



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 550 OF 2013

JAMES NYANGIYE & OTHERS CLAIMANTS

VERSUS

THE HON. ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA RESPONDENT

AND

PETER BAIYE GICHOHI & OTHERS CLAIMANTS

VERSUS

THE HON. ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA RESPONDENT

JUDGMENT

1. Nakuru HCC Suit No. 395 of 2001 was consolidated with Nairobi 1649 of 2001. The two matters were heard and determined by R.N. Nambuye J. (as she then was).

2. The learned Judge rendered a judgment on liability but did not determine the remedial/Quantum payable to the plaintiffs in terms of remedial Nairobi 1649 of 2001. The two matters were heard and determined by R.N. Nambuye J. on her judgment.

3. The consolidated matter was transferred to the Industrial Court for determination of remedial/Quantum.

4. Agreement by the Parties

The parties agreed;

(i) That the assessment of remedial/Quantum was based on paragraphs 4, 6, 12, 16 and 17 of the Judgment of Nambuye J. at p.44 and 45 thereof.

(ii) Claimants to call two witnesses to lead evidence on money that ought to have been paid to each claimant in respect of the budget allocation for the Training and transport of the claimants with a view to

have the court apportion a share to each of the claimants.

(iii) Evidence be led on the amount of Quantum that ought to have been paid, it being common cause that all claimants were paid Kshs.40,000.00 each on a Golden Handshake.

(iv) Evidence led on the claim for aggravated damage based on the unlawful and unfair treatment of the claimants by the Respondent.

(v) The parties to file a full list/matrix of the claimants indicating the particulars of employment of each claimant and the exit package already paid to them.

5. **Proceedings on Quantum**

The claimants relied on the testimony of CW1, James Mwangi. He testified on all the agreed aspects of the judgment of Nambuye J.

6. The Respondent called RW1, Henry Wafula Wesioma from the Ministry of Devolution and Planning who testified on the issue of training planned and delivered to the willing claimants prior to their severance with the employer and the transport and accommodation money available to each participant for the purpose; e.g., RW2, Eliud Mwamo, Assistant Director in the Directorate of Public Service Management (DPM), testified on the various package payable and what was actually paid to the claimants.

She testified that 217 claimants had retired under the Voluntary Early Retirement (VER) in the year 2000.

7. That these are the only employees covered by the judgment of the court and the list marked exhibit 5.

8. He distinguished this category from employees attested by the retrenchment between 1993 to 1999.

9. The witness produced exhibit 6, covering 106 claimants who were neither covered by the Voluntary Early Retirement Scheme of 2000 nor the retrenchment list covering 1993 to 1999. It was her testimony that these must have retired normally.

10. The witness testified that the claimants affected by the Voluntary Early Retirement were paid an enhanced package which was way above the statutory minimum for retrenchment as provided by the then Employment Act, Section 40A.

11. For example, CW1, James Mwangi, claimant No. 294, earned a salary of Ksh.6,015.00. He was paid Ksh.12,030.00 in lieu of notice representing two (2) months salary; Ksh.40,000.00 as Golden Handshake and since he was not permanent and pensionable, he was paid Ksh.175,438.00, severance pay representing two and a half (2 1/2) months salary.

12. The witness refuted the evidence by CW1 that Parliament had made a provision of Ksh.240,000.00 for Golden Handshake for each claimant.

13. Section 40A only provided for one month Notice or payment of one month's salary in lieu thereof, and 15 days salary for each completed year of service on severance pay.

14. The witness testified that the budget of Kshs.240,000.00 represented an estimate of the total expense available to each retiree including training fees; transport to and from the training and accommodation where applicable.

15. That the figure was only a budgetary estimate and was not a package payable to the retirees.

16. That the portion of the money allocated for training, transport and accommodation was spent on those

who attended the training and those who declined to attend cannot now claim to be paid in lieu of training, transport and accommodation, as this is not provided for in government code of regulations and such payment would be contrary to the law.

17. Indeed, this was a privilege accorded to the retirees in recognition of the service given to the government to help them to absorb the shock of early retirement and spent the retirement package prudently.

18. Provision for payment of transport to go home under the Code of Regulations was also a privilege payable in respect of deserving cases. This is not provided for under the Employment Act. The generous package given to the claimants had taken care of this aspect and no further payment is available to the claimants in this respect. In any event, transport to go home upon termination of service was claimable within 2 months of cessation of duty. The claimants did not make any claim for reimbursement in respect thereto.

19. The witness testified that non-pensionable retirees were paid severance pay. Those who contributed to the National Social Security Provident Fund (NSSF) and the Government contributed its portion of the monthly payment were pensionable and the due date was brought forward upon early retirement. They received lumpsum pension and would receive monthly payment upon attaining the retirement age of 55 years.

20. Some retirees who were otherwise permanent and pensionable but had for various reasons including patent errors of the employer, are entitled to payment of pension upon receipt of confirmation letters. The witness said that these are errors of omission that may be rectified even now. An example was CW1, Mr. Mwangi and others in similar category.

21. The witness said that, according to their analysis, there are 5,600 claimants though the actual number of claimants in this suit was 5,133. 278 were in another suit.

22. Regulation G381 provided for different kinds of retrenchment but the claimants were part of a specific programme under the International Monetary Fund (IMF) adjustment programme. Ksh.240,000.00 per retiree was a budgetary estimate and was not representative of a specific amount payable to each claimant.

23. CW1, insisted in his testimony that each claimant should be paid Ksh.240,000.00 Golden Handshake, be paid aggravated damages for mistreatment and unfair and discriminatory termination and also be paid the money not spent for the training, transport and accommodation.

24. RW2 was Mr. Shem Nyakuto, the Deputy Director Pensions at the National Treasury. He testified that the claimants comprised four categories namely;

- (i) Officers on probation leading to permanent terms
- (ii) Permanent but not pensionable officers
- (iii) Temporary and non-pensionable officers and
- (iv) Permanent and pensionable officers

25. **Category 1 – Probation**

These officers were placed on probation pending confirmation to permanent terms, but due to omissions or errors were not given letters of confirmation as at the time of Voluntary Early Retirement.

26. According to him, these ones may retire immediately upon confirmation. The retirement age was between 50 and 55 years then. They need not await to reach 50 years before they are formally retired and

start to earn pension. One must have worked for 10 years to be pensionable.

27. Category (iv) Permanent and Pensionable

To earn pension in this category, an officer must have worked for 10 years. This condition was waived for category (i) and (iv) under the Voluntary Early Retirement. They earned pension whether they had served 10 years or reached 50 years or not. They also got the retrenchment package in addition.

28. The witness filed a written statement on 26th February, 2014 with an annexure which shows a record of earnings by category (i) and (iv) aforesaid.

29. These earnings include the lumpsum amount paid and the monthly pension being received by the claimants. The monthly pension has been increasing since the time of retirement. E.g. Mr. Muthamia, employee No. 1979196852 got a lumpsum of Ksh.198,247.50 and monthly pension of Kshs.2,478.10

30. The monthly pension in 2005 increased to Kshs.35,737.20 per year. Currently the officer earns Ksh.53,748.00 per year. The officer has received a total of Kshs.741,547.90 since the date of retrenchment in the year 2000.

31. The monthly payment is payable to him till death and to the dependants for a further five (5) years (spouse and children below 21 years). If a child is in school and is above 21 years, this payment is made.

32. The witness concludes that no sum of money is owing to the claimants in category (i) and (iv) in terms of paragraph 6 of the judgment of the court on p.44.

33. Category (ii) Permanent but non pensionable

These are subordinate staff majority of whom were covered by NSSF. The employees and the employer contributed to the Fund. Upon attaining the age of 50 years, they were to be paid. Some were serving before 1965 when NSSF came into place for male officers and in 1967 for female officers.

34. Any of these officers who had served for 7 years, was paid NSSF dues, compassionate gratuity calculated at 1/12th of a month's pay for each completed month of service.

35. The officers who had worked for not less than 30 years and were not at the helm of Job Group 'B' or as the President may determine qualify for annual allowance for life from July, 2005. The allowance started at Ksh.2,000.00 per month and has been increasing every two(2) years.

36. Category (iii) Temporary officers on non-pensionable terms

These officers are not paid pension but receive full NSSF payment at age 50.

37. Are these categories owed any money?

The witness submitted that where the employees in category (ii) were retrenched before attaining age 50 then they were entitled to payment of NSSF dues but are not entitled any further payment in terms of paragraph 4 and 6 of the judgment of the court at p.44

38. The witness submitted that as per p.44 paragraph 3 retrenchment was done in accordance with the regulations applicable with regard to benefits payable and no further payments are due.

39. However, as in the case of CW1, Mr. James Mwangi, who says he was erroneously not confirmed into permanent position and therefore did not qualify for pension upon early retirement such case should be addressed by the Human Resource department.

40. This is in accordance with an advisory opinion by the Ministerial Committee filed on 25th September, 2013, to convert temporary employees to permanent stature e.g. CW1. These are errors that should be rectified.

41. However, it was not automatic that all temporary staff, revert to permanent status.

42. Paragraph 16 and 17 at p.45 of the Judgment

The witness testified that it is not advisable as recommended by the trial court to convert retrenchees to voluntary retirees as they would then be entitled to lesser benefits than they have otherwise been paid. Therefore nothing is payable in terms of paragraphs 16 and 17 of the Judgment of the court as it would be a reduction of the package already paid.

43. The witness clarified that probation only lasted for 2 years and an employee was presumed to be permanent on the 3rd year. Where errors occurred leading to employees not getting confirmation letters, that error should be rectified and the officer would henceforth be placed on pension with payment of arrears from the date they completed the two years.

44. Arrears were to be paid in lumpsum and the rest payable at monthly pension in terms of the applicable formula.

The Witness gave example of Mr. Joseph Karanja who had worked for 15 years and was 35 years at the time of early retirement. He was in the category of probation leading to permanent. He would not have qualified for pension at the time as he was below 50 years. However, the due date was brought forward. He qualified for payment of K£1,935.15 and would have qualified for un-reduced pension of K£1,935.15. He also got additional pension of 5/60th of his pensionable emoluments at K£425 making a total of (K£1,933.15 + 425 = 2,358.15). He got a lumpsum gratuity of K£11,793.15 equivalent to Ksh.235,875 lumpsum and monthly pension of Ksh.2,948.45 then.

This has today increased to Ksh.5,448 per month for life plus 5 years monthly payment to the dependants.

This formula was applicable to all officers in his category and in the list produced.

45. Submissions

The parties consented to file written submissions and a matrix showing all the payment particulars of each of the claimants in different categories and were duly filed.

46. Distribution of Training and Transport Allocation

The claimants have failed to show on a balance of probability that there is any outstanding amount of money available then or now for sharing between the trainees. They were entitled to a voluntary service to prepare themselves to face the world after the sudden and unplanned early retirement for reasons not of their own making.

47. From the totality of the evidence adduced, many claimants attended the early retirement training programme to prepare them for the new life. Many others also failed to attend the training for various reasons. It is evident that the Respondent mounted the programme as envisaged whether there was full attendance or not.

48. Paragraph 6 of the Judgment p.44

The Judgment at paragraph 6 reads;

“The assessment of the amount payable under 4 above will also include assessment of other underpaid

benefits payable under the approved retrenchment plan like the pensions, notice period, and there would have been golden handshake.” The court proceeds with the above named items as follows;

49. **Pensions**

Most of the claimants were paid lumpsum pension and continue to receive monthly pension for life and 5 years thereafter for their dependants.

50. The only claimants who missed out on this benefit are those in category (iii) ‘Temporary officers on non-pensionable terms.’

51. There is clear evidence that a list of officers under this category including CW1, James Mwangi, who were on probation but ought to have received confirmation letters after completing two (2) year service. It was admitted by the Respondent that these officers were erroneously not confirmed into permanent and pensionable status and therefore did not benefit from the lumpsum pension nor do they receive monthly pension.

52. The Respondent indicated that it was ready and willing to correct this error by calculating pension payable to this category of claimants with effect from the date they completed 2 years service and pay a lumpsum pension backdated to the respective dates followed by monthly pension with arrears from the effective date.

53. Accordingly, the court directs the Respondent to award all the identified claimants in this category, as listed in the filed matrix and calculate the lumpsum pension payable to each one of them from the date each attained two (2) years of service and effect monthly pension, payable with arrears from the effective date for life and 5 years thereafter to their dependants in terms of the pension rules and regulations applicable.

54. **Notice Period**

It is common cause that the claimants were paid two months salary in lieu of notice upon retrenchment. In terms of S.16A(I) of the repealed Employment Act Cap. 22 of the Laws of Kenya applicable, a contract of service shall not be terminated on account of redundancy unless the following conditions have been completed with;

(a)

(b)

(c)

(d)

(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 or severance pay.

55. It is trite, that the Employment Act provides the minimum permissible terms of employment. An employee who enhances the terms and conditions of employment through a contract of employment and/or via any other internal documents at the work place is bound by the enhanced terms and cannot be heard to unilaterally revert to the minimum terms applicable.

56. It is common cause that the Civil Servant’s Code of Regulations applicable then provided for a 6 months notice to either party to terminate the employment relationship.

57. The employer, in its written submissions states that giving of six (6) months notice by either party is not to be interpreted to include payment of six (6) months salary in lieu of notice where the employer does not allow the employee to serve on full salary the notice period.

58. It is the court's view however, that the Respondent is bound by its internal regulations and the correct interpretation of a termination clause which gives a period of time to be served by an employee upon giving notice of termination also binds an employer to pay the full period of notice if it does not wish the employee to serve the full notice.

59. For this reason all the claimants were entitled to payment of six (6) months salary in lieu of notice the moment the Respondent retrenched them without allowing them to serve the entire notice period.

60. Accordingly, each of the claimant is entitled to the balance of four (4) months salary in lieu of notice.

61. The Respondent is directed to calculate the payments accordingly and payment within 60 days of the judgment.

62. **Golden Handshake**

All the claimants received a Golden Handshake of Ksh.40,000.00 per person to ameliorate the negative effects of early retirement.

63. The claimants have not demonstrated that there is any extra money, that was available to the government for the purpose.

64. On the contrary, the Respondent has ably demonstrated that the Ksh.240,000.00 mentioned in Parliament was only budgetary estimates to cater for the entire exercise.

65. The retirees were not entitled to equal retrenchment package since the exit package was dependent on several variables including length of service, amount of salary received, employment status of the employee, inter alia.

66. It would be presumptuous for the court to second-guess the Respondent and determine what golden handshake ought to have been paid.

67. For this reason, the court will not make any further award in this respect.

68. **Paragraph 12 P.44**

The trial Judge stated;

“Exemplary and aggravated damages are payable because the defendant did not tender evidence to show that they complied fully with the guidelines laid down in the identification of the would be retrenchees. They therefore acted in a highhanded, oppressive and an unfair manner towards its own citizens.”

69. This was the finding of Hon. R.N. Nambuye, the trial Judge therein.

70. However, the claimants have not tendered any evidence to enable the court to quantify the award. To the contrary, the Respondent led evidence showing that it did the best in the circumstances to soften the exit of the bloated staff at the time and paid them an enhanced package and fair criteria was used in the selection exercise.

71. To this extent, the court will award four (4) months salary across the board in respect of the finding by the trial Judge that the Respondent had acted in a highhanded, oppressive and unfair manner towards

the claimants.

72. Paragraph 16 and 17 of the Judgment Page 45

The court accepts the evidence by the Respondent that the package given to the claimants who had attained 50 years and above under retrenchment would be diminished if the retrenchment was to be converted to a normal voluntary retirement as the trial Judge suggested under paragraph 16.

73. The court further accepts the Respondent's evidence that the claimants who had not yet attained the age of 50 years received superior packages under retrenchment than if the exit was converted into normal termination of employment and the dues adjusted accordingly.

74. The court will therefore not make any award under paragraph 16 and 17 of the judgment at p.45.

75. Paragraph 14 and 15 p.45

The award made vide paragraph 6 i.e., lumpsum and monthly pension for those under probation and erroneously not converted into permanent and pensionable terms and the award of four(4) months salary in lieu of notice; is payable with interest at court rates in respect of pension from the date of attaining 2 years service to payment in full; and in respect of notice pay from the date of retrenchment to payment in full.

76. Exemplary and aggravated general damages of four (4) months salary awarded to all Claimants is payable with interest at Court rates from the date of this assessment till payment in full.

77. Costs

The Respondents will pay the costs of the suit.

The court restates the award as follows for ease of reference;

- (1) Four (4) months salary in lieu of notice to all claimants
- (2) Four (4) months salary being exemplary damages to all claimants
- (3) Conversion from probationary to permanent status to all claimants who had served 2 years but had erroneously not been given confirmation letters and payment of lumpsum pension and monthly pension with effect from the date of retrenchment for life and 5 years to the dependents upon death.
- (4) (1) above is payable with interest at court rates from date of retrenchment till payment in full.
- (5) (2) above is payable with interest at court rates from the date of this assessment till payment in full
- (6) (3) above is payable with interest at court rates from the date of attaining 2 years till payment of the full lumpsum and arrears of monthly payment and
- (7) The specific amounts payable to each Claimant be computed and filed with the Court within sixty (60) days from to date by the Respondent.

Dated and Delivered at Nairobi this 4th day of February, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE