



**M’Mugwika v Roy Parcel Services Limited (Cause 2157 of 2016)  
[2023] KEELRC 2165 (KLR) (19 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2165 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2157 OF 2016  
NZIOKI WA MAKAU, J  
SEPTEMBER 19, 2023**

**BETWEEN**

**FRANCIS GITONGA M’MUGWIKI ..... CLAIMANT**

**AND**

**ROY PARCEL SERVICES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent for unlawfully retiring him from employment. He further prays for judgment against the Respondent for payment of his terminal dues, Certificate of Service and costs of the claim. It was the Claimant’s averment that the Respondent employed him from 6<sup>th</sup> July 1999 as a Heavy Commercial Driver at a monthly salary of Kshs. 15,181.75. The Claimant averred that he worked effortlessly and diligently in the said position until he was forcefully and unfairly retired from service without retirement benefits. He averred that a Memo dated 17<sup>th</sup> October 2013 had purported to retire him from service as from 1<sup>st</sup> November 2013 and that the Respondent then issued him with the retirement letter on 11<sup>th</sup> November 2013 with effect from 1<sup>st</sup> November 2013. According to the Claimant, his retirement by the Respondent was unfair and unreasonable because he had received credible recognition for efforts he had made in his job prior to the forced early retirement. In addition, he was neither informed what had prompted his early retirement nor was he given any notice prior to the forced early retirement and that he was only 40 years at the time of the said retirement.
2. It was the Claimant’s further contention that after his retirement, the Respondent unjustifiably withheld and or delayed his 11 days’ salary for November 2013 and subjected him to inconvenience and suffering amounting to discrimination. That the Respondent also completely failed to respond to his demands to be paid his retirement benefits and salary. The Claimant further averred that that before retiring him, the Respondent had underpaid him for 17 months from May 2012 to October 2013 contrary to Labour Laws and prevailing Wages Regulation Order. The terminal dues he claims



- are one month's salary in lieu of notice, 11 days wages worked for November 2013, retirement/service pay for 14 years, and underpayment of basic minimum wages as calculated under paragraph 10 of his Memorandum of Claim.
3. In his Witness Statement, the Claimant asserted that he was paid a meagre salary throughout his salary and that his wage which were Kshs. 15,181.75 was below the minimum wage and thus an underpayment. That he raised his concern for salary increment on many occasions but the Respondent's management refused to consider his request.
  4. The Respondent filed a Response to Memorandum of Claim averring that the suit herein was time-barred by section 90 of the *Employment Act* having been instituted on 2<sup>nd</sup> December 2016, 3 years and 2 months after the date of the Claimant's alleged dismissal. It further averred that without prejudice to the foregoing, it employed the Claimant as a Driver of small or light vehicles to make deliveries for the company and not for Heavy Vehicles as alleged. Furthermore, the Claimant was paid above the Monthly Minimum Wages Guidelines which was Kshs. 11,580/- in 2011 and Kshs. 13,201/- in 2013 and that in addition to the basic salary, housing allowance was added as per the contracts over the years. It was the Respondent's averment that it was forced to retire the Claimant at 70 years after its management was informed that because of his advanced age, his sight and lack of attentiveness on the road had also advanced. That resultantly, the Claimant had become a danger to other road users and it could no longer retain him. It further averred that it settled all the Claimant's dues timeously and prayed that his claim be dismissed with costs.
  5. In the Amended Witness Statement of Tehseen Omar dated 24<sup>th</sup> January 2022, Mr. Omar stated that the Respondent caused the Claimant to retire on 18<sup>th</sup> October 2013 vide a Notice dated 17<sup>th</sup> October 2013. That upon the Claimant being served the said Notice while at the company's premises, he left the premises without permission from his Operation Officer and never returned. That all efforts to trace the Claimant including by the Human Resource Department became futile.
  6. Mr. Omar recounted that a year prior to the Claimant's retirement, they talked to the Claimant about making arrangements for his voluntary retirement but the Claimant vehemently refused to accede to the proposal. That the management then agreed to relieve the Claimant from long-distance deliveries to short and less dangerous tasks in an effort to retain him despite public interest and best practice to protect his and other road users' interest. That however, the management still noted a decline in the Claimant's performance and his persistent absenteeism that would force the Operation Manager to assign his vehicles to other drivers. He asserted that the Claimant's old age had evidently impaired the proper execution of his duties.

## Evidence

7. The Claimant testified that he drove all Classes of Commercial Vehicles, that is, Class A and lorries 6 to 10 wheels and that there were drivers who were paid more than him. He stated that his employment was terminated on the same day he received that Memo and asserted that he had no health issues, no accidents and no issues with his sight. According to him, no time was given as reporting and exit time and that he left other drivers when he left the Respondent's premises, some of who were older than him at the time. He also noted that he was a member of the company's SACCO to which they paid Kshs. 1,000/- deducted from salary each month and that he was however never refunded the sum. The Claimant further testified that no warning was given to him in regard to the retirement and that he went back after being issued with the letter of 11<sup>th</sup> November 2013.
8. The Claimant confirmed under cross-examination that he was born in 1943, was 56 years at the time of engagement and that he left the Respondent's company at 70 years. He asserted that compared to



other drivers, he was treated differently and was discriminated against but acknowledged that he did not avail any documents to show that other drivers were overpaid.

9. The Respondent's witness, Tehseen Omar (RW1), stated under cross-examination that the Claimant was employed at the age of 57 years after the management waived the company policy on the retirement age of 55 years. He acknowledged that the Memo issued to the Claimant was less than one month but asserted that it was still notice. He stated that the Claimant was paid all his salary and dues which he did not dispute and that he only disputed his retirement package. RW1 further testified that they had produced several warning letters issued to the Claimant including one of 23<sup>rd</sup> October 2013 in regards o the Claimant absconding work. RW1 clarified in re-examination that the Claimant was not to work indefinitely and that his engagement was based on his performance that the Respondent would be review. That the Claimant was aware he was hired beyond the company's set retirement age.

### **Claimant's Submissions**

10. The Claimant submitted that the issues for determination are whether his dismissal from service was fair and/or lawful; and whether he is entitled to the reliefs sought. As regards the fairness of his dismissal, the Claimant submitted that under section 45 of the Employment Act, what constitutes unfair dismissal of employment is twofold. First, the Respondent must prove that there was fair administrative action process and fair hearing accorded to the Claimant and secondly, that the reasons for dismissal were justified. Further under section 45(2) of the Act, it must be shown that the reason for termination was valid and fair and that the termination of employment was in accordance with fair procedure.
11. It was the Claimant's submission that in his case, he was not subjected to the company retirement policy and that having been employed at the age of 57 years past the Respondent's retirement age, his employment was permanent. That the Respondent's reason to retire him was thus unfair as his employment was not a subject of age but performance. He submitted that he had also shown how due process and procedure was not followed in his case as he was made to leave on the same day that he was given the document terminating his services. That he was therefore entitled to compensation for unlawful termination as under section 49(1)(c) of the Employment Act at a maximum of 12 months' salary. The Claimant further submitted that he produced before this Court, the License from the Ministry of Transport that he used to apply for employment at the Respondent company and which allowed him to drive heavy commercial vehicles. That Legal Notice LNs-197 Regulation of Wages (General) (Amendment) Order, 2013 provides that a Cashier, Driver (heavy commercial vehicle), Salesman-Driver be paid Kshs. 22,070.95 and was to be effective from 1<sup>st</sup> May 2013. That he was therefore entitled to be compensated for the underpayment from 1<sup>st</sup> May to October 2013. That Legal Notice 71 Regulation of Wages (General) (Amendment) Order, 2012 provides that a Cashier, Driver (heavy commercial vehicle), Salesman-Driver be paid Kshs. 19,360.50 which was to be effective from 1<sup>st</sup> May 2013. Similarly, he should be compensated for such underpayment from 1<sup>st</sup> May 2012 to April 2013.
12. It was the Claimant's further submission that the Respondent having failed to produce any proof of payment of days worked in November 2013, the Court should allow the prayer as prayed. That he was also entitled to the prayer for retirement/service pay as he worked for the Respondent for 14 years and to a Certificate of Service. He asserted that he had produced payslips showing he was being paid on a monthly basis and as he had testified that he was not served with the statutory one (1) month notice, he prayed the Court allows the prayer for him to be paid one-month notice. The Claimant relied on the case of Jane Mokeira Mogoi v Nyamira County Public Service Board [2017] eKLR in which the claimant put up a case of absence of substantive and procedural fairness in her termination after she



was retired in disregard of the provisions of the subsisting Collective Bargaining Agreement (CBA) and without notice, and the Court awarded her 10 months' salary on account that proper procedure and notice was not duly followed.

### Respondent's Submissions

13. The Respondent submitted that under section 43 of the *Employment Act*, the employer has the burden of proving the reason for termination in any legal proceedings brought to challenge the legality of the termination. It was on this basis that it referred the Court to appreciate the case of James Kabengi Mugo v Syngenta East Africa Limited [2012] eKLR in which the Court stated that employers and employees in the private sector are free to fix the retirement age of the employee and that the popular retirement age, mainly due to the influences of public sector employment, and a succession of CBAs in both the private and public sector, is 60 years. It also cited the case of Charles Mwaniki Muchiri v Coastal Kenya Enterprises Limited [2016] eKLR in which Ongaya J. stated that the court had taken judicial notice that the prevailing general mandatory retirement age in Kenya is 60 years of age. It was the Respondent's submission that the fact that the Claimant's contract did not set out the retirement age does not mean that his termination was unlawful and or unfair. That its decision to retire the Claimant was fully in public interest, in its interest as a Company to protect its brand and business and best practice for the employer to protect his interest and that of other road users. Furthermore, there is no mandatory retirement age specified in statute within the private sector unlike the public sector and that more often than not, the retirement age can be agreed upon in the course of the employment relationship. It relied on the case of Steel Makers Limited v Joshua Nzuki [2016] eKLR in which the Court of Appeal opined as follows:

“But what happens where the termination on account of retirement is not provided for in the contract or under the law? Indeed, it is clear that our statutes do not have a set mandatory retirement age for persons working in the private sector. It is also common ground that the appointment letter dated 20<sup>th</sup> August 1986, issued to the respondent, made no mention of the retirement age. Then in that instance we take the view that the issue falls purely within the realm of the law of contract. As with any other contract, the courts will look at the conduct of the parties to ascertain their true intention on the unwritten aspects.” [Emphasis by Respondent]

14. It further submitted that it was not true that the Claimant deserved a notice with a lengthier period than that which he was given. That the letter retiring the Claimant was properly issued in compliance with section 43 of the *Employment Act* as the reason for the termination was indicated as his having attained mandatory age. That the Claimant cannot thus claim notice pay as notice was properly issued. As regards the issue of underpayment, the Respondent submitted that the Claimant was employed as a light duty commercial driver and not a heavy commercial driver as he so wanted the Court to believe. That it produced the logbook for Motor Vehicle Registration Number KAT 627Q, which vehicle the Claimant used to drive, and the same indicated that the vehicle was a five (5) tonne truck. That under section 2 of the *Traffic Act*, Cap 403 Laws of Kenya, a 'heavy commercial vehicle' is defined as a commercial vehicle whose tare weight exceeds six thousand seven hundred and twenty pounds. That having found that the Claimant drove, for the Respondent, a commercial vehicle which as per the *Traffic Act* is like a light commercial vehicle, he was entitled to be paid at that time, the prevailing Order of 2011. The Respondent further submitted that the Claimant had failed to discharge the burden of proof on a balance of probability meaning that the prayer on underpayment must fail. The Respondent cites sections 107, 108 and 109 of the *Evidence Act* Cap 80.



15. The Respondent submitted that this Honourable Court should note that employment contracts, especially in the private sector, are not a lifetime commitment by an employer to the employee as was reiterated in the case of *East African Airways v Knight* [1975] E.A. 165. It submitted that the Claimant's termination by retirement was justified, lawful and fair and that it had provided valid and cogent reasons for the termination. In sum, that the Claimant was not entitled to any of the reliefs he had sought save for the Certificate of Service that is readily available at its offices awaiting collection.,
16. The Claimant was dishonest in his claim. He had asserted that he was only 40 years old at the time his contract was brought to an end by the Respondent. During oral testimony, the Claimant confirmed in cross-examination that he was born in 1943. He therefore was 56 years at the time of engagement and it was proved that he left the Respondent's employ at 70 years of age. He was visibly no spring chicken and had aged sufficiently for the Respondent to feel the Claimant had become a danger to other road users and it could no longer retain him. The Respondent only erred in giving the Claimant a short notice before discharging him from service. Despite the fact that the Claimant was aged and had reached a ripe old age which had begun to interfere with his safe operation of heavy machinery (read high tonnage lorries) the Claimant was entitled to decorum and a modicum of respect as he exited the Respondent's service. Having engaged him at an advanced age and having retained him to the grand age of 70, the Respondent was duty bound to ensure the end of contract was smooth as the Claimant was retiring to enjoy his sunset years at a place of his choosing. Whereas there is no set retirement age in the private sector, many companies have adopted the Government retirement age. When the Claimant joined the Respondent there was no indication that his services would be terminated at the time they were so terminated. The Respondent insists it paid the Claimant's terminal dues but produced no evidence of this. Regarding underpayment, there was no evidence that the Claimant was underpaid as the sum he was paid was in excess of the statutory minimum wage for Nairobi and Kisumu. He received 15,181.75 which was more than the 14,563/- for a medium sized vehicle as the one the Claimant drove. He drove a 5 tonne vehicle and not an 18-wheeler as he had portended in his claims before court.
17. The Claimant was a member of a SACCO and for this he had a sum of Kshs. 1,000/- deducted each month as saving. He did not disclose to the Court that he had a loan for which deductions were also made monthly and as at April 2013 he owed Kshs. 52,100/-. He has not enumerated whether he pursued his SACCO dues from the SACCO and also does not indicate the indebtedness if any, after the set-off against his shares/contributions. This aspect of the claim must fail for not meeting the required proof threshold.
18. The Claimant thus only succeeds in recovering the terminal dues which are due to him, the certificate of service as well as the compensation for unfair termination which I set at 2 months as the Claimant has received an award of service pay which he would have obtained from the Respondent as part of his retirement and the fact that he was dishonest in his pleadings to Court with the intention of obtaining an unfair advantage. In the final analysis I enter judgment for the Claimant against the Respondent for:-
  - a. Salary for 11 days worked in November 2013 – Kshs. 5,566.60
  - b. Service pay for 14 years at 15 days for each completed year of service – Kshs. 106,272.25
  - c. 2 month's salary as compensation – Kshs. 30,363.50
  - d. Costs of the suit.
  - e. Certificate of service.
  - f. Interest on the sums in (a), (b) and (c) above at court rates from the date of judgment till payment in full.



19. It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of September 2023**

**Nzioki wa Makau**

**JUDGE**

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