



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 34 OF 2017

(Before D. K. N. Marete)

JANE MOKEIRA MOGOI.....CLAIMANT

VERSUS

NYAMIRA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGEMENT

This matter was originated by way of an Amended Memorandum of Claim dated 21st September, 2017. The issues in dispute are therein cited as;

- *Unlawful termination of employment of the Claimant Jane Mokeira Mogoi.*
- *Whether the Respondent followed the proper policies and procedures in retiring the Claimant.*
- *Whether the Claimant is entitled to full salary and terminal benefits from the date of termination of employment.*

The respondent in a Response to Claim dated 6th November, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times she was employed by the respondent, as a successor to the now defunct Municipal Council of Nyamira in the position of Market Attendant I. She was on payroll No.[particulars withheld]. She offered dedicated service and was thereby able to retain her position of service at Miruka Market on the following terms;

<i>Particulars</i>	<i>Amount (Kshs.)</i>
<i>Basic salary</i>	<i>32,010.00</i>
<i>Rental House Allowance</i>	<i>13,000.00</i>
<i>Commuter Allowance</i>	<i>2,000.00</i>
<i>Total Earnings</i>	<i>47,010.00</i>
<i>Deductions</i>	
<i>Provident Fund (Auto) LAP Fund (6551)</i>	<i>5,201.20</i>

<i>Social Welfare Association Contribution</i>	<i>500.00</i>
<i>(Kenya Local Government Workers Association)</i>	
<i>NSSF</i>	<i>200.00</i>
<i>PAYE (MPR=1162)</i>	<i>6,415.05</i>
<i>NHIF</i>	<i>1,100.00</i>
<i>Total Deductions</i>	<i>13,416.25</i>
<i>Net Pay</i>	<i>33,593.75</i>

The respondent's case is a denial of the claim. She opens with a narration of the substance of her case as follows;

- *There was no unlawful termination of employment of the claimant.*
- *The Respondent does not owe the claimant the monies stated in the statement of Claim or any monies at all.*
- *The claimant is not entitled to the relief sought.*
- *The claim is bad in law, frivolous and otherwise an abuse of the court process.*

The respondent denies ever employing the claimant. It is her case that the claimant was one of the officers formerly working for the defunct local authority who were seconded to the County Government in the advent of devolution. The respondent in further denial of the claim disclaims paragraph 5, 6 and 7 of the statement of claim laying its basis and further denies the applicability of the Collective Bargaining Agreement dated 12th October, 2012 to this claim.

The respondent denies retirement of the claimant and all appurtenant issues relating to such retirement. She also denies the tabulation of claim and medical expenses as set out at paragraphs 15 and 16 of the claim.

The matter came to court variously until 5th December, 2017 when it was heard *inter partes*.

At the hearing CW 1 – Zipporah Mugoï duly affirmed testified on her identity, profession, and place of residence. She further testified on an adoption of her witness statement dated 4th December, 2012 and also produced a letter dated 4th July, 2016 addressed to the claimant.

On cross – examination, she testified that she was the daughter of the claimant and that the claimant was born in 1956. She further testified that exhibit 2 - the letter of retirement on age grounds was collected by herself from the County Government. She did not sign for it. She further testified that her mother had been invited for the discussion on retirement on age grounds but she had not seen her letter of such invitation.

On re – examination, she reiterated her testimony that the letter on the claimant retirement was issued to her by an officer of the County Government. The letter also contained a date of birth different from the actual date of birth.

The witness further testified that she did not know her mother's date of birth and also that the letter inviting the claimant's advocates for negotiation was not received in good time. The defence counsel however objected to the evidence on receipt of the letter of invitation.

CW 2 Jane Mokeira Mogoi - the claimant, duly affirmed also testified on her identity, profession and place of residence. She further testified on an adoption of her witness statement dated 4th December, 2012 and also annexures to the claim. She wished to rely on these as evidence in support of her case.

On cross – examination she testified that she was employed by the County Council and transferred to the County Government. Her further testimony was that the County Government did call for any documents from herself.

The claimant further testified that she was born in 1956. She did not however remember the date of birth. Her further testimony on cross-examination was that her husband was hospitalized for 10 days and incurred a bill of Kshs.640,956.00 on which she had produced documentary evidence. The NHIF only catered for Kshs.13,000.00.

On re – examination, she testified that she did not get a reimbursement of the medical expenses incurred by her husband. Further, she reiterated that she did not know her date of birth and neither had she delivered the birth certificate to the respondent.

In defence, DW 1 Shem Nyang’au duly affirmed testified that he is the Acting Chief Executive Officer of the respondent. He further testified that he knew the claimant who was a former employee of the County Government and had retired in September, 2016.

The witness further testified that the termination of employment was lawful in that the claimant had attained the retirement age. This was in accordance with the IPPD datasheet documents.

DW 1 further testified on an adoption of his witness statement dated 4th December, 2012 and also the annexures in evidence. This is besides a response to claim dated 6th November, 2016. He also wish to rely on birth certificates annexed to the response as exhibit 1 and also other annexures on his witness statement.

On cross – examination the witness testified that the claimant was a member of the Kenya Local Government Workers Union. Her dated of birth is 1st October, 1956 in accordance with exhibit 2. The date of birth on *her* birth certificate is 6th January, 1956 and this is in the name of Jane Mokeira Mugoi. The date on her ID card is [particulars withheld].

The witness further testified on his familiarity with the CBA which at section 29 provides that the case of non availability of birth date, the identity card takes preference. It shall be deemed to be 31st December, 00 of the year in issue. In the instant case, 01 10 2016 was applied for being the proper date in terms of the IPPD system.

He further testified that the birth certificate was provided by the officer (claimant) on the inception of the County Government. The date of birth was obtainable but was inconclusive.

On closing, DW 1 testified that the amount payable for medical claim was the amount claimed minus the amount paid by the NHIF. Again, the custody of the voucher is in the County Treasury of Finance Office.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful? The claimant in her written submissions dated 4th December, 2017 addressed the issue of substantive justification as follows;

The claimant was terminated for reason of having reached retirement age. This is despite the fact that she was yet to attain the age of 60 years. According to her national identity card, her exact

date of birth is unknown. The year is reflected as 1956. According to section 29(1) (c) of the Collective Bargaining Agreement, in such situation, the anniversary of her birthday shall be deemed to be 31st December of each year. Therefore, the claimant could only be deemed to have attained 60 years on 31st December 2016.

In disregard of the above mentioned CBA, the respondent retired the claimant by stating in their letter dated 4th July 2016 that they were giving her 3 month's notice of termination on grounds of age. This means that according to the letter, the respondent determined that she had attained retirement age in the month of October 2016. This is contrary to the signed Collective Bargaining Agreement and creates a situation where the claimant loses three months of pay. To further compound the situation, the respondent attached a purported birth certificate for the claimant which shows that the claimant was allegedly born in January 1956. The source of the said birth certificate is questionable as the claimant herself does not know the source of the information. In any case, if the respondent had a birth certificate indicating the claimant's date of birth as January 1956, why did they wait until November 2016 to terminate her employment on age grounds? Similarly, why did they contradict themselves as to the date of birth when they wrote the letter dated 4th July 2017.

The above shows that the termination was not proper and the respondent themselves were not certain of their own actions when they terminated the claimant.

The claimant further enlists a case of absence of substantive and procedural fairness in her termination in that despite the conflict in her date of birth, she was retired in disregard of the provisions of the subsisting Collective Bargaining Agreement. Further, she was not notified of the retirement and continued to work in October and for 10 days in November, 2016 when she found out her retirement. Her pension was also not processed as would have been usual on retirement.

The claimant sought to rely on the authority of **Kenya Shoe & Leather Workers union v Bata Shoe Co. (K) Limited Cause 245 of 2014** where Nduma, J. observed as follows;

“22. Section 59 of the Labour Relations Act provides;

“(1) a collective agreement binds for the period of the agreement –

a) the parties to the agreement;

b) all unionsable employees employed by the employer, group of employers or members of the employers organization party to the agreement; or

c) the employers who are or become members of an employers' organization party to the agreement, to the extent that the agreement relates to their employees.”

(2).....

(3) the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

23. it is trite employment and labour law that the terms and conditions of employment in a CBA become the new terms of employment in respect of all employees the CBA applies to.

24. The CBA herein applies to all unionsable employees of the respondent.

25. It follows therefore that all unionsable employees of the respondent must be employed in terms of the CBA. Any terms of an employment contract between a unionsable employee of the respondent and the respondent which contradicts and or is not in conformity with the CBA violates

the CBA and such employees are entitled to enforcement of the terms and conditions of service contained in the CBA.

Clause 29 (1) (c) of the CBA relied on by the claimant in further submission provides as follows;

Subject to the provisions of the local government officers Superannuation fund rules, relevant Provident fund rules, the Public Service Commission (Local Authority Officers) Regulations and any written law, an officer's employment may be terminated in the following ways:

a) ...

b) ...

c) Where documentary evidence of an officer's age is unobtainable or inconclusive, his assumed age will be determined by reference to the date in his identity card together with the recommendations of the Medical Officer of Health, and in such case the anniversary of his birthday shall be deemed to be 31st December. Any appeal will be heard by an independent medical officer.

d) ...

The claimant therefore forments a case of unfair termination of employment and prays for a determination in her favour.

The respondent in her written submissions dated 7th December, 2017 reiterates her case as pleaded and expressed in evidence and further testimony of her witness – DW 1.

She further submits a case of lawful termination of employment and pins this on a submission that clause 29 (c) of the CBA is only applicable where the documentary evidence of an officers age is unobtainable or inconclusive. She submits that this was not applicable in the circumstances of the case here as this evidence was available and conclusive in the form of a certificate of birth and the IPPD data. This essentially concludes her case.

A scrutiny of the respective cases of the parties displays a flow in the respondent's case. From the onset, it is evidently clear that the date of birth of the claimant is disputed. This is because the authenticity of the sources of this data, the birth certificate presented by the respondent, the IPPD data sheet which were not produced but formed the part of the evidence of the respondent and the claimant's birth date on her ID card do not agree and are therefore inconclusive. The parties do not at any one time agree on the date of birth or the process of ascertaining the same. Under these circumstances, the open recourse to the parties is the application of clause 29 (c) of the CBA *inter partes*. This dictates a formulation of the birth date at the close of the year in issue: in this respect, the 31st December, 2016.

The respondent in retiring the claimant on 30th September, 2016 was rushing to nowhere. What with the clear provisions of the CBA, forming part of the employment contract *inter partes*. To me, this is as clear as daylight. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allows the claim and order relief as follows;

- i. One months salary in lieu of notice.....Kshs.47,010.00
- ii. Unpaid salary for October and 10 days

in November, 2016.....	Kshs.62,680.00
iii. Leave allowance.....	Kshs.33,847.00
iv. Medallion.....	Kshs.50,000.00
v. Unpaid medical claim.....	Kshs.330,000.00
vi. 10 months salary as compensation for unlawful termination of employment.....	Kshs.470,100.00

Total of Claim.....Kshs.993,637.00

vii. The cost of this claim shall be borne by the respondent.

Delivered, dated and signed this 15th day of December 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Obosso holding brief for Manduku instructed by Kerangi Manduku & Company Advocates for the claimant.

2. Mrs. Asati instructed by E. Asati & Company Advocates for the respondent.