



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 79 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

CHESTIT MOSES CHEMBEN & 88 OTHERS.....PETITIONERS

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

1. The Petitioners filed Petition through the firm of Messrs Letangule & Company Advocates claiming damages for:-

1. *Severance pay at the rate of 3 months basic salary for every year of service completed.*
2. *Three months basic salary in lieu of notice.*
3. *Unpaid transport allowance.*
4. *Unpaid medical and house allowances.*
5. *Payment of long service bonus for Plaintiffs who have worked for over 15 years.*
6. *Payment of outstanding increments and promotions.*
7. *Payment of unpaid Basic salaries.*
8. *Unpaid and/or underpaid pension amounts.*
9. *Interest on 1-8 (both inclusive) above.*

2. The Petitioners aver that at all material times, the Respondent was their employer having been offered employment in various capacities in the Civil service sector in the Government of Kenya and later seconded to the Kenya Revenue Authority in the year 1995, upon its enactment.

3. The Petitioners further aver that upon the establishment of Kenya Revenue Authority, they were seconded to Kenya Revenue Authority for a period of three months in various capacities from July 1995 to September 1995.

4. The Petitioner aver that during the secondment they did not change or move offices physically but rather they retained the very same physical offices, same desks, same tasks and responsibilities they were holding prior to the secondment. The Kenya Revenue Authority issued a circular to all staff on appropriate packages of salaries and benefits after three months and with no prior official communication, the secondment period was extended by 9 months up to June 1996, which meant that the Petitioners were then the new, original and sole staff of the Respondent.

5. The Petitioner state that during the Secondment period, all employees were awarded two salary increments of 30% on gross salaries effective from 1st October 1995 and 40% on basic salary effective from 1st January 1996. On 17th May 1996 the then Commissioner General of Kenya Revenue Authority issued a circular number CG/5/96 which gave general policy and rates pertaining to imprest and per diem

allowances for local travel with effect from 1st April 1996. These were applicable to all staff.

6. Another circular was issued on the 17th day of September 1996 by Kenya Revenue Authority Human Resource Department which circular gave guidelines on absorption into the Kenya Revenue Authority.

7. At the end of the secondment period letters of offer of appointment were issued to the seconded staff on 23rd September 1996 and Kenya Revenue Authority subsequently hired other people different from those they had absorbed from the Civil service and selectively implemented the employment and retirement and/or retrenchment and/or pension packages, sidelining and discriminating the Petitioners who had been seconded from civil service, despite the fact that the Petitioners were performing the same duties as other Kenya Revenue Authority employees in similar levels.

8. They aver that later the Kenya Revenue Authority Research and Cooperate Planning came out with a stunning statistical brief on a two-tier salary structure where the Petitioners received their salaries based on a different scale: that is the Ordinary scale, compared to the rest of the Kenya Revenue Authority officials who were remunerated based on a Kenya Revenue Authority approved scale. The effect was that the Petitioners, who fell under the ordinary salary scale were grossly underpaid, while their colleagues in the same job group and same job grade were adequately paid under the KRA approved scale.

9. In 2002 and 2005 the Respondent purported to harmonize salaries and backdate the Petitioners' salary but the purported harmonization never took into consideration the difference in the actual amount paid out and what was meant to be the right entry point for over 8 years before the alleged harmonization, further the Petitioners allowances, especially their transport and house allowances were not factored in during the alleged harmonization.

10. The Petitioners aver that the computation of salaries and pensions payable did not take into account the difference between the actual amount earned by the respective petitioners and the desired entry points per month which in turn affected their pension and severance Package of retrenched Claimants who opted to leave Kenya Revenue Authority.

11. In their replying Affidavit, the Respondent avers that the Petitioners were its employees. An initial skeleton staff was recruited when the Respondent commenced its operations mostly from the private sector in order to enhance efficiency and effectiveness of the newly created Authority. The staff were to coordinate the setting up of structures of the Respondent under the legal framework set out under the Act and bring together the functions under one administration and management.

12. The officers who were on secondment from the Government Ministries were paid their salaries and allowances in line with the Civil Service Secondment policy and those who were elected to join the Respondent were offered new contracts of employment by the Respondent with effect from 1st July 1996. The staff were awarded two salary increments of thirty per cent (30%) on gross salaries and (40%) on basic salary.

13. The Respondent further avers that despite the budgetary challenges it was facing, all employees had career paths that provided opportunities for growth whenever vacancies were available.

14. On 29th October 2001, a committee was established to make recommendations on the harmonization of its employees' salaries and the recommendations implemented abolished the two-tier salary scale and all authority employees were placed on same salary scale and despite all the employees being placed on same salary scale some of them were of the view that the Authority had not achieved full harmonization of the salaries.

15. The Respondent states that it rightfully and lawfully deducted and remitted the Petitioners pension contribution to the Kenya Revenue Authority Staff Pension Scheme based on their monthly salaries thus the Respondent has not violated the Petitioners fundamental rights and a violation of rights cannot accrue from a contractual obligation obtaining from an employment contract.

Submissions

16. The Petitioners submit that the present constitution applies to the current dispute for reasons that the Petitioners' grievances persisted beyond the promulgation of the Constitution of Kenya 2010 and their infringed rights were provided for in both the previous and current Constitution.

17. They further state that the right against discrimination is a constitutional right and further reinforces the nature of the constitutional nature of the issues raised, this is to mean that the Respondent failed to uphold fair labour practices by adopting a discriminative pay structure by maintaining a two-tier payment structure without any justification.

18. They further submit that they are justified in seeking a declaration that the maintenance of the two-tier salary structure was discriminatory to them, unconstitutional and contrary to public policy.

19. The Respondent submit that the acts complained of occurred many years before the promulgation of the current Constitution therefore, the remedies sought in the petition ought to have been predicated on the Repealed Constitution, thus the Petition is unprocedural and the wrong provisions of the law have been invoked and the Petitioners failed to state precisely the constitutional violations committed by the Respondent, neither have they demonstrated discrimination and/or presented evidence of differential treatment.

20. The Respondent further submit that the Petitioners brought the suit as a Petition to avoid filing a civil suit which would be out of time and they do not deserve the prayers sought as they did not suffer any losses and they were justly calculated and remitted to them as per the terms of their contract and so were their pension dues.

Issues for determination

21. I have examined all the averments of the parties and submissions filed. The issues for consideration are as follows:-

1. *Whether the Rights of the Petitioners have been infringed under the current Constitution.*

2. *Whether the Petitioners have been discriminated against.*

3. *What remedies if any to grant in the circumstances.*

22. On the 1st issue herein, I have looked at the Petition filed herein. The Petitioner filed this Petition alleging infringement of Article 3, 10, 19, 20, 21, 22, 23, 27, 28, 35, 41, 43, 47, 48, 57, 159, 162, 165 and 259 of the Constitution of Kenya 2010.

23. The Petitioners have claimed discrimination and infringement of their rights by the Respondents who was running and maintaining a two tier salary structure to its employees and maintaining a higher scale to others under a similar job group.

24. The Petitioners aver that due to this differentiated tier structure, upon retirement and/or retrenchment, their pensions were not properly considered as the period during which they were on secondment for 9 month which was considered as a breach of service.

25. Vide the supporting affidavit filed herein paragraph 23, the Petitioners aver that:-

“the Petitioners who opted to retire on 31st December 2000 were not awarded their pensions as Kenya Revenue Authority insisted they had not served the authority for 5 years to qualify for pension. The deponent of the affidavit in support of the Petition deponed that he retired in November 2005”.

26. From these averments, I gather that the events complained of by the Petitioner occurred in 2005 or earlier. This was under the regime of the repealed Constitution of Kenya. It is now not clear why the Petitioners chose to file their Petition alleging breach of their rights under the new Constitution.

27. The current Constitution of Kenya was promulgated on 27.8.2010. The Constitution as promulgated at Article 263 states as follows:-

“This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier”.

28. Article 264 states as follows:

“The Constitution in force immediately before the effective date shall stand repealed on the effective date, subject to the Sixth Schedule”.

29. My reading of this provision is that the Constitution came in force upon promulgation.

30. The Petitioner submitted that the current Constitution is applicable. This issue has been discussed in various case law. In **Duncan Otieno Waga vs Attorney General Petition No. 94 of 2011** the Hon Judge in declining to apply the provision of the Constitution of Kenya 2011 stated as follows:-

“the acts of the Respondent in relation to the Petitioner must therefore be construed by reference to the former Constitution particularly Section 82 which prohibits discrimination. Counsel for the Petitioner has also referred to the provision of Article 23(1) and 165 which read together entitle any person to apply to the Court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this Court to adjudicate violation of the Constitution but they do not empower the Court to apply the Constitution retrospectively.”

31. The Hon. Judge Majanja in the above case concluded that the current Constitution was not applicable and struck out the Petitioner’s case.

32. Other case law that has addressed this issue are **Anarita Karimi Njeru vs Republic (No 1) 1979) KLR 154** where Trevelyan and Hancox JJ held:-

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed”.

33. Having said as above, I do agree with the learned Judges preposition. The Petitioners have not only come to Court seeking redress for atrocities alleged to have been committed under the repealed Constitution but filed under provision of the current Constitution. That in itself

makes this Petition be improperly before Court as being brought under the wrong law and this Court is therefore unable to grant any remedies for the Petitioners.

34. For the above reason, I do not find it useful to continue and consider issue No. 2 and 3 above which I find superfluous.

35. I find the Petitioners case not merited. I therefore dismiss it accordingly. Due to the nature of this Petition, I also direct that each party will bear its own costs.

Dated and delivered in open Court this **30th day of May, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyaga for Respondents – Present

Kirimi holding brief for Letangule & Company for Petitioner – Present