



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**ELR CAUSE NO. 2 OF 2018**

**NATHAN MUKEWA .....CLAIMANT**

**VERSUS**

**ALUPE UNIVERSITY COLLEGE.....RESPONDENT**

**J U D G M E N T**

1. The Claimant by statement of claim dated 22<sup>nd</sup> January, 2018 amended on the 31<sup>st</sup> July, 2018 with leave of the court dated 26<sup>th</sup> July, 2018 seeks the following orders:-

a. A declaration that the intended retirement of the Claimant including any decision to require the Claimant to proceed on terminal leave awaiting retirement from employment was unlawful and amounts to an unfair labour practice contrary to Article 41 of The Constitution of Kenya, 2010.

b. An order of injunction restraining the Respondent from unlawfully and unfairly terminating the Claimant's employment contract and compelling the Claimant to proceed on terminal leave.

c. A declaration that the decision to terminate the employment contract vide the letter dated the 2<sup>nd</sup>, July, 2018 is unfair and unlawful coupled with an order of reinstatement of the Claimant to employment without loss of benefit and/or seniority and/or victimization and/or harassment.

d. A declaration that the Respondent carried unfair labour practices by issuing the termination letter dated the 2<sup>nd</sup>, July, 2018 while a valid contract of employment was subsisting. Discriminated against the Claimant as a person under disability contrary to article 27 of the constitution of Kenya, 2010 and section 5 of the Employment Act, 2007, and the Respondent victimized the Claimant for bringing legal proceedings against it contrary to Section 46 (h) of the Employment Act 2007.

e. A declaration that the Respondent engaged in an unfair labour practice and acted unlawfully by issuing the memo dated the 28<sup>th</sup> June, 2018 to its in-charge of Finance to withhold the Claimant's June, 2018 salary in order to compel and pile pressure on the Claimant to clear and exist the service of the Respondent contrary to article 41 of the Constitution of Kenya 2020 and section 18 of the Employment Act, 2007 respectively.

f. Damages for breach of the rights to non-discrimination account of discrimination for disability status and fair labour practices as contained in Articles 27 and 41 of the Constitution of Kenya 2020.

g. An order to compel the Respondent to release to the Claimant all his salary for the month of June, 2018 and continues to pay the Claimant his monthly due remuneration as required by law and contract and in default the Claimant be at liberty to recover the same by execution as and when it falls due.

h. In the alternative but without prejudice to the remedy of reinstatement 3 months' salary in lieu of notice @ sh.112,907, total salary that would have been earned under the contract dated the 2<sup>nd</sup> November, 2017 until the age of 65 years, and/or 12 months; salary as damages for unfair termination.

i. Costs and interests.

2. The Claimant filed together with the claim, verifying affidavit, list of witnesses, Claimant's witness statement, list of documents all dated 22<sup>nd</sup> January 2018.

3. The Respondent in response to the Claim entered appearance and file response dated 7<sup>th</sup> February 2018 together with witness statement of Professor Esamai, and list of documents all of same date. The Respondent filed amended response to amended claim dated 17<sup>th</sup> August 2018. The Respondent filed further Witness statement of Professor Fabian Esamai dated 14<sup>th</sup> June 2019, and a further list of documents dated 7<sup>th</sup> June 2019.

4. Prior to hearing of the case the parties had filed other documents in applications which by consent the order of stay of reinstatement was lifted.

5. The matter proceeded on hearing before justice Nduma Nderi for Claimant's case on the 28<sup>th</sup> January, 2020 and the Claimant's case closed. This court heard the defence case on the 4<sup>th</sup> November, 2021. The court will rely on the typed proceedings for the Claimant's viva voce evidence.

6. The parties after the hearing filed written submissions. The Claimant's submissions filed by Wambua Kigamwa & company Advocates are dated 9<sup>th</sup> November 2021 and filed in court on the 10<sup>th</sup> November 2021. The Respondent's written submissions filed by the J.O. Juma & Company Advocates are dated 15<sup>th</sup> November 2021 and filed in court on the 6<sup>th</sup> December 2021.

#### **The Claimant's case**

7. The Claimant informed the court that he joined Moi University in employment as an Accounts Assistant in 1984. He was in 1986 issued with a letter of appointment and terms of service. In 1990 he was promoted to a Senior Accounts Assistant. That by memo dated 10<sup>th</sup> February, 2021 he was transferred to Alupe Campus of the University. In 2014 he was promoted to an Assistant Accountant while at Alupe Campus. That he had been transferred from the school of medicine to the said campus and he was in charge as the acting Campus Accountant until an accountant was posted. That earlier in 2016 while working at Moi University he developed spinal problems for which he underwent treatment in various hospitals. That he was recommended or enlistment as person with disability to the Ministry of Health by a doctor's assessment report dated 29<sup>th</sup> August 2017. That he was to attain 60 years of age on the 30<sup>th</sup> June 2018 being the retirement age.

8. On 1<sup>st</sup> July 2017 the Claimant received a retirement notice from Moi University which was to take effect on 30<sup>th</sup> June 2018. On 3<sup>rd</sup> October 2017 he wrote to the University and informed it of his disability. A response was given on 12<sup>th</sup> October 2017 advising that the Respondent was now an independent legal person from Moi University and if he had any issues to raise he ought to have taken them up with Alupe University College.

9. In October 2017 the Respondent interviewed him for the position of Assistant Accountant and he was successful and on the 2<sup>nd</sup> November, 2017 he was issued with an appointment letter which employment offer he accepted on 20<sup>th</sup> November 2017. That on 22<sup>nd</sup> November, 2017 he wrote to the Deputy Principal of the Respondent but instead he received a response from the Principal of the Respondent on 20<sup>th</sup> December 2017 which informed him that he was to clear with Moi University and retire.

10. That on 2<sup>nd</sup> July, 2018 he reported to work being an employee of the Respondent and he was issued with a letter requiring him to clear with Alupe University College pursuant to the notice issued by Moi University for retirement. The Claimant further relies on documents filed and produced in court.

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

11. The Respondent's case is as per witness statements of professor Fabian Esamai (Acting Principal of Respondent) which he adopted in his evidence in chief. In summary the Claimant was employed by Moi University in 1986. On 10<sup>th</sup> February 2011 he was seconded to Alupe campus, the predecessor of Alupe University College (The Respondent). Alupe Campus was constituted into Alupe University College vide the Alupe University Order 2015 issued vide legal Notice No. 133 dated 24<sup>th</sup> July, 2015. That by virtue of the said order Alupe University college became a separate legal entity in law but remained a constituent college of Moi University under section 3 of the legal Notice No. 153. All liabilities and assets were transferred from Moi University (Alupe University Campus) to the Respondent pursuant to that Order. That following review conducted on 18<sup>th</sup> September 2017, the Claimant was retained as an employee of the Respondent in accordance with the legal order but subject to:-

a. Kenya Universities staff Union (KUSU) collective Bargaining Agreement.

b. Public Service Commission Human Resources Policies and Procedures Manual for Public service.

c. The Alupe University college order (2015) statutes of Alupe University College. That the Claimant was issue with a letter dated 2<sup>nd</sup> November 2017 to facilitate his Employment Status with the Respondent but this however did not constitute a fresh contract of Employment

12. The Respondent submits that the Claimant was never appraised by council of the respondent as required under section 16(2) and 7-b of legal Notice 153 hence remained on secondment from Moi University. That the relationship created by letter of 2<sup>nd</sup> November 2017 was an appointment relationship with terms as agreed with Moi University.

13. That all maternal times the Claimant remained an employee of Moi University on secondment to the Respondent and his former terms

and conditions of Employment are those initially set by university. The Claimant was still bound by Kenya Universities Staff Union( KUSU ) Collective Bargaining Agreement entered 1<sup>st</sup> July, 2002 and made monthly remittance and that it was in dispute that the said CBA bound Moi University and its constituent colleges and the Respondent is bound by the CBA being a constituency college of the Moi University vide legal Notice NO. 153 dated 24<sup>th</sup> July, 2018. That under the KUSU CBA the mandatory retirement age is 60 years for employees in grade 5-10. The Claimant was in grade 10 as per letter dated 2<sup>nd</sup> November 2017. That the Claimant having been seconded is bound by terms agreed between Respondent and Moi University by dint of Section 16 (7) (b) of the Alupe University College order 2015 and in line with KUSSA CBA and PSC Human Resources policies and procedures manual from the Public service the Claimant ought to retire at 60 years.

14. The Respondent further told the court that the Respondent is a Public institution and bound by the retirement age as provided for under Section D. 21 of the PSC Human Resource Policies and procedures manual for the Public service and thus binding on Claimant. Further Section 10 (c) of the Respondent's Order 2015 statute reiterates that retirement of staff in grade 10 shall be at 60 which is binding on Claimant

15. That on 2<sup>nd</sup> November 2017 when the Claimant was issued with a letter of appointment by Respondent he had not attained 60 years and the same was to formalize his entry into the Respondent's pay roll. That on the 30<sup>th</sup> June, 2018 the Claimant attained age of 60 years and was expected to clear from the Respondent as per clause 18 (1) (a) and (c) of the KUSU CBA. To this effect the Claimant was notified by both Moi University and Alupe University College. That it is the Respondent's policy to withhold the last month's salary ( salary before retirement) as a security for purposes of set off. The withheld salary is always handed over to the employee if there is no pending debt after the retiring. Employee clears. The Respondent's witness stated that the withheld salary ( subject to any deduction ) is the property of the Claimant and is lawfully subject to Section 19 (1) (b) of the Employment Act, 2007 and have not unlawful practice. That the Respondent has since confirmed from Moi University Pension scheme that the Claimant is considered retired and is currently receiving monthly pension.

16. The Respondent submits that the Claimant's allegation that he is entitled to retire at 65 years of age is baseless since he has not been registered as disabled and the recommendation by the Alupe sub county Referral Hospital following application upon receipt of notification of retirement is an afterthought and void. That the claim ought to fail as Claimant was not terminated from employment having attained retirement age. That reinstating Claimant would be contrary to the law. That the Claimant is not a person with disability and cannot enjoy benefits of the disabled persons under the law. That his withheld salary is subject to clearance which the Claimant has refused complete.

## **DETERMINATION**

### **17. Issues for determination**

The Claimant identified the following issues for determination under his Claim as Lamented:-

- (i) Retirement age of persons with disability .
- (ii) Halting of retirement pending enlistment with the National Council of persons with disabilities (NCPWD)
- (iii) Effect of issuance of an employment contract after an invalid notice of retirement issued earlier.
- (iv) Validity of notice of retirement issued by a person which is not an employer under the law.
- (v) Whether the Respondent can rely on a notice of retirement issued by a person other than itself to terminate the employment relationship.
- (vi) whether the Respondent has any right to retire the Claimant under the contract issued in its name.
- (vii) Whether the Respondent has any right to retire the Claimant under the contract issued in its name.
- (viii) Whether the Respondent can withhold monthly salary dues in order to compel Claimant to clear with the institution for purposes of retirement and if the same is fair labour practice.

18. The Respondent did not file list of issues but from their submissions they addressed the following issues:-

- a. Whether the Claimant was unfairly terminated
- b. Secondment
- c. Whether the Claimant was given sufficient retirement notice
- d. Whether retirement at age 60 was justified.
- e. Whether salary until age of 65 is payable
- f. Whether the Respondent was justified to withhold salary.

g. Whether the Claimant has proven discrimination on amount of disability.

h. Whether the Claimant should be reinstated.

19. The Court having considered issues raised by both parties and having considered both parties case is of the considered opinion that the issues the parties really placed before the court for determination as follows:-

a. Retirement age of person with disability

b. Whether the Claimant was given sufficient retirement notice

c. Whether the Claimant was unfairly terminated

d. Whether the Claimant was validity retired

e. Whether the Respondent was justified to withhold the last salary pending clearance o and if the same was unfair labour practice.

f. Whether the Claimant has proven discrimination on account of disability

g. Whether the Claimant is entitled to reliefs sought.

### **The Law**

20. Section 43(1) of the Employment Act Provides that in any claim arising out of termination of contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do the termination shall be deemed to have been unfair within the meaning of Section 45.

21. The Public Service Commission Act defined “retirement” to mean exit of an officer from Public Service with full separation benefits including pension benefits as may be provided for in the applicable law, contract of service or a special retirement scheme agreed and upon between the Public officer and the relevant lawful authority. Section 80 of the Public Service Commission Act provides:-

‘(1) where a public officer has attained mandatory retirement age as may be prescribed in regulations.

a. The Public officer shall retire from the service with effect from the date of attaining the mandatory retirement age and

b. The Commissioner or other appointing Authority shall not extend the service of such a retired public officer beyond the mandatory retirement age.’

### **ANALYSIS AND FINDINGS**

#### **a. Retirement age of persons with disability**

22. Section 15 (6) of the Persons with Disabilities Act provides that the minimum retirement age of persons with disability shall be 60 years of age. Under the Public Service Commission Human Resources Policies and Procedures Manual for public service May 2016 (No. 2) of Respondent’s list of documents dated 7<sup>th</sup> June 2019, D. 21 retirement age for persons with disabilities is 65 years. That answers the issue.

#### **b. Whether the Claimant was unfairly terminated**

23. It is the opinion of this court that retirement is not synonymous with termination of service as contemplated under the Employment Act. Retirement on basis of age is a natural consequence of aging. The appointment letter of 2<sup>nd</sup> November 2017 following review was still in public service. KUSU terms of retirement for staff under grade 10 was 60 years. The appointment in the opinion of court was a continuation in service from Moi University under KUSU terms of service under which the Claimant was a member. The Claimant admitted to have attained age of 60 years by 30<sup>th</sup> June 2018. The issue of unfair termination as contemplated under Section 41 and 45 of the Employment act does not arise.

#### **c. Whether the Claimant was validity retired?**

24. The Claimant contests the manner the notices of retirement were issued. The Claimant states that on the 1<sup>st</sup> July 2017 Moi University issued him with a retirement notice (document No. 5 of the Respondent list of documents dated 7<sup>th</sup> February 2018)to wit:- “ *to retire on 30<sup>th</sup> June 2018 as per Clause 18 (1) (a) of the terms of service for KUSU under which you serve*”.

25. After that notice, on 3<sup>rd</sup> October, 2017 the Claimant wrote to Moi University informing of disability after which the university wrote back stating the Respondent is the responsible body/institution to deal with such issue. That he wrote to the Deputy Principal on 22<sup>nd</sup> November 2017 and instead received a response from the Principal of Respondent dated 20<sup>th</sup> December 2017 who informed him to clear with the University and retire. I produce the said letter content “ *Dear Mr Mukewa,*

## Re- Retirement

We acknowledge receipt of your letter dated 22<sup>nd</sup> November 2017 addressed to the Deputy Principal in which you requested to rend your retirement until your case is finalized by Ministry of health. We regret to inform you that your request was not successful. You are therefore informed to arrange to exhaust any pending leave days before 30<sup>th</sup> June 2018 as per notice ref No. PF NO.00037 dated 1<sup>st</sup> July, 2017 from Moi University”. The said letter told him he was to clear with relevant departments of *Moi University and Alupe University College to facilities*”.

26. Now after the retirement Notice of 1<sup>st</sup> October 2017, the Respondent interviewed the Claimant and issued him with a letter titled “Appointment as Assistant Accountant Grade 10”. The letter refers to review of 18<sup>th</sup> September 2017. The Claimant says the retirement notice by Moi University is void the Respondent having been gazetted under Act of 2015 as a college it became the employer hence the retirement notice of 1<sup>st</sup> October 2017 was not valid as no notice of retirement was issued by Respondent.

27. It is the finding of the court this is a *sui generis* case. The Claimant never resigned at any point from Moi University. Indeed he was on transfer/secondment from Moi University and it is not in dispute he remained a member of KUSU even under the Respondent. Under the Legal Notice No. 153. “ the Alupe University College Order 2015”. The University is defined as Moi University. The court finds this to mean that there remained a formal relationship between the Respondent and the University as common employers of the Claimant despite the order making Respondent a legal entity. That would explain why the Claimant did not terminate his employment contract with Moi University upon receipt of the appointment letter by Respondent on 1<sup>st</sup> November 2017 but continued in public service. Moi University was thus entitled to issue the retirement Notice to the Claimant and the Respondent was in order to rely on the said notice when it dealt with the Claimant’s request to pend the retirement notice vide letter by its Principal of 20<sup>th</sup> December 2017. From the evidence before the court it was clear that the Claimant was fully aware of the retirement date of 30<sup>th</sup> June 2018 at all material times from the communications by Moi University and the Respondent. The Claimant admitted on oral evidence he had attained 60 years at 2<sup>nd</sup> July 2018 when he was asked to clear for retirement purpose. The court finds the mandatory age of retirement was not an issue of discrimination by the Respondent. The Court did not find evidence that the decision to retire the Claimant was based on the legal proceedings filed against the Respondent as the decision to retire him had been finalized earlier vide the letter of 20<sup>th</sup> December 2017 when the Respondent declined the request by the Claimant to pend his retirement notice. The retirement age of all public servants at 60 years is couched in mandatory terms under the law unless one falls under the disability category which retires at 65 years. Consequently the court finds that the Claimant was validity retired on the 30<sup>th</sup> June 2018 upon attaining the mandatory age of retirement under the terms of his service in Public service.

### **d. Whether the Respondent was justified to withhold monthly salary pending clearance and if the same amounts to unfair labour practice.**

28. The Claimant submits that the withholding of the salary was unfair labour practice and in breach of Article 41 of the Constitution and protection of wages as provided for under Section 17 of the Employment Act 2007. That no provision is made under Section 19 of the Act of withholding his salary. The Claimant to buttress his point relies on the decision of Justice Rika in the *Peterson Ndung’u & 5 others V Kenya Power and Lighting Company ( 2014) eKLR* where Judge held in Part “ *Section 19 which allows for deduction of wages, does not have any provision which would permit employer to deduct any money from the employee or withhold any money s a disciplinary step or sanction* “.

The holding is sound in law. However, the salary of the Claimant was not withheld as disciplinary step or sanction. The Claimant was not facing any disciplinary proceedings. He was due for retirement. The next authority cited in *Titus Wamalwa Khaemba -vs Transport Worker Union ( Kenya) 2014 by Justice Monica Mbaru* is with respect to employees in service hence not relevant to the instant case of mandatory retirement.

29. The Respondent vide letter of 20<sup>th</sup> December 2017 informed the Claimant to clear with Moi University and the Respondent college. The Respondent told court the one month withholding of salary was to set off any debts found at clearance under section 19 (1) (b) (d) & € of the Employment Act which allows deduction of salary by employer for any shortage of money or loss of property lawfully in custody of employee. There is no reason given by the Claimant to justify his failure to comply with the directions of the Respondent having admitted to have attained the mandatory retirement age. The Respondent informed the court that the Claimant is already enjoying his pension. The court finds that the withholding of final month salary of a retired employee pending clearance with employer is not unfair labour practice. The Claimant in most cases has in custody property belonging to the employer like laptops and even signatories to accounts and the employer is entitled to hold as lien that salary pending the clearance of an exiting employee. No evidence was placed before the court of contrary practice in the entire Public Service. The court finds the Respondent/employer is justified to withhold last salary pending clearance by retiring officer and that the act is not unfair labour practice.

### **e. Whether the Claimant has proven discrimination on account of disability.**

30. The Claimant in the amended memorandum of claim at paragraph 14 (g) states that the Respondent acted in violation of the rights as a person under disability which is well aware of as embodied in the law entitles the Claimant to work upto 65 years of age and it amounts to discrimination under Article 27 of the Constitution and Section 5 of the Employment Act 2007.

31. That the Respondent has carried out unfair labour practice of victimization and harassment of the Claimant due to the reason of having brought legal proceedings against it contrary to Article 41 of the Constitution and Section 46 (h) of the Employment Act. The Claimant relies on the determination that no time limit is set when a person with a disability should seek with the National Council of Persons with disabilities while raising the right to retire at 65 years relies on the decision in *Margaret Martha Byana - Alice Otwala & 3 others 2016 ( eKLR). At page 18* where Justice Abuodha said disability exists as a fact whether registered or not. That registration is simply to create a data base for the purposes of operationalizing rights conferred by the persons with disabilities. That it does not confer those rights which

automatically exist once a person fits into the definition of disability contained in the Act”.

32. The Claimant submits that the fact of disability was established within the meaning of section 2 of the Persons with Disabilities Act as per the assessment report. That the court can proceed to deal with the issue whether the Respondent acted towards termination of the Employment to deny the Claimant an opportunity to obtain registration despite having been put on notice that his application for registration was in place and ongoing. The Claimant invites the court to find that the Respondent was inclined to deny the Claimant the entitlement to benefits associated with disability to work up to the age of 65 years as opposed to 60 years and states this amounts to discrimination in terms of Article 27 of the Constitution and prays for award of Kshs. 2 million under this head.

33. On this issue the Respondent submits that the Claimant has not proved discrimination and is not entitled to remedy under the heading. That the claim is unfounded and plain abuse of court process. The respondent submits that the claim failed to meet the Anarita Karimi Njeri criteria in defining dispute to be decided by Court. That the witnesses testified and confirmed that the Claimant is not disabled to benefit from rights of disabled. That the produced PWD assessment form (Claimant's exhibit 2) is not signed and the doctors documentations classify the Claimant as normal. The court considered the PWD form dated 2<sup>nd</sup> August 2017 and at page 2 the type of disability is not identified nor is it indicated whether permanent or temporarily and then on part of eligibility for registration as PWD it is stated 'yes'.

On part of remarks by DMS (as indicated in the form) it is blank and the Director of Medical Services part is blank and no date. The court looked into all the medical reports and none recommends the Claimant as disabled. This position is contrary with the case cited by the Claimant of *Margaret Martha Byama -vs- Alice A. Otwala & 3 others. (2016) eKLR* where upon medical examination the doctor had certified that the Petitioner was a person with disability and recommends he be registered as a person with disability as defined under section 2 of the Persons with disabilities Act. Further in that case the Petitioner was registered as a person with disability by the Council and issued with registration card. Obviously that case is very different from the instant case as the Claimant herein has not met those conditions. That authority is not relevant to the instant case.

34. The Claimant admits by time of his request to pend his retirement notice and by 30<sup>th</sup> June 2018 date of retirement that he had not been declared disabled by Ministry of Health. The PWD assessment report does not disclose the type of disability or whether permanent or temporary and the medical reports do not declare the claimant disabled. The Public Service Commission Act Section 80 cited herein is in mandatory terms hence the Court finds that the Respondent had no choice, without declaration of disability by relevant authorities to pend the retirement. The Respondent under Section 80 (b) Public Service Commission Act could not extend service of the Claimant who was a Public Officer. There is a procedure for employees to be registered as disabled to benefit as disabled and the relevant authority under the persons with disabilities (registrations) regulations 2009 can approve or reject. That means that the registration is not a by the way requirement but a mandatory requirement which the Claimant ought to have met before 30<sup>th</sup> June 2018 to enable him continue in employment post 60 years of age. The Court finds there is no material produced before the court to prove that the Claimant was discriminated against because of disability and further the final decision on retirement was made by the Respondent before the filing of the legal proceedings in court. The head of claim under this issue is without merit.

**f. On whether the Claimant is entitled to the reliefs sought.**

The claim has failed totally. The Court finds the Claimant then is not entitled to the reliefs sought. The entire Claim is dismissed.

35. The court having found the retirement was valid then orders the Claimant to proceed and clear with the Respondent and his terminal dues be paid within 30 days of clearance.

**CONCLUSION AND DISPOSITION**

36. The claim dated 22<sup>nd</sup> January 2018 and amended 31<sup>st</sup> July 2018 is without merit and is dismissed.

37. Each party to bear own costs in the suit.

It is ordered accordingly.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2022**

**J. W. KELI,**

**JUDGE.**

**In the Presence of :-**

Court Assistant : Brenda Wesonga

For Claimant :-Wambua Kigamwa Advocate

For Respondent:- Baraka Advocate