



**Okelo v Car & General Limited (Cause 1941 of 2017)  
[2022] KEELRC 1584 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1584 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1941 OF 2017  
AN MWAURE, J  
JUNE 2, 2022**

**BETWEEN**

**MARTIN NDETI OKELO ..... APPLICANT**

**AND**

**CAR & GENERAL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated September 25, 2019. The applicant was employed by the respondent as a Field Service Engineer at a salary of Kshs. 80,000 per month. He says on March 16, 2017 he received a letter informing him of the management's decision to retire him from April 1, 2017.
2. He states that the said retirement was done without consultation or acquiescence of the applicant. He says at the time of termination he was earning Kshs. 312,531.7 per month.
3. He further says he was not paid his terminal dues but instead were paid to a third party. He says his termination was without hearing and was contrary to section 35, 40, 41 and 45 of the *Employment Act* 2007 at *ILO Convention No. 158*.
4. He prays his termination by respondent was wrongful and he prays for compensation.

**Respondent's Case**

5. The respondent filed his response dated October 2, 2019. In his response that the claimant approached the respondent on attaining the age of 58 years and discussed about retirement. He says he maintained a policy where it is provided that retirement age is 55 years and voluntary retirement is 50 years. He says he is a stranger to the averment that retirement age is 60 years.
6. The respondent says he considered the claimant's request and asked him to file in the staff clearance form. He says the claimant was past the age of retirement according to the respondent's policy.



7. He further says he settled all the terminal dues of the Claimant at retirement. He further says that the respondent made necessary requests for the claimant to be paid his pension dues. Some of the benefits were utilised to settle claimant's debts owing to Comoco Sacco Society Limited.
8. The respondent avers that the client is not entitled to the prayers sought and so should be dismissed with costs.

### **Decision**

9. The court has critically considered the submissions filed by the claimant and dated March 2, 2022 as well as the respondent's submissions dated March 14, 2022.
10. Basically the claimant in his submissions says he was unfairly terminated and the same was referred as retirement. He says that the respondent alleged he had as part of his employment documents "Employee Labour Statute Summary Statement" which provided retirement age as 55 years. He however alleges he never received the same and that he saw it from his advocate when he filed this suit.
11. The claimant says that since the Employee Labour Statute Summary Statement was not applicable and respondent's employees were to be retired at the age of 60 years, there exists no valid reason to terminate the claimant on April 1, 2017 at the age of 58 years and 5 months.
12. The respondent on the other hand in his submissions says that as a private company it has its place its rules and regulations and employment policies that govern its employees. He says that the employee Labour Statute Summary Statement and policy read together with the letter of appointment stipulates the terms of employment. He says Clause 9 of the Employee Labour Statute Summary stipulates the retirement age of their employees.
13. The respondent further says that at the time of employment the employee was issued with Employee Labour Statute summary and was also premised in the respondent's premises. The Respondent says that the claimant did not give any evidence to disapprove the contents of the said employee labour statutes as per the law.

### **Decision**

14. The claimant says that when he was employed he was issued with an appointment letter dated March 23, 2004. He says he was not issued with any other document. He also says his colleagues used to retire at the age of 60 years. He says that was the practice even if it was not in the document of the contracts.
15. He says he was not issued with the Employee Labour Statute Summary statement which document he says he saw it for the first time when he left employment and at his advocate's files after he filed this suit.
16. The court has noted that the letter of appointment of the claimants dated March 21, 2004 is quiet on the retirement age. There is nowhere in the documents produced in court where it is alluded that the claimant was informed about his retirement age. There is no evidence adduced that the claimant was given the referred "Employee Labour Statute Summary Statement" which provide in Clause 9 that the employees will retire at the age of 55 years.
17. Furthermore the claimant was not retired at the age of 55 years. It is the court's contention that if the respondent intended to retire the claimant at the age of 55 years then by all means he should have done so. By allowing him to continue working until the age of 58 years gave him legitimate expectation that he was to retire at the prevailing government retirement age of 60 years and his company's practice of retiring their employees at the age of 60 years.



18. In terminating the employee for any reason the employer must act with justice and equity. Justice Maureen Onyango captured this well in the case of *Njai Muriu v University of Nairobi* (2020) eKLR which she observed:

” Section 45(4) (b) requires an employer to act with justice and equity in terminating the employment of an employee. None of the parties has provided a copy of the terms of service applicable to the Respondent’s staff for notification of retirement. Wherever the provisions are this was not a disciplinary termination and ought to have done with notice”

19. The letter of retirement to the claimant was dated March 16, 2017 and he was to leave by April 1, 2017. That was not just and fair to give an employee such a short notice and without any discussions or preparations and counselling for his retirement. The claimant had worked for the respondent from 2004 to 2017 and was only fair the respondent prepare him for retirement in good time. The claimant having worked for the respondent for so many years definitely had legitimate expectation that he would work for the respondent until the age of 60 years as provided in the prevailing Government Policy on retirement and company’s practice.

20. The court finds therefore that the claimant’s termination by the Respondent was wrongful and unlawful and declares so accordingly and furthermore finds as well the procedure used was unfair and against acceptable labour practices.

### **Remedies**

21. Having found that the claimant was unlawfully terminated on the ground of retirement I award him the following awards:-

1. 10 months equivalent of his salary in lieu of the claimed 19 months which is not part of the letter of appointment  $312,531.76 \times 10 = 3,125,317.50$ . I have considered in giving this award the long period claimant served the respondent and the circumstances of his termination which he did not contribute to.
2. The claimed lost pension benefits is not granted as the court finds no proof or basis of establishing that such an award is due and owing. That prayer is therefore declined.
3. The respondent has annexed a document (exhibit 10) which shows the claimant was paid 3 months salary in lieu of notice amounting to Kshs. 937,594.59. This prayer is therefore declined.
4. The respondent utilised some of the dues of the claimant to pay the Comoco Sacco loan as per the consent given by the claimant on September 15, 2016 in the document referred as Member’s loan application form. In any case there is no prayer by the claimant in relation to that in his claim and so will not address it.
5. The effect of my award to the claimant is Kshs. 3,125,317.50.

Costs follow the event and so the costs of the suit are awarded to the claimant.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 2ND DAY OF JUNE, 2022.**

**ANNA NGIBUINI MWAURE**

**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 March 15, 2020 and subsequent directions of April 21, 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 *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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

