



**Mungai v Kenya Ports Authority (Cause 22 of 2020)  
[2024] KEELRC 13375 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13375 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 22 OF 2020  
AK NZEI, J  
DECEMBER 6, 2024**

**BETWEEN**

**JOEL MUSYOKA MUNGAI ..... CLAIMANT**

**AND**

**KENYA PORTS AUTHORITY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 27<sup>th</sup> March, 2020 and filed on 8<sup>th</sup> May, 2020, and sought the following reliefs:-
  - a. A declaration that the termination process as carried out by the Respondent was contrary to the *Employment Act* and amounted to wrongful, unfair and unlawful termination.
  - b. A declaration that the Respondent was liable for underpayment of the Claimant.
  - c. Lost earnings (12 months) ..... Kshs.3,937,706.04/=.
  - d. Unpaid operational allowance (19 months) ..... Kshs.660,579.84/=.
  - e. Unpaid shift allowance (19 months) ... Kshs.205,346.30/=.
  - f. Basic salary underpayment ..... Kshs.241,870/=.
  - g. Standard house allowance underpayment ..... Kshs.219,450/=.
  - h. Motor transport allowance ..... Kshs.171,000/=.
  - i. Compensation for unfair and unlawful termination ..... Kshs.3,937,706.04/=.
2. The Claimant pleaded that he was, at all material time, employed by the Respondent; having continuously served the Respondent in various capacities on permanent and pensionable basis



between 11<sup>th</sup> July, 1988 and 1<sup>st</sup> January, 2020; his last position being Assistant Superintendent, Grade HM4; whereby he was earning a consolidated gross monthly salary of Kshs.328,142.17.

3. It was the Claimant's further pleading:-

- a. that at the time of employment by the Respondent, the Claimant submitted his National ID Card (Identity Card) which did not at the time read his full birth date, instead only reading the year of birth (1960), which was the standard practice at the time of issuance of the ID Card.
- b. that in 2012, pursuant to a Government directive, the Claimant was able to secure his Birth Certificate which read his full birth date as 25<sup>th</sup> December, 1960; and thereupon sought to update his national identity card to read his full birth date, which was eventually done.
- c. that upon obtaining a birth certificate and prior to updating of his national identity card, the Claimant made verbal inquiries on updating his employment records and was advised to make a written request for the same, which he did vide a letter dated 28<sup>th</sup> August, 2018, and which the Respondent never responded to.
- d. that the Claimant wrote another request/a reminder on 3<sup>rd</sup> January, 2019 which the Respondent received on 4<sup>th</sup> January, 2019; and to which the Respondent responded vide a letter dated 6<sup>th</sup> March, 2019, declining the request on ground that an opportunity (for updating of employment records) had been given vide a circular letter dated 11<sup>th</sup> July, 2000 and that the opportunity had since passed. That the Respondent would place reliance on the incomplete records; which was unlawful and unfair.
- e. that the Claimant was aggrieved as the said circular letter was never served on him, and its contents were never brought to his attention, hence he was unaware of the alleged deadline. That it was an unfair labour practice for the Respondent to bar updates on employment records where new information comes to light.
- f. that the Respondent's refusal to update the Claimant's work records on the basis of a circular that the Claimant had no notice of was malicious, unreasonable and was actuated by bad intent as it served to retire the Claimant earlier than by law required, hence denying him a lawful, justified year of service as well as other dues.
- g. that the Respondent retired the Claimant early, on 1<sup>st</sup> January, 2020, vide a letter dated 27<sup>th</sup> August, 2019. That the retirement was based on assumption and was in total disregard of pre-existing facts that had been communicated to the Respondent prior, and was unfair and unlawful.
- h. that the Claimant's early retirement amounted to unfair, unlawful and illegal termination, and that the Claimant claimed for lost earnings of 12 months, calculated on his gross salary as at December 2019 (Kshs.328,147.17), a total of Kshs.3,937,706.04/=.
- i. that the Respondent did not afford the Claimant a hearing before retiring him early; and without notice in that regard.
- j. that the Respondent refused to recognise Government-issued identification documents.

4. The Claimant further pleaded that prior to his retirement, his superior at the work place, one Mr. Abdirahim Ahmed (Head of Container Operations), wrote to the Respondent's Head of Human Resource on 1<sup>st</sup> December, 2016, recommending the Claimant to work as an understudy in Grade HM4 Post 420 – 5013; upon which the Claimant was subsequently deployed to the said post and started carrying out the duties and functions of the said office. That six months after the said



- deployment, the Claimant's said superior, vide a letter dated 15<sup>th</sup> May, 2017, recommended that the Claimant be formally promoted to the said post.
5. It was the Claimant's further pleading that despite having been deployed to the said post and having served in the post since 1<sup>st</sup> December, 2016, the Respondent failed to formally promote him until 1<sup>st</sup> July, 2018 vide a letter dated 3<sup>rd</sup> July, 2018. That as a result of the delayed formal promotion, the Respondent underpaid the Claimant for the additional work done in the higher job grade between 1<sup>st</sup> December, 2016 and 1<sup>st</sup> July, 2019, which underpayment amounted to exploitation and violated the Claimant's legitimate expectation that he would eventually be compensated for the time served in the higher grade.
  6. The Claimant pleaded that due to failure by the Respondent to back-date his promotion, he (the Claimant) missed out on:-
    - a. Operational allowance at the rate of Kshs.34,767.36 per month for 19 months, and
    - b. Shift allowance at the rate of Kshs.10,807.7 per month for 19 months.
    - c. Underpayment (as noted in the letter of promotion) in basic salary for 19 months (Kshs.241,890/=), in house allowance for 19 months (Kshs.219,450/=) and motor transport allowance for 19 months (Kshs.171,000/=), a total of Kshs.632,320/=.
  7. The Claimant pleaded further that as a result of the Respondent's delay in promoting him and failure to backdate the promotion, the Claimant missed out on multiple annual salary increments, and as a result he was earning a basic salary of Kshs.96,920/= as at December 2019 as opposed to Kshs.105,810/=.
  8. Documents filed alongside the Claimant's Memorandum of Claim were the Claimant's affidavit in verification of the claim, the Claimant's written witness statement dated 27<sup>th</sup> March, 2020 and an evenly dated list of documents listing 14 documents. The listed documents included the Claimant's letter of confirmation to permanent and pensionable status, the Claimant's old identity card, birth certificate, updated identity card, letters dated 3<sup>rd</sup> January, 6<sup>th</sup> March and 9<sup>th</sup> May, 2019 respectively, retirement letter dated 27<sup>th</sup> August, 2019, the Claimant's payslip for December 2019, letter dated 15<sup>th</sup> May, 2017, promotion letter dated 2<sup>nd</sup> July, 2018, payslip for December 2016 and the Respondent's salary guide.
  9. The Respondent entered appearance and filed Response to the Claimant's claim on 2<sup>nd</sup> June, 2020, admitting that the Claimant was its employee, and that he worked for the Respondent in various capacities; but denying his claim. The Respondent pleaded:-
    - a. that a Circular, Ref: MPE/1/6/66 dated 11<sup>th</sup> July, 2000 was brought to the attention of the Respondent's employees, that all employees were to ensure that their employment records were updated by January of the following year regarding dates of birth, which the Claimant did not heed to. That several staff who were in the same predicament (as the Claimant) managed to update their records through the laid down mechanisms.
    - b. that the Respondent was not liable for wrongful early retirement of the Claimant as he, the Claimant, did not adhere to instructions as provided for in the Circular letter Ref: MPE/1/6/66 dated 11<sup>th</sup> July, 2000.
    - c. that appointment as understudies to fellow staff were not new positions, and was occasioned by the fact that the staff were due for retirement as stated in the recommendations in the letter



dated 1<sup>st</sup> December, 2016 (by the Head of Conventional Cargo Operations) to the Head of Human Resource.

- d. that the Understudies were not established posts and were for short periods, occasioned by the fact that staff were retiring. That the Claimant was eventually promoted on 3<sup>rd</sup> July, 2018 in accordance with the Human Resource Manual, having satisfied the Scheme of Service and promotion criteria.
  - e. that the letter from the Head of Conventional Cargo Operations to the Head of Human Resource dated 1<sup>st</sup> December, 2016 recommending understudying was not provided for in the Respondent's Human Resource Manual, and could not, therefore, be enforced by the Respondent's Human Resource Division.
  - f. that the Claimant was paid his full dues and there is no outstanding payments. That the Claimant continues to receive pension from the Respondent's pension scheme; and was further paid a Goods and Repatriation Allowance of Kshs.65,800/=.
  - g. that the Claimant retired on 2<sup>nd</sup> January, 2020, and that the Respondent was in the process of issuing him with a Certificate of Service.
10. The Claimant filed Reply to the Respondent's Response to the Claim on 17<sup>th</sup> June, 2020 and joined issues with the Respondent.
  11. On 24<sup>th</sup> August, 2021, the Respondent filed a written witness statement of Josphat Cheruiyot Lang'at and a list of documents dated 24<sup>th</sup> August, 2021, listing 34 documents. The listed documents included (copies) of the Claimant's ID Card issued on 1<sup>st</sup> August, 1996, the Respondent's duly filled statistics form, East African Harbour Corporation's records, Letter of appointment, payslip showing retirement date, Government Circular on employees to update their employment records, Respondent's (KPA) Circular of Ref No. MPE/1/6/266 dated 11<sup>th</sup> July, 2000 and 21<sup>st</sup> October, 2015, the Claimant's letter dated 3<sup>rd</sup> January, 2019, Respondent's letter dated 6<sup>th</sup> March, 2019, KPA retirement particulars, Retirement letter dated 27<sup>th</sup> August, 2019, Appointment to Understudy, letter of promotion dated 3<sup>rd</sup> July, 2018 and KPA HR Manual 2011 and 2017 respectively, among other documents.
  12. Trial opened before me on 23<sup>rd</sup> January, 2023. The Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 8 of this Judgment. The Claimant further testified that he was deployed to work as an understudy in Job Grade HM4 and was not being paid any duty or acting allowance.
  13. Cross-examined, the Claimant testified that on being employed by the Respondent, he furnished the Respondent with copies of his documents. The Claimant further testified:-
    - a. that the person he was appointed to understudy, Kennedy Ochieng, was still working, and had not retired. That the Claimant's Job Grade at that time (December 2016) was HG1, which was a unionisable post. That Kennedy Ochieng was in Job Grade HM4, which was a Management Job Grade.
    - b. that when one is deployed, they are given a post number. That two people cannot hold the same post number.
    - c. that after understudying Kennedy Ochieng, the Claimant was promoted to the Job Grade HM4, which was a management post, vide a letter dated 3<sup>rd</sup> July, 2018. That the promotion letter gave the Claimant a specific post number.



14. Re-examined, the Claimant testified that no circular letter had been addressed to him. That his letter to KPA (the Respondent) was a reminder on an earlier letter dated 28<sup>th</sup> August, 2018. That the Claimant was to understudy Post No. 420-5013. That he was eventually promoted to Post No. 420-5013 vide a letter dated 3<sup>rd</sup> July, 2018.
15. The Respondent called one witness, Josphat Cheruiyot Lang'at (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the Respondent's documents referred to in paragraph 11 of this Judgement. RW-1 further testified that the Claimant's date of birth according to the records provided by the Claimant was 1960. That when staff do not indicate their date and month of birth, it is construed by the Respondent Authority that birth occurred on 1<sup>st</sup> January. That the Claimant did not declare the date and month of birth, and that the Respondent's decision to retire the Respondent on 1<sup>st</sup> January was in line with Government's circular on staff retirement in state corporations. That the Claimant was retired on 1<sup>st</sup> January, 2020.
16. RW-1 further testified:-
  - a. that a commendation to understudy is not equivalent to a promotion, is not equivalent to performing higher duties, and does not amount to an acting appointment.
  - b. that understudying is an arrangement whereby staff learn from peers of a higher grade.
  - c. that the Claimant was in July 2018 promoted to the post of Assistant Superintendent-Verification Grade HM4, and that the effective date of that promotion was 1<sup>st</sup> July, 2018. The prior to the promotion, the Claimant was a Senior Clerical Assistant-Job Grade HG1; and is not entitled to any compensation regarding the period of understudying; as he was learning from the substantive higher post holder who was still in office.
  - d. that understudying is an informal arrangement, and the same continues/subsists until the person being understudied retires and the post he holds falls vacant. The person who understudied him is then recommended for promotion by the Head of Division. That the Claimant was recommended for promotion and was promoted.
  - e. that the position that the Claimant was understudying fell vacant on 1<sup>st</sup> July, 2018.
17. RW-1 further testified that the circulars produced in evidence by the Respondent on updating of employment records by employees were not specifically addressed to the Claimant; and that there was nothing to show that the same were communicated to the Claimant. That the circulars affected present employees and those yet to come, as long as the circulars remained valid and unoverturned. That it was on the basis of the said circulars that the Claimant was denied the right to change his records.
18. RW-1 further referred to paragraph 11 of his filed witness statement, and to a circular issued by the Public Service Commission on 19<sup>th</sup> November, 2020 whereby the Public Service Commission referred to a decision of the Employment and Labour Relations Court in Judicial Review Application No. 8 of 2019 and directed that the date of birth of a public officer is the date on his/her Certificate of Birth pursuant to the provisions of the *Births and Deaths Registration Act* and the *Evidence Act*.
19. Having considered the pleadings filed by both parties and evidence adduced thereon, issues that present for determination, in my view are as follows:-
  - a. Whether the Claimant's employment was unfairly terminated by the Respondent by way of unjustified early retirement.
  - b. Whether the Claimant is entitled to the reliefs sought.



20. On the first issue, it was a common ground that the Claimant's year of birth was 1960. It was also a common ground that the National Identity Card presented by the Claimant to the Respondent, and which formed part of the Claimant's employment records only indicated the year of birth (1960) and did not state the month and date of birth. The Claimant pleaded that this was the standard practice at the time of issuance of his said ID card.
21. Indeed, the Respondent pleaded, and its witness (RW-1) testified that in July 2000, the Respondent issued a Circular (Ref: MPE/1/6/66 dated 11<sup>th</sup> July, 2000) requiring its employees to ensure that their employment records regarding dates of birth were updated by 1<sup>st</sup> January of the following year. RW-1 further testified that the said circular was, however, not addressed to the Claimant, and that there was nothing to show that the circular was brought to the Claimant's attention. According to the evidence adduced by RW-1, the said circular was meant for then current and future employees, and remained valid unless it was overturned. He referred the Court to a circular issued by the Public Service Commission in November 2020 emphasizing the fact that a public officer's date of birth is the date indicated in his or her birth certificate.
22. The aforementioned circulars are an acknowledgement by the Respondent, and by the Public Service Commission, that employment records presented by an employee to an employer may contain incomplete or even conflicting information on the employee's date of birth.
23. In view of all the foregoing, the Respondent acted unfairly and unreasonably by refusing to update the Claimant's employment records regarding his date of birth to accord with the information contained in his Certificate of Birth, despite the Claimant writing to the Respondent on 28<sup>th</sup> August, 2018 and 3<sup>rd</sup> January, 2019 requesting that the updating be done. The Respondent wrote back to the Claimant on 6<sup>th</sup> March, 2019 declining to effect the update, and proceeded to retire him vide a letter dated 27<sup>th</sup> August, 2019, vide which the Respondent insisted that the Claimant's retirement date was 1<sup>st</sup> January, 2020.
24. According to the Claimant's Certificate of Birth, furnished to the Respondent and produced in evidence herein by the Claimant, the Claimant's date of birth was 25<sup>th</sup> December, 1960. The Respondent did not dispute the said date, and did not dispute the validity of the Claimant's said Certificate of Birth. All that the Respondent contended was that the Claimant did not update his records regarding his date of birth by the date stated in its circular dated 11<sup>th</sup> July, 2000, whose contents were not shown to have been communicated to or made known to the Claimant.
25. The Respondent's aforesaid letter to the Claimant dated 6<sup>th</sup> March, 2019 stated as follows:-

“RE: CHANGE OF DATE OF BIRTH

This is in reference to your letter dated 3<sup>rd</sup> January, 2019 in regards to the above subject matter.

Our Circular letter Ref: MPE/1/6/66 dated 11<sup>th</sup> July, 2000 had advised that all employees ensure that they have updated their employment records regarding dates of birth, failure to do so meant that 1<sup>st</sup> January of the year would be assumed to be the date of birth.

Your request therefore to change your date of birth has been declined.

Please be guided accordingly.

Elsie Bikondo

FOR: AG. HEAD OF HUMAN RESOURCES”



26. The Claimant pleaded and testified that the Respondent's act of retiring him early (on 1<sup>st</sup> January, 2020) was based on wrongful assumption and in total disregard of pre-existing facts, that the early retirement amounted to unfair termination; and that as a result, the Claimant lost earnings for 12 months. I do agree with the Claimant that his early retirement was unjustified, and find and hold that the same amounted to unfair termination of employment. I so declare.
27. For record purposes, it is worthy noting that an employer, as the custodian of employment records, is obligated to notify the employee of any incompleteness of information in his employment records, and to require him or her to avail the missing information at the earliest opportunity. Such requirement ought to be communicated to the concerned employee directly, and not by issuance of general circulars which the concerned employee may never get to see.
28. On the second issue, and having made a finding that termination of the Claimant's employment by way of unjustified early retirement 12 months before his lawful retirement date was unfair, I award the Claimant the equivalent of nine months' salary being compensation for unfair termination of employment. It was a common ground that the Claimant's gross salary as at December 2019 was Kshs.328,142.17. The equivalent of nine months' salary is  $Kshs.328,142.17 \times 9 = Kshs.2,953,279.53$ , which I award to the Claimant.
29. The claims based on alleged underpayment of the Claimant by the Respondent, based on alleged delayed promotion and alleged failure by the Respondent to back-date the Claimant's promotion to December 2016 were not proved, and are declined. It was a common ground that the Claimant, who was as at 2016 a Clerical Assistant Job Grade HG1, was in December 2016 deployed to understudy one Kennedy Ochieng – Post No.420-5013 Job Grade HM4, who was in a higher job grade/management cadre. It was also a common ground that the officer being understudied was nearing his retirement, and that when he eventually retired in July 2018, the Claimant was promptly promoted to the said Management Job Grade HM4, vide a letter dated 3<sup>rd</sup> July, 2018. The Claimant did not allege that any salary or benefits accruing to him after the said promotion had not been paid.
30. The Claimant pleaded and testified that he was entitled to payment of salary and other benefits attached to the higher post that he was understudying, and that the Respondent's failure to pay him at the rates of the higher job grade amounted to underpayment. The Respondent (RW-1) on the other hand testified that understudying is not equivalent to promotion, performance of higher duties or an acting appointment. That understudying is an informal arrangement whereby staff learn from peers of a higher grade. That the Claimant was promoted to the higher grade that he had understudied with effect from 1<sup>st</sup> July, 2018, vide a letter dated 3<sup>rd</sup> July, 2018.
31. Indeed, the Claimant did not adduce any evidence demonstrating that his deployment to understudy an officer of a higher grade entitled him to the salary and benefits attached to the higher job grade being understudied.
32. As already stated in this Judgment, the Claimant's allegations of underpayment were not proved. The claims pegged on that allegation, that is the claims for unpaid operational allowances for 19 months, shift allowance for 19 months, basic salary underpayment for 19 months, standard house allowance underpayment and motor allowance underpayment, are declined. The claim for 12 months' lost earnings is also declined, in view of the award of compensation for unfair termination made herein. Allowing the claim for lost earnings would amount to double award. Further, the claim is not one of the remedies provided in Section 49(1) of the *Employment Act*.



- 33. In sum, Judgment is hereby entered for the Claimant against the Respondent for Kshs.2,953,279.53 being compensation for unfair termination of employment. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 34. The Claimant is awarded interest on the awarded sum, to be calculated at court rates from the date of this Judgement.
- 35. The Claimant is also awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS  
6<sup>TH</sup> DAY OF DECEMBER 2024**

**AGNES KITIKU NZEI  
JUDGE**

Appearance:

.....Claimant  
.....Respondent

