



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL SUIT NO 169 OF 2001**

**WILLIAM BARASA OBUTITI ..... PLAINTIFF**

**VS**

**MUMIAS SUGAR CO. .... DEFENDANT**

**J U D G M E N T**

By a plaint dated 13th November 2001 the plaintiff sued his former Employer, Mumias sugar Co. Ltd and sought for the following prayers:

- (a) A declaration that the voluntary Early Retirement package be premised on current basic salary scales and grades obtaining at the time of retirement in terms of the collective Bargaining Agreement for the period between 1 st April, 1999 and 30 th April 2001.*
- (b) A declaration that the defendant is liable to pay the plaintiff his retirement benefits and entitlements according to the current basic salary rates and grades obtaining at the time of retirement namely 19.11.1999.*
- (c) An order condemning the defendant to pay interest on the amount of under payment from the date of retirement to the date of payment.*
- (d) Costs of the suit.*

The defendant filed a defence denying the plaintiff's claim. The defendant averred that the voluntary Early Retirement Scheme was not Pegged on the collective Bargaining Agreement but was a scheme which was offered to volunteers who wished to leave employment upon terms approved by the Kenya Revenue Authority and on the prior approval of the volunteers. The plaintiff testified as P.W. 1 and also lined up the evidence three other witnesses in support of his case. The plaintiff informed this court that he was employed by the defendant on 3.11.1979 as a tractor driver at a monthly salary of Ksh.3,000/=. He entered employment at grade No. 5. It is his evidence that he left employment on 19th November 1999 at grade U.G. 9 earning a monthly salary of Ksh.9,776/=.

The plaintiff says that the defendant company on 31.5.99 offered a retirement scheme known as Voluntary Early Retirement Scheme (VERS) in which employees of the defendant company were persuaded to voluntarily take up an offer to retire early on the following terms.

- (i) 3 months basic salary for each year of service.
- (ii) 3 months basic salary in lieu of notice
- (iii) 6 months house allowance

(iv) Ksh.75,000 as golden handshake

(v) Payment for any leave allowance

(vi) 24 days pay for every year of service as provided for in the Collective Bargaining Agreement (C.B.A.)

The plaintiff also said that the defendant informed its employees that the 3 months basic pay would be based on the 1997 salary. His basic pay by then was a sum of Ksh.7,167/= per month. He alleged that he was also informed that the 24 days pay would be based on the 1999 salary scales. He also understood that all the other packages were also to be based on. It was made clear to him that the scheme would not be pegged on the current basic salary. The plaintiff further said that he took up the offer on the impression that his dues would be pegged on the salary scale at the time of leaving service. He was however shocked that the 1997 salary scales were used which made the total package he received to be a sum of Ksh.644,442/=.

He stated that he would have received a sum of Ksh.881,987/= had the package been based on a sum of 9,776/= the salary scale for 1999. He now claims for an order to direct that the package to be based on the above scale so that he could claim the balance of Ksh.237,545/=. The plaintiff produced as an exhibit in evidence the document containing the terms of the Voluntary Early Retirement Scheme package. The document was executed by all the persons concerned which included the union officials and the defendant's representatives. The document also indicated the plaintiff's last salary scale of Ksh.9,776/=.

The plaintiff admits he complained after receiving his total dues through his advocate. He claimed that when he received his dues he did not know the exact amount which was due to him. He further alleged that if he knew the terms of the package in advance he would not have taken the offer. On being cross-examined the plaintiff admitted having attended seminars and workshops organized by the defendant company to educate those who would volunteer to take up the offer of early retirement. The plaintiff also admits having undergone a 5 days seminar before leaving the defendant's service. He was in a group of 20 other employees. The plaintiff further alleges that he did not leave the defendant's employment voluntarily.

P.W.2, Dismas Wandera Siparo confirms that the voluntary Early Retirement Scheme was mooted by the defendant company on 31.5.99 and that the same was widely publicized by the defendant's chief executive Errol Johnstone in a general notice. This witness repeated the terms of the package as stated by the plaintiff. This witness also testified to the effect that they held various meetings in which many issues were raised over the proposed package. The witness admitted that the package was voluntary in nature. He told this court that he and the plaintiff attended a seminar for 5 days and were each issued with a certificate of completion before leaving service. This witness also stated that a complaints and Advisory committee was set to receive complaints and advise those who intended to take up Early Retirement on the VERS package.

The evidence of P.W. 3, Elias Muga Ochieng were similar in substance to the evidence tendered by P.W. 1 and P.W.2. He also left employment on the voluntary Early Retirement Scheme package which appeared attractive to him. His complaint is that he only noticed that the scheme was based on the 1997 salary scales after receiving the cheque. He however admits an cross-examination that there was a general notice dated 31.5.99 issued concerning the retirement scheme. He also admits that there were workshops and seminars organised to explain the terms of the package. On its part the defendant lined up four witnesses in support of its defence. Mr. Murambi Khahoya William Njidwakale was the first defence witness.

He is the recruitment and training officer of the defendant company. He told this court that the voluntary Early Retirement Scheme was an idea mooted by the defendant company to allow employees take up early retirement voluntarily. It was not a negotiable scheme and that it was on the basis of take it or leave it. He produced documents to show that general notices on the scheme were issued on 31.1.97, 17.2.97 and on 20.2.97. He produced the document dated 31.5.97 headed 'Voluntary Early Retirement

Scheme (VERS)' which enumerated the terms of the scheme as follows:

*A. (i) 3 months basic salary for each year of service*

*(ii) 3 months basic salary in lieu of notice.*

*(iii) 6 months housing allowance paid at relevant grade*

*. (iv) Golden handshake of 75,000/= for unionisable employees and Ksh.150,000/= for non - unionisable employees. (v) Leave balance upto the date of release.*

*(vi) 24 days pay for each year worked for unionisable staff as provided for under C.B.A.*

*(vii) pension dues as per the pension scheme.*

*(viii) N.S.S.F. dues*

*B. Any one who was of 53 years and above would be paid according to the provisions of (i) and (iii) above as outlined in clause A.*

He told this court that the basic salary applicable to this scheme was that obtaining on 30.4.99 and that this information was relayed to the volunteers through memos and heads of department. He said the defendant company received over 2000 applicants of employees willing to retire on the scheme which was not based on Collective Bargaining Agreement. He told this court that a total of 1041 employees were selected and seminars and workshops were organised for these people by the defendant to sensitise them of the implication of coming within the scheme. External consultants were employed to do the counselling and education. This witness stated that it was not compulsory for people to take up early retirement but the same was optional.

He said that the defendant even set up a complaints and advisory committee to address the issues raised by those making queries about the scheme. He produced a general notice in evidence which was issued by the defendant to its employees informing them of the losses they will incur if they took up Early Retirement as per the scheme and that as a result of the notice so many employees came back to withdraw from the scheme. It was his evidence that the volunteers were allowed to withdraw from the scheme before banking the cheques they had already collected. The employees he said were allowed to consult widely before making a final decision. He also told this court that the amount paid was exempted from taxation. He produced relevant documents in evidence to proof that the package was not taxed. He denied the allegations made by the plaintiff as false.

He further stated on cross-examination that the V.E.R.S. package was not negotiated and hence the union was not consulted in its formulation hence it did not incorporate all the terms of C.B.A. He further stated that the V.E.R.S. terms covered both unionisable and non-unionisable members unlike C.B.A. which only covered unionisable employees. D.W. 2 Patrick Wanyonyi Sichangi testified to the effect that he was hired as a consultant to train retiring employees on the skills of starting and commencing business upon retiring from the service of the defendant company.

D.W 3, Samwel Oduori testified as an employee who did not retire under the V.E.R.S. package. He told this court that he had applied but later on he withdrew from the scheme after consulting. He said people were not forced to retire but that the scheme was purely optional. D.W. 4 Bernard Ong'ere gave similar evidence as that of D.W. 3. He further told this court that the terms of the scheme were posted in all the notice boards of the company. He said there was no concealment of the terms of the scheme. The learned counsels on both sides gave substantive submissions in support of their positions. Each of the parties filed separate issues. I can discern from the two separate statements of issues that the following matters arose for my decision. First, is whether the Voluntary Early Retirement Scheme was based on the Collective Bargaining Agreement for the period between 1st May 1999 and 30th April 2001 or the defendant's production incentive allowance. Secondly, is whether the scheme was voluntary or not.

Thirdly, whether the scheme was unfair, prejudicial and irregular for the Defendant to calculate the plaintiff's entitlements based on the salary scales obtaining on 30.4.99 the last operative date of the previous C.B.A. instead of the then C.B.A. of 1st May 1999 upto 30.4.2001.

I will start with the second issue as to whether the scheme was voluntary. I have considered the evidence of both the plaintiff's side and the defence. What has emerged is that the scheme was widely publicized. The terms were explicit and clear to the parties. The VERS terms were on the basis of take it or leave it. It was not negotiable neither was it compulsory. I am convinced that the terms were made on a voluntary basis. On the first issue as to whether the V.E.R.S. Terms were premised on C.B.A. Scheme; I have considered the submissions made by both counsels. I have also considered the evidence on record and the material placed before me. I have come to the conclusion that the scheme was a separate scheme which covered both unionisable and non-unionisable employees. The same was not envisaged to fall under C.B.A. terms. It was not a negotiated scheme. It was based on the defendant's production incentive allowance.

On the final score I have also to consider whether the scheme was prejudicial, unfair and irregular or not. I have already stated that the scheme was commenced and the parties affected were given time to widely consult. Some came and withdrew from the scheme. If the scheme was forced, I would say, that it was unfair. The volunteers were given a warning. They were trained and advised on the pros and cons of the scheme. The plaintiff took up the package voluntarily. He entered into a scheme which I am satisfied he knew its conditions. He opted to take up the risk. I will state that the plaintiff's conduct comes with the application of the latin maxim of *volenti non fit injuria* . He has himself to blame. He has not shown that he was tricked. I have come to the conclusion that the plaintiff commenced this action as an after thought.

The upshot therefore is that the suit is dismissed with costs to the defendant.

**DATED AND DELIVERED THIS 18th DAY OF June 2004**

**J.K. SERGON**

**JUDGE**