



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 134 OF 2016**

**JOHNSON ASENA LAVATSA.....CLAIMANT**

**VERSUS**

**KENYA POWER & LIGHTING CO LTD.....RESPONDENT**

**JUDGMENT**

1. Johnson Asena Lavatsa (the Claimant) sued the Kenya Power & Lighting Co Ltd (the Respondent) on 23 May 2016, alleging unfair termination of employment, breach of contract and discrimination.
2. The Respondent filed a Response on 22 June 2016, and a Further Reply to Statement of Claim on 15 May 2018 and the Cause was heard on 18 December 2019 and 3 February 2021. The Claimant and the Respondent called 2 witnesses.
3. The Claimant filed his submissions on 3 March 2021, and the Respondent filed its submissions on 13 April 2021.
4. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

5. On 11 April 2014, the Respondent issued a notice of retirement to the Claimant. The notice indicated that the Claimant would attain the retirement age of 60 years on 31 December 2014.
6. The Claimant challenged the retirement on the ground that he was born on 16 July 1955 and had thus not attained the retirement age. The Claimant produced a copy of his certificate of birth to support the argument that he was retired prematurely. The certificate was issued on 26 February 1993. He also produced a copy of the national identity card issued in 1996.
7. The Claimant also produced a copy of Particulars of Manual Labour Engagements. It shows that the age of birth was 1955.
8. The Claimant cited the Age of Majority Act (the Court does not find the Act useful in the determination of this Cause).
9. The Respondent on its part produced a notice of retirement dated 23 September 2008, which informed the Claimant that he would attain the then retirement age of 55 years on 1 January 2010 and a letter dated 25 June 2009 recalling the notice upon the revision of the retirement age to 60 years.
10. The records kept by the Respondent on the age of the Claimant indicated the year of birth and not the date and month. The record is dated 22 June 1981.
11. The Claimant got a certificate of birth in 1993. There was no evidence placed before the Court that he supplied a copy of the certificate to the Respondent or that he requested the Respondent to correct or update the records.
12. The Respondent issued the first notice of retirement to the Claimant in 2009. There was no evidence he requested the Respondent to update the records at that particular point in time.
13. The Claimant was given another notice of termination in 2014. Again, there was no tangible evidence that he informed the Respondent about the certificate of birth.
14. Considering that the Respondent gave notice of retirement to the Claimant based on the records it had, the Court is unable to find that there was unfair and unlawful termination of employment.

15. The heads of claims for lost salary, house allowance, electricity allowance, medical benefits and the others enumerated in paragraph 8 of the Statement of Claim were contingent on a finding of unlawfulness of retirement and are therefore not available to the Claimant.

16. The remedies of compensation and salary in lieu of notice also fall by the wayside.

#### **Breach of contract**

#### **Annual leave**

17. The Claimant prayed for Kshs 129,143/75 on account of outstanding leave. However, he did not lay out an evidential foundation to this head of the claim.

#### **Mobile workshop allowances/mobile construction and survey teams allowances: discrimination**

18. The Claimant made a claim for mobile workshop allowance from 1995 to 2015 totalling Kshs 3,545,215/-.

19. The Claimant contended that the failure to pay him the allowances was in breach of contract as well as discriminatory because other employees were paid.

20. The Claimant was employed as a general worker in 1981. He was promoted to Survey Assistant I effective 1 April 1996 and to Survey Assistant II with effect from 1 May 2006.

21. On 1 July 2013, the Claimant was promoted to Senior Survey Assistant III.

22. The Claimant was a member of the Kenya Electrical Trades and Allied Workers Union, which entered into several collective bargaining agreements with the Respondent.

23. The collective agreements provided at clause 11 for payment of mobile workshop allowance of 15% of the basic salary (for those travelling in a mobile workshop for night outs) and a mobile construction and survey teams allowance.

24. The Court has keenly considered these 2 heads of the claim and found that the same should be declined for the following reasons.

25. First, the Claimant did not provide any evidence that he travelled in (a) mobile workshops or night outs to be entitled to the payment of the 15% mobile workshop allowance.

26. Two, the Claimant did not rebut the testimony by the Respondent's second witness that although he was in the survey department, the survey staff did not form part of the mobile teams.

27. Three, these heads of the claim(s), in the view of the Court, comprised *continuing injury* and the Claimant should have moved the Court within 12 months from the date of separation as required by section 90 of the Employment Act, 2007.

28. The Claimant left employment on 31 December 2014, and he commenced action on 23 May 2016, more than 12 months after the prescribed time.

#### **Conclusion and Orders**

29. From the foregoing, the Court finds no merit in the Cause, and it is dismissed with no order on costs.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 12<sup>th</sup> day of May 2021.**

**Radido Stephen, MCI Arb**

#### **Judge**

#### **Appearances**

For Claimant	Wambua Kigamwa & Co. Advocates
For Respondent	Kimitei, Nthenge & Co Advocates LLP
Court Assistant	Chrispo Aura