



**Gathondeka v Attorney General & another (Cause 983 of 2014)
[2023] KEELRC 859 (KLR) (5 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 859 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 983 OF 2014
AN MWAURE, J
APRIL 5, 2023**

BETWEEN

BARTHOLOMEW MWAURA GATHONDEKA CLAIMANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

**(MINISTRY OF DEFENCE) MINISTRY OF LABOUR NATIONAL INDUSTRIAL
TRAINING SCHEME 2ND RESPONDENT**

JUDGMENT

1. The Claimant instituted his statement of claim by a Memorandum of Claim dated 11th June, 2014 which was later amended on 11th June, 2018 and on 28th March 2019 with the latter being the current statement of claim for consideration by this Court.

Claimant's Case

2. In his current statement of claim in the Court File, the Claimant has sued The Hon. Attorney General (The Ministry of Defence) as the 1st Respondent and the Ministry of Labour- National Industrial Training Scheme, as the 2nd Respondent.
3. The claimant states that he was employed by the 1st Respondent in 1979 as an Artisan (panel Beater) Grade III and retired on 30th June, 2017.
4. That on 18TH July 1979, he was confirmed as a permanent and pensionable employee by a letter dated 28th July, 1997 until 2013 when the said 1st Respondent interfered with his employment informing him that a certificate for Grade 1 Test No. 565570 he had submitted to his employer on the said date was not valid.



5. The claimant says that he had obtained this Certificate after attending the 2nd Respondent's Institute where he took an upgrading course consisting of practical training and relating theory in panel beating from 4th August, 2008, which after submitting to his employer, he was promoted and six (6) years later and to his surprise, precisely in April 2014, he was informed that his certificate was invalid.
6. That upon presenting the said certificate, his basic salary was increased to Kenya Shillings Twenty Thousand Two Hundred and Eighty Nine (Kshs.20, 289/=) plus commuter allowances of Kshs.4,000/- and house allowance of Kshs.5,000/= giving a total of Kshs.29,289/=.
7. That his basic salary in 2015 was meant to be Kenya Shillings Twenty Four Thousand (Kshs.24, 000/=) commuter allowance of Kenya Shillings Four Thousand (Kshs.4, 000/= and House allowance of Kenya Shillings Six Thousand (Kshs.6,000/=) giving a total of Kenya Shillings Thirty Four Thousand (Kshs.34,000/=) if his terms and conditions would have been followed.
8. That he was further entitled to acting allowance, increment of salary, pension annual allowance, house allowance, overtime allowance and medical allowance.
9. That the Claimant retired on 30th June, 2017 and that his pay slip at the date of retirement reflected a reduction of his salary to Kenya Shillings Ten Thousand One Hundred and Forty Four and fifty cents (Kshs. 10,144.50) which was the amount he kept getting paid from April 2014, the month of the impugned certificate.
10. That the alteration of his basic salary affected his retirement benefits for thirty Six (36) months from 1978 July until 30th June, 2017 when he retired reducing his send off package to Kenya Shillings Four Hundred Thousand (Kshs.400,000/=) instead of what he states as the sum of Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=) which he states is what he should have earned. That further his monthly retirement payment was calculated on a wrong figure of Kenya Shillings Eight Thousand (Kshs.8,000/-) instead of Kenya Shillings Fifteen Thousand(Kshs.15,000/=).
11. The Claimant alleges willful default, neglect, breach of contract, breach of constitutional rights to pay and work, mis-representation and malice by the respondents with particulars thereof set out in the current Amended Statement of Claim.
12. The Claimant has at the conclusion, claimed the following particulars of the claim set out:
 - a. A declaration that the certificate of learning and courses issued to the claimant by the 2nd respondent between 1974 to the year 2008 are genuine.
 - b. . A declaration that the 1st respondent could not stop the claimant's 2014 April salary or any other monthly salary of kshs 20,289 thereafter in 2014 or pay half salary for act of unsubstantiated claim that the claimant's certificate was not genuine as claimed by the 1st respondent as was issued as genuine by the 2nd respondent.
 - c. Mesne profits gained by the respondents from the work and employment of the claimant through the illegal acts of withholding salary and allowances during suspension perpetrated by the respondents.
 - d. All salary withheld from April 2014 to June 2017 of Kshs 455,168/-
 - e. All withheld allowance at the rate of Kshs 17,000 per month from April 2014 to June 2017 of kshs 527,000
 - f. All retirements expected benefits as per scale of public service commission as of June 2017 at Kshs 34,000 per month of Kshs 1,400,000/-



- g. All retirement benefits at the salary scale prevailing as at June 2017 of Kshs 34,000 per month.
- h. A confirmation to the public service board that the claimants retirement salary was Kshs 34,000 for tem to be able to calculate the claimants monthly retirement benefits.
- i. All benefits as set out in the particulars of claim above in paragraph 24 a) to g) interest on (c) above court rates.
- j. The respondents be ordered to bear the costs of this claim in any event.
- k. Such further or other relief as this court deems just to grant.

Respondents' case

- 13. The Respondents filed a Memorandum of Response dated 22nd October, 2019 in response to the Claimant's claim.
- 14. In its response, the respondents deny paragraphs 5, 6, 7, 8, 9, 10, 11, 12, and 13 of the Claim and puts the Claimant to strict proof. The Respondent denies the authenticity of the Certificate No. 565570 or that it was issued by the 2nd Respondent but states that the Claimant's salary was deducted and later dismissed after he had been awarded a full hearing.
- 15. The particulars set out in the claim are denied and breach of any laws and the Constitution are also denied.
- 16. That further as regards the impugned certificate No. 565570, it is the respondent's case that this was forged/fake certificate to gain promotions and that the real and correct certificate that applied herein was certificate No.865570 (and not 565570) which was submitted to the authorities for verification by Ministry of Defence from the training institution and that this Certificate belonged to one John K. Maina who took the test in Carpentry and Joinery and passed at Mwea GK Prisons on 30th November, 2007.

Claimants Evidence

- 17. The Claimant in his evidence in Court basically adopted his witness statement and said he was employed in the Ministry of Defence from Grade 2 Artisan to Grade 4. He says after five (5) years he was demoted on accusation that he had a fake certificate. He says that was after working for the 1st Respondent for five (5) years.
- 18. He says there was a mix-up of certificates and his certificate was No.565570 which he says he got in 1980 after passing his examination. He says his salary was reduced from Kshs.20,289/= to Kshs. 16,000/-). He says he also was interdicted from March 2014 to March 2015 and was not paid his salary during the interdiction period.
- 19. The Respondent did not call a witness but depended on their witness statement and there was an affidavit deponed on 11th November 2019 by one Collins Owino an Assessment and certificate officer of National Industrial Training Authority who claimed the certificate he was given by NITA was No.86570 and it belonged to John K. Maina.

Claimant submissions

- 20. The Claimant in his submissions states he was employed to repair Armed Forces vehicles at the Ministry of Defence and his salary was Kshs. 23,580/= to Kshs.16,080/= at retirement on 30th June 2017. He



was paid Kshs.1, 300,000/= instead of Kshs.900,000/=. He says his certificate of Artisan was 565570 not 865570.

21. He says he was underpaid from 2014 to 2016 and he relies on the case ELRC 97 OF 2015 where the Court ordered petitioner's dues to be paid.

Respondents' submissions

22. The Respondent submits that the Claimant was confirmed as a permanent employee of the 1st Respondent on 28th July, 1979 and was due to retire on 10th June 2021. The Respondent says that the Claimant claimed to have taken a panel-beating course in August 2008 being No. 865570. In 2014, his certificate was declared to be fake and he was interdicted. He says the authority followed the right procedure to verify the certificates sent to NITA for verification and avers 222 people were found to be authentic and 103 were fake including the claimant's.
23. The respondent says the certificate submitted by the claimant was No.865570 and NITA followed the set down regulations to verify them and one Collins Owino verified the same as per his affidavit dated 11th November, 2019.
24. The Respondent claims the claimant was disciplined as per Public Service Commission Regulations 2005 and was issued with a Notice to Show Cause. He responded as per his letter dated 26th November 2018. He says the disciplinary proceedings was followed according to the law and Articles 47 and 50 of *the constitution* of Kenya.
25. He says that the Claimant also did not exhaust the internal mechanism of the respondents before filing the case in Court which he should have done.
26. Respondent further says Regulations 18 of Industrial Training Rules provides for appeal. The Claimant failed to appeal to the Minister and so did not follow the procedures.
27. The Claimant did not make an appeal against the decision of an authorized officer. It is only after exhausting all the internal mechanisms that one should revert to legal redress in court. The respondent relied on the Judge's finding in case of Non-Governmental Organizations Co-Ordination Board -vs- Eg & Other (2019) eKLR where the Court of Appeal held:

“Where a statute provides a mechanism for resolution of dispute, the proceedings and processes set out in the said statute must be exhausted before a party is allowed to come knocking on the doors of the court”
28. As to whether the claimant proved his case on balance of probability the respondent submits that the Claimant was obliged to prove he attended NITA training in 2008 and should provide documentary evidence.
29. He further says the Claimant was to be provided with a notification trade test and he did not present the same to prove his certificate was Genuine. On this, The Respondent relies on the case of Miller-Vs- Minister Of Pensions (1947) Z Ali Er 372 and was cited in the case of Juliana Mulikwa Muindi-vs- Board of Manufacturing Yangua Mixed Secondary School And Another (2018) Eklr where the Court provided:

“the proof must carry a reasonable degree of probability but not so high as required in criminal cases.”



30. The Respondent in conclusion says the claimant's case fails and should be dismissed with costs to the Respondent.

Analysis and determination

31. The issues for determination will be the authenticity of the certificate or certificates submitted to the 1st respondent by the claimant which supported his provisions and secondly whether the Claimant was procedurally terminated and further is he entitled to his prayers?.
32. The Claimant was employed in 1979 as an Artisan grade II and it is his averment that he obtained an Artisan certificate and was confirmed in 1997 and he worked for the respondent until 2013 when he was interdicted on the allegation that his grade I test certificate was not valid after 30 years of service. He said he had the grade I certificate in 2008 and it was No. 565570.
33. He was interdicted in 2013 and later the interdiction was lifted in 2014 without the respondent giving the reason for lifting the interdiction.
34. He was however, demoted to grade II Artisan and once again the 1st respondent did not explain the reason and justification of the demotion and the reason of reducing his salary.
35. According to employment Law an employer should not reduce the terms of the employee to the disadvantage of the employee without the consent of the employee. Section 17 of the [Employment Act](#) provides that employer must pay the full salary of the employee for work done in pursuance of the contract of service and section 19 of [Employment Act](#) prescribed permissible provision to reduction of salary and this current pay cut is not one of them.
36. Section 10(5) of the [Employment Act](#) provides that change of terms of employment shall be affected by the employer in consultation with the employee. The 1st respondents cut the pay of the claimant without his consultation and then recovered money from his salary and without valid reason on to how the same was worked out to justify the deductions and recovery of the money deducted.
37. The Claimant was only informed he had submitted a fake certificate and was asked to show cause. He was told the fake certificate was No 865570 and yet he says his genuine certificate was No.565570 and yet there is no evidence either from the 1st Respondent nor from the Claimant which certificate was authentic certificate. It is the word of the 1st Respondent against the Claimant.
38. The official from NITA one Collins Owino said he did a search on a document No. 86570 and found it belonged to one JOHN K. MAINA. The document 86570 is not referred anywhere in the evidence and the Court is not given any evidence to demonstrate if that certificate is the same one in issue or it was a typing error from Mr. Collins Owino. Mr. Collins Owino did not give evidence to correct any error if at all or to establish which is the correct certificate. He deponed in his replying affidavit on 11th November 2019 way after the claimant's salary was deducted from 2014 and by 2017 he had been asked by the Respondent to retire.
39. The Court is puzzled which certificate was certified by the NITA Certification Officer and he does not even deponed when it was given to him. To have deponed to the facts over six (6) years after the fact is really a clear testament the 1st respondent had no valid and verified grounds why he slashed the claimant's salary and recovered some unverified and unexplainable amount of moneys from him. It all seems there was unclear reasons why that drastic action was taken against the Claimant yet claimant was not accused for gross misconduct but rather his salary was deducted and he continued offering the same services until his retirement age.



40. There is no evidence on record of gross misconduct against the Claimant since 1979 when he started working with the Ministry of Defence. In fact his 2016 evaluation form is noted “ Good performance”
41. The only issue is pertaining to the certificate of Artisan which is not clear from the pleadings which certificate it was as three (3) certificates have been referred in the various pleadings. It is not brought to the courts attention how the certification officer was able to establish which of the three certificates numbered 885570, 565570 and 86570 belonged to who and how did they come to the custody of the Claimant if at all they did.
42. The Court is satisfied the Claimant has established a prima facie case that he was unfairly treated by the 1st respondent when he slashed his salary and yet he served from 1979 to the year 2017 and left with terminal dues less than what he would otherwise have been entitled to.
43. The Court is persuaded the 1st respondent also did not give a valid reason for the action taken against the claimant. The use of fake certificate in the opinion of the Honourable Court is a serious matter where even summary dismissal would be justified. Yet the 1st respondent even lifted the interdiction and retained the claimant.
44. When he received the letter of retirement he was appreciated for the service he had offered the government.
45. In Section 43 (1) of the *Employment Act* where the employer decides to terminate an employee, the employer will be required to prove a reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of *employment act*. The 1st respondent did not terminate the employee but he unilaterally deducted his salary. He was the one with the burden to prove the reason for taking the steps he took.
46. In the often cited case of Kenfreight (E.A) Limited -vs- Benson N. Nguti (2016) eKLR the court was emphatic that to terminate the employment of an employee it is not enough to give notice or payment in lieu thereof but must be based on valid reason and fair procedure should be followed.
47. The respondent should have given valid reason as to the disciplinary action he took against the Claimant and yet he failed to do so.
48. Finally the respondent argued that the Claimant did not follow the other internal mechanisms provided in Public service (Regulations 2005). It would appear the Claimant did not have much room to attempt alternative dispute resolution seeing that a decision had already been made to reduce his salary and recover the money from his salary. He did write to the Ministry on 23rd August 2016 but no response is cited in the court file.
49. In any event there is no mandatory provision that bars him from seeking legal redress from court if he feels locked out of his rights by his employer. The Kenya employment Laws are to aid just such people.
50. The claimant was unilaterally demoted by the 1st respondent. There are authorities to support Section 10 of the *employment Act*. The case of Godfrey Odipo-Vs- Tabasamu Sacco Ltd , Cause No.68 Of 2010, the court held that: demotion means that employee’s salary is lower and the grade is lower as well as the position held is changed. It is a double punishment in terms of position and remuneration of an employee.
51. The court in the case No. 12 of 2017 – Motors Mwatemu-Vs- Salama Beach Hotel Limited held that in demotion an employee’s conditions of employment are fundamentally altered without his consultation. The Claimant had worked for complete year but gained his stripe.



52. Indeed a demotion is a humiliating experience and in most cases an employee chooses to resign. The Claimant chooses to soldier on until his retirement age.
53. The Court having considered all the pleadings, evidence given orally and submissions, it is obliged to find the 1st respondent's action to slash the Claimant's salary was unfair and should not have withheld the Claimant's April 2014 salary. He should not have paid half of his salary after 2014 for an unsubstantiated claim that the Claimant's certificate was not genuine which certificate was issued to him by the 2nd Respondent. So he prays for mesne profits drawn from the part salary that was withheld.
54. The 1st Respondent having demoted the Claimant without any justification and having slashed his salary he must compensate. There is no liability proved against the second respondent even though its officer did a shoddy job in certifying the Claimant's certificate and could not even prove what certificate was submitted to them for certification. Nevertheless liability is found to be on the 1st respondent.
55. The remedies he is condemned to meet are as follows:
- i. Underpaid salary for the year 2014 from April to December and 2015 January to March underpaid with Kshs. 10,144 per month. Total Due - Kshs.121,228.00
 - ii. Underpaid salary from April 2015 to April 2016 Paid Kshs. 16,080/ instead of Kshs.24,000 - Kshs. 95,040.00.
 - iii. Underpaid salary from May 2016 to April 2017 having been paid Kshs.16,080/- instead of Kshs. 28,000/- Kshs. 143,040.00.
 - iv. The underpayment of salary from May & June 2017- Kshs. 23,840.00
 - v. The allowance prayed are not specified if the Claimant was entitled to all those overtime allowance, commuter allowance. Leave travel allowance and other benefits. These are not pleaded and not proved and are not provided in his contract. The house allowance is provided and so is awarded 6000 x 38 months -Kshs. 228,000.00
 - vi. The court is not clear what was his salary for June 2017 that should be considered in order to calculate the retirement benefits. The Claimant is asking for Kshs.34,000/= per month but the Court cannot just assume figures with no proof. Furthermore, the Claimant should deduct the retirement benefits paid and only Claim the difference. The 1st respondent and the Claimant must agree on this amount and report to Court by 20th April 2023 on what would be the retirement amount due to him.
 - vii. The Court finds that further prayers are speculative and not justified and not awarded except interest on amounts awarded at Court rates from date of judgement until full payment.
 - viii. The Claimant is also awarded cost as costs follow the event. Case to be mentioned on 20th April 2023 to confirm retirement benefits.

Orders accordingly.

DATED, SIGNED AND DELIVVRED VIRTUALLY IN NAIROBI THIS 5TH DAY OF APRIL 2023.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court 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.

ANNA NGIBUINI MWAURE

JUDGE

