



**Ouko v Kenya Chemical Workers Union (Cause E014 of 2022)
[2023] KEELRC 1877 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1877 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E014 OF 2022
CN BAARI, J
JULY 27, 2023**

BETWEEN

CALEB OTIENO OUKO CLAIMANT

AND

KENYA CHEMICAL WORKERS UNION RESPONDENT

JUDGMENT

1. The Claimant's claim was commenced vide a Memorandum of Claim dated March 14, 2022. He seeks a declaration that his retirement and eventual termination of service was not within the law, and hence unlawful. He further seeks payment of salary *in lieu of* notice, compensation, exemplary damages, issuance of a Certificate of Service and costs of this suit.
2. The Respondent filed a response to the claim dated April 7, 2022, together with a witness statement and other accompanying documents.
3. The case was first heard on February 13, 2023, when the Claimant testified in support of his case, and later on March 21, 2023, a Ms Grace Wairimu Munyi, also testified in support of the Claimant's case.
4. The Respondent did not call any witness, and sought instead, to proceed by way of written submissions.
5. Submissions were filed for both parties.

The Claimant's Case

6. The Claimant states that he was employed by the Respondent as the area Secretary (Coast region) on the September 21, 1991, where he served until December 20, 2012, when he was transferred to Nyanza and Western Region in similar position effective January 7, 2013.



7. It is the Claimant's case that it was an express and explicit term of the contract between himself and the Respondent that his appointment was permanent and pensionable.
8. The Claimant states that he served the Respondent diligently and with loyalty for over thirty (30) years, without any disciplinary and/or integrity issues. It is his case that the only notable issue was non-payment of salary on some occasions, but which did not strain the working relationship between them.
9. It is the Claimant's case that the Respondent summoned him on January 31, 2022, to a meeting and informed him of his immediate retirement. It is his case that the Respondent failed to pay him terminal dues, and only offered him ex-gratia pay of Kshs 400,000.00.
10. The Claimant states that the Respondent has applied the retirement benefits, service benefits and/or gratuity for its former employees, who were all paid their terminal benefits on resignation, death and on retirement on medical grounds.
11. He states that his salary at retirement was Kshs 88,000.00
12. It is the Claimant's case that he was discriminated upon for having been retired when other employees his age were still in service. He further contends that the actions of the Respondent to abruptly retire him, and failing to pay him his lawfully earned benefits, subjected him to torture and mental anguish.
13. It is the Claimant's case that his contract of service entitles him to payment of gratuity upon either retirement, resignation or death and that he would only lose his gratuity if dismissed for gross misconduct.
14. In his testimony before Court, the Claimant states that the Respondent did not have a definite retirement age, and that retirement was by request, medical grounds or on resignation.
15. It is his testimony that the organ of the union mandated to make decisions is the Central Council and the delegates conference. He further avers that decisions of the union are made through minutes and resolutions.
16. The Claimant further states that he was not given an opportunity to comment on his rushed retirement
17. On cross-examination, the Claimant stated that he was given salary advance on requests at different times in his employment. He further stated that he was not paid gratuity and salary arrears upon retirement.
18. He admitted receiving a payment of Kshs 250,000/- made on account of salary arrears.
19. It is his assertion that although the Respondent made deductions in respect of NSSF, he was still entitled to gratuity.
20. The Claimant prays that the Court awards him the reliefs in his statement of claim.

The Claimant's Submission

21. It is the Claimant's submissions that it is settled law in civil cases that a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. He sought to rely in Edward Muriga Through *Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 Of 1997, for the holding that where a defendant does not adduce evidence, the Plaintiff's evidence is to be believed.



22. It is submitted for the Claimant that the Respondent did not call any witness to rebut the position taken by the Claimant that the Respondent did not have a retirement policy nor a definite retirement age, thus the Claimant's position remains unchallenged.
23. It is the Claimant's further submission that he was unfairly and unlawfully targeted by virtue of his age, and forced into an abrupt retirement.
24. It is submitted that the Respondent was wrong in basing their case on the fact that the Claimant had attained the age of sixty (60) years, when it did not have a definite retirement age.

The Respondent's Submissions

25. The Respondent submits that the Claimant had attained the retirement age of sixty years as at the time he retired, having been sixty seven (67) years old.
26. It is the Respondent's further submission that the fact that an employee's contract is said to be permanent and pensionable, does not mean it cannot be terminated. It had reliance in the holding of Maureen Onyango J in Francis N. Gachuri v Energy Regulatory Commission Cause No 2023 of 2011 to buttress this position.
27. It is submitted for the Respondent that retirement is not synonymous with termination of service as contemplated under the [Employment Act](#), rather, retirement on basis of age is a natural consequence of aging.
28. It is the Respondent's submission that the Claimant continued working for it past the age of sixty years, and once he became ineffective and slow at work due to old age. It submits that it did effectively communicate to him about his retirement.
29. It is the Respondent's submission that the Claimant had no salary arrears as at the time of his retirement. It is its further submission that the Claimant having admitted receiving an ex-gratia payment of Kshs 400,000 and remission of NSSF deductions, he is not entitled to an award of gratuity. It sought to rely in [Bamburi Cement Ltd V William Kilonzi](#) (2016) eKLR to support this position.

Analysis and Determination

30. I have considered the pleadings herein, the witnesses' oral testimonies and the written submissions by both parties. The issues for determination are:
 - i. Whether the Claimant's retirement amounts to unfair termination
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's retirement amounts to unfair termination

31. The Claimant's contention is that the Respondent, which did not have a definite retirement age, ambushed him with a retirement decision, and which decision was to take effect immediately.
32. The Claimant was summoned to the Respondent's head office on January 31, 2022, and informed verbally that he will be retired effective February 1, 2022.
33. The Respondent's assertion is that the Claimant was aged 67 years at the time he was retired, and had worked beyond the retirement age of sixty (60) years.



34. As submitted by the Claimant, no evidence was led to show that the Respondent had a policy on retirement age. Retirement, the Court was told, was either upon death, resignation or at the employee's request.
35. The Respondent filed a response to the Claimant's claim together with a witness statement and a myriad of accompanying documents. The witness statement was not a sworn statement as to enable its admission in the absence of a witness to cause its adoption.
36. The documents filed were equally not produced before Court and hence do not amount to evidence before a court of law.
37. In *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) Hccc No 834 Of 2002, Lesiit, J citing the case of *Autar Singh Bahra And Another v Raju Govindji*, Hccc No 548 of 1998 held thus:
- “ Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Count-claim are unsubstantiated.”
38. The Claimant did not request for retirement, and nothing shows that he was medically unfit to continue serving, as these two in addition to death, were the modes of retirement known to the Respondent.
39. In the absence of a policy on retirement in respect of retirement age, or a decision by the union's Central Council and delegates conference, coupled with the fact that the Claimant was only made aware of his retirement just a day to the date in which it was to take effect, I find the retirement to have indeed been an ambush, and which amounted to an unfair termination.

Whether the Claimant is entitled to the reliefs Sought

40. The Claimant claims one-month salary in lieu of notice, salary arrears, gratuity, pay for 31 days worked, compensation for ambushed retirement, prorated leave, a Certificate of Service and costs of the suit.
41. The Respondent did not adduce evidence to rebut that adduced by the Claimant in relation to his claim. The Claimant's retirement took effect immediately and nothing shows that he was paid in lieu of notice.
42. In the premise, I find the claim for notice merited and is hereby allowed as prayed.
43. On salary arrears, the Claimant admitted on cross-examination that he was paid salary arrears of Kshs 250,000.00. His claim in this regard is Kshs 246,000.00, which thus means that the claim is fully settled. It is dismissed.
44. Clause 6 of the Claimant's appointment letter/contract provides for payment of retirement benefits/service benefits/gratuity benefit at the rate of one month's pay for every year of service, where one retires normally, resigns or when they leave on medical grounds.
45. The Court of Appeal in *Bamburi Cement Ltd V William Kilonzi* (2016) eKLR stated:
- “ Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee by



an employer either at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer...”

46. Further, in *John Karanja Mbogo v Leah Wangui t/a Gilgil Distributors Limited* [2020] eKLR the court in dismissing a prayer for gratuity stated that: -

“The claim for gratuity is not due. The Claimant had no written contract giving him such benefit. The Respondent was paying statutory dues and even where a service pay was claimed, with such payment of PAYE, NSSF no service pay is due.”

47. The Claimant’s contract carried an express provision entitling him to a service gratuity, with the only limitation being where he is retired on the basis of gross misconduct.

48. There was no misconduct associated with the Claimant’s retirement and is thus entitled to payment of a service gratuity, and which is hereby awarded.

49. The Claimant has likewise sought an award of compensation for the ambushed retirement. The Court has found the manner in which the Claimant was retired to amount to an unfair termination, and which entitles the Claimant to compensation per Section 49 and 50 of the *Employment Act*. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.)

50. Considering that the Claimant admitted receiving payment of ex gratia of Kshs 400,000, and further considering the length of time for which the Claimant’s employment might have continued but for the termination, I deem an award of four (4) months’ salary sufficient compensation for the unfair termination.

51. The claim for exemplary damages was not proved and is hereby dismissed.

52. In whole, Judgment is entered for the Claimant as against the Respondent as follows:

- i. Payment of one-month salary *in lieu of* notice at Kshs 88,000/-
- ii. Four Months’ salary as compensation for the unfair termination at Kshs 352,000/-
- iii. Service gratuity at Kshs 2,640,000/-
- iv. A Certificate of Service
- v. Costs of the suit.

53. For the avoidance of doubt, the awards are subject to statutory deductions in accordance with Section 49(2) of the *Employment Act, 2007*.

54. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JULY, 2023.

CHRISTINE N. BAARI

JUDGE

