



**Obonyo v Great Lakes University of Kisumu (Cause 376 of 2017)
[2022] KEELRC 1300 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1300 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 376 OF 2017
CN BAARI, J
JULY 21, 2022**

BETWEEN

TOM JOSEPH OBONYO CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU RESPONDENT

JUDGMENT

Introduction

1. Before Court is the Claimant's Memorandum of Claim dated 25th August, 2017, and amended on 19th January, 2022. The Claimant's prayer is for compensation for unfair termination, payment of salary arrears for the months of February, March, September, October, November, December 2016, and January and February, 2017, gratuity, salary for the remainder of his term of contract for the months of March and April, House allowance and Transport allowance, all said to amount to Kshs.2,805,633.00.
2. The Respondent filed a Response to the Amended Memorandum of claim on 27th January, 2022 and filed on 31st January, 2022.
3. The Claimant's case was heard on 2nd February, 2022, followed by the defence hearing on 22nd February, 2022. The Claimant testified in support of his case, adopted his witness statement dated 22nd February, 2021, and further produced his bundle of documents.
4. The Respondent presented her Human Resources Officer, one Ms. Mary Anne Atieno to testify in her defence. Ms. Atieno adopted her witness statement and produced a bundle of documents filed in the matter in support of the Respondent's case.
5. Both parties filed submissions in the matter.



The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on 5th April, 2013, on a two-year contract to develop a curriculum on physiotherapy and to provide physiotherapy services. He states that his job title was Senior Lecturer, and his monthly salary was Kshs. 81,000.00
7. It is the Claimant's case that he was aged 70 years at the time of engagement as aforesaid. It is the Claimant's assertion that he completed his initial two-year contract and was once again given another two-year contract that took effect on 10th June, 2015.
8. The Claimant states that three months to the expiry of his second contract, he received a letter indicating that he had been retired from the service of the Respondent on age ground.
9. The Claimant states that he was already retired when he was contracted by the Respondent. It is his further case that although the letter retiring him based the retirement on his age, he states that he was already past the retirement age when he was first engaged and that this fact was within the knowledge of the Respondent.
10. The Claimant states that payment of gratuity was a term of his contract and was not conditional on availability of funds as the Respondent would want to believe.
11. On cross-examination, the Claimant confirmed receiving retirement notice and that the retirement was to take effect in April, 2017. He further confirmed that he was past the Respondent's retirement age of 70 years at the time notice and the retirement was communicated.
12. The Claimant states that his salary was to be paid until April, 2017 and not 19th January, 2017, when the notice of retirement was issued.
13. The Claimant told the court on cross-examination that his salary was inclusive of house allowance. He further confirmed that he received his house allowance through out his employment.
14. The Claimant again stated on re-examination that he received house allowance in the months he was paid salary, and which is evidenced by the pay slips produced in court.
15. The Claimant states that his letter of appointment issued in December, 2013, indicated his date of birth as 24th April, 1941, and that the renewal of his contract was made on 10th June, 2015, when he was already 77 years old.
16. It is the Claimant's prayer that the court grants him the reliefs listed in his statement of claim.

The Respondent's Case.

17. The Respondent's case is that she employed the Claimant on 5th April, 2013, under a two-year contract to develop a curriculum for one of her departments.
18. The Respondent states that according to her Human Resources Policy, retirement age is set at seventy (70) years for academic staff. It is the Respondent's further case that at the time of employment, the Claimant was already aged above seventy (70) Years.
19. It is the Respondent's position that the Claimant was employed inspite his advanced age on account of an oversight on their part. It is the Respondent's assertion that no body checked the Claimant's age until a routine staff audit was conducted.
20. The Respondent states that a member of staff due for retirement is first given a verbal explanation of the Policy that requires them to retire, and thereafter issued with a one month written notice of retirement.



21. It is the Respondent's case that the Claimant was paid all his salaries, but that records are not available to ascertain the payment. It is the Respondent's further assertion that the Respondent University is undergoing a forensic audit and hence the absence of physical records.
22. The Respondent contends that 25% of an employee's salary is paid as gratuity when the contract lapses, and further states that payment of gratuity is subject to availability of funds. It is the Respondent's case that gratuity is paid as a form of motivation for staff.
23. The Respondent states that the Claimant was paid house allowance for the year 2013, and which is evidenced by the pay slips produced before court. It is the Respondent's further case that house allowance and commuter allowances were paid together with salary.
24. It is the Respondent's case that the Claimant did not clear with them to enable payment of his final dues.
25. On cross-examination, RW1 told the court that the Claimant did not apply for the position he was appointed to, but that he was head-handed by the Respondent.
26. RW1 further confirmed that the Claimant was to earn a service gratuity at the rate of 25% upon completion of his contract and 40% as house allowance.
27. RW1 confirmed that the Respondent had the Claimant's documents at the point of appointment, and that she knew his age was already above Seventy (70) years at the time of employment.
28. RW1 further confirmed that the Claimant was not paid any terminal dues as at the time of this hearing. She further confirmed that the Respondent did not by letter inform the Claimant that he will not be paid gratuity due to unavailability of funds.
29. RW1 told the court that the letter terminating the Claimant's services indicated the reason for termination as poor performance. She further indicated that no disciplinary proceedings have been produced in evidence as proof that the Claimant was given a fair process.
30. RW1 states that the Claimant's contract was to end on 30th April, 2017.

The Claimant's Submissions

31. It is submitted for the Claimant that the Respondent being the Employer, had the obligation under Section 74 of the *Employment Act* of keeping employee records, and for reason that it could not show that she paid the Claimant salary arrears, gratuity and house allowance, the court should order that it is liable so to do.
32. It is submitted that the Claimants has suffered extreme humiliation, hardship and suffering resulting from the Respondent denying him access to their premises and failure to pay his lawful dues.
33. The Claimant further submitted that gratuity is a term of his contract, and hence the claim of gratuity should be awarded as the Respondent did not dispute the amount claimed on this account.
34. It is submitted that the Claimant was unfairly terminated his termination and/or retirement, having been grounded on his age when he was already past retirement age at the time he was employed and that his age was within the knowledge of the Respondent at the time he was appointed.



The Respondent's Submissions

35. The Respondent submits that it concedes to the Claimant's claim for salaries for the month of February, March, September, October, November and December, 2016, and further submits that the Claimant is entitled to the salaries for the afore stated months, less statutory deductions.
36. It is submitted for the Respondent that the Claimant is not entitled to salaries for the months of January and February, 2017. The Respondent further submits that the Claimant was no longer in the employ of the Respondent having been issued with a notice of termination dated 19th December, 2016, and which indicates that his last day at work was to 19th January, 2017.
37. It is submitted for the Respondent that gratuity is a discretionary payment and not a right of an employee and that it is only paid in good faith. The Respondent further submits that the Employment Act, 2007 does not make it mandatory for employers to pay gratuity to employees, instead, the payment of gratuity must be a term of contract, a provision under a private treaty, a provisions under a Collective Agreement or a provision under a term and practice of the employer.
38. It is submitted for the Respondent that the burden of proof lays on the Claimant to prove that the Respondents owed him the alleged outstanding amount and that he has not discharged this burden.

Analysis and Determination

39. I have considered the pleadings herein, the witnesses' oral testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant was unfairly terminated.
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant was unfairly terminated

40. Fair hearing and provision of valid and fair reasons for termination, also known as substantive justification for termination/dismissal, are the two limbs upon which a court determines fairness or lack thereof of a termination/dismissal of an employee.
41. Fair hearing is both a Constitutional and statutory obligation demanded of an employer in a termination/dismissal process. This requirement is anchored on Section 41 of the Employment Act, which provides as follows: -

“41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

42. The Respondent's letter to the Claimant dated 19th December, 2016 states:

“This is to inform you that you have attained the compulsory retirement age of seventy (70) years.

The GLUK Resource Manual for staff at page 36 on the paragraph on retirement states that the retirement age of academic staff shall be upon attaining the age of 70 years. Our record



show that your date of birth is 24th April, 1941, which means that you attained the age of 75 on your last birthday

The purpose of this letter is to give you notice of retirement. Your retirement will start on 19th January, 2017.....”

43. The Respondent’s (RW1) witness told the court that the Claimant was terminated on account of poor performance. She further confirmed that the Claimant was not taken through a disciplinary process prior to the termination.
44. The letter cited herein indicates that the Claimant was retired on age ground. The Claimant’s case is that he had attained retirement age at the time of his appointment, and the letter of appointment confirms that the Claimant was indeed 72 years at the time of appointments.
45. An employee appointed on contract cannot be retired. Retirement is only tenable for employees serving on permanent and pensionable terms. Employers separate with employees employed on contract basis through termination of their contracts of service, and which termination must adhere to the requirements of Section 41 of the *Employment Act*.
46. It is no longer possible post 2007 for an employer to terminate an employee’s contract by simply invoke the termination clause. In the case of *Angela Wokabi Muoki v. Tribe Hotel Ltd* (2016) eKLR, it was held that the process of hearing and ensuring that an employee is given a fair chance to know the allegations against him, is a mandatory requirement of the law. The Supreme Court of Kenya re-affirmed this position in the case of *Kenfreight (EA) Limited v Benson K. Nguti* (2016) eKLR, where it held that it is not enough to terminate employment by notice or payment in lieu thereof, termination should be based on valid reasons and fair procedure.
47. The Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, stated:
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.
- The court stated that four elements must be discernible for the procedure to pass:
- a. an explanation of the grounds of termination in a language understood by the employee;
 - b. the reason for which the employer is considering termination;
 - c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
 - d. hearing and considering any representation by the employee and the person chosen by the employee.”

48. The Claimant told the court that he had retired as at the time he was appointed into the service of the Respondent, and that he was head-handed to develop a curriculum for the Respondent’s department of physiotherapy. This for me explains the age at which the Claimant was hired. The Respondent cannot feign this to have been an oversight, it was not.

49. The Respondent clearly had reason to appoint the Claimant despite his advanced age, and it owed him to either allow him to conclude the remainder of his contract, or procedurally terminate the contract.



50. I find and hold that the purported retirement of the Claimant is unprocedural and unreasonable, and which renders the termination unfair, and I so hold.

Whether the Claimant is entitled to the remedies sought

51. The Claimant's prayer is for compensation for unfair termination, payment of salary arrears for the months of February, March, September, October, November, December 2016 and January and February, 2017, gratuity, salary for the remainder of his term of contract for the months of March and April, House allowance and Transport allowance, all said to amount to Kshs.2,805,633.00.

Compensation for unfair termination

52. The finding of unfair termination entitles the Claimant to compensation per Sections 49 and 50 of the *Employment Act*, 2007.
53. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR noted as follows in regard to an award of compensation:

“When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.”

54. The Claimant's contract with the Respondent was to lapse on 30th April, 2017, just 4 months before it was terminated. Section 49(4) of the *Employment Act* empowers this court to make an award for unfair termination of up to 12 months' salary. Guided by the Supreme Court holding in *Kenfreight (E.A) Limited v Benson K. Nguti* (Supra), I award the Claimant four (4) months' salary as compensation for unfair termination being the unexpired term of his contract.

Salary Arrears

55. The Respondent conceded owing the Claimant salaries for the months of February, March, September, October, November and December, 2016. Consequently, the Claimant is awarded salary arrears for the six (6) months that have been conceded.
56. The Claimant further claims salary arrears for the months of January and February, 2017. The notice of retirement issued to the Claimant was to take effect on 19th January, 2017. It follows that the Claimant is owed salary upto 19th January, 2017, being the date he was to cease being an employee to the Respondent.
57. The Claimant is award salary for 19 days worked in January, 2017. The Claim for salary arrears for the month of February, 2017, has not been proved. it fails and is dismissed.

Gratuity

58. The Claimant's claim for payment of gratuity is premised on the provision in his contract with the Respondent which states:
- “a monthly gratuity accrual of 25% payable at the successful completion of the contract.”
59. Section 35 (6) (b) of the *Employment Act*, 2007 entitles an employee to a gratuity or service pay where it is established under a collective agreement. By dint of this Section, the gratuity entitlement created under the Claimant's contract of employment is binding on the Respondent at the rate agreed by the parties under the said contract.



60. The Respondent's assertion that payment of gratuity is subject to the availability of funds does not hold. To subject payment of gratuity to availability of funds is an unfair labour practice, as the employee will never know when an employer has money and when it does not have. Further, such a provision can easily be abused by employers to escape payment of gratuity.
61. The Claimant's contract provided for the payment of gratuity and the fact that the policy makes gratuity payable only subject to the availability of funding is unfair to an employee.
62. The Respondent's further argument that gratuity was payable only upon completion of contract does not hold in this case, for reason that the Respondent unilaterally terminated the Claimant's contract mid-way without justifiable cause.
63. I find and hold that the Claimant is entitled to payment of gratuity at the rate of 25% of his monthly salary for the term of his contract (Two years/24 months) as per the contract between him and the Respondent.

House Allowance

64. The Claimant seeks payment of house allowance from 5th April, 2013, to 18th December, 2016. The Claimant in his oral testimony told the court that he was paid a salary that was inclusive of house allowance. It was his case that for all the months where salary is not claimed, house allowances were paid together with the salary.
65. The pay slips produced in evidence confirm that the net amount paid to the Claimant for the months when salary was paid, included house allowance. It then follows that the claim for house allowance is unjustified and is hereby dismissed.

Commuter Allowance

66. The pay slips produced in evidence are prove that commuter/Transport allowance was paid together with salary, similar to house allowance.
67. Consequently, this claim fails and is dismissed.
68. In whole, Judgment is entered for the Claimant as against the Respondent as follows:
 - a) Payment of 4 months' salary as compensation for unfair termination at Kshs. 324,000/-
 - b) Salary arrears for the months of February, March, September, October, November and December, 2016 at Kshs. 486,000/-
 - c) Salary arrears for 19 days worked in January, 2019 at Kshs. 51,300/-
 - d) Gratuity at Kshs. 425,049/-
 - e) Costs of the suit and interest until payment in full.
44. Judgment of the court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance



N/A for the Claimant

Ms. Oduor present for the Respondent

Christine Omollo- C/A

