



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1389 OF 2017**

**(Originally Nairobi High Court Civil Case No. 253 of 2003)**

**(formerly Chief Magistrate's Court Civil Case No. 2029 of 2015)**

**DAVID KITHINJI MAGIRI.....CLAIMANT**

**v**

**UNGA GROUP LIMITED.....RESPONDENT**

**JUDGMENT**

1. David Kithinji Magiri (Claimant) was employed by Unga Group Ltd (Respondent) on 10 April 1961. He served the Respondent until 1997 when he retired under a voluntary scheme put in place by the Respondent having reached the position of Marketing Manager.
2. The Claimant was not satisfied with the dues he was paid by the Respondent and on 19 March 2003, he moved the High Court alleging breach of contract (on payment of terminal dues) and coercion or threats regarding the due terminal benefits. He sought Kshs 5,799,721/- being the equivalent of 1 month salary for each year he served, car/mileage allowance, insurance for 11 months, school fees and National Social Security Fund contributions.
3. The Respondent through Defence filed in Court on 22 April 2003 denied breach of contract and contended that the Claimant had been paid all terminal benefits amounting to Kshs 2,734,411/-.
4. The Respondent further denied coercing or threatening the Claimant to accept less dues than he was entitled to.
5. On 23 May 2006, the Claimant moved the High Court to transfer the suit to the Magistrates Court.
6. The Claimant filed a *Notice to Produce* to the Respondent on 5 December 2008 and Issues for determination on 5 February 2009.
7. The Claimant filed another *Notice to Produce* on 24 January 2012, together with his List of Documents.
8. The Respondent filed its List of Documents with a witness statement on 25 July 2012.
9. On 13 August 2013, the Claimant once again filed another motion seeking the transfer of the suit from the High Court to the Chief Magistrate's Court. The order was granted on 25 March 2015.
10. Come 10 May 2017, the Claimant moved this Court to transfer the case from the Chief Magistrate's Court to itself and the application was allowed on 12 June 2017.
11. Upon transfer, the Deputy Registrar scheduled the Cause for hearing on 27 February 2018 when the Claimant and the Respondent's Business Analyst – Human Capital Management testified.
12. The Claimant filed his submissions on 14 March 2018 while the Respondent filed its submissions on 28 March 2018.
13. The Court has considered the pleadings, evidence and submissions and come to the view that the primary question for determination is, *which of the Circulars dated 28 April 1997 applied to the retirement of the Claimant.*
14. Appropriate remedies and orders would follow the determination of the primary question.

## Background

15. Due to difficulties in the business environment, the Respondent decided to restructure, sometime around 1997.
16. The decision was preceded by several meetings by the Respondent's management which included the Claimant.
17. As a consequence of the deliberations, the Respondent issued 2 circulars on 28 April 1997. The circulars were "A" and "B" and which circulars were marked as Claimant's exhibits 2 and 3.
18. Because of the centrality of the Circulars to the issues in dispute, the Court will set them out fully.
19. Circular A

Strictly Confidential

UNGA GROUP LIMITED

DETERMINATION OF EMPLOYMENT CONTRACT EXECUTIVE EMPLOYEES

The amounts below, net of the applicable taxation, will be paid to Executive Employees whose offers to determine their employment contracts are accepted:

1. Notice Period (normally 3 months) emoluments, which are
  - a) Pensionable salary
  - b) Non Pensionable salary
  - c) Car Scheme Allowance
  - d) Proportionate School Fees Allowance
2. Accrued leave days to the date of determination of the contract. In this case items a) – d) in No. 1 above apply.
3. One month pensionable and non-pensionable salary for every completed year of service and/or part thereof. This will be computed using the current salary level.

Taxation on the above payments will be deducted and remitted to the tax authorities in accordance with the income tax laws.

28 April 1997.

20. Circular B

Strictly Confidential

UNGA GROUP LIMITED

DETERMINATION OF EMPLOYMENT CONTRACT EXECUTIVE EMPLOYEES

The amounts below, net of the applicable taxation, will be paid to Executive Employees whose offers to determine their employment contracts are accepted:

1. Notice Period (normally 3 months) emoluments, which are
  - a) Pensionable salary
  - b) Non Pensionable salary
  - c) Car Scheme Allowance
  - d) Proportionate School Fees Allowance
2. Accrued leave days to the date of determination of the contract. In this case items a) – d) in No. 1 above apply.

3. For the unexpired service duration to normal retirement age less the notice period in No. 1 above, the following emoluments:

- a) Pensionable salary
- b) Non Pensionable salary
- c) Company contribution to the pension scheme, if applicable

Taxation on the above payments will be deducted and remitted to the tax authorities in accordance with the income tax laws.

28 April 1997.

21. The distinction between the two Circulars appears in paragraph 3 (of each).

22. Circular A provided for *payment of the equivalent of one month pensionable and non-pensionable salary for each completed year of service* while Circular B provided for *payment of the equivalent of pensionable and non-pensionable salary, and the Respondent's contributions to the pension scheme (if applicable) for the unexpired service duration to normal retirement age.*

23. Both the Claimant and the Respondent agreed that the Claimant had 10 months and 26 days to retirement.

24. It is also common that the Respondent paid the Claimant using Circular B. In other words, the Claimant despite retiring in May 1997 was paid both pensionable and non-pensionable salary up to the date he would have retired normally (around April 1998).

#### **Claimant's contentions**

25. In an attempt to demonstrate that it is Circular A which was applicable to his case, the Claimant stated that he was part of the *Management Committee* which held deliberations on the retirement scheme and that the package which was approved by the Respondent and issued to him was Circular A.

26. He also testified that he offered himself for retirement on 5 May 1997 on the basis of Circular A and that he was therefore taken by surprise when on delivering the retirement letter to the Financial Director, Mr. J Muia, he gave him Circular B and flatly told him that if he declined, he would face the risk of dismissal and miss out on any benefits.

27. To corroborate his version of events, the Claimant served the Respondent with a *Notice to Produce* documents including minutes and resolutions of the Respondent which deliberated on the (restructuring) process and gave the go ahead for it.

28. The documents were not produced. The Respondent, in its submissions asserted that the Notices to Produce were not served.

29. In the view of the Court, that was a factual contention which should have been taken up by the Respondent during the hearing, but was not.

#### **Respondent's case**

30. The Respondent's witness joined it in 2015 and he admitted that his testimony was based on the records available.

31. According to the witness, Circular A was intended to cover employees who had been declared *redundant* while Circular B was a package for those who had served for long and had opted for *early retirement*.

32. The Claimant was therefore paid under Circular B and there were no outstanding dues payable.

#### **Evaluation**

33. Circulars A and B do not on their faces suggest that any of the options/packages related to *redundancy* situation as both referred to employees whose offers for separation had been accepted.

34. *Redundancy* is a separation based on an employer's requirements and therefore on the part of an employee it is involuntary.

35. In most *redundancy* situations, it is the employer which will identify the positions it needs to shed off.

36. There was no suggestion or evidence before Court that the Claimant's position had become superfluous or had been identified for *redundancy*.

37. The evidence before Court is that the Respondent had chosen the option of *voluntary early retirement* and that is the offer the Claimant took up.

38. Again, voluntary early retirement would ordinarily be a precursor to declaration of redundancies where the employer has not achieved the threshold for it to optimise or economise its costs. If employees do not take up voluntary early retirement, the employer would in all probability take the drastic route of redundancy.

39. Considering the generality of the Circulars, it would have been helpful to the Respondent's case to produce the minutes and resolutions which guided the restructuring exercise.

40. The Respondent's witness admitted that the documents existed but he did not have them in Court. The Claimant had served *Notices to Produce* these documents and the failure to produce them will lead the Court to draw an adverse inference against the Respondent.

41. The Court finds that Circular A and not Circular B was applicable to the Claimant.

### ***Coercion***

42. The Claimant's testimony that when he delivered his retirement letter to the Finance Director who in turn informed him he risked dismissal if he did not accept the offer in Circular B was not controverted.

43. Although the events complained of occurred about 20 years ago, there was no attempt on the part of the Respondent to explain the whereabouts of the person who allegedly coerced the Claimant.

44. Despite the failure to rebut the testimony or explain the whereabouts of the Director, in the humble view of the Court, this Issue is not decisive of the substance of the Claimant's claims and reliefs sought, since the Claimant did not seek any specific relief in respect of the coercion.

### **Appropriate remedies/entitlements**

#### ***1 month salary for each year worked***

45. Under this head, the Claimant sought Kshs 6,464,880/-.

46. With the finding that Circular A was applicable, the Court concludes that the Claimant was entitled to paid the equivalent of 1 month pay for each completed year of service.

#### ***Car allowance/mileage***

47. Car allowance is to facilitate an employee who is actively at work.

48. The Claimant sought a total of Kshs 792,000/- for the 11 months he would have served up to normal retirement

49. In the view of the Court, it would be unconscionable to pay the Claimant the amount when he did not actually commute to work.

#### ***Insurance***

50. For reasons in the preceeding paragraph, the Court is of the view that this entitlement was not due.

#### ***School fees allowance***

51. The Claimant failed to disclose particulars of the children who were in school at the material time to qualify for the proportionate school fees allowance.

#### ***National Social Security Fund***

52. This head of claim was not proved.

### **Conclusion and Orders**

53. The Court finds and holds that Circular A applied to the Claimant.

54. The Claimant was paid Kshs 2,734,411/- under Circular B instead of Kshs 7,219,648/- under Circular A. He is entitled to the difference being Kshs 4,485,237/-.

55. The Court therefore awards the Claimant the sum of Kshs 4,485,237/-.

56. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 20<sup>th</sup> day of April 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant            Mr. Orege instructed by Malonza & Co. Advocates

For Respondent        Mrs. Kimani instructed by Kaplan Stratton Advocates

Court Assistant        Lindsey