retirement age. That section 80 of the *Public Service Commission Act* makes it mandatory for an employee to retire at the designated age. In support of this, the Respondent relied on the case of Adrian Kamotho Njenga V Kenya School of Law [2017] eklr and the case of Republic Vs Kenya Revenue Authority, Commissioner, Ex parte Keycorp Real Advisory Limited [2019] eklr , where the court held that;-
- “the mandatory retirement age of 60 years applies to all public officers with the exception of Judges, Academic staff in Public Universities, Research scientists ad Public Servants with disabilities.”
39. It was submitted that the Respondent by the letter of 5<sup>th</sup> May, 2022, gave the claimant notice of her retirement which was to begin with effect from 24<sup>th</sup> May, 2023. That the claimant in response by the letter of 23<sup>rd</sup> September, 2022 raised the issue of the criteria used to retire some employees at 60 and others at 65, which the Respondent expounded on and stated that the claimant retired as the Chief Laboratory Technologist, while the former Chief Laboratory Technologist, Mr. Lincoln Miano, had been transferred into the faculty of Health sciences in the Teaching department, therefore that he retired as a teaching staff as per the designation letter dated 27<sup>th</sup> January, 2006 following Mr. Miano's request for transfer to the said department by his letter of 20<sup>th</sup> September, 2005.
40. Based on the foregoing, the Respondent argued that the claimant was retired as per the regulations in place and the CBA between KUSU and the University, thus she was not discriminated against.
41. On the claim for pension, it was submitted that the claimant admitted during hearing that she was a member of the University retirement benefits scheme which is managed and ran by an independent Trust. Further that the claimant has not tabled any evidence before this Court showing that she has followed up on the payment of the said Pension, neither is there anything on record showing that the Respondent has not been remitting the claimant's Pension deduction as alleged. In any event that any disputes arising from decision of managers, administrators' custodians or trustees of the Pension Schemes lies with the Chief Executive Officers as per section 46(1) of the RBA Act.
42. The Respondent also submitted that clause 14 of the CBA between it and KUSU give the administrators of the Pension scheme the legal mandate to recover recover any money from the Respondent that were not remitted and in addition initiate penal sanctions through the retirement Benefits Authority.
43. The Respondent submitted that since it's a public University, it depends on funding from the Government of Kenya hence remittance of their part contributions to Egerton University Retirement Pension Scheme was already forwarded to the pending Bills Verification Committee, established by the Government of Kenya, which is set to settle the same hence the claim for pension is premature.



44. On the claim for money the claimant could have earned till the age of 65, it was submitted that the claimant is not entitled to any of the said money because she was legally retired at the age of 60 years as per the CBA between the University and KUSU, which she was a member.
45. On the claim for general damages under Article 23, it was argued that the Claimant was retired upon attaining retirement age of 60, thus her rights under *the Constitution* were not violated, therefore is not entitled to the damages sought herein.
46. On costs of the suit, the Respondent relied on the case of Republic Vs Rosemary Wairimu Munene, Ex parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd , JR No. 6 of 2014, where the Court held that;-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

47. In conclusion, the Respondent submitted that the claim has failed totally and urged this Court to dismiss the Claim with costs to the Respondent.
48. I have examined the evidence and submissions of the parties. The issues for this Court’s determination are as follows:
  1. What were the terms of engagement of the claimant at the time of retirement?
  2. Whether the retirement was done within the law.
  3. What remedies the claimant is entitled to?

#### **Issue No I**

49. From the evidence of the claimant herein, she was employed as a Lab Technologist on 29<sup>th</sup> August 1989. With time the claimant earned her promotion and was promoted to the position of Chief Medical Laboratory Technologist grade XII with effect from 16<sup>th</sup> June, 2010. She remained on this position till her retirement on 23<sup>rd</sup> May 2023. The claimant has averred that she was a member of KUSU the union dealing with University Staff and not Lecturers and members of KUSU were from grade 5 to 15. She also admitted in her evidence that Laboratory Technologists are not members of UASU.
50. As per her pays lip, the claimant indicated that she pays subscriptions to KUSU. In her evidence, the claimant further admitted that as per paragraph 9 of the respondents’ statement, according to KUSU CBA, she was to retire at 60 years and she retired at 60 years and not 65 years. She however aver that Mr Miano who was her boss transferred to the faculty of Health Services but he was a member of KUSU and he retired at 65years. She avers that the said Miano was transferred to the Faculty of Health Sciences but his terms of service remained the same. The claimant further states that she sought to be transferred to the department of Health Sciences but her request was never responded to.
51. In cross examination the claimant admitted that as a public servant she knew she would retire at 60 years. She also admitted she was a member of KUSU till her retirement. She also admitted that Miano was in Health Sciences and Student Dean of Faculty and retirement age was 65 years since he was a teaching staff.



52. On issue of pension claim she admitted that the same was to be paid by her pension scheme. She also indicated that she has not lodged her claim for payment with the pension scheme and neither does she have any letter from the said scheme declining to pay her pension.
53. From the evidence of the parties herein, the claimant agreed that she worked in the Faculty of Science as a Lab Technologist. In contrast, Mr Miano was transferred to the Faculty of Health Sciences and became a member of the teaching staff under the Dean Faculty of Health Sciences. Members of the teaching staff retired at 65 to 70 years old depending on the grade.
54. The issue of membership of the member are clear that the CBA provided for claimant's retirement at 60 years. The fact of why Miano retired at 65 years is clear in that he was in a different grade as a teaching staff and therefore his retirement age changed.
55. The claimant has insisted that she was discriminated against because Miano was transferred to the Health Sciences Faculty and not herself. This in my view is not discrimination per se. The claimant had her own employment contract which she signed and agreed to adhere to. The fact that another employee had been moved to another faculty on request does not imply that even the claimant was to be transferred to the same department.
56. An employee is bound by their own individual contract and the employer can only change the said contract with convenience with the employee on mutual agreement as provided for under section 10(5) of the *Employment Act* 2007 which states as follows:
- “Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”
57. The terms of contract of the claimant therefore are clear as per her employment contract and the CBA (b) the respondent and the claimant's union which indicated that she was to retire at 60 years.

### **Issue No. 2**

58. Having given the position on the terms of the claimant's contract above, the issue of whether the claimant's retirement was done within the law still rest on the said contract. I have set out the terms of the contract and the CBA which governed the claimant's relationship with the respondent. The contract indicated that the retirement age was 60 years. The claimant indicated that she indeed retired at 60 years as per the CBA. It therefore follows that there was no illegality committed by the respondent in retiring the claimant at 60 years. Her claim that her retirement was done illegally initially is therefore not founded on any plausible reasons.

### **Issue No. 3**

59. As for the remedies sought by the claimant, the claimant sought to be paid damages for breach of her rights under article 23 of *the Constitution*. The claimant did not establish what these rights that were breached were. That prayer must therefore fail.
60. As to the claim for lost earning of sums up to her anticipated retirement at 65 years, this must also fail for reasons given in this judgment finding that her retirement at 60 years was procedural.
61. As to the claim for pension dues, the claimant admitted that she is a member of a pension scheme and that the scheme is independent of the respondent. She also admitted that she has not submitted her



clam for payment of her dues from the scheme. The claim then that the respondent pays her pension is unfounded as it should be directed to the pension scheme itself.

62. Having found as above, therefore, it is my finding that the entire claim is unfounded. It fails accordingly and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**HELLEN WASILWA**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**HELLEN WASILWA**

**JUDGE**

