



**Ouma v Synergy Industrial Credit Limited (Cause 1752 of 2017)
[2022] KEELRC 13189 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1752 OF 2017
SC RUTTO, J
NOVEMBER 11, 2022**

BETWEEN

FRANCIS WABWIRE OUMA CLAIMANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED RESPONDENT

JUDGMENT

1. It is the claimant's case that he was forced to retire from employment through a letter dated March 31, 2017, issued to him by the respondent. The claimant attributes the issuance of the said letter to an industrial accident which he alleges to have resulted in severe and life threatening injuries on his part. On this account, the claimant avers that his dismissal by the respondent was disguised as retirement. It is on this account that the claimant claims against the respondent, one month's salary in lieu of notice, service pay/gratuity for 26 years as well as compensatory damages.
2. The claim was contested *vide* the respondent's statement of defence which was filed on January 10, 2017, through which it avers that it has been wrongly sued as it never engaged the claimant as an employee. Putting the claimant to strict proof, the respondent denied the existence of any employment contract with him. The respondent further averred that the only nexus between itself and the claimant is his employment by a senior member of its staff. Consequently, the respondent has asked the court to dismiss the suit on grounds of being vexatious and an abuse of the court process.
3. The matter went to trial on June 16, 2022 and each side called one witness.

Claimant's Case

4. The claimant testified as CW1 and at the start of the hearing, proceeded to adopt his witness statement to constitute his evidence in chief. He further produced the bundle of documents filed together with his claim as his exhibits before court.



5. It was the claimant's testimony he was employed by the respondent in the month of August, 1991, as a security guard/general labourer. That he was not issued with any document to evidence the employment relationship. That he worked continuously and to the satisfaction of the respondent.
6. He further stated before court that on or about August 11, 2016 while in the course of his duties and service to the respondent, he was involved in an industrial accident resulting in severe and life threatening injuries. That following his injures, the respondent's manager forcefully retired him from employment through a letter dated March 31, 2017. He was categorical that he never requested to proceed on retirement and denied ever engaging the respondent on the issue. That at the time he was forced to retire, he was 53 years old and was able to continue working for the respondent. According to the claimant, the respondent may have thought that he was not in a position to continue working following his accident, hence his forced retirement.
7. It was his further testimony that his dismissal from employment was disguised as retirement which he regarded as unfair. That he had done nothing wrong to warrant dismissal and was not issued with a notice prior to the same. He further stated that his dismissal was malicious as he had not attained the retirement age. That he was only dismissed because he sustained injuries in the course of employment.
8. With regards to the letter of retirement dated March 31, 2017, he testified that he was asked to sign the same so as to enable him receive payment while his boss was away. That he was never informed that the document was in respect of his final dues and that he only came to realize later, that he had been terminated from employment.
9. It was his further evidence that upon realizing that he had been terminated from employment through the letter of March 31, 2017, he tried to talk to the person who had given him the money, and who in turn, advised him to wait for his boss to return.
10. Summing up his testimony, the claimant asked the court to allow his claim as prayed.

Respondent's Case

11. The respondent's legal officer, by the name Mr Jacob Meeme, testified as RW1. Similarly, he sought to adopt his witness statement, to constitute his evidence in chief. He further proceeded to produce the bundle of documents filed on behalf of the respondent as exhibits before court.
12. It was RW1's testimony that he came to know the claimant as an employee of the respondent's member of staff on or about the month of March, 2017. That when he was introduced to the claimant, the respondent's member of staff who was then out of the country, called and informed him that the claimant had been his casual employee for over 25 years and had been consistently requesting to go on retirement and hence was seeking his advice on his options.
13. That therefore, the claimant had never been employed by the respondent and it was not aware of the specific terms and conditions of his contract of employment. That all the respondent's employees are normally issued with employment contracts and identity cards for purpose of accessing its offices.
14. It was RW1's further testimony that the claimant had no formal contract and employee's identity card and had to obtain a pass to access the respondent's premises. That in addition, the claimant's dues were calculated from 1991 whereas the respondent was incorporated in 2004.
15. He further told court that the claimant visited the respondent's offices on April 1, 2017, to discuss his retirement benefits with his employer who is the respondent's member of staff. The said member of staff was, however, out of the country for a prolonged period of time and as such, left instructions with the respondent's legal officers to negotiate the claimant's retirement package.



16. That the said staff member thereafter requested the respondent to assist and facilitate the retirement by drafting the retirement letter and thereafter make payment, which he would reimburse at a later date.
17. That the claimant's gratuity and or retirement package was discussed, explained and agreed upon, and he was paid by the respondent a sum of Kshs 250,000.00 on behalf of his employer. That the money paid to the claimant was his gratuity and or retirement package for the years served with his employer.
18. That the claimant's employer has no knowledge of legal matters hence the reason he entrusted the respondent's legal officer to undertake the task.

Submissions

19. The claimant submitted that he was engaged by the respondent and that the letter dated March 31, 2017 does not indicate that he was being retired on behalf of its senior member of staff who was away. It was the claimant's further submission that he did not sign the discharge voucher voluntarily and that he did not have full knowledge of all the material information and the import of the document he was issued to sign. To support his argument, the claimant cited the cases of *Thomas De La Rue v David Opondo Omutelema* (2013) eKLR and *Coastal Bottlers Limited v Kimathi Mithika* (2018) eKLR.
20. It was further submitted by the claimant that it was upon the respondent to prove that it had reasons to justify his termination. The claimant further urged that he was never informed of the reason for his dismissal. To buttress this submission, the claimant asked the court to consider the decision in the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR.
21. The respondent did not file written submissions as the same were not on the physical court record and could not be traced on the online platform.

Analysis and Determination

22. Having considered the pleadings before court, the documentary and oral evidence by both parties as well as the submissions on record, the issues falling for the court's determination can be distilled as follows:
 - i. Whether the claimant was an employee of the respondent.
 - ii. Whether the claimant was forced into retirement hence unlawfully and unfairly terminated from employment.
 - iii. What reliefs if any, avail to the claimant?
 - iv. Whether the claimant was an employee of the respondent.
23. The claimant has averred that he was an employee of the respondent from August, 1991. He averred that he was not issued with an employment contract or such other document to evidence the employment relationship.
24. On the other hand, the respondent has disputed the existence of an employment relationship and averred that the claimant was employed by one of its senior members of staff.
25. In determining this issue, I find the claimant's letter of retirement dated March 31, 2017 to be significant and I will reproduce the same in part:

“We refer to the above subject and your request for retirement in our various meetings regarding your retirement.....We appreciate your services for the time you have worked with



us and therefore we are paying your dues (sic) August 1991 to December, 2016.....By a copy of this letter you are hereby advised that your last day of retirement shall be on March 31, 2017 and we take this opportunity to thank you for your enduring loyalty and service during your employment.

Yours faithfully,

Synergy Industrial Credit Limited”

26. My literal interpretation of the said letter, is that there was an implied employment relationship between the claimant and the respondent. Indeed, the letter leaves no room for doubt as regards the existence of the employment relationship. Further, there is no indication in the said letter that the respondent was acting at the behest of another “employer”. If this was the case, then why wasn’t the same expressly stated in the letter?
27. It also bears to note that the said letter of retirement is on the respondent’s letter head and has been signed by one Priti Gadher, who signs off as the respondent’s Financial Controller.
28. In light of the foregoing circumstances, why would there be doubt as regards the employment relationship between the claimant and the respondent?
29. In addition, despite RW1 stating before court that the claimant’s terminal dues were calculated from 1991, which period was before the incorporation of the respondent, there was no evidence to back up this assertion, for instance its certificate of incorporation.
30. The respondent having alleged that the claimant was not its employee and in light of the contents of the letter of retirement, it was bound to adduce more evidence to prove the contrary, but it failed to do so.
31. In the premises, I am inclined to find that the claimant was an employee of the respondent.
Whether the claimant was forced into retirement hence unlawfully and unfairly terminated from employment
32. The claimant has alleged that he was forced into retirement by the respondent through the letter dated March 31, 2017. The claimant further stated that he was illiterate and did not understand the contents of the said letter or the import of what he was affixing his thumb to.
33. The impugned letter which is dated March 31, 2017 is couched as follows:

“Retirement Letter

We refer to the above subject and your request for retirement in our various meetings regarding your retirement.

1. We appreciate your services for the time you have worked with us and therefore we are paying your dues (sic) August 1991 to December, 2016.
2. Please find the enclosed cheque number 000281 dated March 31, 2017 of Kshs 250,000 being full and final settlement of your dues.
3. By a copy of this letter you are hereby advised that your last day of retirement shall be on March 31, 2017 and we take this opportunity to thank you for your enduring loyalty and service during your employment.

Thank you and we wish you the best in all your future endeavours.

Yours faithfully,



Priti Gadher

Finance controller

I (claimant's name) of ID No**31 confirm that I have clearly read and understood the contents of this retirement letter and I have accepted this letter and cheque without any duress or coercion and have no recourse against you in regards to my retirement.

Signature.....

Date.....”

34. It is worth noting that the claimant has not denied affixing his thumb print on the letter. What he has denied knowledge of, is the contents of and import of the said letter. Essentially, the claimant states that he was not aware that he was signing his way into retirement by affixing his thumb print on the letter.
35. RW1 testified that the claimant was retired upon his request and his discussions to that effect with a senior member of staff in the respondent company. He further testified in cross examination that the claimant visited the respondent's offices on April 1, 2017, to sign the letter of retirement and collect his dues. That further, he explained to the claimant the nature of the document he was signing.
36. It is notable that the claimant affixed his thumb print on the retirement letter in the presence of a person by the name Patrick Dasia. Two things stand out. First, it is notable that the claimant did not deny knowing the said person. Second, the visitor's pass exhibited by the respondent indicates that the claimant visited its premises in the company of the said Patrick Dasia.
37. Therefore, it is evident that the claimant was accompanied when he presented himself at the respondent's offices to collect his dues. Indeed, one wonders if the said Patrick Dasia who witnessed the claimant affix his thumb print, explained to him the nature and import of the retirement letter. Afterall, there was no suggestion or indication that the said Patrick Dasia was illiterate as well.
38. As I suppose, one of the reasons the said Patrick Dasia accompanied the claimant, was to assist him surmount the hurdles associated with reading and writing. As a matter of fact, the said Patrick Dasia signed off on the copy of the cheque and on the letter of retirement signifying his acknowledgment of its contents and the payment received by the claimant.
39. Besides, why didn't the claimant call Patrick Dasia who was present when he was affixing his thumb print on the letter, to adduce oral evidence before Court and indeed, confirm that he did so against his will and had no knowledge of what he was consenting to.
40. By disowning the contents of the said retirement letter, the claimant is in essence alleging that he was coerced to sign the same. Be that as it may, the claimant has not provided better particulars of the said coercion.
41. In the case of *Wenslaus Oduki Odinga v Kenyatta National Hospital Board* [2013] eKLR, the court determined as follows:

“Apart from the general claim of duress, the claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the respondent had a substantive justification for terminating the claimant's employment.”



42. Still on the same issue, the court reckoned as follows in *Hussein t/a MN Transporters v Agro-Chemical & Food Company Ltd* [2002] eKLR:

“But as observed above the plaintiff has no pleading with particulars of duress or such other aspect that can vitiate a contract/agreement of this nature.”

43. As stated herein, the claimant did not furnish the particulars constituting the alleged duress hence his assertion to that extent remains unsubstantiated.

44. In addition, it is instructive to note that subsequent to signing the retirement letter, the claimant collected the cheque in the sum of Kshs 250,000.00 from the respondent.

45. It was his testimony that at the time he exited the respondent’s employment, he was earning a monthly salary of Kshs 20,000.00. What this translates to is that the payment received by the claimant was almost 13 times more than his monthly salary. Thus, one wonders whether the claimant while receiving the cheque, paused to question what the payment was all about, seeing that it was way above his monthly salary?

46. Even if it were true that the claimant only realized later that he had been duped into accepting retirement involuntarily, why did he not return the cheque to the respondent?

47. As I see it, the claimant wants to have his cake and eat it too since he wants to impugn the retirement letter dated March 31, 2017 and at the same time retain the benefits accruing from the same, being the payment of Kshs 250,000.00.

48. In light of the foregoing, I am not persuaded that the claimant has proved on a balance of probability, that he was forcefully retired from employment hence unfairly and unlawfully terminated.

49. In view of the findings by the court, the claimant is not entitled to the remedies sought.

Orders

50. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Alividsa

For the Respondent Mr. Otieno

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 15th March 2020 and subsequent directions of 21st 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

