



Kahiu & 8 others v Bollore Transport and Logistics Kenya Limited (Cause 259 of 2020) [2024] KEELRC 2288 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 259 OF 2020
NJ ABUODHA, J
SEPTEMBER 25, 2024**

**BETWEEN
HENRY NDUNGU KAHIU & 8 OTHERS CLAIMANT
AND
BOLLORE TRANSPORT AND LOGISTICS KENYA LIMITED .. RESPONDENT**

JUDGMENT

1. The Claimants through their Amended Memorandum of Claim dated 10th May, 2021 pleaded inter alia:
 - a. The Claimants were gainfully employed under contracts of employment by the Respondent and served in various capacities as per their individual contracts of employment by the Respondent and served in various capacities as per their individual contracts executed on various and diverse dates between 6th February 1989 and 1st March 1997.
 - b. The Claimants averred that they rendered their services to the Respondent for over a period of more than 20 years with the longest Claimant serving the Respondent for a period of 31 years and the shortest serving Claimant having served the Respondent for 23 years.
 - c. The Claimants averred that the Respondent and some Claimants had a legally binding CBA with Respondent having recognized and signed the said CBA with the Aviation & Airport Services Workers Union(K) (AAWU) which CBA had been entered in to on 16th June,2014 and ran between 2014-2015. That upon the lapse of the said CBA AAWU entered in to a further recognition agreement 2nd February 2017 and were in the process of negotiation another CBA on behalf of the Claimants for the *period of 2018-2021*.
 - d. The Claimants averred that they entered in the said contracts and committed to be always diligent in their service for periods ranging from 23-32 years of service to the Respondent with



the legitimate expectation that the Respondent will in turn at all times act fairly by observing all the relevant labour laws and the negotiated CBA.

- e. The Claimants averred that contrary to the above expectation the Respondent sometimes in December,2019 initiated a restructuring process and arbitrarily made the decision to terminate their contracts by forcefully retiring them. That the Respondent's decision and exit package was informed by a CBA entered in to between the Respondent and Kenya Aviation Workers Union (KAWU) for the period 2018-2021 which union the Claimants were not members and only paid agency fees in accordance with section 49 of the [Labour Relations Act,2007](#). That the Respondents forced them in to a membership to a union against their will and applied the terms of the said CBA illegally on them.
- f. The Claimants averred that the decision to retire them was made without their involvement and they only came to their attention when they were called on diverse dates between 18th December 2019 and 23rd December,2019 for individual meetings with the Respondent's management where the decision to retire them was communicated to them.
- g. The Claimants averred that the very same day they were informed of the Respondent's plan to restructure they were issued with notices of early retirement which contained a retirement package as well as indication of the last day of service for each Claimant. That there was no room left for the Claimants to raise concerns, accept or reject the early retirement either in the said notices or at all as the decision had already been made.
- h. The Claimants averred that the Respondent promised to pay them gratuity and ex-gratia in each Claimant's meeting in order to lure them in to acquiescing to the Respondent's decision to forcefully retire them but the same would be reneged in their notices of early retirement and subsequent payment at the time of exit. The retirement package would be revised to salary for days worked in January,2020, leave, service prior to joining the pension scheme, six months' notice and pension savings.
- i. The Claimants averred that in an attempt to regularize the already flawed process the Claimants were directed and made to sign an acceptance letter of the Respondent's terms curiously exempting the Respondent from future claims. That this would be done on the day of exit as a condition precedent for the Claimants to access their final computation of their exit package. That the Claimants signed discharge forms over an ex it package they were not ware of and which would later be paid to their banks days after their exit.
- j. The Claimants averred at the time when the Claimants were forced in to early retirement a section of the Respondent's members of staff who fell under the same category as the Claimants(i.e had attained 50 years of age and had worked for the Respondent for more than 20 years) were retained in employment, were taken through redundancy process which in essence translated to better exit terms compared to the Claimants while picking early retirement which offered the most disadvantage to the Claimants and others who were retired early were given an ex-gratia pay which was denied to the Claimants.
- k. The Claimants averred that the Respondent's actions amounted to inconsistencies and discrimination to unfairly terminate them which was against the spirit of [the Constitution](#), [Employment Act](#) and fair labour practices. That none of the Claimants tendered applications for the early retirement for consideration by the Respondent and the forced retirement was against their legitimate expectation that they would serve the Respondent until 60 years of age.



- iv. The Respondent averred that sometimes in year 2019 its business started experiencing significant changes in its logistics operations which was due to changes in the logistics landscape in the country including the launch of the SGR which fundamentally changed logistics for transport operators including itself. That the fundamental changes affected the very core of its clearing and forwarding operations including how it was structured. That the changes resulted in decline in financial performance in the company with noted significant reduction in business clients and volumes.
- v. The Respondent further averred that as a consequence and in an effort to ensure the survival of the entire company and its clearing and forwarding activity/operation it was forced to re-organize its operations including incorporation of new technology, review of internal operational processes to ensure that the business was addressing specific customer requirements. That the said reorganization necessitated rationalization and restructuring of its workforce in a bid to have a leaner work structure while at the same time enhancing efficiency so as to best meet the customer needs and manage costs.
- vi. The Respondent averred that the effect of the restructuring was two-fold where there was declaration of redundancy where the roles were no longer needed and early retirement with regard to roles which were still relevant for the business but which required a different skillset and additional training. That 18 employees including the Claimants were considered for early retirement following the restructuring.
- vii. The Respondent further averred that the employees were duly informed of the reasons giving rise to the restructuring, why they were considered for early retirement as they had attained the minimum early retirement age of 50 years and had served the Respondent for periods in excess of twenty years, the options available at the time and the exit packages that were available for them.
- viii. The Respondent averred that the decision to retire the Claimants and other employees early was a contractual right conferred upon the parties under CBA and that in exercising this right the Respondent complied with the due procedure under section 41 of the *Employment Act*.
- ix. The Respondent further averred that all the Claimants were unionisable members and hence the provisions of the CBA applied to their respective contracts of employment. That clause 46 (i) of the CBA was applicable to the Claimants where either party could terminate the employment prior to attaining the normal retirement age of 60 years provided that there was mutual agreement between the parties. That the clause provided for eligibility criteria for early retirement where an employee must have served for period longer than 20 years.
- x. The Respondent averred that since Claimants roles were still relevant for the business but needed to be re-engineered on account of the restructuring, the Respondent elected to exercise the contractual right under clause 46 above to retire the Claimants early. That redundancy was not an available option with regard to the Claimants as their positions were not to be abolished.
- xi. The Respondent further averred that on diverse dates in December 2019 through its relevant line managers and the human Resource Personnel it contacted the Claimants individually, notified them in advance of the changes in the organization and the options available to them. That following the consultative meetings with the Claimants and having given each of the Claimants an opportunity to discuss the various options available to them the early retirement and exit package the Respondent proceeded to issue to the Claimants notices of early retirement which notices were issued on diverse dates between 20th to 27th



December,2019.That the notices clearly set out the rationale for the restructuring, the reasons why the Claimants were deemed to be eligible for early retirement as well as the retirement package payable to each of the Claimants. That the Claimants acknowledged receipt of the letter by signing thereby acknowledging that they understood the contents thereon.

- xii. The Respondent further averred that on 6th January,2020 it wrote to the Claimant individually inviting them to attend a counselling session which was scheduled for 8th January,2020. That during the counselling session the Claimants were given an opportunity to express their concerns as well as to resolve any issues they had with the reorganization. That having gone through the consultative meetings with the Claimants, the counselling sessions held on 8th January,2020 and having addressed all the concerns raised by the Claimants regarding the process the Respondent on 17th January,2020 wrote to the Claimants informing them that their last day of service was 27th January,2020. That it did set out the retirement package that was payable to the Claimants in the said letters.
- xiii. The Respondent further averred that from the perusal of the minutes of the consultative meetings and the notices issued to the Claimants the retirement package offered and accepted by the Claimants was at all material times the same as the package contained in the final letters of separation. That the claim of gratuity and ex-gratia payments was misleading. That the payment was subsequently made to the Claimants.
- xiv. The Respondent averred that the exit package to the Claimants was provided for under clause 46 as read together with clause 44 of the CBA hence the Claimants were paid as per those clauses being salary for days worked in January, leave, service prior to joining pension, six months' notice and pension savings. That the Claimants having been informed of the exit package way back in December 2019 and having sufficient time to consider the same duly accepted the said payments on 28th January,2020 as full and final settlement and signed discharge letters confirming that they had no claims against the Company. The Respondent denied that the Claimants were forced to accept the package.
- xv. The Respondent further denied the allegations that the decision to retire the Claimants was premeditated since they were given sufficient opportunity and channels to discuss the terms of their exit. That the Claimants had the option of accepting or declining the offer of early retirement. That the Claimants accepted the offer and voluntarily signed the acceptance and release letters.
- xvi. The Respondent further denied the allegations of discrimination or unfairness and averred that the Claimants were paid all their legal entitlements under the CBA and the law. That the exit process involved consultative discussions with the Claimants including counselling sessions to prepare the Claimants for the implications of early retirement as well as separate meetings with Claimants who sought clarifications or were dissatisfied with the offer. That the termination process was justified, substantive reasons were provided and the process met the fairness criteria provided under *Employment Act*.
- xvii. The Respondent averred that the Claimants were not entitled to the reliefs sought and that they did not have reasonable or justified cause of action against it and the same ought to be dismissed with costs.



Evidence

4. The Claimants Advocate invoked Rule 9 ELRC to reduce the witnesses to testify from the 8 Claimants to two. The Claimants called two witnesses on 5th December, 2022 and the first one was Daniel Kahindo Nganga who testified that he was one of the Claimants who were forcefully dismissed and he sought to be paid compensation for unlawful termination. He relied on his documents as his evidence in chief.
5. In cross examination CW1 confirmed that in 2019 he was 52 years and had served the Respondent for 25 years and retirement age was 60 years. CW1 confirmed getting an invitation letter on 19th December, 2019 inviting him for a meeting on 27th December, 2019. That the agenda was to discuss re-organization and how it would affect his role. That he was aware of the changes and launch of SGR which had effect on clearance of goods at the port.
6. CW 1 confirmed that he attended the meeting, he knew the persons in the meeting and on 15th January, 2020 he signed the minutes. That he was told he was earmarked for early retirement because he was over 50 years as the reason for his selection. That the Respondent was changing systems from digital to TIMS which required training and he had no problem since over the years he was trained.
7. CW1 confirmed that the Respondent told him that it was going to invest on training for 10 years and by then he would have retired even though he was conversant with company system and upgrades and he would adapt easily. That it was not a reasonable criteria and he proposed the early retirement to be made mutual. That his academic credentials were okay and he questioned the criteria used in selecting him.
8. CW1 confirmed that he was not at the meeting of 27th January as alleged by the Respondent and that vide a letter of 23rd January, 2020 he did follow up but the Respondent did not respond to his email. Further that the ministry mentioned that he had reservations on his early retirement.
9. CW1 confirmed that he was called for counselling session on 28th January, 2020 and had two questions on notice but the Human Resource was not the one who attended. That they were many and they questioned the reason for early retirement. That after his letter of 23rd January, 2020 the next communication was exit and termination. That he refused to sign the letter of 17th January 2020 and wrote his protests on 23rd January, 2020. That on 28th January he signed since it was his last date and he signed for lack of any other option.
10. CW1 confirmed that there was no letter threatening him to sign. That he signed a discharge voucher and made a declaration on the final settlement of his dues as a final settlement where he was coerced to sign since he was out of the Company. That the indicated amount was paid to him.
11. CW1 confirmed that the Human Resource offered him the Thika offer but he asked for a written letter. That he had agreed to the transfer and when he went to clear he was told he would be contacted which never happened. That he exited the Respondent and had no contact. CW1 confirmed that the Respondent and KAWU had a CBA but he was not a union member.
12. CW1 alleged that he was discriminated since he was not told if his position was abolished and only that there would be system change and he had reached retirement age. That others got better terms than him for example one Emma Gichuhi was paid ex-gratia yet he was not. That the said Emma had served 24 years yet he had served 25 years even if the said Emma was at a different level she left on early retirement.
13. CW1 further stated that the Respondent had other employees exit on redundancy but they were not in court and he did not know the circumstances under which they left under redundancy. That the



- Respondent in the initial meeting of 19th Decemember, 2019 had indicated it will pay him ex-gratia. That in the minutes of 17th January,2020, ex-gratia was not indicated. CW1 confirmed that he was a member of NSSF and the Respondent made remittances monthly.
14. In re-examination CW1 clarified that the SGR effect only came in on 27th December,2019. That he was not consulted on his exit. That there was a training where he was not asked but told to attend. That the Respondent had previously trained him on system upgrade and he was conversant. That he had good record and was easy to adopt to training on the system.
 15. CW1 clarified that he was in transport section using the available technology in place and he would cope. That there was no specific thing that he was inadequate about or that the SGR would affect his role. That he signed for all other meetings but the one for 27th January, 2020 he did not attend or sign. That he had to sign the discharge voucher in order to be paid.
 16. CW1 clarified that he was not a member of any union and he was not unionisable since he was in management level and the CBA was not applicable to him. That he got Emma's documents from her and that she volunteered to give them to him. That she had an additional package of Kshs 6M as ex-gratia in lieu of long service.
 17. The Second Claimant's witness was one John Musinde who adopted his statement and documents filed as his evidence in chief. CW2 testified that the Respondent should pay him for unlawful termination.
 18. In cross examination CW2 confirmed that he was unionized due to his membership to AAWU and was familiar with CBA between Respondent and AAWU. That early retirement was applicable upon mutual agreement between employee and Respondent. CW2 further stated that early retirement was allowed after serving for 20 years. That in 2019 he was 54 years of age and had worked with the Respondent for 25 years. That he qualified for retirement.
 19. CW2 confirmed that he attended the meeting of December which was to discuss re-organization and extent it would affect his role which he got after the meeting. That he signed the minutes of the meeting. That he was told at the meeting that the Respondent would be introducing a new system. That he was in the field and not office and that skillsets would change yet he had none. That training would take five years by which time he would have retired. That his position was not being abolished save for different skillset.
 20. CW2 confirmed that the proposed mode of separation was early retirement because he had attained 50 years and had served for over 20 years as per clause 46 of the CBA. That he was explained to, his package as per clause 44 of the CBA. CW2 confirmed that he paid union dues to KAWU. That KAWU had same benefits as AAWU on early retirement.
 21. CW2 confirmed that on 19th December,2019 he had discussions with the Respondent at a meeting. That on 20th December,2019 he confirmed that he had read the letter and signed it. That in January 2020 he attended a counselling session and raised his concerns verbally. That he accepted the early retirement offer and a declaration that he had no claim against the Respondent with his last day being 27th January,2020. That he accepted the dues to be deposited in his bank account and that he was paid.
 22. CW2 confirmed that there was no threat from the Respondent forcing him to sign. That he was told to sign before he could be paid. He was told verbally. CW2 confirmed there was discrimination since one Emma was retired early but paid better. That Emma was her manager at a different department and that they shared their documents.



23. In Reexamination CW2 clarified that he was not a member of KAWU but paid union dues to KAWU. That he paid agency fees as non-member. That he was dismissed in 2019 and the agency of KAWU had terminated. That he did not know what the meeting was about.
24. CW2 clarified that the Respondent explained changes in the office and not in the field. That his opinion was not important as there were no negotiation, no option given. It was not a consultation as he listened to what the Respondent said. That exit package was discussed on 20th January,2020 and not 27th January, 2020 as indicated. That he signed the discharge because he was pushed so as to know his package. That nothing had been tabulated. That he signed to a figure which was blank and not shown to him so as to know his exit package.
25. CW2 clarified that he did not ask for early retirement it was the Respondent's decision who pushed him and never gave him options. That Emma was known to him as personnel manager and she gave him the documents showing she was paid Kshs. 6M which was a big difference between what he was paid and no reason was given for the same. That the Respondent did not deny paying Emma the said amount. CW2 clarified that the members present were Human Resource and not union members. That he was not advised to bring other member of the union even though the union was satisfied with the exit proceedings.
26. The Respondent on the other hand called two witnesses who testified on 14th November,2023 the first being the Business Executive of AGL the successor of Bollore after buying it off. RW1 adopted his statement and the Respondent's documents filed in court as his evidence in chief.
27. RW1 testified that the directive to transport cargo via SGR affected the Respondent's business which went financially low around 2018-2019. That this forced the Respondent to undergo restructuring to adjust to the interventions. That changes in IT also affected the Respondent's operations. That the Claimants roles were impacted by the changes in the IT with manual systems being replaced with electronic systems.
28. RW1 testified that the Respondent had to retrain staff for about 5 years and at a heavy cost. That the Respondent had to use the available exit mode since the Claimants did not have sufficient time for trainings because of their near exit from the Respondent.
29. RW1 testified that the affected Claimants were notified of their future as well as their unions and discussions ensued in open forum. That he attended most of those forums where the Claimants were given reasons for the separation being early retirement because their roles were not abolished. That no one was forced in to early retirement as there were discussions and the Claimants signed voluntarily the minutes, discharge vouchers and they cleared. That this was done willingly and that there was an option for Appeal.
30. In cross examination RW1 alleged that he used to work for the Respondent at the material time since he joined the Respondent in 2004. That the separation terms were picked from the CBA which covered unionisable employees. He confirmed that Henry and Daniel were not unionisable and they used the terms even on nonunionisable employees. That Musinde was a member of KAWU as well as AAWU. That officials of KAWU were invited in most of the Claimants meetings but they did not attend and the Claimants were okay proceeding without the union representatives.
31. RW 1 confirmed that it was not recorded that questions were put to all employees. That they did not have a recognition agreement with AAWU but had one with KAWU. That the minutes talked of skillset without providing details of skillset. That the Claimants were not given opportunity to adapt to the



- skillset because of their status and time left with the Respondent. That the notice which was in writing did not give an option to accept or reject but the HR office was open for discussions on the same.
32. RW1 confirmed that there was no rush to throw out the employees who had worked long for the Respondent as discussions started in December, 2019. That the staff were required to sign discharge vouchers before they could be paid. That the Claimants were entitled to December salary and days worked in January. That salary for December, 2019 was paid.
 33. In re-examination RW1 clarified that December dues were paid in December while final dues paid in January. That the Respondent did not engage AAWU as it did not have a recognition agreement with them. That they used the CBA on all affected employees for fairness purposes. That there was an opportunity to the Claimants who wanted to reject the offer to do so. That Daniel though he requested for time to think about the offer and discuss with the HR, no one was forced to sign the minutes and discharge voucher.
 34. The second witness was the HRM for the Respondent RW2 who adopted her statement as her evidence in chief. She stated that they did not engage AAWU since they did not have a recognition agreement with them and that they applied the CBA with KAWU to maintain fairness and uniformity.
 35. In cross examination RW2 confirmed that the CBA and the Pension Trust Deed and Rules were relied on. That clause 46 of the CBA concerned retirement on medical grounds too. That early retirement could be mutually agreed where staff consent was sought at the consultative meetings in December 2019. That the notice was issued after the meetings. That the Claimants were given chance to accept or deny the offer for early retirement.
 36. RW2 confirmed that there was no response to Daniel's email but there was a meeting of 27th January which Daniel attended and refused to take up redeployment in Thika and opted for the early retirement. That Daniel did not sign the Minutes.
 37. RW2 confirmed that Emma was paid ex-gratia of Kshs 6M because she was the only senior manager affected by the process having served for over 20 years. That the payment was discretionary. That the meeting with KAWU on 13/12/2019 was to brief the union on the challenges the Respondent was undergoing and the intended staff rationalization.
 38. In re-examination RW2 clarified that Kahindo accepted the offer after the meeting of 28/1/2020. That Emma was a senior manager the head of department. That the ex-gratia payment was negotiated. That Emma challenged the settlement in court and the suit was dismissed.
 39. RW2 clarified that they had two options of redundancy and early retirement where the affected Claimants did not have the required skillsets for the new operations and would not have made business sense to train them.

Claimants' Submissions

40. The Claimants through their advocates Odhiambo, Nyawade & Mwangi Advocates filed written submissions dated 15th December, 2023. On the issue of whether the Claimants' early retirement was justified and fair as contemplated under section 43 as read together with section 45 of the Act, counsel submitted that the Claimants' termination disguised as an offer of early retirement was unfair and unjust and amounted to unfair termination as per section 45 of the Act.
41. It was the Claimants submissions that the process undertaken by the Respondent was flawed as there were no documents that contractually, lawfully and regularly governed or regulated the Claimants' employment relationship that would have supported the Respondent's actions of retiring



- the Claimants early as it did. Counsel relied on the case of Praxides Akoth Odour v Liberty Eagle Limited & Another (2016) eKLR on what governs employment relationship. That what governed the relationship between the parties herein was the Employment Act, various contracts of employment and CBA between the Respondent and AAWU.
42. Counsel submitted that the Employment Act as well as the Claimants' employment contracts did not provide the Respondent with the right to initiate early retirement and therefore process was unsupported and irregular. With respect to Henry Ndungu and Daniel Kahindo who were not unionisable, the Respondent attempted an explanation that the process was supported by the Respondent's trust deed as well as NSSF Act but the Respondent did not bring the said trust deed to verify that claim. That NSSF Act did not also have such a provision.
 43. Counsel submitted that the only document that provided for early retirement was the CBA signed between the Respondent and KAWU 2018-2021 yet the Claimants were not parties to the said CBA as they were members of AAWU and not KAWU with exception of Samuel Munyinyi and the that 1st and 2nd Claimants were not unionisable. That the said CBA forming the basis for the early retirement was grossly irregular, unlawful and illegal and that the Respondent misapplied the said clause 46 of the CBA to retire the Claimants early to suit their selfish ends. That even if the said clause was applicable the only ground an employee could be retired early at the initiative of the Respondent was on medical grounds. The initiative to retire as per clause 46(vi) was on employee not employer.
 44. Counsel submitted that the respondent inverted the procedure of retiring the Claimants since they did not voluntarily apply for early retirement but were caught unawares with the decision made by the Respondent to retire them early. Their consent was not sought. Further that the notices did not give the Claimants option of accepting or rejecting the retirement offer. Daniel Kahindo who attempted to decline the offer never got his email responded to and he denied the allegations of having a meeting with the Respondent on 27th January and not signing the minutes yet he signed the rest. Counsel relied on the case of Benson N Irungu v Total Kenya Limited (2015) eKLR regarding how early retirement should be conducted. Counsel submitted that the Respondent's defence that the Claimants signed discharge vouchers could not stand as the circumstances of this case was that the Claimants had not even received their December Salaries hence were compelled to sign in order to get their forced dues. Counsel relied on the case of Pauline Wangeci Warui Vs Safaricom Limited(2020) eKLR to submit that the Claimants did not have a voluntary early retirement scheme but were unfairly dismissed hence unfair termination.
 45. On the issue of the reason issued for the termination and or forced retirement counsel submitted that there was no compulsory policy for early retirement as it was neither in the employment contract or the Company's human Resource Manual. The Respondent's allegations that the same was in trust deed was not supported as the same was never produced by the Respondent despite adequate notice. The NSSF as well as rules did not have such a policy. Counsel relied on section 43 of the Employment Act on proof of reason for termination and submitted that the termination was unfair under section 45 of the Act if employer fails to prove reasons for the termination.
 46. Counsel submitted that the Respondent's reason of early retirement of the Claimants as attaining the age of 50 and having served over 20 years was not valid and justifiable reason as it flouted Article 27 of the Constitution. That the meeting of 13th December,2019 between the Respondent and KAWU the Respondent indicated that it would render 24 employees redundant. Nowhere was it mentioned that it would send employees on early retirement. The Respondent gave a commercial reason. That is the introduction of SGR, when they met with the Claimants but the narrative changed from redundancy to early retirement and finally to the requirement of different skillsets without telling the Claimants which specific skillset was required or given opportunity to adapt to the said skillsets.



47. Counsel also submitted that no official of the trade union was invited to the meetings despite being a legal requirement and further that the early retirement instead of redundancy was chosen by the respondent to its advantage while disadvantaging the Claimants who would have got a better package in redundancy. That the Respondent had predetermined to terminate the Claimants and the early retirement was made to sanctify the predetermined summary dismissal. Counsel relied on the case of *Florence Kavosa Wanyanga v Kenya National Examination Council (2021) eKLR*.
48. On the issue of discrimination counsel submitted that the Claimants were first identified for redundancy and early retirement. Claimants were not the oldest employees, they had worked diligently for over 20 years, their age was not a burden to Respondent and that they did not voluntarily apply for early retirement. The employees who were declared redundant as per meeting of 13th December, 2019 received better package which included leave, two months' salary in lieu of notice and salary for January 2019, severance pay at the rate of 26 days for each completed year and service pay prior to joining the pension scheme less money owed to the company. That by being retired early the Claimants were never paid their severance pay as their counterparts hence were discriminated on their age and number of years served.
49. On the issue of denial of ex-gratia package, counsel submitted that some employees like Emma, were paid the same to the tune of Kshs 6 million above the normal package as ex-gratia. That the said employee was retired early as the Claimants and served for over 20 years and was more than 50 years old yet also not unionisable just like the 1st and 2nd Claimants. The employee's discharge voucher indicated the payment was for long serving and the Respondent allegations that the employee was in senior management could not succeed since they did not indicate the same in the employees discharge voucher. Counsel relied on section 98 of the *Evidence Act* on oral evidence.
50. On the issue of whether the Claimant were entitled to reliefs sought counsel submitted that they were entitled having proved their case on a balance of probabilities. The early retirement was done unfairly and unjustly. That the Claimants were entitled to 12 months' salary as compensation. Counsel relied on the case of *Florence Kavosa Wanyanga* above where court awarded maximum compensation. On the severance pay counsel submitted that the reasons given by the Respondent of re-organization of its business translated to redundancy situation hence Claimants were entitled to the same as per section 40 of the *Employment Act*.
51. Counsel submitted that the Claimants had demonstrated that they were discriminated due to their age hence entitled to the general, aggravated and exemplary damages for discrimination. Counsel relied on article 27 of *the Constitution* and section 5 (2) of Employment the Act and the case of *Bakery Confectionery Food Manufacturing and Allied Workers Union Kenya v the Wrigley Co. (EA) Ltd(2013) eKLR* where court awarded 8 months compensation for forced retirement.

Respondent's Submissions

52. On the other hand, the Respondent through its advocates Iseme Kamau & Maema Advocates filed its written submissions dated 8th March, 2024 and on the issue of whether the termination of the Claimants' employment on grounds of early retirement was valid submitted that the reason for the termination of the Claimants' employment was due to change in logistic operations which necessitated the need for re-organization. The Respondents declared employees whose roles had become irrelevant redundant while those whose roles were relevant but required different skillset were offered early retirement. That was the case with the Claimants herein.
53. Counsel submitted that there was indeed a valid reason warranting restructuring of the Respondent's business. That the same required changes in the Respondent's systems so as to optimize its operations



- while requiring significant investments in fresh training with the persons who could serve the organization longer. Counsel submitted that it is not in all cases that there is restructuring that an employer is bound to declare employees redundant since the Claimants' roles were not abolished as would be the case in redundancy. That the law allows for early retirement as a form of separation between employee and employer.
54. Counsel submitted that this being a commercial decision the Respondent was only bound to illustrate that the decision was backed by valid reasons and termination done in accordance with fair procedure. Counsel relied on the cases of Kenya Airline Pilots Association v Kenya Airways Limited(2020) eKLR and Pure Circle (K) Ltd v Paul K.Koech & 12 others (2018) eKLR. Counsel submitted that following the decision to restructure the company the Respondent opted to give the Claimants an offer for early retirement as their positions were not abolished hence they did not merit redundancy within the meaning of section 2 of the Act. That the Claimants were duly informed of the reasons for termination of their employment on the basis of the early retirement.
 55. Counsel further submitted that during the consultative meetings, the Claimants did not raise any issue on the validity of the reason for termination. The Claimants confirmed they understood the reason for the re-organization and circumstances they were faced with. Counsel relied on the case of Fiyadh Ahmed Mohamed v Bollore Transport & Logistics Kenya Limited(2021) eKLR where the court found the operational re-organization to be a valid reason.
 56. On the issue of whether the procedure followed in effecting the early retirement of the Claimants was fair and lawful, Counsel submitted that the process was regular, fair and in accordance with the Respondent's policies and *Employment Act*. Counsel submitted that the decision to retire the Claimants early was governed by the CBA with KAWU which was the duly recognized union as well as Respondent's pension Rules which provided for employee taking up early retirement upon attaining 50 years of age.
 57. Counsel submitted that the Respondent had a recognition agreement with KAWU; signed a CBA with KAWU dated 12th November, 2018 for the period 2018-2021. That the dispute between KAWU and AAWU as to which union had a valid recognition agreement with the Respondent was subject of a court decision in Kenya Aviation Workers Union v Bollore Africa Logistics Limited; Aviation and Airport Services Workers union (K) Interested Party (2018) eKLR where the court declared recognition agreement between AAWU and Respondent as a nullity. Counsel submitted that the court having found the AAWU and the Respondent not having any valid recognition agreement then the valid Union was the KAWU.
 58. On the procedural fairness counsel relied on clause 46 of the KAWU CBA on early retirement and submitted Claimants had all served the Respondent for over 20 years and were 50 years of age hence eligible for the option of early retirement. That where the Claimants were not unionisable the Respondent applied the sections of the *Employment Act* on procedural fairness. That even the AAWU CBA clause 46 provided for early retirement just as the KAWU CBA.
 59. Counsel relied on section 41 of the *Employment Act* on procedural fairness and submitted that the Respondent adhered to the provisions of section by making consultations with the Claimants and the parties reached an agreement on the terms of the separation. Counsel submitted that whereas Daniel Kahindo denied attending the meeting to address his grievance he confirmed in cross examination that he was given a redeployment letter but chose to retire early and signed the acceptance.
 60. On the issue of exit package counsel submitted that the same was provided for under clause 46 as read together with clause 44 of the CBA where the Respondent proceeded to pay each Claimant as per the CBA. Counsel submitted that by the virtue of the unequivocal agreements the Claimants were



- estopped from denying the fact that the terms of their separation were finally mutually agreed between the parties. That the acceptance letters constituted binding agreements between the parties.
61. Counsel submitted that the separation was by way of mutual agreement since it was within the Respondent's right to initiate the early retirement process provided the same was on mutually agreed terms as was the case herein. That there was no contractual requirement that early retirement can only be initiated on medical grounds.
 62. Counsel submitted that the Respondent gave the Claimants an offer of early retirement which they accepted. That even though the same was not provided for under the HR manual or *Employment Act* the same did not deter the parties to mutually separate through early retirement. Counsel relied on the case of Sunil Kumar Chhabra v G4s Security Services Limited (2013) eKLR where the court equated retirement arrangements as binding contracts negotiated and agreed between employers and employees. Counsel relied on among others on the case of Emma Wanjiru Ng'ang'a *Gichuhi vs Bollore Transport & Logistics Kenya Limited cause 257 of 2020* to submit that the Claimants' exit terms were binding agreements between the parties having been negotiated, agreed upon and fulfilled the Claimants could not impeach the said process
 63. Counsel submitted that the acknowledgement and acceptance letters signed by the Claimants as per the acceptance letters and discharge vouchers were binding. Counsel relied on the cases of Patrick Nyoro Njuguna v East African Portland Cement(2014) eKLR and Thomas De La Rue(K) Ltd v David Opondo Omutelema(2013) eKLR on the claim of duress. Counsel submitted that the Claimants voluntarily signed the acknowledgement and the acceptance of the early retirement offer together with discharge vouchers. That there being no evidence of coercion, duress, misrepresentation or undue influence, the agreements were binding and a valid mode of separation of their employment.
 64. On the issue of whether the claim of discrimination was merited counsel for the Respondent submitted that the Claimants allegations of discrimination were not substantiated as no contemporaneous evidence to prove the claims was adduced. Counsel relied on the cases of Ol Pejeta Ranching Limited V David Wanjau Muhoro(2017) eKLR and Peterson Guto Ondieki v Kisii University(2020) eKLR. On what amounts to discrimination. Counsel submitted that the Claimants did not demonstrate on what grounds they were allegedly discriminated upon as set out under Article 27(4) of *the Constitution*. Further, they did not produce evidence of similarly circumstanced individuals against which a claim for discrimination can be founded.
 65. On the issue of whether the Claimants were entitled to the reliefs sought, counsel submitted that the Claimants were not entitled to the 12 months compensation for unfair termination since their termination was based on valid and fair reasons and the process was fair and just. That the Claimants accepted the early retirement and received their full terminal dues without any reservations.
 66. On the relief of severance pay counsel submitted that the Claimants termination was based on early retirement and not redundancy to be entitled to severance pay. On the claim for service pay, counsel submitted that since the Claimants were members of NSSF section 35(6) of the *Employment Act* prohibited them from claiming service pay. That this fact could be proved from the Pay slips.
 67. On the prayer for salary for reminder of years until retirement Counsel submitted that it was an anticipatory damage which the court cannot award and relied on the case of Eng. *Francis N. Gachuri vs Energy Regulatory Commission Industrial Cause No. 203 of 2011*. On the prayer for general, aggravated and exemplary damages for discrimination on the basis of age counsel submitted that the Claimants did not prove this claim of discrimination hence not entitled to the damages. On the claim for damages for distress, loss of career and future earnings counsel submitted that the Claimants did not lead evidence in support of the claims and hence not entitled to the same.



Determination

68. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and in opposition to this case. The court has also considered authorities relied on by Counsels and has come up with three main issues;
- i. Whether the Claimants' termination of employment was unfair and unlawful
 - ii. Whether the Claimants were discriminated
 - iii. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful

69. In this instant case, the Respondent alleged that they terminated the Claimants by invoking Clause 46 of the KAWU CBA which provided for early retirement for those employees who were 50 years of age and had served it for over 20 years. It is not in dispute that all Claimants by the time they were retired in 2019 were of 50 years of age and served the Respondent for over 20 years.
70. The Claimants have raised the issue of applicability of KAWU CBA and the court notes that they all appreciated that they knew the Respondent had a CBA with KAWU and they paid agency fees to KAWU. The court further appreciates that the 1st and 2nd Claimants were not members of any union. The Respondent's witnesses explained that they invoked the CBA for fairness and uniformity.
71. The Court is guided by the authorities relied on by the Respondent that is Kenya Aviation Workers Union v Bollore Africa Logistics Limited; Aviation and Airport Services Workers union (K) Interested Party (2018) eKLR and agrees that the applicable CBA was the one with KAWU. In any event the Claimants' witness acknowledged that the AAWU CBA provided for early retirement and that it provided the same benefits as those in KAWU CBA.
72. In considering whether the termination is fair both in substance and procedure, the Court will be guided by the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR on this well-established principle. The Court is further guided by section 41 and 43 of the Act.
73. The settled position both in statute and case law is that the employer must prove that the reason for termination was valid and fair. In this particular case the Claimants acknowledged that the Respondent was highly affected by the launch of SGR to transport cargo. This court notes that every business has a right to take initiatives to realise its goals by re-organizing and restructuring if need be. This was the holding in the case of *Njeru v Nampak Kenya Limited (ELRC Cause No. 501 of 2019)* [2023] KEELRC 2434 (KLR) (6 October 2023) (Judgment) the court held as follows; -

The respondent proved to this court that due to heavy losses incurred on account of drastic reduction in demand of its products from 2016 and in an effort to return to profitability it decided to restructure and the claimant testified he was well aware of the same.

74. In addition, this court is of the view that the reason for early retirement was sanctioned by the CBA in place and the Respondent explained that their roles were never abolished but were relevant but required different skillsets and that the staff would need to be trained for a long period of which the claimants were near retiring of 60 years. The court therefore agrees with the Respondent that it would make no business sense to train employees who were almost retiring when the business itself was struggling. The Claimants assertions that they ought to have been declared redundant as per provisions of section 40 of



the Act does not sound fair since the Respondent explained that their roles were not abolished. To this court therefore the Respondent has proved that the reason for the termination passed the fairness test.

75. On the issue of procedural fairness, the claimant's termination was not based on any disciplinary issue. The Respondent invited the Claimants for consultative meetings in December 2019 where the subject of the meeting was to discuss the Respondent's re-organization and how it would affect the Claimants roles. It was not in dispute that all the Claimants attended the said meetings and signed the minutes. The Claimants were informed of the re-organization in place, how they were earmarked for early retirement and their exit package. The Claimants were issued with notices for early retirement which again contained their exit package. Even though only one of the Claimant raised issues with his selection for early retirement the rest did not.

76. This court notes that the Claimants attended meetings in December, 2019 and were retired towards the end of January 2020. The court also notes that the Claimants were invited for counselling sessions in January 2020 to help them transition and they attended and raised their concerns as well. In addition, the Claimants signed for the acceptance of the early retirement and discharge vouchers declaring that they have no claim against the Respondent. The agreements entered between employee and employer were binding between the parties. In *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR the Court of Appeal had this to say: -

“... it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the *Employment Act* and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.

77. The Claimants acknowledged during hearing that they were not forced to sign the documents by the Respondent but signed for them being no other option. Without proof of duress, coercion or misrepresentation the court is persuaded that the Claimants willingly signed the documents and were paid their exit package thereafter. The Court therefore takes the view that the claimant's seek from this Court an order against the respondent to pay them more and over and above what they willingly accepted as full and final settlement. It would be unjust for the Court to aid them in doing that.

78. In the case of *John Mburu vs. Consolidated Bank of Kenya* [2018] eKLR the Court of Appeal echoed the words of the Privy Council in *Pao On vs. Lau Yiu Long* that in determining whether duress is established:-

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law and be regarded as coercion of his will so as to vitiate his consent...In determining whether there was coercion of will such that there was no true consent it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it.”

79. The Court notes that the Respondent gave the Claimants a fair procedure from the consultative meetings to counselling sessions further even if it is the Respondent who initiated the process the Claimants signalled their acceptance by signing all the documents and attending all the meetings. Nothing prevented them from denying the said offers of early retirement.



80. From the foregoing, the court finds the claim for unfair termination unmerited
81. Whether the Claimants were discriminated
82. The Claimants alleged that they were discriminated because of one Emma Gichuhi who served the Respondent for 24 years and was of 50 years of age; was retired early just like them but was paid ex-gratia pay of Kshs 6M. That other employees were declared redundant and paid severance pay which did not happen in their case. Further that other employees remained in the service of the Respondent despite having served the Respondent more than 20 years and being 50 years of age.
83. The Respondent on the other hand explained that the reason Emma was paid ex-gratia was because she was the only senior manager affected by the process of early retirement and the same was negotiated. That the said Emma also challenged her dues in court and her case was equally dismissed. On the issue of redundancy, the Respondent explained that the Claimants were not candidates for redundancy since their roles were still relevant and were never abolished. That the Claimants needed a different skillset by training which did not make economic sense to train employees near retirement age.
84. In the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (22 October 2021) Discrimination was explained as follows:
- “Discrimination was failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured. Not all cases of distinction amounted to discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who were in similar positions on the basis of one of the prohibited grounds like race, sex disability or due to unfair practice and without any objective and reasonable justification.”
85. Equally, in *Francis Njeru Kariuki v Crown Paints Kenya Limited* [2022] eKLR it was held that:
- “According to the Court of Appeal in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR – “...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...”
- In the instant case, apart from stating that position of Business Development Manager was given to another person, the Claimant provided no factual basis for the allegation. It is the finding of the Court that the Claimant has not on a balance of probabilities established that he was discriminated.
86. In this particular case the Claimants have not led tangible evidence to prove the allegation of discrimination. No witness was called vouch for allegations of discrimination. On the other hand, the Respondent has discharged its burden by illustrating that no such discrimination happened to the Claimants. The Respondent explained that it was not only the Claimants who were affected by this process of early retirement and that they were 18 in number and only the claimants’ filed a suit claiming among others that they were discriminated.
87. In conclusion this court finds and holds that the claim in its entirety is found without merit and is hereby dismissed with no order as to costs considering the circumstances of separation between the parties.



88. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

