



**REPUBLIC OF KENYA**

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

**CAUSE NO 190 OF 2016**

**GEETA JOSHI.....CLAIMANT**

**VS**

**PANDYA MEMORIAL HOSPITAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Geeta Joshi the Claimant in this case was a long serving employee of Pandya Memorial Hospital, the Respondent herein. She brought this claim following termination of her employment by way of retirement, effective 31<sup>st</sup> December 2015.
2. The claim is contained in a Memorandum of Claim dated 14<sup>th</sup> March 2016 and amended on 27<sup>th</sup> June 2017. The Respondent filed an amended Response on 2<sup>nd</sup> February 2018.
3. The matter was initially heard by my brother, **Makau J** who took the Claimant's evidence. Following an interlocutory application by the Claimant, my brother Judge allowed an amendment of pleadings to introduce an element of discrimination. When the parties appeared before me on 6<sup>th</sup> March 2018, it was agreed that the Claimant be recalled to canvass the issue of discrimination.
4. On 29<sup>th</sup> May 2018 the Claimant closed her case and the defence case was fixed for hearing on 4<sup>th</sup> October 2018 on which date, the Respondent did not avail its witness. The Court therefore closed the case and directed the parties to file final submissions.

**The Claimant's Case**

5. The Claimant states that she was employed by the Respondent on 26<sup>th</sup> March 1990 in the position of Laboratory Technologist. On 14<sup>th</sup> August 2013, she was appointed to the position of Laboratory Superintendent and on 3<sup>rd</sup> December 2013, she asked for responsibility allowance in light of added responsibilities. She was not paid the allowance.
6. On 28<sup>th</sup> February 2014, the Laboratory Administrator, Pravin Thanki wrote to the Claimant requiring her to respond to allegations of disclosing confidential information to an unauthorized person. The Claimant responded on 4<sup>th</sup> March 2014 asking for a meeting to air her grievances.
7. On 31<sup>st</sup> March 2014, an internal memo was circulated indicating that one Peter Ndaluzioka had been appointed to the position of Laboratory Superintendent. On the same day the Claimant received a letter revoking her appointment as Laboratory Superintendent and by a further letter dated 11<sup>th</sup> July 2014 she was instructed to vacate the hospital residential premises.
8. On 25<sup>th</sup> March 2015, the Claimant received a letter from the Respondent's Chief Administrator notifying her that she would retire at the age of 55 years since it was the policy of the Respondent Hospital to retire female staff at that age. A reminder of the said notification was sent to the Claimant on 12<sup>th</sup> September 2015.
9. The Claimant states that she was aggrieved by the decision to retire her early on the basis of her being a female employee contrary to the law. The Claimant maintains that she was retired prematurely without her consent and/or any lawful basis.
10. The Claimant claims the following:

a) 12 months' salary in compensation.....Kshs. 521,400

- b) Unpaid allowances for extra duties (40,000x24 months).....960,000
- c) Lost earnings for the remaining period to retirement.....2,607,000
- d) Unpaid loyalties for registration of the Respondent's Lab  
Using the Claimant's documents (40,000x12).....480,000
- e) Service pay *ex gratia* payment of one month  
for each completed year of service (43,450x25).....562,500
- f) General damages for loss of earnings
- g) Damages for discrimination and unfair labour practices.....6,000,000
- h) Certificate of service
- i) Costs plus interest

**The Respondent's Case**

11. In its amended Response filed in court on 2<sup>nd</sup> February 2018, the Respondent admits having employed the Claimant on 26<sup>th</sup> March 1990. The Respondent further admits that there was an issue regarding staff working in its Laboratory Section but adds that the said issue was adequately resolved on 29<sup>th</sup> October 2013.

12. The Respondent denies that the Claimant was entitled to an allowance of Kshs. 40,000 for performing the duties of Laboratory Superintendent. The Respondent further denies that the Claimant was assigned the duties to be in charge of the Laboratory and adds that the workings of the Hospital in general were under the control of the Administrator who would delegate such duties to any individual.

13. Regarding the disciplinary issue facing the Claimant, the Respondent states that in her response dated 4<sup>th</sup> March 2014, the Claimant failed to show cause why disciplinary action should not be taken against her. Nonetheless, she was given an opportunity to express herself at a meeting held on 19<sup>th</sup> September 2014. The Respondent denies that the request to the Claimant to vacate the Hospital residential premises was a move to frustrate her.

14. The Respondent admits that the Claimant's employment was terminated on account of age but denies the allegations of discrimination. The Respondent states that by letter dated 25<sup>th</sup> March 2015, the Claimant was notified that it was the policy of the Respondent to retire all employees on attainment of the age of 55 years.

15. The Respondent avers that the Claimant's employment was lawfully terminated by way of retirement and further avers that the Respondent was willing to pay the Claimant her full dues which she had not collected.

**Findings and Determination**

16. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant has made out a case of discrimination;
- c) Whether the Claimant is entitled to the remedies sought.

**The Termination**

17. On 25<sup>th</sup> March 2015, the Respondent wrote to the Claimant as follows:

*"Dear Madam,*

**REF: RETIREMENT NOTIFICATION**

*We hope this finds you well.*

*According to the hospital policy, the retirement age for female staff is 55 years, the employment records at our disposal indicates (sic) that your date of birth was 1960. We seek to advise you that the management will retire you upon the date you will be*

celebrating your 55<sup>th</sup> birth (sic). However, to give you ample (sic) time to prepare; you will work with us until December 31<sup>st</sup> 2015.

We take this opportunity to thank you for the years you have dedicated your services to this hospital. Should you need further clarification, do not hesitate to talk to the Human Resource Manager for guidance. We wish you well as you prepare for retirement.

Yours Sincerely,

(Signed)

**RAJESH SHUKLA**

**CHIEF ADMINISTRATOR”**

18. By a follow up letter dated 12<sup>th</sup> September 2015, the Respondent’s Human Resource Manager reminded the Claimant that she was due to retire on 31<sup>st</sup> December 2015.

19. Being aggrieved by the Respondent’s decision to retire her, the Claimant instructed the firm of Pandya & Talati Advocates who wrote to the Respondent on 22<sup>nd</sup> October 2015, challenging the decision. In its response dated 30<sup>th</sup> October 2015, the Respondent stated that its retirement policy was clear and consistent.

20. From the foregoing correspondence, it is evident that the Claimant’s employment with the Respondent came to an end by way of retirement. According to the Respondent, this was normal retirement as per policy. On the other hand, the Claimant maintains that her retirement was selective and discriminatory.

21. The Court was referred to the decision in *Michael Kagoma v Kenya Police Service & 2 others [2013] eKLR* where my brother **Ongaya J** stated the following:

**“in the absence of the general constitutional or statutory mandatory retirement age in public or private sectors or any other employment, the age of mandatory retirement is a term of the contract of employment to be agreed between the parties or varied by the employer in consultation with the employee as envisaged in section 10(5) of the Employment Act 2007.”**

22. While retirement generally is a valid ground for termination of employment, it must be undertaken within the law. The Respondent’s retirement policy was not availed to the Court. However, the retirement notice sent to the Claimant on 25<sup>th</sup> March 2015 expressly states that the retirement age of 55 years was applicable specifically to female staff. The corollary is that male staff had a different retirement age. The Respondent did not call any evidence to rebut this presumption. Further, it was not lost on the Court that the Claimant’s retirement was paved with instances of conflict between the Claimant and her employer. Whichever way one looks at it, the Claimant’s employment had no justification in law thus rendering it unlawful and unfair and the Claimant is entitled to compensation on this account.

#### **Discrimination?**

23. Article 27 of the Constitution of Kenya, 2010 which guarantees equality and freedom from discrimination provides as follows:

**27. (1) Every person is equal before the law and has the right to equal Protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

24. In similar fashion, Section 5(2) and (3) of the Employment Act, 2007 provides that:

**(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.**

**(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-**

*(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

*(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of employment.*

25. The retirement notice issued by the Respondent to the Claimant specifically states that the decision to retire the Claimant at the age of 55 years was informed by her being a female staff. This evidently flies in the face of the provisions of Article 27 of the Constitution and Section 5(3) of the Employment Act.

26. As observed by my sister **Mbaru J** in *Janine Buss v Gems Cambridge International School Limited [2016] eKLR* under Section 5(6) of the Employment Act, the burden of disproving an allegation of discrimination lies with the employer. In the instant case, the Respondent was under an obligation to prove that the retirement notice issued to the Claimant was not discriminatory against her, on the basis of her being a female employee. The Respondent neither produced any policy document to the contrary nor did it call any witness to dispel the Claimant's assertion.

27. The Court therefore finds and holds that by retiring the Claimant at the age of 55 years, the Respondent subjected her to discrimination on the ground of gender and she is entitled to damages.

### **Remedies**

28. In light of the finding that the Claimant's retirement amounted to unlawful and unfair termination, I award her twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent as well as the Respondent's conduct in the retirement process.

29. In addition, the Claimant is entitled to damages for discrimination. In assessing quantum under this head, the Court has considered that the Claimant's career in a high skill technical area was cut short by the Respondent's decision to retire her early. She was unable to find alternative employment and at the conclusion of the hearing, she had been jobless for three (3) years. Moreover, the Respondent had not paid her terminal dues. Taking these factors into account, I award the Claimant Kshs. 5,000,000 (read Five Million Kenya Shillings) as damages for discrimination.

30. By its letter dated 27<sup>th</sup> January 2014, the Respondent undertook to pay to the Claimant the sum of Kshs. 40,000 for laboratory superintendence duties during the year starting from 1<sup>st</sup> January to 31<sup>st</sup> December 2014. This amount is therefore due and payable to the Claimant. The Claimant is further entitled to her final dues as tabulated by the Respondent on 27<sup>th</sup> January 2016.

31. No basis was laid for the claims for lost earnings and unpaid royalties which therefore fail and are dismissed.

32. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months' salary in compensation.....	Kshs. 521,400
b) Damages for discrimination.....	5,000,000
c) Allowance for lab superintendence duties in 2014.....	40,000
d) Final dues as tabulated by the Respondent.....	<u>354,037</u>
<b>Total.....</b>	<b>5,915,437</b>

33. This amount will attract interest at court rates from the date of judgment until payment in full.

34. The Claimant is also entitled to a certificate of service plus costs of the case.

35. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Chala for the Claimant

Mr. Anjarwalla for the Respondent