



**REPUBLIC OF KENYA**

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

**CAUSE NO 28 OF 2012**

**JOHN MWANGI KURIA & 165 OTHERS.....CLAIMANTS**

**VS**

**ATTORNEY GENERAL.....1ST RESPONDENT**

**NATIONAL IRRIGATION BOARD.....2ND RESPONDENT**

**AWARD**

**Introduction**

1. The Claimants in this case are all former employees of the National Irrigation Board, the 2<sup>nd</sup> Respondent herein. They filed their claim in the High Court by way of Originating Summons dated 19<sup>th</sup> September 2005 seeking a broad spectrum of prayers ranging from a declaration that their rights had been violated to an order for payment of their terminal dues. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn by John Philip Olum on 8<sup>th</sup> February 2006.

**The Claimants' Case**

2. When the matter was transferred to this Court, the Claimants narrowed their prayers to the following:
- An order for payment of severance pay at 2 ½ months' salary for every year of service for senior staff;
  - Severance pay at 2 ½ months' salary less 25 days' salary for every year of service for junior staff;
  - Damages for breach of fundamental rights;
  - Costs and interest.
3. Charles Waweru Kariuki, John Mwangi Kuria, Ernest Mutugi Mwangi and Joseph Waweru Njoka testified for the Claimants. Kariuki told the Court that he was employed by the 2<sup>nd</sup> Respondent in 1987 initially in the position of Assistant Research Officer and later on promotion to the position of Assistant Manager. In 2002, the 2<sup>nd</sup> Respondent initiated a retrenchment programme. Kariuki stated that although he was not against the retrenchment, the process followed by the 2<sup>nd</sup> Respondent was flawed. Specifically, there was no employee preparation and the departing employees were not paid all their dues.
4. According to the retrenchment programme, there were three categories of employees: contract, pensionable and non pensionable. Kariuki who was a senior officer, was paid a golden handshake of Kshs. 40,000, 2 months' notice pay and gratuity but was not paid severance pay.

Junior officers were paid a golden handshake of Kshs. 40,000, 2 months' notice and severance pay calculated at 25 days' pay for every completed year of service.

5. John Mwangi Kuria was employed in 1972 as a clerical officer and was later promoted to the position of accountant. He testified that he received a notification of early retirement on 4<sup>th</sup> February 2002 while on annual leave. Kuria was paid a golden handshake, transport allowance, 2 months' notice pay and one month's leave pay. He was not paid gratuity nor severance pay.

6. Kuria told the Court in cross examination that he was initially employed on contract but was later admitted into the Respondent's Staff Retirement Benefits Scheme to which he contributed 7% and the 2<sup>nd</sup> Respondent 10%. When he left employment, he was paid his dues under the Retirement Scheme.

7. Ernest Mutugi Mwangi was employed as Clerical Officer II in October 1993. Mwangi was a member and a shop steward of the Kenya Plantation and Agricultural Workers Union. According to him, by the time the retrenchment took place, there was no Collective Bargaining Agreement (CBA) in place. Mwangi was paid a golden handshake, one month's notice pay and severance pay at 25 days' pay for every completed year of service.

8. He claimed that he ought to have been paid 2 ½ months' pay per year in severance pay as well as additional benefits as per the CBA. Mwangi further told the Court that he was a member of the Respondent's Staff Retirement Benefits Scheme. Joseph Waweru Njoka was employed as a clerk in 1973. He testified that he was also a member of the Respondent's Retirement Benefits Scheme.

### **The 2<sup>nd</sup> Respondent's Case**

9. The 2<sup>nd</sup> Respondent's Human Resource Officer, Samuel Mugo Mureithi testified that the Claimants were identified for retrenchment in 2002. Mureithi made reference to a document titled *National Irrigation Board Reform Committee Identification for Early Retirement* which the 2<sup>nd</sup> Respondent used to tabulate the Claimants' terminal benefits.

10. Mureithi told the Court that senior pensionable officers including John Mwangi Kuria and Charles Waweru were entitled to a golden handshake of Kshs. 40,000, normal pension and 2 months' salary in lieu of notice. Junior pensionable officers including Ernest Mwai and Joseph Njoka were entitled to a golden handshake of Kshs. 40,000, normal pension, 2 months' salary in lieu of notice and severance pay at 25 days' pay for every completed year of service. According to Mureithi the Claimants were paid all their entitlements.

11. Mureithi went on to testify that the junior pensionable officers were not entitled to 2 ½ months' severance pay as claimed since they were members of the Retirement Benefits Scheme. Additionally, the unionisable employees were paid in accordance with Clause 16(f) of the CBA for July 1997 to June 1999. No other CBA was signed after this date. The non pensionable employees were either temporary or on probation and the contract employees were paid a gratuity at the end of each contract. None of the Claimants was on contract.

### **Findings and Determination**

12. The issues for determination in this case are as follows:

- a) Whether in retrenching the Claimants, the Respondent complied with the law;
- b) Whether the Claimants were pensionable or non pensionable;
- c) Whether the Claimants are entitled to the reliefs sought.

## **Retrenchment Process**

13. The Claimants complain that the 2<sup>nd</sup> Respondent failed to notify them of the retrenchment and that in fact they were caught by surprise. In its defence the 2<sup>nd</sup> Respondent states that the Claimants were well aware of the financial woes facing their employer and that retrenchment was inevitable. Further, there was general retrenchment within government.

14. The applicable law on redundancy at the time the Claimants were retrenched would have been Section 16A of the repealed Employment Act (Cap 226) which provides as follows:

*16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with -*

*(a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;*

*(b) the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;*

*(d) any leave due to any employee who is declared redundant shall be paid off in cash;*

*(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 as severance pay.*

15. The 2<sup>nd</sup> Respondent's witness, Samuel Mugo Mureithi admitted that the retrenchment notice given to the Claimants was short and from the documents filed in Court, the Claimants were given notices of not more than three days.

16. With regard to the unionisable employees, Clause 16 (b) of the CBA for 1997-1999 required that where an employee is declared redundant the minister for labour and the Union of which the employee is a member be notified 60 days earlier of the reasons for and the extent of the intended redundancy.

17. There was no evidence of any notice of the redundancy to either the minister for labour or the Union as required under the law and the CBA. The Court therefore finds that in carrying out the retrenchment exercise, the 2<sup>nd</sup> Respondent violated both the law and the collective bargaining agreement. I do not think that just because the 2<sup>nd</sup> Respondent was facing financial challenges or there was general retrenchment within government there was liberty to disregard the law.

## **Were the Claimants Pensionable or Non Pensionable**

18. The Claimants admitted that they were members of the 2<sup>nd</sup> Respondent's Staff Retirement Scheme which was contributory by design. The Claimants however sought to make a distinction between the Retirement Scheme sponsored by the 2<sup>nd</sup> Respondent and a pension scheme and thus maintained that they were non pensionable.

19. It was submitted on behalf of the Claimants that the 2<sup>nd</sup> Respondent's Retirement Scheme set

the retirement age at 55 years and did not provide for early retirement. The Scheme also availed employees the option of either receiving a 25% lump sum payment while converting the balance into a pension upon attaining the retirement age of 55 years or converting the lump sum payment into a pension payable throughout the life of the employee. It is also the Claimants' case that their membership in the Staff Retirement Scheme did not render them pensionable since a pension is by nature non contributory.

20. In my opinion this argument is a mere splitting of hairs. Section 2 of the Retirement Benefits Act defines a retirement benefits scheme as:

*“any scheme or arrangement (other than a contract for life assurance) whether established by a written law for the time being in force or by any other instrument under which persons are entitled to benefit in the form of payments, determined by age, length of service, amount of earnings or otherwise and payment primarily upon death, termination of service or upon the occurrence of such other event as may be specified in such written law or other instrument.”*

21. I agree with the 2<sup>nd</sup> Respondent's submission that the Retirement Benefits Scheme established by the 2<sup>nd</sup> Respondent of which all the Claimants were members rendered them pensionable within the meaning of the Retirement Benefits Act.

## **Reliefs**

22. Having found the retrenchment exercise carried out by the 2<sup>nd</sup> Respondent flawed for failure to follow the law and the CBA, I award each of the Claimants the equivalent of one month's salary in compensation.

23. The Claimants submit that the retrenchment package paid to them ought to have been in accordance with the package obtaining in the civil service at the time. To support this position, the Claimants produced a document outlining applicable retrenchment package for civil servants. It is on this basis that the Claimants claim severance pay at 2 ½ months' current basic salary for each year worked.

24. The 2<sup>nd</sup> Respondent on the other hand submitted that because it was a statutory body under the Irrigation Act (Cap 347) it was not bound by retrenchment terms applicable in the civil service. Further, the document relied on by the Claimant could not be verified as it was unsigned. I agree with the 2<sup>nd</sup> Respondent on this point. In my view, the mere fact that the retrenchment programme within the 2<sup>nd</sup> Respondent coincided with a similar exercise in the civil service or that the 2<sup>nd</sup> Respondent's retrenchment costs were funded by the government did not bind the 2<sup>nd</sup> Respondent to any predetermined terms.

25. For the unionisable employees, it was argued that at the time they were retrenched, there was no operational CBA since the CBA for 1997-1999 had lapsed and it was therefore erroneous for the 2<sup>nd</sup> Respondent to base severance pay on a lapsed CBA. In light of the finding by the Court that the Claimants were pensionable and that the civil service retrenchment package was not applicable to the 2<sup>nd</sup> Respondent's employees, this argument is not helpful to the unionisable Claimants.

26. Indeed, if the Court was to apply the Claimants' argument in this regard, the unionisable Claimants would be required to refund the equivalent of 10 days' pay per year since the statutory severance pay set under Section 16A of the repealed Employment Act (Cap 226) was in fact 15 days' pay for each completed year of service.

27. However, once terms of service which are more favourable than those set by statute are conferred to an employee either by a CBA or by an employment contract, those terms cannot be altered to the detriment of the employee. The severance pay at 25 days' salary for every completed

year of service conferred on the unionisable Claimants by the 1997-1999 CBA are therefore confirmed and their claim for 2 ½ months' pay is dismissed.

28. The Claimants also submit that they were entitled to severance pay under Section 35(5) and (6) of the Employment Act, 2007. With respect, this submission is misguided for two reasons. First, when the Claimants were retrenched, the Employment Act, 2007 had not come into operation. Second, Section 35 deals with service pay and not severance pay.

29. As far as the non unionisable Claimants are concerned, Section 16A (f) conferred statutory severance pay at 15 days' pay for each completed year of service which is payable irrespective of whether or not they were pensionable.

30. Ultimately, I make an award in favour of the Claimants in the following terms:

a) One month's salary payable to all the Claimants as compensation for an irregular retrenchment exercise to be based on each Claimant's last salary;

b) Severance pay at 15 days' salary for each completed year of service payable to all the non unionisable Claimants.

c) The amounts payable under (a) and (b) above shall be tabulated jointly by

Counsels for the parties and paid to the Claimants within the next 60 days from the date of this award;

d) The Respondent shall pay the costs of this case;

e) The award amounts shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mrs. Ligunya for the Claimants

Mrs. Kimani for the 2nd Respondent