



**Lemelita v Tourism Promotion Services (K) Ltd (Cause 515 of 2017)  
[2023] KEELRC 2174 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2174 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 515 OF 2017  
SC RUTTO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**DICKSON LEMELITA ..... CLAIMANT**

**AND**

**TOURISM PROMOTION SERVICES (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. Through a Memorandum of Claim filed on 16<sup>th</sup> March, 2017, the Claimant avers that he was employed by the Respondent in the year 2005 as a guide. According to the Claimant, he worked for the Respondent with loyalty and diligence. It is the Claimant's case that he was retired by the Respondent on medical grounds after he was involved in an accident and failed to fully recover. He contends that the Respondent paid his terminal benefits but failed to pay him compensation for injuries sustained during his accident as well as his acting allowances. On account of the foregoing, the Claimant seeks against the Respondent the following reliefs:
  - i. Compensation for industrial injury as provided by the *Work Injury Benefits Act*, 2007;
  - ii. Compensation under clause 9 of the Collective Bargaining Agreement;
  - iii. Compensation under clause 14 of the Collective Bargaining Agreement;
  - iv. Compensation under clause 27 of the Collective Bargaining Agreement;
  - v. Acting allowance as provided for under clause 17 of the Collective Bargaining Agreement;
  - vi. Transport expenses incurred during hospital visits -Kshs 10,000.00.
  - vii. Costs of the cause;
  - viii. Interests on (i), (ii), (iii), (iv), (v), (vi) and (vii) above;



- ix. Any other relief as the Court may deem fit n adjust.
2. The Respondent challenged the Claim through a Response filed on 23<sup>rd</sup> May, 2017, in which it avers that the Claimant was not on duty at the time of the alleged accident and that it catered for all his medical bills as per its Policy. However, it disputes any liability. The Respondent further maintains that the Claimant is not entitled to compensation for injuries sustained in the alleged accident or for acting allowance. Consequently, the Respondent has asked the Court to dismiss the Claim with costs.
3. The matter proceeded for hearing on 2<sup>nd</sup> May, 2023, during which both sides called oral evidence.
4. It is worth noting that on 17<sup>th</sup> November, 2021, the Court directed that it will only confine itself to the matters relating to the Claimant's termination from employment and that the other issues related to work injury were to be channeled to the appropriate body being the Director of Occupational Safety and Health in accordance with the provisions of the [\*Work Injury Benefits Act\*, 2007](#).

### **Claimant's case**

5. The Claimant testified in support of his case and at the outset, he asked the Court to adopt his witness statement, Memorandum of Claim, Verifying Affidavit and bundle of documents to constitute his evidence in chief.
6. It was the Claimant's testimony that his duties included transporting guests and facilitating their tours. He also occasionally stood in for the supervisor of the nature department when he was unavailable.
7. He testified that on or about 11<sup>th</sup> August, 2007, he was involved in an accident while on duty at Mara Serena Safari Lodge. He was treated at the local hospital and later transferred to Aga Khan Hospital in Nairobi where he continued to receive treatment and was eventually discharged. Despite his employer being aware of the accident, he was not compensated for the same. He was later transferred to Kilaguni Serena Safari Lodge.
8. On 12<sup>th</sup> December, 2014 while on his way back to the station, he was involved in a road accident at Emali along the Nairobi - Mombasa Highway. He was taken to Voi General Hospital by well-wishers for emergency treatment. While there, he informed his supervisor of the same and requested that a vehicle be dispatched to transport him to the hospital that he had been referred to in Mtito Andei for further treatment. The same wasn't provided and he had to facilitate his own transport.
9. The Claimant further stated that he was operated on and after being discharged, he continued to attend clinic and had numerous physiotherapy sessions for his injured left hand ring finger and as a result, took a lot of time off from work. Since his injury did not fully recover, he was informed that he was to be retired on medical grounds.
10. The Claimant further told Court that the Respondent's Human Resource Manager just gave him the letter of termination. That there was no procedure prior to his termination.
11. He further stated that when he was transferred to Kilaguni Serena Lodge, he would perform the duties of a naturalist, which was a grade higher to his, but he was not compensated accordingly as per the terms of the relevant Collective Bargaining Agreement.

### **Respondent's case**

12. The Respondent called oral evidence through Mr. Anthony Kiteng'e and Ms. Catherine Waruhiu who testified as RW1 and RW2 respectively. Mr. Kiteng'e was the first to go. He identified himself as an



employee of the Respondent serving in the capacity of a Resident Naturalist. For starters, he adopted his witness statement to constitute his evidence in chief.

13. It was RW1's evidence that the Claimant worked under his supervision. That on or about 12<sup>th</sup> December, 2014, the Claimant was supposed to report back to work and resume duty the next day. He had on that day sent Mr. Joseph Munyao, a driver, on official duty to pick and drop staff since it was shopping day. The Claimant was on that list of staff to be picked up. At around 5:30 pm, he received a call from Mr. Joseph Munyao who informed him that the Claimant had not arrived at Mtito Andei. He later called him at around 5:45 pm and informed him that the Claimant had called to inform him that he would find his own way to the Lodge. He then instructed Mr. Joseph Munyao to proceed to the Lodge with the rest of the staff members as time was running out as there were park rules with respect to entry at the gate.
14. It was RW1's evidence that as the Claimant's supervisor, he expected him to report to duty at 8:00 am on 13<sup>th</sup> December, 2014. He however did not report to work that morning. He later received a call from the acting Lodge nurse, Dennis Kioko, who informed him that the Claimant had been involved in an accident at Mtito Andei on the previous night and therefore did not report to his workstation. On further enquiry, RW1 learnt that the Claimant had been rushed to Moi Hospital Voi the night before and that arrangements were underway to have him transferred to Nairobi for further treatment. The Claimant was on sick off thereafter for almost two years.
15. Ms. Catherine Waruhiu, who testified as RW2 identified herself as the Respondent's Human Resource Director. Similarly, she started by adopting her witness statement to constitute her evidence in chief. She further produced the bundle of documents filed on behalf of the Respondent as exhibits before Court.
16. It was her evidence that on 10<sup>th</sup> December, 2014, the Claimant took three off days from his place of work to attend a funeral and was scheduled to report back to work on Friday, 12<sup>th</sup> December 2014. This being a staff transport day for Kilaguni Serena, the Claimant's name was included in the list of employees expected back to the Lodge on staff transport on that day.
17. It was her evidence that as per the Respondent Company policy, the driver is expected to ensure all staff expected on the staff bus are on board before leaving Mtito Andei for the Lodge. On noticing that the Claimant was not on board, the driver called his mobile number but did not get any response and so he called his Supervisor at the Lodge to enquire whether it was in order to leave without the Claimant and he was instructed to try and call the Claimant again, which he did but he informed the Driver that he will find his own way back to the Lodge and the Driver therefore left with the rest of the staff without the Claimant.
18. On the evening of the same day at 9:30 pm, the Lodge Manager received a call from the Claimant informing him that he had been involved in an accident within the Park, near the Senior Warden's residence, whose nature was not made clear. This call was followed by the Senior Warden's call informing the Manager of the said accident and the Manager enquired about the status of the Claimant and was informed that he had sustained injuries on his fingers. The Manager requested the Senior Warden to assist in rushing the Claimant to Hospital which the Senior Warden agreed to do.
19. RW2 further stated that on 13<sup>th</sup> December 2014, the Lodge Manager organized for the Lodge Nurse and a driver to go for the Claimant from Voi Hospital where he had been taken. He was brought to the staff clinic for further dressing and then transferred to Nairobi by the Lodge driver for further treatment. He was then admitted at Avenue Hospital where he underwent surgery and treatment for the injuries.



20. According to RW2, as the injury was not in the course of duty or in the Company premises, Management did not make any Occupational Accident report or complete ML/DOSH/FORM 1 on the same.
21. The Claimant was prescribed several follow-up physiotherapy sessions but did not fully recover and on 2<sup>nd</sup> September 2015, he was referred by the Lodge Nurse to the Company Doctor who in turn referred him to a different Orthopaedic Surgeon for review. The Claimant was hospitalised at Menelik Hospital and a repeat operation carried out on 4<sup>th</sup> September, 2015. He was again required to attend further post-operation rehabilitation and was put on sick leave.
22. It was RW2's evidence that the Claimant was therefore away on sick leave for a prolonged period of time beginning 2<sup>nd</sup> September 2015. RW2 further stated that the Collective Bargaining Agreement provide for 75 days of sick leave on full pay and the said days expired on 15<sup>th</sup> November, 2015 but the Claimant continued to be on sick leave.
23. The Claimant began his sick leave on half pay on 16<sup>th</sup> November, 2015 which as per the terms of the Collective Bargaining Agreement, would not exceed 90 days. The 90 days provision of sick leave on half pay expired on 13<sup>th</sup> February, 2016. The Respondent wrote to inform the Claimant that should he continue to be on further sick leave, he would be on sick leave without pay until 13<sup>th</sup> March, 2016 when the 30 days without pay would expire. The Claimant was however granted further sick leave after the said date.
24. Management sought medical direction on the ability of the Claimant to continue with his work as a Driver Guide. They received a medical report from the Claimant's attending doctor who informed the Respondent Company that despite treatment and numerous rehabilitation sessions undertaken throughout the post-operative period, the Claimant's left ring finger had remained stiff at the proximal interphalangeal joint giving him a poor grip and thus making it difficult for him to drive. The doctor's recommendation was that the Claimant be retired on medical grounds. The recommendation was relayed to the Claimant.
25. It was RW2's testimony that the Respondent's management held discussions with the Claimant on 6<sup>th</sup> June, 2016 to confirm his understanding of the recommendations and the provisions under the terms and conditions of employment. Pursuant to Clause 14 of the Collective Bargaining Agreement, the Claimant was retired on medical grounds effective 7<sup>th</sup> June, 2016.
26. RW2 further stated that the Claimant's dues were calculated and on 17<sup>th</sup> June 2016, the Claimant through his Advocate contested the same. The Respondent responded and also held a meeting with the Claimant's Advocate to explain the matter. Thereafter, the Claimant through his Advocate requested that the Respondent pays the final dues and pension benefits.
27. On 10<sup>th</sup> October, 2016, the Respondent made out a cheque with respect to the final settlement of the Claimant's final dues and Company retirement gift, and on 31<sup>st</sup> November 2016, the Staff Pension Scheme made out a cheque in respect to settlement of his Pension proceeds.
28. To the best of RW2's knowledge, the Claimant has received all monies due to him from the Respondent and as such has no claim against it.
29. With regards to the claim of unpaid acting allowance, RW2 made reference to the Collective Bargaining Agreement and contended that the Claimant was appointed to act as an in charge of the Nature department from 6<sup>th</sup> to 16<sup>th</sup> April, 2014, a period of 10 days both dates included and therefore did not qualify for an acting allowance.



## Submissions

30. It was submitted on behalf of the Claimant that he was unfairly terminated as he not given a chance to defend himself prior to the decision to terminate his employment was made. He contended that he was merely called to the Human Resource Manager's office to receive a letter stating that he had ben retired on medical grounds. It was further submitted that the Respondent did not make any attempt to provide the Claimant with reasonable accommodation or flexible working hours. That it was therefore unreasonable and arbitrary for the Respondent to decide that the Claimant was no longer productive because of his inability to work on his duty as a tour guide. In support of the Claimant's submissions, the Court was invited to consider the determination in Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantation & Another 2015] eKLR.
31. It was the Claimant's further submission that the Respondent ought to have properly investigated the extent of the incapacity and considered all the possible alternatives short of dismissal including other lighter duties seeing that this was his main source of income.
32. On the part of the Respondent, it was submitted that the Claimant was not terminated but was retired on medical grounds. That this was for a justifiable reason as he had suffered an injury, which led to his prolonged absence from work. It was the Respondent's further submission that it was not in a position to engage the Claimant in alternative duties as he was not cleared to report to work. It was the Respondent's contention that the argument for reasonable accommodation in this case does not lie. The Respondent further argued that the Claimant did not plead reasonable accommodation and the same was not brought up during the hearing. In support of this argument, the Respondent sought to rely on the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR.
33. It was the Respondent's further submission that it was supportive towards the Claimant's recovery journey and offered him necessary support including facilitating transportation to Nairobi for further treatment. The Respondent further argued that the Claimant had no issue with retirement on medical grounds and did not plead that the same was unfair or unprocedural.
34. The Respondent further submitted that its action of retiring the Claimant on medical grounds was not an act of discrimination and that the same had neither been specifically pleaded nor particularized.

## Analysis and Determination

35. Having considered the Claim before Court, the evidence and the rival submissions, to my mind, the main issue that stands out for determination is whether the Claimant is entitled to the reliefs sought. However, before I delve into the said issue, I find it imperative to make a mention of the issue regarding the fairness of the Claimant's retirement on medical grounds. The reason for this, is that during the hearing, the Claimant told the Court that his retirement was unprocedural and that he was merely called by the Human Resource Manager and given his letter of retirement. The Claimant further submitted on the issue extensively and even raised an issue with regards to discrimination and reasonable accommodation by the Respondent.
36. Notably, this issue was not pleaded by the Claimant and the same only came up during the hearing and at the submissions stage. As a matter of fact, looking at the body of the Claim, it is apparent that the Claimant is not challenging his retirement on medical grounds. His contention appears to be with regards to the compensation paid to him following his accident.
37. Indeed, the question regarding the procedure applied in effecting the Claimant's retirement only surfaced during the hearing and at the submissions stage. Needless to say, this was outside the Claim.



It thus follows that as the issue was not pleaded, the Respondent did not also address the issue in its Response. Indeed, the Claimant did not seek compensation for unfair termination. It is now trite law in law that parties are bound by their pleadings.

38. This position was reaffirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR in which it cited with approval the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002, wherein it was held that parties are bound by their pleadings and any evidence led by any party that does not support the averments in the pleadings goes to no issue and must be disregarded. The Court went on to hold that as parties are bound by their pleadings, this in turn limits the issues upon which a trial court may pronounce.
39. Additionally, the Court of Appeal in the case of Mukatha v Ouko (Administrator of the Estate of Jason Atinda Ouko- Deceased) & 4 others (Civil Appeal E211 of 2020) [2023] KECA 962 (KLR) (28 July 2023) (Judgment) determined as follows:

“The appellant did not plead the alleged fraud against the deceased or his personal representatives in the plaint and the amended plaint. The appellant also did not lay any claim over the suit property on the basis of adverse possession. What is evident from the appellant’s pleadings was that his suit was at all times based on specific performance. He therefore cannot be heard to argue that the trial court erred by not making a finding on these two issues, or that the applicable provisions of the Limitation of Actions Act was section 26 and not section 4.”
40. I wholly subscribe to the position taken by the Court of Appeal in the above decisions and apply the same to the case herein.
41. If at all, the Claimant intended to challenge the Respondent’s termination of his employment through retirement on medical grounds, then nothing stopped him from expressly pleading the same in his Memorandum of Claim and seeking compensation accordingly. Raising the issue at the hearing and submissions stage does not help his case at all.
42. I further align myself with the determination of the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, thus: -

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”  
Underlined for emphasis.”
43. In this case, as I have found that the fairness of the Claimant’s retirement clearly transcends the Claim, it is therefore not open for consideration at this stage.
44. In as much as the issue is valid, the hands of the court are tied and I am only constrained to consider the issues raised within the Memorandum of Claim.
45. That said, I now turn to consider the issue of the reliefs sought by the Claimant.



46. The Claimant has sought compensation under Clauses 9, 14, 27 and 17 of the relevant Collective Bargaining Agreement. It is noteworthy that the Claimant has not particularized these Claims hence the nature of the reliefs he is seeking against the Respondent in this regard is not clear. Indeed, the Claimant did not lay a basis for claiming the said reliefs and adduce evidence to that effect. How is the Court to decipher the same with no specified amounts and particulars to accompany the same? The Court will not grope in the dark.
47. With regards to the claim for transport expenses, the Claimant has sought the sum of Kshs10,000.00 against the Respondent. Be that as it may, the Claimant did not support the said claim with evidence. Besides, being a specific claim in nature, the onus was on the Claimant to prove the same strictly. Having failed to do so, the claim in that respect collapses.
48. In light of the foregoing, I cannot help but find that the Claimant has failed to prove his case to the requisite standard hence the same is dismissed in its entirety, with an order that each party bears its own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of September, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**For the Claimant Ms. Kiprop**

**For the Respondent Ms. Gachinga**

**Court assistant Abdimalik Hussein**

**ORDER**

**In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**STELLA RUTTO**

**JUDGE**

7

