



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 548 OF 2016**

**AHMED KIARIE.....CLAIMANT**

**VS**

**UNITED (EA) WAREHOUSE LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Ahmed Kiarie worked for United (EA) Warehouse Limited as a Forklift Driver, having been employed initially on causal basis from July 2007 and being employed on permanent terms from 1<sup>st</sup> February 2012. Kiarie’s employment with the Respondent came to an end on 31<sup>st</sup> December 2017 giving rise to this claim.
2. The Claimant’s claim is contained in a Memorandum of Claim dated 12<sup>th</sup> July 2016 and filed in court on 15<sup>th</sup> July 2016. The Respondent filed a Memorandum of Reply on 11<sup>th</sup> November 2016. At the trial, the Claimant testified on his own behalf. The Respondent did not call any witness.

**The Claimant’s Case**

3. The Claimant began his employment with the Respondent on 13<sup>th</sup> July 2007. On 31<sup>st</sup> December 2014, he attained the mandatory retirement age of 60 years. His employment was however extended by contract for a period of 3 years running from January 2015 until 31<sup>st</sup> December 2017.
4. The Claimant claims that the Respondent unilaterally decided to terminate his contract of employment prematurely without any lawful or justifiable cause.
5. The Claimant claims the following from the Respondent:

- a) Unpaid annual leave allowance for 5 years.....Kshs. 100,000
- b) Unpaid leave travelling allowance.....6,500
- c) House allowance.....120,000
- d) Unpaid terminal dues for 5 years.....60,000
- e) Unpaid salary for 30 months.....600,000
- f) Damages for breach of employment contract

**The Respondent’s Case**

6. In its Memorandum of Reply dated 3<sup>rd</sup> November 2016 and filed in court on 11<sup>th</sup> November 2016, the Respondent admits having employed the Claimant but denies that the Claimant’s employment was terminated as alleged by the Claimant.

7. The Respondent states that the Claimant was offered permanent employment as a Forklift Driver from 3<sup>rd</sup> February 2012, having previously worked on casual basis.

8. Upon attaining the retirement age of 60 years, the Claimant requested the Respondent's Executive Chairman to consider his request for an extension of employment. The matter was discussed at length and the Respondent made an offer for extension of the Claimant's employment. The Respondent avers that the Claimant did not acknowledge the offer for extension.

9. The Respondent states that due to intervening factors arising, the Respondent decided to release the Claimant from service. The Respondent claims that reasons as to why it had changed its position were given to the Claimant.

10. The Respondent further states that the Claimant's dues were tabulated in accordance with the number of years served and the Claimant was issued with a certificate of service.

### **Findings and Determination**

11. There are two (2) issues for determination in this case:

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

### **Unlawful Termination?**

12. On 19<sup>th</sup> December 2014, the Respondent wrote to the Claimant as follows:

*"Dear Ahmed,*

**RE: RETIREMENT AT AGE 60-EXTENDED EMPLOYMENT PERIOD**

*Reference is made to your letter dated 17<sup>th</sup> December, 2014 requesting for an extension of your retirement period, a meeting held with the Human Resources Manager.*

*In accordance with the Employment Act, of 2007, you have attained the normal retirement age of sixty (60) years.*

*However, the company has considered your request to continue working in the same position for an extended period of three (3) years.*

*You will be expected to continue with your normal duties as per your appointment letter dated 3<sup>rd</sup> February, 2012. Your salary and other conditions of service remain unchanged.*

*Yours faithfully,*

*(Signed)*

*J.J. Ogwapit*

***EXECUTIVE CHAIRMAN"***

13. Subsequent to this letter, the Respondent wrote to the Claimant on 15<sup>th</sup> May 2015 under reference 'Retirement at Age 60-Release from Service/Termination of Contract'. The latter letter makes reference to meetings held on 22<sup>nd</sup> April 2015, 29<sup>th</sup> April 2015 and 6<sup>th</sup> May 2015 between the Respondent's officers and the Claimant. In the said letter, the Respondent states *inter alia*:

*"You will agree that the company had hoped to give you a soft landing based on the situation then, however after evaluating several factors, the company finds the decision untenable hence has rescinded its decision and therefore releases you from service after attaining the retirement age and in accordance with the Employment Act, of 2007."*

14. From the foregoing correspondence, plus the record of the minutes of the meetings held on 22<sup>nd</sup> April 2015, 29<sup>th</sup> April 2015 and 6<sup>th</sup> May 2015, it emerges that the Respondent had initially agreed to the Claimant's request for extension of employment post retirement but rescinded its decision, owing to a decline in business.

15. It is however also evident that the Respondent made effort to explain the turn of events to the Claimant. From the record, the Claimant held three meetings with the Respondent's officers. The Claimant told the Court that at the conclusion of the meeting held on 6<sup>th</sup> May 2015, whose minutes he signed, it was agreed that he would be released from employment.

16. The Claimant's case is that he was coerced to sign the minutes of the meeting of 6<sup>th</sup> May 2015. He however did not provide any particulars of coercion. As held in *Jonathan Patrick Ondieki Nyangau v Nairobi City Water & Sewerage Co Limited [2018] eKLR* a party alleging coercion must lay before the Court evidence of such coercion. It is not enough for one to simply state that they were coerced.

17. That said, the Court finds and holds that at the meeting of 6<sup>th</sup> May 2015, the Claimant voluntarily agreed with the Respondent that he would be released from employment by 30<sup>th</sup> June 2015. The said agreement effectively brought the extension of the Claimant's employment to an end and he cannot therefore lay a claim for breach of contract.

18. The claims for breach of contract and unpaid salary are therefore without basis and are dismissed.

19. In response to the claim for leave pay, the Respondent filed a leave application form signed by the Claimant, showing nil leave balance for 2015. The Claimant did not raise any objection as to the authenticity of this leave record and the Court found no reason to discredit it.

20. In the result, I find and hold that the Claimant's claims for leave pay and leave travelling allowance are also without basis and proceed to dismiss them.

21. The Claimant also claims house allowance. However, from his letter of appointment, it is evident that he was paid house allowance. The claim thereon is therefore without merit and is dismissed.

22. The only surviving claim is what the Claimant refers to as '*terminal dues*'. According to the tabulation filed by the Respondent, the Claimant was paid terminal dues based on 3 years of service. However, the certificate of service issued to the Claimant by the Respondent on 28<sup>th</sup> May 2015 reckons the Claimant's service period from 13<sup>th</sup> July 2007 to 30<sup>th</sup> June 2015.

23. Taking the Claimant's certificate of service as *prima facie* evidence of his employment with the Respondent, I return that he served for seven (7) complete years of service. Having been paid terminal dues on the basis of 3 years, the Claimant was underpaid by 4 years.

#### **Final Orders**

24. I therefore direct the Respondent to tabulate and pay to the Claimant terminal dues for a period of 4 years, within the next thirty (30) days from the date of this judgment.

25. I further direct the Respondent to pay the costs of this case.

26. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Gichana for the Claimant

Miss Kieti for the Respondent