



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2575 OF 2016**

**RAPHAEL NJOROGE MWAURA.....1<sup>ST</sup> CLAIMANT**  
**SAMUEL MIGWI THEURI.....2<sup>ND</sup> CLAIMANT**  
**MARY WAENI WAMBUA .....3<sup>RD</sup> CLAIMANT**  
**ANNE ELIZABETH OWUOR .....4<sup>TH</sup> CLAIMANT**  
**CHARLES LWANGA OOKO .....5<sup>TH</sup> CLAIMANT**  
**CHARLES THINWA MATHENGE .....6<sup>TH</sup> CLAIMANT**  
**CLEOPHAS SIMIYU WEKESA .....7<sup>TH</sup> CLAIMANT**  
**FLORENCE KIRIMANIA OBURA.....8<sup>TH</sup> CLAIMANT**  
**GODFREY KIGARIE GATHIGE.....9<sup>TH</sup> CLAIMANT**  
**JAMES NGUGI NJUGUNA.....10<sup>TH</sup> CLAIMANT**  
**JOSHUA KAMAU MWANGI .....11<sup>TH</sup> CLAIMANT**  
**NATHANIEL WAITHAKA WANYAGI..... 12<sup>TH</sup> CLAIMANT**  
**SAMUEL NJOROGE NJOGU..... 13<sup>TH</sup> CLAIMANT**

**VERSUS**

**KENYA POWER &  
LIGHTING COMPANY LIMITED.....RESPONDENT**

**(Before Hon. Justice Hellen S. Wasilwa 27<sup>th</sup> February, 2020)**

**JUDGEMENT**

1. The Claimants herein filed a Statement of Claim dated 14<sup>th</sup> December, 2016 and filed in Court on 15<sup>th</sup> December, 2016, seeking compensation for constructive redundancy by the Respondent herein.
2. The Claimants aver that they were on diverse dates employed by the Respondent herein, a State Corporation and enjoyed varied terms and conditions of employment that applied to the management staff pegged on the Management Human Resource Manual amongst other documents.
3. The Claimants further contended that they performed their duties diligently and to the Respondent's satisfaction and were in fact willing to continue rendering their services were it not for the Respondent's decision to declare them redundant disguised as Voluntary Early Retirement as communicated in the Company's Managing Director's Circular of 27<sup>th</sup> March, 2015.

4. The individual Claimants' did make Applications to the Respondent to take the Voluntary Early Retirement Offer and was to take effect from 2<sup>nd</sup> April, 2015, which applications were duly accepted by the Respondent herein on the following terms:-

*a) Three (3) months basic salary in lieu of notice*

*b) 15 days basic salary for every year worked*

*c) Outstanding leave pay*

*d) Advance Payment of eight (8) months basic salary*

*e) Pension will be computed and paid in accordance with the Pension Fund and Trust Deed Rules.*

*f) Full sponsorship of a three (3) days Pre-retirement Training*

*g) The Company will bear all Tax Costs.*

5. The Claimants contended that the offer was not only discriminatory but was in breach of the Corporation's Human Resource Manual as well as Articles 27 and 41 of the Constitution of Kenya, 2010 and Section 5 and 26 of the Employment Act, 2007.

6. They further contended that the Respondent's acts of maliciously sending them home without paying them their dues was contrary to its Human Resource Manual.

7. In their Statement of Claim, the Claimants seek the following reliefs:-

*1. A declaration that the Claimants were declared redundant as a result of staff organizational restructuring.*

*2. A declaration that the Claimants were discriminated against and underpaid.*

*3. Damages for discrimination*

*4. Compensation for constructive redundancy of staff as per the attached Schedule A.*

*5. Payment of all the lawful terminal dues set up in Schedule A*

*6. Costs of this suit with interest thereon.*

8. In response to the Statement of Claim the Respondent through the firm of Hamilton, Harrison & Matthews filed its Response dated and filed in Court on 23<sup>rd</sup> February, 2017, in which it admits having engaged the Claimants in the manner stated in their Statement of Claim.

9. The Respondent further admits having issued a Memorandum offering Voluntary Early Retirement Package to certain employees of the Respondent including the Claimants herein. It further averred that the 1<sup>st</sup> to 13<sup>th</sup> Claimants herein accepted the offer as contained in the said Memorandum of 27<sup>th</sup> March, 2015.

10. It is the Respondent's contention that the Claimants were not declared redundant as alleged and that they were not coerced into applying for the Voluntary Early Retirement.

11. The Respondent stated that the terms of the Memorandum of 27<sup>th</sup> March, 2015 were not discriminatory and were not in breach of any provisions of its Human Resource Manual, Articles 27 and 41 of the Constitution of Kenya, 2010 and Sections 5 and 26 of the Employment Act, 2007 as alleged by the Claimants herein.

12. The Respondent further averred that all the Claimants were paid all the sums due to them under the terms of the Memorandum dated 27<sup>th</sup> March, 2015 and therefore have no claims as against the Respondent.

13. It is on this basis that the Respondent urged this Honourable Court to dismiss the instant Claim with costs to the Respondent.

14. The matter was thereafter proceeded for hearing on 26<sup>th</sup> September, 2019 with three of the Claimants testifying on their own behalf and on the behalf of all other Claimants and the Respondent calling one witness to testify on its behalf.

#### **Claimants' Case**

15. CW1 **Raphael Njoroge Mwaura** (the 1<sup>st</sup> Claimant) herein testified that he was employed by the Respondent on or about the year 1979 and worked for a continuous period of 35 years and 6 months.

16. CW1 further requested to have his witness statement dated 14<sup>th</sup> December, 2016 and filed in Court on 15<sup>th</sup> December, 2016 adopted as his evidence in chief, a request that was allowed by this Honourable Court. In his statement, the Claimant reiterated the averments made in the Statement of Claim.
17. He further stated that he applied for Voluntary Early Retirement and was paid only three months' notice. He further contended that the said payment was made contrary to the Respondent's Human Resource Manual.
18. He further contended that he was declared redundant and was asked to leave. He further contended that the Voluntary Early Retirement (VER) was not sent out to all members of staff but was targeted to a few staff members.
19. CW1 further averred that he expected payment of severance pay that was not made by the Respondent. He therefore urged this Honourable Court to allow the Statement of Claim in terms of the reliefs sought therein.
20. On cross-examination, CW1 confirmed that the notice on Voluntary Early Retirement (VER) was pinned at the notice board within the Respondent's premises and did not mention any redundancy. He further confirmed that redundancy would have been subject to tax and the Voluntary Early Retirement (VER) package was tax free.
21. CW1 further confirmed that he was paid his dues as per the Voluntary Early Retirement (VER). He however contended that his years of service were not paid in full. CW1 further stated that the notice for Voluntary Early Retirement (VER) was discriminatory as it was not for every member of staff within the Respondent Company as it had targeted a few members of staff.
22. On further cross-examination CW1 averred that he was not given any notice on the termination of his services and that no bonus was paid to him at the end of that financial year.
23. On re-examination, CW1 stated that the notice of VER was targeted on members of staff that were not successful in placement in the new company structure and was therefore discriminatory. He confirmed that he was one of the said members of staff that were not successful in the placement exercise and that the notice of Voluntary Early Retirement (VER) was targeted on them.
24. CW1 further testified that the notice of 27/3/2015 made no reference to redundancy but referred to reorganization structure within the Respondent Company. He contended that if the reorganization would not have been done he would still be under the Respondent's employment.
25. CW2, **Samuel Migwi Theuri**, the 2<sup>nd</sup> Claimant similarly sought to have his witness statement dated 14/12/2016 and filed in Court on 15/12/2016 adopted as his evidence in chief, a request that was allowed by this Honourable Court. In his statement, CW2 reiterated the averments made in the Statement of Claim.
26. CW2 further testified that all Claimants were employed by the Respondent Company until March 2015. He further stated that there was restructuring done within the Respondent Company and that the new structure did not cover his job.
27. CW2 testified that he nonetheless continued to work in the same capacity until March 2015 when Voluntary Early Retirement (VER) notice was issued and he gave notice.
28. It was his contention that his expectation in terms of terminal benefits was not met by the Respondent herein as they failed to pay his severance pay for the 25 years of service.
29. CW2 further contended that the Voluntary Early Retirement (VER) notice was targeted on a few members of staff and was therefore discriminatory. He therefore urged this Honourable Court to allow their Claim in terms of the reliefs sought.
30. On cross-examination, CW2 confirmed that the notice of 27/3/2015 was posted on the notice board and that he was paid everything as indicated in the letter of offer for Voluntary Early Retirement (VER).
31. CW2 insisted that he was however not paid to his expectation as provided under the Respondent's Human Resource Manual with regards to redundancy. CW2 contended that he was declared redundant as his position was no longer in existence under the Respondent's new structure.
32. On further cross-examination, CW2 confirmed having received Kshs. 12.4 Million from the Respondent at the time of his separation from it. He however insisted that the sum given is less than what he expected and urged this Court to allow his Claim as against the Respondent herein.
33. On re-examination, CW2 confirmed that his only claim as against the Respondent was for payment of severance pay and bonus pay that he did not receive from the Respondent herein.
34. CW3, **Mary Waeni Wambua**, the 3<sup>rd</sup> Claimant also sought to have her witness statement dated 14/12/2016 and filed in Court on 15/12/2016 adopted as her evidence in chief, a request that was allowed by this Court. In her statement, she reiterated the averments made in the Statement of Claim.
35. CW3 further testified that she joined the Respondent Company on 1/12/1981 as a graduate accountant and rose to the rank of Accounting Manager a position she held until her separation on 8/4/2015.

36. CW3 insisted that there was a restructuring process prior to 2015 that affected her position as the same was split into 2. She further testified that she was not successful in placement to a new position.

37. CW3 further averred that on 27/3/2015 the notice on Voluntary Early Retirement (VER) was posted within the Respondent's notice board and that she applied for the same and was successful. She also confirmed having been paid at the point of her separation with the Respondent but contended that the payment was not to her expectation, as she was not paid for severance pay having worked for the Respondent for a total of 33 years and 4 months as well as bonus pay.

38. CW3 also contended that the notice on Voluntary Early Retirement (VER) was targeted on those employees who were not successful in the placement exercise and was therefore discriminatory. She urged this Honourable Court to allow their Claim in terms of the reliefs sought therein.

39. On cross-examination, CW3 averred that she applied for Voluntary Early Retirement (VER) as she was a target. She further confirmed having received payments from the Respondent as indicated in its letter for Voluntary Early Retirement (VER). CW3 insisted that her payments were below her expectation as per the Respondent's Human Resource Manual.

40. On re-examination, CW3 contended that her Claim is for severance pay and insurance claim less what was paid by the Respondent at the time of her separation. She further urged the Court to allow the Claim as drawn.

#### **Respondent's Case**

41. The Respondent Witness (**Mercy Muchira, RW1**), the chief Human Resource Officer at the Respondent Company requested to have her witness statement filed in Court on 17<sup>th</sup> September, 2019 adopted as her evidence in chief, a request that was allowed by this Court. In her statement, the Respondent reiterated the averments made in the Response filed herein.

42. RW1 urged this Court to dismiss the Claim in its entirety. On cross-examination, RW1 testified that the notice of 27/3/2015 did not target any employees and that the same was affixed on the notice board for easy access to all employees.

43. RW1 further stated that the Claimants were paid all their dues as indicated in the notice. She further insisted that the amount did not include severance pay and that the Human Resource Manual was not applicable in this case as against the Claimants herein.

44. The parties thereafter agreed to file and exchange their written submissions to the Claim.

#### **Submissions by the Parties**

45. It is submitted on behalf of the Claimant herein that the Voluntary Early Retirement (VER) scheme was not voluntary and was targeted on a few members of staff. It is further the Claimant's contention that the same was discriminatory and was only meant to force the Claimant out of the Respondent's employment in the guise of a great offer.

46. The Claimants further submitted that the Respondent's Restructuring Programme and the subsequent Voluntary Early Retirement (VERs) offer was a veiled move to cover the constructive redundancy effected upon them.

47. The Claimants submitted that the Respondent's actions were malicious and discriminatory in nature and urged this Honourable Court to find that the Respondent violated the provisions of Articles 27 and 41 of the Constitution of Kenya, 2010 as read together with Sections 5 and 26 of the Employment Act, 2007.

48. The Claimants contended that they are entitled to their outstanding lawful dues as set out in Schedule A of the Statement of Claim and urged this Honourable Court to allow the same as prayed.

49. In conclusion, the Claimants urged this Honourable Court to allow their Claims in terms of the reliefs sought therein. To buttress this argument the Claimants relied on the cases of **Gladys Muthoni Mwangi & 20 Others Vs Barclays Bank of Kenya Limited & Another (2016) eKLR** and **Leonard Gethoi Kamweti Vs National Bank of Kenya Limited & 2 Others (2016) eKLR**.

#### **Respondent's Submissions**

50. The Respondent on the other hand submitted that it properly offered Voluntary Early Retirement Scheme to its employees and that the Claimants herein voluntarily applied for the same. To fortify this argument the Respondent cited the Court of Appeal decision in the case of **Harrison Ndungu Mwai & 500 Others Vs The Attorney General (2018) eKLR** and the High Court decisions in the cases of **John Mwove & 97 Others Vs Kenya Meat Commission (2018) eKLR** and **Francis Ndalo Sabatia & 23 Others Vs Inteel Limited (2018) eKLR**.

51. The Respondent urged this Honourable Court to disregard the assertion of restructuring exercise as raised by the Claimants as the same was not raised in their pleadings. The Respondent further contended that the Claimants laid no foundation for the same and urged the Court to ignore the same.

52. The Respondent further submitted that the Claimants herein voluntarily chose to apply for Voluntary Early Retirement (VER). It is further contended that the instant case is distinguished from the 1<sup>st</sup> Authority of **Gladys Muthoni Mwangi & 20 Others Vs Barclays Bank of Kenya Limited (2016) eKLR** as in that case the employee were issued with notice of termination of their employment on the grounds of

redundancy a deviation from the instant case where there was no notice of termination and no redundancy.

53. The Respondent proceeded to distinguish further the case of **Leonard Gethoi Kamweti Vs National Bank of Kenya (2016) eKLR**, which relates to termination as opposed to the facts of this case where there was no termination.

54. The Respondent further submitted that there is no basis for the Claimants' allegation of discrimination and urged the Court to dismiss the same.

55. The Respondent further submitted that the Claimants cannot take all the sums due under Voluntary Early Retirement (VER) offer and at the same time allege that they were declared redundant and claim compensation for redundancy. To fortify this argument the Respondent cited and relied on the Authority of **Harrison Ndungu Mwai & 500 Others Vs The Attorney General (2018) eKLR**.

56. The Respondent further submitted that the additional claims by the third Claimant amounting to Kshs. 1,561,493.00 has not been proved as she failed to avail any evidence to support this assertion. The Respondent contended that the same ought to be dismissed.

57. It is on this basis that the Respondent herein submitted that the Claimants are not entitled to the reliefs sought in their Statement of Claim.

58. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim in its entirety with costs to the Respondent.

59. I have examined all the evidence of the parties and submissions filed herein. The Claimants allege discrimination in terms of being targeted for Voluntary Early Retirement (VER).

60. The Claimants' witnesses however admit that the Voluntary Early Retirement (VER) notice was pinned on the notice board and was not addressed to any particular employee.

61. The notice however read as follows:-

***“From: Managing Director & CEO***

***To: List 'C' & Notice Boards***

***27<sup>th</sup> March 2015***

**VOLUNTARY EARLY RETIREMENT**

***Further to the ongoing implementation of the new organizational structure, which involved competitive filling of senior management positions, some of the existing senior staff did not succeed in securing placements in the current structure.***

***Consequently, the Board of Directors and Management have approved a Voluntary Early Retirement Package to those affected. It is in this regard that the Company offers an opportunity to all the affected staff' to apply for Voluntary Early Retirement. The terminal dues will include the following:-***

- a) Three (3) months basic salary in lieu of notice.***
- b) 15 days basic salary for every year worked.***
- c) Outstanding leave pay.***
- d) Advance payment of eight (8) months basic salary.***
- e) Pension will be computed and paid in accordance with the Pension Fund & Trust Deed Rules.***
- f) Full sponsorship of a three (3) day Pre-Retirement Training.***
- g) The Company will bear all Tax Costs.***

***Applications for the Voluntary Early Retirement should reach the General Manager, Human Resource & Administration, Abubakar Swaleh not later than Thursday, 2<sup>nd</sup> April, 2015.***

***Management reserves the right for final removal***

***Signed***

***DR. BEN K. CHUMO, OGW ...”***

62. It is clear that this Voluntary Early Retirement (VER) followed a restructuring process by the Respondent and the Voluntary Early Retirement (VER) notice was directed to those who had not secured placements in the new structure following the restructuring. Though the notice was placed on the notice board, the notice indicated that it was an invite to “those affected” by the restructuring. Placed in the position they were, having just lost their position, the Claimants ordinarily chose to apply for the Voluntary Early Retirement (VER) as they did. They were then paid as per the offer in the Voluntary Early Retirement (VER).

63. The fact that the Voluntary Early Retirement (VER) was actually targeted on those in “senior management” and with a deadline for when applications should be received of only 5 days, pressure was mounted upon the targeted applicants for Voluntary Early Retirement (VER) and in this case, this was discriminatory and not a voluntary early retirement exercise.

64. The positions occupied by the Claimants having fallen off, the prudent thing the Respondent should have offered the Claimants was a redundancy. Redundancy is defined as follows:-

***“Redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.***

65. The case of Claimants falls squarely under this definition.

66. Under the Respondent Human Resource Staff Regulation and Procedure, staff who had served for over 16 years as the Claimants herein and who were declared redundant were entitled to a redundancy package of 2 months salary for each year worked.

67. The Claimants were paid only 15 months’ salary for each year worked.

68. In view of this fact, I agree with the Claimants that they are entitled to constructive redundancy package of 2 months’ salary for each year worked less what was paid to them of 15 days, which is equivalent to 45 days salary for each year worked.

69. This amount shall be computed at a later stage and adopted as a judgement of this Court.

70. The Respondent will pay costs of this suit.

**Dated and delivered in open Court this 27<sup>th</sup> day of February, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ndegwa holding brief Guserwa for Claimant – Present

Obwagi holding brief Fraser for Respondent –Present