



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO.315 OF 2010**

**KENYA UNION OF JOURNALISTS AND ALLIED WORKERS ..... CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The issues in dispute is the unlawful/wrongful termination of William Onywera Osago the Grievant and victimisation and the violation of the CBA.
2. The claim herein was filed on 25<sup>th</sup> March 2010. The defence was filed on 17<sup>th</sup> July 2011. The Grievant was heard on his evidence on 15<sup>th</sup> October 2012. Defence hearing was reserved for 5<sup>th</sup> November 2015 when the Respondent took the option of not calling any witness and parties agreed to file written submissions. Mention was on 15<sup>th</sup> December 2015 on which day only the Claimant had filed their submissions, the Respondent was absent and had not filed any written submissions.

**The claim**

3. The claim is that the Claimant signed a Recognition agreement with the Respondent on 18<sup>th</sup> February 1972 under the name of East African Newspapers (Nation Series). Since, several Collective Bargaining Agreements have been signed the last in this regard being registered on 21<sup>st</sup> August 2008 as RCA No.183 of 2008.

The Grievant was employed on 2<sup>nd</sup> April 1984 as a translator/reporter in the editorial department of the Respondent with a basic salary of Kshs.4, 212.00 per month and without a house allowance. For 24 years he served until 11<sup>th</sup> June 2008 when he was terminated on account of early retirement. The Grievant was paid;

- a. Salary due 30<sup>th</sup> June 2008;
- b. Salary for 7 days accrued leave;
- c. 3 months' salary in lieu of notice; and
- d. One month basic pay for each completed year of service.

4. At the time of termination, the Grievant was earning Kshs.187, 848.00. The grievants being aggrieved reported tot eh Claimant and a dispute was reported to the Minister. The claim is that the Grievant was unfairly treated when he was terminated and replaced with a new employee and was also victimised when he went public about his HIV/AIDS status. The Respondent violated the CBA between the parties and also violated the provisions of section 31(b) of the HIV/AIDS Prevention and Control Act and section

46(g) of the Employment Act, 2007.

5. The claim is for judgement against the Respondent for;

- a. *An order restraining and injunction the Respondent from violating the provisions of a duly registered CBA. The recognition agreement and also the constitution of the Republic of Kenya and the ILO conventions as to the rights to join a trade union.*
- b. *An order to reinstate the grievants without loss of benefits or in the alternative the Grievant will be seeking*
- c. *Damages for wrongful termination up to maximum of 12 months' salary*
- d. *Payment of anniversary (360/= per month) and salary increments for the years 2006 10%, 2007 10% and 2008 11%*
- e. *Payment of 7 years' salary for the remaining years to retirement age of 60 years*
- f. *Payment of 20 days unpaid leave*
- g. *Payment of leave travelling allowance of 2005 Kshs.4,500.00, 2006 Kshs.5,808.00, 2007 Kshs.5,808.00 and 2008 Kshs.6,447.00.*
- h. *Payment for anniversary increment for 4 the 2006, 2007 and 2008 at 360/= per month*
- i. *Payment of 30 days salary for every completed year of service by way of gratuity.*
- j. *Any other award that seems fit to ends of natural justice be awarded by the Court to the grievant.*
- k. *Costs of the instant suit with interest I so pray.*

6. In evidence, the Claimant called the Grievant who testified that upon his employment by the Respondent he served diligently but was terminated on 29<sup>th</sup> June 2008 without any reasonable cause. That he reported to work on 29<sup>th</sup> June 2008 and was ambushed with information that he should not report to work the following day. Later and while at home he got a letter indicating that there was a restructuring but the grievants had not been aware of such a matter until then. On 8<sup>th</sup> July 2008 he informed the Claimant who made effort to discuss with the Respondent but they claimed that the Grievant was not unionised and the CBA did not apply to him and that the Respondent would not reinstate the claimant.

7. The Grievant also set out his claim for damages, compensation and salary increments and 7 years pay for years lost before retirement. That he had 20 days of leave due; leave travel allowance; 30 days gratuity for each year worked and costs.

8. The Grievant also testified that in 1996 he was unwell and had to seek treatment using the Respondent insurance cover and he discovered that he was HIV positive. That 3 weeks before termination, his supervisor Mr Odindo asked him why he had accumulated so many leave days to 90 but the Grievant had made effort to take leave but the Chief Executive officer (CEO) had indicated that there was shortage of staff and he could not take leave. The supervisor then insisted that the grievants was a burden to the Respondent with regard to the medical benefits and the time he took off sick. That he felt targeted due to his medical status.

9. In cross-examination, the Grievant testified that he was ambushed with termination and had not been aware of any retrenchment going on until he got his letter of termination stating so. When his supervisor Mr Odindo called him to his office, he did mention that the Respondent would be offering him early retirement but the Grievant did not take this comment seriously then. Since 1996 the Respondent was aware of the Grievant being HIV positive but remained employed for 12 years without this being an issue. Through the union, the Grievant agreed to early retirement and was paid Kshs.1, 629,384.45 as terminal benefits in October 2008. He got a pension payment certificate for Kshs.1, 776,115.00. There was gratuity payment for 30 days for each year worked; 7 days accrued leave; salary for June 2008 and 3 months' notice pay.

10. The Grievant also testified in cross-examination that he never made a demand letter to the Respondent after his termination as he was sick due to his HIV status, he was traumatised after termination and thus claim for salaries due for 7 years he should have been at work save for the unfair termination.

**Defence**

11. In defence, the Respondent in the statement stated that the letter referred by the Claimant dated 28<sup>th</sup> August 2009 does not reflect deliberations made with regard to a complaint against the Respondent on wrongful early retirement of the grievant. On 16<sup>th</sup> September 2009 the Respondent wrote to the Grievant challenging the complaint as not being correct, the parties held a meeting but failed to agree. Upon the dispute being reported to the Minister, there was no settlement.

12. The defence is also that the Respondent was always supportive of the Grievant since he went public about his HIV status and did write to the Respondent about this fact in a letter dated 1<sup>st</sup> July 2008. The Grievant signed the letter of offer for early retirement and all benefits were paid and acknowledged.

13. The Respondent also submitted that due to re-organisation of its workforce, there were lengthy discussions with Sharrif Swaleh and the Grievant and was offered early retirement. There was a formal offer through letter dated 11<sup>th</sup> June 2008, the Grievant considered the offer and on 1<sup>st</sup> July 2008 he wrote to the Respondent accepting the offer. He also asked to be released from employment. During the discussions, the grievants' HIV status was not an issue and this only arose on 1<sup>st</sup> July 2008 when the Grievant wrote to the Respondent appreciating support given. This can therefore not be a ground used against him for retirement and such a claim must fail.

14. The defence is also that all terminal dues were paid in full; 3 months' notice pay on his last salary of Kshs.187,843.00 all at Kshs.563,529.00; 7 days leave at Kshs.43,830.00; severance pay at 30 days for 24 years worked all at Kshs.3,827,692.75. All the total dues were Kshs.4, 435,051.75. A cheque was issued less the tax due; an advance payment; loan with Sacco and balance all amounting to Kshs.1, 629,384.45. Pension was also paid and nothing is due. The claim herein is an abuse of the Court process and should be dismissed.

15. The Respondent did not call any evidence.

### **Submissions**

16. In submissions, the Claimant stated that the Grievant should be reinstated and in the alternative damages for unfair termination. The Claimant is also seeking for salary increments that the Grievant was never granted under the CBA for 2006 of 10%, 2007 at 10% and 2008 at 11%, all being Kshs.225, 417.60. The Claimant is also seeking for his salaries due for 7 years due until retirement. There was also leave travelling allowance due for 2005, 2006, 2007 and 2008 pursuant to the CBA. Gratuity is due at 30 days for every completed year for 24 years all at Kshs.5, 012,911.20.

17. There were no written submissions from the respondent.

### **Determination**

18. The issues in dispute herein is the unlawful termination of the Grievant on the grounds of early retirement and that there was a violation of the CBA. The basis of the claim is that on 29<sup>th</sup> June 2008 the Claimant was ambushed with termination when he was told not to report for work the next day. There is also a claim that the Grievant was victimised due to his HIV status.

19. Despite the Respondent not calling any evidence in defence, the claimant's case is clear to the extent that he has the letter dated 11<sup>th</sup> June 2008 on early retirement. This letter is issued by the Respondent stating;

*RE: EARLY RETIRMENT*

*Following our discussion regarding the on-going re-organisation within the group, this is to advice you that you are one of the employees affected by the changes. As explained during the discussion on the subject, the company has worked out your terminal dues and you will be paid as follows less any money owed to the company.*

20. Thus from the above communication, there is the case of early retirement based on the reason of re-organisation. Early retirement is one form of termination of employment and in this case, based on the notice issued to the grievant, he acknowledged at the end as follows;

*I William Onnywera Osago of P.O. Box 49010 Nairobi have read and understood the terms and conditions stated above and agree to discharge my employment. Signed [William Onnywera] date: 08-07-2008.*

21. By this act of acceptance for discharge, the Grievant on 8<sup>th</sup> July 2008 accepted the terms for his early retirement. On 1<sup>st</sup> July 2008, the Grievant wrote to the Respondent Human Resource Director as follows;

*After searching my soul and reconciling with myself to the sudden chance of my stay at the Nation Media Group [NMG] for the last three weeks, I agree to a proposal by your office that I take an early retirement. Consequently I humbly request you to release me from today July 1, 2008.*

22. However, the Respondent attaches the reason for the early retirement as being that of re-organisation. Such re-organisation is a matter addressed in law under section 40 of the Employment Act and which re-organisation is defined as form of redundancy where due to business need to restructure a business, some positions are abolished. Thus redundancy is defined under section 2 of the Act as;

*“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;*

23. Where therefore such a reason for termination is cited and an employee challenges the same, the burden placed upon the employer pursuant to the provisions of section 43 and 47 of the Employment Act is to prove that indeed there was a business need to re-organise and hence the termination of the employment of the grievant. Indeed under section 40(1)(a), an employer is required to give **the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination.** When called upon to give the reasons for, and the extent of, it is not simply sufficient to show evidence of re-organization. The Court must investigate all facts and circumstances of the matter. See **AAWU Vs. Kenya Airways Limited, Cause No. 1616 of 2013.**

24. The Respondent opted not to call any evidence. Such had it been given would have explained the reasons for, and the extent of the re-organisation that affected the employment of the grievant. Such is denied of this court. What is apparent is that due to the cited re-organisation that is not justified, the Grievant lost employment and has challenged the same as unfair. Without discharging the burden required, there being no reasons for, and the extent of the need to terminate the grievants employment on a matter regulated in law, such becomes unfair under the provisions of section 45 of the Employment Act. I make reference to the case of **Jane Khalachi versus Oxford University Press E.A. Ltd [2012] eKLR** where the Court held that a redundancy cannot affect only one employee. The process requirements for the same must find justification where the employer finds the need for and undertakes the process set out in law under section 40 of the Employment Act so as to give the requisite notices to affected employees.

25. On the claim that the Grievant was victimised due to his HIV status, I find that the evidence on record is that the Grievant knew of his HIV status in 1996 and remained in the employment of the Respondent for 12 years. When his supervisor called him in his office 3 weeks before termination, the discussion was about early retirement, his taking time off but there was no evidence that his HIV status was an issue. The Grievant did not go into this conversation or set out if he perceived the conversation with his supervisor as inferring that he was being retired early due to his HIV status.

26. A claim of victimisation on the grounds of HIV status is specifically outlawed under section 5 and 47 of the Employment Act. Such cannot be used to terminate the employment of an employee as such would be discrimination against the employee and an unfair labour practice. However, an employer should not just cite the application of their health status or as in this case HIV status and leave it at that. There is

need to dwell on the subject and set out clearly how such a matter became subject of concern and why the employee felt, perceived or was concerned that the treatment given or received was to set them aside due to the HIV status. This Court recognises the serious violation of employees' rights particularly due to HIV status, but with that recognition it is imperative that such a matter should not be glossed over or treated casually and should be specifically gone into to enable the Court make a firm finding based on the evidence before it.

27. In this case, though set out in the claim, the Grievant did not set out his case to this end as to how he was victimised due to his HIV status and equally the Claimant failed to offer any submissions in this regard. Even though the Respondent did not call any evidence, what the Court is left with is that once he Claimant was diagnosed with HIV in 1996, he continued in the employment of the Respondent until 2008 and upon cross-examination he affirmed that this was not a matter discussed with his supervisor at the meeting where his early retirement was discussed.

28. I therefore find no evidence upon which to make a finding on victimisation of the Grievant on the grounds of his HIV status.

### **Remedies**

29. It is set out that upon termination, the Grievant was paid dues amounting to Kshs.1, 629,384.45. Such included;

- a. 3 months' notice pay – Kshs.563,529.00;
- b. 7 days leave – Kshs.43,830.03;
- c. Severance pay for 24 years – Kshs.3,827,692.75

**Total – Kshs.4, 435,051.75**

Less – Kshs.2, 805,667.35 [being for tax, advance pay and Sacco loan].

30. Such payments as set out above were acknowledged. As set out above, where there is a redundancy that results in termination, the statutory dues payable are notice pay; severance pay; and any leave days due and salaries. In this case the Grievant salary at the time of termination was Kshs.187, 843.00 per month. Being unionised, the CBA in force at the time applied to the negotiated dues at clause 18. Such required a 30 days' notice payment; 15 days payment for each year served as severance pay. The fact of early retirement having been conceded, the payments due for redundancy and upon the finding that the same was unfair, and the CBA terms I find to be lower than the Grievant was paid. There was a 3 months' notice pay unlike the 30 days' pay under the CBA while severance pay was paid at 30 days over and above the legal minimum and what the CBA provided for at 15 days for each year served. To therefore award further in this regard would be to penalise the Respondent for a matter they have gone beyond the legal minimum. I find the Grievant was adequately compensated and therefore no other award herein.

31. The Claimant is seeking payment of anniversary and salary increments for 5 years at Kshs.360.00. though the CBA at clause 2 sets out an anniversary payment of kshs.360.00 the context of it is not clearly set out in relation to the claim before court. the Claimant should have outlined this claim for the Court to fully appreciate the context and the intention of the parties to the CBA. This shall not be awarded.

32. There is a claim 7 years remaining to retirement. As set out above, the Grievant conceded to the retirement, there was a payment for severance pay over and above the legal minimum and over the CBA negotiated rate. This is declined.

33. On the leave due at 20 days, this was not particularly challenged by the Respondent and shall be awarded. A sum of Kshs.125, 232.00 is awarded.

Travel allowance during leave was negotiated for unionised employees. There is no evidence of these payments in the final dues to the grievant. He is awarded Kshs.22, 863.00.

34. The claim for 30 days service pay is already paid in the final dues acknowledged by the claimant. This is declined.

**As set out above, judgement is entered for the Claimant for KShs.125, 232.00 for leave due; kshs.22, 863.00 travel allowances; and each party shall bear their own costs.**

**Orders accordingly.**

**Delivered in open court at Nairobi and dated this 20<sup>th</sup> day of January 2016.**

**M. Mbaru**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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