



REPUBLIC OF KENYA



KENYA LAW
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**Ngige v Wells Fargo Limited (Employment and Labour Relations Cause
806 of 2018) [2023] KEELRC 1963 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1963 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 806 OF 2018
NZIOKI WA MAKAU, J
JULY 4, 2023**

BETWEEN

BRUCE NJOROGE NGIGE CLAIMANT

AND

WELLS FARGO LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim vide a Statement of Claim dated May 22, 2018 praying for Judgment against the Respondent for:
 - a. A declaration that the Claimant is entitled to his lawful benefits by way of the accrued gratuity and pay in lieu of notice and unpaid leave days.
 - b. Damages for loss of opportunity to invest.
 - c. Costs of this suit and interest on the above sum.
2. The Claimant averred that on or about August 12, 2010, the Respondent employed him in the position of Training Manager effectively from August 23, 2010. That he diligently served the Respondent for 7 years and at the time of his retirement, he was drawing a salary of Kshs 137,550/- per month. However, when he was sent on retirement, the Respondent failed to pay him his entitlement of gratuity for the 7 years of service as provided for in section 17 of the Regulation of Wages (Protective Security Services Order). That the Respondent continues to withhold the said gratuity dues for the period 2010 to his retirement date without according him any valid reason and/or justification. In addition, the Respondent failed to pay him his annual leave days. It was the Claimant's averment that the Respondent's aforementioned actions amount to malice. He thus sought for the said gratuity payment, 13 unutilised leave days, accrued interest of the said payments, and damages for wrongful retention of his gratuity. He also noted that the Respondent had failed to honour his claim despite demand and notice of intention to sue.



3. In reply, the Respondent filed a Statement of Response dated July 14, 2018 averring that the Claimant used to earn a gross salary of Kshs 80,000/-. That it was an express term of the contract that normal retirement would be on the last day of the month in which the Claimant attained the age of 60 years. It also asserted that under the said contract, the Claimant was entitled to 24 working days of leave for each completed year of service. The Respondent denied that the Claimant is entitled to a gratuity as alleged or at all stating that the Regulation of Wages (Protective Security Services Order) was part of subsidiary legislation under the Regulations of Wages and Condition of *Employment Act*, Cap 229. That the Wages Regulations Orders are based on proposals submitted by wages councils, which deliberate on the minimum wages and conditions of employment for vulnerable employees who did not have the power to negotiate their terms of employment. Secondly, the Wages Regulations apply to the specific occupations set out in the First Schedule to the Order and the Claimant did not hold a position on any of the occupation to which the wages order applies. Lastly, the Claimant was not earning a basic minimum wage and cannot as such assert an entitlement to a gratuity under the said regulations. The Respondent also stated that the Wages Regulation Orders do not apply to management employees and did not apply to the Claimant in this case. It further denied that there was any malice as alleged or at all or that any legitimate expectation could arise in the circumstances of this case. The Respondent's account was that the Claimant was paid all his final dues including accrued but unutilised leave and that he received a sum of Kshs 73,360/- in his final payslip. It thus denied that the Claimant is entitled to any gratuity or to any damages as claimed and prayed that the Court dismissed the Claimant's Claim with costs.
4. The Respondent also filed a Witness Statement made on July 14, 2018 by its Group HR Director, Mr Willis Ayieko, who stated that the Claimant was given three months' notice that he would be retired once he reached the age of retirement. That if the claim that the Claimant was assured of a fixed term of contract after retirement was true, it would not be a basis to assert any entitlement. He further stated that as the Claimant was a guard, he was not entitled to a gratuity.

Evidence

5. The Claimant testified that he recalled being served with the notice of retirement letter and the HR Director then indicating to him that he would give him a further 2 years to serve the company, which was in line with the HR Manual. That unfortunately, the extension was not given and he felt deceived because he had made plans due to the promise. He testified that he was indeed his leave emoluments of 24 days per year but felt he was to be paid more because the Training Manual provided for 26 days. That he thus had a deficit of 2 days for 5 years and was thereafter entitled to 28 days but only got 24 days. The Claimant confirmed in cross-examination that the promise for a two-year extension was never made to him in writing. He also confirmed that he was paid his due leave days for 2017 as computed by the HR Director, that his contract did not have a provision for gratuity and that he did not earn minimum wage.
6. In his testimony before Court, Mr Willis Ayieko Onyango (RW1) denied making any promise to the Claimant that he would extend his contract. He also stated that part of the Claimant's final pay was inclusive of leave pay. Under cross-examination, RW1 stated that the Respondent's HR Manual provided that all employees are entitled to 24 days leave.

Claimant's Submissions

7. The Claimant submitted that he was entitled to gratuity for the 7 years worked at the rate of half month's salary for every year worked, totalling Kshs 481,425/- that he urged this Court to allow. On unpaid leave days, he submitted that clause 10.4 of the Respondent's HR Manual provides that the



leave days entitlement for employees who have not completed five years is 26 days; for those who have completed five years of service is 28 days; and for those who have completed ten years of service is 30 days. That having served for a total of 7 years, the Respondent failed to apply the provisions of its HR Manual by offering him 24 days leave instead of 26 days. That this meant there was a shortfall of 2 days for each of the 5 years and therefore, he was entitled to the balance of 10 leave days not taken. Furthermore, after having completed 5 years of service, he was entitled to 28 days leave instead of the applied 24 days and that with the shortfall of 4 days for the last 2 years, he was thus entitled to the balance of 8 leave days not taken. That in total, he was owed 18 leave days not taken at a basic salary of Kshs 137,550/- on a prorated basis and is therefore entitled to Kshs 82,530/-.

8. As to whether he is entitled to damages, the Claimant invited this Court to note that RW1 acknowledged receiving a letter dated September 21, 2017 from him inquiring on the promise to give him a contract after retirement. That the refusal by RW1 to respond to the inquiry was in bad faith and constitutes unfair labour practice on the Respondent's part, contrary to the provisions of Article 41 of the *Constitution* of Kenya. Moreover, that clause 14.4 of the Respondent's HR Manual provides that the Respondent could retain an employee beyond the retirement age for either a renewable or non-renewable term contract as determined by the Directors. It was the Claimant's submission that the doctrine of promissory estoppel applies in his case and that this Court ought to estop the Respondent from asserting the contrary given that the Claimant relied on the promise of a contract after retirement by RW1, to his detriment. That due to this detriment, he was denied the opportunity to invest the equivalent of 2 years' salary. He thus urged this Court to allow the said claim for damages. The Claimant also urged the Court to allow his Claim with costs for the foregoing reasons.

Respondent's Submissions

9. The Respondent submitted that section 107 of the *Evidence Act* provides that:

'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'
10. It was submitted that further, clause 14.4(a) of the Respondent's HR Manual provides that, 'where it is not intended to retain an employee beyond the compulsory retirement age of 60 years, the HRM will inform the employee by giving him reasonable notice of not less than three months.' While Clause 14.4(b) provides that where it is desired to retain an employee beyond 60 years, the employee's HOD will, at least six months in advance of the employee's 60th birthday, report to the HRM/PD stating full reasons why they should be retained, then seek approval of the director. That consideration was also to be given on whether such retention would block the advancement of deserving junior employees. It was the Respondent's submission that the Claimant having confirmed he received the three months' notice prior to retirement, it was clear there was no intention to retain him beyond his 60th birthday. That there was also no evidence from the Claimant demonstrating that the conditions in clause 14.4(a), (b) and (c) had been met. That there would have been discussions and records of such discussions of any intention to retain the Claimant after retirement but in this case, no such evidence existed as testified by RW1.
11. The Respondent cited the case of *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR* in which the Court, when faced with oral agreements, held that a claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. It submitted that whereas the Claimant tried to infer the existence of an agreement with RW1 in his letter dated September 21, 2017 and the likelihood of him being given a contract, the same was insufficient to justify the existence



of such an agreement with the Respondent. It further cited the case of *Moses Njane Ngendo v Josiah Anyangu Omutoko & another [2022] eKLR* wherein the Court held that:

' Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable.'

12. The Respondent submitted that the Claimant was not entitled to rely on the doctrine of promissory estoppel, arguing that the same was neither pleaded nor proved. It submitted that it is trite law that mere silence and inaction by a party cannot found promissory estoppel (see page 350 of Snell's Equity). That therefore the Claimant's silence on the alleged promise could not establish promissory estoppel and furthermore, estoppel does not arise in this case because: the Claimant had not shown that RW1 either knew or could have foreseen what would have been done in reliance of it; and the Claimant had not discharged the burden of proving he relied on the alleged promise. On this submission, the Respondent relied on the case of *Steria Ltd & Ors v Ronald Hutchison & Ors [2006] EWCA Civ 1551* in which the Court held that there must be evidential basis to support estoppel in cases of reliance of a promise.
13. The Respondent submitted that the Claimant was paid Kshs 152,223/- constituting his salary for the month of September 2017 and 16 days accrued leave as shown in the copy of the payslip at page 19 of Claimant's Bundle). That the Claimant also signed the Discharge Voucher dated September 30, 2017 acknowledging receipt of the cheque (page 20 of Claimant's Bundle). It was the Respondent's submission that the Claimant had not proved any of the claims. That he firstly had neither laid a basis nor led any evidence in support of his allegation that he lost an opportunity to invest entitling him to damages. That this is because when the Claimant took employment in 2010, he knew it would end once he attained the age of 60 years. Secondly, his claim for 18 days' leave is based on a document he alleges to be the Respondent's HR Manual, but which document was unsigned and bore no identifying markers save for the title (see pages 14 to 16 of Claimant's Bundle). That in this regard, RW1 testified that the said HR Manual did not belong to the Respondent, whose documents bear headers and footers and are signed on every page. That the Claimant adducing a document that did not bear features that are uniform to other documents of the Respondent casts a reasonable doubt as to the authenticity of the document. It submitted that the document that set out the terms of the Claimant's service was the contract and that it produced in evidence the Claimant's leave application forms which show that his leave entitlement over the years was 24 days. That on his part, the Claimant had not shown why he did not raise the issue of the 4 days shortfall in the course of the 7 years if he was indeed entitled to the same. Thirdly, for an employee to claim gratuity, it must be provided in the contract of employment or CBA or Statute. The Respondent cited the Court of Appeal decision in *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR*. It submitted that the Claimant's contract did not contain a provision on gratuity and neither did he lead any evidence to prove that he was a member of a union and that such a union entered into a CBA with the Respondent for payment of gratuity. That the claim for gratuity was therefore without merit and should fail.
14. On costs, the Respondent submitted that costs follow the event and are to be awarded to the successful party at the discretion of the Court. That since it had proved that it paid the Claimant's dues as provided under the contract and as per the law and that his employment ended once he attained retirement age, the Court ought to exercise its discretion and grant the costs of the suit to the Respondent.
15. The Claimant seeks to rely on an alleged promise to give him employment beyond the age of retirement. The Claimant asserts that the Respondent's Group HR Director, Willis Ayieko promised to retain



the Claimant beyond the age of 60. Under the Respondent's HR Manual Clause 14.4(b) provides that where it is desired to retain an employee beyond 60 years, the employee's HOD will, at least six months in advance of the employee's 60th birthday, report to the HRM/PD stating full reasons why they should be retained, then seek approval of the Director. On the other hand, clause 14.4(a) of the Respondent's HR Manual provides that, where it is not intended to retain an employee beyond the compulsory retirement age of 60 years, the HRM will inform the employee by giving him reasonable notice of not less than three months. This was what happened in respect of the Claimant. As such, he was not offered the extension he had anticipated and the doctrine of promissory estoppel does not therefore apply to him. The Claimant in addition did execute a discharge voucher when accepting his final dues. He therefore was not entitled to mount any claim having absolved the Respondent from the threat of such claim. The Claimant was not an employee to whom the gratuity payable to staff of the Respondent applied. He was not entitled to it and as such cannot claim the same. He also had no claim on leave days as he acquiesced during his employ to having leave days that were fewer than his entitlement. Under the provisions of section 90 of the *Employment Act*, he was required to mount such claims within a year of the infringement and he failed to do so. As such his claim is found to lack merit but granted the relative might of the parties before the Court each party will bear their own costs for the suit. Suit dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

