REPUBLIC OF KENYA

High Court at Mombasa

Commercial Civil Case 22 of 2008

LAWI DUDA & OTHERS……..…..…PLAINTIFFS

VERSUS

BAMBURI CEMENT CO. LTD…….....……..DEFENDANT

Coram:
Mwera J.
Khaminwa for Plaintiffs
Njeru for Defendant
Furaha Court Clerk

JUDGMENT

The pleadings, documents, proceedings, submissions plus such interlocutory matters as were necessary, this suit appears in eight files. Hearing got under way at some stage but had to commence afresh later.

The best that can be gleaned from these files reveals that a plaint dated 31st December, 1998 was filed by M/S Khaminwa & Khaminwa Advocates. It featured twenty-two (22) plaintiffs suing their former employer, Bamburi Cement Limited. It was pleaded that the plaintiffs were once employees of the defendant company working on permanent and pensionable terms, with the retiring age of 55 years. There was in force a contributory pension scheme at the end of one's service. The plaintiffs stated that they would demonstrate that as at the time of their retirement, they had 4 to 15 years to go in the service. That it was a term of employment that the plaintiffs' services could not be terminated until each reached the retirement age of 55 years. There was no provision for early retirement. But in breach of all that on various dates with effect from 25th March, 1996 the defendant without allowing the plaintiffs to be heard and in contravention of labour laws, it terminated their services under a scheme styled ***"early retirement"***, whereby the plaintiffs were to receive payment of one month's salary for every year served up to a maximum of 18 months (years?) with a ceiling of Shs. 2.5 million, yet some plaintiffs had served for more than 18 years, entitling them to benefits of well over Shs. 2.5 million. So with that move the plaintiffs suffered loss and damages. They were entitled to benefits at the rate of 2½ months for each and all the years worked.

It was laid on the alternative that if the plaintiffs were declared redundant they should have been paid at the rate of two months basic salary for all the years of service and not up to 18 years only. That the plaintiffs were accordingly denied opportunity and earnings from the effective date in 1998 to the retiring age of 55 years. It was added that the early retirement plan by the defendant company was not necessary except that it was used as a cover-up to terminate the plaintiffs' services: They were not consulted and

work guidelines were not followed. Then two schedules were appended to illustrate how redundancy pay or payments for early retirement should have been computed. Accordingly, the plaintiffs prayed for:

(a) a declaration that the method used to terminate their employment was unlawful;

(b) a declaration that the plaintiffs were entitled to payment either under early retirement or redundancy terms;

(c) a declaration that redundancy terms under the Collective Bargaining Agreement (CBA) applied to them as well as unionisable staff;

(d) damages and costs.

M/S Ghalia & Ghalia Advocates filed a defence that the claim herein was misconceived, incompetent and did not disclose any or any reasonable cause of action. The claim that the plaintiffs were employed on permanent terms of service was denied. It was pleaded that the retirement benefits scheme contained express provisions relating to termination of service on resignation or redundancy or on-health or from any other reasons beyond the control of an employee. That each contract of employment contained expression provision for termination at any time with:

(i) the employee giving 3 months notice upon resignation;

(ii) normal termination by the employer on giving 3 months notice;

(iii) summary dismissal;

(iv) early retirement.

(v) redundancy;

(vi) termination on medical grounds.

And that on any of these reasons a contract could be lawfully terminated. The services of the plaintiffs were not unlawfully terminated; all the time they were notified of the retrenchment programme. Economic circumstances necessitated the exercise. There were no breaches of terms of employment; the plaintiffs were paid enhanced terminal benefits, which they willingly accepted. They suffered neither loss nor damage. That the plaintiffs were not unionisable staff and so could not benefit from the scheme applicable, the Collective Bargaining Agreement (CBA), to unionisable staff. It was denied that the plaintiffs were entitled to two months' salary for each year worked or that they were guaranteed employment up to the retirement age of 55 years. In promoting its image and in the interests of shareholders, the defendant took such measures, including terminating services. When the services of the plaintiffs were terminated, they accepted the benefits by signing due discharge vouchers in full and final settlement. That no unpaid balances were due.

In the reply to the defence, the plaintiffs joined issue with the defendant in its defence, save to add that their services were terminated on redundancy and so the defendant ought to have applied due and applicable terms. It did not and thus the termination was unlawful. That the retrenchment package was forced onto the plaintiffs. They did not discuss it and it was not for their benefit. The defendant should not have treated non-unionisable staff (the plaintiffs) in any way different from the unionisable staff. That the plaintiffs protested the retrenchment as far as the Ministry of Labour. Payment was not in full and final settlement at all and the plaintiffs were forced to sign discharge vouchers in order to be paid, since they were already out of employment. The computations were erroneous.

A draft of issues, not signed or dated appears on the record.

On further perusal of the file, there appears an amended plaint dated 20th September, 1999. It adds

schedules C, D and E essentially showing what the plaintiffs could have been paid as management staff – 3 ½ months (salary for each year of service?) as is the practice in government parastatals e.g. Kenya Railways. And that what the plaintiffs could have been paid basing on 4 and 5 months respectively. Then there is the amended amended plaint (call it further amended) dated 29th January, 2008. It repeats all else but quantifies in more detail the claimed special damages.

Hoping that nothing has been overlooked as regards the pleadings or whatever may have followed the many interlocutory proceedings, parties filed witness statements as well as documents to be relied on and on 6th March, 2012 the hearing **de novo** got under way with Lawi Duda (PW1, 1st plaintiff) in the witness box. He produced their bundle of documents (Exhibit P1) and proceeded to testify.

A holder of a degree in engineering (1973), PW 1 told the court that he was employed by the defendant company as a cadet engineer. He served for 25 years, rising to the level engineer-in-charge, earning Shs. 172,569/= per month. Then he was declared redundant in 1998. At this point the defence bundle of documents was produced (Exhibit D1) and PW1 referred to letters of his appointment and retrenchment (Exhibit D1 – 20, 21, 14). The witness complained that he lost his job on no mistake of his and when he left his junior Rasam Timimy was recruited to replace him. The labour principle of ***"last in, first out"*** was not followed. His co-plaintiffs similarly lost their job. They were also replaced. All that occasioned the plaintiffs loss of promotion, allowances and bonuses, and the defendant company (employer) came up with a unilateral procedure to pay gratuity limited to one month pay for every year worked up to a maximum of Shs. 2.5 million and a period of 18 years of service. That PW1 was given a short notice between 28th March, 1998 and 31st March, 1998 to leave.

The court heard that the retrenchment exercise started in 1996. Those involved then were given a six (6) month notice. PW1's dues were by way of gratuity. Instead of one month's severance pay, the plaintiffs should have been given salary for two months for every year worked. By the Collective Bargaining Agreement made on 23rd March, 1998 (Exhibit P1 – 45, 48) reference was made to redundancy. PW1 had worked for 25 years and so should have been paid two months' salary for each worked year. And as per the Collective Bargaining Agreement of 13th February, 1995 (Exhibit P1 – 40) redundancy was defined as loss of employment by involuntary means through a no fault of the employee. While referring to Exhibit P1 – 42 – severance pay, the court heard that those who left in 1996 and had served for more than 5 years, got 1½ month's salary for each completed year of service. There was no limit of Shs. 2.5 million or 18 years of service. The court's attention was drawn to one Justin Ngolo (Exhibit P1 -72) who left service on 30th June, 1996 under early retirement. PW1 had no document to show that this staff left on account of redundancy.

Back to his retrenchment letter (Exhibit D1 – 14), PW1 told the court that it did not refer to 18 years maximum service or Shs. 2.5 million. So he claimed that all was arbitrary. The witness however insisted that he ought to have been paid severance allowance for a total of 50 months because his service spanned some 25 years. To him the collective bargaining agreement (Exhibit P1 – 45, 48) related to redundancy pay covering non-unionisable staff (like the plaintiffs) and unionisable staff all alike.

Moving to the permanency of employment, the court was referred to Staff Standing Instructions (Exhibit P1-1, 9) which stated that the applicable principle was *"last in first out"* and the defendant would provide employees with continuous work. Yet the plaintiffs were retrenched. The court heard that pension was contributory and normal retirement age was at age 55. An employee could retire before that age on mutual agreement, the Standing Instructions continued. So to the plaintiffs, the defendant company should not have retrenched them before age 55. They were on permanent terms. As at Exhibit P1 – 56, Company Organization Changes dated 13th March, 1998 got into play due to competition. The defendant had to scale down to a leaner and fitter organization. All the staff had several meetings to achieve that. PW1 specifically said:

"We had several meetings to achieve that. Applicable policies could apply to every cadre of staff, especially those above 50 years of age who could benefit under Early Retirement Facility. Workers were invited to apply for this retirement."

PW1 however maintained that when their turn to go came, they were not invited. The court heard that this Change Management Programme encompassed leaving the company under EARLY RETIREMENT and RETRENCHMENT. The plaintiffs left under retrenchment. When he got his letter (Exhibit P1 -76) he was not called to discuss the move. PW1 protested (Exhibit P1 – 95). The retrenchment was unfair to the plaintiffs. Even the Ministry of Labour questioned the move (Exhibit P1 – 89), that the law was not being followed. If the law had been followed, the plaintiffs would have been paid severance allowance at 15 days salary for each worked year. PW1's view was that the defendant had a policy and Collective Bargaining Agreement that a retrenchee could get two (2) month's salary for each year worked. Their retrenchment was all wrong.

PW1 continued that as per the further amended plaint all the plaintiffs could have earned Shs. 245,777,585/= if they were to retire at age 55; Shs. 39,321,040/= in pension benefits; Shs. 20,481,455/= in annual bonuses. The witness enumerated other losses comprising medical insurance allowance, leave allowance and education allowance. That had the plaintiffs been regularly retired/retrenched for example he, according to what he called Schedule A could have been paid Shs. 8.2 million; co-plaintiffs e.g. Abulaziz could have been paid Shs. 7.1 million, Ogada – Shs. 3.94 million and all of them Shs. 57,191,285/50. Then PW1 moved to what was called Schedule B and put forth what they claimed they lost, in total Shs. 346,123,739/= in special allowances. PW1 gave examples of staff who retired in 1996 including one Evanson Mwadime (Exhibit P1 – 71) who, after working for 16 years was paid as per the Collective Bargaining Agreement severance of two months salary for each year worked. That Benjamin Oyuga (Exhibit P1 – 100) retired in 2000 and his gratuity was worked at one month salary for each year of service. After further examples PW1 urged the court to accept his evidence, as also covering his co-plaintiff's and then declare that termination of their services was unlawful and they ought to have been paid redundancy benefits either under early retirement arrangement or under the Collective Bargaining Agreement.

PW1 added that the defendant set up a revolving fund for the retired/retrenched staff to borrow from and set up businesses. Repayment of money borrowed from the fund was to be borrowed by other staff. Referring to Exhibit D1 – 3 to 11, that was a list of staff who left service during the change management programme, they were said to have been given better packages than the plaintiffs. On John Ngolo took early retirement package and was paid 1½ month salary for each year of service. The plaintiffs were of the view that the retrenchment that affected them was not genuine because when they left the defendant was expanding by opening business in Nairobi, Uganda and Tanzania.

In cross examination PW1 told the court that he received his letter of retrenchment (Exhibit D1-14). When he left, one Kimimi took over his place, a thing the witness did not have evidence of. He was given a very short notice to leave. As regards the staff standing instructions (Exhibit P1 – 18) PW1 referred to notice for retirement and stated that either party would give three months notice or pay salary in lieu (Exhibit D1 – 20) and that the same was in accordance with the contract PW1 signed in 1976. He concluded that he was paid salary for three months in lieu of notice. But his view was that the plaintiffs should instead have been paid two months' salary for each year of completed service in accordance with Collective Bargaining Agreement. Looking at the Collective Bargaining Agreement of 23rd March, 1998 (Exhibit P1 – 45) PW1 told the court that neither he nor his co-plaintiffs were union members. That this Collective Bargaining Agreement had been signed between the defendant and Kenya Chemical and Allied Workers Union. He repeated that the plaintiffs were not union members and yet they were seeking benefits under that Collective Bargaining Agreement. They had amended their plaint asking the court to apply the Collective Bargaining Agreement because it had for long been the defendant's practice to apply the collective bargaining agreement across the board – for unionisable and non-unionisable staff. That the plaintiffs did not pay union membership fees; they enjoyed the education allowance from the defendant – a benefit PW1 was not sure whether it was extended to the union members. To him, there was no difference between one exiting the company via the early retirement programme (John Ngolo in 1996 – Exhibit P1 – 72) or by retrenchment. The court heard that the Collective Bargaining Agreement dated 13th February, 1995 (Exhibit P1 – 40) was also between the defendant and the union. Shown names of Ajulu Oduori (Exhibit P1 – 59) and one Chibarawa (Exhibit P1 – 57) in the light of the list contained in Exhibit D1 – 7, 8, PW1 agreed that they were union members who exited the company between 1996 and 1998.

The witness told the court that he did not sign on the dotted line to signify his acceptance to leave. And as per his discharge voucher (Exhibit D1 – 15, 18) he was given Shs. 2.5 million as severance pay, three months' salary in lieu of notice, **pro rata** bonus and leave dues. The gross package was Shs. 7.2 million but after taxation PW1 took home a net of Shs. 5.3 million. However, he insisted that he took the money under duress even as he signed a certificate of clearance (Exhibit D1 – 19). That that stated that all was in full and final settlement with no more claims outstanding against the defendant and all without protest. Seemingly, all other plaintiffs did the same thing but still maintained that the exercise was a surprise, executed contrary to all the procedures governing redundancy. The plaintiffs however had not computed what they could have been paid under the Employment Act (Cap. 226, now repealed) section 16 (f) which provided severance pay worked at not less than 15 days per month for every year of service. Shown the computation by the defendant (Exhibit D1 – 178), it transpired that the witness could have earned Shs. 2.1 million under the Act while he was paid Shs. 2.5 million. The same applied to the rest of the plaintiffs. They were paid at a higher rate than that provided for under the Employment Act. Then the plaintiffs did not appreciate the sum over and above the legal entitlement. It was repeated as per the further amended plaint that all of the plaintiffs would have earned a total of Shs. 305,580,080/= had they stayed on the job until the retirement age of 55 years. And that being in the senior level jobs, the plaintiffs got better benefits than the lower level staff.

On re-examination PW1 reiterated more or less what the court had heard in examination-in-chief and cross-examination about short notice to leave, wrongly computed redundancy benefits and how some people were paid in accordance with Collective Bargaining Agreements. And that the plaintiffs' positions were taken up by later recruitments.

James Omache Nyachieyo (PW2), aged 56 years once was employed by the defendant for 18 years. He was retrenched in April, 1998 but paid less than the staff who retired in 1996. Although he signed for his package, it was under protest. The package was not sufficient. He signed in order to be paid as he had no alternative, with a family to fend for. PW2 did not bring to court his letter of appointment or retrenchment. He did not know even how much he signed for since the forms remained with the defendant.

Justin Gideon Ngolo (PW3) testified next. With a string of academic and professional/technical qualifications and having worked with various organizations, PW3 joined the defendant company and rose up the ranks to be a safety officer in 1998. A Change Management Programme was introduced at Bamburi, characterized by retrenchment of staff. He was among those who left; his position was taken by his junior. Having been on the salary of Shs. 42,633/= p.m., PW3's terminal package was computed at Shs. 3,493,636/=. It consisted of 1 ½ month's salary pay for each of the 20 years of service. He exited at age 52, and was paid for the three years left before retirement. PW3 was in the management cadre. He was paid Shs. 1,631,729/= by the pension scheme.

This witness also stated that the Collective Bargaining Agreement provided for various benefits and it applied to both union and management staff. The plaintiffs ought to have been treated the way he was at time of leaving the defendant's employment, with the 1996 Collective Bargaining Agreement applying.

PW3 did not produce his letter of appointment or the Collective Bargaining Agreement under which he exited. But he told the court that there had been many lectures on how the exiting staff could utilize their terminal packages, however, the witness could not say if the retrenchment had to be in accordance with collective bargaining agreements. His terms of employment did not include Collective Bargaining Agreement. It was as per the Staff Standing Instructions. That closed the plaintiff's case and the defence one opened.

Charles Machogu (DW1), joined the defendant company as a human resource officer in 1986. He was the administration manager in 1998 with duties to oversee to day-to-day matters of recruitment, training, retirement/retrenchment, etc. DW1 was involved in the plaintiffs' exit. They were retrenched on account of competitive economic environment which required the defendant company to shed staff – loss of jobs (Exhibit D1 – 2). All this was as per the change management programme that started in 1996. As for the unionisable employees, provisions to exit were contained in the Collective Bargaining Agreement. The

non-unionisable staff left according to statutory requirements giving them two weeks pay for each year of service. But the defendant's management computed packages that gave bigger benefits than statutorily provided for. Appreciating the position of severance pay in the Employment Act, the employer had the right to hire/fire since the employees' appointment letters contained termination clauses (Exhibit D1 – 21). The plaintiffs here were management staff – not unionisable. Collective Bargaining Agreement could not apply to them. It only applied to unionisable members. At the time of their exit, due pay documents were drawn up. The plaintiffs accepted their respective packages and signed the clearance certificates e.g. for PW1 (Exhibit D1 – 19), with discharge vouchers stating that each payment was in full and final settlement of terminal dues with no further claim against the defendant. The court heard that these payments were better than what the Employment Act provided for. In reply to an inquiry from the Ministry of Labour on 26th June, 1998 (Exhibit P1 – 93), the defendant explained that the retrenchees were being offered better packages than the Employment Act mandated. DW1 then made reference to the computation of what the law mandated and what the defendant actually paid (Exhibit D1 – 178). There PW1 could have been paid Shs. 2.15 million as per the Act, but the defendant paid him Shs. 2.5 million. As regards the evidence that Ajulu and Kazungu (Exhibit D1 – 7, 8) were given better packages, DW1 told the court that these were union members whose terms were governed by collective bargaining agreement. It would be in error to compare the plaintiffs' packages (management) and those of the two (unionisable staff). That the plaintiffs were properly paid, signed and filed clearance certificates and thus their claim here was not justified.

In cross-examination DW1 told the court that he had retired, and was carrying on business which sometimes included getting contracts from the defendant – nothing peculiar. He too left during the change management programme in 2002. He was aged 45 years but was not paid for the years remaining before the retirement age of 55. DW1 was paid salary for 22 days, not 15, for every year worked. DW1 said that PW3 (Ngolo) was paid salary of 1 ½ months for every year of service. But he could have wished to see PW3 payment voucher. It has been noted above that PW3 did not exhibit such a document. DW1 continued that the plaintiffs were paid as per the Employment Act, which did not provide for paying for the remaining years before retirement. DW1 maintained that he testified here truthfully and not because once in a while the defendant company gave him contracts. And with that the trial closed and each side submitted. Each filed at least two scripts of submission then the final one, followed by highlights. Both sides cited several authorities. The court will endeavour to condense all the above in its decision.

The plaintiffs side started off by asserting that the defendant did not put in place the change management programme in good faith. It had at the end of 1995 published a report of sound financial performance and so could not soon thereafter put in hand retrenching staff under redundancy. In any case those who were retrenched, and the plaintiffs in particular, were replaced. Indeed the defendant did not inform the Ministry of Labour and the union that it was planning to lay off staff. And if any termination was contemplated, then guidelines used earlier, in 1996 had to be followed. That the plaintiff's legitimate expectation in employment or manner of computing benefits was violated and particularly that the plaintiffs in 1998 were treated less favourably than those retrenched in 1996. Although there appears to have been no evidence (PW2, 3 did not offer such) the court was urged to accept that the plaintiffs were given short notices to leave and under duress made to sign discharge vouchers accepting the unfavourable terminal packages. Then focus shifted to Collective Bargaining Agreement (CBA) of 13th February, 1995 and the Staff Standing Instructions. That by these, the Collective Bargaining Agreement, was to cover both unionisable and non-unionisable staff being retired/retrenched. Examples were given of both cadres of employers benefitting under the Collective Bargaining Agreement even as Ngolo (PW3) failed to place before court documents of his retrenchment to ascertain his cadre and the contents of his package. If it may be so said, parties put bundles of documents before court as exhibits. But they should specifically refer to those documents that support their case to enable the court have a clear picture. It is not enough to produce a bundle of documents, not refer to them in evidence and expect them to be made part of the case or decision. That seemed to filter in this matter where, during submissions not examination of any witness, the names of e.g. Mwijaa Mwanagoda, Augustus Maithya, Ogwari Olendo featured. However, be that as it may. The plaintiffs went on to answer in the affirmative some 13 issues to the effect that they were on permanent and pensionable terms with – contributory pension scheme. There were provisions for leaving employment by resignation, redundancy, ill health or for reasons beyond the employees' control. That this court should determine whether the plaintiffs exited employment under normal

retirement or redundancy or if early retirement was forced on them. Further, the court to find that the Collective Bargaining Agreement on redundancy applied across the board. And that it was necessary to determine whether the defendant was to provide continuous employment and whether the change management programme was discriminatory against the plaintiffs and thus unlawful. Finally, that the plaintiffs suffered loss and damage and so are entitled to their prayers with costs. The supplementary skeletal submissions made further expansion to the claim, and cited authorities i.e. regarding special damages in the grant total of Shs. 346,123,739/= and the declarations set out above.

The defendant company contested the plaintiffs claim as per its defence and in the light of all the evidence tendered. It was posited that all the plaintiffs were once employees, but not unionisable staff of the defendant. They were declared redundant in 1998. Even as the plaintiffs did not appear clear as to whether they were declared redundant or were put on early retirement, and such uncertainty and vagueness is all in the plaint and evidence, the preponderant view that can be taken at this stage is that they were all declared redundant and for that reason, they have computed what they seems to represent benefits under redundancy and that they ought to have been paid for the reminder of time to retirement at age 55. Then the defendant added as undisputed the fact that the plaintiffs were paid their respective dues and signed discharge vouchers to the effect that each had no outstanding claim as against the defendant. Again at this point, it is observed that the plaintiffs argued that such signatures were under duress because they were no longer in employment.

The defendant proceeded to state what it considered issues in dispute: guaranteed employment until retirement or subject to termination before that; whether the redundancy process was fair; were the plaintiffs paid their dues as per the law; and what legal procedure was to apply: the Employment Act or Collective Bargaining Agreement; the effect of signing the discharge vouchers and if the plaintiffs were entitled to payment of future earnings.

Similarly, the defendant answered each of the said issues as it deemed fit and urged the court to incline to its side. And at every stage evidence and exhibits were referred to as well as authorities.

The plaintiffs retorted in reply, in essence, endeavouring to demolish the defendant's position.

In this court's view all the issues raised by either side and said to be in dispute can be resolved in the best of effort by putting forth three or so broad approaches and touching on other necessary aspects as contribute to the decision. The approach can be stated thus:

1) ISSUE 1: Whether the plaintiffs' employment was unlawfully terminated;

2) ISSUE 2: Whether the plaintiffs were entitled tobenefits under normal retirement or redundancy terms;

3) ISSUE 3: Whether the redundancy terms under the Collective Bargaining Agreement applied to both unionisable and non-unionisable staff;

4) ISSUE 4: Whether special damages put at Shs. 362,771,365/50 or Shs. 346,123,739/= were proved and are payable.

5) ISSUE 5: Costs.In that order the court's determination is as follows:

1) ISSUE 1: **Whether the plaintiffs' employment was unlawfully terminated:**

From the pleadings and evidence from either side, it is not in dispute that the defendant company once employed the plaintiffs in their respective capacities. Evidence also has it that (PW1, DW1) that they were all in the management cadre – not unionisable staff. As such they enjoyed better terms of employment and better perks e.g. education allowance which the union members did not enjoy. While the unionisable staff paid dues for their membership to the Kenya Chemical and Allied Workers Union, the plaintiffs did not. And the two Collective Bargaining Agreements placed before this court – 1995 and

1998 were between eh union and the defendant for the benefit of the union members.

When the time for retrenchment came, no matter that the company had earlier announced a rosy financial picture, economic competitiveness dictated staff-shedding. Evidence has it (again PW1, DW1) that the staff were acquainted with that prospect and many lectures or meetings were held as to what would follow and if one chose to be retrenched, how best to utilize the terminal package. So it was not accurate of the plaintiffs to claim that they were not consulted and the notice to go was very short – a surprise.

The defendant chose the path of retrenchment which the governing regulations as well as the Employment Act allowed. If either side was to terminate employment, it had to give a three months notice or three months salary in lieu. And because the plaintiffs were leaving for none of their mistake, the defendant was obliged to pay severance/redundancy benefit. It was stated in evidence that the plaintiffs were given notices to exit the company, they were paid three months salary in lieu of notice plus redundancy pay and other benefits.

Can it therefore be said that the plaintiffs' employment was unlawfully terminated? This court does not think so. Their letters of appointment set out the methods to go about terminating employment. The letters were in conformity with the Staff Standing Instructions and not contrary to the Employment Act at all. If the process was unlawful, unacceptable or untenable, the Ministry of Labour made an inquiry by letter and the defendant gave it a reply/explanation and all seemed to end there. It can therefore be concluded that the way the defendant went about retrenching its staff did not contravene the law or procedures. Accordingly, this court is unable to declare that the way the plaintiffs' employment was terminated, was unlawful. And with termination clauses of employment provided for, it cannot be said that the plaintiffs had guaranteed employment until the retirement age of 55 years.

2) ISSUE 2: **What benefits the plaintiffs were entitled to**:

This court has found that the plaintiffs exited employment by being declared redundant. They may feel that they were not redundant because their positions were filled even by their former juniors. But that was the policy of the defendant. Accordingly, the plaintiffs were entitled to severance pay. The plaintiffs were laid off as per the Employment Act. That Act as well as the staff instructions provided for redundancy pay. It was acknowledged here and computations produced here by the defendant showed that as compared to redundancy pay of salary of 15 days for every year of completed service, the defendant worked out a more favourable package for each of the plaintiffs. It contained sums higher than what the Act provided. For instance PW1 got Shs. 400,000/= more. Similarly, did other plaintiffs in their respective packages. Again the declaration here is that the plaintiffs were entitled to redundancy benefits and this they were paid.

3) ISSUE 3: **Whether redundancy terms under Collective Bargaining Agreement applied across the board**:

Two Collective Bargaining Agreements produced before court referred to 1995 and 1998. They were between the defendant and the union aforementioned. Thus only union members stood to benefit. In our case, and as in every industrial case scenario, union members are the unionisable cadre of employees. They pay their dues to the union usually by way of check-off system. So these are the people and they alone on whose behalf a Collective Bargaining Agreement is concluded to benefit under it. The plaintiffs here were in the management of the defendant company. They admitted this, adding that they did not pay union dues. Then how could they benefit from Collective Bargaining Agreement and its terms including redundancy? It could not be and a claim by PW1 that it was a practice by the defendant to apply Collective Bargaining Agreement's across the board was not borne out by evidence. The plaintiffs brought PW2, 3 as witnesses who did not help much in that regard. They did not even bring to court relevant documents e.g. of employment or payment of redundancy benefits. In the end it was a fallacy for the plaintiffs to claim that the defendant applied Collective Bargaining Agreements to unionisable as well as non-unionisable (management) staff members. It was all but a mere claim with no evidence to back it up. One cannot benefit from an agreement or pact where one is not a party. So on the whole what applied to the plaintiffs as regards redundancy were the Staff Standing Instructions and the Act and the

Employment Act. And these were applied in the present case.

4) ISSUE 4: **Special Damages**: The plaintiffs put a large figure on this. Although it was not well demonstrated by evidence how each item was made up, as should be the case with proving special damages, the court was of the mind that the plaintiffs services having been regularly terminated, nothing stood to be claimed as loss of earning, pension, bonuses, leave, education allowance, etc. These are earnings one enjoys while in employment. And for example leave allowance is earned when the employer grants one leave and education allowance goes to those who demonstrate that they are having school-going children. It is not earned as a matter of course. And here it was not shown to court that any of the 22 plaintiffs earned/deserved such payment, which the defendant was withholding. And more importantly, the Employment Act does not provide for payment of salary for one's time remaining before retirement. The plaintiffs claimed, without proof, that they signed discharge vouchers under coercion or duress. How does this court determine such a claim? There is no way. Agreed in absence of evidence/demonstration, the plaintiffs ceased to be in employment as soon as they were retrenched. It can be taken as one standing in a position of weakness via-a-vis the employer. But without proof or demonstration, that alone cannot establish a claim of duress put forth but denied. Here the defendant denied such a claim and placed before the court each plaintiff's discharge voucher duly signed. Each said that the package being accepted was for full and final settlement as between the former employee/employer with no outstanding claim against the latter. With this, and each side produced copies of these vouchers, it would be imprudent for this court to look beyond and outside these documents and import in its decision what was claimed and not proved/demonstrated. All the way from employment to termination of services the parties executed written agreements/pacts. It could be untenable to assume and import anything else in them. What the parties finally executed is what is before court to deal with. And here we have the discharge vouchers and clearance certificates duly signed by the plaintiffs in favour of the defendant. In sum the plaintiffs have not proved and are thus not entitled to the grand total in the name of special damages.

5) ISSUE 5: **Costs**: In conclusion this suit is dismissed with costs.

Delivered on 6th November, 2012.

J. W.MWERA
JUDGE