



**REPUBLIC OF KENYA**

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

**CAUSE NO.1848 OF 2014**

**RUFUS OSOTSI OLEFA.....CLAIMANT**

**- VERSUS -**

**NAIROBI CITY WATER & SEWAGE COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.10.2014 and an amended memorandum of claim on 22.06.2018 through Rakoro & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant was born on 01.12.1955 and reached 60 years on 01.12.2015 and the premature retirement of the claimant by the respondent on 01.01.2015 was unfair and unlawful termination.
- b) A mandatory injunction restraining the respondent from retiring the claimant from service on account of the mandatory retirement age of 60 years as the claimant will be 60 years on 01.12.2015 and not on 01.01.2015.
- c) An order compelling the respondent to pay the claimant all his retirement benefits including maximum compensation for unfair termination amounting to Kshs. 3, 621, 267.52.
- d) Costs of the claim plus interest.

The memorandum of response was filed on 25.08.2015 through Koceyo & Company Advocates. The respondent prayed that the suit be dismissed with costs on a higher scale.

It is not in dispute that the claimant was employed by the Nairobi City Commission on 12.02.1991 and reported on duty on 10.06.1991 as a Sewer Foreman II at the water and sewerage department. On 07.05.1996 he was appointed as Technical Inspector at the water and sanitation department of the City Council of Nairobi as per the letter dated 18.09.1996. On 15.09.2005 he was employed by the respondent in the position of Maintenance Supervisor – Electrical Works.

The claimant's case is that when he was employed in 1991 he signed an acceptance letter but not a personal data form and when he joined the City Council of Nairobi in 1996 he was not given a personal data form but signed the letter of offer on 30.09.1996. Similarly, in 2005 upon joining the respondent's service he signed an acceptance of appointment on 21.09.2005 and no personal data form. However on 16.10.2005 he was given a personal data form and he dated his date of birth as December 1955.

On 22.01.2014 the respondent served the claimant a notice to retire showing that he would retire on 31.12.2014 upon attaining the mandatory retirement age of 60 years. The claimant disputed the notice because, in his case, he was born on 01.12.1955 so that he would attain the retirement age on 01.12.2015 and not 01.01.2015. The claimant filed an affidavit with the respondent to that effect. The respondent served another notice to retire dated 27.03.2014 indicating that the claimant would retire on 01.01.2015 upon attaining 60 years of age because the claimant's national identification card simply stated the year of birth as 1955 without a date of birth. Thereafter the claimant obtained a national identification card and birth certificate showing his actual date of birth being 01.12.1955 so that his case is that he ought to have retired on 01.12.2015 and not on 01.01.2015. That he attained 60 years of age on 01.12.2015.

The respondent's case was that upon being served with a notice to retire the claimant fraudulently declared his date of birth as December 1955 whereas all the documents on his record of service showed he was born in 1955. Further the respondent's case was that all documents the claimant relied on to support his case that he was born in December 1955 were suspect because he obtained them after he was notified about his retirement. The documents are the affidavit, the revised national identification card, and the certificate of birth all issued after the retirement notice had been issued.

It is submitted for the respondent that the claimant having not indicated his date of birth when filling out the employee's personal records and as such, per the Employment Act, if a date is not filled in the identity card, then the assumption of the day of birth would be the first day of the month and the year. The Court returns that the respondent has not cited a section of the Act that provides for such proposition. The Court therefore finds that the assertion was unfounded.

There is no dispute that at all material times of the employment the claimant's date of birth was recorded as 1955 until 16.10.2006 when he was given a personnel form by the respondent and he indicated the date of birth as December 1955. Earlier in 2004 the claimant had completed the NHIF statutory personal data form and indicated that his date of birth was on 01.12.1955. The Court finds that the respondent at that time did not dispute the data and the Court returns that the data thereby became incorporated in the contract of service as the claimant's date of birth. The parties are bound accordingly. Accordingly the Court returns that the contractual date of birth was December 1955 and the claimant cannot suffer loss arising from the respondent's deficiency in the respondent's operational requirements, systems, and policies. The respondent pleaded and decried the habit of its employees changing their dates of birth to achieve service beyond attainment of the 60 years of retirement age. The respondent did not exhibit any operational requirements, systems, and policies it had put in place to curb that emerging trend. Further the respondent failed to show that as at the time the claimant filled the personnel data showing that his date of birth was December 1955, he had thereby fraudulently changed his date of birth. The evidence is that up to the date the claimant completed the personnel form, the record was that he was born in 1955 and the specific date being at large or unknown, there is no reason to penalise the claimant for reporting the most advantageous date, the respondent having stated that it was aware of such predicaments but failed to institute or negotiate a policy position. It is the opinion of the Court that where the employee is faced with a genuine situation to elect one or other factor, term or condition of service as was the case in the instant case, the employee will be presumed and is entitled to opt for the most favourable option. Further, section 45(2) (b) of the Employment Act, 2007 provides that a reason for termination is valid if it relates to the employee's conduct, capacity or compatibility, or, is based on the employer's operational requirements. The Court returns that the reason for retirement in the instant case was not valid because it did not pass the prescribed test.

For example, nothing prevented the respondent from negotiating or instituting an operational policy thus, **"In event the date of birth is in dispute as at the time of retirement, the date of birth will be as indicated in the employee's national identification card as at date of appointment or be deemed to be 1<sup>st</sup> of July of the year indicated in such identification card, if a specific date of birth had not been indicated."** The Court finds that the respondent having failed to institute or negotiate such appropriate operational policy, the claimant will not suffer adversely in view of that employer's deficiency.

The Court follows and upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus,

**"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."**

Accordingly, the termination in the instant case was unfair. The Court returns that the claimant's contractual date of birth was 01.12.1955 and he was contractually entitled to retire upon attaining 60 years of age (per the CBA) on 01.12.2015 and he was unfairly retired prematurely on 01.01.2015.

The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The claimant prays for lost earnings and benefits for the lost period he would have served to 60 years of age being non-practice allowance; employer's pension allowance; unpaid salary for 10 months in 2015; yearly bonus for 2015; and package allowance. The Court considers that during that time the claimant did not work and the benefits were therefore not earned. The Court further considers that during that period the claimant was entitled to mitigate his losses by engaging in alternative gainful activities and it was not shown that due to the retirement or other reason attributable to the respondent he was unable to do so. Further the payment of the non-practice allowance was based on the employee being registered with a recognised professional body instituted by an Act of parliament and are required to be in possession of a practice certificate to carry out their duties as may be approved by the respondent's Board of Directors or as the CBA may apply. The Claimant was registered and licensed as an electrician by the Energy Regulatory Commission established under the Energy Act, 2006. However the claimant did not show that he was a member of a professional body enacted by parliament and did not show the provision of the CBA or approval by the Board that he could earn non-practice allowance. Thus he would not be entitled to non-practice allowance effective 01.07.2012.

The prayers will therefore fail but the Court considers that the loss of earnings for 10 months prior to attaining 60 years of age is such justifiable aggravating factor in considering award of compensation under section 49 (1) (c) of the Employment Act, 2007 for the unfair termination.

The claimant desired to honourably retire upon reaching 60 years of age per the Contract of service, he did not contribute to his termination, and after a clean and long service he had to leave employment against his legitimate expectation. The Court has looked for but not found mitigating factors in favour of the respondent. In particular the Court finds that it was an aggravating factor that the respondent failed to institute or negotiates appropriate operational requirements and policies on retirement age where the date of birth was expressed only as a year of birth like in the instant case. Thus the Court finds that the maximum compensation of 12 months' gross salaries will meet the ends of justice and the claimant is awarded **Kshs. 1, 196, 724.00** as was prayed for. The claimant is entitled to the 3 months' pay in lieu of notice Kshs.99, 727.00 x3 months making **Kshs. 299, 181.00**.

The Court makes the following further findings on remedies:

- a) The claimant has established that he is entitled to overtime night out allowance of 45 days as submitted and based on approvals on record for overtime but which has not been shown to have been paid. He is awarded **Kshs. 149, 590.00** as prayed for.
- b) The claimant has shown that he was allocated a house whose rent was fixed at Kshs.900.00 per month but he was deducted all his house allowance Kshs. 3, 300.00 per month for 79 months and is awarded the refund of excess payment for rent **Kshs. 189, 600.00** as prayed for.
- c) The claimant gave no evidence to justify prayers on yearly bonus and package and they will fail.
- d) The prayer for a mandatory injunction restraining the respondent from retiring the claimant from service on account of the mandatory retirement age of 60 years as the claimant will be 60 years on 01.12.2015 and not on 01.01.2015 has been overtaken with events through effluxion of time and the Court declines to grant the same..

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the claimant was born on 01.12.1955 and reached 60 years on 01.12.2015 and the premature retirement of the claimant by the respondent on 01.01.2015 amounted to unfair and unlawful termination.
- b) The respondent to pay the claimant a sum of **Kshs. 1, 835, 095.00** by 01.02.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 30<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**