



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1300 OF 2014

HAMIDA BANA & 102 OTHERS.....CLAIMANTS

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants are all former employees of the Respondent bank, a commercial bank operated under the Banking Act.

2. On various dates, the Respondent employed the Claimants, in various positions within the bank countrywide. The Claimants, enjoyed terms and conditions of employment based on the Management Human Resource Manual (Manual) among other documents.

3. The Claimants, were undertaking their duties diligently when the Respondent offered Voluntary Early Retirement (VER) vide a circular dated 19th february, 2014 and which provided that;

For those who will be exiting the Bank the last day of work will be communicated directly to them. They will be entitled to the following dues:-

- 1. Pension benefits in accordance with the scheme rules*
- 2. One month's salary in lieu of notice*
- 3. Purchase of leave days earned but not taken up to the last of employment.*
- 4. Severance pay equivalent to half a month's salary for each completed year of service.*

4. The claimants, through individual applications applied to take the for Voluntary Early Retirement offer which was to take effect on the 30th April, 2014. The Respondent accepted the applications for Voluntary Early Retirement on the terms that were set out in the respondent's letters of 2nd April, 2014 and which set out the benefits as follows;

- i. One months' salary in lieu of notice.*
- ii. Payment of your leave days earned but not taken as at 30th April, 2014.*
- iii. Severance pay of half a month's salary for every completed year of service*

iv. Your retirement benefits will be handled in accordance with the National Bank of Kenya Staff Pension Fund rules.

5. The claim is that the offer made to the Claimants, was discriminatory and in breach of the Respondent Bank's Human Resources Manual and article 27 and 41 of the Constitution and section 26 of the Employment Act and therefore biased and unfair. Whereas the Voluntary Early Retirement was to take effect on 30th April, 2014 the Respondent unlawfully and unfairly kept the Claimants, in employment until 6th May, 2014 therefore subjecting them to great anxiety, stress and loss. This was malicious for the reasons that the Respondent failed to apply terms of the bank's Human Resource Manual to the Claimants, on retirement; failed to give the Claimants, equal treatment with other former employees; discriminated against the Claimant in comparison to other employees of the bank; retired the Claimants, on unfavourable terms; treating the Claimants, unfairly and with contempt; and subjecting the Claimants, to late clearance and humiliation. As a result the Claimants, suffered great financial loss and damage as set out in their claims.

6. The Claimants, suffered special loss and damage and seek payment of such damage in the following areas;

a) Pay in lieu of two months' notice

b) Pay in respect of ½ month salary for every year of service

c) Tax rebate

7. The Claimants are seeking for a declaration that they were discriminated against; damages for discrimination; damages for wrongful and unfair retirement; payment of all lawful terminal dues claimed; and costs of the suit.

8. In evidence, the Claimants, witness is the 3rd claimant, Dickson Njaramba Warutumo. Mr Warutumo testified that all the Claimants were the employees of the Respondent and were terminated on the same date over similar grounds. The positions held by the Claimants, were both in lower and high management but all were terminated under the Voluntary Early Retirement.

9. Mr Warutumo joined the respondent's employment on 1st march, 1988 as a Clerical Staff and rose through the ranks to a Loans Officer. He was in management, lower cadre. He had worked for 24 years.

10. The Respondent made an offer for Voluntary Early Retirement in May 2014. On 19th febraury, 2014 the Respondent sent a circular of Voluntary Early Retirement giving terms that those who accepted the offer would receive;

Half (½) month salary for each year worked;

Notice pay;

Rebate on loans

11. Mr Warutumo also testified that he accepted the Voluntary Early Retirement terms but on the offer made for the same, what he knew was acceptable was a 3 months' notice pay. Upon promotion, his termination notice was increased to 3 months but the offer by Respondent was less by 2 months.

12. Severance pay was offered at ½ month's salary but previously the Claimants were aware that the Respondent had made an offer of one (1) month salary pay for each year worked. He looked at the offer made to his juniors who were paid for a full month yet he was only given ½ month pay. The respondent's human resource manual made provision for a full month pay in such a case. The Voluntary Early Retirement terms did not follow the human resource manual. He is seeking the difference of ½ month not

paid in severance pay.

13. The Claimants are also seeking; 2 months' notice pay; ½ month pay as severance pay; Damages for discrimination for being treated differently from other employees of the Respondent who left under Voluntary Early Retirement; and payment of costs.

14. In cross-examination, Mr Warutumo testified that he has authority to testify for the entire claimant. The Claimants, were offered Voluntary Early Retirement with the option to accept or reject it and the circular of 19th february, 2014 had the exit terms. He wrote back to the Respondent and accepted the terms. The Respondent had the right to accept or reject the application for Voluntary Early Retirement and in his case, the Respondent accepted he claimants' applications. Payments were made in accordance with the circular and in response to the claimants' application for Voluntary Early Retirement. At the time he was aged 47 years. The human resource manual has the retirement age and Voluntary Early Retirement was provided for upon attaining 50+ years and the retirement age is 60 years. The Voluntary Early Retirement offer made by the Respondent was not in accordance with its human resource manual. He accepted the Voluntary Early Retirement under duress.

15. Mr Warutumo also testified that when he accepted the Voluntary Early Retirement offer and terms he did not say that the CBA and human resource manual terms were not applicable. The issued circular did not specify that those below 60 or 50 years should not apply. The claim is based on terminal dues already provided under the human resource manual and the unpaid terminal dues.

Defence

16. In defence the Respondent has set out the issue in dispute as that of:

Whether the claimants' acceptance of an offer for voluntary early retirement was discriminatory and if the Claimants, are entitled to damages and payment of additional terminal dues.

17. The respondent's case is that they are a commercial bank registered under the Banking Act. By circular dated 19th february, 2014 the Claimants, with haste accepted the Voluntary Early Retirement and receive benefits arising therefrom. The Claimants, willingly applied for Voluntary Early Retirement on the terms set out in the respondent's letter dated 2nd April, 2014. The offer made to the Claimants, was not discriminatory and the Claimants, have not established factual and legal comparative terms against which the offer made is alleged to be discriminatory. The offer for Voluntary Early Retirement was not in breach of the human resource manual as paragraph 9.4.1 of the manual allow early retirement of employees either at the parties discretion and the acceptance of the respondent's offer to the Claimants, was purely voluntary.

18. The entitlements communicated to the Claimants, in the memo of 19th february, 2014 and the letters of acceptance dated 2nd April, 2014 were the same? The Respondent accepted to release the Claimants, with effect from 30th April, 2014 after which date the Claimants, were free to leave their stations of employment.

19. The Claimants are not entitled to the prayers sought. The Respondent paid and the monies were duly received by the Claimants, as their entitlement under the Voluntary Early Retirement. The Claimants, have no cause of action against the Respondent and the claim should be struck out.

20. In evidence, the respondent's witness was Linnet Anyika an employee of the Respondent in the human resource department. Ms Anyika joined the Respondent in November, 2015 and has access to the human resource records of all employees. She has the Claimants, documents and conversant with the case before court.

21. Ms Anyika also testified that on 19th february, 2014 the managing director issued a circular and employees were invited to a Voluntary Early Retirement with set out terms and invited applications for

review by human resource for the Respondent to approve. It was a voluntary process and there was no compulsion. The Claimants, allege that the Respondent did not follow the human resource manual but the manual has no provision for Voluntary Early Retirement before 50 years but the circular invited all to apply.

22. The terms for the Voluntary Early Retirement were set out. In the manual and CBA there was no rebate on loans which had to be paid at 40% on outstanding balances. The offer made was for a 20% rebate where loan balance was paid immediately. In the offer for Voluntary Early Retirement, all loan balances had no rebate and had to be paid at 10% while the manual provided for the loan to revert to commercial rates.

3. On the issued circular, the employee responded with applications for consideration for Voluntary Early Retirement. The employee did not say that they did not understand the circular terms.

24. In cross-examination, Ms Arika testified that when she joined the Respondent in November, 2015 there was no human resource manual in place. In early 2015 there was a human resource manual of September, 2015. The Claimants left the respondent's employment in April, 2014. The role of a human resource manual is to give a framework of terms and conditions of engagement between an employer and employee and is binding.

25 That clause 9.4.1 of the manual makes provision for 3 months' notice pay upon early retirement. The Claimants took Voluntary Early Retirement and should benefits from this clause. The Claimants are seeking 2 months' notice pay unpaid but they have no claim to loans rebate. The Claimants got an offer which they accepted. The offer was determined by the respondent. This does not state the Claimants, accepted to forgo all benefits; that the manual does not apply. Rebate on bank loans and negotiations by Respondent with Kenya Revenue Authority (KRA) were an offer made by the respondent. The Claimants did not negotiate the offer on rebates but some opted to negotiate. The Voluntary Early Retirement was accepted individually and the terms were to also apply individually. There was no communication by the managing director to the employee but the Respondent paid in accordance with the issued circular without any further communication to the employees.

26. Ms Ataka also testified that the law requires that all employees be treated equally. The CBA and the law require that unionised and non-unionised employee to be treated equally. Employee leaving ought to have better terms similar to what is provided for in the CBA or above.

27. Ms Ataka also testified that The Voluntary Early Retirement was informed on matters not in her knowledge. A total of 177 employees left the employment of the respondent. Article A7 of the CBA, severance pay is one month's pay for each year worked but the Claimants, were paid ½ month for each year served.

Submissions

28. The Claimant submits that they all worked for the Respondent between 1994 to April, 2014. The Claimants were diligently undertaking their duties and were it not for the Voluntary Early Retirement offered on 19th February, 2014 they were happy to remain in service of the respondent. Before the Voluntary Early Retirement offer the terms and conditions of service were never changed until the offer for Voluntary Early Retirement that led to the dispute herein. The Respondent witness confirmed that the claimant's employment was regulated by the human resource manual in place. The human resource Manual was binding to the Respondent and its employees. That the termination terms under the Manual were superior to the offer made via circular of 19th ferbruary, 2014. That the Manual provided for 3 months' notice pay; the CBA provided for severance pay at one month salary for every year worked but in this case the Claimants, were paid notice pay at one (1) month and severance pay at half month salary which was less.

29. The Claimants, also submit that they were unfairly treated when they were terminated under inferior terms unlike previously retired employees who got better terms. That the Respondent initiated the

Voluntary Early Retirement to lure the Claimants, out of employment and then applied unfair terms contrary to the set Manual and CBA. The terms upon which the Company Secretary, Mr Leonard G Kamweti was terminated upon were superior than the offer made to the claimants.

30. The offer for Voluntary Early Retirement did not state that the benefits due under the Manual would not apply as set out under clause 9.4.2 which allows notice pay at 3 months. The Respondent therefore proceeded to retire the Claimants, without the application of the Manual and the benefits therein. The Respondent underpaid the Claimant in the Voluntary Early Retirement by giving one months' notice pay; half year salary for each year served and the severance pay. The CBA made a provision for severance pay of one month pay for each year served and notice pay at one notice pay.

31. The Claimants, also submit that they were discriminated against in the payment of the exit package as against other employees. They were offered unfavourable terms on retirement that denied them their entitlement from the Respondent and there was violation of article 27 and 41 of the constitution read together with section 5(2) and (3) of the Employment Act.

32 The Claimants, reiterated the claims for damages for discrimination; damages for wrongful and unfair retirement; payment of the lawful terminal dues; and costs.

33. The Claimants, have relied on the following cases – **Gladys Muthoni Mwangi & 20 Others versus Barclays Bank of Kenya Limited & Another [2016] eKLR; Leonard G Kamweti versus National Bank of Kenya Ltd & 2 others [2016] eKLR.**

34. The Respondent submits that the Claimants, applied for Voluntary Early Retirement offer made by the Respondent and which was to take effect on 30th April, 2014. The Respondent accepted the applications made by the Claimants, for Voluntary Early Retirement that offered;

One month salary in lieu of notice;

Payment of leave earned but not taken;

Severance pay of half a month salary for every completed year of service;

Retirement benefits in accordance with the respondent's Staff Pension Fund Rules;

40% rebate on the outstanding loans should the loan account be settled immediately;

20% rebate if settlement of 50% and above but less than 100% of the outstanding loan is done immediately;

All balances outstanding thereafter would not qualify for rebate and would be consolidated into one loan account and repaid at 10%;

The securities held would be consolidated to continue securing the consolidated loans; and

The repayment period would not exceed the normal retirement age of 60 years.

35. The Respondent initiated the Voluntary Early Retirement by inviting employees to apply and the terms were set out. All the Claimants, applied for early retirement based on the offer made and the Respondent accepted the applications. The Claimants, have since been paid in terms of the letters of invitation by the respondent.

36. The Respondent also submits that the scheme inviting employees to early retirement was a scheme outside the Manual. Clause 9.4 provides for retirement where upon attaining 50 years an employee can apply for early retirement but in the scheme offered by the Respondent on 19th February, 2014 all employees including those below 50 years were invited to apply. The Manual therefore did not make

provision for retirement below 50 years and the only way to address the matter was by agreement and hence he respondent's invitation to which the Claimants, responded by application and there was an acceptance.

37. The respondent's offer for early retirement was in recognition that the Manual and CBA did not provide for early retirement. To interest's applicants, the offer contained benefits of rebate on loans which rebates were not provided for in the Manual or CBA. The Court of Appeal in **National Bank of Kenya versus Pipeplastic Samkolit (K) Limited, Civil Appeal No.95 of 1999** held that it is not the duty of the Court to re-write terms of contract between the parties and in this case the parties agreed to the terms upon which the Claimant would exit the Respondent employment in terms not under the CBA or Manual.

38. The Respondent has also relied on the case of **William Barasa Obutiti versus Mumias Sugar Company, Civil Appeal No.198 of 2004** where the Court held that it is open to an employer and employee at any time during the currency of a contract of employment to terminate the same by agreement. Such mutual agreement may be by Voluntary Early Retirement and such mutual agreement effectively overrides formal or substantial restrictions placed on the termination of the contract by the original contract itself. A party should not be allowed to probate and reprobate. The Claimants, have taken the benefit under the Voluntary Early Retirement by way of loan rebates not available under the Manual of CBA and cannot then renege from the terms of the agreement.

Determination

Whether there was discrimination against the claimants

Whether there was unfair practice against the Claimants

Whether the Claimants, are entitled to the remedies sought

39. It is not in dispute that the Claimants were the employees of the respondents until the offer for early retirement on 19th February, 2014 to which the Claimants, made applications for early retirement and the Respondent accepted the same by payment of the dues set out in the offer. It is also not in dispute that the Respondent did not follow its Manual in making the offer and the terms of the offer were outside the Manual.

40. The respondent's case is that the offer for early retirement was made as the Manual and CBA did not make provision for the same. To address the issue of early retirement before age 50, the Claimants, were asked to apply which they did and their applications were accepted and the dues owing in the terms of the offer were paid.

41. The shift created by the constitution in terms of article 41 is to raise the bar in employment and labour relations in Kenya. Employment and labour relations is now part of the realm of Bill of Rights. With it, parties engaged in employment and labour relations are required to ensure *fair labour practices* as a precondition to the enjoyment of the rights now set out under the Employment Act and related statutes on employment and labour relations.

42. The introduction of the concept of *fair labour practices* is unlike the previous practice existing prior to 2007. The law is now couched to ensure that those engaged in employment and relations are seized of new aspects of *labour relations* and *fair labour practices* as these are matters that were not in existence before.

43. The right to fair labour practices has created a framework to regulate labour relations in a changed constitutional dispensation. The Court has now created jurisprudence on what amounts to unfair labour practices – *unfair labour practice* being any act or omission which may have the effect that any employee(s) is or may be unfairly affected or that his/their employment opportunities or work security is or may be prejudiced. Conversely for an employer, an *unfair labour practice* means the unfair disruption of business due to labour unrest leading to the detriment of the labour relationship. See **Elizabeth**

Washeke & Others versus Airtel Networks Limited & Another, Cause no.1972 of 2012.

44. In this regard therefore, fair labour relations in dismissals, employment opportunities, appointment and rights at work are not only a question of *equity* rather the concept of *fairness* which goes beyond lawfulness. Even where a conduct is lawful, it may not be fair. Section 45 of the Employment Act therefore requires an employer while effecting a termination of employment to not only ensure that there is a lawful reason for the termination but that there is procedural fairness in effecting such termination. Even where an employer has a good and sound reason to summarily dismiss an employee, the correct procedure must be followed for the dismissal to be found as fair. See **Council of Mining Unions versus Chamber of Mines of South Africa [1985] 6 ILJ 293 (IC)**.

45. The Respondent has relied on the Court of Appeal decision **National Bank of Kenya versus Pipeplastic Samkolit (K) Limited, Civil Appeal No.95 of 1999**. My reading of this case is that the fact upon which this decision was premised upon is fundamentally different from the claimants' case in terms of constitutional context, the law applicable, time and context. The case commenced at the High Court on the question of sale of property upon the borrowing of funds through a charge. This is purely a commercial issue with a dispute that arose in 1996 unlike the claimants' case that is regulated under article 41 of the constitution as an employment and labour relations matter and the context of employment which is regulated by the Employment Act. As such, to apply this case word for word without putting into account the fundamental principles governing commercial undertakings as against employment and labour relations matters would be to lose the essence of disputes filed before this court. Further, the constitutional dispensation subsisting now and at pre-2010 must have a bearing on the case law before our courts. The shift from August, 2010 in terms of the rights accruing based on the constitutional protections is different unlike before.

46. The essence of enacting a new regime of statutes regulating employment and labour relations was to give ample protections for employees such as the Claimants, from the vulgarity of the proletariat. Similarly, the employer got the space to enjoy labour within the law. As such no party has lost. All stand to gain – one from the labour and productivity while the other can enjoy the fruits and benefits of their labours.

47. The situation subsisting before 2007 when the Employment Act was enacted by Parliament made it possible for an employer to act *suo motto* and terminate an employment relationship without any cause save for payment of due notice. Since August, 2010 at the promulgation of the constitution, support was given to the Employment Act by adding the provisions under article 41 with the right to fair labour practices being part of the Bill of Rights. As such the situation subsisting when the Court of Appeal presided over the case of **William Barasa Obutiti versus Mumias Sugar Company**, in my humble view, this has fundamentally changed.

48. Section 10 of the Employment Act; read together with sections 8 and 9 makes it mandatory for an employer to issue an employee with a written contract of service. Such a contract is to set out the terms and conditions of service. Where there is a Manual that further set out terms and conditions of work, this must be brought to the attention of the employees and the employee must agree to its terms. See **peter Wambua Nzoka versus ASL Limited, Cause no.1373 of 2014** and **Abraham Gumba versus KeMSA [2014] eKLR** where the Court held that a work place Manual is binding on the parties to it as it further expounds on the workplace Manual but does not change the contract of service.

49. In this regard therefore, where there is a change to the employment contract, section 10 (5) requires that the change be communicated to the employee in writing so as to have effect;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

50. Provisions under section 10 are all set out in mandatory terms. As such, where the Respondent made an offer to vary the employment terms, whichever mode, by offer or agreement, fair labour relations

required that the terms of the employment contract and the Manual terms and where there was a CBA to remain constant unless such were specially changed, varied or altered by mutual agreement of both parties. To rely on any other provisions to negate the application of the law under the Employment Act and the provisions of article 41 of the constitution would be to negate the rights therein and engage in an effort to circumvent the very purpose of the right to fair labour practices now secured under the law and indeed the constitution.

51. Changes to the employment terms and conditions are extensively gone into by the Employment Act. Any changes to the agreed terms as set out above are to be specifically stated. Further to the provisions of section 10, section 13 goes further to enumerate the purpose of having written terms of employment and why a change should be addressed with the knowledge of the employee. Section 13(5) provides;

(5) A statement under subsection (1) may refer the employee for a change in either of the matters specified in section 10(3) (e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.

52. The provisions above make reference to section 10(3) (e) which provides that;

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

...

(e) Any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the person by whom they were made; and

53. Therefore written terms and conditions of employment cannot be negated in an agreement without specifically been set out as to what terms and conditions therein the employee is giving up. To make an offer to terminate employment without seeking the consent and approval of an employee to alter the applicable terms and conditions of employment existing at the time particularly as it relates to the contract of employment/service or in a CBA, is to circumvent clear provisions of the law.

54. The matters set out above are important. where the Respondent made an offer and the Claimants, accepted the same, nothing stopped the Claimants, from seeking their rights as due under the law, their contract of service and under the applicable CBA or on terms similar to those applicable for employees covered under a CBA and the respondents Manual . Section 47 of the Employment Act provides;

(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.

(4) The right of an employee to make a complaint under this section shall be in addition to any right an employee may enjoy under a collective agreement.

55. The context to the above is that no employee should be placed under inferior terms and conditions of employment as against other employees as to do so would be to act in a discriminatory manner. Where there is denial of rights under written law and under a CBA by an employer, such is an unfair and an employee is allowed under section 47 of the Employment to lodge a complaint with the Court and seek the remedies available under section 49 of the Act.

56. As set out above, the Claimants, applied for early retirement. Such applications have not been attached. What is submitted are the letters of acceptance of the Voluntary Early Retirement by the respondent, and an acknowledgement by each claimant? These letters are standard save for the personal details, the payments due and the amounts due in loan facility advanced to each claimant. In the letters of acceptance the Respondent notes;

The Human Resource Division will liaise with you to facilitate all the required exit procedures as stipulated under the Bank's regulations including but not limited to the procedures under the Human Resource Manual. We hope for your utmost co-operation in this regard.

57. I find therein lies the respondent's recognition that indeed the Manual document between the parties applied with regard to the termination of the Claimants, and its terms remained binding on both parties. I have also gone through the entire records in terms of the letters of acceptance, none relates to the Claimants, forgoing their lawful entitlement under the Manual.

58. Complaints have been lodged with the Court as provided for under section 47 and 87 of the Employment Act. The Claimants, challenge the payment of their dues in terms of the Voluntary Early Retirement. Section 47 of the Employment Act is couched in a manner to ensure that an employee is not held hostage by an employer so as to accept inferior terminal dues or is forced into accepting to discharge the employer from any liability before an exit or terminal package can be paid. The law allows an employee, who upon termination is aggrieved due to non-payment of statutory or lawful dues such as in a CBA or workplace policy to move the court and claim for such dues. This is one such case.

59. I find that the Claimants are entitled to their lawful dues under the Manual in terms of notice pay and the severance pay due. The Manual made provision for 3 months' notice pay while the severance pay was at a full month pay for each year worked. The Respondent paid less what was due, such terms were inferior to what was provided for under the Manual and CBA and to engage as such amounted to unfair labour practice. Such is unlawful conduct under section 45 of the Employment Act.

60. To engage an employee on inferior or unfavourable terms and conditions of employment is a practice that cannot find justification in law and in fair labour practices. Such should be frowned upon and not receive the sanction of the court. Where the Respondent was keen to lay off part of its workforce, there was a Manual in place that addressed the mechanisms to be employed and there was a CBA that was setting out how unionisable employees were to be treated and the terms to apply. With the CBA terms agreed, no employee of the Respondent should have been given terms below the CBA terms where unionised, unionisable or otherwise. To pay below the CBA minimum is to engage in unfair labour practice. I find by the Respondent in offering and accepting the exit of the Claimants, on Voluntary Early Retirement, the terms were unfavourable and went contrary to Manual and the CBA in existence over a large portion of its employees. Such is unfair in terms of section 45 of the Employment Act.

61. The Respondent also submits that the Claimants were fairly treated in the Voluntary Early Retirement and there is no case of discrimination against them so as to make a comparison to the case of Mr Leonard Kamweti whose case did not relate to Voluntary Early Retirement. Unlike Mr Kamweti's case, the Claimants were invited to apply for Voluntary Early Retirement which they did and cannot renege on the accepted terms. The CBA and Manual were not applied in the claimants' case as there was an agreement between the parties to end the employment by Voluntary Early Retirement.

62. Therefore, on the question as to whether there was discrimination, the Claimants, have relied on the case of **Gladys Muthoni Mwangi & 20 Others**, cited above. The Court therein was addressing a case of clear discrimination against the employees on account of their nationality. However, in the same case the Court relied on the case of **Christopher Onyango & Others versus Heritage Insurance, Cause No.781 of 2015** and held that where an employer sets aside a section of employees and treats them differently and separately as against the others, such different and separate treatment not being justified, that is to act in discrimination against such employees differently and separately treated.

63. Part of the changes introduced by the Employment Act is section 5 which specifically prohibits discrimination against any employee, directly or indirectly. Section 5(3) and (7) provides;

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) ...

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

...

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section. [Emphasis added].

64. The claimant's witness Mr Warutumo testified that they are aware of other employee who was previously retired by the Claimant on better terms than what they got. He cited the case of Mr Kamweti who was retired and offered a different package from them. That to be treated differently from other employee was discriminatory and damages are payable to the claimants.

65. In terms of section 5(7) of the Employment Act, on these allegations, the burden of proving that there was no discrimination against the Claimants, shifted to the Respondent as the employer. This is a claim that has been set out in the Memorandum of Claim and part of the evidence submitted in the testimony of the claimant's witness, Mr Warutumo.

66. To the allegations of discrimination against the claimants, the respondent's defence is that Claimants, have not established factual and legal basis for the claim. That the Claimants, have not set out any comparative terms against which the offer made is different and separate with others. That Mr Kamweti left the employment of the Respondent over a year before the Claimants, took the offer of Voluntary Early Retirement and his case did not relate to similar terms of Voluntary Early Retirement as that of the claimants.

67. My reading of the proceedings in the case of Kamweti is that he was retired early in terms of clause 9.4.1 of the manual, the same clause under which the Claimants, were terminated, clause 9.4.2. Ms Arika also testified that under Clause 9.4.1 the retirement terms were more favourable than what the Claimants, got in the offer for Voluntary Early Retirement. As such, I find no rationale, looking at Mr Kamweti's case, the evidence of the respondent's witness as to why the Claimants were treated differently in a similar situation of retirement. If anything, where the Claimants, were willing to leave their employment under the offer of Voluntary Early Retirement, the best the Respondent should have done was to give them more favourable terms than the employee who had either left due to misconduct or in a case of redundancy. To pay the Claimants, less under the guise that this was purely an agreement where an offer was made and there was an acceptance is to fail the test and the essence of fair labour relations. It is also not lost to the Court that the severance payment made to the claimant should have been paid in a redundancy situation where indeed there was a redundancy and the respondent failed to address the legal requirements attendant in terms of section 40 of the Employment Act so as to avoid paying the due entitlements therein and instead for a cheaper option of a retirement, the Respondent only invited suits such as this one against themselves. To therefore treat the Claimants, less favourably when placed under similar situation of retirement, such I find to be in discrimination against the Claimants.

68. Within the realm of employment and labour relations, where an employee is discriminated against, and the court makes such a finding, such an employer has not acted in justice of equity amounting to unfair treatment. This is contrary to section 45 of the Employment Act.

Remedies

69. Based on the findings above with regard to the unfair termination of the claimants, section 49 of the Employment Act and the finding that the Claimants, were discriminated against, I will put these two aspects into account in assessing the appropriate compensation. On the items offered by the Respondent in the retirement scheme, such were paid without delay. Such has been acknowledged by the claimants. However, this does not cure the unfair and discriminatory practices committed by the Respondent. Where there is unfair termination, the Court has power to award compensation. On the finding of discrimination

against the claimants, sections 5 and 88 of the Employment Act have a sanction. Putting all these into account, the Claimants, are awarded 10 months' salary in compensation.

70. The unpaid dues under the Manual and CBA in terms of notice pay and severance pay are due. The Claimants, are awarded two (2) months' salary in notice pay and ½ month salary for each year served that were not paid in the Voluntary Early Retirement. Such equalises the Claimants, with other employee retired by the Respondent in terms of payment of terminal dues.

Judgement is hereby entered for the Claimants, against the Respondent in the following terms;

(a) A declaration that the Claimants, were discriminated against and unfairly treated by the Respondent in the Voluntary Early Retirement;

(b) Compensation awarded at 10 months gross salary to each Claimant [see schedule A];

(c) Each Claimant shall be paid two (2) months gross salary in notice pay [see schedule B];

(d) Each Claimant shall be paid ½ months' salary for each year worked in severance pay [see schedule B]; and

(e) Costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 22nd day of February, 2017.

M. MBARU

JUDGE

In the presence of:

.....

.....

Particulars of Schedule – B

NAME	HALF SALARY FOR EVERY YEAR WORKED	TWO MONTHS NOTICE PAY
1. HAMIDA BANA	4,396,700	879,340
2. VERONICA OBARE	4,275,171	900,000
3. NJARAMBA WARUTUMO	2,649,452	407,608
4. ANNE NYANGAI	3,057,060	407,608
5. MARTHA MBURU	6,419,940	855,992

6. MARY BAGAJAH	3,044,015	529,394
7. JAMES AYONGA	2,482,434	551,652
8. RACHEL KHAVOSHI	2,371,072	321,270
9. SAMUEL MAMBO	4,103,137	482,722
10.LUCY WAMBUGU	3,441,061	529,394
11.SIMON MARINGA	7,657,317	875,122
12.MIKE KIBUE	4,262,252	549,968
13.MULWA NZINDA	2,929,488	488,248
14.MUREITHI JOSEPH	3,402,227	388,826
15.DORIS MBOTELA	6,645,408	949,344
16.MARGARET MUTAHI	8,429,694	864,584
17.JANE NYONYO	4,537,236	549,968
18.MARGARET OPONDO	4,755,555	613,620
19.HENRY OMBASO	5,008,491	1,112,998
20.MARGARET NJOROGE	2,580,200	412,832
21.EDWARD NGUCHUGA	3,168,378	704,084
22.WALLACE NDINGURI	6,335,000	724,000
23.ERIC MWANDACHA	5,081,125	883,674
24.GRACE NGAMAU	3,015,610	463,940
25.EUNICE JUMA	4,749,300	949,860
26.FRIDAH MIKALA	4,208,952	474,327
27.BEATRICE OKARA	9,678,690	1,061,834
28.FANNY CHWEYA	7,799,553	1,006,394
29.CATHERINE N. KAMAU	3,180,125	508,820
30.DAWSON MUTHIE	4,177,715	539,060

31.WILSON KHANIRI	3,162,926	744,218
32.OMARI JUMA	3,428,487	761,886
33.ROSEMARY OKOKO	3,015,610	463,940
34.BEATRICE SADAT	2,382,273	529,394
35.GRACE MBURIA	6,139,472	701,654
36.JOSEPH MACHARIA	2,107,620	351,270
37.EMMANUEL OTONDI	5,537,871	714,564
38.MARK MOSETI	6,474,544	809,318
39.AGNES NGIGE	2,337,119	370,046
40.DONESIO KIMARI	5,726,525	654,460
41.KENNEDY KAMUNDI	2,970,838	565,874
42.MICHAEL GAKERE	5,697,459	654,460
43.WILFRIDA OKUMU	4,537,236	549,969
44.PETER NJUEINI KABUE	2,405,299	370,046
45.MICHAEL NDIRANGU	4,234,762	604,966
46.TERESA MUCHIRA	5,293,452	604,966
47.JANE W. GITHITHA	2,371,072	351,270
48.BENARD MBITHI	4,654,759	689,594
49.GRACE MWITHIGA	1,411,695	313,710
50.PETER CHIRMA	1,446,796	445,168
51.JOHN N. KIAMA	4,386,438	974,764
52.PAUL KIPKUTO AGUI	2,746,449	610,322
53.ASUMPTA MWAMI	4,433,400	591,120
54.JULIUS KISUNA	8,997,030	999,670
55.MARK SIRMA	2,849,202	633,156

56.HENRY BABU	6,002,337	750,292
57.ROSE ACHILA	1,926,132	321,022
58.MERCELINE JUMA	6,311,235	721,284
59.JENNIFER MELI	2,220,276	370,046
60.ATHUMANI SALIM	5,413,484	656,180
61.JOHN G. KIGURU	3,392,242	448,368
62.GEORGE O OUMA	5,976,000	996,000
63.CLEMENT MWANGO	10,706,842	1,127,038
64.EMILY KANGETHE	1,931,985	351,270
65.LILIAN ALOGO	2,607,659	453,506
66.SUSAN KABUNGO	3,371,523	370,046
67.VERONICA MUBEA	4,980,533	538,436
68.CAROLINE MUTERO	3,134,375	501,500
69.JUSTINE MUKWA	4,323,244	557,838
70.ISAAC GITAU	2,220,276	370,046
71.CONSTANCE OSORO	5,215,770	613,620
72.MARIA ODHIAMBO	4,863,915	627,602
73.SHARISH OGUNDE	2,660,040	591,120
74.JAMES N. MWANZA	4,509,267	530,502
75.CAROLINE MSENGETI	808,486	321,282
76.ELIZABETH KIVUSYU	5,316,517	607,602
77.MORRIS OMUPANGO	2,563,302	488,248
78.ESTHER NJOROGE	2,751,354	407,608
79.DENNIS WANDERA	1,580,715	351,270
80.JAMES MBUTHIA	10,915,561	717,718

81.ESTHER MAINA	2,969,453	321,022
82.DANIEL KITUSA	2,867,856	370,046
83.GEORGE KATHILA	3,358,212	559,702
84.FLORENCE MUTUNGA	4,674,728	549,968
85.JACOB MUNG'ATHIA	3,985,884	549,968
86.HAMISI MASUUD	2,220,276	370,046
87.BENEDICT TARUS	2,834,592	354,324
88.ROBERT KARIUKI	5,642,136	627,602
89.BENARD KOTONYA	2,139,155	1,283,733
90.JOYCE WESONGA	5,172,300	591,120
91.EDDAH MWALUGHA	4,393,214	627,602
92.FLORENCE ANGAINE	4,006,513	447,168
93.MARTHA MASILA	2,489,935	321,282
94.MICHAEL NGALA	5,120,239	758,554
95.PATRICK OCHIENG	583,239	388,826
96.WILLIAM KIBIAS	4,447,245	539,060
97.AISHA NDOPE	6,540,208	817,526
98.JOSEPH CHEPTUMO	3,428,540	721,798
99.JOHB TALLAM	5,770,792	720,724
100.DAVID KAMUKU	6,014,527	325,115
101.NANCY DALLA	3,772,030	520,280
102.ANNE NARAGWI	5,690,448	632,272
103.JACINTA MAINGI	3,773,560	431,264