



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2120 OF 2011**

**MARIKO OLUOKO KANGA.....CLAIMANT**

**VS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**AWARD**

**Introduction**

1. Mariko Oluoko Kanga, the Claimant herein was a long serving employee of the Respondent, Kenya Railways Corporation. His claim as pleaded in his Statement of Claim dated 19<sup>th</sup> December 2011 and amended on 30<sup>th</sup> May 2013 is for payment of terminal benefits. The Respondent's Reply dated 8<sup>th</sup> October 2012 was amended on 3<sup>rd</sup> July 2013. The Claimant and Rogers Were Washika testified for the Claimant while Zeddy Chemtai Chepkwony and Frank J. Maina Ngatia testified for the Respondent. Both parties filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 12<sup>th</sup> August 1974. On 8<sup>th</sup> December 2006, he was arrested and charged with the offence of theft by servant. By letter dated 20<sup>th</sup> December 2006, the Respondent suspended the Claimant without pay effective 8<sup>th</sup> December 2006.

3. The Claimant was acquitted on 18<sup>th</sup> December 2008 and his suspension was lifted by letter dated 2<sup>nd</sup> February 2009. The same letter retrenched the Claimant with effect from 31<sup>st</sup> December 2006.

4. The Claimant claims Kshs. 7,276, 608 in terminal benefits as well as accruals thereof. He also claims the costs of this case.

**The Respondent's Case**

5. In its Memorandum of Reply as amended on 3<sup>rd</sup> July 2013, the Respondent pleads that the Claimant's employment was terminated lawfully in accordance with the Respondent's Early Retirement Programme Phase IV that came into force on 31<sup>st</sup> December 2006.

6. While admitting that the Claimant's suspension was indeed lifted on 2<sup>nd</sup> February 2009, the Respondent denies that the Claimant was entitled to any pay during the period of suspension. The

Respondent further states that the Claimant was paid all his dues.

### **Findings and Determination**

7. In my estimation, the issues for determination in this case are as follows:
  - a. Whether the Claimant's suspension without pay was lawful
  - b. Whether the backdating of the Claimant's retrenchment was proper
  - c. The effective date of the Claimant's separation from the Respondent's employment
  - d. Whether the deductions made from the Claimant's dues were proper
  - e. Whether the Claimant is entitled to the reliefs sought

### **The Claimant's Suspension**

8. The Claimant was suspended by letter dated 20<sup>th</sup> December 2006 in the following terms:

***“Following your arrest by the Police and subsequent arraignment in a Court of Law on 8th December, 2006 in connection with theft of Corporation Money you are hereby suspended from your duties with effect from 8th December, 2006 in line with the provisions of Personnel Regulations G. 9 (e) pending the outcome of the Court Case.***

***Please note that you will not be entitled to payment of salary during the period you are under Suspension.***

***Acknowledge receipt of this letter on the duplicate copy attached.***

***ENG. WILFRED K. NDULU***

### **CIVIL ENGINEERING SERVICES MANAGER”**

9. Regulation G. 9 (e) in the Respondent's Personnel Regulations, September, 1988 a copy of which was availed by the Claimant provides as follows:

***(e) Where an employee has been convicted of a criminal offence he may be suspended from the exercise of his office, by the officer who would be empowered to interdict him under the terms of paragraph (a) pending consideration of the case. While an employee is thus under suspension he will not be entitled to any salary but the Managing Director may, if he thinks fit, direct that a suspended employee be granted an alimentary allowance in such amount and on such terms as he may determine. The allowance to be granted to an employee, however, should not exceed half his salary.”***

10. It is not in contention that at the time the Claimant was suspended, he had been charged in Court but not convicted. In fact the Claimant was never convicted. The Court was therefore unable to understand under which provisions of its regulations, the Respondent suspended the Claimant without pay.

11. As held by this Court in the case of ***Wilberforce Ojiambo Oundo Vs Regent Management Limited eKLR[2013]*** suspension by itself is not a disciplinary action but rather a neutral act requiring an employee to step aside to allow investigations into some alleged wrong.

12. An employee on suspension remains innocent pending the outcome of the investigations upon which the employee must be given an opportunity to respond to any adverse findings against them. The Respondent's action in suspending the Claimant without pay was therefore not only unlawful but flew right in the face of the Respondent's internal regulations.

### **The Claimant's Retrenchment**

13. On 2<sup>nd</sup> February 2009, the Respondent wrote to the Claimant as follows:

***“Consequent to the Court acquittal of your case No. 2228 of 2006, Management has decided to lift your suspension and retrench you along with others with effect from 31/12/2006 in line with the current Phase IV Early Retirement Programme.***

***Josephine Masibo***

***Human Resources & Admin. Manager***

***FOR:MANAGING DIRECTOR”***

14. In its final submissions, the Respondent referred the Court to the case of ***Aviation and Allied Workers Union Vs Kenya Airways Ltd & 3 Others [2012] eKLR*** where **Rika J** stated that the terms *redundancy*, *retrenchment* and *restructuring* are related as in all such cases the result is the loss of employment by involuntary means through no fault of the employee. Since in such cases action is initiated by the employer, the law requires that adequate notice of an intended retrenchment, redundancy or restructuring be given to the employee, the employee's union and the labour office.

15. From the letter above cited, it would appear that the Respondent decided to backdate the Claimant's retrenchment to coincide with the retrenchment of other employees of the Respondent who had been retrenched effective 31<sup>st</sup> December 2006. The Respondent's witness, Zeddy Chemtai Chepkwony told the Court that the backdating of the Claimant's retrenchment was necessitated by the transition arising from the Kenya Railways Corporation/Rift Valley Railways concession which took effect from 31<sup>st</sup> October 2006.

16. In my view, the nature of a restructuring or retrenchment programme cannot be used by an employer as an excuse to circumvent its obligations to employees who are affected by the restructuring or retrenchment. Employees who are affected by a restructuring or retrenchment programme are individuals and not some faceless statistics. Each employee who is to lose their employment through such a programme must therefore be notified as required by law.

17. In the instant case, the Respondent sought to backdate the Claimant's retrenchment by a period of over two years. I find no basis either in law or general human resource practice to support such a proposition. I therefore find that the Respondent's action of backdating the Claimant's retrenchment was unlawful and award the Claimant his full salary for the entire period he was under suspension.

### **The Claimant's Separation from the Respondent's Employment**

18. Related to the effective date of the Claimant's retrenchment is the date of his separation from the Respondent's employment. It is the Claimant's case that because he was not paid his dues in full, he remains an employee of the Respondent to date.

19. In support of this position, the Claimant referred the Court to memos from the Respondent's Managing Director to the effect that employees facing retrenchment would continue to be in the Respondent's employment until full payment of their retrenchment dues. The Claimant further relies on Section 16A of the Pensions Act as well as Section 40(1)(g) of the Employment Act, 2007.

20. To my mind, these provisions would be applicable where the amounts due are clear and uncontested. However, in the Claimant's case, his dues were calculated by the Respondent as far back as June 2009 but there was disagreement on the actual amount due to the Claimant. It seems to me therefore that the Claimant cannot avail himself of the provisions above cited to maintain that he remains an employee of the Respondent. In my view, the Claimant's separation from the Respondent's employment took effect from the time his dues, though contested, were first calculated and paid.

### **Deductions from the Claimant's Dues**

21. The Claimant testified that pursuant to the Respondent's letter dated 2<sup>nd</sup> February 2009, his dues were computed at a gross figure of Kshs. 1,236,353, with a net figure of Kshs. 1,007,659. The Respondent then notified PKF Consulting Ltd who were handling the retrenchment dues on behalf of the Respondent to deduct the sum of Kshs. 883,034 from the Claimant's dues to cover what was referred to as 'MS03 Recoveries.' The Claimant denied owing any such debt stating that the amounts owed by him to the Respondent were reflected in his payslip for the month of December 2006 which showed a balance of Kshs.20,318 which was duly recovered from the Claimant's dues.

22. The Respondent's witness, Frank J. Maina Ngatia took the Court through the approval process of advances to employees of the Respondent beginning with an application by the employee and culminating with an acknowledgement of receipt by the employee.

23. The witness was referred to a bundle of documents supplied by the Respondent in support of the debt of Kshs. 883,034 allegedly owed by the Claimant. He admitted that most of these documents were either unsigned or incomplete. Yet, he told the Court that these are the primary documents used to update the Claimant's 'MS03' (suspense account) which was the basis of the claim for Kshs. 883,034.

24. It seems to me that save for the sum of Kshs. 35,000 on whose account complete documentation was availed to the Court and which figure was not reflected in the Claimant's payslips, any further recovery from the Claimant's dues was not supported and cannot therefore be justified. I therefore award the Claimant the sum of Kshs. 848,034 being unsupported and unverified advances recovered from his terminal benefits.

### **Reliefs Available to the Claimant**

25. The Claimant pegs his claim on a monthly basic salary of Kshs. 24,969.56 plus house allowance of 10,000 and other allowances amounting to 11,944 being the applicable salary for employees in his job group as at October 2012 as per payslip of one Gichahi Timothy Mureithi.

26. From the Claimant's last payslip dated December 2006, his basic salary stood at Kshs. 9,235. Employee salaries are personal and to assign the salary earned by one employee to another would in my view be to engage in an exercise of conjecture and speculation. In the absence of any evidence of a different figure as to the Claimant's salary, the Court takes the figure of Kshs. 9,235 as the Claimant's basic salary and loads 15% as house allowance giving a total figure of Kshs. 10,620 which is hereby adopted as the Claimant's monthly salary for purposes of tabulating the claim for unpaid salary.

27. In view of the Court's finding that the Claimant was deemed to be an employee of the Respondent up to the time his dues were calculated and paid, I award him gratuity and severance pay for period between 1<sup>st</sup> January 2007 and 31<sup>st</sup> May 2009.

28. Ultimately, I make an award in favour of the Claimant in the following terms:

- a. Salary from December 2006 to June 2009 when his dues were tabulated and paid (30 months).....Kshs. 318,608
- b. Unsupported recoveries.....Kshs. 848,034
- c. Gratuity (9,235 x 29 months /10).....Kshs. 26,782
- d. Severance pay (@ 2 ½ months basic

salary for 2 years).....Kshs. 46,175

**Total.....Kshs. 1,239,599**

29. I further award the Claimant the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF  
MAY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Owino for the Claimant

Miss Ouma for the Respondent