Mwangi & 59 others v National Social Security Fund (Cause 488 of 2015) [2022] KEELRC 14644 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 14644 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 488 OF 2015

NZIOKI WA MAKAU, J

NOVEMBER 17, 2022

BETWEEN

MARGARET WANGUI MWANGI & 59 OTHERS ..... CLAIMANT

AND

NATIONAL SOCIAL SECURITY FUND ..... RESPONDENT

JUDGMENT

1. The 60 Claimants who are former employees of the National Social Security Fund (NSSF) instituted this suit against the NSSF in March 2015. After several notices of change of Advocates in the proceedings, the Claimants later filed a Joint Further Amended Memorandum of Claim dated June 25, 2019 seeking compensation for the unprocedural, unlawful and unfair termination of their employment. The 1st and the 15th to the 60th Claimants are represented in the suit by Odero & Associates Advocates while the 2nd to 14th Claimants are represented by M/s Enonda & Associates.

2. The Claimants aver that sometimes in 2010, the Respondent flouted a Voluntary Early Retirement Scheme (VERS) for its employees and thereafter sent out several circulars on the terms of the scheme. That on or about November 2, 2010, a Circular referenced SF/EST/1/159 approved the VERS which detailed: an exit package of 3 months' basic salary and house allowance for every year worked; golden handshake for the different SF cadres; TPS/ Mortgage Rebate; and a pre-retirement training for all employees taking up the VERS. That without annulling the earlier circular, another Circular referenced SF/EST/1/25(5) was sent out on March 1, 2013 purporting to give other terms of an Exit Package including:

    i. 2 months' severance pay for unionisable staff (basic salary);

    ii. House allowance for every year worked but capped at 10 years; and

    iii. 2 months' severance pay for management staff (consolidated pay) for every year worked but capped at 10 years.

3. That on or about March 15, 2013, yet another Circular referenced SF/EST/1/15A(13) elucidated that staff with car loans would continue paying the loans at staff rate until full clearance, and that the government through the treasury could waive tax on the VERS payment. The Claimants further averred that on several occasions, the Respondent's Managing Trustee went around intimidating staff to either take up the scheme or lose out on ex-gratia payment on the next option or be terminated. That this was despite the fact that none of the circulars issued to the affected employees was revoked and they did not know which package was legally applicable. They aver that whereas the government approved the VERS scheme and recommended that the Respondent's Managing Trustee directly engages the Treasury on the same, there was no information whether the Respondent undertook the engagement. They contend that the inaction was calculated to put the retirees to a financial distress and that the PAYE so recovered on the VERS pay-outs may have been misappropriated to the benefit of other persons instead of being remitted to the KRA.

4. It is also the Claimants' evidence that the board minutes authorizing the VERS and the particulars relayed to the government for approval have never been disclosed to the retirees despite their Union repeatedly requesting for the said information. Further, that there was no dialogue or discussions held with the retirees before formulation of the VERS terms. They aver that the Respondent demonstrated discrimination and unfair treatment as some retirees were paid 3 months' severance pay for all the years worked and those years that would have worked to compulsory retirement. That the capping of payment at 10 years rather than all years worked further amounted to victimization of the retirees. That the recovery of the car loans in full was also contrary to the terms of the VERS and further, Treasury could not have acted before the Respondent clearly stating the position as directed by the government. It is the Claimants' averment that they were therefore short-changed and underpaid and they subsequently particularise in their Claim the special damages for each of the 60 Claimants. The Claimants pray for: a declaration that the termination was unprocedural, unlawful and unfair thus seek compensation for unfair termination special damages as pleaded in paragraph 21 of the Joint Further Amended Memorandum of Claim; severance pay for the remaining period to be worked to attain mandatory retirement age; a refund of PAYE amounts recovered; proof of remission of PAYE recovered to KRA; interest; costs of the suit; any other further and better relief this Honourable Court deems fit and just in the circumstances; a declaration that the decision to cap severance pay at 10 years was unlawful and unfair with no basis in law; and an order for payment of 12 months pay for unfair termination of employment. In a Witness Statement made by the 6th Claimant, Francis Otieno Minyenya on May 15, 2019, he states that the Claimants joined the employment service of the Respondent on various dates as indicated in the Certificates of Service attached to the statement.

5. In reply, the Respondent filed an Amended Memorandum of Response to Claim dated July 25, 2019 averring that all the issues raised in the Claim herein were *res judicata* as they were previously litigated and concluded in Industrial Cause 984 of 2012, Kenya Union of Commercial Food & Allied Workers Union v National Social Security Fund; wherein the claimant union represented the Claimants in the instant case. That however the Claimants presently seek to abandon the Union which raised similar issues over the same circulars that formed part of their retirement scheme. That in the said Industrial Cause 984 of 2012, the Court found that a large number of employees had accepted the VERS package after it was approved by the Government and that the VERS was only one-off based on the dynamics of the organization. That the Court further found that the offer by the NSSF was lawful and did not amount to unfair labour practice. The Respondent invites the Court to adopt the above court finding as no appeal was ever preferred against the judgment at all. It is the Respondent's averment that it informed its staff of a VERS that had been approved by its Board of Trustees but was yet to be approved by the Government. That however, the VERS was withdrawn for being expensive and unsustainable. It further avers that the Circular of November 2, 2010 was simply an update of the Trustees' intention

to offer the said terms to any staff who wished for an early exit from the fund. That it was through the Circular dated 1st March 2013 that it informed its staff that the Fund had obtained Government approval for VERS and thereafter expressed the terms of the scheme, application procedure and the timeframe involved. That it issued a Circular dated March 15, 2013 to shed light on the terms of the scheme that staff sought clarifications on and that evidently, the contents of the said circular could not have constituted a further offer. It avers that all the Claimants herein voluntarily gave their consents to the VERS on offer and no information at all was withheld from them. That all the Claimants were paid their dues as per the VERS terms and cannot thus seek to reopen their terms for discussion. Further, the Claim herein is an abuse of the process of Court and against the tenets and purpose of VERS in labour jurisprudence. The Respondent further avers that vide its letter dated February 20, 2013, it formally sought tax exemption from Treasury which was denied and it dutifully deducted and remitted PAYE on all the Claimants' benefits. That the Claimants need to demonstrate the legal basis for refund of tax already paid. It therefore denies that it short-changed and underpaid the Claimants as particularised in the Claim and prays that the Claimants' Memorandum of Claim be dismissed with costs. The Respondent also filed a witness statement made on by its Regina Mua who asserts that all the Claimants were paid their dues under VERS as per the terms offered on March 1, 2013, less PAYE tax that was duly remitted to KRA.

6. There were witnesses who testified before Radido J and others before me for the Claimants and Respondent. They all maintained the position in their pleadings with nothing significant hinged on the oral testimony adduced. In other words, it was a re-hash of the pleadings and need not be reproduced in extenso at this stage. The parties thereafter prepared and filed written submissions a summary of which appears next.

Claimants' Submissions

7 The 1st and 15th to 64th Claimants submit that redundancy and retrenchment were defined in the case of *Directorate Of Personnel Management (GOK) v Union Of Kenya Civil Servants* [2005] eKLR, as an involuntary and permanent loss of employment caused by an excess manpower. It is their opinion that the question whether or not redundancy or retrenchment is necessary is exclusively and purely an administrative matter and the government is thus not under an obligation to consult the Union or take its consent. That it is a normal and necessary incident of work that courts cannot interfere with as long as it is undertaken for better management, to cut costs and increase efficiency and productivity, and is not prompted by unfair labour practice or instituted in bad faith. The Claimants submit that the Respondent has not produced before Court the minutes of the Board of Trustees meeting, if there was any, approving the terms of the Circular dated March 1, 2013. Further, no evidence was tendered to confirm when the circular dated November 2, 2010 was revoked and the new terms of March 1, 2013 communicated. They submit that it was the 2nd Claimant's testimony that the Claimants had no knowledge of the new terms issued on March 1, 2013 and that their applications for consideration was based on the 2010 circular. In support of this submission, the Claimants cite the case of *Josephat Kamau Kamau & 2 Others v National Bank of Kenya* [2019] eKLR where the court stated that while parties to a contract of service are at liberty to contract outside the regular or prevailing written instruments on the terms or conditions of the contract of service, there must be an express or an implied intention that the parties are varying or waiving or setting aside any such relevant term and condition in such regular or prevailing written instruments, failure of which the Court would hold that such relevant term or condition in the regular or prevailing written instruments remain binding upon the parties despite the purported and further "outside contract". The Claimants submit that the Respondent therefore reneged on the contract it had with them because they were coerced, compelled and/or intimidated to take the scheme through misrepresentation. They submit that the Respondent

did not give them the opportunity to freely choose the obligations and terms to accept and undertake, thereby compelling them to agree to a contract that was unknown to them and whose validity they can therefore deny. They rely on the case of *National Bank of Kenya v Hamida Bana & 103 Others* [2017] eKLR where the Court of Appeal reiterated its decision in *William Barasa Obutiti v Mumias Sugar Company Ltd* [2006] eKLR that an employer and employee were open to terminate the contract of employment at any time by mutual agreement and that such agreement may be subject to terms in the VERS. It is the Claimants' submission that their contracts were not terminated by mutual agreement but by misrepresentation of the terms by the Respondent. They further rely on the Supreme Court of India case of *State of Punjab & Others v Dhanjit Singh Sandhu* Civil Appeal No 5698-5699 of 2009 on the doctrine approbate and reprobate that no party can accept and reject the same instrument ie a person cannot say at one time that a transaction is valid and thereby obtain advantage to which he could only be entitled on the footing that it is valid, and then turn around and say the transaction is void for purposes of securing some other advantage. The Claimants invite this Court to note that the doctrine of approbate and reprobate does not apply to them as the Respondent misrepresented the terms of the VERS. With regard to their claim for a refund of PAYE recovered, the Claimants cite the case of *Patrick Nyoro Njuguna v East African Portland Cement* [2014] eKLR where the Court ordered the respondent to pay the balance of income tax deducted from the claimant in disregard of the tax exemption by the Minister in the impugned Legal Notice, while considering the amount admittedly remitted to the claimant in the computation. They submit that whereas the Respondent in the instant case wrote to the KRA seeking Clearance Certificates for them pursuant to the VERS on April 30, 2013, one of the Claimant's P9 form did not reflect the PAYE deducted from his pay in the Claimants' Supplementary List of Documents dated May 6, 2022. In this regard, they question where the said amount was to reflect if not on the said P9 form yet it was PAYE. It is the Claimants' submission that they have evidenced the non-remittance of the PAYE deductions and are thus entitled to a refund.

8. On the submission that they were unprocedurally terminated from their employment and are therefore entitled to the reliefs sought, the Claimants rely on the case of *Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited* [2014] eKLR where the Industrial Court entered judgment in favour of the claimants because no evidence was adduced on the essence of the undertaken redundancy process. The Court held that the respondent had flouted every principle of their own terms and that though the affected employees were paid part of their terminal dues, there was more to a retrenchment and voluntary early retirement process than just payment of dues. It is the submission of the Claimants that the promise made to them was not fulfilled and the Respondents instead varied the terms of the Scheme without notifying them. That clearly, the Respondent never followed the procedure set out in paragraph 3 of the Government Circular dated November 7, 1995 (item 3, page 6 of the Respondent's bundle) which states as follows:

> " Proposals on retrenchment and safety net payments which have been approved by respective Boards, should be channelled through the parent ministry to my office for coordination of their analysis and approval by the National Steering Committee of the Civil Service Reform programme."

9. Further, the 2nd to 15th, 23rd, 24th, 27th, 28th, 34th, 35th, 37th, 38th, 40th, 43rd, 47th, 48th and 54th Claimants submit that the Circulars of March 1 and 15, 2013 were unlawful and unprocedural because the Respondent never approved the package as tabled to the staff and that the minutes the Respondent attached indicating board approval are in fact not approvals but recommendations and resolutions regarding VERS (item 5, page 9 in the Respondent's bundle dated February 4, 2020 and page 10 of the resolutions of the board thereof). Secondly, since the tax returns produced by Claimant's Witness 2 emanating from the Respondent clearly indicate that no taxes were remitted for the month of June

2013 or subsequently in regard to the VERS payment, the same demonstrates the illegalities by the Respondent. That it further backs up the assertion that there may have been an exemption granted and the taxes deducted but never remitted. Thirdly, the Claimants were coerced to take the package. Fourthly, the earlier Circular of November 2,2010 issued to the Respondent's staff was never revoked. Fifth, the VERS offer on redundancy was capped at 10 years contrary to the express provisions of Section 40(g) of the *Employment Act* and the Respondent subsequently made underpayments of the severance pay. Lastly, the Respondent did not get appropriate government approvals for the VERS as set out in the Government Circular dated November 7, 1995.

10. It is their submission that although the VERS is termed as voluntary, the minimums of redundancy set in the *Employment Act* have to be complied with. That however the Respondent did not follow the laid down process of redundancy under Section 40 of the *Employment Act* as it did not inform them, the Union or the area Labour Officer of the impending redundancy. Further, the Respondent has not justified the unprocedural termination of their employment. They rely on Civil Appeal No. 46 of 2013, *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* where Maraga JA (as he then was) held that in determining whether a redundancy was necessary, courts need to determine the two aspects of a redundancy being that the loss of employment in redundancy cases: has to be by involuntary means and at the initiative of the employer; and has to be at no fault of the employee. That in Nairobi Cause No. 1645 of 2011, *Josphat Bundi Murithi v Pasico Eastern Africa Ltd*, the Industrial Court asserted that the Labour Officer should have been appraised of the matter to give advice before the termination notice and that it was not the intention of the law that the officer just be given the final decision of the respondent.

11. The Claimants submit that in cases with procedural and substantial lapses such as this, the court may consider a redundancy to amount to wrongful termination and is empowered to subsequently order for compensation limited to 12 months and/ or reinstatement. That courts have held that damages can be awarded in cases of redundancies that are devoid of following proper procedures and that in the case of *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K)* [2013] eKLR, the Court awarded 12 months compensation for termination of employment based on a flawed redundancy process. They submit that the *Employment Act* also provides for payment of severance pay in cases of redundancy at a minimum of 15 days' pay for each completed year of service and that it was thus not proper for the Respondent to cap the compensation to 10 years. That Radido J. in the case of *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v Catering & Tourism Development Levy Trustees; Attorney General (Third Party)* [2019] eKLR found it was improper for an employer to cap the redundancy pay in a restructuring process and went on to remove the placed cap of 10 years and award the claimants the remainder of the years not paid for as per the law.

12. The Claimants submit that in addition to the damages for unfair termination, courts have occasionally awarded damages for loss of income or alternatively, exemplary damages for breach of contract in cases as this where it is demonstrated that termination of contract was laced with malice. That for instance in the case of *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute* [2016] eKLR, the Rika J. awarded damages of Kshs. 20 million as coalesced damages for unfair and unlawful termination; diminished employability; and in compensation for other violations outlined in the Award. The court noted that the Claimant in that case had been mistreated, lost opportunities and had as a result incurred loss that ought to have been compensated. It is the Claimants' submission that since they lost their employment and are unlikely to get income from the state or any institutions thereof, they propose payment for loss of salary for the remainder of their work duration as pleaded and as supported in the authorities of *Michael Kagoma Maina v Kenya Police Service & 2 Others* [2013] eKLR and *Thomas Nyangi Mwita v Kenya Commercial Bank Ltd* [2015] eKLR. They thus urged the grant of the prayers in their claim.

Respondent's Submissions

13 The Respondent submits that the testimony of the Claimants' witnesses was based on suppositions and conjectures. That the Claimant's Witness 1 was not able to show the particular circular which conclusively promised the employees that their loans would not be deducted at once upon leaving, and would continue to be paid in instalments. That both the first and second Claimant's witnesses could not demonstrate the alleged discrimination and favouritism in the manner the staff were paid. That the 2nd witness also failed to prove the Claimants' allegation that the Respondent's Managing Trustee failed to write a request for tax waiver to the Government, or that the recovered tax was not remitted to KRA. That furthermore, the 2nd witness admitted not having checked with KRA if the PAYE were remitted before demanding that the same be returned to the Claimants. With regard to the Respondent's evidence, it submitted that its witness adduced that the Respondent obtained a job evaluation report prepared by Price Waterhouse Coopers recommending, among other things, the restructuring of the organization and the subsequent decision of its Board of Trustees to implement the same.

14. In relation to the earlier filed Industrial Cause 984 of 2012 (*supra*) by the Claimants' Union, the Respondent submits that the court dismissed the suit after determining that the Respondent had provided tangible reasons why the proposals contained in the Circular dated November 2, 2010 were withdrawn, that the Circular of March 1, 2013 was lawful and did not amount to unfair labour practice. The Respondent submits that the standard well established law is that special damages must be specifically pleaded and particularly proved but the Claimants have failed to prove the same (see Haho v Singh, Civil Appeal No. 42 of 1983 (1985) KLR 716 quoted with approval in Civil Appeal No. 14 of 2016, *Swalleh C. Kariuki & Another v Violet Owiso Okuyu*). On the claim for severance pay, it submits that the same is not based on any of the circulars the Claimants purport to rely upon, nor their original letters of employment. That even if the Court were to give effect to the Circular of November 2, 2013 which were found by Ndolo J. and Nduma Nderi J. to be inapplicable, the circular made no proposal for "severance pay for the remaining period to be worked to attain mandatory retirement age". Thirdly, that the claim for a refund of PAYE recovered was based on the false presumption that same had not been transmitted to KRA and was disapproved by evidence from the Respondent. It submits that the prayer seeking proof of remission of the recovered PAYE to KRA was done through the unchallenged documents of the Respondent produced in Court. That the prayer for interest on the sums claimed has to fall as there was no legitimate claim made against the Respondent hence nothing to pay interest on and on costs of the suit, the same should follow the event.

15. Further, the Respondent submits that the VERS package exceeded what the law requires and was an offer equally made and paid to all who opted for the scheme. That clearly the law does not prohibit an employer from conferring a benefit greater than the basic legal requirement or contracted obligation, which is what the offer was doing here. That VERS are not unlawful or illegal methods of retrenchment as has been suggested in the instant suit and courts have repeatedly pronounced themselves regarding them. That the International Labour Organisation in fact recognises VERS as an alternative to possible termination of employment for economic, technological, structural and similar reasons (ILO Termination of Employment Recommendation, 1982 (No. 166) para 21 dealing with measures to avert or minimise termination).

16. It is the Respondent's submission that the evidence before the Court clearly shows that the VER scheme was elaborately discussed both directly with the employees and with their union and that this fact was not denied. That the submissions by the Claimants' Counsel dwell upon purported breach of procedures contained in a government circular from the former office of the Prime Minister, but

fails to disapprove the fact that the VERS was floated, widely discussed and eventually, voluntarily applied for by those interested. Further, that the issue of alleged discrimination cannot possibly arise in such situations where a voluntary scheme was floated, discussed, litigated over, and the court even extending time for those interested to be enjoined. The Respondent further submits that none of the pre-conditions for redundancy raised by the Claimants was necessary as there was no declaration of redundancy by the employer in this case. That the claims herein are clearly an afterthought by former members of its staff, who had voluntarily and knowingly applied for the scheme and paid under the scheme, to try and extract more payments from the Respondent without justification whatsoever.

17. The suit involves the termination of service by way of a voluntary early retirement. It is the Claimants' case that they were discriminated against and given the erroneous payment on the VERS, their taxes deducted and not remitted and that there was non-payment of severance pay. They also allege their pay was unlawfully capped at 10 years. The Respondent on its part asserts the Claimants were duly paid and that the sums they in fact received were higher than what the Respondent had anticipated paying. It argues there was no proof led that taxes deducted were not remitted to KRA. The Respondent argues that the VERS was floated, widely discussed and eventually, voluntarily applied for by those interested.

18. The Court has determined that prior to institution of this suit, there was a suit articulated on behalf of the Claimants being Industrial Cause 984 of 2012, Kenya Union of Commercial Food & Allied Workers Union v National Social Security Fund. It is not denied that such a suit was mounted. The determination therein places this matter in the realm of *res judicata*. In addition, even having had a look at this case dispassionately, this Court did not discern any iota of misrepresentation by the Respondent. When the VERS was floated, it was discussed at length with the Claimants and they willingly took it. They hinge their arguments on communication from the office of the Prime Minister yet they disregard the circular on VERS that the Respondent applied in giving them the benefits that accrued under the VERS. As such this suit was a waste of precious judicial time since the issues had been settled earlier in Industrial Cause 984 of 2012, Kenya Union of Commercial Food & Allied Workers Union v National Social Security Fund. The suit is therefore dismissed albeit with no order as to costs.

19 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2022

NZIOKI WA MAKAU

JUDGE