



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2373 OF 2017**

**SAMUEL OMUTOKO MABINDA.....CLAIMANT**

**VERSUS**

**RILEY SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a verbal contract of service, the Claimant was employed by the Respondent on 26th March 1995 as a night security guard earning a basic salary of KShs. 3,175.50. By the letter dated 14.1.1998 his appointment was confirmed after which he worked until 26.7.2017 when he was retired on account of age by the respondent's notice dated 17.7.2017. At the time of termination, he was earning a basic salary of KShs. 12,222.00. He contended that the notice period given before his retirement was shorter than what was provided under the Employment Act. He further, contended that his salary was underpaid and denied pay for the extra 4 hours he worked per day. Consequently, the Claimant filed this suit on 30.11.2017 contending that his termination was unfair and unlawful and sought the following reliefs:

a) One month pay in lieu of notice.....KShs. 14,420.90

b) Underpayment of basic pay

(14,420.90–12,222.00=2199.00 x 3 months) .....KShs. 6,599.10

c) Underpayment of 4 extra hours worked on

a daily basis for the period of 274 months.....KShs. 1,765,601.20

d) Compensation for unfair dismissal

(12 months) .....KShs. 173,050.00

e) Cost of this suit.

f) Any other relief that this Honourable Court may deem fit to grant.

2. The Respondent filed her Statement of Response on 11th January 2018 admitting that she employed the Claimant as alleged but refuted the Claimant's entitlement to the reliefs sought. The Respondent averred that the Claimant's services were lawfully terminated at his own request upon attainment of the statutory mandatory retirement age and contended that termination notice was not applicable. She further averred that after the separation she paid the claimant all his rightful service gratuity equaling to kshs 73,350 and prayed for the suit to be dismissed with costs.

3. The suit was heard on 26th September 2018 when the Claimant testified as CW1 and the Respondent called her HR Officer, M/s Mary Wembuye, who testified as RW1. Thereafter both parties filed their written submissions.

**Claimant's Case**

4. CW1 testified that he was verbally employed by the respondent on 26.3.1995 and worked until 11th July 2017, when he was given a

retirement notice of 15-days upto 26.7.2017. He further testified that throughout his service, he used to report to work at 6 a.m. and leave at 6 p.m. translating to 4 extra hours of work per day. That out of the 4 extra hours worked he was only paid for 2 hours only.

5. Upon cross-examination by counsel for the Respondent, CW1 testified that his employment was not terminated but that he was retired on account of his age being 58 years. He contended that he worked overtime for 22years but admitted that during the said period he used to go for his annual and also take his off days. He further admitted that he being paid overtime which varied from month to month as indicated in the pay slips filed by the respondent and further admitted that he signed his pay slip voluntarily. He however maintained that he used to work the same hours every day.

6. As regards the reliefs sought, he stated that the KShs. 73,350.00 paid to him had been classified as service pay. He however maintained that he was paid half of the overtime pay due to him for the extra 4 hours worked per day and contended that he is entitled to the outstanding balance. He clarified that the overtime pay he is seeking is for the days he worked and not the days he was at work. He concluded by observing that the Respondent had failed to produce attendance records to prove that he was absent on the days he is claiming the overtime pay.

### **The Respondent's Case**

7. RW1 testified that the claimant was sent on retirement on account of his age after he requested to retire alleging that he was unable to work at night. She further testified that, under regulation 17 (2) (b) of the Protection Security Service Wage Order, the retirement age for guards was 55 years but the claimant retired at 58. She also testified that the after the separation the claimant was paid service gratuity for 1998 to 2008 when he worked on permanent basis being 10 years at the rate of

18 days' pay per year of service equaling to Kshs.73,350.

8. As regards overtime pay, she testified that a guard is supposed to work for 225 hours per month and any extra hours worked is compensated by overtime pay equaling (the days worked x 12) – 225 hours. She produced a bundle of pay slips filed by the respondent on 4.4.2018 to prove that the claimant was paid his overtime pay and it varied from month to month. She further contended that the claimant utilized all his leave days since he went for his annual leave every year.

9. Upon cross examination, RW1 admitted that the Claimant continued to work even after attaining the retirement age at the request of the client he was assigned to. She maintained that the claimant requested to retire on attaining 58 years after which he was paid service gratuity. She contended that the claimant worked as casual employee from 1995 until 1998 when he became permanent. She admitted that the claimant would work for 12 hours a day but contended that he was to be paid for 225 per month. She further admitted that the Respondent had a clock in system. He clarified that overtime varied monthly because some months had fewer days and the fact that he used to take 4 rest days each month.

### **The Claimant's Submissions**

10. The Claimant confined his submissions to three issues namely, whether the termination was unfair, whether the notice was proper and whether there was unpaid overtime. First, he submitted that his dismissal was unfair and unlawful because he was not served with a proper termination notice. That having worked beyond the retirement age of 55 years, there was an implied term of the contract that he was not to retire at that age but upon service of a proper retirement notice of at least one month. On that basis he submitted that he was retired without a proper and sufficient notice which rendered the termination unfair. He relies on the case of *Simon Muguku Gichigi vs. Taifa Sacco Society Limited I.C.N. 681 of 2012* where the Court held that:

***“... An employer cannot therefore at the spur of the moment tell an employee...you are fired. Such knee jerk decisions have no place in modern employment law.”***

11. The Claimant further submitted that the Respondent failed prove the

Claimant's incapacity to perform his duties, as a valid reason for the termination, as required by **section 45 (1) and (2) of the Employment Act 2007**. He specifically observed that the respondent had failed to produce medical evidence to prove any incapacity to perform his duty as a guard.

12. As regards overtime pay, he submitted that it was not fully paid contending that the Respondent's calculation of the overtime payable based on the letter dated 14th January 1998, was inapplicable to him because he never signed it. He urged that the overtime payable to him, should be calculated in accordance with Regulation 6 of the Regulation of Wages (General) Order and as such, his overtime was never fully paid.

### **The Respondent's Submissions**

13. The Respondent submitted that the Claimant did not dispute that he had exceeded the mandatory retirement age prescribed by the law as at the time he was retired. She further submitted that the law did not contemplate issuance of a retirement notice where retirement age had already been attained, and especially if it is the employee who requests for the retirement. In her view, she argued that the Claimant was only enjoying an extended period of notice after his continued service, once he attained retirement age. To buttress this position, she relied on regulation 24 (b) of the Wages Order for Security Services which allows an employer to summarily dismiss an employee for lawful case, which was attainment of retirement age in the case herein.

14. The Respondent did not see the need for a notice before retiring the claimant provided was paid all his terminal dues. In her view, all

what was important was for the Claimant to know his retirement date in advance. Never the less, she contended that, if any wrong was done, the same can be compensated by 15 days' pay in lieu of notice since he had already been issued with 15 days' notice. However, she submitted that she was fully discharged from any claim since the Claimant accepted and acknowledged the full settlement of his dues and has never raised the issue of fraud, coercion or misrepresentation relating to the signing of the discharge. She relied on the Court of Appeal cases of **Thomas De La Rue (Kenya) Limited vs. David Opondo Omutelema [2013] eKLR** and **Coastal Bottlers Limited vs. Kimathi Mithika [2018] eKLR**.

15. As regards the reliefs sought, the Respondent submitted that the Claimant is not entitled to payment of 1 months' notice because it is not merited; that the claim for compensation for unfair dismissal was not proved in evidence; that the claim underpaid salary was not properly brought out; and finally, the claim for underpayment of 4 extra hours on a daily basis for 274 months is presumptive and imprecise hence indeterminate and improbable as the Claimant seeks payment for 22 years at the same rate yet the payment for overtime would vary from time to time. She relied on the case of **Kudheiha Workers vs. Charles Waithaka Goka t/a Apple Bees Pub and Restaurant [2013] eKLR** where the Court held that:

***“... There is a tendency for Claimants seeking overtime pay to just throw all the public holidays in a calendar, all the hours beyond the agreed working hours on the clock, and all the years served, in the face of the Court and hope they make a credible case for overtime. Claimants of overtime must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable and factually credible system of overtime pay. The Claimant did not do this to the satisfaction of the Court.”***

16. She further submitted that the claim for overtime for 22 years is time barred and is an abuse of court process and relied on the cases of **Chai Ngala & 7 Others vs. Smoky Hill Limited [2014] eKLR** and **Charles Nguma Maina vs. Riley Service Limited [2018] eKLR**.

### **Analysis and determination**

17. After carefully considering the pleadings, evidence and the submissions presented by the parties there is no dispute that the Claimant was employed by the Respondent from 26.3.1995 and was to retire at the age of 55. There is further no dispute that he worked beyond his retirement age until 26.7.2017 when he retired at the age of 58 years. It is also not disputed that the claimant was served with a 15 days' retirement notice and thereafter paid Kshs.73,350 as gratuity for a period of 10 years from 1998 to 2008. The issues for determination can therefore be summarized as follows:

- a) Whether the termination of the Claimant's employment was unfair and unlawful.
- b) Whether the Claimant is entitled to the reliefs sought.

### **Whether the termination of the Claimant's employment was unfair and unlawful**

18. Termination of the contract of service in this case was done by the respondent through her letter to the claimant dated 11.7.2017. The letter stated as follows:

***“Dear Sir,***

#### **RE: RETIREMENT NOTICE**

***We refer to the above subject matter and wish to inform you that you have attained the retirement age of 55 years.***

***We therefore write to notify you that you will be retired formerly w.e.f. 26th July,2017 after which you'll be required to return all company property in your possession before your dues are paid to you.***

***The management, staff of Riley Services Limited would like to appreciate you for the commitment, hard work and service rendered for the years you have been with the company...”***

19. Under ***section 45 (2) of the Employment Act***, termination of an employee's contract of employment is unfair if an employer fails to prove that:

- a. The reason for the termination is valid;
- b. The reason for the termination is a fair reason;
  - i. Related to the employee's conduct, capacity or compatibility; or
  - ii. Based on the operational requirements of the employer;
- c. The employment was terminated in accordance with fair procedure.

20. Further, under sub section (4) of the said section, termination of employment shall be unfair where :

- a. The termination is for one of the reasons specified in section 46;

b. It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

### **Reason for the termination**

21. In this case, the reason for the termination was attainment of the mandatory retirement age. The Respondent contended that the Claimant's retirement was long overdue, and that fact was admitted by the claimant by confirming that as at the time of the retirement he was 58 years old. The Respondent relied on **regulation 17 (2) (b) of the Protective Security Service Wage Order** in asserting that the retirement age was 55 years but admitted that the claimant's service was extended beyond the mandatory retirement age at the request of a client he had been assigned to. In view of the said express provision of the law that the mandatory retirement age for private security guards is 55 years, I return that the respondent had a valid and fair reason for retiring the claimant at the age of 58 years. I therefore dismiss the contention by the claimant that the employer didn't prove that he was no longer incapable of performing the duties of a security guard.

### **Procedure followed**

22. The Claimant contended that the 15 day's retirement notice served on him was insufficient because after extension of his service beyond the mandatory retirement age, it was implied that he would continue serving until service of a proper retirement notice. On her part, the Respondent contended that retirement notice was not necessary after the claimant attained the mandatory retirement age and maintained that all what was needed was for the claimant to be informed about his retirement. In addition, she contended that the attainment of retirement age was a lawful cause for summary dismissal.

23. I agree with the claimant that there was an implied contract between him and the respondent to extend his employment contract for an indefinite term terminable by notice or cause. In ***Michael Kagoma Maina vs. Inspector General of Police & 2 Others [2014]eKLR***, it was held that:

***“Termination of contract by way of retirement demands of the employer to make a decision in that regard failing which the employee would be entitled to consider that the employment relationship has not come to an end.”***

24. The notice period was not expressly agreed but under section 35 (1) (c) of the Employment Act, where the employee receives salary on monthly intervals like in this case, the contract is terminable by 28 days' notice in writing. In this case, the claimant contended that a notice of 15 days was not sufficient and maintained that he had reasonable expectation of a proper notice.

25. The Court in ***Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR*** extensively pronounced itself on the issue of legitimate expectation citing the book of **De Smith, Woolf & Jowell, “Judicial Review of Administrative Action”**. 6thEdn.

Of Sweet & Maxwell page 609 thus:

***“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.”***

26. In light of the foregoing, I am of the view that the Claimant had the legitimate expectation to be issued with adequate termination notice which is a requirement under the Employment Act. However, the foregoing did not render the retirement unfair or unlawful because the claimant was aware or had the reason to know that the question of his retirement was not whether, but when. The only blunder on the respondent's part was how she answered the said question by giving unreasonably short notice considering the claimants length of service and also the fact that he accepted to an extension of his service after attaining the retirement age. I therefore return that the respondent breached the employment contract by giving 15 days' retirement notice instead of one month.

### **Whether the Claimant is entitled to the reliefs sought**

27. The Court has found that the Respondent ought to have issued the Claimant with a proper notice. The respondent submitted that because

15 days' notice had been given, only 15 days' salary in lieu of notice should be awarded. I however dismiss that submission for lack of merit and proceed to award the claimant one full months' salary in lieu of notice as prayed.

28. The claim for underpayment of salary and overtime is time is exaggerated and is therefore dismissed. There is lack of precise particulars for overtime pay taking into consideration that there were days when he was on leave or off day. He did not also consider the reality of change of salary from time to time during the 22 years of service. As regards salary under payment, there are no particulars of the time when the salary was underpaid.

### **Conclusion and disposition**

29. I have found that the retirement of the claimant was not unfair and unlawful but it was done in breach of the contract with respect to the termination notice period. I have also found that the claimant is entitled to one month's salary in lieu of notice. Consequently, I enter judgment for him against the respondent for the sum of Kshs.14,420.90 plus costs and interest at Court rates from date of filing suit.

The award is subject to statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 15th day of March 2019**

**ONESMUS N. MAKAU**

**JUDGE**