



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE 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 in the Claimants' submissions it was argued that employees over 50 year of age were to be paid one month's salary for every year foregone and were to be retired in accordance with the terms and conditions of service at Postal Corporation of Kenya. The Claimants argue that the differential treatment was meted out contrary to their expectations. They submit that the Court of Appeal in the case of **Telkom Kenya Ltd v John Ochanda [2013] eKLR** held that the formula for payment after the decision to retrench is statutory and the rate cannot be tied to pension. The Claimants submit that the payments made were discrimination meted out to the Claimants contrary to the provisions of law. The Claimants submit that they are entitled to the payments sought and that granted the circular from the Permanent Secretary to the Cabinet and Head of Civil Service dated 27th May 2004 on Targeted Voluntary Early Retirement Scheme (TVERS) exempted the payment of tax on the package. The Claimants assert that the 2nd, 3rd and 9th Claimant have no debt and gave the amounts each of the other 7 Claimants owed. The Claimants submit that they are entitled to payment of the respective claims less the sums owed by the said Claimants.

7. 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.

8. The Claimants were all former employees of the 1st Respondent. I have considered the provenance of the suit against the 2nd Respondent and there was no basis to enjoin the 2nd Respondent to this suit. Having found that the Postmaster General was not a necessary party to the suit I strike out his name from the suit. The Claimants were all without exception over the age of 50 at the time of the retrenchment. It is not controverted that 7 out of 10 had liabilities with the 1st Respondent. Having regard to all the facts of the case and the submissions filed, the Claimants were entitled to receive payment for the retrenchment. The chief grouse the Claimants have is the retrenchment package they were to receive. The employees under 50 were to receive a golden handshake of Kshs. 200,000/-, 2 months salary for each year worked and 3 months basic salary in lieu of notice. This was not what the Claimants were offered. The **Concise Oxford English Dictionary Twelfth Edition** defines discrimination as the act of discriminating people while **Black's Law Dictionary Tenth Edition** defines it *inter alia* as differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured. In the case before me, the only distinction between the staff who received the golden handshake was the age barrier of 50. Anyone above 50 was discriminated against as was clear in the variation in the payments. There is no reason as to why the two categories of staff were given different treatment. The voluntary early retirement was not tied to pension and to discriminate on grounds of age is untenable. The Claimants herein are therefore entitled to the remedy which is the sum of Kshs. 200,000/- as well as the sums for notice and the payment for their service. The liabilities for the 7 out of 10 Claimants which are admitted and which are set out by each of the 7 Claimants to be deducted from each of the 7 before the sums are paid out. The sums due to the Claimants will be exempt from tax as stipulated in the letter by the Head of Civil Service. In the final result, the Claimants are each entitled to:-

- a. golden handshake of Kshs. 200,000/-,
- b. 2 months salary for each year worked,
- c. 3 months basic salary in lieu of notice,
- d. Costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 4th day of April 2019

Nzioki wa Makau

JUDGE