



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1902 OF 2011

1. PATRICK NYAKUNDI
2. CHRISTOPHER ONGOTO.....**CLAIMANTS**

versus

1. JOSEPH TIMKUI CHIRCHIR
2. FRANCIS MUIRURI NGA'NGA
3. FRED ONDARI ONTERE
4. GEOFFREY MOGIRE
5. DAVID OTEMA MOKAMBA
6. ARON G'WOMA.....**RESPONDENTS**

JUDGMENT

1. The matter commenced in the High Court and was transferred to this Court sometime in November 2011. It was listed for hearing a few times and took off on 28th June 2012 before Judge Kosgey the predecessor of this Court. At that time, Michael Owuor Advocate appeared for the Claimants while Mildred Munyasa Advocate appeared for the Respondent. The first Claimant herein Christopher Ongoto testified and stated that he was the Claimant herein and his case was consolidated with Patrick Nyakundi's case having been consolidated at the High Court. He was born on 2nd November 1944 and was employed by 2nd Respondent in January 1967, trained at Kenya Institute of Administration Kabete for 1 year in the Accounts Clerk course in 1977-78. He worked at Kisii Branch as accountant from 1980 though prior to then he was a clerk. On 6th February 1998 he received a letter of termination on grounds of redundancy which was backdated to take effect in January 1998. He testified that the redundancy was not right as he was not paid any dues following redundancy. Later he was recalled to be re-employed. He had complained to the Labour Officer Kisii and Kisumu and the Labour Officer said the termination was not lawful and thus he was re-engaged. He continued working and was given 3 months notice up to 31st March 1998. On 27th March 1998 the letter asking him to continue working was given to him. He testified that he was told if he didn't sign it he could be dismissed. The salary was reduced by half from Kshs. 44,888 to Kshs. 22,244. He didn't accept the offer but continued working and his age of compulsory retirement was 60 years. He was retired before he turned 60 years in 2002 (28th February 2002). He testified that he would have worked for 3 more years. He added that his retirement was unlawful. He thus claims Kshs. 2,562,700/- as staff retirement benefit, leave for 2000 – 2004 of Kshs. 7,020/-, 6 months notice pay prior to retirement of Kshs. 532,302/-, gratuity for 2002, earned leave of Kshs. 1,330,762/-, salary arrears of Kshs. 86,958/-, half salary of 1,171,260/- and compensation for the 3 years of service not worked due to early retirement – Kshs. 1,690,616/-. He also sought costs of the suit and interest on the sums aforesaid at Court

rates.

2. He was Cross-examined by Ms. Munyasa and reiterated that he was born on 2nd November 1944 and was employed as a clerk in 1967. He testified that the KIA course was sponsored the Respondent and the condition was if he passed he could be employed. He maintained that the letter of January 1998 was for redundancy. The second letter he received was for re-employment and he continued working. He added that he was not told to collect money from KNUT on termination. There was no re-examination by Mr. Owuor and the matter was stood over for further hearing in September 2012. It did not proceed in September 2012 but on 6th December 2012 after I had been appointed a judge in July 2012. The proceedings were under the Constitutionally established Industrial Court. The appearances were Mr. Owuor for the Claimants while Mr. Ameyo appeared for the Respondent.
3. Mr. Owuor called the second Claimant Patrick Nyakundi who was sworn and testified that he was born 15th July, 1941 and employed on 1st October 1978 by KNUT Kisii Branch as an Executive Officer. He was to retire after 60 years as per regulations. There was objection to some of the documents on record leading to deferment of the case and after a series of adjournment Mr. Osoro came on record for the Claimant while Mr. Ameyo appeared for the 1st and 2nd Respondents. Mr. Nyakundi then testified that he was employed on 1st October 1978 and retired in December 2001 and he was an Executive Officer at KNUT Kisii Branch when he retired. The basic salary at the time he started was 2,090/= per month. He testified that Kisii Branch was split in 1997 into Gucha and Kisii Branch. The split led to some workers leaving to join Gucha branch and some workers left in Kisii branch. He testified that the salary would be reduced to half as KNUT did not have enough funds. The salaries were reduced from April 1998 but the Secretary increased his salary and their allowances and the second Claimant wrote to headquarters complaining. He wrote to Mr. Francis Ng'ang'a the Acting Secretary General. From April 1998 till retirement in 2001 the second Claimant was paid half salary. He now seeks the balance to be paid. He testified that in 1998 balance was Kshs. 415,628.25, in 1999 balance was Kshs. 584,882.40 and in 2000 it was Kshs. 549,131.40. The total balance unpaid for all these years was Kshs. 2,117,127.75. He also sought the terminal benefits due being Kshs. 2,071,559.70 from the terminal benefits scheme. The terminal benefits are calculated as the total monthly emoluments multiplied by the months of service divided by 10. He also sought pay for leave not taken totaling 42 days amounting to Kshs. 285,487.86, gratuity arrears Kshs. 100,222.10., unpaid service gratuity Kshs. 271,879.20, Gratuity arrears from Headquarters of Kshs. 108,734.70, Salary arrears Kshs. 104,552.85. He thus prayed that he be paid balance of unpaid salary, leave payments, balance of unpaid salaries, unpaid gratuity, salary arrears, notice for 6 months, unpaid service gratuity, staff terminal benefits scheme all totaling to 566,854.06
4. He was cross-examined by Ameyo Advocate and stated that he is Patrick Nyakundi and has have annexed ID to the case. He conceded that the names on ID are Nyakundi Osiemo and the name Patrick is not indicated on the ID. He testified that he was employed in 1978 as Executive Officer. He testified that he did not use the National ID card when he applied and had used his certificates to give his name when he got employed. He however did not have the certificate in his document bundle. He admitted that the certificate does not show when he was born. He testified that he worked as Executive Officer and he received a Notice which ran from 1st January 1998 to 31st March 1998 and termination took effect in March 1998. He testified that he was forced to sign the re-employment letter and as per the letter he was to earn 22,571/-. He stated that he lodged the case in High Court in 2006 and admitted that since receipt of the letter of 1998 March he only lodged complaint in High Court in 2006. He testified that he understood the Staff Terminal Benefits Scheme paragraph 5.3(a) which provided that for staff to qualify for Staff Terminal Benefits the service is to be "continuous service" and Para 5.3(c) which provides that the Terminal Benefits will be limited to 5 years or 60 months. He testified that he was staff at Branch and according to Staff Terminal Benefits he was to be entitled to 5 years. Regarding the unpaid salary for January and February 1998, he admitted that there is no letter here to show he was assigned to go to Gucha. He testified that when he retired he cannot remember what he was earning. He

agreed that the ID indicates date of birth as 1941 and as of when he received the letter in 2001 he had attained 60 years of age.

5. In re-exam by Mr. Osoro he testified that the letter is addressed to Patrick Osiemo Nyakundi. He stated that the ID was issued on 15th March 2010 and was not available when he was applying for his job. He stated that the redundancy letter told the staff to re-apply. He testified that he signed because he feared he would be sent away and he complained still to Ministry of Labour Kisii and Provincial Labour office. He stated that it is not true that he only lodged complaint in 2006. He testified that the employment was not interrupted till he retired in 2001. That marked the end of the Claimants case.
6. The Respondents called Peter Riang'a who testified that he was a teacher and Chairman of Kisii Central Branch of KNUT. He stated that at the time of giving testimony he was the Chairman while in 1997 he was Branch Committee Member attended meetings of the KNUT Branch. He stated that Patrick Nyakundi was a worker of the KNUT Kisii Branch and in 1997 there was a split of Kisii Branch and Gucha Branch. It was split and the number of teachers were fewer than before and what was coming from headquarters reduced due to the fewer teachers. The finances reduced. When the money reduced, as a Branch, they realized money was not enough to pay workers and officials and it was decided that there be fewer workers or there would be redundancies declared and then employ afresh with new terms and condition. A letter was issued to the Claimant. Claimant was asked to re-apply in accordance with redundancy declared. He applied, he was called to meeting and told why the redundancy was necessary and he accepted and the terms and conditions were agreed to and that is why he continued with his work. He worked from 1998 to 2001 when he retired. It was a compulsory retirement and he did not complain and he was paid his dues.
7. In Cross-Exam by Mr. Osoro, the witness stated that the Claimant was an organizing secretary of the union. He occupied that position till he left the union and he did not occupy the office of Executive Officer. The Executive Officer is elected while organizing secretary is appointed. However, when he was referred to page 17 of the Amended Memorandum of Claim the witness stated that he knew the second Claimant as an organizing secretary but according to what was on the letter he was a Senior Executive Officer. He testified that he was aware there was a 2% increase of deduction at Kisii Branch and it was effected around 1998. He conceded that the Branch had declared the second Claimant redundant. The payment was to be Kshs. 22,771 per month to be increased in January of each year and the Claimant was given an opportunity to look at the new terms which he accepted. When he was called, he was explained to why he was to earn that sum and he accepted. He stated that the Claimant left employment on compulsory retirement in December 2001. He stated that the financial situation could not sustain employees.
8. The second defence witness was Aron Risa G'woma who is the 6th Respondent. He testified that he is a teacher by profession and an official of KNUT as Treasurer Kisii Branch. He stated that he joined the union in 2001 April and was elected as a Treasurer. The duties of a treasurer are to prepare budget, receive commission from headquarters and pay per budget prepared. He testified that he knew the Claimant who was working in the Branch as Executive Officer and in the year the witness joined the second Claimant reached compulsory retirement age, was retired and his dues on retirement. He testified that unfortunately when he left he was in custody of all the documents and when the witness checked he found the documents had disappeared. He stated that he is familiar with Staff Terminal Benefits and that the Claimant was not entitled to the payment as he was not in continuous service. His services were interrupted. For staff of branches and Executive Committee members its limited to 60 months. When Claimant retired the witness calculated the amount he was entitled to the dues were all paid.
9. In Cross-Exam by Mr. Osoro he stated that payment was to be made and the payment were made in cash, workers were paid by cash and payslips given to workers. He testified that the Claimant was given cash and as indicated when the Claimant left all the records disappeared. He could not however remember how much the Claimant was paid. He maintained that the service by Claimant

was interrupted. He stated that he joined the Union in April 2001 and the records for Claimant are not on record but the minutes that were there showed the Claimant was interrupted in 1997. There is the Minute of 3rd December 2001 on page 3 of the witnesses statement.

10. In re-exam by Mr. Ameyo he reiterated that there were no records to support the payments as the Claimant left with all the documents touching on their service.
11. In the case, the Claimants have testified that they received less than what they were entitled to. However, they both signed new contracts with reduced pay after the split of the Kisii Branch of KNUT.
12. The 2 Claimants sued the 1st to 6th Respondents who were according to the records, officials of the employer of the Claimants. In any suit, a cause of action can only lie against the parties who would of necessity have a nexus. The employer of the Claimants was KNUT and not the officials. The suit was a non-starter as there is no cause of action against the Union officials.
13. In law, a cause of action may be defined generally as a situation or state of facts that entitles a party to maintain an action in a judicial tribunal or conversely a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party.
14. **Black's Law Dictionary Ninth Edition** defines cause of action as **a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.**
15. There is no conceivable cause of action that could lie from the pleadings against Joseph Timkui Chirchir, Francis Muiruri Nga'nga, Fred Ondari Ontere, Geoffrey Mogire, David Otema Mokamba, Aron G'woma named as defendants in the suit. The suit is therefore dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 10th day of January 2014

Nzioki wa Makau

JUDGE