



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1927 OF 2014

(Formerly HCT CC No. 713 of 20017)

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2018)

JOHN KIMARAT OLE KIRUA.....1ST CLAIMANT

BERNARD KIPTONUI CHERUIYOT.....2ND CLAIMANT

WILLIAM KIPTOO KIMAYO.....3RD CLAIMANT

FRANCIS MWENDA.....4TH CLAIMANT

ANDREW KIPROTICH RUTO.....5TH CLAIMANT

HUSSEIN DAHIR.....6TH CLAIMANT

-VERSUS-

THE POSTAL CORPORATION OF KENYA.....1ST RESPONDENT

THE POSTMASTER – GENERAL.....2ND RESPONDENT

JUDGMENT

1. This claim was initially filed by way of a Complaint filed on 9-10-2007 in the High Court as HCCC No. 713/07 through the firm of S. Musalia Mwenesi and company Advocates.

2. The Claimants thereafter filed an Amended Claim on 9th November 2015. They allege that they were unfairly terminated by the Respondent on grounds that a retirement package had been approved by the government for those under 50 years. The Claimants in their Amended Claim seek the following orders:-

a) A declaration that the termination of the Claimants' employment was wrongful and unlawful.

b) The Respondents deliberately and unwarrantedly inflicted economic loss on the Claimants.

(bb) Reinstatement of the Claimants to their respective positions.

c) The Respondents severally and jointly pay damages to the Claimants for fraudulent misrepresentation that the Claimants services were terminated due to implementation of the new Management and Regional Structure, in line with the corporation's strategic Business Plan 2003-2007 when there was no implementation scheme for the Plan in place.

d) The Claimants were each of them unjustifiably defamed in their person, name character and office.

e) Compensation for loss of earnings as pleaded in the Claim and as the Court shall find to be just and equitable.

f) Without prejudice to the claim for compensation for loss of earnings, damages for wrongful and unlawful termination of their employment.

g) Damages for defamation.

h) Interest at court rates or as the court may deem appropriate from the date of termination of the Claimants' services or as the court may determine.

(hh) In the alternative and without prejudice to the above, payment of retirement monies as provided for under the Posta Code.

i) Costs of the suit be awarded to the Claimants.

Claimants' Case

3. The Claimants were employees of the Respondent holding senior management positions at the 1st Respondent. They had carried over their services from the former Kenya Posts & Telecommunications Corporation of Kenya.

4. The Claimants aver that vide a letter dated 9th October 2016 they were each informed of their termination of employment for those under 50 years due to restructuring. The letter informed the Claimants that the government had approved the retirement package of the 1st Respondent's employees as an effort to meet the Corporate Strategic Plan for the year 2003-2006.

5. The Claimants aver that they had no prior knowledge of the termination of their services and were certain that they would retire from the 1st Respondent upon attaining the mandatory retirement age of 60 years.

6. The Claimants aver that the 1st Respondent in its general notice dated 26th September 2006 assured its employees that it had no intention of retrenching its employees or forcibly terminating their employment.

7. The Claimants state that they had applied for facilities at the 1st Respondent's or with other institutions and were certain that they would cater for their financial obligations until they attained the age of 60 years.

8. During the hearing, only the 1st, 4th and 6th Claimants testified with the Claimants 6th Claimant testifying on behalf of the 2nd, 3rd and 5th Claimants. They reiterated that they did not voluntarily retire from employment.

Respondents' Case

9. The 1st Respondent filed its Statement of Defence on 25th November 2015 through the firm of Gaturu Muthoga and Company Advocates while the 2nd Respondent filed his Statement of Defence on 2nd December 2015. However, John Kibyegon Tonui RW1 testified on behalf of the Respondents.

10. The 1st Respondent avers that the Claimants were its employees in the defunct Kenya Posts and Telecommunications Corporation except John Kiramat Ole Kiru, William Kiptoo Kimaiyo and Francis Mwenda Munene.

11. The 1st Respondent alleges the misjoinder of the 2nd Respondent.

12. The 1st Respondent avers that the termination of the Claimants employment was justified and legitimate in the exercise of its rights as an employer and obligations to the public as a manager of public enterprise. It further avers that despite the Claimants communicating their stay in service to 55 years, the 1st Respondent had the lawful authority to terminate the Claimants' service.

13. It is the 1st Respondent's case that the Claimants were aware of the restructuring which could lead to job losses .Furthermore, though it was keen on protecting the service of each employee, its communication could not prevent the retrenchment programme.

14. The 1st Respondent denied the defamation allegations and further stated that it had put in place a counselling programme which the Claimants had refused enrol into.

15. With regard to the financial obligations, the 1st Respondent avers that the Claimants had a duty to plan their respective financial obligations.

16. The 1st Respondent contends that the Claimants are not entitled to salaries and other benefits accruing from actual service. Moreover, that the Claimants have sought reinstatement in the amended pleading more than 9 years after the claim was instituted. It therefore prays that the Claim be dismissed with costs.

17. The 2nd Respondent avers that its joinder in the suit is an abuse of the Court process for reasons that the 2nd Respondent is not a body corporate and has no capacity to sue or be sued and that no cause of action had been disclosed in the Amended Claim against the 2nd Respondent. Therefore, this court has no jurisdiction to determine the matter and prays that this Court does strike out or in the alternative dismiss the suit against the 2nd Respondent.

18. The 2nd Respondent avers that should the Court hold that it's a proper party in the Claim, it will adopt the contents of the 1st

Respondent's Statement of Defence.

Claimants' Submissions

19. The Claimants submit that at the date of their termination, the official retirement age of the Respondents' staff had been reviewed from 50 years to 55 years and they had expected to work for the Respondents until attaining the 55 years.
20. The Claimants submit that they were never made aware of any retrenchment plan or the 2003/2006 Strategic Plan and that they were only aware of the Corporate Strategic Plan issued on 20th February 2003 which was yet to be finalised.
21. They submit that the letters addressed to them were a misrepresentation and that they had been targeted for redundancy under the guise of a Strategic Plan that was not in existence. In addition, the Strategic Plan was contrary to the principles of the Postal Code.
22. The Claimants submit that they were targeted and selected for termination without just cause, due notice and their consent.
23. The Claimants submit that their Claim is based on two schemes of services. The first scheme being their entitlement under their current positions and the other being a revised scheme, which they would have been entitled with effect from 1st October 2006. The Claimants claim under the non-revised scheme at the time of termination is Kshs. 53,425,550 and Kshs. 71,253,610 under the revised terms if service.
24. They further submit that they claim a sum of Kshs. 600,000 per annum (in-patient) and Kshs. 25,000.00 each per annum (out-patient) medical claims under the non-revised terms. Under the revised terms this amounts to Kshs. 600,000 per annum (in-patient)/Kshs. 25,000 outpatient and an ex -gratia payment of Kshs. 29,000.00 each.
25. They submit that no valid reason was given for their termination which was contrary to the provisions of Section 43 (1) of the Employment Act and cited the **Court of Appeal decision in Ken freight (E.A) Limited v Benson K. Nguti Civil Appeal No. 31 of 2015.**
26. In submitting that they were entitled to the reliefs sought the Claimants rely on the case of **Ezekiel Nyangona Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR.**

Respondents' Submissions

27. The Respondents submit that its settled law that parties are bound by their pleadings and that the Claimants have in their submissions set out the terminal dues owed to them including medical claims for the first time and therefore the prayer on the liquidated amount should be disregarded.
28. The Respondent submits that the basis for retirement was Government circular on Targeted Voluntary Early Retirement Scheme which referred to a Civil Service Reform Programme that was a continuous process. In respect of their dues, they submitted that they had issued the Claimants with better terms as opposed to those approved by the government.
29. The Respondents submit that the Court should be guided by Section 49 (4) of the Employment Act in determining the reliefs sought as the Claimants do not dispute having being paid or offered compensation in their termination letters.
30. On reinstatement the Respondents submits that Section 12 (3) of the Employment Act allows the Court to issue an Order for reinstatement within 3 years of dismissal and hence the prayer for reinstatement is impractical. In respect to the loss of earnings the Respondents submit that the loss was not particularised and that the Claimants had not worked for the period which they claimed loss of earnings. The Respondents cited the following two cases **Daniel Kamau Kariithi v Bamburi Cement [2016]eKLR** where the Court held that there was no guarantee on the loss of earnings up to the retirement age of 50 years.
31. I have considered the evidence and submissions of the parties herein. The issues for determination by this Court are as follows:-

1. ***Whether the Claimants' termination was justified.***
2. ***Whether the claimants are entitled to remedies sought.***

32. On the first issue, the Claimants were all terminated vide a letter which stated as follows:-

“As you are aware, the Government of Kenya has approved the retrenchment package of employees of Postal; corporation of Kenya as part of its objective to meet the objectives of the Corporate Strategic Plan for the year 2003/2006.

The strategic plan required among other things, competitive filling of the management positions through advertisements internally. You were considered alongside others and were not successful for the position as advertised.

In this regard, this is to inform you that your services with the Corporation are hereby terminated with effect from 20th June 2006....”.

33. The Claimants have contended that they were never made aware of any retrenchment plan on a 2003/2006 Strategic Plain that targeted

them. They aver that they were only aware of a five-year Corporate Strategic Plain issued on 20th February 2003 which had not been finalized.

34. Indeed, there is no evidence that the Claimants were informed prior to this 20.6.2006 of the targeted Strategic Plan that was to render them jobless.

35. The Respondent's position is that they were implementing a Government Policy. The Respondents sought to rely on a Government circular, which is a letter, dated 27.5.2004. this circular stated as follows:-

"Targeted Voluntary Early Retirement Scheme (TVERS)

The Government has been implementing Public Service Reforms aimed at institutionalizing good governance and enhancing service delivery.....

The TVERS will be applicable to civil servants in overmanned and no-core areas who are below fifty three (53) years of age. Ministries/departments are therefore required to use the findings and recommendations of their strategic plans, already developed to determine specific cadres in non-core areas and in areas where staff is in excess of requirements and at the same time, "ring-fence" critical cadres including professionals, managerial and technical services in the civil service.

5) The Government has designed a safety net package predicated on the existing service rules and regulations, the current economic situation in the country and the Government ability to pay it.

"...the retirement package will be paid to both permanent non- permanent and pensionable employees as follows:-

A) Permanent Non-Pensionable Employees

i) Severance payment of three months basic salary for every completed year of service.

ii) Three (3) months' salary in lieu of notice.

iii) A golden handshake of Kshs.80,000/= and

B) Pensionable Employees

i) Severance payment of fifteen (15) days basic salary for every completed year of service.

ii) Three (3) months' basic salary in lieu of notice.

iii) Normal and additional pension and

iv) A golden handshake of Kshs.80,000/=

36. The letter was addressed to the Acting Chairman of Electoral Commission, All Permanent Secretaries, the Controller and Auditor General, the Secretary, Public Service Commission, The Registrar, High Court of Kenya, the Director General, National Security Intelligence Service, the Clerk, National Assembly, All Provincial Commissioners, and all District Commissioners.

37. The letter in principle talks of **Targeted Voluntary** (Emphasis is mine) Early Retirement Scheme (TVERS). The Retirement envisaged was therefore voluntary and this implies that any employee wishing to retire had to indicate their intention to do so.

38. In the case of the Claimants, the retirement seems 'forced' and in terms of the letter of termination falls in the category of what is referred to as retrenchment or redundancy.

39. The Respondents cannot hide behind a circular such as the one above to force retirement.

40. In this Court's view, the Claimants were actually retired.

41. In 2006, the Employment Act Cap 226 (now repealed) provided as follows at Section 16(c):-

"16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-

a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

b) the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular

class of employees affected by the redundancy;

c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;

d) any leave due to any employee who is declared redundant shall be paid off in cash;

e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.

42. The instances under which a contract of service could be terminated due to redundancy are thus set out as indicated above.

43. The Respondents did not follow the above parameters. No notice was given to the Claimants. The CW1 indicated that he was 47 years old when he was terminated. No notice was given to him.

44. In **CA No. 46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** Maraga JA (as he then was considered the position of consultation before redundancy and rendered himself thus:-

“51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982-requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:

“1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

*52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in *Mugford v. Midland Bank*, UK Employment Appeal Tribunal, 10 and the treatise by Rycroft and Jordan, - “A guide to the South Africa Labour Law” both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on”.*

45. It is my finding that the termination of the Claimants was unfair and unjustified in the circumstances and I declare it so.

46. In terms of remedies sought, the Claimants were indeed partly paid some dues except for the CW1 – John Kiramat Ole Kirua. In the circumstances, I will award the Claimants as follows:-

1st Claimant

1. Retirement package offered as per the circular letter dated 27.5.2004.

2. 1 months' salary in lieu of notice.

3. 12 months salary as compensation for unlawful termination;

4. Any pension dues from the Pensions Scheme if not yet collected.

All other Claimants

1. 1 months' salary in lieu of notice.

2. 12 months' salary as compensation for unlawful termination;

3. Any pension dues from the Pension Scheme if not yet collected.

47. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement save for the retirement package of 1st Claimant as per the letter of 27.5.2004 which interest will accrue from the date of filing this claim.

Dated and delivered in open Court this 11th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ayako for the Respondent – Present

Claimants – Present