



**Kenya Plantation & Agricultural Workers Union v Flamingo Horticulture (K) Limited
(Cause E041 of 2021) [2023] KEELRC 1011 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1011 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E041 OF 2021
HS WASILWA, J
APRIL 25, 2023**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
FLAMINGO HORTICULTURE (K) LIMITED RESPONDENT**

JUDGMENT

1. The claimant Union instituted this claim vide memorandum of claim dated 5th July, 2021, claiming that one of its members, Zipporah Kemunto Mose, (herein after referred to as the ‘grievant’) was not paid her terminal dues upon being retired on medical grounds. The Union prayed for the following reliefs; -
 - a. Basic pay for the period between 1st July, to 25th July, 2019 of Kshs 6,800.
 - b. House allowance for the period between 1st July to 25th July, 2019 of Kshs 2,600.
 - c. 45 days pay in lieu of notice of Kshs 12,259.
 - d. One way travelling allowance of Kshs 1,450.
 - e. Service pay for 5 years worked of Kshs 31,325.
 - f. Compensation for unfair treatment on retirement (4 months) of Kshs 31,325.
 - g. Cost of this suit.
 - h. Interest on (a), (b), (c), (d),(e) &(f) above.
 - i. Any other relief that this Honourable Court may deem fit to grant.



Claimant's case

2. The claimant states that it is a registered union within the meaning of section 2 of the *Labour Relations Act* and that the Respondent is a members of Agricultural Employers Association which have a valid recognition agreement with the claimant and have negotiated several Collective Bargaining Agreements.
3. It is stated that the Grievant herein was employed by the Respondent as a general worker (pack house) on 21st October, 2014 earning a basic salary of Kshs 8,173 and house allowance of 2,600 per month, a job that she maintained until her retirement on medical grounds on the 25th July, 2019.
4. The circumstances that led to her early retirement is that, the grievant fell ill sometimes in 2018 and was referred to South Lake Medical centre and Naivasha County Hospital. It is averred that the grievant was experiencing severe lower back ache secondary to intervertebral disc of lumbar sacral spine.
5. Despite receiving treatment from the aforementioned hospitals, her condition deteriorated causing the Respondent to place her on lighter duties for one year. Consequently, following the recommendation of medical doctors, the grievant was retired on medical grounds and since her health had compromised her work, she was not in a position to serve the notice period.
6. On 25th July, 2019, the Respondent issued the grievant with the said retirement notice and indicated the dues payable to the grievant upon the said retirement. However, on the retirement, she was not paid as per the retirement letter.
7. It is stated that the Respondent alleged that since the retirement was due to illness, the grievant was not entitled to service pay, having retired early than the expected retirement date.
8. Due to the Respondent's adamancy in paying the grievant her dues, the matter was referred to the labour office on 15th May, 2020. The matter was conciliated over but the conciliation process was not successful and the conciliator issued a disagreement certificate on the 9th September, 2020 in accordance with section 69(a) of the *Labour Relations Act*.
9. Owing to this, the claimant urged this Court to compel the Respondent to pay the grievant all her terminal dues as indicated in the letter of retirement and the claim herein.
10. During hearing the grievant, Zipporah Kemunto Mose, testified as CW-1 and adopted her witness statement dated 5.7.2021. She also produced the document in the list dated 5th July, 2021 as her exhibits. She testified in addition that she left employment on medical grounds but was not paid a single cent to date. she told this court that the letter of 23.7.2019 is a letter of recommendation by the medical doctor for the Respondent to retire her on medical grounds. Also that letter of 25th July 2019, written by Joshua Kimani, indicated that she would be paid terminal dues, which she never received.
11. Upon cross examination, she testified that she agreed with all the contends of the letter of 23.7.2019 from Naivasha County Hospital including the recommendation to have her retire on medical grounds. She stated that the Respondent refused from the get go to pay her service pay because she had not clocked 5 years, she however stated that she was two months away from clocking 5 years at the Respondent's employ because she was employed on 21.10.2014. Also that she was in the Respondent's employment for three years prior to the said confirmation. She admitted to being a member of NSSF.



Respondent's case

12. The Respondent entered appearance on the 13th August, 2021, through the firm of Prof. Albert Muma ad Company advocates and filed a response to claim on the 21st September, 2021 denying the entire claim and in particular stated that the grievant was officially confirmed to employment on the 20th January, 2015 and retired on 25th July, 2019, therefore did not clock 5 years in employment to deserve service pay.
13. It is averred that indeed the grievant had been unwell with chronic back pain that deteriorated over time despite seeking medical attention. That the Respondent in the bid to alleviate her pain, offered her lighter duties but eventual on advice of the doctors and grievant's request, she was retired on medical grounds. The Respondent denied initiating the process of retirement and reiterated that it is the grievant that requested to be retired early.
14. On the terminal dues, the Respondent stated that the dues were indeed calculated and send to the accounts office for the grievant to collect but the grievant failed to present herself for collection. On service pay, it was averred that the grievant was retired on medial grounds but the same was not occasioned by her work to warrant the service pay, but by an illness that she had before joining the Respondent's employment.
15. The Respondent also stated that the grievant is not entitled to gratuity, compensation for unfair termination or 45 leave days sought. They maintained that the dues that is payable are as per the retirement letter which the grievant has failed to collect the same from the accounts office and sign for.
16. During hearing, the Respondent called its Human Resource manager, Tabitha Ndunge, as it RW-1 who adopted her statement of 22.11.2021 and a further statement of 8.4.2022 and produced documents of 22.11.2021 and another list of 8.4.2022 as the Respondent exhibits. She stated in summary that when the grievant was retired on medical grounds, her terminal dues were calculated and deposited at the accounts office ready for collection but the grievant refused to collect the same. She testified that they did not pay service pay because she had not serve them for 5 years as is required in the agreement.
17. Upon cross examination, she testified that the grievant cleared with the respondent and they processed the pay though did not have any evidence of the same.
18. The Respondent called Dr. Isaiah Ndirangu as its RW-2 who testified that he is the medical practitioner since 2001 and a consultant at South lake clinic in Naivasha. He produced the report that recommended the grievant to be retired on medical grounds and stated in addition that the grievant has issues of joints osteoarthritis which condition is not related to her nature of work. He testified that osteoarthritis is a degenerating bone disease which are mostly affecting female than male and obese people. He stated that this disease can also be caused by previous injuries.
19. Upon cross examination, he testified that he has known the grievant for over a year and stated that he does not have any diagnostic report for the grievant.

Claimant's Submissions.

20. The claimant submitted on one issue; whether the grievant was paid her terminal dues upon her retirement on medical grounds.
21. It was submitted that the *employment Act* under sections 35(5), 36 and 40(1)(e),(f) &(g) provides for entitlement of employee on termination and Section 40 (1)(g) is clear on the issue that service pay is



to be paid at the rate of 15 days' pay for each year completed in employment. In this they relied on the case of *Kenya Union of Commercial Food and Allied Workers v Murang'a Farmers Co-Operative Union* [2022] eKLR and submitted in addition that the Respondent has merely indicated that they calculated the terminal dues for the grievant but did not give any evidence on that regard or communication of whether the said money was indeed available for collection.

22. It was submitted that since the said money was not paid to the grievant, this Court should go ahead and compel the Respondent to remit the grievant's terminal dues as sought. To further reinforce this argument on the need to compensate the grievant for failure by the Respondent to pay the terminal dues, they relied on the case of *Martin Mwangi v Protocol Solutions Limited* [2022] eKLR.
23. On that basis, the claimant submitted that since the grievant was not paid her terminal dues till now, the employer acted in an unfair manner and urged this court to compensate the grievant and allow the claim as prayed together with costs.

Respondent's Submissions

24. The Respondent submitted on one main issue, whether the claimant is entitled to the reliefs sought.
25. The Respondent relied on the case of *Pathfinders International Kenya Limited v Stephen Ndegwa Mwangi* [2019] eKLR where the Court held that;

“We are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the *Employment Act* of 2007 does not make it mandatory for employers to pay gratuity to employees.”

26. On that basis, it was submitted that as per Clause 7.4 of the Human Resource and policies manual, the employees on job group A to G4 are entitled to gratuity only when they have worked continuously for more than Five (5) years. Accordingly, that since the grievant had not worked for at least 5 years in the Respondent's employ, she is not entitled to any service and or gratuity pay. He added that the grievant has admitted working for 4 years 10 months and since no provision was made for pro-rated service pay, the grievant is not entitled to any claim under service pay. To reinforce, this position, the Respondent relied on the case of *National Bank of Kenya Ltd. v Pipeplastic Samkolit (K) Ltd and another* [2001] KLR 112 at p. 118 where the Court opined that: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

27. It was submitted further that the evidence before Court shows and the grievant even admitted during hearing, that the Respondent submitted NSSF deduction and thus the claim for service and gratuity is not to be made mandatory on that basis.
28. On the claim for compensation on the basis of unfair treatment on retirement, it was submitted that the grievant is the one who requested to be retired on medical grounds and even served the Respondent with a medical report advising on the same. It was argued that since the grievant resigned on her accord, the claim for unfair treatment cannot stand. In this they relied on the case of *Benard Muriuki Gikandi v Kenya Wildlife Service* [2022] eKLR where the Court held that;-

“My view is that the claimant indeed resigned from employment and there is no indication that the reason for the resignation was prompted by harsh or unfair termination. This is



because in his resignation letter, the claimant indicated that he resigned for personal reasons. The prayer for unlawful and unfair termination cannot therefore stand or be granted.”

29. It was submitted in addition that contrary to the allegation that the grievant as unfairly treated, the Respondent infact, accepted her wishes to be retired early and wrote back by the letter of 25th July, 2019 advising the grievant that she would be paid her basic pay and house allowance from 1st July 2019 to 24th July, 2019, one-month salary in lieu of notice, one way traveling allowance and overtime pay if any was earned. Therefore that the claim for notice pay, basic pay from 1st to 25th July, 2019, travelling allowance should not be ordered because the same was due to the grievant, which the Respondent admitted and even communicated its intention to pay her upon clearance as per the letter of 25th July, 2019.
30. The Respondent submitted that contrary to the claimant’s allegations, the grievant did not fall ill in line of duty, neither did the illness get worse because of her work to suggest the resignation was occasioned by the kind of work she did. It was argued that as per the medical report from South Lake Medical centre produced by RW-2- Dr. Isaiah Ndirangu, the grievant was ill before joining the Respondent’s employment and also that the disease as told by the doctor cannot be caused by the kind of work the grievant was doing but by genetic makeup, age, weight issue among others. It was also submitted that the claimant has not given the particulars in support of the said unfair treatment to warrant any compensation. In this, they relied on the case of *Kenya Commercial Bank Limited v Sheikh Osman Mohammed* [2013] eKLR where the Court held that;-
- “it is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”
31. On the claim for 45 days’ pay in lieu of notice, it was submitted that under the Human Resource manual. An employee is entitled to 30 days’ notice pay when they work for less than 5 years and 45 days’ notice pay on working for over 5 years. Similarly, that since the grievant had worked for 4 years and 10 months, she is entitled to 30 days’ notice pay.
32. In conclusion, it was submitted that save for the terminal dues indicated in the letter of 25th July, 2019, the grievant is not entitled to any other claim as the claimant has not been proved to the required standard. The Respondent thus prayed for the entire claim to be dismissed with costs.
33. I have examined all the evidence and submissions filed by the parties herein.
34. The contention herein relates to payment of terminal dues to the claimant by the respondent which the respondent avers is not payable as per the contract.
35. I note that the claimant was employed by the respondent with effect from 21/10/2014 at a salary of Kshs 7,505/=, house allowance 2,200/= per month.
36. The salary later rose to 8,173/= and house allowance of 2,600/= making the gross pay at 10,373/=.
37. The claimant’s contract was also governed by the respondent’s HR Manual which also indicated that after completion of 5 years of service, they would be payable service pay of 45 days notice or 45 days pay in lieu of notice.
38. The CBA between the claimant Union and respondent also provided for payment of service pay after 5 years of continuous pay.



39. The claimant herein served the respondent for less than 5 years. The issue of payment of service pay does not therefore arise in her case.
40. The claimant is however entitled to payment of her gross pay up to 25th July, 2019 which is = 9,400/=.
41. The claimant is also entitled to 1 month's salary in lieu of notice = 10,373/=, and one way travelling allowance = 1,450/=.
42. The Total payable is Kshs 21,223/= plus costs and interests.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awino for Claimant – present

Ochieng for Respondent – present

Court Assistant – Fred

