



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 80 OF 2013**

**PATRICK OMUTIA.....CLAIMANT**

**VERSUS**

**TELKOM KENYA LIMITED.....RESPONDENT**

**Mr Onido for the Claimant**

**Mrs Baabu for Respondent**

**JUDGEMENT**

1. The Claimant relies on the amended plaint dated 17<sup>th</sup> December 2007 and filed on 18<sup>th</sup> December 2007; bundles of documents filed in court on 16<sup>th</sup> March 2011 and witness statement dated 16<sup>th</sup> February 2010 and filed on the same day.

2. The Claimant seeks;

- a. A declaration that the Claimant was entitled to early retirement and the package thereof.
- b. A declaration that the Claimant is entitled to terminal dues set out under paragraph 16 of the Plaint.
- c. General damages.
- d. Special damages in the sum of Kshs 5,676,549.50
- e. Interest on (a) (b) and (c) above.

3. The Respondent filed a statement of defence dated 16<sup>th</sup> February 2010 and filed on the same day and witness statement of Caroline Ndindi together with a bundle of documents filed on 16<sup>th</sup> September 2011.

4. The Claimant gave oral evidence and was intensively cross examined by counsel for the Respondent. The Respondent did not call any witness. Both parties filed written submissions on 23<sup>rd</sup> October 2015 and 4<sup>th</sup> November 2015 respectively.

**Facts of the Case**

5. The Claimant was vide a letter dated 16<sup>th</sup> April, 2004 appointed to the post of Chief in the company in salary scale 2. The appointment was a deployment on terms and conditions of service enjoyed by the claimant in his former position as Director of KCCT. The Claimant was to earn a consolidated package of Kshs 293,416 per month comprising of basic salary, house allowance, entertainment allowance, Gardener allowance and Newspaper refund.

6. The Claimant was to contribute to the pension at 7.5% of the basic salary which was Kshs 103,235 per month. Any financial liabilities owed by the Claimant to KCCT were to be deducted from the monthly salary and remitted directly to the institution.

7. The letter of deployment was amended by another letter dated 23<sup>rd</sup> April 2014 by reducing the consolidated package from 193,416.00 to 180,416.00 per month. The rest of the terms remained the same. The amendments were reflected in a document dated 4<sup>th</sup> May 2004.

8. The Claimant met the Managing director of the Respondent on 6<sup>th</sup> and 7<sup>th</sup> July 2004 in which meeting the possibility of early retirement of the Claimant was discussed. The Claimant followed the meetings with a letter dated 7<sup>th</sup> July 2004 to the Managing Director Eng. J. N. Waweru titled 'early retirement'. In the letter the Claimant wrote interalia;

*"It is with deep regret that I am now formally requesting you to consider my early retirement from service under any scheme including that applied to certain General Managers last year"*

9. At the time the Claimant was on annual leave until 19<sup>th</sup> October 2004. The claimant had served the company for 20 years from 18<sup>th</sup> December 1984 and paid gratitude to all the institutions he had served during the period. By a letter dated 27<sup>th</sup> November 2004, Eng J. N. Waweru, Managing Director replied to the request for early retirement dated 7<sup>th</sup> July 2004 in which he declined the early retirement by the Claimant. The Managing Director noted that the General Managers retired under very different circumstances not applicable to the Claimant. The Claimant was asked to return to work on 21<sup>st</sup> October 2004 upon expiry of his leave. The claimant was given the option to resign from the service of the company provided he showed how to clear the outstanding liability of Kshs 6,233.690.15 owed to KCCT.

10. The Claimant responded to the letter vide a letter dated 1<sup>st</sup> December 2004, in which he asked the Managing director to reconsider his application for early retirement. The Managing Director responded on 11<sup>th</sup> Feb 2005 and informed the Claimant that the request was denied but the Claimant may go ahead and resign provided he paid his liabilities.

11. It is the Claimant's case that upon redeployment to the respondent as Chief of company on 18<sup>th</sup> February 2004, the Managing Director, Eng Waweru did not allow him to serve but he sent the Claimant to spend a further two weeks at the KCCT to handover and orient his successor which he dutifully complied. However on reporting to the company on 1<sup>st</sup> March 2004, the Managing Director compelled the Claimant to take eighty (80) days leave without first assigning the Claimant any office or responsibilities. The claimant was not paid monthly remuneration for March 2004.

12. The Claimant received the letter appointing him to the position of Chief in the company on salary scale 2-1 which was below his previous scale of 2.0 in the position as KCCT's Director.

13. The position of Chief in the company given to him did not exist in the Respondent's organizational structure or at all and the purported posting was without adequate job description or defined duty station.

14. The Respondent did not assign the Claimant any office to occupy or any place of work anywhere within the Respondent's premises in the Republic of Kenya or elsewhere. The Claimant was not issued with a staff identity card which was a standard and normal request which the Claimant reasonably expected to be granted but was not. The Claimant was compelled to take 80 days leave between March 2004 and June 2004 and a further 80 days leave from July 2004 to October 2004. No duties were

assigned to the Claimant in breach of the letter of redeployment dated 16<sup>th</sup> April 2004.

15. The amendment of the terms and conditions of service by the letter dated 4<sup>th</sup> May 2004, to the Claimant's disadvantage was a further violation of the contract of service between the Claimant and the Respondent. Benefits such as medical cover, newspaper subscription to professional bodies and tuition advance for ongoing studies were suspended by the Respondent. This was a demotion without any disciplinary process and was a reduction from the prior position of Director KCCT.

16. The Claimant states that the culmination of these frustrating steps by the Respondent amounted to constructive dismissal. It had become impossible for the Claimant to work. The only logical and viable option in the circumstances was for the Claimant to seek early retirement from the Respondent's employment in terms of the existing policy as stipulated in the proposal put forward by the Permanent Secretary and Head of the Civil Service and Secretary to the Cabinet, Amb. Francis Muthaura in his letter dated 23<sup>rd</sup> October 2007, the Claimant being equivalent to the rank of 'Manager'. In terms of the proposal, employees who opted to retire before attaining 50 years would receive;

- a. Golden handshake of Kshs 150,000 per retrenchee
- b. Payment of 2 months basic salary in lieu of notice
- c. Severance payment of two and half months basic salary for every year worked
- d. Transport allowance of Kshs 20,000.

17. The letter dated 23<sup>rd</sup> October 2003 was produced at page 47-48 of the Claimant's bundle.

18. The claimant expected a payment of Kshs 5,676,549.50 if retired in these terms as set out under paragraph 14 of the memorandum of claim and in the witness statement by the Claimant. As stated earlier, Eng. Waweru declined the early retirement and asked the Claimant to resign. Eng Waweru was replaced by Mr Sammy Kirui who also declined the request by the claimant for early retirement. The Claimant though ceased to work for the respondent from 4<sup>th</sup> November 2004, the respondent continued to pay the Claimant's salary for the month of November 2004 to March 2005.

19. The Claimant however, returned the money. The Claimant has since reduced the staff loan in the sum of Kshs 6,049,329.00 to 4,495,754.26 which is less than the claim of Kshs 5,676,549.50 due from the defendant. The Claimant seeks the outstanding loan from the Claimant to be off set against the judgement sum due from the Respondent. The Claimant obtained alternative employment with Nairobi city Water and Sewarage Company on 5<sup>th</sup> August 2004 in the position of Director of financial services of the Company. As at the time of filing suit the Claimant was still in the employment of the Nairobi City Water & Sewerage Company.

20. The Claimant seeks:-

- a. A declaration that he was entitled to early retirement with effect from 4<sup>th</sup> January 2004.
- b. A declaration that he was entitled to terminal dues under the package pleaded in paragraph 15 of the statement.
- c. Grant the Claimant Kshs 5,676,549.80 as pleaded.
- d. Award the Claimant general damages for malicious breach and simple breach of employment contract.
- e. Costs of the suit and interest on the monetary awards.

## **Defence**

21. In the statement of defence and witness statement of Caroline W. Ndindi the legal advisor of the Telkom Kenya Ltd, the Respondent states that the Claimant was indeed deployed to the post of Chief Officer at a salary scale 2.1 on April 2004 at a consolidated salary of Kshs 209,176.

22. The Respondent emphasizes that the position the Claimant was deployed to was Chief Officer and not "Chief in the Company". That the letter dated 16<sup>th</sup> April 2004 clearly stated his duties and work station would be communicated as soon as he reported on duty. That the Claimant never reported hence he was not given duties and an office to work from. The Respondent denies that the Claimant was frustrated as alleged or at all. The Respondent further states that the Claimant was not entitled to early retirement. That the early retirement approved by the office of the President was in relation to specific managers and the claimant was not one of them a fact he was informed on 27<sup>th</sup> September 2004.

23. The Claimant had over 160 unutilized leave days running upto 19<sup>th</sup> October 2004. He took leave and resigned while still on leave. He never reported back to work. He thus vacated office and he was alerted of the same.

24. The Board of Directors accepted the claimant's resignation and communicated to him that he was expected to give three months' notice or pay one month's salary in lieu of notice. That the delay in stopping his salary was inadvertent and the amount would be recovered from his terminal dues. That in the year 2000 the claimant was not the employee of the Respondent.

## **Issues for determination**

25. The court has identified the following issues for determination:

- i. Whether the Claimant was entitled to the early retirement and the attendant package.
- ii. Whether the Claimant was constructively dismissed or he voluntarily resigned from the employment of the Respondent.
- iii. Whether the Claimant is entitled to the special and general damages sought

## **Issue i & ii**

26. The court will consider issues i & ii together as the same are related in that the Claimant sought early retirement because he felt he had been constructively dismissed by the Respondent in that;

- i. He was deployed from KCCT where he worked as Director in job scale 2.0 to a non-existent position of 'chief in the company'
- ii. That he was offered a salary in job scale 2.1. which was lower than the previous position.
- iii. That the alleged position had no defined job description and he was infact not given any job description.
- iv. That he was not allocated any office or any job station.
- v. That he was compelled to take 80 days leave and when he returned he was asked to take a further 80 days leave
- vi. That he requested to be retired early in terms of a scheme proposed by the office of the president for early retirement of managers. The request was declined by the Respondent.

vii. That in frustration he tendered his resignation and moved to a new employer Nairobi Water and Sewerage Company.

viii. That his benefits had been withdrawn unlawfully which included training provision, professional membership subscription, daily newspapers and medial reimbursement to spouse while he was on leave inspite submitting medical bills as required.

27. The Managing Director constantly reminded him that the company was over bloated and there was a dire need for massive retrenchment. Indeed a request was sent to GOK for approval of massive retrenchment. This led to the proposal by the office of the president for voluntary exit for managers below 50 years of age.

28. The proposal by the office of the President read partly thus;

*“The proposals have now been considered in accordance with this office’s circular No OP13/19A of 7<sup>th</sup> November 1995 and 23<sup>rd</sup> June 2000. In this regard the early retirement requests by the 5 managers of Telkom Kenya Ltd is hereby approved. The retirement should be administered under the following arrangement-*

i. Category A -3 managers over 50 years old:-

*The following 3 managers should retire under the 50 year rule:-*

*They may accordingly be allowed to draw pension benefits in accordance with the corporation’s pension scheme rules and any other terminal benefits due from the corporation.*

ii. Category B – 2 managers below 50 years old.

*The following 2 managers may be paid in accordance with the following authorized retrenchment safety net package-*

- *Golden handshake of Kshs 150,000 per retrenchee*
- *Payment of 2 months basic salary in lieu of notice*
- *Severance payment of 2.5 months basic salary for every year worked*
- *Transport allowance of Kshs 20,000.*

*The above retrenchment safety net package should be the bench mark for paying employees retrenched in future. (emphasis mine).*

*Kindly communicate this decision to the Management of Telkom Kenya Limited”*

The letter was Signed by Amb. Francis Muthaura MBS

29. The Claimant had served 19 years 10 months and 17 days from December 1984 to November 2004 and was below age of 50. It is on this basis he claims Kshs 5,507,249.50 calculated at:

i. 150,000 Golden handshake

ii. Payment of 2 months salary in lieu of notice (2 x 103,235) 206,470

iii. Severance payment of 2.5 basic salary for every year worked (2.5 x 19.88 x 103,235) 5,130,779.50

iv. Transport allowance 20,000

30. The Claimant at the time owed Telkom Kshs 5,673,45.80. The Claimant requested that the package be used to defray the outstanding liabilities and undertook to settle any excess thereof after approval of the early retirement request.

31. A careful evaluation of the evidence presented to court by both parties has led to the following conclusion of facts;

i. The Claimant was deployed to the Respondent company and was given a non-existent position of “Chief of the Company” without a job description and at a lower remuneration to that he earned in his previous position of Director KCC.

ii. The Claimant was not allocated any office or any work station

iii. The claimant was not assigned any duties but was instructed to take 80 days leave and upon return was asked to take a further 80 days leave.

iv. The claimant applied in terms of the proposal by the office of the President aforesaid to be retired early in the category of employees below 50 years of age.

v. The proposal by the office of the President expressly states that it would be applicable to all future retrenchments in future.

vi. The employment contract between the claimant and the respondent was repudiated by the unlawful conduct by the Managing Director of the Respondent Eng. Waweru which conduct included, posting to a non-existent position; failure to allocate the claimant any office; failure to give the claimant any job description, failure to allocate the claimant any duties; placing the claimant on prolonged compulsory leave the claimant having not applied for the same and reducing the grade and remuneration of the claimant including other benefits stated herein before arbitrarily.

32. The Respondent had by its own conduct terminated the employment of the claimant by the time he tendered his resignation and moved on to another employer. In the book, **a practical guide to labour law 5<sup>th</sup> Edition. JV duplessis, MA Fouche and Mw Van Wyk** had this to say;

*“Constructive dismissal was in terms of the decisions of the old Industrial Court, an unfair Labour practice. It is now included in the definition of ‘dismissal’. Rightly so, because everyone would agree that the resignation of an employee due to unreasonable and excessive pressure by his employer is not a voluntary resignation or termination of services, but a situation akin to a dismissal”.*

33. **See WL Ochse Webb & pretorious (pty) Ltd V Vermeuleu [1997] 2 BLLR 124 (LAC); Vander Piet V Leisurennet Ltd t/a Health and Racquet Club [1998] 5BLLR 471 (LAI).**

34. Accordingly the Claimant has proved on a balance of probability that he was unlawfully and unfairly constructively dismissed by the Respondent and was entitled to the exit package duly approved by the office of the President for officers leaving Telkom (K) Ltd at the time for operational purposes as pleaded in the statement of claim and set out in this judgement herein before.

35. **The Court awards the Claimant Kshs 5,507,249.50 as set out under paragraph 15 of the plaint and in the paragraph 14 (i) – (iv) of the witness statement of the claimant. The Court offsets a sum of 4,495,754.26 owed by the claimant as a staff loan as at 16<sup>th</sup> March 2011, when he filed his witness statement against the judgement sum aforesaid.**

**Issue ii**

36. Secondly the claimant has proved on a balance of probability that he was entitled to and was not paid

i. Kshs 8,500 annual professional membership

ii. Kshs 120,000 reimbursement fees incurred in furtherance of education

iii. Kshs 16,800 refund of newspapers not given to the claimant for 160 days he was entitled to the same and privately incurred the expense and;

iv. Kshs 24,000 reimbursement for medical expenses by the Claimant's spouse

v. Total 61,300

**Total award to Claimant is Kshs 5,676,549.50.**

37. In view of the fact that the Claimant had requested to be separated from the Respondent vide an early retirement package approved by the office of the President due to the intolerable conditions meted on him by the Managing Director of the Respondent and since the court has granted his request that was unfairly denied him at the time, the court will not grant him general damages since the suffering he endured was mitigated by his immediate employment by another agency of the Government of Kenya.

38. An award of general damages would result in unjust enrichment in the circumstances of the case. This does not however derogate from the finding by the court that the conduct by the Managing Director of the Respondent was unlawful and unfair and amounted to unfair labour practice.

39. Thirdly the Claimant is entitled to payment of interest at court rates from the date of the constructive dismissal until payment in full to defray any interest that may have accrued on his unpaid staff loan. This to be treated as part of the set off.

40. The Claimant is entitled and is awarded costs of the suit in the High court where the matter commenced and in this court.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of March 2016.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**