



REPUBLIC OF KENYA



**SGA Security Limited v Okuku & another (Appeal E079 of 2022)
[2023] KEELRC 1716 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1716 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E079 OF 2022**

**M MBARÚ, J
JUNE 29, 2023**

BETWEEN

SGA SECURITY LIMITED APPELLANT

AND

KENNETH OUMA OKUKU 1ST RESPONDENT

ENOCH IROTO DAUDI 2ND RESPONDENT

*(Being an appeal against the part judgment of Hon. Maureen Nabibya
(SPM) in Mombasa CMELRC No.1023 of 2019 delivered on 27 October 2022)*

JUDGMENT

1. On the appeal, both parties attended court and agreed to address the same by way of written submissions. Only the appellant complied.
2. The appeal herein resulted from the judgment of Hon. Maureen Nabibya, Senior Principal Magistrate in CMELRC No 1023 of 2019 delivered on 27 october 2022.
3. The background to the appeal is that the respondents herein filed a claim before the lower court on the grounds that they were employees of the appellant as security guards and later as cashier and driver respectively. The 1st respondent from March 1996 to January 2019 earning Kshs 33,979.80 and the 2nd respondent from the May 2010 to January 2019 earning Kshs 32,719.
4. The respondents claim was that on 29 January 2029 the appellant wrote letters retiring the respondents on age grounds which was unfair, without notice or due process or payment of terminal dues. they claimed for payment of their dues;
- 7 1st respondent claimed the following;
 - a. One month notice pay Kshs 33,979.80;



- b. Overtime worked Kshs 292,656;
 - c. Unexpired work period before retirement Kshs 135,919.20;
 - d. Public holidays Kshs 24,917.20;
 - e. Severance pay for 23 years Kshs 390,747;
 - f. 12 months compensation Kshs 407,757.60.
- 8 The 2nd respondent claimed the following;
- a. One month notice pay Kshs 32,719.80;
 - b. Leave pay Kshs 15,736;
 - c. Leave travelling allowance Kshs 5,245;
 - d. Unexpired period of contract before retirement at 60 years Kshs 1,325,212.20;
 - e. Severance pay Kshs 151,212.20;
 - f. 12 months compensation Kshs 392,630.40
9. The response was that the appellant retired the respondents upon attaining the retirement age per the company policy that retirement age is 55 years. The 1st respondent as at January 2019 was 60 years old while the 2nd respondent in January 2019 was aged 57 years. Retirement notices were issued on 29 January 2019 and 8 February 2019 respectively. Such retirement was lawful and in accordance with the practice of the appellant.
10. In the judgment, the learned Magistrate made a finding that the 1st respondent was properly retired and there is no case of unfair termination of employment while the 2nd respondent was retired 2 years before attaining 60 years which was unfair and was awarded for such period at Kshs 948,880, 3 months notice pay at Kshs 98,160, leave pay at Kshs 15,736 and costs of the suit.
11. Aggrieved, the appellant filed the appeal on the grounds that the learned magistrate ignored the policy of the appellant that employees retire at 55 years as the mandatory age and hence varied the employment contract and hence making the payment for the balance of the period was in error and should be set aside and substituted with an order dismissing the claims.
12. In the written submissions, the appellant's case is that the 2nd respondent was fairly terminated upon attaining the retirement age in term of Section 45(2) of the *Employment act* which was a valid and fair reason and in accordance with fair procedure as required under Section 43 of the Act that where there is a justified reason, the employer can terminate employment. the policy of the appellant is to retire its employees at 55 years as notice issued in this regard. Under the Regulation 17(2)(b) of the *Regulation of Wages (Protective Security Services) Order 1998*, the normal retirement age for employees in the security sector is 55 years.
13. Regulation 24(b) allow an employer to summarily dismiss an employee for lawful cause which is attaining retirement age as the case was herein and for this reasons the trial court erred by awarding the 2nd respondent for years until 60 years of age as held in *Samuel Omuktoko Mabinda v Riley Services Limited* [2019] eKLR that the lawful retirement age if a security guard is 55 years.
14. This being a first appeal, the court is allowed to review the pleadings, evidence and findings of the trial court and make own finding but take into account the court has no opportunity to hear the witnesses.



15. At the heart of the appeal is that award of 2 years and 10 months to the 2nd respondent upon the trial court finding that he was retired early and hence this was not justified and it was unfair.
16. It was not disputed that the 2nd respondent was retired while aged 57 years and the appellant has relied on Section 45(2) of the Employment Act, 2007 (the Act) to justify that as per its practice, summary dismissal was allowed on the grounds of one attaining 55 years. this perception is misleading in view of cited provisions of the Act. summary dismissal only arise where an employee is in breach of a fundamental provision of the employment contract or the employee is of gross misconduct or the employer has a given policy defining what constitutes gross misconduct and such policy is known to the employees.
17. Retirement should be a natural occurrence to an employee upon attaining the retirement age in terms of the law, policy or practice of the employer. A policy that is applied to all employee that a given employee can pick the age of retirement without struggle to appreciate such policy.
18. In this case, where the respondent had an actual policy, which was not filed as part of the pleadings, that allowed retirement of its employees at 55 years, then the 1st respondent was retired at 60 years while the 2nd respondent was retired at 57 years. The logic of a retirement age is lost.
19. The learned magistrate evaluated these facts and made a sound finding. This cannot be faulted.
20. On the assessment of the award for the remainder of the term, Section 49(1)(b) of the Act allow the court to award an employee who has been unfairly terminated from his employment for the reminder of the time period not served under a given written contract;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
21. However, in making such an award, the court must weigh the injury suffered and the procedures adopted by the employer in arriving at termination of employment taking into account not to disturb the shop floor and make awards that are prohibitively high to the extent that such becomes harsh and overly punitive to an employee and eventually run them out of business. The context of having a maximum award of 12 months in a case of unfair termination of employment was therefore made to ensure that such an award only issues in the rarest of case where the employer has acted grossly and is both procedurally and substantively unfair.
22. Account must also be taken to the fact that an award of futuristic claims are balanced to ensure that an employee dismissed form his employment is left at liberty to secure new employment unless he can demonstrate that following termination of employment he is so prejudiced that in a given sector, it is impossible to get new employment. as otherwise, once employment has terminated and notice has issued, the employee relations his skills and work experience to look for new employment as held in Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR that Section 49 of the Act caps the award of compensation at 12 months gross pay. in the case of D K Njagi Marete v Teachers Service Commission [2020] eKLR the court held that the award of future earnings where the employee has not offered his labours to the given employee should take into account the maximum award of compensation is based on 12 months gross wage last earned by the employee.



23. The Court of Appeal in *Standard Group Limited v Jenny Luesby* [2018] eKLR held that where an employee is able to prove other breaches that entitle him to additional compensation outside the capping under section 49 (1) of the *Act*, the court may grant such damages subject to having at the back of its mind the caution that the function of award of damages in employment matters is not to punish the employer but to recompense an aggrieved employee for the injury suffered following the unfair termination.
24. On his basis the award of 2 years and 5 months salaries was too high and without justification based on the evidence before the trial court. the award was made together with 3 months notice pay despite the 2nd respondent pleading for one month notice pay.
25. On the finding that there was unfair termination of employment an award of 3 months is hereby found sufficient together with costs.
26. Accordingly, the appeal with regard to the award of Kshs 948,880 for 2 years and 5 months is hereby reviewed to an award of 3 months at Kshs 98,150 with costs and to this extent the appeal is successful.
27. Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

