



**Mwita v Crown Hotels Limited (Cause 224 of 2017)
[2022] KEELRC 12870 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 224 OF 2017
AK NZEI, J
OCTOBER 13, 2022**

BETWEEN

NICHOLAS WAMBURA MWITA CLAIMANT

AND

CROWN HOTELS LIMITED RESPONDENT

JUDGMENT

1. The claimant sued the respondent vide a memorandum of claim dated March 22, 2017 and filed in this Court on March 23, 2017 and pleaded as follows:-
 - a. That on October 1, 1996, the claimant was employed by the respondent as an accounts clerk until September 2, 2016 when he was unlawfully send on retirement at the age of 48 years, without just cause and without adherence to due process.
 - b. That the forced retirement was illegal, not based on any proven facts and was against the principles of natural justice.
 - c. That at the time of retirement, the claimant was a member of KUDHEIHA Union which had a collective bargain agreement negotiated on June 2, 2012, on whose terms the claimant wholly relied.
 - d. That the claimant was earning a gross salary of Ksh 42,000 at the time of retirement.
 - e. That the claimant was paid Ksh 210,000 as terminal benefits, which was lower than the claimant's lawful entitlement.
 - f. The claimant set out his claim against the respondent as follows:
 - i. Four months' salary in lieu of notice.....Ksh 168,000
 - ii. Public holidays Ksh 184,000



- iii. GratuityKsh 672,000
 - iv. Leave allowanceKsh 294,000
 - v. Damages for unlawful retirementKsh 504.000
 - vi. A declaration that retirement of the claimant from service was unfair, unjust and unconstitutional.
 - vii. Certificate of service.
 - viii. Costs of the suit and interest.
2. Along with the suit documents, the claimant filed his written witness statement dated March 22, 2017, which basically replicated the averments made in the memorandum of claim, and a list of documents dated the same date, listing some five documents. The listed documents included the claimant's letter of appointment dated October 1, 1996, a payslip for the month of October 2016, a copy of KUDHEIHA membership card (undated) and a demand letter dated January 25, 2017.
 3. On September 19, 2019, the claimant filed a supplementary list of documents dated September 17, 2019, listing copies of payment receipts to KEDHEIHA and a collective bargaining agreement. On November 4, 2019, the claimant filed a further list of documents dated October 25, 2019, listing a collective bargaining agreement and a certificate of registration thereof dated August 17, 2015.
 4. The respondent defended the claimant's suit vide a replying memorandum dated May 18, 2017 and pleaded:-
 - a. That the claimant's early retirement was voluntary and mutually agreed between the claimant and the respondent's managing director; and that the claimant was paid a seven months' salary compensation as negotiated arrangement between the parties.
 - b. That the claimant commenced employment with the respondent as an accounts clerk in October 1996, and was subsequently promoted to the position of personnel manager, a position he held until 2016 when he negotiated an early retirement with the respondent's managing director.
 - c. That at the time of retirement, the claimant held the position of the respondent's personnel manager and was earning a basic salary of Ksh 30,000.
 - d. That in late 2015 and early 2016, the respondent underwent an organizational restructuring due to the huge losses that the respondent was experiencing and that the affected employees were offered to choose either early retirement or termination in accordance with terms of contracts of employment.
 - e. That the responsibilities of the personnel manager were consolidated with those of the general manager, hence eliminating the position of the personnel manager held by the claimant; and that the process was undertaken in good faith.
 - f. That soon after the amalgamation of responsibilities of the general manager and personnel manager, the respondent's shareholders requested a meeting with the claimant and duly informed him of the position, and gave him the option of either accepting the changes and taking seven months' salary as retirement gratuity or his employment being terminated in accordance with his employment contract.
 - g. That the claimant took the first option and was immediately paid seven months' salary.



- h. That the claimant was not a unionisable employee at the time of his early retirement, as he was a personnel manager, and therefore not a member of KUDHEIHA.
 - i. That the claimant had exhausted all his annual leave days at the time of his early retirement; and that as the personnel manager, the claimant was responsible for leave approval, and was the custodian of approved leave forms.
 - j. that the claimant is not entitled to any remedy or declaration.
5. Along with the replying memorandum, the respondent filed documents which included documents signed by the claimant in his capacity as the respondent's personnel manager, signed during the years 2006, 2011 and 2015.
6. The respondent filed a further list of documents and a witness statement on November 10, 2017. A further list of documents was filed by the respondent on March 12, 2020.
7. When the trial opened on April 8, 2019, the claimant adopted his filed witness statement as his testimony. He further testified:-
 - a. That he was employed on October 1, 1996 and worked until September 2, 2016, and was earning Ksh 42,000.
 - b. That on September 1, 2016, the respondent's Managing Director, Azim, send him an SMS to go to Nairobi and that when the claimant got to Nairobi, the Managing Director told him to hand over and to go away, and that he handed over through the month of September and was paid Ksh 210,000, the breakdown whereof he was not given.
 - c. That the claimant was not called for any meeting on early retirement but was just told to hand over.
 - d. That the claimant did not get any notice of retrenchment, and that he was a member of KUDHEIHA.
 - e. The claimant produced in evidence the documents referred to in paragraphs 2 and 3 of this judgment.
 - f. Cross-examined, the claimant testified that he started signing documents as a personnel manager in 1998, approved leave, and kept personnel data. That he took leave until the year 2005.
 - g. That the claimant was asking for leave pay but not leave allowance; and public holidays for ten years from 2006 to 2016. The claimant also sought to be paid gratuity as per the CBA, which he stated that he had not filed.
8. The respondent called one witness, John Dennis Gwaro (RW-1) who adopted his witness statement dated November 10, 2017 as his testimony. He further produced in evidence the documents referred to in paragraphs 5 and 6 of this judgment. The witness further testified that the respondent's policy was that all leave days had to be taken in the same year and public holidays (paid) in the same month.
9. Cross examined, RW-1 testified that the claimant was promoted to the post of Personnel Manager in the year 2006, and that the general manager wrote him a letter (dated August 19, 2006) in that regard, which the witness produced in evidence. The witness further testified:-
 - a. That no letter was written to the claimant informing him of restructuring of the respondent company. That he was only given a call and fare to travel to Nairobi.



- b. That there were no minutes of any meeting between the claimant and the respondent's shareholders.
 - c. That there was no written evidence that the claimant agreed to take the option of early retirement.
 - d. That the claimant wrote a payment voucher which the respondent produced in evidence, and that the claimant himself had put the same in his file.
 - e. That the claimant received a cheque for Ksh 164,5154 (after deductions) and banked it.
10. Based on the pleadings filed by the parties and evidence adduced in court, issues that fall for determination are as follows:-
- a. Whether termination of the claimant's employment was unfair.
 - b. Whether the claimant is entitled to the reliefs sought.
11. On the first issue, it is clear from the evidence on record that the claimant was never notified of the respondent's intention to terminate his employment in whatever manner. The reasons for such intention were never disclosed to the claimant before hand, and the claimant was not given an opportunity to be heard before his employment could be terminated.
12. Section 41 of the *Employment Act* sets out mandatory procedural steps that must be undertaken by any employer contemplating termination of an employee's employment. The section states as follows in mandatory terms:-
- “(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.
 - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
13. It was held as follows in the case of *Walter Ogal Anuro -vs- Teachers Service Commission* [2013] eKLR:-
- “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
14. The Court of Appeal held as follows in the case of *CMC Aviation Limited -vs- Mohammed Noor* [2015] eKLR:-
- “In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the *Employment Act*. In Kenya Union Of Commercial Food



And Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui –vs –kenya Pipeline Company Limited [2014] eKLR”

15. Termination of the claimant’s employment by the respondent, regardless of the term or description assigned to such termination by the respondent, fails both procedural and substantive test. The respondent:-
 - a. Did not present any evidence of compliance with the mandatory procedural requirements set out in Section 41 of the *Employment Act*.
 - b. Did not present any evidence of negotiations and agreement between the respondent and the claimant on any proposed early retirement and compensation payable thereon.
 - c. The respondent’s managing director, whom the respondent’s witness (RW-1) alleged held a meeting with the claimant after restructuring of the respondent company, never testified.
 - d. The respondent did not present any evidence of a letter inviting the claimant or any other employee of the respondent to take early retirement.
 - e. No evidence was adduced on the alleged losses on the part of the respondent, which necessitated termination of the claimant’s employment through alleged early retirement.
 - f. No evidence was presented to support alleged merger of managerial positions in the respondent company.
 - g. The claimant was not given an opportunity to be heard before termination of his employment.
16. I find, hold and declare that termination of the claimant’s employment by way of purported early retirement was procedurally and substantively unfair.
17. Before addressing the second issue of reliefs sought by the claimant, I must address the issue of the claimant’s gross salary at the time of termination. The Claimant exhibited his payslip for October 2016 whereon his basic pay is indicated as Ksh 30,000 and house allowance of ksh. 12,000. The Claimant’s gross monthly salary was therefore Ksh 42,000 as pleaded by him.
18. On the claim for damages/compensation for unfair termination of employment, I award the claimant the equivalent of nine months’ salary, which is $Ksh\ 42,000 \times 9 = 378,000$. The claimant pleaded to having been paid Ksh 210,000 upon termination, which I deduct from the sum awarded, leaving a balance of Ksh 168,000 under this heading.
19. The prayer for four months salary in lieu of notice is declined, and the claimant is awarded two months’ salary in lieu of notice pursuant to the terms of his contract of employment, which is Ksh 84,000.
20. The prayer for payment on public holidays worked during the period of employment is declined. The claimant did not give particulars of the public holidays allegedly worked, during which years of employment and amounts payable for each, as such payments may change from year to year depending on the minimum wage guidelines applicable during any specific period of time. Unpaid earnings are in the nature of special damages and must be specifically pleaded and proved on a balance of probability. The burden of proving such earnings is on the employee, not the employer.



21. On the claim for leave payment, the claimant testified that he used to take leave until the year 2005. That he did not take leave from that date. This evidence was not controverted or rebutted as the respondent, which was the custodian of all employment records relating to the claimant pursuant to section 74(f), did not produce in court documents indicating otherwise.
22. Failure by the respondent to pay the claimant for accrued leave days over the years of employment amounted to continuing injury as contemplated in section 90 of the *Employment Act*, which ceased upon termination of employment. The claimant prayed for payment on leave days accrued during a period of seven years. I award him twenty six (26) days' salary for each completed year of service, in accordance with his contract of employment for a period of seven years, which is Ksh 254,800.
23. The claim for gratuity is declined as termination of the claimant's employment was not on account of redundancy.
24. For record purposes, I am satisfied that the respondent demonstrated that the claimant, being a personnel manager, was not a unionisable employee of the respondent. Calculation of his dues cannot, therefore, be based on an alleged collective bargaining agreement between the respondent and KUDHEIHA.
25. In sum, and having considered submissions filed by counsel for both parties, judgment is hereby entered for the claimant against the respondent for:-
 - a. Compensation for unfair termination of employmentKsh 168,000
 - b. Two months' salary in lieu of noticeksh 84,000
 - c. Payment for accrued leave daysKsh 254,000
Ksh 506,000
26. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
27. The respondent shall issue the claimant with a certificate of service pursuant to section 51(1) of the *Employment Act* within 30 days of this judgment.
28. The claimant is awarded costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Jumbale for Claimant

Mr. Muliro for Respondent

