



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okuku v SGA Mombasa Limited (Appeal E083 of 2022)  
[2023] KEELRC 1941 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1941 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E083 OF 2022**

**M MBARÚ, J  
AUGUST 1, 2023**

**BETWEEN**

**KENNETH OUMA OKUKU ..... APPELLANT**

**AND**

**SGA MOMBASA LIMITED ..... RESPONDENT**

*(Being an appeal against part of the judgment of Hon. Maureen Lambisa Nabibya, Senior Principal Magistrate delivered on 27 October 2022 in Mombasa CM ELRC No.1023 of 2019)*

**JUDGMENT**

1. The background to this appeal is a claim filed by the appellant and another in Mombasa CM ELRC Case No.1023 of 2019 on the grounds that he was employed by the respondent as a security guard in March 1996 until January 2019 when he was unfairly retired while earning a wage of Kshs 33,979.80. That the retirement was illegal and unlawful and no reasons justified such action and he claimed the following dues;
  - a. Notice pay Kshs 33,979.80;
  - b. Overtime worked for 20 months Kshs 292,656;
  - c. Payment for the unexpired term to retirement at 60 years being 4 months Kshs 135,919;
  - d. Public holidays worked Kshs 24,917.20;
  - e. Severance pay Kshs 390,747;
  - f. Compensation for 12 months and
  - g. Costs.



2. In response, the respondent denied the claims made and that termination of employment was lawful after the appellant attained 55 years as allowed under the respondent's company policy that the retirement age is 55 years and as at January 2019 the appellant was 60 years. On 29 January 2019 the appellant was issued with a retirement notice and the claims made are not justified.
3. In judgment, the learned magistrate held that the appellant had no abnormal procedure leading to termination of his employment and his prayer for overtime was not justified and there was no redundancy to justify a claim of severance pay.
4. The appeal herein follows part of the judgment of the Hon. M. Nabibya delivered on 27 October 2022 in Mombasa CM ELRC No.1023 of 2019 on the grounds that the finding that there was lawful termination of employment in the absence of any agreement between the appellant and the respondent on the retirement age was in error. There was no consultation between the parties with regard to termination upon attaining 60 years and this resulted in unfair termination of employment.
5. Both parties attended and agreed to address the appeal by way of written submissions. Only the appellant filed written submissions.
6. The appellant submitted that under Article 41 of the Constitution, every employee is entitled to fair labour practices. The appellant was not provided with any written contract of employment regarding his retirement age and the unilateral decision by the respondent to retire him at 6 years was unfair. Under Section 107 of the Evidence Act, the burden of proof was on the respondent to show there was an agreed retirement age which they failed to do. Only civil servants retire at 60 years and in the absence of a written contract, a CBA or human resource policy by the respondent on the retirement age, the appellant should have been allowed to continue with his employment. In the case of Robert Githua Githaka v Saab Kenya Limited Cause No.270 of 2016 (Nyeri) the court held that the question of a retirement date not having been fixed in the contract, the employee should have been left to work. The claimant testified as to his circumstances and the trial court erred in finding that he was not unfairly terminated in his employment and his terminal dues should be assessed and awarded with costs.
7. This being a first appeal, the court's role is to re-evaluate the evidence and record and arrive at own determination.
8. The appellant's assertion is that in the absence of any agreement with regard to his retirement age, the notice terminating his employment was wrongful and unfair and he should be paid terminal dues. The appellant filed various records including his National Identity Card that show he was born in the year 1959 and hence was to attain 60 years in the year 2019. The respondent issued one-month retirement notice to the appellant on 30 January 2019.
9. There is no permanent employment in law or in fact. Each type of employment is terminable due to different aspects including that of attaining a retirement age. Where parties fail to state the retirement age, the general practice, which is good practice is to apply the general retirement age in the public service. save, such should be treated cautiously and brought to the attention of the subject employee in good time.
10. In Republic v Judicial Service Commissions & 2 others Ex-parte Erastus M Gitbinji [2019] eKLR the court in addressing when a retirement age is due in a case where the employee's age is only stated by the year and not the month or day held that;

It is arbitrary and not based on contract or statute or decision based on oral evidence for the applicant's retirement date to be 01.07.2019 on the basis, "The Government Policy



stipulates that where an officer indicates only the year of birth on PSC Form, he / she is deemed to have been born on 1<sup>st</sup> July of that year.”

11. Unless the employer has caused the employee to register and state his date of birth or month, the employer cannot turn around and assign such date unilaterally.
12. The government Circular relied upon as cited above, was to address the growing need for honesty and certainty in employment by allowing the employee to state his date of birth to give the employer a semblance of certainty with regard to the retirement date. The circular guided as follows;

The policy with regard to determination of an officer’s age for purpose of retirement was set out in Establishment Circular No. 43 of 13<sup>th</sup> November, 1958 as varied by Treasury Circular No. 23 of 14<sup>th</sup> August, 1967.

On first appointment a candidate is required to declare his age and date of birth in the Application for Employment Form PSC 2. This information is given voluntarily without any duress and it is vouched as correct by the candidate. The record of age is important because Regulation 23 of the Pensions Regulations provides that any period of service while an officer is under the age of 18 years shall not be taken into account as pensionable service.

It has been noted that there has been a growing tendency on the part of officers to alter their dates of birth when they realize that they are approaching retirement age so that they can stay on longer in the service. They do this by obtaining Birth Certificates from the Registrar of Births and Deaths. In order to curb this undesirable tendency, it has been decided that with effect from the date of this Circular, the applications for late registration of births from civil servants shall be routed through their Permanent Secretaries/ Heads of Departments who will endorse each application to the effect that the date of birth indicated therein tallies with the officer’s declared age on first appointment as reflected in official personal records. The Registrar of Births and Deaths will not issue a Birth Certificate to a civil servant other than through this process. Any Birth Certificate obtained by an officer in future without complying with the new requirement will not be honoured for purpose of determination of age on retirement.

With regard to Birth Certificates issued before the date of this Circular, it is pointed out that where cheating is strongly suspected, the officer concerned may be retired compulsorily by application of the provisions of section 8 of the *Pensions Act* (Cap.189).

Permanent Secretaries / Heads of Department are requested to bring the provisions of this circular to the attention of all officers and to ensure that the provisions of Regulation G 44 of the Code of Regulations in regard to retirement on attainment of the age of 55 years are strictly observed.

13. The retirement age at 55 years was subsequently amended to 60 years and this has applied as a best practice over the years. It should however, not be applied erratically and without order where there remain employees whose date of birth or month is not stated. The effective date of 1<sup>st</sup> July of each year has since served well.
14. In this case, the appellant’s National Identity Card gave the year of birth only at 1959 and hence his date of attaining 60 years ought to have been 1<sup>st</sup> July 2019 and not earlier. Had this been well addressed he should have been allowed to serve his employment until such date.



15. The early retirement without the appellant being taken through the due process was unfair. He was however issued with notice, though prematurely and paid for time worked. The lapse from February to 1<sup>st</sup> July 2019 denied the appellant a fair chance
16. to earn a living and this was an unfair labour practices against him. for such loss, compensation for 3 months' gross wage is hereby found appropriate.
17. The appellant was last earning Ksh. 33,979.80 per month and total compensation is awarded at Ksh. 101,939.40.
18. On the claims for notice pay, this was issued before the appellant was retired and the unfair part is addressed.
19. Leave travelling allowance, unexpired term contract for 4 months and severance pay were all properly analysed by the learned trial magistrate and the conclusions made cannot be faulted.
20. Accordingly, the appeal partially succeeds with the award of compensation at Ksh. 101,939.40 for unfair early retirement. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 1<sup>ST</sup> DAY OF AUGUST 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

