



**Mbugua v Principal/Secretary Board of Management Cheptoroi Secondary School
(Cause 350 of 2016) [2022] KEELRC 4165 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4165 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 350 OF 2016
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN

LILIAN NJERI MBUGUA CLAIMANT

AND

**PRINCIPAL/SECRETARY BOARD OF MANAGEMENT CHEPTOROI
SECONDARY SCHOOL RESPONDENT**

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 25th August, 2016 through the firm of M. Korongo and Company Advocates claiming wrongful and unfair termination, unpaid notice of retirement, leave pay and gratuity. She sought for the following reliefs;
 - a. One month gross wages in lieu of Notice.
 - b. Leave for 8 months.
 - c. Leave allowance for 8 years.
 - d. Gratuity for 29 years.
 - e. Salary arrears for doing accounts clerical work at kshs.300 x 13 months which was not paid.
 - f. Costs of suit to be borne by the Respondent.

2. The Claimant avers that he was employed by the Respondent on the 1st January, 1984 as a copy typist and served the Respondent continuously till 30th September, 2013 when her services were discontinued abruptly without any Notice or explanation thereof. Prior to the termination, the Claimant had attained retirement age in the year 2010 however the Respondent requested her to continue working as they sourced for a suitable replacement. She avers that the Respondent by a letter dated 16th November, 2010 had indicated that she will be served with notice upon her termination or retirement.



3. She avers that she served the Respondent from 2004 up until 2013 without going for leave save for the year 2012 and prayed for the payment of the leave days for the 8 years not taken or paid for.
4. Upon termination, she avers that she was not paid all her terminal dues as provided for under the law and her effort to have the said issue addressed fell on deaf ears.
5. She stated that by a circular issued by the government dated 20th March 2009, she was entitled to gratuity payment which was never paid to her. Also that she was entitled to leave pay for the said 8 years which the Respondent has not honoured to date.
6. During her service at the Respondent, the Claimant was assigned extra duties as Accounts Clerk for a period of 2 years 6 months via the letter of 1st January, 1990 and paid for a period of 1 year 5 months thereby leaving a balance of payment for 1 year 1 month. Despite several letters of reminders from her and her Union the said money was never paid to her.
7. It is the Claimant's case that she served the Respondent till her retirement but the Respondent requested her vide the letter of 16th November, 2010 to continue holding the said position until a suitable replacement is sourced and the termination of 30th September, 2013 without notice as anticipated was unlawful and against good industrial relationship.
8. Due to the abrupt termination, the Claimant has suffered loss and anguish and urged this Court to allow the claim as prayed.
9. The Respondent entered appearance on the 8th November, 2016 and filed a response to Claim on the 15th February, 2017 denying all the contents of the claim and stating that the Claimant was paid all her dues including gratuity.
10. The Claimant's case was heard on the 30th March, 2022 while the defence was heard on the 8th June, 2022.

Claimant's Case.

11. The Claimant testified as CW-1 and stated that she is not in any gainful employment at the moment. She avers that she worked for the Respondent as a secretary and bursar. She adopted her statement of 15th September, 2018 and produced her documents as filed as her exhibits.
12. Upon cross examination by Ngira Advocate, the Claimant testified that she was employed in January, 1984 and left employment in September, 2013. She avers that she was given her retirement letter 4 months later after leaving employment. She indicated that on 16th October, 2010 she was issued with a letter requesting her to continue working after her retirement until a suitable replacement is sourced.
13. Upon further cross examination she testified that sometimes in 1990, she was requested to work as a bursar and that she would be paid kshs.300 over and above her salary for the extra duties, however, that the Respondent stopped the payments. She stated that she never took her leave for the 8 years worked neither was she paid leave compensation.
14. On re-examination she testified that she was served with a retirement letter in December, 2013.

Respondent's case.

15. Stephen Waweru, the principal of the Respondent, testified as RW1-1 and adopted her witness statement and produced the document dated 3rd August, 2017 as the Respondent's exhibits.



16. Upon cross examination by Juma Advocate, the witness testified that she does not know the Claimant personally but came to know her through her documents at the Respondent. He stated that he was employed into the Respondent's in 2020.
17. He stated that according to records the Claimant was employed in 1984 and retired in 2013. He avers that he was not informed, neither was there any record that showed the Claimant was a bursar, but all the records in the office shows that she was a secretary and at some point she was given extra duties which she was fully paid for. On gratuity pay the witness affirmed that the Claimant was yet to be paid gratuity.
18. On re-examination, he maintained that the records show he was paid all her dues including the extra-duties save for gratuity pay which is owing.

Claimant's submissions.

19. The Claimant submitted that before any termination is considered fair in accordance with Section 45 of the *Employment Act*, it must adhere to the provisions of Section 43 and 46 of the *Employment Act*. Accordingly, it was argued that the Claimant's services were terminated abruptly without notice when the Respondent upon retirement had expressly requested the Claimant to continue working for it till they got a suitable replacement. It was submitted that the Respondent ought to have informed the Claimant vide a notice of the intention to end her employment upon getting a suitable replacement as agreed in 2010. Therefore, that the termination of employment without any notice was unfair and illegal in the circumstances considering that upon termination, the Claimant was not paid her terminal dues and no efforts or evidence was tabled by the Respondent to support its allegation that it had prepared terminal dues for payment. To support this argument, the Claimant relied on the case of *Rashid Jeneby V Prime Bank Limited* (2015) eklr, where the Court insisted on the need for the employer to demonstrate reason for termination as per the provisions of Section 47(5) of the *Employment Act*.
20. The Claimant further submitted that having been terminated without reason given by the Respondent, the Claim is merited and therefore should be allowed as prayed.

Respondent's submissions.

21. The Respondent maintain that they served the Claimant with a Retirement notice dated 26th November 2013, therefore her termination was not unfair as pleaded. It supported its case by relying on the case of *Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School* (2022) eklr where the Court held that;

“it is not enough for a party to make allegations and expect the Court to find in its favour without substantiating such an allegation and supporting the same with oral and or documentary evidence, this is more so where an allegation is expected to be supported with documentary evidence to establish payment of salary or underpayments thereof.”
22. Accordingly, it was argued that the Claimant has failed to prove her case on the allegation of unfair termination as such the case is not merited and should be dismissed with costs.
23. On the reliefs sought, it was argued that the claim for leave pay for the 8 years allegedly worked is caught up by laches and contrary to the provisions of Section 90 of the *Employment Act*, that require that such claims be filed within 3 years of the time within which the cause of action arose. In support of



this argument the Respondent relied on the case of *James Mugerialgati V Public Service Commission* (2014) eklr.

24. The Respondent maintain that the Claimant's claim is caught up by limitation of action and this Court ought to dismiss it with costs. They then relied on the case of *Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others* (2014) eklr.
25. I have examined all evidence and submissions from both parties. The fact that the Claimant was employed by the Respondent and retired as indicated is conceded by the Respondents. The Respondents however aver that the Claimant was paid all her dues save for the gratuity which was not paid.
26. The Claimant has sought to be paid leave for 8 years save for the year 2012.
27. In this respect, the Claimant filed this claim on 15th September, 2016 claiming for leave for periods beyond 2013 which in my view is a prayer that is time barred as per Section 90 of the *Employment Act* 2007 which envisages that any claim filed should be filed within 3 years. This having not been done, I find the prayer for leave cannot stand and is therefore dismissed.
28. The Claimant also sought to be paid for carrying out duties of Accounts Clerk which was kshs.300/= per month over and above her salary. This was not paid and this is money earned for 13 months. I find that this prayer is valid and I allow it and enter Judgment for her for the kshs.3900/= prayed for.
29. Having considered that the Respondent admitted not paying the Claimant her gratuity, I also allow the prayer for gratuity as prayed for kshs.236,727/=.
30. The end result is that I allow the claim for the Claimant and enter Judgment as follows;
 1. 1 month salary in lieu of notice = 12,944/=
 2. Gratuity pay for kshs.236,727/=
 3. Unpaid salary for extra duties of accounts clerk = 3,900/=Total Awarded= 253,571/=
- Less statutory deductions
4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mr. Juma for Claimant – present

Ngira for Respondent – present

Court Assistant – Fred

