



**REPUBLIC OF KENYA**

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

**CAUSE NO.858 OF 2013**

**(Formerly HCCC No. 287 of 2008 at Nairobi)**

FRANCIS NDALO SABATIA.....1<sup>ST</sup> CLAIMANT  
JOEL MUKOLWE NYANJE.....2<sup>ND</sup> CLAIMANT  
JOSEPH GITHUKU GICHARU.....3<sup>RD</sup> CLAIMANT  
LEONARD KALEE MULU.....4<sup>TH</sup> CLAIMANT  
HAMISI OYIGO OCHONO.....5<sup>TH</sup> CLAIMANT  
EVANSON N. MWANGI.....6<sup>TH</sup> CLAIMANT  
GIDEON O. OERI.....7<sup>TH</sup> CLAIMANT  
JOSEPHAT MUSIKU.....8<sup>TH</sup> CLAIMANT  
MUNYAO WAMBUA.....9<sup>TH</sup> CLAIMANT  
CHARLES OMBEYI.....10<sup>TH</sup> CLAIMANT  
ESSAU AMAGOYE.....11<sup>TH</sup> CLAIMANT  
CHARLES MANGALE.....12<sup>TH</sup> CLAIMANT  
TITUS N. WAMBUA.....13<sup>TH</sup> CLAIMANT  
JOHN A. NYANJE.....14<sup>TH</sup> CLAIMANT  
OBADIAH S. KANDENGE.....15<sup>TH</sup> CLAIMANT  
HERMAN K. GICHENGO.....16<sup>TH</sup> CLAIMANT  
BERNARD M. MBULA.....17<sup>TH</sup> CLAIMANT  
PETER GICHERU GITAU.....18<sup>TH</sup> CLAIMANT  
FELIX O. ODWORI.....19<sup>TH</sup> CLAIMANT  
SAMUEL MOTARI.....20<sup>TH</sup> CLAIMANT  
PIUS K. MWANZIA.....21<sup>ST</sup> CLAIMANT

PAUL M. KANYOTE.....22<sup>ND</sup> CLAIMANT

MANUEL WERE.....23<sup>RD</sup> CLAIMANT

HASSAN ALI ZANI.....24<sup>TH</sup> CLAIMANT

- VERSUS -

INSTEEL LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

### JUDGMENT

The claimants commenced the suit by filing a plaint on 02.07.2008 in the High Court at Nairobi through Kiarie Njuguna & Company Advocates. The respondent filed a defence on 23.07.2008 through A.F. Gross & Company Advocates.

In the amended plaint filed on 19.07.2013 the claimants prayed for judgment against the respondent for a declaration that the termination of employment was unlawful; redundancy pay; terminal dues; prorata leave; gratuity; and general damages. The respondent filed the amended defence on 15.11.2013. The respondent prayed that the claimant's suit be dismissed with costs.

The plaintiffs were at all material times employees of the defendant at the defendant's plant situated along Olkalou Road, Industrial Area in Nairobi.

The claimants' case is that about or on 17.04.2008 the respondent unilaterally and unlawfully directed the plaintiffs to proceed on immediate early retirement and failed to pay terminal dues to claimants. The claimants' case is that the early retirement was forced and it amounted to unlawful dismissal.

The respondent's case is that the claimants voluntarily left the respondent's service or employment on 11.04.2008 and by the time they left they had been paid all their dues and the respondent denied owing the claimants dues as claimed and as prayed for. The respondent's account of the events is as follows:

- a) On 04.04.2008 the respondent held a meeting with its employees including the claimants and the respondent introduced the request for early retirement and set out retirement packages which the outgoing workers would receive.
- b) The claimants agreed to the early retirement proposal and prepared an early retirement letter dated 11.04.2008.
- c) The respondent offered an early retirement handshake which each claimant accepted by signing a formal release or discharge in favour of the respondent.
- d) The early retirement package included:
  - Two months pay in lieu of notice.
  - Salaries for April 2008 prorata.
  - Payment of 35 days of leave outstanding as at 30.04.2008.
  - Service gratuity at the rate of 30 days for every completed year of service.
  - Ex-gratia payment at the rate of 15 days for every remaining year of service.
  - One of payment(golden handshake) of Kshs.30, 000.00.
- e) The early retirement was agreed upon and it was not forced or unlawful. The decision was not capricious, illegal, oppressive or discriminatory at all. All terminal dues were settled and nothing was outstanding.

The **1<sup>st</sup> issue** for determination is whether the suit for 4<sup>th</sup> to 24<sup>th</sup> claimants was time barred as introduced by the amended plaint filed on 19.07.2013. The respondents pleaded and submitted that the cause of action for 4<sup>th</sup> to 24<sup>th</sup> claimants was time barred under section 90 of the Employment Act, 2007. Further, the Court upholds the submission for the claimants that the amended plaint was pursuant to the consent orders and the respondent having consented, the suit would not be time barred under the 3 years of limitation prescribed in section 90 of the Employment Act, 2007. The Court follows **Transworld Safaris (K) Ltd –Versus- Ratemo [2008]KLR 339 at 341** where the Court of Appeal (Bosire, Onyango Otieno, & Githinji JJA) held, **“Because the leave to amend the plaint was given with the appellant's consent, it could not avail itself of the submission that the plaint was amended long after the period of limitation prescribed under the Act had expired and that the respondent's claim was time barred.”** Thus the Court returns that the respondent waived reliance on such defence.

The **2<sup>nd</sup> issue** for determination is whether parties entered a valid contract to end the claimant's respective contracts of service by way of early retirement. The evidence is that the respondent offered the employees who were 45 years of age and above the opportunity to take early retirement under the prescribed terms of the voluntary early retirement scheme dated 19.02.2008. By the letter dated 27.02.2008 the chief shop steward requested the respondent's management that workers hold a meeting known as Kamukunji on 01.03.2008 for the Workers'

Union Committee to educate the workers about the voluntary early retirement scheme. The Human Resources & Administration Manager replied by the letter dated 10.03.2008 granting permission for the meeting to be held on 15.03.2008 at 1.00pm. The letter of 14.04.2008 by the Workers' Union Committee confirms that a number of the union office bearers would be going on early retirement by the end of April 2008 and so the Committee needed to hold elections on 18.04.2008 and the letter requested the respondent to avail an overseer on the election date. The meeting of 14.04.2008 was held between the respondent's management and the employees leaving for early retirement. The minutes show that the retirement package was agreed upon and the respondent confirmed that co-operative loans would be considered for write-off on case to case basis since some of the employees had floated the Co-operative by-laws. Further, in any case, the respondent would only undertake the loan balances net of the share deductions. A farewell party was organised to take place on 26.04.2008. The employees requested to be released on 19.04. 2008 as last day at work so as to start the clearance process. The employees requested to be paid Kshs. 30, 000.00 between 15<sup>th</sup> and 16<sup>th</sup> April 2008 to facilitate transport of their household and the management agreed.

The evidence is that the farewell party was held as was planned. The Kshs. 30, 000.00 was paid as was agreed. Each claimant was paid the final dues as was agreed and relevant pay slips are on record. Each was given an early retirement letter dated 11.04.2008 setting out the final payments. Each signed acknowledging clearing with the respondent, paid the final package and that each had retired voluntarily and that there was no legal claim against the respondent.

The Court returns that the evidence is that the parties entered a valid, lawful and voluntary contract to terminate the contract of service by way of early retirement. The evidence is that at all material time there was no redundancy situation as defined in the Employment Act, 2007 and section 40 thereof did not apply. The Court further finds that the early retirement package was voluntarily agreed upon and the same was in any event generous in comparison to a redundancy package as prescribed in section 40 of the Act.

In conclusion the claimants' suit is hereby dismissed with costs.

**Signed, dated and delivered in court at Nairobi this Friday 16<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**