



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 338 OF 2017

[FORMERLY KISUMU HCCC NO. 8 OF 2003]

(Before Hon. Justice Mathews N. Nduma)

CHARLES P. O. NYAMUNGA & 68 OTHERSCLAIMANTS

VERSUS

MASENO UNIVERSITYRESPONDENT

J U D G M E N T

1. The 69 Claimants were retrenched from Maseno University under a Kenyan Government Policy to retrench staff. The exercise in the entire civil service was guided by a letter dated 23rd June, 2000 which provided that the retrenchment package included –

- a) Severance package of 2½ months of basic salary for each completed year of service.
- b) Two months' salary in lieu of notice.
- c) Golden handshake of Kshs.40,000 and
- d) Compassionate gratuity.

2. The circular from the office of the President stated that each department of the Civil Service shall have specific guidelines in line with their terms and conditions of service to actualize the payment package payable to them.

3. The claims in the amended plaint dated and filed on 29th September, 2003 in the sum of Kshs.41,056,218.40 is broken down as follows:-

- (I) The value of unsupplied uniforms.....Kshs. 5,388,760/00
- (ii) Unpaid overtime allowances.....Kshs. 862,456/04
- (iii) Unpaid commuting allowances.....Kshs. 4,253,170/00
- (iv) Underpayment.....Kshs. 174,546/00
- (v) The balance of the retrenchment package, that is:
 - (a) Golden handshake.....Kshs.15,542,388/00
 - (b) Training allowances.....Kshs. 2,460,000/00
 - (c) Transport allowances.....Kshs. 2,070,000/00
- (vi) Unpaid severance.....Kshs. 4,744,624/00
- (vii) Unpaid gratuity.....Kshs. 4,744,624/00

(viii) Unpaid benevolent fund.....Kshs. 515,550/00

4. The above claim is further broken down and particularized for each claimant in the document produced in court titled "Particulars of each of the Plaintiffs' Claims" which sets out what each of the 69 Claimants is claiming as being due to him or her.

5. The court will firstly deal with claims that are common to all claimants as follows:

(a) General Damage

The plaintiffs' claim that the retrenchment of the plaintiffs induced a breach of contract, was discriminatory, violated the law, and was illegal and null and void.

It affected more than 245 employees of Maseno University. The notice dated 26th March 2001 took effect on 1st April 2001, providing only six (6) days' notice. No notice was given to each individual employee but notification was done to all staff generally.

6. Claimants state that many of them fainted when they got the news. That it was cruel, inhuman and degrading. They allege to have suffered psychological torture due to the sudden loss of employment.

7. That the Plaintiff's had reasonable expectation to retire at 55 years of age but this was cut short unceremoniously contrary to Clause 5 of the Memorandum of Agreement between the union and the respondent. In terms of Clause 23(i) of the Agreement, the Claimants were entitled to at least 1 month notice before the intended redundancy. This was not done.

8. The principle of first in last out under Clause 23(ii) was not followed.

9. That the circular from the office of the President dated 23rd June 2001, provided

(a) Retrenchment was voluntary but it was made compulsory by the respondent.

(b) That there would be no more recruitment after retrenchment but other persons were employed to replace the plaintiffs and another security firm (Riley Security Services) was hired to replace the entire staff of the Security department.

10. The Plaintiffs rely on the Decision of the Court of Appeal, at Mombasa, Civil Appeal No. 47 of 2014, in which the Court of Appeal stated "Redundancy although is a proper and valid ground for termination of employment, it must always be fashioned along the requirements of *Section 40 of the Employment Act*. Any departure therefrom would attract the wrath of *Section 45* with the consequence that the retrenchment would be characterized unfair and the invocation of *Section 49* for appropriate remedies"

11. The plaintiffs pray for the equivalent of 12 months' salary as compensation for the unlawful and unfair retrenchment of each of the plaintiffs. The court notes at this juncture that this retrenchment was in the year 2001 when the Present Employment Act, 2007 was not in place. The Employment Act in place then did not provide the compensation equivalent to 12 months' salary as is the case under the present Act. Section 40 cited in the court of Appeal case, above was non-existent then. Although the erstwhile Act, embraced similar principles in implementing retrenchment.

12. The Court further notes ten (10) plaintiffs have since died to wit: the 1st, 4th, 5th, 6th, 18th, 43rd, 53rd, 54th, 55th, 57th and that counsel to the plaintiffs has submitted that their claims be excluded from any award by the court. The proper approach for the court is to pronounce itself on the issue of liability and any relief the deceased would have been entitled to so as to ease the process upon substitution at a later date.

13. The respondent admits and submits that for Public Universities there was a public University Reform Program Guidelines for staff Retrenchment in Public Universities – February 2001 that stated in – Clause 4-10 that:

"The benefits payable under the Public Universities Retrenchment Scheme are as follows:

(a) Statutory Payment

These are payments provided by the University terms and conditions of service and CBA where an employee is separated from the payroll. These are:

- i. Service pay calculated as one month basic salary for each completed year of service.
- ii. Service gratuity will be calculated at the rate of one month basic salary for every year worked on agreement terms.
- iii. Package and Baggage allowance will be paid at the rate agreed in the CBA and terms of service.
- iv. Pay in lieu of notice at 3-6 months, graduated depending on grade and terms of service.

(b) Non Statutory Payments

These payments are not provided for by the University terms and conditions of service. These payments are referred to as Golden Handshake. The Golden Handshake will be Kshs 45,000

14. In a further letter dated 2nd December 2001, by Professor J.C Kiptoo (Then PS Ministry of Education, Service and Technology) titled 'Staff Retrenchment in Public Universities' it was stated at paragraph 11 that:

“The retrenchment package for the targeted staff is as indicated below:

- i. Service payment of one month current basic salary (at the time of retrenchment) for each year worked in university.
- ii. Payment of service gratuity of one month current basic salary (at the time of retrenchment) for each year worked in the university.
- iii. Payment of basic salary in lieu of notice as per service regulations.
- iv. Payment of Package and Baggage as per service regulations.
- v. A Golden Handshake of Kshs 45,000

15. It is not in dispute that the plaintiffs received the above said package upon retrenchment.

16. The respondent submits that the retrenchment exercise followed a government policy that affected the entire Civil Service. The Respondent followed the guidelines as provided in selecting staff to be retrenched. None of the claimants were discriminated on as alleged or at all. All staff were aware that the process was on going and have admitted as much and were notified and compensated. Respondent relied on a demonstrable fair criteria for selection of retrenchees.

17. The Respondent relies on a decision by the High Court at Nakuru ***in Nakuru HCC NO. 100 of 2002 – Amos Ng’ang’a Waiharo and 148 others vs Egerton University*** in which the court found in respect of the same retrenchment exercise at Egerton University as follows:

“ 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 case 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”

18. With respect, this is a distinction without a difference. The definition of redundancy that lead to retrenchment under our law then and now embrace that very principle of an employee losing employment due to operational reasons that include rationalization to make the enterprise more efficient and productive and for no reason attributed to the employee.

19. It is also apparent that the policy document from the office of the president did not in any way create a distinction or derogate from the known common-law and Statutory Principles that guide implementation of retrenchments in a fair and humane manner.

20,. It is however, the Court’s considered view that the plaintiffs 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 and in most Public Institutions including the respondent. The report of Universities on identification of potential retrenchees is self-speaking and was not materially impugned by the plaintiffs. It sets out a transparent, analytical process that led to an objective selection of those to be retrenched.

21. Having concluded that the process of retrenchment followed a fair procedure and was lawful, next question is whether the respondent underpaid the plaintiffs by not following the Guidelines for Staff Retrenchment in Public Universities – February 2001 and the guide contained in a letter dated 2nd February 2001 from the Principal Secretary Ministry of Education Service and Technology Professor J.C Kiptoo, instead of following the circular from the office of the president dated 23rd June 2000.

22. The respondents were obliged to apply a criteria contained in the circular from the office of the president dated 23rd June 2000 which was applicable to the entire Public Service. The University erred in deviating materially from the circular to the loss and detriment of the Plaintiffs in that the respondent paid the plaintiffs severance pay at the rate of one (1) month salary for each completed year of service instead of paying the plaintiffs severance pay at the rate of two and half (2^{1/2}) months’ salary for each completed year of service. To the credit of the respondent however, the respondent paid the plaintiffs in addition to the severance pay gratuity calculated at one months’ salary for each completed year of service. The plaintiffs effectively received a severance/gratuity package of the equivalent of two (2) months’ salary for each completed year of service.

23. The cumulative difference to the plaintiffs in terms of the exit package is not 1^{1/2} months’ salary but half (1/2) month salary for each completed year of service.

24. This repackaging of the retrenchment package which was permitted by the circular from the office of the president to accommodate specific terms and conditions of service pertaining in specific Public Institutions may be explained by a provision in the CBA between the

claimants' union and the respondent which provided for payment of gratuity upon separation calculated at 30 days salary for each completed year of service.

25. Accordingly, the court awards the plaintiffs additional severance pay calculated at half ($\frac{1}{2}$) month salary for each completed year of service.

Underpayments of Kshs 174,546

26. This claim was settled by a consent recorded by the parties on 2nd March 2004 and same is spent.

The Value of unsupplied uniforms: Kshs 5,388,760.

27. Provision of two (2) sets of uniforms including tie and shoes where applicable annually, and provision of soap was for the benefit of the employee and employer so as to enhance good image and better service delivery by the respondent.

28. It is the Court's considered view that where there is derogation by an employer to provide uniform or facilities agreed upon in the CBA, this grievance ought to be raised and escalated to the highest level, and if not resolved, a dispute is reported to the Ministry of Labour in terms of the relevant provision of Labour Relations Act. There is no evidence before court that the plaintiffs raised this dispute in this manner nor is it ably demonstrated that they spent their own money to provide self with uniforms not provided by the respondent. This claim lacks merit and is dismissed particularly because it was not compulsory for the staff to wear those uniforms.

Unpaid Overtime allowances Kshs 862,456.04.

29. This claim has not been proved on a balance of probabilities by the 2nd, 26th, 53rd, 58th, and 64th plaintiffs. 53rd plaintiff is now deceased. Payment of overtime is denied by the respondent state that there existed an agreement for employees taking off days in the event of working extra hours. The plaintiffs have not shown that the issue was dealt with whilst the employees were working. It was not reported as a dispute to the Ministry of Labour then. The claims lack merit and are dismissed.

Unpaid Commuting Allowance: Kshs 4,253,170

30. Similarly, this claim is couched as a continuous existing grievance whilst the plaintiffs worked for the respondent. The respondent demonstrated that the Claimants were in terms of the CBA entitled to Kshs 500 commuting allowance and the same was paid monthly and reflected in the plaintiffs' pay slips. All pay slips produced by the plaintiffs reflect the payment. The claim has not been proved on a balance of probabilities and is dismissed.

Golden Handshake: Kshs 15,542,388.00

31. The plaintiffs stated that Kshs 265,252 was budgeted for per person retrenched but were paid 40,000 and claimed a difference of Kshs 225,252. This matter was clarified by the Director of Personnel Manager in an advertisement by the office of the President on 11th December 2003 which stated at paragraph 4 that Golden handshake was Kshs 40,000 and not Kshs 240,000. This position has been settled by the courts in previous cases. The claim lacks merit and is dismissed.

Training Allowance – Kshs 2,460.00.

32. The plaintiffs alleged that provision for training of retrenchment was budgeted for at Kshs 40,000 per person. The plaintiffs were not trained and were instead paid Kshs. 5,000 each in lieu of training. The plaintiffs allege this amount is grandly inadequate and that Egerton University paid each employee Kshs 40,000 in lieu of training. Justice Martha Koome, (as she then was) in **Nakuru HCCC No. 100 of 2002. Amos Nyaga Weihero and 148 others vs Egerton University** handed the retrenched of Egerton University Kshs 40,000 that in respect of training that was not provided. The learned judge stated:

“If no amount was provided for training this was a serious oversight on the government. It is provided for in the policy document and there is no reason why the money was not provided for training of the retrenched. I am satisfied that this is a legitimate claim by the plaintiffs”.

The court agrees with the finding by the learned judge and award the claimants Kshs 40,000 each less Kshs 5,000 paid to each person in respect of essential training not provided.

33. In the final analysis, judgment is entered in favour of the plaintiffs, including the deceased plaintiffs subject to substitution by lawful representatives as against the respondent as follows:

- (a) Respondent to pay additional severance pay to each of the claimants the equivalent to half ($\frac{1}{2}$) month salary for each completed year of service. Computation to be done and filed in 60 days.
- (b) The respondent to pay to each claimants Kshs 35,000 in respect of essential training not given to the retrenched.
- (c) The award is payable with interest at court rates from date of filing suit till payment in full.

(d) The respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 21st day of February, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Orengo for Claimants

Mr. K'ouko for Respondents

Chrispo – Court Clerk