



**Vishva Builders Limited v Musindalo (Employment and Labour Relations  
Appeal 2 of 2020) [2024] KEELRC 13352 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13352 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 2 OF 2020  
MA ONYANGO, J  
DECEMBER 5, 2024**

**BETWEEN**

**VISHVA BUILDERS LIMITED ..... APPELLANT**

**AND**

**ISAAC OMONDI MUSINDALO ..... RESPONDENT**

*(Being an appeal from the Judgment and decree arising from Eldoret Chief Magistrate's Court,  
ELRC Cause No. 159 of 2019 delivered by the Honourable S. Wewa SRM on 12th May 2020)*

**JUDGMENT**

1. The Appellant herein was the Respondent in the trial court in which it was sued by the Respondent (Claimant in the trial court) vide a Statement of Claim dated 6<sup>th</sup> November 2018 in which the Respondent herein had alleged that his employment was wrongfully, unprocedurally and unlawfully terminated.
2. In the Statement of Claim, the Appellant averred that he was employed by the Respondent as a carpenter on 1<sup>st</sup> June 1996 and worked until 1<sup>st</sup> March 2018 when his employment was wrongfully, unprocedurally and unlawfully terminated by the Respondent without a valid reason and without paying his terminal dues.
3. The Respondent averred that the Appellant terminated his services after the Respondent's son Erick Omtata Omondi, who was also working for the Appellant as a welder, got injured while at work and filed suit against the Appellant seeking compensation following termination of the employment of the Respondent's son on grounds that he was not performing optimally. The Respondent prayed for the following remedies in his Memorandum of Claim:



- a. Declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of her terminal dues as outlined above.
  - b. Reinstatement with full salary, benefits and continuity of service without victimization.
  - c. In the alternative the sum of Ksh.535,500/= in terminal benefits as set out above.
  - d. Exemplary damages
  - e. Certificate of service
  - f. Cost of this suit and interest at court rates from time of filing the suit until payment in full and
  - g. Any other relief the Honourable Court may deem just and fit to grant.
4. The sum of Kshs. 535,500 was made up of one month's salary in lieu of notice, Kshs. 19,500; compensation for unfair termination, Kshs. 231,840; leave dues, Kshs. 107,940; and service pay/gratuity, Kshs. 176,400. I must point out here that the payment for leave dues was grossly understated as the same should have been based on last basic salary of Kshs. 16,800 x 21 leave days per year x no. of years worked which would have amounted to Kshs. 284,953.85.
  5. In its Response to the Statement of Claim the Appellant admitted employing the Respondent but denied terminating his employment. It averred that the Respondent was retired after attaining the age of 65 years.
  6. It was the Appellants case that it notified the Respondent of his retirement and fully paid all his dues, including payment for transportation of the Respondent's belongings so that he could vacate the Appellants premises where he was housed.
  7. The Appellant denied that the Respondent was entitled to any of the remedies he had sought in his Memorandum of Claim.
  8. The Respondent filed a Reply to the Response to the Claim in which he denied that he was retired and reiterated the averments in the Statement of Claim.
  9. At the hearing the Respondent testified on his own behalf while the Appellant called Christopher Wanyonyi Masinde, its supervisor and store keeper.
  10. After hearing the parties, the trial court delivered its judgment on 12<sup>th</sup> May 2020 in which the Respondent was awarded the following:  
Kshs. 535,500 as terminal dues to include compensation for unfair termination and Kshs. 5,000 exemplary damages.
  11. The Appellant being dissatisfied with the trial court's judgment instituted the instant appeal vide the Memorandum of Appeal dated 28<sup>th</sup> May 2020 on the following grounds of appeal:
    - a. The learned trial magistrate erred in law and fact in holding that the Appellant unlawfully, unprocedurally and/or unfairly terminated the Respondent's employment without any basis and/or any evidence in that regard.
    - b. The learned trial magistrate erred in law and fact in failing to hold that the Respondent's services came to an end on account of retirement and not termination as claimed.



- c. That the learned magistrate erred in law and fact in failing to hold that the Respondent having already attained retirement age, his retirement from the Appellant's employment was proper, timely and in line with the Appellant's notice dated 9/01/2018 which notice was not denied and/or objected to by the Respondent.
  - d. The learned trial magistrate erred in law and fact in failing to hold that the Respondent was not entitled to any terminal benefits on account of retirement.
  - e. The learned trial magistrate erred in law and fact in holding that the Appellant was entitled to exemplary damages of Kshs. 5,000/= without any evidence and/or basis for such an award.
  - f. That the learned trial magistrate erred in law and fact in failing to properly apply the law in making its decision hence an erroneous decision that does not reflect the correct facts on record.
  - g. That the learned trial magistrate erred in law and fact in failing to take into account, consider and adjudicate all issues raised in the Appellant's response to the Respondent's claim, Appellant's witness statement, the evidence and the Appellant's written submissions and authorities thereof hence an erroneous decision.
  - h. That the learned trial magistrate erred in law and fact in awarding the Respondent costs of the suit and interest.
  - i. That the learned trial magistrate erred in law and fact in failing to take into account and comply with the requirements set under Order 21 rule 4 of the Civil Procedure Rules as to judgments.
  - j. That the learned trial magistrate erred in law and fact in failing to hold that the Respondent was duly notified of his retirement vide the Appellant's letter dated 9/01/2018 hence the issue of unfair and/or unlawful termination does not arise.
  - k. That the learned trial magistrate erred in law and fact in failing to hold that the Respondent's employment properly came to an end in line with the law and that no fault of any kind could be attributed to the Appellant.
  - l. That the learned trial magistrate erred in law and fact in awarding the Respondent a sum of Kshs. 535,500/= without any basis and/or justification contrary to the evidence on record.
12. The Appellant did not set out the reliefs that it seeks from the court in the Memorandum of Appeal.
  13. The appeal was disposed of by way of written submissions. The Appellant filed his submissions dated 1<sup>st</sup> December, 2023 while the Respondent's submissions are dated 5<sup>th</sup> December, 2023.

### **Appellant's Submissions**

14. In its submissions the Appellant set out the issues for determination to be:
  - a. Whether the Respondent's services were unprocedurally, unlawfully and unfairly terminated
  - b. Whether the Respondent was entitled to compensation for terminal dues as awarded by the trial court.
15. On the 1<sup>st</sup> issue the Appellant submitted that the Respondent's services were not terminated. That he was retired after attaining and surpassing the retirement age. That the Respondent was 65 years old at the time of exiting employment.



16. It was submitted that the Respondent's claim that his employment was terminated because his son Erick Omtata filed suit against the Appellant is not true.
17. It is submitted that the Respondent admitted that he was 65 years in 2018 when he left employment, having been born in 1953. That his services came to an end on account of age. That retirement age in Kenya is 60 years but the Respondent was retired at 65 years after he exceeded the retirement age by 5 years. That the Respondent should not be heard to say that his employment was unfairly terminated.
18. It is submitted that before retiring the Respondent the Appellant issued a retirement notice to the Respondent dated 9<sup>th</sup> January, 2018. That any extra day given to the Respondent after retirement age was purely on humanitarian grounds.
19. It was the submission of the Appellant that the law is very clear that the age of retirement is 60 years, a fact which this court is alive to and that the court should take judicial notice of the said fact.
20. It is submitted that the retirement notice given to the Respondent was 3 months and thus longer than the one month provided for in section 35 of the *Employment Act*. That although the Respondent denied receiving the retirement notice in examination in chief he admitted the fact under cross examination.
21. On payments the Appellant submitted that it issued a salary voucher to the Respondent dated 29<sup>th</sup> January, 2018 for Kshs. 28,000 which the Respondent again denied during examination in chief but admitted during cross examination. That the Respondent further confirmed receiving the monies as set out in the payment vouchers at page 33 to 35 of the Record of Appeal.
22. On the claim for leave dues it was the Appellants submission that the same was an afterthought and is not founded on the facts. That the Respondent went on leave all through his employment. That there is no averment in the Claim that the Respondent sought leave and was denied. That the claim for leave is unfounded under the *Limitation of Actions Act* and can only be sustained for 3 years.
23. On the claim for service pay the Appellant submitted that the Respondent was a member of NSSF and is not entitled to the same. On gratuity the Appellant submitted that the Respondent was paid Kshs. 28,000 which he acknowledged.
24. The Appellant submitted that the Respondent gave contradictory evidence during examination in chief and in cross examination. That his demeanor should be taken into account by this court. The Respondent submitted that the entire suit was filed in bad faith, is bad in law and should be dismissed with costs.

### **Respondents Submissions**

25. It was the submission of the Respondent that in his claim he sought awards that can be summarized as:
  - i. One month's salary in lieu of notice
  - ii. Compensation for unfair termination
  - iii. Leave dues, and
  - iv. Service pay/gratuity
26. The Respondent proposed the issues for consideration in the appeal to be:
  - a. Whether the Appellant unfairly terminated the Respondent's services from employment or the Respondent was due to retire after attaining age of 65 years



- b. Whether the Respondent's case was proved on a balance of probability and whether the Respondent is entitled to termination dues and awards awarded in the trial court
  - c. Who pays the costs of the application (sic)
27. It is submitted that the Respondent testified that his employment was terminated after his son Erick Omtata who also worked for the Appellant was injured at work and was not paid compensation so he sued the Appellant for compensation. That this is confirmed by the letter dated 25<sup>th</sup> September, 2018 at page 20 of the Record of Appeal which the Respondent produced at the trial court as an exhibit. That the Appellant's witness did not dispute the letter. That at paragraph 1 of the letter which was written to the Labour Officer, Uasin Gishu County it is stated that the Respondent was given notice due to lack of work. That if it is true the Appellant was retiring the Respondent for attaining retirement age of 65 years there was no reason to inform the Labour Officer that the termination was due to lack of work.
28. It is submitted that the Respondent denied receiving the notice of retirement letter dated 9<sup>th</sup> January, 2018 at page 32 of the Record of Appeal. That there is no indication on the face of the letter that it was received by the Respondent. That the Appellant's witness stated at the hearing that he was not aware whether or not the letter was issued to the Respondent.
29. It is submitted for the Respondent that the burden of proof is on the Appellant to prove that the letter was received by the Respondent relying on the decision in *Kosgei v Metkei Multi-Purpose Company Limited* (Civil Appeal 95 of 2017) [2021] KECA 140 (KLR) (19 November 2021) (Judgment).
30. It is further submitted that the said letter, if it was issued to the Respondent, indicates that the he would retire with effect from 9<sup>th</sup> April, 2018 yet the Claimant's service was terminated on 1<sup>st</sup> March 2018.
31. It is further submitted that the Appellant is a private entity and ought to have a manual or policy on retirement age and the process of retiring employees. That no such manual or policy or contract was availed showing that the retirement age for the Appellant's employees is 60 years. For emphasis the Respondent relied on the decision in *Michael Otieno Ouma v Carslake Nominees Ltd t/a Diani Sea Resort* [2013] eKLR.
32. It is submitted that the Appellant did not at any time inform the Respondent that he would retire upon attaining the age of 65 years.
33. The Respondent further relied on the decision in *Frank N. Kamau v Tusker Mattresses Ltd* [2018] eKLR where the court stated that in the absence of any written evidence the inference to be drawn was that the Claimant was to continue working after 60 years.
34. It is submitted that the Appellant did not submit any evidence to the court to prove that the Respondent was no longer fit to work. That further the Appellant did not pay the Respondent his retirement dues if at all he was being retired. That the Respondent stated that he started working for the Appellant in 1996 and worked continuously until 2018.
35. It is further submitted that the Appellant did not avail any proof that an explanation was given to the Respondent on the reason for retirement in a language that the Respondent understands.
36. On the second issue it was submitted for the Respondent that the Respondent proved his case on a balance of probabilities. That the law is silent on the retirement age for employees in the private sector. That the Appellant should not have waited until the Respondent attained the age of 65 to send him on retirement. That what informed the said decision is what the Respondent told the court that his employment was terminated because his son filed suit against the Appellant.



37. It is submitted that the Appellant did not prove its case in the trial court.
38. On the remedies the Respondent submits that he is entitled to notice under section 35(1)(c) of the *Employment Act*. That there was no proof that the Respondent was issued with the retirement notice produced by the Appellant. Further that the Appellant informed the Labour Officer that the Respondent's service was no longer required.
39. On compensation it was submitted for the Respondent that he had proved that his employment was unfairly terminated and he was therefore entitled to the compensation as awarded by the trial court.
40. On leave dues it was submitted for the Respondent that sections 10(7) and 74 of the *Employment Act* bind employers to keep and produce records for leave. That the burden of proof lay with the Appellant which burden it failed to satisfy. For emphasis the Respondent relied on the decision in Peter John Mwangi Kamau v Autolitho Limited [2013] eKLR and Edwin Kabogo Munene v Equity Bank Limited Industrial Cause No. 1123 of 2012 (21 March 2012).
41. On service pay/gratuity the Respondent submitted that section 35(5) provides for payment of the same to an employee whose services are terminated under section 35(1). That having worked for 22 years the Respondent is entitled to the same. That the Respondent was not registered with NSSF and no remittance was made by the Appellant to NSSF on account of the Respondent.
42. On costs it was submitted for the Respondent that it was the Appellant who made the Respondent incur the expenditure of paying an advocate to represent him and should therefore pay the costs of the appeal.

#### **Analysis and Determination**

43. I have considered the record of appeal, the grounds of appeal and the submissions on record. I have also taken into account the authorities relied upon by the parties. This being a first appeal, I am obliged to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.
44. From the Memorandum of Appeal and the submissions on record, I deduce that the appeal before this court raises the following issues: -
  - i. Whether the Respondent's employment was unlawfully terminated by the Respondent or he was retired upon attaining retirement age;
  - ii. Whether the trial court erred in awarding the Respondent terminal dues and compensation as per judgment of the trial court
  - iii. Who pays costs of this appeal

Whether the Respondent's employment was unlawfully terminated by the Respondent or he was retired upon attaining retirement age
45. It was the Appellant's case that it did not terminate the Respondent's employment but rather retired the Respondent after he attained 65 years. It was the Appellant's case that it issued a letter dated 9<sup>th</sup> January, 2018 to the Respondent notifying him of his retirement and giving the Respondent 3 months' notice.
46. The letter is at page 32 of the Record of appeal and reads:



Vishva Builders Ltd

9<sup>th</sup> January, 2018

Isaac Omondi Musindalo

Box

300100-Eldoret

Dear Sir,

Re: Notification Of Retirement

According to your employment records, your date of birth is indicated as 1953 and you therefore reached the retirement age of 65.

Notice is hereby given that you shall be retired with effect from 9<sup>th</sup> April, 2018.

We thank you for the years you have served the Company. Should you need further clarification do not hesitate to talk to us.

We wish you well as you prepare to retire.

Yours faithfully,

signed

Vishva builders limited

Director

47. For the Respondent it was his case that the termination was unlawful, unprocedural and unfair as the reason for the termination was that his son Erick Omtata Omondi who also worked for the Appellant filed suit against the Appellant seeking compensation for injuries he sustained in the course of employment.
48. The Respondent denied that he was ever issued with the letter dated 9<sup>th</sup> January, 2018. The Respondent further produced a letter dated 25<sup>th</sup> September, 2018 at page 20 of the Record of Appeal in which the Appellant informed the Labour Officer, Uasin Gishu, that the Respondent's employment was terminated in February 2018 due to lack of work. The letter was not disowned by the Appellant.
49. The Appellant further did not produce evidence of policy that its employees retire at age 60 or explain why the Respondent was retired at age 65 instead of 60 if that was the Appellant's policy.
50. The Appellant's submission that retirement age in Kenya was 60 years and that the court should take judicial notice of the same is not supported by the law or any evidence. The correct position is that the law does not prescribe retirement age and an employer ought to set the same either in the contract of employment or in employee terms and conditions of service. This was stated in the case *Michael Otieno Ouma v Carslake Nominees Ltd t/a Diani Sea Resort [2013] eKLR* where the court stated that: -

“Am however of the view that the present case involves a contract of employment in the private sector and not public sector as in the said Court of Appeal case. In the said case the employment contract was subject to a staff pension scheme which provided for mandatory retirement at the age of 55 years. In the present case, there was no provision for mandatory retirement at any age in the employment contract. It follows therefore that the respondent's MD was wrong to retire the claimant summarily. There was no law and I believe there still none which provides for mandatory retirement of workers in the private sector. The



matter of retirement therefore remains a mode of termination of employment which must be agreed upon by the employer and the employee.

Consequently, if the same is not agreed between the parties, it is presumed that the employment is indefinite unless it is terminated by notice, breach, dismissal, impossibility or death. In the present case the court is satisfied that the employment contract was terminated through breach because the reason given of retirement on ground of age was not provided in the contract between the parties herein.”

51. The same was further restated in the case of *Frank N. Kamau v Tusker Mattresses Ltd* [2018] eKLR where the court stated that: -

“It therefore obvious that, in absence of any written evidence that the Claimant was to retire at 60 years, the natural inference to draw is that, he was to continue working indefinitely as long as he remained capacitated to do so. The Claimant maintained that he was strong enough to continue working and that the physiotherapist did not recommend for his sick off but rather the reduction of his work load. Consequently, I find and hold that the retirement of the Claimant without his consent and/or for any just cause amounted to unfair and unlawful termination of his contract of service.”

52. In the absence of proof that the Respondent received the letter dated 9<sup>th</sup> January, 2018 and considering the reason given to the Labour Officer by the Appellant for the termination of the Respondent’s employment, it is my finding that the Appellant did not controvert the Respondent’s evidence that his employment was terminated on grounds that his son filed suit against the Appellant.

53. The termination of the Respondent’s employment was therefore unfair for lack of valid reason and procedural fairness. I thus find no fault with the finding of the trial court that the Respondent proved his case on a balance of probabilities.

Whether the trial court erred in awarding the Respondent terminal dues

54. The Appellant submitted that the trial court erred in awarding the Respondent the remedies that he sought. The Respondent had prayed for Kshs. 535,5000 made up of one months’ pay in lieu of notice, compensation for unfair termination, leave dues and service pay/gratuity. He further prayed for exemplary damages.

55. Having found that the termination of the Respondent’s employment was unfair, he is entitled to notice under section 49(1) of the *Employment Act* as read with section 35(1) of the Act. I find no reason to interfere with the trial court’s award of the same at Kshs. 19,320.

56. The Appellant did not submit any evidence that the Respondent was granted leave during the period he worked for the Appellant or proof that he was paid in lieu thereof. I find no reason to interfere with the same as awarded by the trial court.

57. The Appellant further submitted that the prayer was statute barred. The Claimant having come to court within the 3-year limitation period in section 90 of the Act, his claim is not statute barred as it was a claim that was continuous and he was not expected to file suit every time the right accrued while he was still in the employment of the Appellant. He is entitled to all his statutory and terminal dues for the duration worked, including leave accrued for the duration of his employment for the period worked.

58. The Respondent was further awarded compensation maximum compensation of 12 months gross salary. Taking into account the reasons for the termination of his employment, the length of service and all other factors as set out under section 49(4) of the Act, I find no reason to interfere with the award.



59. The Respondent was also awarded service pay as prayed in the Claim. Having found that he was not registered with NSSF and the Appellant was not paying any contributions on his behalf to NSSF or any other scheme as specified in section 35(6) of the Act the Respondent is entitled to the service pay.
60. He was also awarded exemplary damages of Kshs. 5000 for what the trial court found to be willful acts of the Respondent that were malicious, oppressive or grossly reckless.

**Conclusion**

61. Having made the findings above, I find that the appeal has no merit and dismiss it with costs.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**M. ONYANGO**

**JUDGE**

