



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 841 OF 2013

(formerly HCCC No. 913 of 2003)

Before Hon. Lady Justice Maureen Onyango

PASCHAL AKONG'O SIHUDU.....1ST CLAIMANT
ANDREW MKUBWA ANGANI.....2ND CLAIMANT
CHARLES AVULA MAGOMERE.....3RD CLAIMANT
CAXTON HARRISON GATORU KIMANI.....4TH CLAIMANT
MARY WANGARI MAINGI.....5TH CLAIMANT
THERESIA MUMO MUTAVA.....6TH CLAIMANT
PAUL MUCHIRI GICHURU.....7TH CLAIMANT
MARK OUMA WAREGA..... 8TH CLAIMANT
LUCY WANJIRU KINYANJUL GIKONYO.....9TH CLAIMANT
GILBERT MWANGI GACHUHL.....10TH CLAIMANT
MONICA WANJIRA GIKONYO.....11TH CLAIMANT
JOYCE WANJIRU MBUTHIA..... 12TH CLAIMANT
FRANCIS NGIGE KARANJA.....13TH CLAIMANT
FLORENCE NDUTA MWANGI.....14TH CLAIMANT
BEATRICE ADHIAMBO OGANGA.....15TH CLAIMANT
NANCY NJOKI KAMUNYA.....16TH CLAIMANT
GITAARI MUKHRA NG'ENTU..... 17TH CLAIMANT
TERESIA WANJIRU KIMOTHO.....18TH CLAIMANT
MOSES KIATU MUNYWOKI..... 19TH CLAIMANT

ERNEST ONYANGO WAGWA.....20TH CLAIMANT
SAMUEL KIPLANGAT ARAP CHELULE..... 21ST CLAIMANT
BERNADETTE RESIAN TUMAINA..... 22ND CLAIMANT
ELIUD CHERUIYOT ARAP BARCHOK.....23RD CLAIMANT
JOHN NJOROGE KAMAU.....24TH CLAIMANT
PATRICK MANTHI MUNYAKA.....25TH CLAIMANT
JOEL MUTUA KITEMA..... 26TH CLAIMANT
JOSEPH OCHIEL ALUOCH OKOLLA..... 27TH CLAIMANT
HARRISON OKWIRI KUSINA.....28TH CLAIMANT
SIMON WAMBUA NTHAMA..... 29TH CLAIMANT
MICHEAL OWUOR ORICHO.....30TH CLAIMANT
FREDRICK ODUOR OKOTH.....31ST CLAIMANT
APOLLO OTIENO ATIANG'32ND CLAIMANT
JOSEPH KHASABO BUBOLU..... 33RD CLAIMANT
REBECAH KARUANA MIGWI..... 34TH CLAIMANT
FESTUS ISIAHO MUSASA.....35TH CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Pascal Akong'o Sihudu and 34 other Claimants instituted this suit vide a Complaint dated 29th September 2003 and later filed an Amended Complaint dated 22nd July 2013 against the Attorney General, sued pursuant to the provisions of the Government Proceedings Act, on behalf of the Public Service Commission. The Claimants averred that they were public officers appointed by the Public Service Commission of Kenya and serving under the Ministry of Transport and Communication, Kenya Meteorological Department.

The Claimants averred that they served as Meteorological Assistants in core functions of the Kenya Meteorological Department. They annexed letters of first appointment and subsequent letters of confirmation of appointment, training and promotions issued to them by the Public Service Commission of Kenya. They aver that on 6th September 2000, they each received letters of **Notification for Early Retirement** from the then Permanent Secretary of the Ministry of Transport and Communications, Mr. Titus T. Naikuni, which were dated 31st August 2000. The letters stated they had been identified amongst those to be retired with effect from 1st October 2000 under what was called "*the staff retrenchment programme which is aimed at achieving optimal staffing levels in the Civil Service.*" That they were to cease performing their respective duties as at the date of the said letter of 31st August 2000 and return a duly completed '**Identification for Early Retirement Form**' which was attached to the letter, not later than 7th September 2000. The letters further informed them that they were entitled to their retirement benefits and final dues.

They averred that some Claimants appealed against the purported decision to terminate their services to the Public Service Commission through the Director Kenya Meteorological Department and the Permanent Secretary. That by letter dated 12th June 2001, they received a response through the PS that the commission had considered but disallowed their appeal against retirement on re-organisation of Government and abolition of office, which response led to the rest of the Claimants not appealing.

The Claimants pleaded that they have suffered loss of career; unwarranted infliction of economic and financial loss; and loss of social standing. Further, that the termination of their services was:

- a. Fraudulent, and wrongful;

- b. Inconsistent with and a breach of the constitutional process relating to their contract of employment as public officers and null and void;
- c. A malicious breach of contract; and
- d. In bad faith.

The Claimants averred that subject to discovery in these proceedings, as at February 2000 the PS notified the Directorate of Personnel Management in the Office of the President that the Ministry wished to recruit 32 meteorological trainees even as the retrenchment and alleged reform was going on. That they were aware of an alleged agreement between the said Directorate and the PS on the retrenchment of officers in non-core area(s) so as to accommodate the new officers and they contended that the Kenya Meteorological Department was not involved. That the **June 2000 Manual on retrenchment in the Civil Service** issued by the Directorate of Personnel Management in the Office of the President clearly stipulates that retirement on abolition of office or re-organization of Government occurs when an office is abolished as a result of its functions becoming redundant due to re-organisation, which was not the case with the Claimants. The Claimants listed the names of the 32 trainee officers together with their personnel numbers under *Paragraph 17 of their Plea*.

They further pleaded that the rules of natural justice and fair conduct of public affairs were breached as their offices were not abolished as earlier communicated to them, but given to 32 freshly recruited non-core personnel. That there was no objectivity and impartiality as required by the rules of the Directorate of Personnel Management as communicated for the retrenchment programme. Further, that there were no Special Regulations promulgated either under the Constitution of Kenya or under the Service Commissions Act for the manner of retirement inflicted and forced upon the Claimants. There were no proper hearings of their appeals or any indication when the appeals were heard, if at all, by the Commission. That as at September 2000, the Kenya Meteorological Department had recommended only 110 officers from its staff component for early retirement and which recommendation did not include the Claimants. They contended that their retirement was a waste of the resources invested in their training and development by the government and international agencies.

The Claimants prayed for judgment against the Defendant and for the following declarations and orders:-

- a. Declaration that by 31st August 2000 the Claimants were serving officers in the public service of Kenya in the Kenya Meteorological Department.
- b. Declaration that the retrenchment or early retirement of the Claimants was unlawful and wrongful.
- c. Declaration that the conduct of the Permanent Secretary for the time being responsible for the matters related to the Claimants service as public officers in the circumstances of the case was fraudulent and a malicious procurement of breach of the Claimants contracts of service with the Government of Kenya.
- d. Declaration that the employment by the Directorate of Personnel
- e. and deployment of 32 (thirty-two) trainee officers in the Kenya Meteorological Department on 1st October 2000 was inconsistent with the constitutional requirement that the Public Service Commission is responsible for all appointments in the public service. To the extent of the inconsistency the employment and deployment is null and void.
- f. An order for damages to be paid by the Defendants to the Claimants taking account of the matters pleaded and specified in paragraph 20 of the Plea and such other circumstances as to the court will be just for wrongful and unlawful termination of the Claimants contract of service in the public service of Kenya.
- g. An order for exemplary damages for malicious procurement of breach of the Claimants' contract of service by the Defendants.
- h. An order reinstating the Claimants to their core positions in the Kenya Meteorological Department and therein to serve until voluntary retirement or until their services are lawfully and constitutionally terminated.
- i. Costs.
- j. Such other order as the court deems fit and just in the circumstances of the case.

The Claimants also filed a List of Witnesses dated 12th June 2012 together with the Witness Statements of all the 35 Claimants in pleading their case. The Witness Statement of the last Claimant Festus Isiaho who was included in the suit later on, was filed in October 2019 together with a list of his documents.

The Respondent filed a Statement of Defence dated 17th January 2005 denying that the Claimants were informed to cease performing their duties as alleged. It averred that in the alternative, if the Claimants were notified of early retirement and finally retired as alleged, then the same was done for a reasonable and justifiable cause and the procedure complied with the law. It denies that its servants and or agents received any appeal from the Claimants and contends that its servants and or agents did not breach the Claimants' contracts of employment or act in bad faith as alleged in the Plea. The Respondent further denied the particulars of damages for breach of contract. It further did not admit the jurisdiction of this Court. It averred that the suit herein is fatally and incurably defective. It prayed that the Claimants' suit against the Respondent be dismissed with costs.

The matter came up for hearing on 18th December, 2019 when the parties agreed to dispose of the matter by way of written submissions. The

Claimants filed their submissions dated 13th February, 2020 and the Respondent filed its written submissions dated 17th July, 2020.

Claimants' Submissions

The Claimants submitted that the dispute arose before the promulgation of the Constitution of Kenya, 2010 prior to the Employment Act, 2007 and the establishment of the Employment and Labour Relations Court. That despite the repeal of the former Constitution and the Service Commissions Act (Cap 185) their proceedings and the remedies claimed herein are preserved by Section 23 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya. They submitted that they have filed witness statements and bundle of documents which they rely on as evidence to support their claim, and which the Defendant has not disputed. That pursuant to Section 20(4) (c) and subsections (5) and (7) of the Employment and Labour Relations Court Act, 2014 this Court should find and hold that the Defendant has no evidence to offer.

The Claimants submitted that they were at all material times permanent and pensionable public officers as demonstrated in their letters of appointment filed in court. That the letters dated 31st August 2000 enclosed an Identification for Early Retirement Form meaning they were to identify themselves for early retirement yet the Respondent had already decided they were to be retrenched. That no prior notice of the purported early retirement and no reasons for the decision to have them retired early were given. That the letters of 28th September 2000 gave only two days' notice. The notification for early retirement and identification for early retirement forms did not conform to the law on retrenchment at all. That Regulation 20 of the Public Service Commission Regulations made under Section 13 of the Service Commissions Act Cap 185 (repealed) which was the statute applicable to the Claimants' employment provided as follows:

20. Where an office which is one of a number of similar offices in the public service has been abolished but one or more such offices remain, the authorized officer shall send to the commission his recommendations with full reasons thereof as to which substantive office holder of such office shall have his appointment terminated or be transferred or seconded to a public office in another department or ministry, and the Commission shall decide which substantive holder of such office shall have his appointment terminated or be transferred or be seconded, as the case may be."

It was submitted by the Claimants that under the Sensitization Manual on Retrenchment in the Civil Service of June 2000, the retrenchment method that would have been applicable to them was the 'Front Loading' method, which the Respondent did not follow. That no recommendations under Regulation 20 of the Public Service Commission Regulations were made known to the Claimants. They rely on the case of *Loise Obengo v Nyanza Reproductive Health Society* [2013] eKLR where concerning a notice of retrenchment, the Court held thus:

"In the written notice the following information should be disclosed:

- i. The reasons for retrenchment
- ii. The alternatives considered by the employer to avoid retrenchment and the reasons given for rejecting them
- iii. The number of employees identified to be affected and their job categories.
- iv. The selection criteria applied.
- v. The date of termination of services.
- vi. The proposed severance pay.
- vii. The assistance offered to employees likely to be affected by the retrenchment
- viii. The possibility of the future re-deployment of the retrenches."

The Claimants submitted that in a case similar to this, ELRC Cause No. 1255 of 2014 (Formerly High Court Civil Case No. 1512 of 2002 Consolidated with High Court Civil Case No. 8 of 2003) *Ishmael Omula Egala & 7 Others v The Attorney General*, the High Court then dealing with that matter, had on 16th June 2003 declared the retrenchment/ retirement on abolition of office or early retirement null and unconstitutional. That the circumstances therein were similar to the current cause, took place at the same time and in the same Government Department instigated by the same Permanent Secretary.

They submitted that the Respondent unlawfully denied them a chance to adjust themselves accordingly for the life outside employment, as required by law. Further, that Paragraph 73 of the Sensitization Manual on Retrenchment states that "these regulations should be applied to provide guidance in identification and retrenchment of staff to avoid inconsistencies with the law which may make the exercise ultra vires." That Paragraph 31 of the Sensitization Manual on Retrenchment set out the criteria to be used in selecting retrenchees to include schemes of service, academic and professional qualifications, performance appraisals, the principles of FIFO (First in First Out) and LIFO (Last in Last Out). That none of the letters they received from the PS indicated any criteria used to select them for removal from office.

Further, that Regulation 21 of the Public Service Commission Regulations on Special Procedure provided thus:

21. Where the Commission is satisfied that the public interest requires that any matter relating to the appointment, promotion, transfer, secondment or confirmation in his appointment of a public officer be dealt with otherwise than in accordance with the procedure laid down in this part, it shall take such action or issue such directions with regard to that matter as appears to it to be most appropriate in the circumstances."

That the Permanent Secretary did not reveal to them any other special procedure that may have been undertaken in considering their removal from office and thus ignored the legal requirements for discharging his duties as the authorised officer of the Claimants' employer. That the retrenchment was ultra vires section 107 of the former Constitution and the powers of the Public Service Commission under that Constitution and that on that score alone, they deserve the orders and declarations as prayed.

On the question of unlawful procurement of breach of contract, the Claimants relied on the case of *Bamburi Portland Cement Company Limited v Imranali Chandbhai Abdulhussein* [1996] eKLR where Kwach J.A in his determination of the same relied on the decision of Lord Diplock L.J. in the case of *Emerald Construction Co. Ltd v Lowthian* [1966] 1 WLR 691 that there are three essential elements in the tort of unlawful procurement of a breach of contract, the act, the intent and the resulting damage. The learned judge further elaborated that:

“The burden on the plaintiff is to show that there was an intentional invasion of his contractual rights, not merely that the breach of contract was the natural consequence of the defendant's conduct. The defendant must be shown to have knowledge of the existence of the contract but he does not need to know relevant terms of the contract...”

Further, that the Permanent Secretary's conduct in their removal from office was fraudulent and a malicious procurement of breach of contract of every one of the Claimants' contracts of service as 32 trainee officers were deployed in their place immediately the Claimants were removed from office.

They submitted that the Director of Meteorological Services Dr. J. R. Mukabana wrote a letter to the Permanent Secretary dated 15th September 2000 on the retrenchment of Kenya Meteorological Department Staff as shown at page 22 of the 35th Claimant's list of documents. That the PS retrenched them without considering the Director's proposals and has not provided any evidence that the PS responded to the Director. That the letter dated 15th September 2000 highlights the illegality of the PS's action of removing the Claimants from office.

As to whether they are entitled to the prayers sought, the Claimants relied on the case of *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute* [2016] eKLR where Rika J. stated at paragraph 68 that:

“In all forms, the Service Commissions Act, even before its amendment to the current form, recognized the exercise of disciplinary control by Public Authorities over their Employees, should be alert to fundamental principles of natural justice, recognizing further that an Officer's career and livelihood are at stake. In all cases of involuntary termination, the Officer concerned was given an opportunity to make his representations, and those presentations considered by the Employer, before the Officer's service was terminated. The protections against arbitrary actions imposed on Employees by their Employers, has always been part of the Service Commissions Act. These protections extend to CEOs of state Corporations, appointed under Section 5(3) of State Corporations Act, Cap 446 of Laws of Kenya. The Terms and Conditions of Service of the Respondent flow from this legislation. They protect Employees against arbitrary actions by Public Employers. The concept of fair administrative action has been part of the law governing termination of Employment in Public Service.”

They submitted that they have shown that the termination of the Claimants' employment was wrongful, unfair, illegal and unconstitutional and for that reason, they are entitled to a declaration that their retrenchment/early retirement was unlawful and wrongful and are further entitled to an award of damages. Further, that since their contracts of service did not disclose any notice period, the reasonable notice period is 12 months. They relied on the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR where the Court stated:

“The superior court, in our view, ought to have examined the Code of Conduct and if as it finally found it was silent on the period of notice it had the power to award salary in lieu of notice and also determine a reasonable period of notice, which in the circumstances and according to the applicable law and decided cases in this country ranged from six (6) months to twelve (12) months. Indeed, a contracting party does not have to rely on a misconduct in order to terminate a contract of service and a party can terminate such a without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice.”

The Claimants submitted that in 2015 long after they had purportedly been terminated, some Claimants received letters promoting/upgrading their job group and salaries with effect from 1st November 1987. (See pages 27, 33(g) and 89 of the Claimants' Further and Additional bundle of documents dated 17th June 2016 and copy of the letter dated October 2015 at page 29 of the 35th Claimant's list of documents.) They produced with the submissions, a copy of the Personnel Circular No. 16 of 27th October 1997 together with letters of various dates between August 2015 and February 2016 on “Re-alignment/Harmonization” received by the Claimants from the Respondent on salary upgrades. The documents are marked PAS-1 and PAS-2 respectively. They submitted that these documents are relevant and material to the fair and just determination of the Claimants' case, that they believe that the law permits the Court to admit the documents into evidence for purposes of calculating what is actually due to the Claimants. They submitted that the admission of documents by this Court at this stage is permitted under Rules 14(10) and 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

It is submitted by the Claimants that even though they signed and accepted terminal dues at the time they were retrenched, the same was not the true reflection of what was justly owed to them. They urged this Court to consider the case of *Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Limited & 2 others* [2017] eKLR in determining the rightful and lawful terminal dues to them.

They further submitted that exemplary damages are awardable as a penalty for wrongdoing and as deterrence against occurrence of such actions in future and that the principle is that they are awarded without proved or actual loss suffered by the claimant. They relied on the case of *James Orenge v Attorney General Nairobi HCC No 207 of 2002* where the Court was of the similar opinion and awarded a global sum of Kshs.5 Million to the Claimant with costs and interests. That in the *Ishmael Omula* case above, which had similar circumstances like the suit herein, this Court awarded exemplary damages of Kshs.500,000. They submit that the reasonable amount of exemplary damages for each of the Claimants herein is Kshs.2 Million considering that the Claimants in the *Ishmael* case had been reinstated and are serving until retirement

unlike the Claimants whose chances for reinstatement are non-existent.

Respondent's Submissions

The Respondent in its submissions, identified the issues for determination as whether the retrenchment of the Claimants was lawful and followed the laid down procedure under the Kenya Civil Service Reform Forum (CSRFP) and whether the Claimants are entitled to the reliefs sought.

On whether the retrenchment was lawful, the Respondent submitted that the Respondent while following the Government guidelines in determining who was eligible for early retirement followed the principles of first in, first out and considered qualifications. That it was intended to be fair to those in service for longer as they benefitted from employment and would qualify for terminal/retirement benefits. Further, that the Respondent used academic and professional qualifications to determine the suitability and potential of each employee to occupy a particular job.

It was the Respondent's submission that the Claimants received letters of 'Notification of Early Retirement' dated 30th August, 2000 which informed them that they had been identified for retirement under the Staff Retrenchment Program with effect from 1st October, 2000. That they were issued with CSRFP/SRP forms which they filled and returned to the relevant offices.

The Respondent submitted that the Claimants were informed that following their retrenchment, their benefits would include salary up to and including 30th September, 2000, 'Golden Handshake', salary in lieu of notice and pension. That from the evidence on record the Claimants' benefits were paid and their pension processed and paid by the Director of Pensions which none of the Claimants rejected at the time of payment.

It was the Respondent's submission that even though the Claimants submit that they were not served with a termination notice, the payment of salary up to and including 30th September, 2000 was salary in lieu of notice as set out under Section 30 of the Employment Act, Cap 226 (Repealed).

In response to the allegation by the claimants that they were not given reason for their termination and were never heard prior to being retrenched, the Respondent's submission is that under the Repealed Employment Act, it was not mandatory for the employer to give reasons for the termination or to give an employee an opportunity to be heard. This requirement, it submitted, came into force in the Employment Act, 2007. In support of their submission they relied on the case of Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR where Rika J. held:

"In the Court of Appeal of Kenya decision of Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, the Court held that prior to 2007 employers had no obligation in observing principles of natural justice in the termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, employers could terminate contract of employment at will, for good cause, bad cause or no cause."

With respect to the submission by the Claimants that 32 trainee officers were deployed to take up positions held by the Claimants, it was the Respondent's submission that the Department of Meteorological Communication Assistants whose duties included inter alia coding and decoding of observed weather parameters into meteorological data messages according to international standard formats transmitting meteorological data messages according to international standard formats. These duties and responsibilities were totally different from those that were performed by the Claimants.

It was the Respondent's submission that the law is very clear on the mechanism to be applied once a decision has been reached by an employer to retrench, restructure, downsize or declare redundancy. That the Claimants have not demonstrated that the Respondent derogated materially from fair procedure followed in implementing the particular retrenchment which happened across the entire Kenyan Civil Service including the Respondent. Further, that the report of Guidelines for Staff Right Sizing in the Civil Service dated May, 1999 in identification of potential retrenches is self-speaking and was not materially impugned by the respondent. In support of its submission, the Respondent relied on the decision in Nakuru HCC No. 100 of 2002 – Amos Ng'ang'a Waiharo and 148 Others v Egerton University where the Court held:

"I respectfully agree with the above propositions of law which are correct and legal. However, I find that this was not an ordinary and normal employee-employer relationship which was being terminated. If this was an ordinary normal relationship the judgment of this court would have doubtlessly followed those principles which are set out in common law and decided authorities. I find this case distinguishable from the above cases in more than one way: -

Firstly, the retrenchment of employees from the Government Civil Service and Public Institutions was a policy directive which was carefully guided by an articulated policy document namely the Civil Service Reform Retrenchment Plan 2000-2002 whose overarching goal was to ensure that there was a creation of a lean efficient and more productive public service."

On whether the Claimants are entitled to the reliefs sought, the Respondent submitted that it applied the criteria as contained in the circular as set out for the retrenchment of officers in the entire Public Service. That the Claimants have not presented before this Court evidence to show that the Respondent diverted from the said criteria and paid less terminal benefits.

It was the Respondent's submission that the amount used by the Claimants to calculate measure of damages is incorrect. In support of their submission, the Respondent urged this Court to consider the payslips for each of the Claimants attached to the submissions.

The Respondent submitted that the Repealed Employment Act set out the remedies for wrongful dismissal and unfair termination as set out under Section 40 of the Repealed Employment Act.

It was the Respondent's submission that the Claimant's allegation that the retrenchment amounted to induced breach of contract, or was discriminatory, violated the law, illegal, null and void is as it is not correct. That the Claimants have not pleaded and provided evidence for the particulars of inducement, alleged breach of contract and discrimination to entitle them to an award of exemplary damages.

The Respondent submitted that it has provided documents that show the criteria that was followed to identify the Claimants for retrenchment and therefore the decision in *Peter Baiye Gichohi & Another v Attorney General* [2012] as relied on by the Claimants is not applicable.

With respect to costs, the Respondent cited Section 27 of the Civil Procedure Act. It was the Respondent's submission that by dint of the said section costs are awarded at the discretion of the Court and follow the event unless with good reason the Court declines to award the same. It relied on an excerpt from Halsbury's Laws of England that:

"the Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion either to award or not. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

The Respondent submitted that the principle that costs must follow the event is translated to mean that winning party is entitled to costs at the discretion of the Court. In support of its submission, it relied on the case of *Kennedy Maina Mirera v Barclays Bank of Kenya Limited* [2018] eKLR and the holding that:

"Therefore, the Plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities."

It was the Respondent's submission that it would be in the interests of justice that the Claimants would only be entitled to costs at the discretion in the event that they discharge the burden that the retrenchment was wrongful.

Determination

The issues for this Court's determination are whether the Claimants were permanent and pensionable employees/officers within the Public Service, whether the Claimants were wrongfully and unlawfully retrenched/retired early and whether the Claimants are entitled to the reliefs sought.

The Claimants averred that they were public officers appointed by the Public Service Commission. The 34 Claimants provided their **Public Service Personnel Numbers** at *pages 2 and 3 of the Plaintiff* and further produced Letters of Appointment, Confirmation of Appointment, Re-alignment/Upgrade and Certificates from the Meteorological Department, the Ministry of Transport and Communications, and the Public Service Commission. I find that these documents and/or correspondence confirm that the Claimants were indeed officers working in the Public Service at the Kenya Meteorological Department.

The Respondent in its Statement of Defence more or less issued a blanket denial of the averments in the Plaintiff including the averments of the Claimants' employment. I note however, that in the Respondent's written submissions it admits that the Claimants were indeed public officers duly appointed as such by the Public Service Commission and serving at various positions at the Ministry of Transport and Communication in the Kenya Meteorological Department. As such, it is my finding that the Claimants were public officers appointed by the Public Service Commission.

The next issue forms the crux of the entire suit; whether the Claimants were unlawfully retrenched/retired early. It is not in dispute that vide identical letters dated 31st August, 2000, issued to each of the Claimants and titled '**Notification of Early Retirement**' the Claimants were informed that they had been identified for retirement effective 1st October, 2000. The letters essentially informed the Claimants that the Government was in the process of implementing the Staff Retrenchment Programme aimed at achieving optimal staffing levels in the Civil Service. As such, each respective Claimant was notified in the letter that they had been identified amongst others to be retired under the programme with effect from 31st August, 2000 but continue to draw their salary, house and medical allowances up to and including 30th September, 2000. After this date, it was indicated that their name would be deleted from the payroll and they would be required to vacate the Government house not later than 1st October, 2000. The letter also enclosed the Identification for Early Retirement Form which the Claimants were required to fill and return by 7th September, 2000.

The Respondent submitted that the letters were issued following a review by various departments in the public service of the organizational structures. The Respondent submitted that the notifications were issued under the Civil Service Program Reform (CSRPF) re-organization and abolition of office and that due process was adhered to. It has been pleaded and submitted by the Claimants that they were effectively being declared redundant and not served with the proper redundancy notice in the guise of an early retirement.

A simple understanding of a retrenchment is a derivative of the word retrench defined in the **Oxford English Dictionary** as 'the reduction of costs or spending in response to economic difficulty'. Redundancy on the other hand while not defined under the Repealed Employment Act took its definition by dint of Section 16A of the Repealed Act from Section 2 of the Trade Disputes Act that reads:

“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 services of an employee are superfluous, and the practice commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business, but it does not include any such loss of employment by a domestic servant.

It is apparent therefore that redundancy and retrenchment in this case mean the same thing. The roundabout manner by which the Respondent attempted to force the Claimants into taking early retirement due to the re-organization and abolition of office is plainly and simply a redundancy. Section 16A of the Repealed Employment Act provides on redundancy that:

1. A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with

- a. the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;**
- b. the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
- c. no employee shall be placed at a disadvantage for being or not being a member of the trade union;**
- d. any leave due to any employee who is declared redundant shall be paid off in cash;**
- e. an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;**
- f. an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.**

It is clear from the provisions of **Section 16A** that the notification to the labour officer or union representative as well as one month's notice or one month's notice in lieu of pay together with severance pay and leave was not paid to the claimants. Further, the employer is required to have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees. **Regulation 20** of the **Public Service Regulations** under the Service Commission Act Cap 185 (Repealed) provides as follows with respect to abolition of office:

“Where an office which is one of a number of similar offices in the public service has been abolished but one or more such offices remain, the authorized officer shall send to the commission his recommendations with full reasons thereof as to which substantive office holder of such office shall have his appointment terminated or be transferred or seconded to a public office in another department or ministry, and the Commission shall decide which substantive holder of such office shall have his appointment terminated or be transferred or be seconded, as the case may be.”

As stated above, the Respondent issued blanket denials with respect to the averments in the Plaintiff. It did not file any documents in support of their defence save for the payment vouchers annexed to its written submissions. In addition, the Respondent issued a Sensitization Manual on Retrenchment in the Civil Service in June, 2000. Therein, with respect to retrenchment, the manual sets out the types, process and principles of retrenchment in great detail. Under **Clause 73** of the said Manual, there are provisions for retrenchment in the form of retirement on abolition of office or re-organization of Government. It defines retirement under this process as one that occurs when an office is abolished as a result of its function becoming redundant due to re-organization. The clause then goes ahead to cite the provisions of **Regulation 20** (supra) as the applicable procedure to be applied by the Respondent.

Section 107(1) of the former Constitution provided as follows:

Subject to this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Public Service Commission:

Provided that the Commission may, with the approval of the President and subject to such conditions as it thinks fit, by directions in writing delegate any of its powers under this section to any one or more of its members or to any officer in the public service.”

The Respondent has not provided any documentation or evidence to rebut the Claimant's averments. Indeed, the Respondent has not submitted any documentations to establish whether the process was adhered to and what principles were applied in the retrenchment process. Further, the Respondent went ahead to recruit 32 new officers to essentially fill the positions vacated by the Claimants and claims in its submissions that the duties by the said new appointees were different from those undertaken by the Claimant are not substantiated or demonstrated by evidence. The Claimants were officers in the meteorological department. While the roles of the respective Claimants may not have been purely based on the scientific aspects of meteorology they still undertook roles that gave them specific aptitude within the meteorology field. In fact, some of the Claimants have produced documentation of further studies that they pursued in order to propound their careers within the very specialised field. It is unfortunate that they were then replaced by the Respondent without a thought and their places taken up by new trainees after many dedicated years of service. No mention was made about training them to perform the new roles

I note that prior to the enactment of the Employment Act, 2007 and the promulgation of the Constitution, there was little provision for providing notice and reasons for termination. As aptly stated by the Court of Appeal in **Ezekiel Nyangoya Okemwa v Kenya Marine &**

Fisheries Research Institute (supra), under the old Employment law in Kenya, employers could terminate contracts of employment at will, for good cause, bad cause or no cause. Be that as it may, the former Constitution espoused the principles of natural justice that would serve as a guideline in the dealings of administrative bodies. Further, in the public service, there were regulations and policies governing termination and even retrenchment. The case of **Ezekiel Nyangoya Okemwa** is thus not relevant in the circumstances of this case.

In Cause 1255 of 2014 (Formerly HCCC No. 1512 of 2002 consolidated with HCCC No. 8 of 2003) *Ishmael Omula Egala & 7 Others v The Attorney General* which had similar facts and issues as this one, the Claimants made prayers similar to those made in the suit herein. Aluoch J. on 16th June 2003, issued a Preliminary Decree granting the following orders in the said consolidated Cause:

- a. That it is hereby declared that by 31st August 2000 each and every one of the Plaintiffs was a serving officer in the Public Service of Kenya in the Kenya Meteorological Department.
- b. That it is hereby declared that the retrenchment or early retirement of the Plaintiffs on or after 30th September 2000 was unlawful and wrongful.
- c. That it is hereby declared that in the circumstances of the case, the conduct of the permanent secretary for the time being responsible for the matters relating to the Plaintiffs' service as public officers was fraudulent and malicious procurement of breach of the Plaintiffs' service as public officers was fraudulent and a malicious procurement of breach of the Plaintiffs' contracts of service as public officers.
- d. That it is hereby declared that the action of the Directorate of Personnel to employ and deploy 32 trainee officers in the Kenya Meteorological Department on 1st October 2000, some of whom took over the duties of the Plaintiffs was inconsistent with the constitutional requirement that the Public Service Commission is responsible for all appointments in the Public Service. To the extent of the inconsistency the employment and deployment is null and void.
- e. That the Plaintiffs are hereby reinstated to their core positions in the Kenya Meteorological Department and therein to serve until voluntary retirement or until their services are lawfully and constitutionally terminated.
- f. That the Defendant to pay the Plaintiffs' costs of this suit."

I am in agreement with the findings of the preliminary decree but would not reinstate the Claimants. As I have found that the Claimants were unlawfully and unfairly terminated by way of redundancy, pursuant to Section 16A of the Repealed Employment Act, this Court accordingly awards each of the Claimants severance pay at the rate of 15 days of service for each complete year of service.

With respect to the prayer for damages, in the said case of *Ishmael Omula Egala & 7 Others v the AG (supra)*, I rendered the Judgment on the award for damages based on the same set of facts and actions of the same Permanent Secretary in this suit. The difference was that the Claimants in that case were reinstated and in this case they were not. My findings were as follows:

"On the issue of whether general damages are payable in a contract of employment, the Court of Appeal in *Directline Assurance Company Limited v Jeremiah Wachira Ichaura* [2016] eKLR held as follows-

"We now turn to consider whether the respondent was lawfully entitled to an award of damages in the sum of Ksh.4,200,000/- as general damages. Both parties concede that the applicable law to the dispute was Cap 226. The general rule then was that the court could not award general damages for breach of contract and or employment terms. This was succinctly summed up in the case of *Securicor Courier (K) Ltd v Benson David Onyango and Ann*, Civil Appeal No. 323 of 2002 (UR) as follows:

As general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract...'

Further in the case of *Joseph Ileli Kikumbi v Central Bank of Kenya (supra)* it was held-

"The law with respect to the quantum of damages payable to an employee who is wrongfully dismissed is now well settled in this jurisdiction. When the contract of service contains a termination clause, the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause regardless of the nature of the Employment following the unlawful termination of such service contract. There is then breach of contract and the measure of compensation or indemnity or general damages or special damages is the loss of the employee would incur during the stipulated period of the termination clause or notice ..." see also *Central Bank of Kenya v Nkabu (supra)* "

As earlier established, the Claimants are not entitled to 12 months' compensations since the current employment Act is not applicable to the situation. As such, I award them compensation equivalent to 3 months' gross salary at the time of termination which would have been a reasonable period for them to be sensitized and prepared for their retrenchment, had the right procedure been followed. The Court of Appeal in *Kenya Bus Services Limited v Meleksadik Okutoi* [SUPRA] held as follows-

"The Conduct of the defendant may have been reprehensible but this cannot change the well-known legal principles upon which damages are calculated in such cases. Since no evidence was led on the length of notice applicable in this case we think that three months would be reasonable."

On the issue of whether the Claimants are entitled to exemplary damages, I find in the affirmative as the Permanent's Secretary actions were

found to be null and void and unconstitutional. The Court in *Benedict Munene Kariuki and 14 Others v The Attorney General* [2011] eKLR held that:

“[55.] This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya's Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-payer. Further I note that the Petitioners were not labouring for the “Second Liberation” in order to get monetary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognized.”

The Court of Appeal in *Gitobu Imanyara and 2 others v Attorney General* [2016] eKLR held that although awarding exemplary damages was the Courts discretion and was appropriate in instances of constitutional violations, there were instances when a declaration order would suffice so as to balance the interests of the parties. I find that this is one instance that warrants the Court to exercise its discretion.

The Permanent Secretary's violations cost the Claimants' their means of livelihood for about 7 years while they were following up on this case. This is because Public Service Commission (PSC) failed to honour the order by Aluoch J. directing the Claimants to be reinstated. In any event, the court ordered that they be paid damages. As such, I award each of the Claimants exemplary damages in the sum of Kshs.500,000.00 each, to compensate for the delay by the Public Service Commission to reinstate them to their former positions and for the suffering they underwent for over 7 years before their reinstatement..

The instant suit arose out of the same retrenchment as that of *Ishmael Omulama Egala* and his co-plaintiffs. I therefore have no reason to depart from the award of punitive and exemplary damages in the said case, although the claimants herein suffered more as they were not reinstated as their colleagues in the said case.

Accordingly, in addition to one month's salary in lieu of notice and severance pay at the rate of 15 days of service for each complete year of service, this Court awards each of the Claimants three months' salary as compensation for the unlawful and wrongful retrenchment, and an award for exemplary damages set at KES 500,000.00 for each employee.

As explained in the *Ishmael Omulama* case, the compensation is for reasonable notification period that the respondent should have given the claimants had they complied with the Sensitisation Manual on Retrenchment in the Civil Service. It should not be confused with compensation under Section 49 of the Employment Act, 2007.

The respective payments are as per the attached Schedule 1 - AWARD

SCHEDULE 1 - AWARD

	GROSS SALARY (ONE MONTH'S SALARY AS NOTICE)	NO. OF YEARS	3 MONTHS COMPENSATION	SEVERANCE {(gross salary/26) x 15 x no. of years worked}	EXEMPLARY DAMAGES	TOTAL COMPENSATION (SEVERANCE + EXEMPLARY DAMAGES)
HAL AKONG'O SIHUDU	21,118.00	26	63,354.00	316,770.00	500,000.00	901,242.00
NEW MKUBWA ANGANI	26,618.00	17	79,854.00	261,061.15	500,000.00	867,533.15
LES AVULA MAGOMERE	19,364.00	25	58,092.00	279,288.46	500,000.00	856,744.46
ON HARRISON GATORU KIMANI	26,618.00	27	79,854.00	414,626.54	500,000.00	1,021,098.54
Y WANGARI MAINGI	22,648.00	20	67,944.00	261,323.08	500,000.00	851,915.08
ESIA MUMO MUTAVA	22,648.00	12	67,944.00	156,793.85	500,000.00	747,385.85
MUCHIRI GICHURU	20,357.00	12	61,071.00	140,933.08	500,000.00	722,361.08
K OUMA WAREGA	20,948.00	10	62,844.00	120,853.85	500,000.00	704,645.85
WANJIRU KINYANJUI GIKONYO	22,648.00	17	67,944.00	222,124.62	500,000.00	812,716.62
ERT MWANGI GACHUHI	25,333.00	15	75,999.00	219,227.88	500,000.00	820,559.88

CA WANJIRA GIKONYO	22,548.00	12	67,644.00	156,101.54	500,000.00	746,293.54
E WANJIRU MBUTHIA	24,187.00	9	72,561.00	125,586.35	500,000.00	722,334.35
CIS NGIGE KARANJA	18,723.00	20	56,169.00	216,034.62	500,001.00	790,927.62
ENCE NDUTA MWANGI	18,590.00	7	55,770.00	75,075.00	500,000.00	649,435.00
RICE ADHIAMBO OGANGA	17,421.00	7	52,263.00	70,354.04	500,000.00	640,038.04
EY NJOKI KAMUNYA	18,590.00	10	55,770.00	107,250.00	500,000.00	681,610.00
ARI MUKHRA NG'ENTU	19,040.00	9	57,120.00	98,861.54	500,000.00	675,021.54
SIA WANJIRU KIMOTHO	15,797.60	1	47,392.80	9,114.00	500,000.00	572,304.40
S KIATU MUNYWOKI	16,380.00	8	49,140.00	75,600.00	500,000.00	641,120.00
ST ONYANGO WAGWA	22,648.00	19	67,944.00	248,256.92	500,000.00	838,848.92
EL KIPLANGAT ARAP CHELULE	18,775.00	25	56,325.00	270,793.27	500,000.00	845,893.27
ADETTE RESIAN TUMAINA	14,113.00	7	42,339.00	56,994.81	500,000.00	613,446.81
D CHERUIYOT ARAP BARCOK	24,187.00	17	72,561.00	237,218.65	500,000.00	833,966.65
NJOROGE KAMAU	23,686.50	21	71,059.50	286,971.06	500,000.00	881,717.06
CK MANTHI MUNYAKA	18,206.75	10	54,620.25	105,038.94	500,000.00	677,865.94
MUTUA KITEMA	18,924.50	10	56,773.50	109,179.81	500,000.00	684,877.81
H OCHIEL ALUOCH OKOLLA	24,864.50	26	74,593.50	372,967.50	500,000.00	972,425.50
ISON OKWIRI KUSINA	23,275.50	23	69,826.50	308,847.98	500,000.00	901,949.98
N WAMBUA NTHAMA	22,648.50	19	67,945.50	248,262.40	500,000.00	838,856.40
EAL OWUOR ORICHO	24,275.50	22	72,826.50	308,112.12	500,000.00	905,214.12
RICK ODUOR OKOTH	15,113.50	7	45,340.50	61,035.29	500,000.00	621,489.29
LO OTIENO ATIANG'	23,187.00	19	69,561.00	254,165.19	500,000.00	846,913.19
H KHASABO BUBOLU	23,187.00	20	69,561.00	267,542.31	500,000.00	860,290.31
CAH KARUANA MIGWI	18,020.00	8	54,060.00	83,169.23	500,000.00	655,249.23

JS ISIAHO MUSASA	25,618.00	26	76,854.00	384,270.00	500,000.00	986,742.00
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I also award the Claimants costs and interest at Court rates from the date of this Judgment until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF AUGUST 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE