



**Mutia v Peter Mulei & Sons Co Ltd (Cause E516 of 2021)  
[2023] KEELRC 2670 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2670 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E516 OF 2021  
JK GAKERI, J  
OCTOBER 30, 2023**

**BETWEEN**

**WILLIAM KITHEKA MUTIA ..... CLAIMANT**

**AND**

**PETER MULEI & SONS CO LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 28<sup>th</sup> June, 2021 alleging forced retirement and unfair termination of employment.
2. It is the Claimant's case that he was employed by the Respondent vide a written contract dated 1<sup>st</sup> March, 2017 at a monthly salary of Kshs.150,000/= on a six (6) months contract which parties had agreed to renegotiate based on his performance and by an email dated 31<sup>st</sup> August, 2017, the Respondent confirmed that his performance was exemplary and retained him on permanent and pensionable terms and his salary was reviewed upwards to Kshs.160,000/=.
3. The Claimant avers that his official designation was Supermarket Warehouse Manager where he remained for 2<sup>1</sup>/<sub>2</sub> years and was then transferred to Distribution Warehouse Manager and served the Respondent diligently and would report to the work place at 7 am and leave at 7 pm daily but earlier when he was the Warehouse Manager and additionally worked on public holidays.
4. The Claimant avers that the selfless service to the Respondent notwithstanding, the Respondent purported to retire him effective 8<sup>th</sup> April, 2021 for no reason as he had not attained the mandatory retirement age. He avers that the contract of employment made no mention of retirement age and neither the Human Resource Department nor the Chief Executive Officer granted him audience on the issue.



5. It is the Claimant's case that the Respondent's letter dated 8<sup>th</sup> March, 2021 was a dismissal or termination of employment letter disguised as a retirement as he was not accorded the safeguards under the Employment Act, 2007.
6. That the Respondent's unilateral decision was malicious and motivated by extraneous factors other than retirement.
7. The Claimant prays for;
  - i. A declaration that his termination, dismissal and/or forced retirement was unfair.
  - ii. 12 months compensation Kshs.1,920,000.00
  - iii. One month's salary in lieu of notice Kshs.160,000.00
  - iv. Unpaid salary Kshs.42,667.00
  - v. Unpaid leave Kshs.74,667.00
  - vi. Unpaid overtime Kshs.4,994,496.00
  - vii. Unpaid public holidays Kshs.341,334.00
  - viii. Service gratuity Kshs.320,000.00
  - ix. Costs of the suit.
  - x. Interest on sum awarded.
  - xi. Any further relief the court may deem fit to grant in the interest of justice.

#### **Respondent's case**

8. In its response filed on 9<sup>th</sup> August, 2021, the Respondent admits that the Claimant was its employee under a contract dated 1<sup>st</sup> March, 2017 which incorporated the Respondent's Human Resource Policy.
9. That the Claimant was to retire at the age of 60 years and any extension of services was by mutual agreement and no benefits accrued after retirement.
10. The Respondent avers that the Claimant was aware of the terms contained in the letter of employment and the Human Resource Policy.
11. It is the Respondent's case that the claims for unpaid salary and leave were unsustainable as they were part of the clearance package.
12. That the clock in/clock out print out do not avail the Claimant overtime pay.
13. The Respondent avers that as it was remitting NSSF contributions as the Claimant admits and service gratuity was unavailable.
14. That the retirement notice was issued out of courtesy as it was not part of the contract.
15. The Respondent denies having dismissed the Claimant.

#### **Claimant's evidence**

16. The Claimant testified that he was not given a copy of the Respondent's Human Resource Policy and the one on record was signed by a Ms. Muasya who was not an employee of the Respondent at the time.



17. That he had not been to the office and did not sign anything.
18. That the time sheets filed by the Respondent were untrue as they contained the Claimant's name only.
19. On cross-examination, the Claimant confirmed that he was not given a confirmation letter after the 6 months period and was given a one (1) month notice to clear the office and was paid for the month.
20. It was his testimony that he was not in control of the clocking system and had no record and was not aware that the system could select one person's data.
21. That he had no documentary evidence of having been promised overtime pay.
22. The witness confirmed that he used to receive payslips on email and were blank. That he received a copy from the auditor and filed it but was unsure of this.
23. He admitted that he did not sign the clearance certificate and NSSF contributions were being remitted.
24. That the letter of retirement provided no reason for the Respondent's action.
25. On re-examination, the Claimant testified that he continued working after the 6 months and his salary was increased.
26. That the Clocking System could not have his name only. According to the witness, it had to have the names of other employees.
27. That he had not attained retirement age in 2021 having been born on 24<sup>th</sup> December, 1962 and was thus 58 years.
28. The Respondent did not adduce oral testimony. It opted to proceed by way of documents and the Claimant's counsel had no objection to the proposal.

#### **Claimant's submissions**

29. Counsel did not isolate particular issues for determination but addressed the facts of the case urging that the Claimant was not compensated for the extra hours he put in and for working on public holidays.
30. Counsel submitted that since the Notice of Retirement dated 8<sup>th</sup> March, 2021 had no reason or explanation of the decision, it amounted to an unfair termination of employment as the Claimant was 58 years as evidenced by his Identity Card Number 5260772.
31. Counsel further submitted that before the notice was issued by the Respondent, the issue of retirement had not been discussed and the Claimant had not been notified of the retirement age under the Respondent's policy, if any.
32. Counsel relied on the decision in Frank N. Kamau V Tusker Mattresses Ltd (2018) eKLR and other cases to urge that forced retirement of an employee was an unfair labour practice and amounted to an unfair termination of employment.
33. The decision in Evans Katiezo Aligulah V Eldomat Wholesale and Supermarket Ltd (2016) eKLR was relied upon to urge that the Claimant was entitled to the reliefs sought.
34. By 22<sup>nd</sup> August, 2023 when the court retired to prepare this judgement, the Respondent had not filed submissions.



## Findings and determination

35. The issues that commend themselves for determination are;
- i. Whether the Notice of Retirement dated 8<sup>th</sup> March, 2021 amounted to an unfair termination of the Claimant's employment.
  - ii. Whether the Claimant is entitled to the reliefs sought.
36. Before delving into the issues isolated herein above, it is essential to restate the law on undefended suits or where the Respondent adduces no evidence.
37. The court is guided by the sentiments of Maureen Onyango J. in *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, where the learned judge stated as follows;
- “In the case of *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
38. Similarly, in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR, the learned Judge expressed himself as follows on the import of Section 47(5) of the *Employment Act*, 2007.
- “This burden does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
39. The foregoing sentiments are firmly grounded on the overarching principle of evidence that he who alleges is obligated to adduce evidence to establish the allegations encapsulated in the provisions of Sections 107, 108 and 109 of the *Evidence Act*.
40. In this case, there is no contest that the Claimant was an employee of the Respondent and remained an employee until the Notice of Retirement dated 8<sup>th</sup> March, 2021.
41. It is also common ground that the Respondent entered appearance, filed a response and list and bundle of documents, cross-examined the Claimant but did not avail a witness. It relied on the documents on record.
42. As to whether the ‘Notice of Retirement’ dated 8<sup>th</sup> March, 2021 constituted an unlawful termination of employment, the Claimant testified and counsel submitted that it was as the issue had not been incorporated in the written contract and was not subsequently discussed by the parties and agreed upon.
43. Equally, the Claimant testified that he was not given a copy of the Respondent's Human Resource Policy and the copy on record was signed by a Mr. Muasya who was not an employee of the Respondent then.



44. Although the Respondent did not controvert this evidence directly, the Notice of Retirement shows that the Human Resource Manager was one Priscah N. Muasya and the Claimant did not allege that the other Muasya was a different person.
45. Noteworthy, the Respondent adduced no evidence to show that it gave the Claimant a copy of the Human Resource Manual or directed him to the on-line site where he could access it.
46. Infact, the copy of the manual filed by the Respondent on 9<sup>th</sup> August, 2021 is neither dated nor authenticated by the Chief Executive Officer or any other person. It has no commencement date or board's approval and in the court's view lacks any probative value.
47. The court is in agreement with the Claimant's testimony that he served the Respondent diligently as exemplified by the email from the Chief Executive Officer, Mr. Kevin Mulei Ngumbi dated 31<sup>st</sup> August, 2017 at 3.51 pm in response to the Claimant's email dated 30<sup>th</sup> August, 2017 on the way forward as his contract of employment was due to expire the following day.
48. The Chief Executive Officer's positive email promised that he would revert to the Claimant as soon as the following day but there is no evidence that he did. What is not in dispute is that the Claimant continued serving the Respondent, his salary was enhanced and he was later transferred from the Supermarket Warehouse to the Distribution Warehouse effective 3<sup>rd</sup> June, 2019.
49. Both the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass muster, it must be shown that the employer had a valid and fair reason to do so and conducted the termination in accordance with fair procedure.
50. Put in alternative terms, the employer must demonstrate that it had a substantive justification to terminate the employment and conducted it in accordance with a fair procedure. (See Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and Naima Khamis v Oxford University Press (EA) Ltd (2017) eKLR on the foregoing requirements of a fair termination of employment.
51. As far as the reason for the abrupt retirement of the Claimant was concerned, the Notice of Retirement dated 8<sup>th</sup> March, 2021 stated as follows;
 

“ On behalf of Director, I would like to communicate that your retirement from your position as a Branch Manager will take effect on 8<sup>th</sup> April, 2021.

We appreciate the many years of service you have given Mulleys . . .

You were very dedicated and true to your work since your appointment in 2017. It has been 4 good years of service. Your contribution to Mulleys is beyond words. We thank you for all the extra hours of hard work you put in your job.

We wish you good health and a colourful future ahead in your well earned retirement.

Yours sincerely

For Mulleys Supermarkets Ltd”
52. Worthy of note, the Notice of Retirement is unclear as to the reason as it makes reference to neither the Claimant's age nor the alleged Human Resources Manual or any agreement entered into by the parties.
53. The letter lacks a valid foundation for the alleged retirement which is typically associated with a person's age, yet the Claimant's evidence reveal that he was born on 24<sup>th</sup> December, 1962 and had more than 1 year before celebrating the 60<sup>th</sup> birthday.



54. In the court's view, this was an unjustified forced retirement of the Claimant by the Respondent and transitioned to an unfair termination of employment.
55. The provisions of Sections 41, 43 and 45(2) of the *Employment Act*, 2007 are explicit on the need to demonstrate the reason or reasons for termination of employment and fair procedure.
56. Significantly, the absence of an operational human resource manual does not mean that the Claimant was employed on "permanent and pensionable terms" indefinitely.
57. There is an operative Government of Kenya retirement policy and the mandatory retirement age and those employed on "permanent terms" retire at the age of 60 years which was applicable to the instant suit.
58. Although the Claimant had not served the Respondent for a long period of time, he did so diligently and with loyalty and the sentiments of Nduma Nderi J. in *Benson N. Irungu V Total Kenya Ltd (Supra)* are still applicable as follows;

"Forced retirement of employees who have served an employer royally and diligently for long period is a conduct that needs to be discouraged by this court."
59. On procedural requirements, it is indisputable that the Respondent did not invoke the safeguards under the provisions of Section 41 of the *Employment Act*, 2007 and as these requirements are mandatory, as held in *Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR*, termination of the Claimant's employment was procedurally flawed.
60. From the foregoing, it is evident that the Respondent did not comply with the provisions of Sections 41, 43, 45 and 47(5) of the *Employment Act*, 2007 thereby rendering the purported retirement of the Claimant an unfair and unlawful termination of the Claimant's employment and the court so finds.
61. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

**i. Declaration**

62. Having found that the purported retirement of the Claimant was an unfair termination of employment, it is declared that the retirement/termination of the Claimant's employment was unfair and unlawful.

**ii. 12 months compensation**

63. In view of the foregoing finding, the Claimant is entitled to compensation for the unlawful and unfair termination of employment by dint of Section 49(1)(c) of the *Employment Act*, 2007.
64. The court has taken into consideration the fact that;
  - i. The Claimant served the Respondent for 4 years, 7 days which is a short time.
  - ii. The Claimant was a loyal and diligent employee.
  - iii. The Claimant did not express his wish to continue in the Respondent's employment and did not appeal the decision, yet he had not attained the retirement age.
  - iv. The Respondent paid the Claimant the sum of Kshs.88,897.00 comprising salary of April 2021 and 14 days of leave balance. A bank deposit was made on 7<sup>th</sup> May, 2021 and the Claimant was the beneficiary. The Claimant did not deny having received the sum of Kshs.88,897.00; and



- v. The Claimant did not contribute to the termination of his employment.
65. In the circumstances, the equivalent of four (4) months gross salary is fair, Kshs.640,000/=.

**iii. One month's salary in lieu of notice**

66. The Claimant confirmed on cross-examination that he was accorded a one month's notice, worked and was paid for it. In the circumstances, the prayer for one month's salary in lieu of notice is unsustainable and is declined.

**iv. Unpaid salary Kshs.42,667.00**

67. Neither the Claimant's written statement nor the oral evidence attest as to when the salary was not paid and how it remained outstanding after retirement.

The prayer is declined.

**v. Unpaid leave**

68. Neither the Claimant's written statement nor the oral testimony provide the essential particulars of the leave days involved including the number.

69. The uncontested clearance certificate availed by the Respondent reveal that the sum of Kshs.74,666.67 was paid as leave for 14 days.

70. In his submissions, the Claimant's counsel appear to agree that the outstanding leave days were 14.

The prayer is declined.

**vi. Unpaid overtime, Kshs.4,994,496.00**

71. The contract signed by the Claimant on 28<sup>th</sup> February, 2017 had no clause on payment of overtime. In fact, it had specific reporting and exit timings as follows; Monday to Friday 8.00 am to 5.00 pm and Saturday 8.00 am to 1.00 pm.

72. The clause further added that;

“ You will be requested to work extra hours from time to time.”

73. Clause 7 of the contract above had no promise of payment for any overtime and no agreement to that effect was availed. Relatedly, the Claimant has not tendered evidence to show that he worked for extra hours at the instance of the Respondent.

74. Although the Claimant alleged that he worked 4 extra hours per day for 4 years and provided two emails showing that he was at work at that time, he lead no evidence to show that it was his daily routine having discounted the Respondent's clock in/clock out print outs which appear to suggest otherwise.

75. The Claimant faulted the print outs on the ground that they did not contain the names of other employees. The Respondent, on its part availed specific evidence of the Claimant's alleged attendance record.

76. Since the Claimant is not an IT expert and did not profess expertise in clock in/clock out systems, his allegation that print outs cannot exclude other employees is unpersuasive in view of the strides humanity has made in Information Communication Technology. The possibilities into which a system may be configured are innumerable.



77. Similarly, the Claimant's evidence would have been exceedingly persuasive if he had adduced evidence of a letter or email to the Respondent requesting payment for overtime at any time during his employment and none was availed. Such evidence would have given credence to the prayer and demonstrated that the Claimant had raised the issue formally and the same had not been responded to or was under consideration.
78. The meticulous computations on record are an invitation to the court to find that from 1<sup>st</sup> March, 2017 to 8<sup>th</sup> March, 2021, the Claimant reported to work and left at the same time, as alleged and that the two emails were sufficient factual evidence.
79. The court is however not persuaded that the Claimant has placed sufficient material before it for a finding that he worked overtime and was thus entitled to compensation.
80. The court is guided by the sentiments of the Court of Appeal in *Rogoli Ole Manadegi V General Cargo Services Ltd* (2016) eKLR as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The Claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days . . .”

81. The prayer is declined for want of proof.

#### **vii. Unpaid public holidays**

82. The Claimant adduced no evidence of the public holidays in question as each year had its public holidays and it cannot be assumed that he worked on all of them without supportive evidence.
83. As held by the Court of Appeal in *Patrick Lumumba Kimuyu V Prime Fuels (K) Ltd* (2018) eKLR, it is the duty of the employee to establish that he/she had worked on the days claimed for the burden to shift to the employer.
84. In this case, the public holidays in question are not identified and the court is being invited to assume that the Claimant worked on all of them.
85. In the absence of the relevant particulars of the specific public holidays, the prayer for compensation for public holidays is declined.

#### **viii. Service gratuity**

86. The Claimant adduced no evidence of entitlement to service gratuity which is distinguishable from service pay and severance pay which are statutory.
87. Service gratuity is a gratuitous payment made by the employer to the employee in appreciation of the employee's services. It is payable either pursuant to the terms of employment agreed upon by the parties or on account of a Collective Bargaining Agreement (CBA).
88. The Claimant has not demonstrated the contractual basis of the prayer for gratuity and as it has no statutory basis, the prayer is dismissed as was the case in *Lillian Mwende Nzabu V Trustees and Office Bearers of Diocese of Anglican Church of Kenya* (2018) eKLR where the court declined to award gratuity.



89. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms;
- a. A declaration that the forced retirement was unlawful and unfair.
  - b. Equivalent of 4 months gross salary, Kshs.640,000.00.
  - c. Costs of this suit.
  - d. Interest at court rates from the date of judgment till payment in full.
90. For the avoidance of doubt, all the other prayers are declined.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF OCTOBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

