



**Tamimu v Ocean Freight (EA) Limited (Cause E005 of 2023)
[2023] KEELRC 1330 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1330 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E005 OF 2023**

M MBARŪ, J

MAY 25, 2023

BETWEEN

MOHAMED ATHUMANI TAMIMU CLAIMANT

AND

OCEAN FREIGHT (EA) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed his Memorandum of Claim on 24th January, 2023 on the grounds that he was employed by the respondent as an export manager from 16th May, 2007 up to 6th September, 2022 when his employment was unfairly terminated. The claimant took his annual leave on 2nd August, 2022 and ended on 2nd September, 2022 but when he reported back to work on 3rd September, 2022 he was summoned by the human resource manager, Rachael Mambua-Fadhili and who served him with a letter dated 31st August, 2022 terminating his employment on the grounds of early retirement despite the claimant being physically fit and in good health.
2. The claim is that the claimant had been employed on permanent and pensionable terms and the decision to terminate his employment without notice or a hearing was not justified. There was no case of misconduct or any matter to justify the early retirement. He had not applied for the early retirement and the fact of being replaced by the respondent who engaged Ms Spirinah Mageo demonstrates back faith.
3. In January, 2022 following the manager's performance evaluation, the claimant scored 71% and was given a salary increment. Owing to his advanced age, the claimant is not able to get new employment and is now subjected to poverty after serving the respondent for 15 years. The respondent subjected the claimant to early retirement which was unlawful and unconstitutional.



4. The claimant was earning Ksh. 155,364 per month and is claiming compensation for unfair termination of employment, damages for discrimination and salary payments until retirement age of 60 years.
5. The claimant testified in support of his case that he is 55 years and he worked for the respondent until 3rd September, 2022 when he reported back to work after taking his annual leave when he was handed letter dated 31st August, 2022 terminating his employment by retirement. The respondent has filed a notice to show cause letter dated 31st August, 2022 but he was not served with it. He had no warning letter as alleged and no disciplinary hearing was conducted save for the letter of retirement for which he was not due and had not applied for it.
6. Upon cross-examination, the claimant testified that his annual leave was ending on 2nd September, 2022 and since this was on a Saturday, he reported back on Monday when he was served with a notice to show cause on 6th September, 2022. He signed on the delivery book but when he opened the letter it was notice terminating employment by retirement. The alleged notice to show cause was not issued and retirement was with effect from 31st August, 2022. There was no mutual agreement to take annual retirement and he had not applied for such retirement. This has affected him because he was not prepared, he had just been evaluated and rated highly, he had just taken his annual leave and there was no reason to retire before 60 years.
7. The claimant testified that he had an altercation with a colleague and the matter was resolved amicably. He agreed to look at his shortcomings and work within the team but the termination of employment was discriminatory because he was the only one targeted among all employees of the respondent. such action was devoid of any due process and damages are due.
8. Upon termination of employment, the respondent paid severance pay of 15 days for every year work together with remittances to NSSF and NHIF.
9. In response, the respondent's case is that on 12th July, 2022 the claimant was involved in a workplace conflict to which a meeting was held to discuss his conduct. On 4th and 5th July, 2022 reports on the export department workplace conflicts were received from Mr Njoroge and the claimant and on 15th July, 2022 the claimant failed to respond to various clients' queries on time as a result of which the respondent has to repair the business relationship. The claimant failed to address various requests by clients leading to complaints and on 31st August, 2022 the respondent issued him with a show cause letter requiring him to respond as to why his employment should not be terminated. This letter was delivered to the claimant on 6th September, 2022 upon which he pleaded that his be addressed as early retirement and upon consideration of the request, the respondent granted the request on 27th September, 2022 and to take effect from 31st August, 2022. The letter as prepared and served upon the claimant on 27th September, 2022.
10. After the claimant received the notice to show cause, he went to discuss the contents with the human resource manager, Racheal Mambua and it was orally agreed to the option of early retirement. The claimant request for early retirement was allowed and his claims in court are made with unclean hands. The performance evaluation score cannot be reviewed in isolation of the specific comments made by the respondent. The claimant had various incidents and complaints made against him and the claim that there was discrimination is without proof.
The last salary paid was Ksh. 195,364 per month.
11. Upon the claimant's request for retirement, the respondent paid him terminal dues based on his gross salary as follows;



12.
 - i. 6 pending leave days Ksh. 43,084;
 - ii. Severance pay for 15.3 years Ksh. 1,489,650.50;
 - iii. One-months' notice pay Ksh. 195,364;
 - iv. 8 months' gratuity pay Ksh. 1,562,912;
 - v. Leave allowance Ksh. 30,000;
 - vi. Telephone benefit Ksh. 15,282.
18. The payment of severance and gratuity were gratuitous because severance pay was only due in a redundancy but this was considered as an adequate retirement package. The total payment was subject to statutory deductions and on the final tabulation the claimant was paid on 19th September, 2022.
19. In evidence, the respondent called Racheal Mambea Fadhili the human resource manager who testified that she worked with the claimant and on 6th September, 2022 when the claimant reported back from his annual leave she gave him a letter of notice to show cause and when he read it he requested that this be changed to early retirement. He therefore returned the notice to show cause to her and instead she issued him with notice of early retirement and he signed the delivery book. The conversations were oral based on the claimant's request for early retirement and a certificate of service was issued. The respondent opted not to take the claimant through the disciplinary process taking into account the years of service and the misconduct he was facing and on humanitarian grounds, the request for early retirement was found to be more feasible.
20. Ms Fadhili also testified that the claimant was supposed to have resumed duty on 3rd September, 2022 which was a Saturday and a working day for the respondent but he only returned on 6th September, 2022 when she issued him with the Notice to show cause dated 31st August, 2022. The claimant had an altercation with a colleague in his department and had been issued with a warning over various lapses and complaints made by different clients. He did not respond to the show cause letter and offered to take early retirement. His terminal dues were prepared and paid immediately and a certificate of service issued.
21. Leonard Mugenyah the director finance testified that he tabulated and paid the claimant his terminal dues less statutory deduction on 19th September, 2022 through a deposit in his bank account. A total sum of Ksh. 891,461,55 was paid less Ksh. 372,276 from the total of Ksh. 1,232,752.55 and the P9 form to Kenya Revenue Authority will reflect these payments. The claimant has a legal duty to pay taxes and the respondent has a legal duty to remit all statutory deductions.
22. At the close of the hearing both parties agreed to file written submissions. Only the respondent complied. These submissions are analysed and the issues for determination are whether employment terminated fairly and whether the remedies sought should issue.
23. It is common cause that the claimant was employed by the respondent and the employment relationship governed under a written contract. The written contract has a termination clause which required notice or payment in lieu of notice thereof.
24. Such term is also regulated under the provisions of Section 35(1) of the *Employment Act*, 2007 (the Act) that either party to an employment contract before termination of employment should issue notice or pay in lieu of notice. The termination of employment can be by mutual agreement or involuntary due to misconduct or gross misconduct.



25. In this case, the claimant's case is that he reported back to work from his annual leave only to be served with letter terminating his employment through retirement yet he had not attained the retirement age. He was 55 years at the time he testified in court.
26. The respondent on the other had had its case that the claimant was issued with a notice to show cause following workplace misconduct and complaints from clients and taking into account his years of service and the potential of losing his employment he orally requested for early retirement and hence returned the notice to show cause. On humanitarian grounds, the request for early retirement was accepted and terminal dues processed and paid immediately only for the claimant to turn around and claim that he was unfairly terminated and discriminated against.
27. Ms Fadhili testified for the respondent as admitted that as the human resource manager, she issued the claimant with the notice to show cause but he returned and orally offered to take early retirement. As the human resource manager of the respondent, this witness stood out as well experienced officer in human resource matters and operations of the respondent. An employee facing workplace misconduct is issued with a notice to show cause so that he can explain why disciplinary action should not be taken against him. A trade-off between gross misconduct and early retirement so as to circumvent the outcome of any possible sanction only entrenches a culture of impunity. This much, Ms Fadhili as the human resource manager of the respondent should appreciate so that when the claimant offered to take early retirement, the provisions of Section 41 and 44 of the Act should have rung a bell to her.
28. An employee who offers to terminate employment should issue notice. An employer who terminates employment should issue notice and give reasons in terms of Section 35 and 43 of the Act. To proceed and act or a verbal negotiation with an employee so as to avoid a disciplinary process should therefore have been treated with a lot of caution. To casually take the word of the claimant, if at all, that he read the show cause notice and instead returned it and offered to take early retirement should have been in writing to avoid a suit such as is currently before court. without any evidence of the claimant offering to take early retirement, the court is left with the word of the claimant as against that of the respondent. The respondent with advantage of a human recourse manager and an expert in human resource matters had the advantage of expertise advice. The claimant on the other hand, faced with possibility of losing his employment after 15 years of service must have been shocked to receive a show cause notice immediately after resuming duty from his annual leave. Whatever he opted to do, reasons demanded that this be put into writing. Employment was through a written contract and termination of the same dictated it should and ought to have been in writing.
29. Without any matter that the claimant offered to terminate his employment through early retirement, the law supports his case. His employment was terminated through the unilateral action of the respondent that of early retirement. This is unlawful and contrary to Section 35 of the Act.
30. The claimant is seeking compensation for unfair termination of his employment. On the finding of the unilateral conduct of the respondent in terminating employment for no good cause, the claimant is entitled to compensation.
31. Pursuant to Section 45(5) of the Act, in assessing due compensation the court is required to look at the conduct of the parties. The respondent processed and paid the claimant his terminal dues immediately and by 19th September, 2022 the terminal dues had been processed and paid fully. Such immediate action taken into account, one-month compensation at Ksh. 155,364 is hereby found sufficient.
32. With regard to alleged discrimination, the claim is that the claimant was treated differently from other employees facing similar circumstances. However, the claimant does not state the other employee who were facing similar circumstances and were issued with notices of early retirement as he was. The



conduct of the respondent terminating employment through early retirement is addressed as unlawful act and compensation awarded. The court finds no matter of discrimination in this case as defined under Section 5 of the Act. the distinguishing feature of discriminatory treatment are absent.

33. With regard to a claim for payment of salaries until retirement, the claimant was released by the respondent and paid all his terminal dues. the package of severance pay together with gratuity, these are ordinarily not available in a case of early retirement. One is due in a redundancy while the other is a benefit in a written contract or under the collective agreement and purely gratuitous. The terminal dues were generous in the circumstances. The claimant was at liberty to source other employment and cannot be found to state that he should be paid and compensated until he attains 60 years. in the case of D.K. Njagi Marete v Teachers Service Commission [2013] eKLR the court held that;

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The *Employment Act* 2007 requires he moves on as he has done, and mitigated the loss of his job An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

34. Upon loss of employment, the claimant was expected to mitigate such loss and secure new endeavours. He cannot sit back and put to waste his skills and lessons learnt from his last employer.
35. Accordingly, judgment is hereby entered for the claimant against the respondent with an award of compensation at Ksh. 155,364 only. Each party shall bear own costs.

Delivered in open court at Mombasa this 25th day of May, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

