



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1200 OF 2017

(Formerly HCCC 688 of 2007)

- 1. AINEAH LIKUMBA ASIENYA**
- 2. FRANSISCA WANJIKU MUIGAI**
- 3. FREDRICK ONDENG OKELLO**
- 4. NASHON PHILIP ODUOR**
- 5. JAMLCK MBAE MWIRICHIA**
- 6. TOBIAS OBUKWI WANZALA**
- 7. EBBY KAHAI MUDAVADI**
- 8. FRANCIS MUTUNGI MUTUNE**
- 9. NELSON MARK ETALE**
- 10. EDWARD SEWE OCHILLO**
- 11. CHARLES JOHN OKETCH**
- 12. MARTIN KISOMBE MWANJALA.....CLAIMANTS**

VERSUS

- 1. POSTAL CORPORATION OF KENYA**
 - 2. THE POSTMASTER-GENERAL**
- POSTAL CORPORATION OF KENYA.....RESPONDENTS**

JUDGMENT

1. The Claimants sued the Respondents at the High Court of Kenya at Nairobi upon retrenchment from the Postal Corporation of Kenya, on attaining the age of 50 years. Some were way past that age and were almost at the retirement age of 55 years which was the option they had opted for. The retirement was ostensibly due to restructuring. The termination was stated to be with effect from 20th June 2006 and the letters were dated 9th October 2006. The Claimants protested this move and asserted that they suffered trauma, humiliation and gross inconvenience for the premature retirement without notice. They averred that they were discriminated against and were prejudiced by the action of the Respondents. They sought damages being the unpaid salaries, allowances – entertainment, car, house, utility, leave, telephone as well as medical entitlement – both in and outpatient for self and family.

2. The Respondents filed a defence in which it was asserted that the inclusion of the Postmaster General of the Postal Corporation was an

abuse of the court process. The 1st Respondent averred that Claimants save for the 6th Claimant Tobias Obukwi Wanzala were former employees of the defunct Kenya Posts and Telecommunications Corporation (KPTC) and were subject in part to the Posta Code, a codification of legislative framework that primarily governed the relationship between the former employees of KPTC and the 1st Respondent. It averred that the termination of the respective contracts of service for the Claimants herein was a legitimate, lawful and reasonable exercise of the 1st Respondent's rights as an employer and obligations to the public as a manager of a public enterprise. While admitting that the Claimants had communicated a preference to stay in service up to the age of 55 years, the 1st Respondent stated that it had lawful authority at all times to terminate the employment of the Claimants before the attainment of the age of 55 years. The 1st Respondent averred that it had put in place a counselling programme which the Claimants had refused to go through and if any of them was suffering any trauma or illness, the 1st Respondent cannot be blamed for any such misfortune as the counselling would have ameliorated the same. It was averred that the claims relating to pension should be directed to the Postal Corporation of Kenya Pension Scheme and not the 1st Respondent. The 1st Respondent decried the attachment of the schedules to the claim so as to avoid paying full court fees. The 1st Respondent averred that the Claimants were indebted to the Respondent in loans and that it reserved the right to counterclaim upon reconciliation of the accounts. It thus sought dismissal of the suit with costs to the Respondent.

3. In an amended claim filed by the Claimants, they sought the inclusion of the threat by the 1st Respondent to sell their properties which had secured their individual loans and that they were entitled to enjoy the terms of the Targeted Voluntary Early Retirement Scheme (TVERS) under the public service. It was averred that the Respondent had no valid defence to the suit and that an injunction should issue injuncting the 1st Respondent from disposing the securities it held on account of the loans the Claimants held. In the defence and counterclaim, the Respondent averred that the claims were statute barred and that the 1st Respondent which came into existence on 1st July 1999 did not inherit the liabilities of the predecessor KPTC that accrued before that date.

4. The Claimants witness Fredrick Ondeng Okello (3rd Claimant) testified on behalf of the Claimants. Unfortunately at the time of hearing, the 9th Claimant Nelson Mark Etale was deceased. The Claimants restricted their claim to the unpaid retrenchment dues. He asserts that the retrenchment package given was 2 months salary for each complete year of service was offered to employees under 50 years plus 3 months salary in lieu of notice while for those who were over 50 years were given one month for each year of service foregone till 55 years. He said this disparity was arbitrary and no explanation was given. He cited the case of a retrenched employee who was over 50 years at the time she was retrenched and she received the package for those below 50 years. He said this was discrimination and that is why they had filed the suit.

5. The Respondents witness John Tonui testified that the retrenchment exercise was carried out in compliance with the ministerial approval given for the staff to be retired. The witness testified that the 1st Respondent offered a retrenchment package in compliance with the ministerial approval and because they under the category of those over 50 years their package was different. He stated that the lady mentioned by the Claimants as a beneficiary had not clocked 50 years in February when she was paid at the age below 50 years. He said the Claimants were thus not discriminated against. He stated that the Respondent can pay from 1st July 1999 but is not obligated to pay for the prior period. He was cross-examined and he stated the difference between the two categories of staff was that the staff over 50 years could access pension immediately. He said that the Claimants were entitled to payment of dues for leave not taken and days worked.

6. The parties were to file submissions and at the time of this partial determination of the case, the Claimants' submissions were not on the file. In the submissions filed for the Respondents, it was submitted that the Claimants had mistakenly pegged their claims on the cumulative period served under KPTC and Postal Corporation of Kenya (PCK). The Respondents argued that personal liability could thus not attach against the 2nd Respondent as the Postmaster General could not be sued or sue in his/her own name. The Respondents cited the case of **ABN Amro Bank NV v Kenya Revenue Authority [2017] eKLR** in interpretation of section 16A of the repealed Employment Act. The Respondent submitted that the case cited by the Claimants was distinguishable as the decision in **Telkom Kenya Ltd v John O. Ochanda [2013] eKLR** related to issues that were markedly different from those in the present suit.

7. The Claimants were all former employees of the 1st Respondent. I have considered the provenance of the suit against the 2nd Respondent and find that there was no basis to enjoin the 2nd Respondent to this suit. As the Claimants focus was on the retirement package, the issue that falls for determination is what dues they were entitled to under the terms of the retrenchment package. They declined to take a compromise that was rather generous since they were all without exception over the age of 50 at the time of the retrenchment. They concede that they had liabilities with the 1st Respondent. Having regard to all the facts of the case, the Claimants were entitled to receive payment for the retrenchment. Whereas a very long period has lapsed from the date of the retrenchment and in view of the rights of the Claimants that had crystallised, I will order that the parties meet and resolve the matter through a settlement to forestall the crushing reality of a decision of the court that would punish both sides. The court is minded to say so as the claim against the Claimants in the counterclaim is weighty and a land or commercial matter that would have received ample and rigorous ventilation in the High Court. In the final analysis I order parties to resolve the matter amicably out of court within the next 4 weeks failing which the cause will be referred to me on 1st April 2019 at Nairobi for me to give my final verdict on 4th April 2019 in respect to the parties rival claims. The Claimant to also avail a copy of the submissions filed.

It is so ordered.

Dated at Nyeri this 27th day of February 2019

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 28th day of February 2019

Radido Stephen

JUDGE