



**Rucha v Kenya Ports Authority (Cause 88 of 2019)
[2022] KEELRC 13069 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13069 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 88 OF 2019
B ONGAYA, J
NOVEMBER 4, 2022
(FORMERLY HCCC NO. 231 OF 1999 AT MOMBASA)**

BETWEEN

MERCY RUCHA CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The suit has been pending in the courts' system for over 20 years. It is unfortunate but it has finally been heard. The claimant initiated the suit by way of the plaint filed on May 21, 1999 through Khaminwa & Khaminwa Advocates. The respondent entered appearance on June 2, 1999 through George Dulu Advocate. The respondent filed a statement of defence on June 1, 1999. The claimant filed a reply to the defence on June 16, 1999. On October 16, 2019 orders were made transferring the suit from the High Court to this court. The claimant changed her advocates to Gikandi & Company Advocates and was granted leave to file and serve an amended amended plaint which was filed on April 27, 2022. On July 5, 2022 the claimant filed a notice of change of advocates to Mutisya Mwanzia & Ondeng Advocates. The parties recorded in a consent order on July 6, 2022 to file further amended pleadings together with lists and copies of documents and, witness statements in bundles to be relied upon at the hearing. The claimant filed the bundle of further amended amended plaint on July 18, 2022. The respondent filed the further amended statement of defence on July 25, 2022 through Madzayo Mrima & Jadi Advocates. At the hearing on July 27, 2022 the parties recorded a consent order thus, "(1) By consent documents filed for parties are deemed duly produced as filed and admitted in evidence accordingly. (2) Parties to rely on bundles filed July 18, 2022 and July 25, 2022 respectively."
2. The claimant testified to support his case. The respondent's witness (RW) was Samuel Mnashi, the Senior Human Resource Officer.



3. The court has considered the pleaded facts and the evidence on the background of the case. These appear to be as follow:
- a. The respondent employed the claimant since May 21, 1984 per the letter of appointment dated May 29, 1984. She was promoted over the period of service. By the letter dated September 29, 1993 her service was translated to grade PA10 (supernumerary) effective July 1, 1992.
 - b. In 1996 reports were made to the respondent by the Head of Security Services and the Head of Internal Audit that some employees of the respondent were involved in fraudulent payments of Kshs 3.1 million duty travel allowance for journeys that were never made and the respondent's management constituted a disciplinary committee of inquiry to carry out further investigations in the matter and made recommendations upon which action was to be taken. Initial report implicated 10 employees who were interdicted from duty pending further investigations. The subsequent investigations implicated more employees including the claimant and bringing the number of the implicated employees to 27.
 - c. The case against the claimant was as follows. She was granted an official duty travel with other employees to Kisumu to represent the finance department at the funeral of a deceased employee by the name Susan Ogwen. She did not however travel despite the fact that she was paid an advance duty travel allowance of Kshs 8, 000.00 and she later made a final claim of Kshs 2, 740.00 amounting to Kshs 10, 740.00 paid to her which included Kshs 6, 000.00 return 2nd class rail fare to Kisumu. To support her purported travel to Kisumu she presented Kenya Railway certificate Ref No SM 64 112/2470/95 dated June 21, 1995 for a 2nd class ticket No 5210. The ticket looked suspicious. Investigations showed that the Kenya Railways (Mombasa) confirmed the certificate was fake so that the claimant had justified the payment upon fake certificates. Thus the disciplinary inquiry committee recommended the claimant be interdicted because she had failed to show that she had actually travelled to Kisumu. She was interdicted by the letter dated December 11, 1996. She was asked to show cause why she should not be dismissed from the respondent's service. She requested for a personal hearing and she was heard on March 27, 1997. It was decided she be dismissed from the service effective December 15, 1997 together with those who had a hand in processing her fraudulent travel documents.
 - d. On December 16, 1997 the then Coast Provincial Commissioner one TK Sirma wrote a letter Ref No COR 4/A vol 11/78 to the then Managing Director of the respondent one L Mwangola appealing for the reinstatement of the claimant. The Managing Director replied by explaining that the dismissal was just and fair. It appears the respondent's case was that the action to seek the intervention as was done breached the respondent's staff regulation 1992 prohibiting staff from seeking intervention of a person outside the respondent's service (including Ministers and Members of Parliament) in any matters affecting employment with the respondent.
 - e. The claimant has exhibited a letter dated December 31, 1997 by TK Sirima, Provincial Commissioner Ref No SF/ST/41/201 marked "confidential" addressed to the respondent's Managing Director titled "dismissal" and stating, "I wish to acknowledge receipt of your letter ref No MPE/D/69/CON dated December 18, 1997 which was written to us on the above subject. During His Excellency's visit to Coast Province, Mercy Rucha managed to meet His Excellency the President and he directed that she be reinstated. Please do the needful." Thus she was reinstated by the Managing Director's letter of January 27, 1998 titled "reinstatement" and stating thus, "Further to my letter of similar reference dated December 15, 1997 and



your recent appeal against dismissal, this is to inform you that the Authority has decided to give you the benefit of doubt and reinstate you with immediate effect. Please note that this Authority will not hesitate to take appropriate disciplinary action against you in the event of any misconduct or disregard for terms and conditions governing your contract of employment with this Authority.”

- f. At the same time, claimant was a member of the Dock Workers Union. On December 20, 1997 the Secretary General of the Union appealed against the management’s decision to dismiss the claimant from the respondent’s service. On January 19, 1998 the Personnel Manager addressed a memo to the respondent’s Managing Director about the appeal. The Managing Director endorsed on the memo remarks to the Personnel Manager to act as had been discussed that morning and the Managing Director duly signed the remarks on January 27, 1998. Consequently, the claimant was reinstated in the respondent’s service with immediate effect on January 27, 1998.
- g. On January 15, 1999 the respondent’s Board met and resolved, “Disciplinary cases arising from fraudulent paid allowances relating to duty travel, motor mileage, cash imprest and out of pocket; That the services of all the employees involved, including Mercy Rucha, should be terminated and they should be paid their terminal benefits. The letters of termination should be approved by office of the Attorney General.” By the letter dated January 28, 1998 the respondent conveyed to the claimant the Board’s decision that she retires in the public interest with immediate effect. The letter stated she would be paid a month’s salary in lieu of notice plus any other terminal dues less debts owed the respondent it further stated, “If you are in occupation of a KPA quarter, you are hereby given three months’ notice to vacate the same. She was to acknowledge the receipt of the letter by signing the duplicate copy provided.
- h. By the letter dated March 31, 1999 the claimant appealed to the Chairman of the Board against the retirement in public interest. She stated that the letter to retire in public interest dated January 28, 1999 had been received by her on March 31, 1999. It was her case that without fresh charges against her, the Board of Directors had erred in terminating her services. The respondent issued its letter dated November 12, 1999 now referring to the claimant’s appeal dated October 25, 1999 against the retirement and upholding the retirement as conveyed in the letter dated January 28, 1999.
- i. The claimant again appealed to the respondent’s Managing Director against the retirement in the public interest by her letter dated March 7, 2003. The Board’s position was that allowing the reinstatement to stand would be unjust because other implicated officers had been retired in public interest.
- j. The Dock Workers Union appears to have filed a dispute in the matter by a letter dated April 7, 2014. The Cabinet Secretary for Labour appointed a conciliator. The conciliator’s report is dated April 30, 2014. The report shows that the union and the respondent filed memoranda and a meeting fixed for April 24, 2014 at 3.00pm but which was not attended by both parties. The conciliator considered the memoranda and found that since the reinstatement was not under any condition relating to the alleged fraud that had led to the prior dismissal, then the matter of alleged fraud stood closed and it was in bad faith to use the alleged fraud to act against the claimant as it was unfair, anti-social and unjustifiable. The conciliator J, Nyaga concluded, “In this case, the Management reviewed a matter that had been concluded and acted on the same to the disadvantage of the lady. I do note that she is not said to have had any wrong after the reinstatement. However, I have noted that she had been found to have grossly misconducted herself earlier leading to the dismissal from service.” The Conciliator



then proceeded to make his recommendation thus, “I do recommend that Ms Mercy Rucha be paid four (4) months compensation for unfair termination of her service.” The claimant was paid per the recommendation a sum of Kshs 38,760.00 and she signed on December 16, 2015 and endorsed her ID No 0991700.

4. Against that background the claimant alleges as follows. The reinstatement amounted to a binding contract so that the ensuing retirement in the public interest amounted to unfair termination. It was unfair as it was based upon allegations she had already been dismissed and thereafter reinstated. As at termination she earned Kshs 16,637.95 per month per the payslip for January 1999 and in the position of Clerical Assistant grade PA-10 at pay point 18. As at 2019, the basic salary for pay point 18 was Kshs 59,240.00, house allowance Kshs 22,275 and mileage of Kshs 12,000.00. She served on permanent and pensionable terms and she was entitled to pension, gratuity or other allowances for the years served. She claimed pension be paid as calculated per salary subsisting at pay point 18 in 2019 when she would have attained retirement age. It is her case that the retirement in public interest at age of 39 was calculated to deny her the terminal dues. It is her case that the termination was unfair because the respondent failed to pay the terminal dues; she was not accorded a fair administrative procedure; an adopting inapplicable procedure. The claimant claimed for:
 - a. Aggravated and exemplary damages from the respondent on account of the unfair termination by way of retirement in the public interest.
 - b. Her monthly gross salary in April 2000 was Kshs 16,637.95 at age of 39 years. She had 21 years to serve prior to attaining the age of 60-years and claimed Kshs 4,192,763.4 being pay for the unexpired tenure of service. In alternative she prayed for a remedy to place her in a position she would have been had she not been terminated.
 - c. She lost opportunity to be promoted and she prayed to be compensated.
 - d. Interest on the amount awarded running from 1999.
 - e. Her full terminal dues be calculated and paid.
 - f. Costs of the suit.
5. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the retirement or termination of the claimant’s employment by the respondent was wrongful.
 - b. A declaration that the claimant’s eviction from the respondent’s house was wrongful and inhuman.
 - c. Aggravated and exemplary damages for unfair and wrongful termination, and, for forcible and inhumane eviction.
 - d. General damages for lost promotion opportunities.
 - e. A remedy in compensation that would have put the claimant in a good position as the claimant would have been had the respondent not unlawfully terminated the employment with the claimant.
 - f. Issuance of a certificate of service to the claimant.
 - g. Any further entitlement the court may deem fit to grant or that may be proved at the hearing of the cause hereof and which counsel for the claimant submits on his final filed submissions.



- h. Interest on monetary award from May 1999 when the suit was filed to the date of full payment.
 - i. The full terminal benefits be calculated by the respondent and she is paid the same as, she was employed on permanent and pensionable basis and, calculated at pay point 18 salary prevailing in 2019 when the claimant was due to retire at age of 60 years.
 - j. Costs of the suit.
6. In the further amended statement of defence the respondent has denied the claimant's claims and has pleaded as follows. While the claimant was dismissed, reinstated, retired in public interest, appeal rejected, and the union involved as the conciliator was appointed, the respondent duly complied with the respondent's recommendation to pay the claimant the 4-months' salaries in compensation for the unfair termination. Per the respondent's policy the claimant was given three months' notice to vacate from the housing accommodation provided for by the respondent and consequential to the retirement in the public interest. It was not possible that she continues to occupy the house whereas the contract of service upon whose basis she occupied the house had lapsed. On April 25, 2000 the claimant requested the respondent to extent her occupation of the house. In the meantime, her application before the court to continue occupying the house was dismissed by Waki J in a ruling delivered on September 21, 1999. The judge found that once the contract of service lapsed, the claimant had no basis to continue occupying the house provided by the respondent. The respondent pleaded that the claimant was on permanent and pensionable terms of service but that in itself did not mean she was to work for the respondent until attainment of 60 years of age. The issues of pension are governed by the [Retirement Benefits Act](#) No 3 of 1997 and the court lacks jurisdiction to entertain such matters.
7. The respondent prayed that the suit be dismissed with costs,
8. The court has considered the pleadings, the evidence and the final submissions on record. The court finds as follows.
9. To answer the 1st issue for determination the court returns that the parties were in a contract of service and there is no dispute in that regard as per the pleadings and evidence.
10. To answer the 2nd issue for determination the court returns that the claimant's contract of service was terminated by the letter of retirement in the public interest dated January 28, 1999.
11. To answer the 3rd issue for determination, the court finds that whereas the retirement in the public interest was unfair for want of due process and want of fresh allegations, if any, it appears that the issue was conclusively resolved by the conciliator. The respondent's case and submissions are upheld in that regard. It is submitted for the claimant that even after the conciliation process, the claimant was entitled to move the court. The submission invokes the holding in [Transport and Allied Workers union & another -versus- John Delfino Ntoruru](#) [2013] eKLR that once a matter is concluded either before a conciliator or the court, a grievant should not be allowed to resuscitate it unless the grievant demonstrates that he took issue in the course of the proceedings and was ignored or that the union and the employer have colluded to short change the grievant. It was further submitted for the claimant that the union and the respondent referred the dispute to a conciliator without the knowledge of the claimant. Further, the claimant was not involved in the conciliation process. For the respondent it was submitted that the dispute was reported by the union as a trade dispute for unfair dismissal of the claimant. The union wanted the claimant reinstated. The claimant was fully represented by the union. The conciliator considered both parties' cases and the recommendation was that the claimant be paid 4-months' salaries in compensation for the unfair termination. Subsequently the claimant was paid



and she freely accepted the payment by signing in acknowledgement. It was submitted that the holding by Rika J in *Janet Mwacha Mwaboli –versus- Modern Soap Factory Limited* [2009]eKLR applies thus,

- “14. Conciliation outcome, under the Labour Relations Act, 2007 ought, like a complaint under section 47 of the Employment Act, 2007 to be binding on the parties unless compelling reasons can be shown before the court, justifying interference with the findings and recommendations of the conciliator,”
12. The court has considered the submissions and the evidence. In the cited cases the principle is that an outcome by the conciliator applies as long as it is agreed between the union and the employer and will not so apply if it shown there exists collusion between the union and employer; the claimant’s objection during the conciliation is ignored; or, compelling reason for court’s interference is shown to exist. In the instant case, none of the justifications to interfere have been established. The claimant purports to say she was not involved or she lacked knowledge of the conciliation proceedings. However, her position in that regard cannot be trusted because she voluntarily signed for and accepted the payment of 4-months’ salaries per the conciliator’s recommendation. By doing so, the court finds that the conciliator’s recommendation amounted to a binding agreement between the union, the respondent, and the claimant, as the conclusive purge of the unfair termination by way of the impugned retirement in the public interest. It cannot be that she took the money and then retained the ambience to go back and continue alleging unfair termination in the present suit that was pending hearing and determination. It was open for her to reject the payment and insist that the matter proceeds in court but she failed to do so. The claimant testified thus, “I raise the issue of unfair retirement. I did not know if issue was the issue before the conciliator because I did not attend conciliation proceedings.” In re-examination, the claimant confirmed she received the pay for the 4-months’ salaries and it was separate from the pension lump-sum of Kshs 240,000.00 that she was equally paid. The evidence is that the claimant signed for receipt of Kshs 38,760.00 on December 16, 2015 and the narration is clearly stated as payment of 4-months’ salary compensation for Rucha 88516.
13. The court returns that while there was established unfair termination by way of the retirement in public interest as was urged for the claimant, the issue was resolved between the parties and conclusively so once the parties acted in accordance with the conciliator’s recommendation. All allegations, claims and prayers for payment based on that unfair termination are found unjustified on that account. They will collapse.
14. The 4th issue is whether there was unlawful eviction in the instant case that may warrant grant of general damages. It is urged for the claimant that she was forcefully and inhumanely evicted from the housing accommodation provided for by the respondent. The evidence is that the contract of service lapsed effective January 28, 1999, the date of the retirement in the public interest. On September 21, 1999 Waki J delivered the ruling in the suit finding that once the employment relationship lapsed, the claimant lost the housing accommodation as had been enjoyed per the terms and conditions of the contract of service. The court finds that in absence of a tenancy agreement as at the time the claimant was evicted, it cannot be said that the claimant was unlawfully evicted. The evidence is that as at the time of the eviction, the claimant was as good as a trespasser and the respondent appears to have relied on the common law self-help principle to remove her. Her case and evidence is that unreasonable force was invoked by the respondent to forcefully remove her. She testified thus, “I was unlawfully evicted from respondent’s quarters. It was in Easter of 2000. By 2000 I was not respondent’s employee.... I stated certain items were stolen. I have no inventory filed of the goods lost. They came at night. It was at night. They threw my things out. They were drunk persons. Inventory of items I say I lost, not filed. I say the inventory was there.” The claimant by that evidence confirms that as at the time of eviction, the contract of service that entitled her to occupy the house had long lapsed. There was no evidence



of tenancy arrangements concluded thereafter. It may be that excess force may have been used to evict the claimant but if so, the court returns that her cause of action fell outside the current employment dispute – and certainly outside the jurisdiction of the court because, the claimant’s occupancy of the house had long ceased to be within and governed by the contract of service. The court finds that the claims for damages for alleged unlawful eviction will collapse as unfounded.

15. The 5th issue is whether the claimant is entitled to claims about pension. The claimant testified that in 2014 she received a lump-sum of Kshs 240, 000.00 for 36 years of service and since then she earns monthly pension of Kshs 7, 105.00 per month. At close of the hearing it was ordered, “By consent parties to seek to compromise the issue of pension claim herein and to undertake reconciliation of claimant’s pension dues with a view of recording a consent or submitting on the issue appropriately.” Parties did not record a compromise on the issue. The submissions for the claimant appear not to address the issue in terms of the order by consent. As urged for the respondent, should there be any dispute in the calculations of the claimant’s pension, the matter could very well fall for determination under the provisions of the *Retirement Benefits Act*. The court rests the matter accordingly.
16. To answer the 6th issue for determination, the court returns that the claims of anticipated promotional benefits and lost earnings for period not worked up to age of 60 years were all speculative claims free from the contract of employment and relevant statutory provisions. The claimant has not established anything attributable to the respondent that barred her from alternative gainful engagement after the retirement in public interest. Indeed, there was no agreement and guarantee of the claimant earning beyond the termination of the contract of service.
17. The court considers that the claimant was entitled to a certificate of service. This will be delivered. The court has considered the long life of the suit and the conciliator recommendations which belatedly purged the respondent’s otherwise unfair termination of the claimant. The court considers that it is just for parties to bear own costs of the suit.
18. In conclusion, the suit is hereby determined with orders:
 1. Each party to bear own costs of the suit.
 2. The respondent to deliver the claimant’s certificate of service by December 1, 2022.
 3. A decree to issue accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH NOVEMBER, 2022.

BYRAM ONGAYA

JUDGE

