



Agira v Nyanas Water & Sanitation Ltd & another (Cause E011 of 2022) [2024] KEELRC 1911 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E011 OF 2022
CN BAARI, J
JULY 25, 2024**

BETWEEN

LUCAS AGIRA CLAIMANT

AND

NYANAS WATER & SANITATION LTD 1ST RESPONDENT

**KISUMU WATER & SEWERAGE COMPANY LTD (KIWASCO) 2ND
RESPONDENT**

JUDGMENT

1. In a Memorandum of Claim dated 27th January, 2022 and filed in court on the 3rd March, 2022, the Claimant sued the Respondents alleging unfair termination. He seeks the following remedies: -
 - i. A declaration that his termination was unfair and unlawful.
 - ii. Kshs 3,556,684.39/= being payment on account of early retirement, unpaid salary, unpaid allowances, actuarial deficit, unremitted Sacco deductions, pension scheme contributions and 12 months' salary in compensation for the unfair termination.
2. The Respondents entered appearance and subsequently filed a Response to the Memorandum of Claim dated 24th March, 2022, wherein, they assert that the Claimant agreed to proceed on early retirement after consultative deliberations with his union.
3. The matter proceeded for hearing on 6th March, 2024 with the Claimant and one Maureen Odeng, the 2nd Respondent's Area Manager testifying in support of their respective cases.
4. Thereafter, both parties filed written submissions.



The Claimant's Case

5. The Claimant's case is that he was initially employed on 24th January, 1989 by the Ministry of Water, working in various areas and designations until 15th July 2020, when he was summarily dismissed.
6. It is the Claimant's contention that at the time of his dismissal he was a shop floor steward within the larger Nyanza region covering the 1st Respondent whose management had been taken over by the 2nd Respondent sometime in the year 2014.
7. The Claimant states that his woes began when he represented one Gabriel Chepkwony, a colleague at a disciplinary hearing. The Claimant avers that Mr. Moseti the 2nd Respondent's finance manager was not happy and threatened him with termination from employment.
8. The Claimant's further case is that later on 17th February, 2020 when he requested for his transfer allowance, the Respondent countered with a notice to show cause for abscondment. It is the Claimant's assertion that the abscondment allegations were malicious and baseless.
9. In emphasising the malicious nature of the allegations, the Claimant asserts that all his absences from work were sanctioned by his immediate supervisor. He further avers that in March, 2020, the President issued a directive that all employees above 58 years should stay home in preparation for retirement in order to mitigate on the harmful effects of the Covid 19 Pandemic.
10. In further explaining his absences from duty, the Claimant cited the increase in fare due to the Covid 19 virus and the cutting off of the route from Nyakach to Muhoroni by floods.
11. The Claimant's case is that the disciplinary hearing was just a smokescreen to sanitize the Respondent's decision to terminate his employment as he was not allowed representation at the hearing.
12. He states that he was not accorded an opportunity to defend himself, given the very short notice to attend the hearing and his appeal was determined by the same committee that heard his disciplinary hearing.
13. On cross-examination, the Claimant told Court that despite reaching an agreement with the Respondent on early retirement he was still claiming wrongful dismissal.
14. The Claimant confirmed on cross-examination that he was issued a show cause letter, he responded to the show cause, he was advised to appear for the hearing with a representative, and that he attended the disciplinary hearing. It is his further evidence that he attended the hearing with two representatives who were neither colleagues nor union representatives.
15. The Claimant further confirmed that he engaged his union when he lodged an appeal against his dismissal, and the union mediated the issue and arrived at an offer of an early retirement.
16. It is the Claimant's evidence that he was paid 17 months salary being the remainder of his employment contract based on the mediation agreement reached between the Respondent and his union.
17. The Claimant confirmed that he indeed had a settlement with the Respondents, but still claims wrongful dismissal.

The Respondents' Case

18. The Respondents aver that the Claimant's termination was justified due to abscondment of duty. They assert that the Claimant absconded duty from March to June, 2020 without permission or reasonable cause necessitating disciplinary action.



19. The Respondents' further case is that the Claimant was issued with a notice to show cause dated 23rd June, 2020 whose response they found unsatisfactory and invited him for disciplinary hearing on 9th July, 2020. It is their assertion that at the disciplinary hearing, the Claimant was represented by outsiders, which representation was not envisaged by regulations resulting in the representatives being locked out.
20. It is their case that after hearing the Claimant, he was found culpable for absenteeism, impunity and being ungovernable at the workplace and was summarily dismissed.
21. The Respondents state that the Claimant appealed against his summary dismissal and simultaneously sought the intervention of the Kenya Union of Food and Allied Workers. The Respondents assert further that the unions intervention bore fruit with the effect that the summary dismissal being reviewed to an early retirement.
22. It is the Respondents' position that following the mediation agreement, the Claimant's retirement dues were computed and paid to him in full.
23. In light of the foregoing the Respondents' case is that the Claimant is not entitled to the monies sought as all the monies due to him was paid and the matter settled.
24. On cross-examination, the Respondents' witness RW1 told Court that the Claimant attended the disciplinary hearing accompanied by a representative of the area Member of County Assembly (MCA) and a representative from the office of the area Member of Parliament (MP). She further confirmed that the said representatives were not allowed to represent the Claimant during the hearing.
25. The Respondents pray that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

26. It is submitted on the Claimant's behalf that the termination was not procedurally and substantively fair. He cites not being allowed sufficient time to defend himself and his representatives being denied audience.
27. The Claimant equally draws the Court's attention to the provisions of Sections 43(1), 44(4), 45(1) of the *Employment Act*, and the case of *Anthony Mkala v Malindi Water & Sewerage Company Ltd* Cause no 64 of 2012 where the court stressed on the importance of procedural fairness by urging that an employee should be accorded adequate opportunity to reply to accusations against him.
28. On his prayer for payment on account of leave, the Claimant cites Section 28 of the *Employment Act*, and buttresses that he worked for 22 months and 25 days without leave.
29. On his claim for house allowance, the Claimant states that he is entitled to the claim premised on Section 31 of the *Employment Act*, and the Court of Appeal decision in *Grain Pro Kenya Inc ltd v Andrew Waitbaka Kiragu* (2019) eKLR where the Court stated that it was mandatory and should be calculated at not less than 15% of the basic salary.
30. The Claimant further cites Section 35(5) of the *Employment Act* to support his entitlement to service pay for every year worked. He relies on the case of *George Onyango Akuti v G4s* where the Claimant was awarded service pay as he was not in any pension scheme.
31. The Claimant finally submits that he served the Respondents diligently for 22 months. He urges the court to award 12 months' salary on the basis of his period of service. He placed reliance in the case of *Alfred Muthomi & others v National Bank of Kenya Limited* [2018] eKLR to support this position.



The Respondents' Submissions

32. The Respondents' submit that the Claimant was approbating and reprobating by accepting the retirement benefits and thereafter lodging a claim for unfair termination. They assert that the Claimant's conduct is unacceptable and place reliance in *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Munda Njeru Geteria* [2010] eKLR where the court cited with approval the holding in *Evans v Bartlam* [1937] 2 ALL ER 649 at page 652 for the holding that: -

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment, cannot allege the invalidity of a judgment which conferred the benefit.”
33. In light of the foregoing the Respondents strongly submit that the claim should have been for retirement benefits and not for unlawful termination.
34. The above notwithstanding, it is the Respondents' submission that the dismissal preceding the agreement for early retirement was procedurally and substantively fair. They draw the Court's attention to the notice to show cause dated 26th June, 2020, and his response of the same date and the disciplinary hearing of the 9th July, 2020.
35. It is the Respondents' further submission that the Claimant appealed against his summary dismissal which appeal was compromised by the agreement that he proceeds on early retirement.
36. In support of the propriety of the dismissal, the Respondents submit that there was no objection to the manner of the proceedings. For instance, the Respondents assert that the Claimant did not request for more time or even a postponement of the hearing to enable him prepare.
37. On the appeal not being heard, the Respondents submit that it was compromised by the agreement for early retirement.
38. With regard to the Claimant's dismissal being justified, the Respondent directs the court's attention to the Claimant's assertion that he had been away from work due to his daughter being sent home for school fees, his step mother passing away and the directive by the President. The Respondents assert that the Claimant had not provided any proof of the reasons for being absent.
39. That in the absence of this proof the Respondents avow that there was no justification for abscondment.
40. The Respondents submit that the Claimant is not entitled to the early retirement on the strength of the Kshs 302,434/= paid in settlement of the early retirement agreement. The Respondents further aver that transfer allowance was paid together with the salary for December, 2019.
41. On the Claimant's claim for leave allowance for 3 years, the Respondents' submits that leave for the year 2019 was paid in September 2019 while in the year 2020, he utilized all his leave days.
42. On the claim for actuarial deficit, the Respondents' submission is that it ought to be paid by the National Water Conservation & Pipeline Corporation Pension Scheme.
43. The Respondents submit that they remitted all deductions to the Claimant's Sacco and the Claimant should enquire from the Sacco.
44. Lastly on the claim for 12 months compensation, the Respondents reiterate that the issue herein was with regard to early retirement and not unfair termination.



Analysis and Determination

45. I have considered the pleadings, the evidence tendered, the witnesses' testimonies and the submissions by both parties. The following issues crystalize for determination.
- a. Whether the Claimant retired from the service of the Respondents
 - b. Whether the Claimant was unfairly dismissed.
 - b) Whether the Claimant is entitled to the remedies sought.

Whether the Claimant Retired from the Service of the Respondents

46. It is the Respondents' assertion that the Claimant's appeal against the summary dismissal was arrested by an agreement reached between themselves and the Claimant's union, that he proceeds on early retirement in place of the summary dismissal.
47. The minutes of the appeal hearing of 14th August, 2020 produced in evidence, indicate that the hearing was adjourned to enable discussions on exploration of the Claimant's early retirement. Further in a letter dated 18th August, 2020 addressed to the Claimant, it is indicated that a compromise had been reached pursuant to meetings with the Claimant's union representatives.
48. The Claimant also confirmed on cross-examination that he acceded to the fact that the union was negotiating a settlement on his behalf, and further confirmed that an agreement was reached and that he received payment of Ksh 302,424 for the remainder of his employment contract.
49. It is not disputed that the Claimant was heard in a seemingly procedurally conducted disciplinary process that resulted in his summary dismissal. It is also true that he did appeal the dismissal and belatedly roped in his union at the appellate stage which negotiated a settlement on his behalf.
50. The evidence before Court further confirms that a settlement was reached which set aside the earlier verdict of the Respondents summarily dismissing the Claimant, and which was substituted with a requirement that the Claimant takes an early retirement.
51. The Claimant again admitted that he proceeded to take an early retirement and received a 17 months' salary payment on account of the remainder of his employment contract.
52. To my mind, the agreement to have the Claimant take an early retirement is a decision that compromised his appeal. The question that arises therefore, is whether the Claimant after opting for early retirement could turn back and claim to have been wrongfully dismissed.
53. The Claimant told this Court that he engaged his union to negotiate and to represent him at the hearing of his appeal. He further confirmed that a settlement was reached pursuant to which he received payment for the remainder of his contract term.
54. By this chronology of events and the Claimant's admission of having accepted the agreement reached on his behalf by his union and received payment, I am of the view that he cannot now turn around and claim to have been wrongfully dismissed. He acquiesced to the settlement and should live by his decision.
55. A court cannot in my opinion interfere with an agreement between parties except in such circumstances as would afford good ground for varying or rescinding a contract between those parties. (See *Flora N. Wasike v Destimo Wamboko*[1988] eKLR)



56. Additionally, the decision to dismiss the Claimant having been replaced by to an agreement to retire early, the issue of unfair or wrongful dismissal does not arise. There was at the end of the day, no dismissal. The Claimant separated with the Respondents by way of retirement albeit early, and not through summary dismissal.
57. I conclude by holding that the Claimant voluntarily took an early retirement and was therefore not unfairly dismissed from service.

Whether the Claimant is Entitled to the Remedies Sought

Early retirement Dues

58. The Claimant sought Kshs 521,021/= on account of early retirement. He however did not provide a basis for the amount claimed having received a retirement settlement as agreed between the Respondents and his union.
59. This claim fails and is dismissed.

17 months' Salary

60. This claim is not available to the Claimant, the same having been paid in settlement of the early retirement.

Transfer Allowance

61. The Respondents asserted that this was paid as evinced by the payslip for December 2019. The payslip indeed shows that transfer allowance was paid. This evidence has not been controverted in any way by the Claimant. The claim equally fails.

Leave Allowance

62. The Claimant did not provide any evidentiary proof for an award under this head. The Respondents alluded to paying leave allowance for the year 2019 as evinced by the September payslip. There being no proof that leave allowance for the other two years was paid, I find the claim merited and awards the Claimant Kshs 21,506/= on account of leave.

Unremitted Contributions

63. The Claimant has not provided evidentiary proof that his contributions were not being submitted. There is no statement from the SACCO or the pension scheme in this respect. The claim is therefore unsupported and it fails.

Compensation

64. The Court has held that the Claimant was not wrongfully dismissed and hence the claim for compensation fails.
65. The upshot is that the Claimant's suit only succeeds to the extent that he is awarded Kshs 21,506/= on account of leave allowance. The rest of the prayers are dismissed.
66. Parties shall bear their own costs of the suit.
67. Orders accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
25TH DAY OF JULY, 2024.**

C. N. BAARI

JUDGE

Appearance:

Mr. Ochieng h/b for Mr. Khalwale for the Claimant

Mr. Oduor present for the Respondents

Ms. Anjeline & Debra-C/As

