



REPUBLIC OF KENYA



KENYA LAW
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**Koech v County Government of Nakuru & another (Cause 30 of 2020)
[2022] KEELRC 13497 (KLR) (13 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 30 OF 2020
HS WASILWA, J
DECEMBER 13, 2022**

BETWEEN

DANIEL KIPLANGAT KOECH CLAIMANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

NAKURU PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The Claimant, Daniel Kiplangat Koech, sued the Respondents, Nakuru County and Nakuru County Public service Board alleging to have been threatened to be retired early than his date of retirement and seeking to stop the Retirement notice or in the alternative be compensated for the remainder of his employment period. He seeks the following Orders;
 - a. A declaration that the notice of retirement dated March 16, 2020 varying the contract of employment is unlawful and unfair.
 - b. The Claimant be retained in his current employment position till all the benefits and terms as per the contract of employment
In The Alternative
 - c. compensation for the prospective future earnings for the remainder of the contract period based on the last Gross salary.
 - d. A maximum compensation for the wrongful/illegal termination of the employment contract as per section 49(c) of the *Employment Act*.
 - e. A certificate of service as per section 51 of the *Employment Act*.
 - f. Costs and interests.



- g. Any other relief this Honourable Court may deem fit to grant.

Claimant's case.

2. The Claimant was employed by the Respondent as a general laborer on January 29, 1998 and worked for the Respondent faithfully that he rose through the ranks to be a Revenue clerk II while working on permanent and pensionable terms. He alleged that his gross salary was Kshs 88,602 as at December 5, 2019.
3. He states that on March 16, 2020, he received a notice from the 1st Respondent, purporting to issue him with a retirement notice which is to take effect by June 30, 2021.
4. He contends that save for his National Identity card that erroneously shows his date of birth as 1961, all his other document including his birth certificate indicate his date of birth as 1969, which is his right age of birth and the age that was rightfully captured by the Respondents at the time of employment in 1998 as the date of birth, which date reflects in all his pay slips. Additionally, that the date of retirement in all his work documents including the payslips is on December 30, 2029.
5. On the strength of the said date of retirement, he made financial commitment and took unsecured loan with the Cooperative Bank of Kenya with outstanding balance of Kshs 739,880 as at August 30, 2020, which bank relied on his retirement age when granting him the said loan.
6. He states further that he is a member of the LAP Trust Fund, which scheme has his date of retirement as December 30, 2029, as such that he will need to make contributions to the said scheme to the year 2029 in order to access his pension benefits.
7. He contends that the actions of the Respondent to unilaterally change his date of retirement is discriminatory and contrary to the Employment Contract entered between him and the employer. He added he recently registered himself as a person living with disability and that several other employees who were working in a similar condition like him were retired at 65 years and not 60 as contemplated by the Respondents.
8. He avers that his position is on the process of being advertised and filled to his detriment. He also stated that if the said position is filled and forced to retire he will be embarrassed both psychologically and financially.
9. He prays for an order by this Court retaining his employment till December 30, 2029 as indicated in his employment records to be able to fulfil his career and meet all his financial obligations.
10. The Claimant stated that the rectification of his erroneous date of birth was done by the Court (Nakuru Magistrates Court) vide an sworn affidavit on May 20, 2002 and the information tabled for rectification with his employer which it made the necessary changes and corrected the same as is and has been reflecting in his pay slips and official records.
11. He maintained that he completed his secondary school education in 1984 and joined Narasura Farmers Training College in 1985 and the letter produced by the Respondent that he joined Mogotio Polytechnic is a forged document.
12. He stated further that he is a person living with disability whose date of retirement ought to be 65 years and not 60 years as indicated by the Respondent. That the said information was requested by the ministry of interior and coordination of National government on December 9, 2020 for correction, which document include IPPD Datasheet and pay slip which were forwarded to the



ministry indicating that the Claimant to be retiring in 2029 as from 2010 when the rectification of date of birth was made leading to the financial commitment.

13. During hearing the Claimant testified as CW-1 and adopted his witness statement of September 15, 2020 which reiterated his claim and in addition testified that he was already retired and now is unemployed and living in Kaptembwa Area in Nakuru County.
14. Upon cross examination by Kinuthia Advocate, the Claimant testified that he completed his secondary education in the year 1984 when he was 15 years old. That he got division II and got employed in the year 1998. He denied giving the employer any document or filling any form at the time of employment as such the error made in his employment records were not made by him. He testified that he applied to be considered as a person living with disability and the said changes were to be reflected in his NHIF, KRA and NSSF Documents.

Respondents' Case.

15. The Respondent filed a response to claim on April 26, 2021 admitting to employing the Claimant however that his gross salary excluding leave and travel allowance was Kshs 52, 350 and not Kshs 80,000 pleaded.
16. It is stated that at the time of appointment, the Claimant indicated his date of birth as 1961 and even attached a National Identity card number 6353279, showing that he was indeed born in the year 1961. It is added that there is no correction to the said documents as such the same stands as the true records of employment of the Claimant.
17. Based on the said employment record, the Respondents dutifully served the Claimant with a retirement notice on March 16, 2020 indicating his retirement age as June 30, 2021 based on the date of birth the Claimant willingly and voluntarily indicated as his date of birth during his first appointment.
18. It was stated further that the ministry of state and Public service through a circular reference number DPM/PA/5/7/VOL LII(170) of September 25, 2008 raised concerns with the rate at which civil servants were changing their date of birth and increasing their years of service and to gap that, it gave direction that the date of birth to be relied upon shall be the one appearing on the first appointment documents.
19. The Respondents maintained that as per the records they have in their offices, the date of birth of the Claimant is 1961 as such he is due to retire on June 30, 2021.
20. The Respondent took issue with the rectification documents filed by the Respondent in that the Claimant deposed in his affidavit of May 25, 2002 that he completed his secondary school education in the year 1984 while his results slips gives a contradicting date of 1982. Furthermore, that his other document shows that he attended Mogotio Youth polytechnic between the year January 1984 and December 1985, which year he ought to be in secondary school. Additionally, that even if the said Claimant was to be believed, it would be preposterous and unimaginable that he completed secondary school education at a tender age of 15 years from the year of birth of 1969 to clear secondary school in the year 1984.
21. The Respondents summoned its assistant Human Resource Director, Moses Bii as RW-1 who also adopted his witness statement of June 14, 2022 which reiterated the contents of the Respondents' defence and in addition testified that he got the documents filed in Court in the Claimant's personal file which records are available in the Human Resource offices. He maintained that during the first appointment, the Claimant was given a form to fill which he did voluntarily and the information in the said form were duly filled by the Claimant and duly signed by the Claimant.



22. He admitted that it is indeed his office that changed the date of retirement to 2029 but could not tell how and why the said date of retirement was changed. He testified further the issue of date of birth was resolved by the ministry that issued a circular maintaining that the date of birth declared at the time of appointment is the one to be relied upon as such the date of birth the Claimant declared at the time of birth is the year 1961 therefore due to retire in June 2021.
23. Upon cross examination by Ouma Advocate, RW-1 testified that indeed an issue of date of birth might arise. That the said issue was indeed raised in the affidavit showing that he was born in 1969. He testified that the pay slips show that he is to retire in the year 2029 but that the same was erroneous. He maintained that the employer cannot influence such changes.
24. He admitted that all the Claimant's documents such as Birth certificate, NHIF documents among others show the date of Birth as 1969 but maintained that the Claimant can still be paid all his retirement benefits upon the authority being served with the retirement notice by the Employer.
25. He stated further that the Claimant did not appeal the retirement notice which is normally issued a year before the date of retirement. He added also that NSSF records show that the Claimant is to retire in 1961 and not 1969.

Claimant's submissions.

26. The Claimant submitted on four issues; whether the termination was unfair, whether the Claimant has proved his case on a balance of probability, whether the reliefs sought should be granted and who should pay costs of this case.
27. On the first issue, it was submitted that the employment contract that was issued to the Claimant was duly corrected to reflect the date of birth as 1969 in the year 2010, which changes reflected in his pay slips and records from then on therefore any changes to be made on the said contract of employment ought to be made in consultation with the employee as provided for under section 10(5) of the *Employment Act*.
28. He argued that the Claimant was terminated on the basis of the letter of retirement of 2020, when records in the employer's possession show that his date of retirement is the year 2029. It was submitted that the changes in the date of retirement to reduce the retirement age of the Claimant ought to be considered unfair as contemplated under section 45 of the *Employment Act*. To support this argument, they relied on the case of *Simon Patrice Matianyi V G4S Security Services (K)* [2013] eKLR where the Court and the case of *John Benson Gitinji V Attorney General and 4 others* [2014] eKLR.
29. The Claimant cited the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and submitted that any termination that is not justified both substantively and procedurally is unfair under section 45 of the *Employment Act* and the Court should find as much.
30. The Claimant submitted that the termination and or the early retirement is unfair because the Respondents' unilaterally changed the date of retirement to 2021 instead of 2029 contrary to provisions of section 26(2) of the *Employment Act* and therefore the Claimant is deserving of all the reliefs sought in the claim.
31. On costs, the Claimant submitted that costs follow event and cited the case of *Peter Muriuki Ngune V Equity Bank (K) Limited* [2018] eKLR then urged the Court to award him costs and interests of this claim.



Respondents' Submissions.

32. The Respondent on the other hand submitted on one main issue; whether the Claimant is entitled to the reliefs sought. On that basis, it was submitted that to determine that issue, the question that needs to be answered is whether the Claimant was born in 1969 or 1961.
33. It was submitted that the Claimant was initially employed by the defunct Municipal Council of Nakuru before being absorbed by County Government of Nakuru and the official record as held by the Human Resource of the Respondents indicate the Claimant's date of birth as 1961, informing the decision of the Respondents to issue the Claimant wit retirement notice of March 16, 2020 for his retirement to take effect from June 30, 2021. That the issuance of the retirement notice was in compliance with Section D. 21 of the Respondent's Human Resource Policies and Procedure Manual.
34. It was submitted further that the decision to retire the Claimant on June 30, 2021 was informed by the circular reference number DPM/PA/5/7VOL LII (170) from the Ministry of State and Public Service dated September 25, 2008 affirming that incase of dispute on the date of birth, the one to be relied on is the one that was declared by the employee at the time of first appointment. It was argued that the Claimant has not taken any steps to make any changes to his date of birth to enable the Respondent make the relevant changes if any as such his date of birth remain the one he indicated at the time of appointment.
35. It was further submitted that the documents placed before this Court demonstrate that the Claimant is a dishonest man having indicated to have completed high school in the year 1984 while his results slip indicate the date of completing secondary school as 1982 and the explanation given was merely denial without any evidence. Furthermore, that the record show the Claimant cleared high school when he was 15 years which is almost impossible in the circumstances and more absurd that the Claimant cleared secondary school in 1982 when he was only 13 years old. The Respondent urged this Court to construe the information placed before it against the Claimant and as result strike out the suit herein for lacking merit and cited the case of County Council of Nandi V Ezekiel Kibet Rutto and 6 others [2013] eKLR.
36. They also relied on the case of Republic V National Employment Authority and 3 others Ex parte Middle East Consultancy Services Limited [2018] eKLR where the Court held that;-

“Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the ex parte applicant ought to have subjected itself to the vetting process and at least exonerate itself from the adverse police reports instead of invoking the Judicial Review jurisdiction of this Court.”
37. The Respondent then submitted that the Claimant is seeking to illegally use this Court to unjustifiably extend his otherwise expired period of service and thereby impede the Respondents' ability to deliver fair administration in accordance with statutory laid down procedure.
38. It was submitted that the allegation that the Respondents forged Claimant's documents is not backed up with evidence to warrant any consideration by this Court.



39. It is the Respondent submissions that the suit herein was prematurely filed in light of the fact that the Claimant has not exhausted all internal dispute resolution mechanism such as Appeal and Review, captioned under Section K.10 and K. 11 of the Public Service Human Resource Policies and Procedures Manual, 2016 and reinforced in Article 159(2) of the *Constitution*. In this they cited the case of *Speaker of National Assembly v James Njenga Karume* [1992] eKLR.
40. They also relied on the case of *Umoja Inncore Tena Matatu Owners Sacco Society Limited & Another V Commissioner for Cooperative Development & 25 others* [2017] eKLR where the Court held that;-
- “Furthermore It is now settled law and judicial opinion that where the *Constitution* or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law.”
41. In conclusion, the Respondent submitted that the retirement was arrived at based on the records and information which was voluntarily given by the Claimant at the time of appointment as such the time of termination was due and the Claimant lawfully retired from public service as such there is no fault on the part of the Respondents to warrant the issuance of the reliefs sought in the claim. The Respondents urged this Court to dismiss the claim for lacking in basis.
42. I have examined all evidence and submissions of the parties herein. From the records submitted by the Claimant at the time of employment and voluntarily given, he was born in 1961. He indicated this as per his Identity Card No. 6353239.
43. However the date declared in his NHIF & NSSF statement is 1969.
44. In an affidavit the Claimant swore on May 20, 2002, he now changed tune indicating that the date 1961 was an error and that his actual date of birth was 1969. He indicated that this was as per his school leaving certificate issued by Kimulot Secondary School.
45. In 1984 to 1985 the Claimant joined Mogotio Youth Polytechnic where he studied a Farm Machinery Course.
46. If the Claimant was born in 1969 then at this time he was 15 years. He did his KCSE exams in 1982. And if at the time he was born in 1969, he was just 13 years which arithmetic does not add up and given that the Claimants had without coercion declared his birth year as 1961, this is the date to go by in determining his retirement.
47. His insistence that he was born in 1969 is rejected and this claim therefore fails and is dismissed accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF DECEMBER, 2022.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oumo for Claimant – present

Kinuthia for Respondent – present

Court assistant – Fred

