



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 798 OF 2010**

**PAUL NGOTWA.....CLAIMANT**

**VS**

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

**RULING**

*(Pursuant to Judgment of the Court of Appeal dated 19th July 2013)*

**Background**

1. On 14th January 2011, Kosgey J (as he then was) found the termination of the Claimant's employment by the Respondent unfair and unlawful and made the following orders:
  - a. That the Respondent reinstates the Claimant to his previous job with effect from 24th September 2009, being the date of termination without any loss of benefits such as salaries, house allowance, leave etc;
  - b. That should the Respondent find the services of the Claimant superfluous after reinstating him, then it may invoke the redundancy law to terminate his employment;
  - c. That each party bears their own costs.
2. Being dissatisfied with the Award of the Court, the Respondent filed an appeal in the Court of Appeal. The Claimant himself was also dissatisfied with the Award in as far as the Court had ordered reinstatement rather than granting his claim for special and general damages.
3. The Court of Appeal heard the Respondent's appeal and the Claimant's cross-appeal and in its judgment dated 19th July 2013 ordered the Respondent to invoke the redundancy law to determine the Claimant's terminal benefits. The Court of Appeal further directed that in the event of a dispute on the terms of the redundancy law, the Industrial Court would take evidence on that point only and determine it.
4. On 27th September 2013, the Claimant filed a Notice of Motion under Certificate of Urgency seeking a priority date for the taking of evidence on redundancy law as directed by the Court of Appeal. Counsel for the Claimant appeared before me *ex parte* on 30th September 2013 when I was the Duty Judge and I directed him to serve the Respondent. When Counsels for the parties appeared before me on 10th December 2013, they had filed their respective affidavits and they agreed to proceed by way of written submissions.

**The Claimant's Submissions**

5. Counsel for the Claimant, Mr. Wachakana filed written submissions on 17th December 2013. He made reference to the cases of Stephen Michira Mbaka and David Marindich Biwott both former employee of the Respondent who had been declared redundant in January 2010. According to the release letters attached to the Claimant's further affidavit sworn on 11th October 2013, the said former employees had been offered the following package:

- a. One month basic salary in lieu of notice
- b. One month basic salary for each year worked
- c. Cash pay for any leave earned and outstanding for year 2010
- d. Pay for all the days worked in the current month

6. In addition, any medical bills incurred before the last day of service would be honoured.

7. Based on this, Counsel submitted that the Claimant was entitled to the following payments under redundancy law:

- a) Severance pay (Kshs. 180,000x18 years of service.....Kshs. 3,312,200.00
- b) Interest on redundancy amount @ 18%.....6,435,191.14
- c) One month's pay in lieu of notice.....180,000.00
- d) 23 accrued leave days

8. Counsel further submitted that since the Claimant's employment was terminated on 24<sup>th</sup> September 2009 during the period when the Respondent's employees who had been retrenched enjoyed tax exemption, the exemption should be extended to the Claimant at this stage. Finally, the Claimant claims interest on the redundancy payment.

9. In support of the claim for tax exemption, Counsel for the Claimant made reference to Gazette Notice Number 73 dated 14th May 2010, vide which the then Deputy Prime Minister and Minister for Finance had directed that the lump sum retirement benefits payable to employees of Telkom Kenya Limited retrenched between 31st December 2008 and 28th February 2010 be exempted from tax.

### **The Respondent's Submissions**

10. Mr. Chiuri Ngugi for the Respondent filed skeletal submissions on 23rd December 2013 and a list of authorities on 7th January 2014. Counsel submitted that after termination of his employment, the Claimant was paid one month's salary in lieu of notice and 26 accrued leave days. According to the Respondent, the Claimant was only entitled to Kshs. 1,161,720 being 15 days' pay for each year worked.

11. Counsel for the Respondent took issue with the production of copies of the pay slips and release letters for Stephen Michira Mbaka and David Marindich Biwott attached to the Claimant's submissions arguing that this amounts to production of additional evidence at final submissions stage which cannot be cured even under Section 10(1) of the Industrial Court Act, 2011, which provides that the Industrial Court is not bound by the strict rules of evidence.

12. Counsel for the Respondent also took issue with the production of a copy of Legal Notice No. 73 dated 14th May 2010 by attachment to the Claimant's written submissions in support of the Claimant's position that redundancy benefits due to him are exempt from tax.

13. Mr. Chiuri Ngugi further submitted that even assuming that Legal Notice No. 73 of 14th May 2010 was properly before the Court, the tax exemption referred to was limited to '*the lump sum retirement benefits*' paid to persons whose services were terminated on grounds of redundancy or retrenchment.

14. According to Counsel, retirement benefits are handled separately by trustees under designated

retirement schemes created under the Retirement Benefits Act, 1997 and the payment of retirement benefits is pegged on reaching an age fixed by the rules of the retirement scheme. On the other hand, terminal benefits on redundancy are governed by Section 40 of the Employment Act, 2007. Terminal benefits under redundancy were therefore not exempted from tax under Legal Notice No 73 of 14th May 2010.

### **Ruling by the Court**

15. The issues for determination before me are as follows:

- a) The actual terminal benefits payable to the Claimant under redundancy law;
- b) Whether these benefits are subject to tax;
- c) Whether the Claimant is entitled to interest

### **Terminal Benefits Payable to the Claimant under Redundancy Law**

16. Section 40 of the Employment Act, 2007 provides for termination of employment on account redundancy. By its judgment dated 19th July 2013, the Court of Appeal confirmed the separation of the Claimant from the Respondent's employment by way of redundancy and the only issue referred to this Court has to do with the benefits payable to the Claimant pursuant to the redundancy.

17. I will therefore restrict myself to Section 40 (1)(e)(f) and (g) of the Employment Act which sets out the following parameters on payment of redundancy dues:

***(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***

***(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***

***(g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

18. With regard to severance pay, Counsel sought to establish what is commonly referred to as 'past company practice' and produced documents relating to Stephen Michira Mbaka and David Marindich Biwott both former employees of the Respondent whose severance pay was based on one month's salary for every year of service.

19. Counsel for the Respondent objected to the production of these documents on the ground that they were being sneaked in final submissions and could not therefore be relied on as evidence.

20. The Court however noted that the release letters issued to the two formers employees which contained the terms of their redundancy dues were also attached to the Claimant's further affidavit sworn on 14th October 2013 and were therefore properly before the Court.

21. That settled, the issue remains whether the redundancy terms applied to Stephen Michira Mbaka and David Marindich Biwott are applicable to the Claimant.

22. In a further replying affidavit sworn by Lawrence Karanja on 23rd December 2013, it was deponed that there were no express terms of payment of redundancy dues under the Company's human resources policy as deponed by the Claimant in his further affidavit.

23. Karanja further deponed that the payment of severance pay at one month's basic salary for every year served made to Stephen Michira Mbaka and David Marindich Biwott was part of their negotiated

individual agreements with the Respondent.

24. It was the Respondent's position therefore that in the absence of express terms on payment of terminal benefits on redundancy, the applicable legislation would come into play.

25. Part V of the Employment Act sets out the rights and duties in employment. Section 26 which falls under this part provides as follows:

**26. (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.**

**(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.**

26. Section 40 falls under Part VI of the Act and the logical conclusion is that if there existed redundancy terms as between the Claimant and the Respondent that are more favourable than the minimum terms set under Section 40, then those more favourable terms would apply.

27. A part from a general statement that the redundancy terms applied to Stephen Michira Mbaka and David Marindich Biwott were part of their individual negotiated agreements, the Respondent did not render any evidence to prove the existence of such individually negotiated agreements exclusive of other employees including the Claimant.

28. In the absence of any evidence to the contrary, the Court finds that the redundancy terms applied to Stephen Michira Mbaka and David Marindich Biwott were general terms applicable to a large number of employees and there is no reason why the Claimant should be excluded.

29. Consequently, I direct that the Claimant shall be paid severance pay at the rate of one month's salary for every year of service. The Claimant is also entitled to one month's salary in lieu of notice. Since the Respondent did not produce any leave records to counter the Claimant's claim for 23 days accrued leave as required under Sections 10 and 74 of the Employment Act, 2007 this claim is also payable.

#### **Are the Claimant's Redundancy Benefits Subject to Tax?**

30. As held by Maureen Onyango J in the case of *Hosea Njeru Kagundu Vs Kenya Union of Commercial Food & Allied Workers Union (Industrial Court Cause No 109 of 2010)* employers have a statutory duty to deduct and remit tax derived from employee dues and Article 210 of the Constitution provides that no tax may be waived or varied except as provided by legislation. Sometimes employers may opt to pay tax on behalf of their employees by topping up the tax amount on the employee's dues. This however does not amount to a tax exemption but a tax cushion.

31. In this case, the Claimant seeks a tax exemption. His Counsel submitted that since the Claimant's former colleagues at Telkom Kenya Limited who were retrenched between 31st December 2008 and 28th February 2010 were exempted from paying tax on their lump sum retirement benefits, it followed that the Claimant's redundancy benefits whose employment was terminated within the tax exemption period ought to be exempted from tax as well.

32. Counsel for the Respondent sought to make a distinction between retirement and redundancy benefits arguing that what was exempted from tax on account of the Claimant's former colleagues was the retirement benefits and not the redundancy benefits. This Court did have the benefit of the actual items that were exempted from tax and is not therefore in a position to assign the distinction advanced by Counsel for the Respondent.

33. Nevertheless, the Court finds that Legal Notice No 73 of 14th May 2010 extended a tax exemption to some one thousand and thirty eight employees of Telkom Kenya Limited retrenched on various dates ranging from 31st December 2008 to 28th February 2010. It seems to me that the exemption was specific to these employees and the exemption cannot therefore be lawfully extended to any other employee. To my mind, the Claimant's redundancy took effect from the date of the judgment by the Court of Appeal on 19th July 2013 and cannot be backdated. I therefore direct that the redundancy benefits due to the Claimant shall be subject to tax.

**Is the Claimant Entitled to Interest?**

34. I have looked at the Award by the trial court and the judgment by the Court of Appeal and find no order for interest and I therefore find no basis for this claim.

35. Ultimately, I make orders for payment of redundancy benefits to the Claimant in the following terms:

- a) Severance pay at one month's salary for every year of service (180,000x18).....Kshs. 3,240,000
- b) One month's salary in lieu of notice.....180,000
- c) Pay for 23 accrued leave days (180,000x23).....138,000

30

**Total.....3,558,000**

Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF FEBRUARY 2014**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*