



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1705 OF 2015

JAMES OKELLO OUMA	1st CLAIMANT
YUSUF ONYANGO OBONYO	2nd CLAIMANT
DAVID HARAMBE OTAMBO	3rd CLAIMANT
PATRICK GEKONGE MARABURI	4th CLAIMANT
ROMANUS OHANGA	5th CLAIMANT

v

RIFT VALLEY RAILWAYS (KENYA) LTD RESPONDENT

JUDGMENT

1. This judgment should have been delivered on 31 May 2018 but because the Court had other official engagements elsewhere, the delivery date was rescheduled to today.
2. This Cause was heard on 24 April 2018 when James Okello Ouma (1st Claimant) testified on behalf the other 4 Claimants (the Court had directed on 21 January 2016 during pre-trial that only 1 Claimant testifies).
3. The Respondent did not lead any evidence as the Court declined its request for adjournment in order to secure the attendance of a witness (reasons are on record).
4. The Claimants filed their submissions on 2 May 2018 while the Respondent filed its submissions on 28 May 2018.
5. The Court has considered the pleadings, evidence and submissions.
6. Principally, only one primary issue arises for consideration and it is, whether the Respondent is liable to pay the Claimants terminal dues.

Background

7. The Claimants were employed by Kenya Railways Corporation on various dates.
8. On 23 January 2006, the Kenya Railways Corporation, the Respondent and the Government of Kenya entered into an Agreement providing for the *Concession of Kenya Railway Freight and Passenger Services* (the *Agreement*).
9. The *Agreement* was to commence on the date the Kenya Railways Corporation, the Uganda Railways Corporation, Sheltam Rail (Pty) Ltd, RVR Investments (Pty) Ltd, Nalukongo Workshop Ltd, the Respondent, Uganda Railway concessionaire, the Government of Kenya and the Government of Uganda entered into an *Interface Agreement*.
10. The *Interface Agreement* was signed on 7 April 2006. The Agreement therefore became effective on the same date.
11. In terms of section A.1 of the *Agreement*, transferred employees were defined as *those KRC employees who are employed by the Concessionaire after the commencement date*.
12. The Respondent issued letters of appointments to the Claimants on 25 October 2006.

13. On 29 November 2012 the Respondent informed the 2nd and 5th Claimants that they were being retrenched in terms of the *Agreement*.
14. The 1st, 3rd and 4th Claimants were informed of retrenchment through letters dated 29 October 2014.
15. Under separate cover, the Respondent advised the Claimants of the computation of their *terminal dues* and that the *severance pay* component would be paid at the rate of 1 month's pay for each complete year of service.
16. The Claimants did not agree with the formula of 1 month used to compute the severance pay, and on 24 September 2015 they jointly sued the Respondent contending that because they had all severally served the Respondent for less than 10 years, they were entitled to *severance pay* at the rate equivalent to two and a half months' salary for each completed year of service.
17. The Claimants relied on section D.4: 3(a) of the *Agreement* for their contention
18. The section provides that

Retrenchment Packages payable to transferred employees as stipulated in section D.4.2 shall be the same as the Retirement package paid to KRC employees retrenched at the Commencement date, which package for the main categories of staff comprised:

(a) a severance pay of one (1) month salary for every complete year worked in the case of permanent and pensionable employees with at least ten (10) years of service or two and a half (2) months salary for each complete year worked in the case of non-pensionable employees and pensionable employees with less than 10 years' service;

19. The Respondent in its Response contended that the section relied upon by the Claimants only applied to employees of the Kenya Railways Corporation who were retrenched at the commencement date (7 April 2006) and not those who were taken on board by it.
20. The Respondent maintained that the provisions of the *Agreement* did not apply at all to the Claimants and that it is the Employment Act which was applicable.
21. It was asserted that all the Claimants were paid severance pay as prescribed by the Act as renegotiated in terms of section D.4.4 of the *Agreement*.

Evaluation

Commencement date

22. The parties did not dispute the commencement date of the *Agreement*. Because the *Interface Agreement* was signed on 7 April 2006, that was the commencement date for the *Agreement*.

Were Claimants transferred employees

23. All the 5 Claimants were given appointment letters after the commencement date (7 April 2006) and therefore they all qualified as *transferred employees*.

Applicability of the Agreement

24. Having come to the conclusion that the Claimants were transferred employees, it does not require much extrapolation to reach a conclusion that the *Agreement* applied to their retrenchment package.
25. Further, the Respondent's contention that the *Agreement* did not apply to the Claimant flies directly in the face of section D.4.3 (a) of the *Agreement*.
26. In employment law and practice and indeed in transfer of business cases, it is usual to the *transferor* and *transferee* to agree on liabilities due to employees.
27. In the view of the Court therefore the question of *privity of contract* as raised by the Respondent was a red herring.

How was severance pay to be computed?

28. In terms of the *Agreement*, the Claimants, being transferred employees were entitled to computation of severance pay at the same rate as those employees of the Kenya Railways Corporation who had been retrenched by 7 April 2006.
29. That formula/rate was the equivalent of 1 month pay for each completed year of service for those who had served for at least 10 years and equivalent of two and a half months pay for each completed year of service for those with less than 10 years of service.

Length of service

30. The Respondent disputed the length of service of the Claimants.

31. In responding to the proposition, the Claimants drew the attention of the Court to the *Terminal Dues and Release* letters issued by the Respondent where the length of service had been indicated.

32. It would be an afterthought for the Respondent to attempt to elope from its own records and or documents. The Claimants had also served for less than 10 years.

Appropriate remedies

33. Apart from attempting to challenge the Claimants lengths of service, the Respondent did not rebut the computations as presented by the Claimants, and the Court will therefore adopt the same, and find that the Claimants are entitled to the underpayments as computed.

Conclusion and Orders

34. The Court finds and holds that the Claimants were underpaid severance pay and the Court orders the Respondent to pay them the balances as hereunder

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|-------------------------------|------------------|
| (i) James Okello Ouma | Kshs 1,224,300/- |
| (ii) Yusuf Onyango Obonyo | Kshs 387,567/- |
| (iii) David Harambe Otambo | Kshs 828,360/- |
| (iv) Patrick Gekonge Maraburi | Kshs 830,772/- |
| (v) Romanus Ohanga | Kshs 464,634/- |

35. Claimants to have costs.

Delivered, dated and signed in Nairobi on this 13th day of June 2018.

Radido Stephen

Judge

Appearances

Mr. Sumba instructed by N.O. Sumba & Co. Advocates for Claimants

Mr. Thuo instructed by Njoroge Regeru & Co. Advocates For Respondent

Court Assistant Lindsey