

side 1.2 billion for purposes of the retrenchment of employees in the public universities. This was contained in the budget speech for the fiscal year 2001-2002 by the Minister of Finance. The plaintiffs allege that the money was embezzled and secondly the University breached the Constitution of Kenya and the Labor Laws of this country and intentionally inflicted upon the employees economic harm by denying them the right to earn a living. The plaintiffs also sought for a declaration that the retrenchment was null and void.

The University filed a defence and denied each and every allegation by the plaintiff. In the alternative the University averred that the suit as instituted by the plaintiffs was bad in law for reasons that each and every employee had a separate distinct contract of employment and thus this omnibus suit is grossly incompetent.

The plaintiffs relied on the evidence of four witnesses in support of their suit. Three of the witnesses are the plaintiffs in this suit. **Silas Karani** who was among the employees retrenched gave evidence and produced a data which the plaintiffs compiled in support of their claim. The plaintiffs came together and compiled the list of the items which were not paid by the University. He further testified that they were not informed about the decision by the University to retrench them from employment. They were only given a letter which he produced in evidence showing that they were supposed to handover and vacate the University premises not later than 28th March 2001. That notice was dated 23rd March 2001. He claimed that they were not paid certain monies being transport allowance, balance of severance pay, gratuity and leave. Later on the plaintiffs were able to come together and after they examined what each one of them was paid, they realized certain monies were not paid and thus they filed the present suit after giving due notice to the defendant.

Joseph Mwirigi Mukango also gave evidence on behalf of the other plaintiffs. In his evidence, he claimed that the retrenchment exercise was discriminatory and there was no justification for his retrenchment from employment. The exercise was also not carried out transparently. He was not consulted and his dues in accordance with the Civil Service Reform Retrenchment Plan were not paid, for instance he was not paid training money to take care of his ability to adjust in his new post-retirement life and to prepare him for life outside of employment. He therefore averred that he came across policy documents that showed that a sum of Kshs 40,000/- was due to be paid to each employee for training. In addition to training, the defendant should have paid transport allowance to enable him transport his household goods from the University to his home area. The severance pay was also miscalculated and was not in accordance with the sum of money set aside by the Government for the retrenchees. The Government of Kenya had set aside 1.2billion in this regard most of which was embezzled.

Alice Chepkurui Kering also gave evidence in support of the plaintiffs' case. She produced several documents namely the payslips of the plaintiffs who filed this case. All the plaintiffs organized themselves and put their documents together to show that they were employees of the defendant. She supported the evidence of the other witnesses and further confirmed that the amount set aside by the Government of Kenya for the retrenchment of employees from the Public Universities was embezzled. As regards the sum paid as golden handshake this witness was of the view that they should have been paid more than Kshs 45,000/- under this heading.

The plaintiffs also summoned the head of civil servants **Ambassador Francis Muthaura** as their witness. Mr. Muthaura produced a copy of the Civil Service Reform Retrenchment Plan 2000-2002 which is the policy document that guided the Government of Kenya on the retrenchment of the excess employees within the Civil Service and Public Institutions which included the Public Universities.

The defence relied on the evidence of two witnesses. **Thomas Kiprono Serem** the Registrar of the University. He gave a detailed account of how the process of the retrenchment of excess employees of the University was undertaken. The University retrenched 501 employees from the various departments within the Category 1 and 4 of the University Scheme of Service. The

employees were earning different salaries depending on the positions and experience. Not all employees were required to wear uniform. It is only the employees who required protective clothing and not all employees needed to work overtime. The plaintiffs issued a demand note for payment of a sum of Kshs 30 million but subsequently the plaintiffs filed the present suit in which they are claiming for more than Kshs 86 million. The defendants testified that when they received instructions from the Government in the letter dated 2nd February 2001 signed by Permanent Secretary Ministry of Education Science and Technology, the University set up a committee which developed guidelines for retrenchment. Each sector had three members comprising of the Head of the Department, the senior most member of staff in the department and a former head of the department who looked into each and every case for each staff member who was identified for retrenchment. They had a score card which rated each employee. After identifying the persons to be retrenched the matter was presented to the University Council which approved the persons to be retrenched and each of the employees was paid a retrenchment package as follows:-

- a) Severance payment of one month current basic salary (*at the time of retrenchment*) for each year worked in the University;**
- b) Payment of service gratuity of one month current basic salary (*at the time of retrenchment*) for each year worked in University;**
- c) Payment of basic salary in lieu of notice as per service regulations;**
- d) Payment of baggage and passage as per service regulations;**
- e) A “Golden Handshake” of forty five thousand shillings (Kshs 45,000/-).**

According to this witness, the employees were given the notification letters and they were paid all their dues which was given by the Government to the University. The claim by the plaintiffs has no basis as the University received a total of Kshs 112,458,011 which was spent in this exercise and the balance that remained was returned to the government. Passage and baggage which was meant for the transportation of the employees was also paid in accordance of each of the employees grade. There was no provision for training and therefore the University did not pay for the training of the retrenchedes.

Robert Kibet Langat the accountant of the University kept the records of all the payments that the University made to the retrenched employees. All the money that was released by the government was paid to the retrenchedes in accordance with the guidelines given by the government. As regards passage and baggage each employee was paid in accordance to his grade. Grade 1 was paid Kshs 2,350/-. Employees within the category of Grade 2 were paid Kshs 2,600/-. Grade 3 – Kshs 2,950/- and Grade 4 – Kshs 3,400/-. Severance pay was calculated based on the basic salary for each employee multiplied by the number of years each employee had served the University and the basic salary which was applied was the one each employee was earning as at the time. The employees who had not gone for leave were paid leave accrued and anybody who had worked overtime was similarly paid. Before each employee was paid, they had to clear any outstanding debt owing to the University or the Co-operative Society. Not every employee was entitled to uniform. Only certain category of employees like those in catering, transport or security used to get uniforms and the uniforms were supplied in the course of employment and therefore there was no outstanding payment for uniforms. This witness denied that the university was obliged to provide training to the employees and an ex-gratia payment of Kshs 45,000/- was paid to each employee.

This case brings out interesting and important points of law that also touch on public policy on employment. Both parties filed extensive submissions which doubtlessly involved research and cited several authorities on the principles governing employer-employee relationship. Am grateful to both Counsel for their industry in this respect. I will make reference to some of the

authorities cited in the cause of analyzing the evidence.

It is an agreed principle in employment law that an employer or employee who are parties to an employment contract can terminate the services of employment by giving due notice as provided in the contract of employment. If no notice is given, and the employment contract is terminated, it is generally accepted that the damages to be paid to a party in breach should be restricted to the period of notice. See the case of **Githinji vs. Mumias Sugar Co. Ltd. [1991] LLR 308 (CAK).**

The position taken by the courts is in tandem with the common law position which was also reiterated by the Court of Appeal in the case of **Rift Valley Textile Limited vs. Ogada [1992] LLR 308 (CAK)** where the Court of Appeal while setting aside the judgment of the High court held that:

“We have no doubt whatsoever that the law did not entitle the judge to do any of those things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it is also provided for what was to be done if either party was unable to comply with the said notice period namely to pay the other party for the notice period. In our view even though the respondent’s dismissal was unlawful he had been paid under and in accordance with the terms of his contract with the appellant.”

This view is also captured in the Court of Appeal decision in the case of **Central Bank of Kenya vs. Nkabu [2002] 1EA 34** where the Court of Appeal held that:-

“A right to terminate an employee from service is a statutory right which can even be taken away by a mere stipulation in the staff rule and regulations.”

I respectfully agree with the above prepositions of law which are correct and legal. However I find that this was not an ordinary and normal **employee-employer** relationship which was being terminated. If this was an ordinary normal relationship the judgment of this court would have doubtlessly followed those principles which are set out in common law and decided authorities. I find this case distinguishable from the above cases in more than one way:-

Firstly, the retrenchment of employees from the Government Civil Service and Public Institutions was a policy directive which was carefully guided by an articulated policy document namely the Civil Service Reform Retrenchment Plan 2000-2002 whose overreaching goal was to ensure that there was a creation of a lean efficient and more productive public service. Ideally the exercise was supposed to ensure that the retrenchment programme, designed a safety net package that would help to cushion retrenched from possible economic vulnerability. These guidelines are found in the policy document and in the letter that directed the University to carry out the exercise of retrenchment. Further evidence shows that the University was advised by the government to follow a sequenced procedure in off-loading the staff such as:-

- i) Identification of over-manned posts/cadres and functions;***
- ii) Compilation of bio-data of staff to be retrenched;***
- iii) Isolation of staff to leave the service under natural attrition from staff to be off-loaded;***
- iv) Determination of staff for off-loading;***
- v) Seeking approval for off-loading;***
- vi) Notification of staff and release from duty;***

vii) Communication of approval for separation;

viii) Processing and disbursement of Safety Net and Terminal Benefits;

ix) Deletion from the payroll. (see letter dated 2nd February 2001)

Going by the evidence before the court there is no doubt that all the above procedures were followed by the University as they undertook the programme. The defence evidence detailed the procedures that were followed and how the dues payable to each employee was calculated and paid. I also have no doubt in my mind that the procedure followed by the University to determine the employees for retrenchment was credible. Although the plaintiff alleged that there was discrimination no evidence was adduced to show any acts of discrimination or bias on the part of the University.

Against this background, the issue to bring the bear is whether the employees proved their case and each of the claims sought in their plaint. I will deal with each of the claims seriatim.

The claim for unsupplied uniforms - this claim was not proved by the plaintiffs. It was also seriously contested by the defence evidence which was to the effect that not every employee was entitled to uniform. It is only for the employees who worked in catering, drivers and security who were entitled to uniforms. They were also issued with uniforms in the course of their employment. I agree with the defence that there is no justification for this claim and the plaintiff did not show in their evidence how they were entitled to uniforms.

Similarly **overtime** was paid to the employees who worked overtime and thus the plaintiffs did not prove the claim of Kshs 1,989,140/-. **The claim for golden handshake:** the plaintiffs' position is that the Government of Kenya set aside 1.2 billion for the retrenchment of employees in public universities and the sum spent by the defendant was way below the budgeted amount. The plaintiffs referred to the budget speech but no evidence was given in this respect. Ambassador Muthaura who gave evidence testified that he was not aware of the budget speech which gave the commitment. He only produced the Civil Service Retrenchment Plan which he found in the office. He did not know the amount of money which was budgeted for the anticipated retirement. I find that the University paid a golden handshake of Kshs 45,000/- to each of the employee. This was an ex-gratia payment which is also articulated in the policy document as a flat rate golden handshake. **Transport allowance** was also paid to each employee according to their grade and I therefore find no justification for the sum of Kshs 3,470,000/- sought in the plaint. The only item that requires consideration is the item claimed for **training of the retrenchees**. I have gone through the policy document as well as the letter from the Ministry of Education Science and Technology which are the two documents that guided this exercise of retrenchment. Also the evidence by the plaintiffs is to the effect that they were not offered any training. They were also not consulted or sensitized about the retrenchment to prepare them to adjust their lives accordingly. According to the Civil Service Reform Retrenchment Plan the Directorate of Personnel Management was supposed to prepare the retirees both financially and psychologically for life in retirement by planning a training and outplacement intervention for those identified for retrenchment. The policy sets out the training objective as follows:-

“213. The broad aim and objective of training retrenchees is to prepare them for post retirement social and economic challenges. The majority of retirees have been used to one permanent steady income generated by their employment in the Civil Service. The loss of income arising from the retirement has to be compensated by the retirees themselves through investments in income generating activities. Such investments are necessary if the retirees have to maintain and improve their current standards of living.

214. Training of retirees under CSRP I mainly aimed at sensitizing and not imparting any skills. The duration of the programme lasted for only 3 days and as a result, many

retirees made poor investment decisions. The training programme proposed in this phase is projected to take more than three days and aims at equipping retirees with knowledge, skills and attitudes necessary for setting up and managing small scale income-generating projects, or expanding an already existing one, so as to ensure regular and sustainable income for the retirees and their families. Specific objectives of the training are:

§ *To equip retirees with necessary and relevant information regarding:*

- i) socio-economic and psychological issues associated with retrenchment;*
- ii) viable investment opportunities;*
- iii) setting up and managing a small scale income generating project;*
- iv) sources of financial support; and*
- v) Advisory bodies.*

§ *To enable retirees productively utilize their retrenchment benefits so as to be able to maintain a reasonable standard of living.*

§ *To impart vocational skills which may be used by the retrenchee to seek re-employment in the private sector.”*

Going by the above policy pronouncement, it is clear that training of the retrenchees, was a critical component of the Government's overreaching objective within the policy framework of retrenchment of employees. It was not the intention of the Government to off-load its employees to the vagaries of unemployment without equipping them and preparing them psychologically. The whole programme was well thought out and designed to cushion the retrenchees and to prepare them for the life after retirement. To do this, they needed to be trained and given the necessary skills on how to survive in business or by giving them other social skills depending on their needs.

It is also within the legitimate expectation of the retrenchees who had become victims of a bloated civil service and public service, that they would continue to work and earn a living after retirement. This is within the broad provisions of the Constitution of this country that guarantees every Kenyan a right to life. To attain the right to life, one has to work to sustain a life.

The plaintiffs in their evidence stated that they were entitled to Kshs 40,000/- each for training. The defendant denied this claim and the reasons given was that no amount of money was provided by the Government for training. That may very well be so, but if no amount of money was provided for training this was a serious oversight on the part of the government. It is also provided for in the policy document and there is no reason why the money was not provided for training of the retrenchees. I am satisfied that this is a legitimate claim by the plaintiffs. They have been able to prove this claim and I also find that it is supported by the Government's policy document that guided the retrenchment exercise and the overriding objectives of the retrenchment programme. I therefore allow this claim and judgment is hereby entered for the plaintiffs for Kshs 5,960,000/-. The plaintiffs will also have the cost of this suit.

Judgment read and signed this 9th day of November, 2007.

M. KOOME

JUDGE