



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAROI**  
**CAUSE NO.1373 OF 2014**

**PETER WAMBUA NZIOKA ..... CLAIMANT**

**VERSUS**

**ASL LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Peter Wambua Nzioka filed his claim on 20<sup>th</sup> August, 2014 and a defence was filed on 17<sup>th</sup> December, 2014.
2. The Claimant was an employee of the Respondent from 1985 to 14<sup>th</sup> February, 2014 when he was terminated. At the time the Claimant was earning Kshs.62, 000.00 in the position of Production Supervisor, production division.
3. In the contract of employment, it was provided that the retirement age was 65 years and the Respondent took the duty to ensure the safety of the Claimant while at work and to pay him all his dues and benefits.
4. On 14<sup>th</sup> February, 2014 the Respondent retired the Claimant at the age of 62 years after serving for 28 years. That he had not attained the contract age of 65 years; he was not paid the dues owing before retirement being;
  - i. the notice pay at Kshs.62,000.00;
  - ii. leave allowances at Kshs.120,000.00; and
  - iii. Severance pay at Kshs.867, 990.00.
5. The claim is also that around the time the Claimant was retired, his colleagues Patrick Ogola Abuonj and James Njoroge Kamau were also retired and their terminal dues were paid and the non-payment to the Claimant was thus discrimination against him noting that he had diligently served the Respondent for 28 years.
6. The claim is also that on 30<sup>th</sup> October, 2013 while the Claimant was working as a supervisor at his work station he stepped onto some loose metal bars which had negligently been laced by other employees causing him to slide and fall and causing him injury as a result of which he suffered loss and damage. That the Respondent was negligent in that he failed to implement safety systems for the Claimant while at work; exposed the Claimant to injury; not taking reasonable measures and precautions for safety; not placing warning signs in risky areas; and failing to issue the Claimant with protective gear to prevent

injury. As a result the Claimant sustained injuries of a fracture to the ankle putting him to a medical expense of Kshs.3, 000.00 and seek payment of damages.

7. The claims are for;

- a. *Payment of terminal dues;*
- b. *General damages to be assessed by the court;*
- c. *Special damages of Kshs.3,000.00 and*
- d. *Any other relief the court may deem fit to grant.*

8. The Claimant testified in support of his case that upon employment on 1<sup>st</sup> December, 1985 he served diligently and on 1<sup>st</sup> February, 211 he was issued with a letter of employment as a replacement as his original letter was said to be illegible. In 2004 he was promoted to Production Supervisor as a salary of Kshs.62, 000.00.

9. That in 2013 the Claimant got injured while at work and was hospitalised at Nairobi West Hospital, had a plaster until 26<sup>th</sup> December, 2013. The Respondent insisted that the plaster be removed as he wanted to retire the claimant. When the Claimant got injured he went on sick leave from October to 18<sup>th</sup> December, 2013 when he resumed work and the office closed on 22<sup>nd</sup> December, 2013.

10. While at work on 14<sup>th</sup> February, 2014, the Claimant was served with a letter of retirement which was to take effect on the same date. There was no prior notice or reasons to warrant the early retirement. The respondent's allegations that the retirement was discussed and that he agreed to retire after June, 2014 was not correct as the retirement was abrupt and without notice. The Claimant was also not given a hearing to state his case before termination.

11. That the Claimant was only paid Kshs.38, 000.00 as terminal dues which were deposited in his bank account. The dues paid at the end of February, 2014 were only Kshs.38, 000.00 only. The Claimant is thus seeking terminal dues, notice pay, lave for 2 years, service pay as there was a practice at Respondent to pay an employee 15 days for each year served. Other employee who retired at the same time were paid service pay – James Njoroge, Patrick Ogwenya and Paul Kamau. These employees were at the same level with the Claimant and were paid 15 days for each year served.

12. The Claimant also testified that the defence that he was aged 62 years and due for retirement is not correct as he was under a contract of employment that did not set the age limit and should not have been forced to retire. He should have been given at least 6 months' notice.

13. On cross-examination, the Claimant testified that he has no document to show that he was due to retire at age 65. He was injured while at work and was issued with medical records upon leaving hospital on 30th October, 2013 and not on 3<sup>rd</sup> October, 2013. He was never issued with the human resource manual while in employment. He was aware that the retirement age was 55years.

14. The Claimant called his second witness Mr Paul Kamau who testified that he worked with the Claimant but has since left the respondent's employment upon retirement in 2015. Upon retire he was paid service for years served. This practice was applied to all employees and the Claimant was thus entitled to his service pay like other retired employees. The practice of not paying the Claimant was discriminatory. He was in the same department as the Claimant who was the supervisor and he ought to have been paid his service dues. That he was paid for NSSF and service dues were paid that notwithstanding.

15. Mr Kamau also testified that his contract did not stipulate payment of service upon retirement yet this was paid to him. There was a policy in pace to this effect that existed since he was employed and all

retired employees was paid service pay.

## **Defence**

16. In defence, the respondent's case is that they are a limited liability company operating 6 different divisions, being the Steel Division, Trading, Paper, Heavy Fabrication, Cables and the Packaging Divisions. Each division has employees under different contracts and terms of service depending on the unique skills required of the performance of their work.

17. The Claimant was employed in the Steel Division in different capacities until 14<sup>th</sup> February, 2014 when the Claimant retired. His employment was also governed by the human resource manual applicable in the Steel Division. It was a term of the contract that the Claimant would be eligible to 26 working days paid annual leave to be taken at the discretion of the respondent. Termination of employment could also be upon notice of one month by either party.

18. The defence is also that it was a term of the contract that the normal retirement age was 55 years or as per government retirement age whichever was higher. The respondent's retirement age was thus not 65 years.

19. The Respondent did not make it a term of contract to pay service pay and in any event statutory dues to NSSF and NHIF were remitted for the claimant. In December, 2013 the Respondent notified the Claimant that he had exceeded his retirement age and should consider retiring. The Claimant asked for an extension of time and the Respondent gave him one month notice taking effect on 14<sup>th</sup> February, 2014.

20. Upon retirement, the Claimant was not entitled to severance pay as his case did not relate to a redundancy and was thus paid one month notice and 6 leave days. The Claimant that Patrick Ogolla Abuonj and James Njoroge Kamau were retired and paid terminal dues and that the action in paying out the same amounted to discrimination is not true. These employees were in the Heavy Fabrication Division and were not retired and the dues paid to them were not terminal payments. The terms of service applicable to the Heavy Fabrication Division were distinct and separate from those in Steel Division as was the case in each Division.

21. The Respondent discharged its statutory duty to the Claimant and no dues owe upon retirement.

22. The allegations that on 30<sup>th</sup> October, 2013 the Claimant stepped on a metal bar that had negligently been placed by employees causing him injury as this has not been proved. There is no case of negligence as set out and no liability arises. Where an accident occurred it was wholly by the contribution of the Claimant who was negligent and in breach of his employment contract. The Claimant failed to supervise his team under him so as to undertake their duties properly and failed to keep proper look of his surroundings or wear protective gear while at work hence placing him in danger of the accident. The Claimant was also aware of the potential risks and danger inherent in the nature of work assigned to him and he voluntarily accepted the same and the doctrine of *volenti no fit injuria* apply.

23. The claim set out in terms of termination of employment is denied and the claim with regard to industrial injury, the court has no jurisdiction and should be struck out. The claim should be dismissed with costs.

24. In evidence, the Respondent called Emmanuel Kyalo Titus. That he worked with the Claimant as an Accountant with the Respondent in the Steel Division where the Claimant was situated. That upon retirement of the Claimant, in 2015 he became the human resource officer since July, 2015. That in the 4 divisions of the Respondent, the employees have different contracts of employment taking into account the skills and capacities required. The terms and conditions of service are not the same.

25. The Claimant left employment upon retirement at 62 years. The retirement age at the Respondent is 55 years and the claimant's retirement had been extended and terminal dues were paid on 14<sup>th</sup> February,

2014. Funds were posted to his bank account.

26. Upon retire, the Claimant came back and asked to be helped to move his goods to his rural home and a cheque issued was for him to meet these costs.

27. Before retirement, there was a discussion held with the Claimant and the operations manager agreed and the Claimant accepted his certificate of service on 18<sup>th</sup> December, 2013. There was no discrimination against the Claimant as James Njoroge Kamau pay slip for aril, 2013 show that he was in heavy fabrication division and not in steel division as alleged. The employees had opted for the NSSF option and thus had a different computation of dues. At the time the Claimant retired, James Kamau was still an employee of the Respondent and his payment rate applied due to change of systems.

28. The April, 2013 pay slip for Mr Ogolla show that he was in heavy fabrication division and service years paid in relation to change of systems and he is still at the Respondent as an employee.

29. Pau Kamau Njuguna as the general manager up to June, 2015. He worked in the steel division. In accordance with the policy, the issue of service pay is silent and is pad at the discretion of the respondent.

30. In cross-examination, Mr Kyalo testified that despite being the human resource officer of the Respondent he does not have the different policies applicable in the 4 divisions of the respondent. The Claimant was retired on 14<sup>th</sup> February, 2014 and this took effect on the same date. It was instant termination. There are no letters filed giving the Claimant notice of his retirement. A certificate of service was issued but the minutes leading to the decision to retire the Claimant have not been produced. The Claimant had been away from October to December, 2013 due to work injury. Mr Kyalo could not confirm if the work injury of the Claimant resulted in his retirement.

### **Submissions**

31. The Claimant submits that his termination by retirement was without notice and contrary to sections 41, 43, 45, 46 and 47 of the Employment Act. He is thus entitled to severance/service pay and damages for discrimination against him. That upon retirement, the practice of the Respondent pays 15 days of service for each year served. The claimant's witness Mr Kamau testified that he retired and was paid service. Mr Kyalo for the Respondent also confirmed that service pay was payable across to all employees as a matter of practice and without discrimination. That the Claimant should be paid service for the 28 years worked.

32. That notice pay is due as the Claimant was not given notice upon retirement that was instant. The leave due in 2013 was not taken and thus payable together with 6 days due in 2014.

33. The Claimant relied upon the cases of **Zachary Ochako versus KBC [2014] eKLR and James Mwathi Nguri versus Egerton University [2013] EKLK.**

34. The Respondent submits that the termination of the Claimant is valid when he attained 62 years and was therefore retired. The human resource policy of the Respondent provides for retirement age at 55 years and the Claimant was allowed to serve to 62 years. The retirement was not due to the work injury as had this been the case, termination should have followed the 55 years rules but the Claimant was allowed to serve for 5 more years.

35. The termination was lawful and procedural. By letter dated 14<sup>th</sup> February, 2014 the Claimant was retired and before this date, on 18<sup>th</sup> December, 2013 a meeting was held with the Claimant where the issue of his retirement was discussed and the Claimant asked for time extension and was thus issued with notice of his retirement.

36. The Respondent also submit that there was no discrimination against the claimant. His contract did not make provision of service/severance pay of 15 days for each year worked. In evidence it was apparent that James Njoroge Kamau works in the heavy fabrication division and the service years set out

in his pay slip are not terminal dues. This is the case for Mr Oggola Patrick. There was no evidence by the Claimant on the terms applicable to employees in the steel division as Mr Kamau did not present his employment contract.

37. That in **Max Masoud Roshankar & Another versus Sky Aero Limited [2015] eKLR**, the court held that parties have a right to negotiate their terms of contract. The Claimant was thus under his specific contract, and cannot rely on other provisions to claim that he was discriminated against.

38. The Claimant is not entitled to the reliefs set out s these are not due.

### **Determination**

Whether the retirement of the Claimant was fair;

Whether there was discrimination against the claimant; and

Whether there are any remedies due.

39. On 25<sup>th</sup> August, 2016, the Claimant filed notice withdrawing his work injury claim.

40. The question of the court jurisdiction in terms of work and industrial injury set out by the Respondent at paragraph 20 of the defence is thus dealt.

41. It is not sufficient for an employer to rely on the termination clause of an employment contract. The mandatory provisions of section 43 of the Employment Act requires that before a contract of employment is terminated, there must be lawful reason(s) that are genuine and that also comply with section 45(2) for being valid and fair and more fundamentally that the employer has complied with procedural fairness. Section 43 provides;

#### *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.*

42. And section 45(2) provides;

*(2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;*

*(b) that 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; and*

*(c) That the employment was terminated in accordance with fair procedure.*

43. There is no notice submitted by the Respondent that before 14<sup>th</sup> February, 2014 the Claimant was issued notice, given reasons or due process followed. Termination of employment whether due to retirement or for reasons set out under section 41(1) of the Employment Act should be procedurally fair. This is not the case for the claimant.

44. On the question of discrimination against the Claimant, Mr Kyalo testified that Mr Paul Kamau Njuguna was a general manager in the steel division where the Claimant worked and that the payment of

service was discretionary. There was nothing to show in the Respondent policy in this regard. That the policy is silent on service pay.

45. Where Paul Kamau Njuguna was paid service upon termination of his employment, noting that he was placed in the steel division where the Claimant worked, to pay his service for years worked and fail to pay the Claimant upon his termination, even where the Respondent was exercising its discretion, treating employee similarly placed is contrary to article 41 of the constitution which requires an employer to engage in fair labour practice. Similarly, to go out and make a payment to one employee and deny the other without any justification looking at work performance, capacity or any other due cause, such is to engage in a practice described under article 27 of the constitution as discriminatory.

46. On the admission by Mr Kyalo for the Respondent that there was no particular policy to pay or not to pay service pay to employees placed in the steel division, to then proceed and pay one employee upon retirement and fail to pay another upon retirement is a practice discriminatory. In this case therefore where the Claimant retired upon attaining 62 years, and Mr Kamau also retired and left employment of the Respondent and was paid service pay, the Claimant who was faced and placed in similar circumstances and was not paid his service pay like Mr Kamau was, this amounted to discrimination against him.

47. In arriving at the above findings, I have made reference to **Christopher Onyango & Others versus Heritage Insurance Company limited, cause no.781 of 2015**; that

*... where an employer fails to act and promote equality of opportunity in employment; fails to promote and guarantee equality of opportunity; and proceeds to terminate the employment of any employee in a manner that is discriminatory – that is without setting out the reason(s), without justification and in setting out such an employee aside and separate from other employees so as to deny them a legal right without any justification – such an employer commits discrimination against the employee and such is specifically prohibited under section 5 of the Employment Act, it is unconstitutional practice under article 27 of the constitution and the same is an unfair labour practice under article 41 of the constitution. In the case of **Frederick Kariuki versus Bank of India, Cause no.2424 of 2012**, the Court held that where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified*

48. In **Abraham Gumba versus KeMSA [2014] eKLR**, the court cited the following findings;

*43. In the Industrial Court Cause No. 746 [N] of 2009 between Kenya Union of Journalists v. the Standard Group Limited this Court concluded that Human Resources Policies and Procedures Manuals represent quotidian aspects of human resource management; they do not ordinarily change the contract of employment, but expound workplace policies; and do not automatically become incorporated to the contract of employment.*

...

*The Manual does not become part of the Employee's contract simply by being posted on the notice board or dispersed online, as allegedly done by the Respondent. Whereas the Employers who author workplace Manuals should always be held accountable for the standards established in the Manuals, the Employees cannot be held accountable, unless they have consented to be bound, by signing their full acceptance of the standards set in the Manuals. The nature of workplace Manuals in general, is not to define the individual terms and conditions of service. They may be authored because the law requires they are authored, such under Section 6 of the Employment Act which requires Employers state their policies on sexual harassment; they may be authored by Employers to self-publicize; and are useful in guiding everyday interactions amongst Employers, their Employees and the Consumers of their goods and services. They are useful in enabling Employees, Consumers, the Public and the Authorities in holding Employers accountable on such issues as Fair Labour Practices, Protection of the Environment, Corruption and Human Rights.*

49. As such, where a matter is set out in the human resource policy, such should be accepted by the employee and this set out in the employment contract for the employee to sign in acceptance and become bound by its terms. To thus go out and treat the employees outside the human source manual and effect a terminal payment such as service pay without putting into account the employment contract, the human resource policy, the practices at the work pace in the context of the rights attendant under article 27 and 41 of the constitution, and where such acts stand out as pitching one employee against the others, such I find to be discriminatory. The non-payment of the Claimant of service pay where a similar payment was done to another employee Mr kamau who testified in court to this effect, such cannot find justification in the realm of fair labour relations. Such is discriminatory against the Claimant and damages are due.

50. Notice pay before termination of the Claimant was highly contested. Section 35 of the Employment Act requires that where there is an employment relationship, before the termination of employment, a notice must issue. Such notice is qualified as it must be *in writing*. This is important as upon which written notification, where an employee wishes to challenge the same, under section 47 of the Employment Act, the right exists and the basis is such notice.

51. Also section 36 of the Employment Act provides;

*36. Payment in lieu of notice*

*Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.*

52. Therefore, each employment should be terminated by notice or payment in lieu thereof. In this case, the respondent's case is that on 18<sup>th</sup> December, 2013 a meeting was held with the Claimant and his retirement was discussed. However the minutes and the agreements arrived at this alleged meeting have not been submitted. In any event, where there was a consent or agreement at such a meeting, section 38 of the Employment applied thus;

*38. Waiver of notice by employer*

*Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise.*

53. Where at the meeting of 18<sup>th</sup> December, 2013 the Claimant waived his right to a termination notice and asked for time extension, the duty was then upon the employer, the Respondent to issue communication to this effect. There is no such agreement submitted to this effect. What is apparent from the proceedings is that the Claimant had been on sick leave from 30<sup>th</sup> October, 2013 due to work injury and only resumed duty on 18<sup>th</sup> December, 2013. To attend and engage with the employer on such a serious matter as his retirement and on the same date agree to retire as set out by the Respondent is highly impractical. In any event, where the Claimant agreed to retire, a time within which to retire agreed upon, then the notice of 14<sup>th</sup> February, 2014 was not necessary. The notice issued does not make any defence to any meeting held on 18<sup>th</sup> December, 2013.

54. In this regard I take the evidence of the Claimant as credible; he was not issued with termination notice before his retirement. His termination was instant on 14<sup>th</sup> February, 2014 contrary to section 35 of the Employment Act. Notice pay is due and the procedure to issue instant termination is contrary to the provisions of section 41 and 43 of the Employment Act and where there is such breach, section 45 of the Employment Act apply.

55. Where the Claimant was due to retire at 55 years and was not retired, he continued in the service of

the Respondent and diligently performed his duties. To thus take an instant decision to retire him without any reason, notice or compliance with the mandatory provisions of section 41 of the Employment Act, such amount to procedural unfairness.

## **Remedies**

56. On the finding that the Claimant was discriminated against, section 12 of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act set out the remedies available. In employment, payment of gross salary of up to 12 months is a remedy available to compensate an employee unfairly treated by an employer. Such I find is well available to the court to award in this case on the finding that there was discrimination and that this compounded the unfair circumstances of his termination. Compensation at 10 months gross pay is an appropriate award all being Kshs.620, 000.00.

57. Notice pay as assessed above is due. The Claimant is awarded Kshs.62, 000.00 in notice pay.

58. The evidence by the Respondent that leave due at 6 days as at 14<sup>th</sup> February, 2014 was paid was not challenged by the Claimant in any material way. Where leave was due in 2013, the claim for leave in 2014 where the Claimant was terminated by the second month of the year, the day's payable at 6 days is a reasonable computation of the same. The claim is declined.

59. Under paragraph 5(b) (iii) of the claim, the Claimant is seeking the following;

*Severance pay being 15 days for each year worked based on the last salary earned being 62,000.00*  
 $\div 30 \times 15 \times 28 = 876,900.$

60. In submissions, the Claimant case was that he is entitled to severance/service pay. In his evidence, the Claimant case was that he is entitled to service pay similar to what the employees were paid. However, the remedies sought in the Memorandum of Claim relate to a claim of *severance pay*. In the witness statement filed by the Claimant to support his case, he set out the prayers he is seeking relate to *severance pay*.

61. There is a legal difference between service pay and severance pay. One is due under section 35 and the other under section 40 of the Employment Act. The evidence required for each claim is fundamentally different from the other.

62. Severance pay is due under the provisions of section 40 of the Employment Act in a case of redundancy. This was a matter clearly gone into by the Respondent under paragraph 10 and 12 of the defence but the Claimant did not take the cue to amend the claim(s) as appropriate. Such a claim cannot be replaced, amended or awarded based on submissions. To grant the claims set out under the filed Memorandum of Claim as prayed would be to award severance pay without any evidence of a redundancy. As such, no severance pay is due and this prayer is declined.

63. With regard to service pay, the assessment and finding above are with regard to the discriminatory practices of the Respondent where the Claimant was treated differently from other employees who were paid service pay and he was not. Even where service pay is not awarded as pleaded, the evidence available led to the findings of a case of discrimination against the claimant.

64. On the withdrawal of the claim for industrial injury, the Claimant for medical expenses is not due.

**In conclusion, judgement in hereby entered for the Claimant against the Respondent in the terms that;**

**a. The Claimant was unfairly terminated from his employment with the respondent;**

**b. Compensation awarded at Kshs.620,000.00;**

**c. Notice pay of Kshs.62,000.00;**

**d. Costs of the suit.**

**Read in open court at Nairobi this 2<sup>nd</sup> day of February, 2017.**

**M. MBARU**

**JUDGE**

In the presence of:

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