



**Waithaka v Nairobi Bottlers Limited (Cause 2249 of 2017)  
[2022] KEELRC 13042 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13042 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2249 OF 2017  
SC RUTTO, J  
OCTOBER 28, 2022**

**BETWEEN**

**STEPHEN KARIUKI WAIHAKA ..... CLAIMANT**

**AND**

**NAIROBI BOTTLERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant has averred vide his claim dated 10<sup>th</sup> November, 2017 that he was employed by the respondent as a machine attendant on 23<sup>rd</sup> March, 1990 and that he commenced work on 1<sup>st</sup> April, 1990. That he was promoted several times and at the time of his retirement on 7<sup>th</sup> June, 2016, he was the Syrup Room Quality Controller.
2. The claimant further avers that he was injured on both shoulders while at work as a result of lifting and pulling heavy objects. That through his letter dated 6<sup>th</sup> June, 2016, he informed the respondent's country human resource manager of the doctor's recommendation for early retirement.
3. That on 7<sup>th</sup> June, 2016, the respondent informed the claimant of its acceptance of his application for early retirement. That subsequent to his retirement, the respondent failed to remit his full and final dues.
4. The claimant has further cited the respondent for breach of the employment contract to wit, failure to assign him lighter duties, discrimination on the basis of disability, failure to fairly remunerate him and prohibiting him from joining the Kenya Union of Commercial Food and Allied Workers Union.
5. Consequently, the claimant seeks against the respondent a declaration that his rights have been violated, general damages for breach of contract, compensatory damages equivalent to 12 months of his gross salary, balance of WIBA payment in the sum of Kshs 439,829.00, loss of future earnings, costs and interests.



6. The claim was defended through the respondent's Response dated 13<sup>th</sup> February, 2018 through which it denied the allegations by the claimant. The respondent contended that the claimant was compensated adequately and that there are no dues owing to him. Putting the claimant to strict proof, the respondent denied breaching the employment contract.
7. On 31<sup>st</sup> May, 2022, just before the trial took off, the parties confirmed before the Court that they had reached an agreement to compromise a portion of the claim which was in regards to the balance of the WIBA payment of Kshs 439,829.00. As it stands, the claim to that extent is now settled.

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

8. The claimant testified in support of his case and at the outset, asked the Court to adopt his witness statement and bundle of documents to constitute his evidence in chief. The claimant told Court that at the time of his employment, he was a member of the Kenya Union of Commercial Food and Allied Workers Union.
9. That he was promoted in 2008 and he joined management hence became unionisable. That he did not want to join the management and only signed the letter of promotion in acknowledgement, to avoid being terminated. That on or about 29<sup>th</sup> May, 2012, he was injured as a result of lifting and pulling heavy objects, hence underwent an operation. That the doctor recommended that he only undertakes light duties and also to avoid using his right hand.
10. That when he resumed work after his operation, he continued to work using his left hand and was injured once again as a result of lifting and pulling objects, hence attained injuries on his left shoulder on 8<sup>th</sup> August, 2016. That subsequently, on 12<sup>th</sup> May, 2016, Prof. Gakuu, who was his doctor, confirmed his inability to pull and lift heavy objects as a result of the injuries he had sustained.
11. That on 6<sup>th</sup> June, 2016, he wrote to the respondent's country human resource manager informing him of the doctor's recommendation for his early retirement. That on 7<sup>th</sup> June, 2016, the respondent accepted his application for early retirement but failed to remit all his full and final dues. That as a result, he suffered loss and was put in great mental financial distress and deprived of his benefits. Summing up his testimony, the claimant told the Court that as a result of his injuries, he cannot be employed elsewhere hence is jobless.

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

12. The respondent presented oral evidence through Ms. Latiffah Cheronno who testified as RW1. She identified herself as the respondent's human resource manager. She also adopted her witness statement and bundle of documents filed on behalf of the respondent, to constitute her evidence in chief. The documents were also produced as evidence before Court.
13. It was the testimony of RW1 that the claimant was given light duties following the doctor's recommendation, in that he was given a team to supervise. That further, in the event the claimant was dissatisfied, he had a right to lodge a complaint through the company's internal grievance handling mechanism. That in this regard, the claimant did not lodge a complaint as per the company's procedure. She further denied the claimant's assertions that he was discriminated on account of his disability.
14. RW1 further told Court that through his letter dated 6<sup>th</sup> June, 2016, the claimant requested to proceed on early retirement and the respondent could not decline his request. That he was advised of the dues owing to him and the required procedures thereafter. That the claimant proceeded to do his clearance on 8<sup>th</sup> June, 2016 and thereafter, respondent dispensed with its contractual obligation by paying him



his final dues. That he was also issued with a certificate of service. Concluding her testimony, RW1 asked the Court to dismiss the claim with costs.

### Submissions

15. It was submitted on behalf of the claimant that his constitutional rights under Articles 27, 28 and 54 of the *Constitution*, were violated as he was caused to retire on medical grounds without taking into account the possibility of reasonable accommodation and section 15(6) of the *Persons with Disabilities Act*. To buttress this position, the claimant cited the case of *Anthony Kipkorir Sang vs Attorney General* (2014) eKLR and *Juliet Mwongeli Muema vs Smolian Kenya Limited* (2019) eKLR.
16. It was further submitted that the respondent's failure to provide the claimant with lighter duties leading to his subsequent injury thus the decision to retire him early on medical grounds, was unfair and unlawful.
17. At the time of writing this decision, the respondent's submissions were not on the Court's physical record and were not traceable on the online platform. I therefore presume that the same were not filed.

### Analysis and Determination

18. Having considered the claim before Court, the evidence and the submissions on record, the following issues stand out for determination:
  - i. Was the claimant forced by the respondent to take early retirement?
  - ii. Whether the respondent breached the employment contract
  - iii. Is the claimant entitled to the reliefs sought?

#### Was the claimant forced by the respondent to take early retirement?

19. The claimant has alleged that he was forced to proceed on early retirement on account of the respondent's failure to assign him light duties. On record is a letter dated 6<sup>th</sup> June, 2016 from the claimant to the respondent's country human resource director. It reads thus:

“RE:Recommendation from Prof. Gakuu

I refer to our discussion on the letter from Prof. Gakuu which indicates that I have sustained permanent injuries over the years I have worked here.

I am left with no option than to follow the Doctor's recommendation for early retirement.

Please process all my benefit and compensation arising from this unfortunate turn of events.

Yours faithfully,

Stephen Kariuki Waithaka

SAP No. 7360.”

20. It is apparent that the claimant's application for early retirement was triggered by the medical report dated 12<sup>th</sup> May, 2016, from Prof Gakuu addressed to the respondent in which he advises as follows:

“HUMAN RESOURCE MANAGER

NAIROBI BOTTLERS LTD

RE: STEPHENE (sic) KARIUKI WAITHAKA (MALE 47 YEARS)



The above has been treated since 08/02/2016 with a painful right shoulder. He says that this is due to heavy manual work of lifting and pulling of heavy objects at work for the last 26 years.

Clinically, he had a painful left shoulder with reduction in the range of joint movement.

MRI done o 08/02/2016 confirmed a full thickness tear of the supraspinatus tendon. He was taken to the theatre for surgical reconstruction on 15/02/2016.

Currently he has pain on both shoulders and thus inability to continue with the work of pulling and lifting heavy objects at work. The right shoulder had operation on 2012 for the same problems. He is advised to take an early retirement on medical grounds.

Prof. L. GAKUU, EBS

ORTHOPAEDIC AND TRAUMA SURGEON”

21. The claimant’s application to retire early was accepted by the respondent through the letter dated 7<sup>th</sup> June, 2016, which reads as follows:

“Dear Stephen,

REF: REQUEST FOR RETIREMENT ON MEDICAL GROUNDS

We refer to your application for retirement on medical grounds letter dated 6<sup>th</sup> June, 2016 and write to inform your request has been accepted. Therefore, your last day of service will be 7<sup>th</sup> June, 2016.

After you return all company property in your possession, you will be paid as follows:

1. Salary up to 7<sup>th</sup> June, 2016
2. Outstanding leave as at 7<sup>th</sup> June, 2016
3. Thee (3) month’s salary in lieu of notice
4. Ex-Gratia Baggage Allowance of KShs.50,000/-
5. Provident/Retirement Fund dues in accordance with the rules in place.

Please note that the above amounts are subject to taxation where applicable.

You are requested to hand over all company property in your possession, and sigh off the attached clearance form, after which your dues will be processed. All your dues will be paid net of all statutory deductions, amounts owed to the organization and/or the Co-operative Society.

We sincerely thank you for the services you have rendered to the company. We wish you success in your future endeavours.

Yours faithfully,

Sammy Lugado

HRBP – Manufacturing and Support Functions.”

22. At the outset, it is worth noting that the claimant has not disputed tendering the application for early retirement. Further, the claimant did not indicate in his memorandum of claim, let alone, suggest that he was forced to tender the application for early retirement by the respondent. It is also instructive to



- note that the recommendation for early retirement emanated from the claimant's doctor and was very explicit to the effect that it recommended his retirement on medical grounds.
23. As a matter of fact, the claimant gave the basis for his early retirement as being the doctor's recommendation. He stated thus: "I am left with no option than to follow the Doctor's recommendation for early retirement."
  24. A plain reading of the claimant's letter of 6<sup>th</sup> June, 2016, clearly indicates that his intention was to retire early from employment on medical grounds. As a result, his request to proceed for early retirement on medical grounds, was acknowledged and accepted by the respondent's country human resource manager.
  25. Coupled with the foregoing, the Court was not shown any evidence that the early retirement was provoked by the respondent.
  26. In the event the claimant did not wish to retire as per the doctor's recommendation, he may have as well kept the letter to himself. He presented the medical report to the respondent and followed up the same with his application to proceed on early retirement, which was accepted. Indeed, the claimant has not told the Court what he would have expected the respondent to do, having received his application for early retirement and upon noting the doctor's recommendation.
  27. It actually defeats logic why the claimant would present the application for his early retirement and the medical report recommending as much to the respondent, then come to challenge the consequences thereafter.
  28. I must add that in the event the doctor had recommended that the claimant be assigned lighter duties, but ended up being forced to retire early on medical grounds, then the respondent would have been faulted and the Court would have arrived at a different finding. In this case, and as I have stated, the doctor's recommendation was very explicit and did not recommend lighter duties.
  29. In light of the foregoing, I cannot help but find that the claimant has failed to demonstrate to this Court on a balance of probabilities that the respondent forced him to proceed on early retirement.

#### **Whether the respondent breached the employment contract**

30. The claimant has alleged that the respondent breached the employment contract by failing to assign him lighter duties, discriminating him on the basis of disability, failing to fairly remunerate him and prohibiting him from joining the Kenya Union of Commercial Food and Allied Workers Union. The claimant therefore bears the burden of proving the alleged breach as pleaded in his claim, on a balance of probabilities.
31. The question as to what amounts to proof on a balance of probability was determined by Kimaru, J in the case of *William Kabogo Gitau vs George Thuo & 2 Others* [2010] 1 KLR 526, thus:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."
32. This position is also premised on the age long principle of law of "he who alleges must prove" and section 107 of the *Evidence Act*.



33. In the instant case, the claimant did not demonstrate the manner in which the respondent committed the alleged breaches. Case in point, he alleged that the respondent failed to assign him lighter duties. The onus was on the claimant to bring to the respondent's attention the doctor's recommendation on lighter duties. To the contrary, he failed to provide evidence to prove that he forwarded the doctor's recommendation for assignment of lighter duties and the respondent failed to comply as appropriate. As a matter of fact, the claimant did not exhibit any evidence in the form of correspondence to the respondent, requesting to be assigned lighter duties.
34. The claimant further failed to prove that the respondent discriminated him on grounds of disability. As per the Black's Law Dictionary, (10<sup>th</sup> Edition), the term "discrimination" is defined to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
35. In this case, the claimant did not demonstrate the manner in which the respondent treated him differently and less favourably, on account of his disability.
36. On the same note, the claimant did not prove how the respondent failed to remunerate him fairly. Indeed, he failed to inform the Court the remuneration he was entitled to or rather, what he expected to earn. In this regard, he did not prove, let alone suggest that the remuneration he was earning was lower compared to what he was entitled to or what was payable to other employees serving in the same cadre as himself.
37. The claimant has further alleged that he was prohibited from joining the union. Again, this was not proved. Besides his assertion, there was no further evidence in support of the allegation of breach of the employment to that effect.
38. As I have stated before, the claimant had the onus to prove his case on a balance of probability but he failed to do so, given that his allegations of breach of contract was not supported by any evidence. Therefore, his claim to that extent collapses.

### **Orders**

39. The upshot of the foregoing is that the claimant has failed to prove his case on a balance of probability hence the claim is dismissed in its entirety, with an order that each party bears its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Ms. Njeri Ngunjiri

For the Respondent Ms. Mulongo

Court assistant Abdimalik Hussein

**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 had 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.

**STELLA RUTTO**

**JUDGE**

