



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1284 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

NJAI MUTITU..... CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

JUDGMENT

The Claimant filed a Statement of Claim on 30th June, 2016 alleging that the Respondent unfairly terminated his employment on 9th October, 2015 on grounds that he had reached the retirement age. He avers that the allegations that he had attained mandatory retirement age as he was born on 4th July 1957 and not 4th July 1953. He seeks the following reliefs:

- i. A declaration that the Claimant’s termination from his employment was unfair and unlawful.
- ii. The Claimant be reinstated to his employment with full benefits and continuity of service.
- iii. In the alternative and without prejudice to (i) above, the claimant be paid his terminal benefits as set out below:

a. One month’s salary in lieu of notice

.... (11,005 + 6.956+10,000)..... 27,961

b. Compensation for the remainder of the duration of the contract (11,005 + 6956 -10,000) x 3..... 363,493

c. 12 months’ compensation for unfair termination

.... (12 x 27,961)..... 335,532

d. Certificate of Service

Total amount..... Kshs.726,986

- iv. The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- v. The Respondent to pay the costs of this claim.
- vi. Interest on the above at court rates from the date of filing this claim until payment in full.

The Claimant filed an affidavit in support of the claim sworn on 22nd September 2020. He avers that he was offered employment by the Respondent as a cleaner in the estate department with a salary of £ 2466 per annum for a period of 6 months which was renewed from time to time with the latest renewal being contract for the period between 1st December 2015 to 30th November 2016 by letter dated 28th September 2015.

He deposes that his national identity card clearly shows and confirms that he was born on 4th July, 1957. He avers that the Respondent did not give him notice or a letter to show cause why he should not be terminated. He avers that he notified the Respondent of his true and correct age but it wilfully and intentionally refused to reinstate him to his employment.

Respondent's Case

The Respondent filed a Statement of Defence on 5th July, 2017 in which it states that the Claimant's contract was terminated following the University's Council's decision to comply with the National Government Circular No/ OP/CAB.2/&7A requiring persons in the public service who had attained the compulsory retirement age of 60 years to be retired.

It avers that in accordance with its Human Resource Management Information System (HRMIS), the Claimant's date of birth was recorded as 4th July, 1953. Therefore, going by this information he had attained 60 years on 4th July, 2013. It avers that it is by reason of the said information that the HRMIS identified the Claimant as being beyond the age of retirement in service. That the date of 4th July, 1953 must have been provided by the Claimant while seeking employment.

The Claimant filed a Reply to the Response on 30th April 2018 and avers that the Respondent's wrong entries in the HRMIS should not be used to prejudice him. He avers that he has no issue with the circular but the manner in which the Claimant terminated his services. That his fixed term contract was cut short for no apparent reason.

The Respondent also filed an affidavit sworn by Peter Mwai Muhori, its Acting Registrar, on 29th September, 2020. It avers that at the time of his engagement in 2002, the Claimant provided his details including date of birth being 4th July, 1953 which was entered into the Respondent's HRMIS.

He avers that from its records, it is clear that the Claimant was well past the age of 60 years as at 4th July, 2014 and that in compliance with the government's directive dated 14th February, 2014 the Respondent rescinded his contract before it took effect on 1st December, 2015.

He avers that from the Respondent's letter dated 9th October, 2015 the Claimant was to clear with the Respondent before being paid his terminal dues but the Claimant has not cleared with the Respondent to date.

Claimant's Submissions

The Claimant submitted that section 45 of the Employment Act requires that an employer shall not terminate an employee unfairly and that a termination is unfair if the employer fails to prove that the reason for termination is valid. He relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court held that for a termination to pass the fairness test there must be both substantive and procedural fairness.

He submitted that the letter dated 9th October 2015 demonstrates that the termination was taking effect immediately. As such no notice was served and therefore negates the element of fairness under section 45 of the Employment Act. He argued that his date of birth is 4th July, 1957 as opposed to the misleading information by the Respondent's HRMIS being 4th July, 1953. He submitted that he had not attained the age of retirement.

He submitted that since he had not attained the age of 60 years, the Respondent ought to have demonstrated that his age of 55 years related to his capacity or compatibility to work or operational requirement and further follow fair procedure on the same. He submitted that the Respondent did not demonstrate this.

He argued that the Respondent violated the provisions of Section 10 of the Employment Act by failing to keep accurate data regarding his date of birth. He submitted that in a letter dated 11th January, 2016 he reminded the Respondent of his date of birth as reflected in his identification card and birth certificate. He relied on the case of **Rufus Osotsi Olefa v Nairobi City Water and Sewerage Company Limited [2018] eKLR** where the Court held that the contractual date of birth was in December 1955 and that the Claimant could not suffer loss arising from the Respondent's deficiency in the Respondent's operational requirements, systems and policies. Further, that the respondent failed to show that at the time of filing the personnel data the claimant fraudulently changed his date of birth.

He relied on section 41 of the Employment Act and submitted that the procedure for terminating his employment was unfair. He submitted that he has demonstrated that no valid reason warranting the termination of his contract and that due process was not followed for the termination. He therefore argued that he is entitled to the remedies provided under section 49 of the Employment Act. He relied on the case of **Republic v Judicial Service Commission & 2 Others ex parte Erastus M Githinji [2019] eKLR**.

He urged the Court to find that but for the Respondent's omission and/or action, this suit would not have been necessary and as such order the Respondent to pay costs of the suit.

Respondent's Submissions

The Respondent submitted that it is not clear from the pleadings whether the Claimant's gravamen relates to the 1st contract or the 2nd contract. It argued that there appears to be no cause of action against the 1st contract as the same is not supported by the pleadings or the Claimant's affidavit.

It argued that an order of reinstatement cannot be granted since 3 years have lapsed since the suit was filed. It argued that the Claimant in his affidavit introduced a prayer for gratuity which was not canvassed in its pleadings. It relied on the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** in which the Court cited **Malawi Railways Ltd v Nyasulu [1998] MWSC** wherein the Court held that each party is bound by its own pleadings and it cannot be allowed to raise a different case without due amendment.

It submitted that the element of gratuity has a contractual underpinning which does not exist in the Claimant's contract. It relied on the case of **Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR** where the Court held that for an employee to claim gratuity, it must be provided in the contract of employment, a collective bargaining agreement or a statute.

It submitted that the Claimant's last contract had been rescinded on 9th October, 2015 before it could take effect on 1st December, 2015 thus there was no employment relationship capable of being terminated. It submitted that at the time of the alleged "termination" the Claimant had attained the age of 60 as per its HRIMS. It submitted that the Claimant has admitted that he failed to provide the Respondent with the particulars of his identification thus he was the author of his misfortunes.

It argued that the failure to renew the Claimant's fixed term contract does not amount to unfair and unlawful termination. It relied on **Johnstone Luvisia v Allpack Industries Limited [2019] eKLR** where the Court held that the Claimant was not entitled to a declaration that his dismissal was unfair as there was no dismissal.

It submitted that the court in **Isaiah Makhoha v Basco Products (K) Ltd [2014] eKLR** held that the non-renewal of a fixed term contract does not form a basis for unfair termination. It argued that the Claimant is not entitled to one month's notice pay or the orders sought in the claim.

In conclusion, it submitted that the Claimant should comply with the terms of the letter dated 9th October 2015 to facilitate processing of his dues.

Analysis and Determination

The Respondent's letter dated 28th September, 2015 renewing the Claimant's contract stated that his employment contract had been renewed for a period of one year with effect from 1st December, 2015 up to 30th November, 2016. However, his employment contract was terminated on 9th October, 2015. It is the Respondent's submission that there was no contract between the Claimant and the Respondent as from 1st December, 2015 because the contract did not take effect as it was rescinded before its start date.

I do not find the Respondent's position to be correct, as there was indeed a contract of employment at the time of termination of the Claimant's contract. He was already serving on a contract which was to expire on 30th November 2015 and had about two months to go and he had been issued with contract for 12 months.

The Claimant's termination letter dated 9th October 2015 is reproduced below:

"Mr. Njau Mutitu

C/o Estates Department

Dear Mr. Mutitu,

TERMINATION OF CONTRACT

On behalf of the University of Nairobi Council and further to the circular reference OP/CAB.2/7A, dated February 14, 2014 on retention in service of officers beyond the mandatory retirement age, it is now the directive of the Council that the circular be fully and firmly complied with.

Consequently, and in compliance with the Government's directive and reference to the terms of service under which you were serving, the post retirement contract of employment has been terminated with immediate effect.

You will be paid your dues, in lieu of notice, upon successful handover of all functions of your office to your Head of Department.

On behalf of the University Council and Management, I thank you for many years of great service to the University of Nairobi and wish you well in your retirement.

SIGNED

PETER. M.F. MBITHI, PHD,EBS

VICE CHANCELLOR & PROFESSOR OF VETERINARY SURGERY."

The Respondent submitted that the details in its HRIMS showed that the Claimant had attained retirement age and that the Claimant was

guilty of failing to provide it with his identification documents. Even if the Respondent had not been provided with the documents, after the termination of his employment the Claimant in his letter dated 20th November 2015 with a reminder on 11th January, 2016 clarified that his birth date was 4th July, 1957 and provided the Respondent with his old generation ID, new generation ID and his birth certificate. The Respondent did not as much as acknowledge the same.

The claimant has in his claim pleaded at paragraph 7 that the issue of his age was a misunderstanding and that he produced copies of his new and old generation National Identity Card and a copy of his birth certificate only after receiving the letter of termination of his contract. It is clear from the facts of this case that the employment records of the Respondent with respect to the Claimant reflected that the claimant was borne on 4th July 1953 and going by those records the claimant was as at the time of termination of his employment contract well past the compulsory retirement age of 60. It is not clear whether the date of birth in the records was an error by the Respondent or it is what the claimant submitted as the time of recruitment. It is also clear that based on the claimant's employment records the Respondent had valid reason to terminate the employment of the claimant on grounds that he had attained mandatory retirement age. Section 43(2) of the Employment Act provides that –

43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Even although the Respondent had valid reason for terminating the claimant's employment according to its records, the procedure was not fair. Section 45(4)(b) requires an employer to act with justice and equity in terminating the employment of an employee. None of the parties has provided a copy of the terms of service applicable to the Respondent's staff for notification of retirement. Whatever the provisions are, this was not a disciplinary termination and ought to have been done with notice. As the claimant has pointed out, had he been given notice, he would have had a chance to present his records to the employer before the termination was effected so that the issue of the correct date of birth or the cause of the variance in the Respondent's records would have been addressed.

The Respondent should have in the least, allowed the Claimant to complete the term of the contract that was expiring on 30th November 2015. The termination is therefore wrongful, not for the grounds thereof, but for the procedure adopted by the Respondent, after it had even renewed the claimant's contract for a further term of 12 months to commence on 1st December 2015 and to expire on 30th November 2016. The claimant therefore had legitimate expectation to serve for the term of the contract that had been issued to him which he had accepted by signing the same.

Again having been in the employment of the Respondent for about 13 years, the claimant had legitimate expectation that the Respondent would continue renewing the contracts as it had done for all those years, until he attained the mandatory retirement age according to his national identity card and birth certificate.

It is for these reasons that I award the claimant 12 months' salary as compensation in the sum of **Kshs.335,532** based on the salary in the new contract which the claimant was not allowed to serve.

The Respondent will also pay one month's salary in lieu of notice in the sum of **Kshs.27,961**.

The prayer for gratuity is dismissed as the claimant was a member of NSSF as demonstrated by the NSSF statement he attached to his pleadings, and the fact that his contract did not provide for the same.

The claimant is also not entitled to salary for the remainder of the term of his contract as this would constitute double compensation having claimed and been awarded compensation for the unfair termination of his contract.

In conclusion, judgment is entered in favour of the claimant against the respondent in the total sum of Kshs.363,493/-.

The Respondent shall issue a certificate of service to the claimant in terms of Section 51 of the Employment Act.

The Respondent shall further pay all terminal dues as stated in the letter of termination.

The Respondent shall further pay costs of the suit to the claimant. Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 2020

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE