



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1722 of 2011

1. DAVID MWANGI GIOKO.....CLAIMANTS

2. BARACK ONYANGO OKUKU

3. ALOIS JUMA OGOLA

4. MAURICE OGOLA OLOO

5. NJUGUNA EMILY N

6. PAUL OKUMU

7. MESHACK OMOLO

8. SAMUEL KAGIRI

9. MARK KHAYIKA NGARA

10. FELISTERS NEKESA ONGECHI

11. MARGARET W. KIHU

12. EMILY MUMBI KAIRU

13. Z.O. AGENYA

14. MIRIAM MUTUA

15. JOHN K MBUGUA

16. STEPHEN MWANGANGI SILA

17. JOSEPH N AUMA

18 GLADYS MUCHUMA

19. JOSEPH MAINA NJAU

20. MATHIAS ASIAMBO

21. ALFRED O OJUANG'

30. CHRISTINA KIMWELE
31. MARGARET NJOKI
32. MICHAEL WANDERI
33. BETHA NDEGI KIURA
34. RICHARD A. DONGO
35. CHARLES OHOKA OGOLA
36. JANE WARIARA MWANGI
37. PATRICK G NJOROGE
38. RAMJUS OTHIENO OWIDO
39. JAMES KARIUKI WABORO
40. FRANCIS M KIHARA
41. SAMUEL MUIRURI NYURURU
42. SAMUEL MARAKWEN
43. PHOEBE MASYOKO
44. MARGARET W NGOTHO
45. VERONICA N NG'ANG'A
46. MWANGI GACHORE
47. LYDIA WANJIRU
48. JACINTA NJAGI
49. JUSTUS B. MAKWARA
50. LUCY NJOKI CHEGE
51. DANIEL W MUKUA
52. ISAAC NGUGI

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITEDRESPONDENT

Rika J
CC. Elizabeth Anyango

Mr. Michael Owuor instructed by Michael Owuor and Company Advocates for the Claimants;

Mr. Kioko instructed by Ndonye and Associates, Advocates for the Respondent.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL RETIREMENT

AWARD

1. There originally were 62 Claimants to this dispute. There were 2 Respondents. On 7th December 2011 Mr. Owuor for the Claimants applied for, and was granted the order, to have the Claim discontinued against the City Council of Nairobi, initially named as the 2nd Respondent. When the hearing opened on 6th November 2012, 18 of the original Claimants applied to withdraw their claims against the remaining Respondent. Two names, Christine Kimwele and Ramjus Othieno had twice been listed as Claimants. With the withdrawal of the Claim by the 18 Claimants, and the correction of the duplication with respect to Kimwele and Othieno, there are 52 remaining Claimants and 1 Respondent, as named above.
2. Evidence on behalf of the Claimants was given by Samuel Nyururu [Claimant No. 41], Jane Mwangi [Claimant No. 36], Philemon Atik [Claimants' Trade Union Official], and Barack Onyango [Claimant No. 2]. They testified, and the Claimants closed their case on 6th November 2012. The Respondent testified through its Industrial Relations Coordinator Rose Naliaka Wangila, on 5th December 2012 when the proceedings came to a close.
3. The position of the Claimants, as explained in their pleadings and evidence on record, is this: They were initially employed by the Nairobi City Council, in the Water Department. Following the water reforms under the Water Act Number 8 of 2002, the Nairobi City Water and Sewerage Company was founded in 2004. The Nairobi City Council transferred the services of the Claimants to the new Company on 18th May 2004, by executing a Transfer of Operational Assets, Staff and Operational Liabilities. The Claimants took up employment with the new Company, under the prevailing terms and conditions of employment. The mandatory retirement age, was fixed at 55 years. In January 2009, they received notices of retirement from the Respondent. They were advised that they would attain the compulsory retirement age by 31st December 2009. Their contracts of employment with the Respondent would come to an end on this date.
4. Before the notices could take effect, the Permanent Secretary, Secretary to the Cabinet and Head of Public Service, Ambassador Francis Muthaura issued a Circular to all Public Authorities dated 20th March 2009, reviewing the mandatory retirement age of Public Servants from 55 years to 60 years. The Circular explained that this review was necessary, in order to harmonize the retirement age applicable to the East African Community. The change became effective from 1st April 2009. Employees serving on contract, as at 5th March 2009 after the attainment of the age of 55 years, would continue to serve under the respective contracts. Contracts expiring before the age of 60 would be renewed, in accordance with the provisions of the contracts. The Circular directed that employees who had already received retirement notices, or had their pension claims already prepared, but not attained the age of 55 as of 5th March 2009, would continue to serve until they attained the age of 60 years if they so wished. The Claimants state further that as of January 2009, the retirement age contained in the Collective Bargaining Agreement concluded between the Respondent and the Kenya Local Government Workers Union [KLGWU] was 55 years. The CBA adopted on 1st August 2009, amended the mandatory retirement age to 60 years. The Claimants hold that they were still in employment when the Circular and the CBA both adopted the 60 years mandatory retirement age. The retirement notices issued in January 2009 had not taken effect.
5. The Claim is based on the decision by the Respondent to go ahead with the implementation of the retirement notices on 31st December 2009, in disregard of the change in the mandatory retirement age. In January 2010, the Respondent stopped paying the salaries of the Claimants. After retirement, some of the employees sought assistance from the Office of the Prime Minister. They wished to be re-instated. In response to the communication from the Prime Minister, the acting Managing Director of the Respondent wrote on 11th July 2011 stating, *“through consultation with the Nairobi City Council, Office of the Deputy Prime Minister, Ministry of Local Government, Athi Water Services Board and Ministry of Public Service, it was decided that the affected staff be compensated for the time they will not be working. The company’s Board of Directors, in their meeting of 5th July 2011, approved the compensation package for*

the early retirees. In line with that approval, the management is preparing to make payments accordingly.” The Board had earlier met on 31st May 2010, when it was noted that *‘the company has already adopted the 60 year retirement age. However, those who retired when the government started implementing this retirement age will have their cases reviewed by the new Board of Directors, with a view to returning them to work.’* There was an agreement the Claimants return to work. The Claimants allege that the Respondent through its then Managing Director Francis Karimi Mugo, reneged on the agreement.

6. The Claimants testified their correct retirement date should have been 31st December 2014, not 31st December 2009. The agreement was that the Claimants would be reinstated and paid the arrears of their salaries and allowances from 1st January 2010, and thereafter would receive their normal salaries until retirement on 31st December 2014. There was a change of management at the Respondent. The new management offered to pay off the Claimants for the period between 1st January 2010 and 31st December 2014. This was not honoured, and instead, the Respondent went on to recruit new staff. The Claimants consider the termination of their contracts of employment through premature retirement unfair. They seek the following

orders:-

- a. A declaration that, in the circumstances, termination was unfair;
- b. They be reinstated effective from 1st January 2010, with full payment of all emoluments;
- c. They be re-engaged by the Respondent in comparable jobs with effect from 1st January 2010;
- d. Alternatively, they be compensated for loss of employment at a total of Kshs 152,736, 302.60 as tabulated in the Claimants’ schedule attached to the claim;
- e. They be paid arrears of salaries from 18th May 2004 at Kshs 42,242,786;
- f. Each Claimant be paid arrears of salary and allowances from 1st January 2010, and the anticipated salary and allowances up to 31st December 2014;
- g. A declaration that retirement of the Claimants at the age of 55 years, breached the Claimants’ fundamental rights and freedoms under Article 41 of the Constitution;
- h. A declaration that the recruitment of new staff by the Respondent is discriminatory under Section 5 of the Employment Act 2007;
- i. Costs;
- j. Interests at 14 % per annum; and,
- k. Such further or other relief as the Court deems fit.

7. Cross-examined by Mr. Kioko, Nyururu testified that his name was added to the list of 2009 retirees by his advocates. The schedule indicating what salaries and allowances were owed to the Claimants from January 2010 to December 2014 bore the names of the same employees contained in the list of retirees. The employees were issued with notices of retirement. Most retired by 31st December 2009. The witness was not able to tell if Jacinta Njagi, Claimant Number 48, retired in 2008. All Claimants had attained the age of 55 by December 2009. They were not retired on diverse dates. The notices issued between January and April 2009. Jacinta’s notice of retirement was given in 2008. All the Claimants were covered under Muthaura’s Circular. Some employees such as Meshack Omolo were forced to go on voluntary early retirement. The Claimants are not pursuing arrears of salaries; just the salaries and allowances which the

Respondent conceded it would pay to them. The amounts already paid to some of the employees were not factored in their computation and claim before the Court. The CBA was effective from 1st August 2009 and applied to the Claimants. The company adopted the 60 year retirement age. By the time it issued the notices, it was well within its mandate to do so. In re-direction, Nyururu testified that the Respondent adopted 60 year retirement age before the Claimants graduated to 55 years. The Respondent's Board undertook to review the Claimant's forced retirement, but did not do so. The letter from Engineer Gichuki said employees would be compensated for the balance of their years of service. Jane Mwangi told the Court she worked for the Respondent as a Sewer Operator. She was among employees served with notices of termination in January 2009. She was retired December 2009, while she correctly would have retired, in December 2014. She has not received her salary and allowances from January 2010. On cross-examination she admitted she has received about Kshs. 180,000 from the Respondent. This, she explained, represented arrears of salary predating retirement. Philemon Atik was employed as Water Assistant. He is the Branch Chairman of the currently recognized trade union National Union of Water and Sewerage Employees [NUWASE]. There is a CBA between the Respondent and the Union, effective from 1st August 2009, fixing retirement age at 60 years. The Claimants are unionisable employees and covered under the CBA. Answering questions from Mr. Kioko, Atik testified that the current CBA negotiations have not been concluded. The old CBA remains in place until amended by the incoming one. All Claimants are members, having joined NUWASE in 2006. Jacinta Njagi enlisted in 2006-2007. Atik did not have a list of his Union Members in Court. A CBA covers all unionisable employees, not just the union members. Barack Onyango worked as an Artesan Plumber. He too was retired prematurely, without any compensation for his years left in service, counted up to December 2014. He left on 31st December 2009 and was paid about Kshs. 187,000. He was not told what this amount was for.

Mr. Owuor implores the Court to find in favour of the Claimants, and assist in terms detailed under paragraph 6 of this Award. He argues that the decision by the Respondent has rendered the Claimants destitute.

8. The Respondent counters that some of the Claimants have no capacity to bring this Claim. Fredrick Odiyo for example, is deceased. Some of the Claimants voluntarily agreed with the Respondent to have their contracts of employment terminated. They were paid retirement benefits. The retirement notices issued regularly in January 2009, while the Muthaura Circular came in March 2009. The directive was in any case optional, and an employee could agree with the employer on retirement at 55 years. Termination was fair. The employees were fairly retired. Lawrence Ogolla, Charles Mutua Musoi, Mary Wanjiru and Lucy Njoki Chege requested the Respondent to leave on early retirement. They were allowed to do so in 2008. Eustace Gitonga resigned from employment on 12th January 2008. Samuel Muchina, Manasseh Ogutu, Sarah Wairimu, Agnes Ogola, Samuel Tima, Wirigu Wamburi, Margaret Waithere and Mwangi Richard were out of employment for other reasons other than retirement. Francis Wahome Kiiru is still in employment. Other employees such as Gladys Muchama, Jane Mwangi, Samuel Kagiri and Joseph Maina Wanjau chose to be paid their dues after retirement. The Respondent calculated and paid these dues out. The Claim is unmeritorious and should be dismissed with costs to the Respondent.

9. Naliaka Wangila testified she is a Human Resources Professional, in-charge of the coordination of employees and industrial relations at the Respondent. She deals with employee welfare and grievances, and has been involved with the issue in dispute. She conceded that the Respondent issued retirement notices to the Claimant in January 2009. The employees were to retire in December 2009. Ambassador Muthaura issued his Circular on 20th March 2009, after the Respondent had already given the notices. The Respondent did not revoke the notices because it thought it was a private company. The Respondent's Management consulted, and the Circular was adopted in 2010. The Respondent then embarked on consultation with the stakeholders, among them the Office of the Prime Minister, Ministry of Local Government. It was necessary to consult because the Respondent was under the impression that water companies were not affected by the Circular. The Permanent Secretary in the Ministry of Local Government advised the Respondent in February 2011, that indeed, the Respondent's employees fell under the Public Service, and were therefore covered by the Circular. The Permanent Secretary advised that the retirement should not have taken place, and the Respondent should rehire.

10. The Respondent designed a compensation package for the employees comprising golden handshake of Kshs. 50,000; 2 months' basic salary for each of the 5 years of service left; 1 month basic salary in lieu of notice; and baggage allowance of Kshs.50,000 to each employee. The Respondent borrowed from redundancy and other market benchmarks. The parties struck a deal because none of the parties was to blame. Some new employees had already been recruited. The agreement was to have a package based on years left, not years served. The Respondent consulted Kenya Local Government Workers Union and a disagreement arose. Some employees accepted the offer, others rejected. There were 44 employees. Gioko was among the employees who rejected the offer, while Isaac Ngugi and his group accepted. Nyururu retired in 2009, but was not covered in the list of the beneficiaries under the deal. His name was inserted by his Advocates later. He was in Management, with completely different terms of service. The Circular did not apply to him. He was employed under a 3 year contract on 20th August 2005. This was renewed for 16 months on 28th August 2008. Jacinta Njagi retired on 9th January 2008. She was not in the group of 2009. The ones who accepted the deal were paid. 13 employees have already been paid. Some were paid the full amount while others received 50% due to financial constraints. The retirement was not same thing as redundancy or premature retirement. Gratuity was not recoverable as the Claimants fell under a Pension Scheme. Medalion is an item that the Respondent ceased to give to the employees. Gratuity, Uniforms, Bar Soaps, Rain Coats, Gumboots and Industrial Boots were items under review and therefore un-claimable. By the time they lodged their Claim, positions had been filled at the Respondent. Nothing was forced on the employees. Their respective claims are farfetched. The Respondent is always ready to compensate when a claim is rightly due.

11. Naliaka testified in cross-examination that she worked as a Senior Officer with the City Council of Nairobi from 1999, and transferred her skills and services to the new Water Company in 2005. There is a Human Resources Director and Human Resources Manager, above her. She is the Coordinator, not the Manager. She represents Management. She keeps records of employee payments. Meshack Omolo was paid Kshs. 270,000. He signed in acknowledgement, but Naliaka did not have any record of this acknowledgement. He was paid in compensation for premature retirement. The Permanent Secretary in the Ministry of Local Government advised the Respondent to pay the 1st Claimant compensation for the period up to 2014, in a letter dated 21st February 2011. The Respondent did not agree to pay up to 2014. Each Claimant was employed by the Respondent. The Respondent considered the whole scenario. Notices issued in January 2009, while the Circular of Ambassador Muthaura came in March 2009. It was not adopted immediately. It was adopted in 2010. The CBA adopting the 60 year retirement age was signed in May 2010. Engineer Gichuki wrote stating the retirees would be paid for the period not worked. The letter was written in 2011 and said the employees would be compensated for the time they were not working. Computations by the Respondent came after the letter by Engineer Gichuki. The meeting of the Respondent's Board of 31st May 2010 stated that the Respondent had already adopted the 60- year retirement age. The CBA effective 1st August 2009 had clause 26 which adopted the 60 years as the mandatory retirement age. The Muthaura Circular was adopted after the Claimants had already exited. The figures stated in the claim would be correct based on the period between January 2010 and December 2014, but the Respondent looked at the whole scenario. The respondent did not deliberately retire the Claimants early. Nyururu was on contract, though the Respondent had indicated elsewhere that he retired in 2009. Naliaka testified that the Respondent has not been pressuring the Claimants to withdraw their Claim as a precondition for settlement. She agreed that the Respondent has not completed paying what it computed as being due to the Claimants. The computations by the Respondent referred to payment of 1 month salary in lieu of notice, while the Respondent argued elsewhere that it had issued 6 months notice of retirement. She denied that the Respondent was involved in a fraud against its former employees. She asked the Court to refer to payment of terminal dues slips at page 236 of the Claim, and find that the Respondent has been honouring its obligation to the Claimants.

The Court Finds and Awards:-

12. The Claimants were initially employed by the Water Department in the City Council of Nairobi. They were transferred to the newly created Nairobi City Water and Sewerage Company under the Water Reforms that came with the Water Act Number 8 of 2002. The Company was incorporated in 2004, taking over the role of the former Department of Water in the City Council of Nairobi. They continued

serving in the Respondent until 31st December 2009. Early that year, in January 2009, the Respondent issued the Claimants with notices of retirement. The Claimants were told they would retire upon the attainment of the 55 year age ceiling, on 31st December 2009. On 29th March 2009, well over 8 months before the notices took effect, the Head of Public Service Ambassador Francis Muthaura issued a Circular. The Circular was addressed to various Public Authorities, among them Clerks to Local Authorities. The communication served to direct these Public Authorities that the mandatory retirement age for Public Servants had been raised from 55 years to 60. The Central Government justified the policy shift on the following grounds-

- The 55 year age ceiling had the effect of rendering employees who would otherwise be productive, largely unproductive and reliant on the tax payer for funding their pension when they should be contributing to the economy; and,
- Other members of the East African Community had adopted the 60 year retirement age, and Kenya was bound to follow suit in the context of an integrated job market.

The Government advised Public Service Employers that the circular took effect from 1st April 2009. This was a clear 8 months before the notices issued by the Respondent to the Claimants took effect. The communiqué specified that *employees who had already received retirement notices, or had their pension claims already prepared, but had not attained the age of 55 years as of 5th March 2009 will continue to serve until they attain the age of 60 years if they so wish.*

13. The Respondent testified it only adopted this circular in 2010, some time after the notices it issued to the Claimants took effect. Naliaka explained that the delay was occasioned by the lack of clarity on the status of the Respondent's employees. Are they Public Servants, covered by the Circular, and is their employer a Public Body?

14. The Water and Sewerage Companies were established as instruments in the actualization of the water reforms contemplated under the Water Act Number 8 of 2002. They are owned by Local Governments, with other stakeholders having nominal shareholdings. Their structure was discussed by Hon. Justice Mohammed Ibrahim in ***Eldoret High Court Miscellaneous Civil Application Number 97 of 2003, Republic v. Eldoret Water and Sanitation Company ex parte Booker Onyango [2008 e.KLR]***. It was concluded by the Court that the Water and Sanitation Company is a governmental agency and instrumentality, a part of the Local Authority, whatever name it went by. The Respondent is a governmental agency and instrumentality, established under the Companies Act Cap 486 the Laws of Kenya, publicly owned but whose operations and management are privately run. The Central Government, through Legal Notice Number 101 of 12th August 2005 directed the transfer of staff and assets from the Central Government to the newly created Water Services Boards and Water Services Providers.

15. It is not clear to the Court why it was necessary for the Respondent to engage in wide consultations in trying to find out if its employees were covered by the Circular. It does not look convincing that on 31st December 2009 when it implemented the retirement notices, the Respondent was still looking for an answer. Naliaka's evidence that the Respondent was caught up in a peculiar situation was a weak piece of evidence. What was peculiar, while Naliaka and the top Management at the Respondent are well versed with the Water Reforms and understood well from 2005, that they were not running a private commercial company but an adjunct of the Local Authority, whose employees are subject to Public Service Regulations? The Respondent ought to have implemented the Circular issued by the Head of Public Service with effect from 1st April 2009. The effect of the Circular was to recall the retirement notices. The Respondent was aware of the obligation imposed on it by the Circular, but shut its eyes and recklessly went on with the retirement plan. The applicable mandatory retirement age was clarified by the subsequent CBA that took effect on 1st August 2009. The CBA adopted the 60 year retirement age. Parties who negotiate CBAs are the same persons placed in positions of access to market information. The Management of the Respondent did not go to negotiate the CBA without information on the changing East African Market. The CBA upheld the new age prescribed some months back by the Government

Circular. The Circular took effect on 1st April 2009, while the CBA did so on 1st August 2009. The Respondent had no reason to go on with the retirement exercise. In view of the two documents varying the contractual age of mandatory retirement, the Respondent did not have justification in retiring the Claimants. The problems that followed that execution of the retirement plan were of the Respondent's own authorship. What are these problems and how should the Court intervene in their resolution?

16. The Respondent retired the Claimants and filled some of the positions they had vacated. Un-ending debate involving the Respondent and the Ministry of Local Government, whether the Claimants should be reinstated or compensated, took the better part of the years after retirement. Engineer Phillip Gichuki wrote the Office of the Prime Minister on 11th July 2011, revealing the following-

- Through consultations, it was decided that the affected staff be compensated for the time they will not be working;
- The company's Board of Directors in their meeting of 5th July 2011 approved compensation package for the early retirees; and
- The Management was preparing to make the payments.

There were several requests for reinstatement from individual Claimants, and from Politicians interceding for certain employees, before the Respondent made the resolution for compensation. The Claimants allege the communication of Engineer Gichuki promised them salaries and allowances for the 5 years left in their service ending December 2014. But the package developed by the Respondent, which Naliaka explained borrowed from redundancy situations and early retirement experiences of some Kenyan Businesses, offered **golden handshake of Kshs. 50,000 across the board; 2 months' basic salary for each of the 5 years remaining; 1 month basic salary in lieu of notice; and baggage allowance of Kshs. 50,000**. Some of the employees accepted this offer and were paid some portion of their total packages. Another group led by Gioko declined and decided to come to Court. They did their own computation of what they deem as due to them. They claim **full 5 years' salary; 5 years house rent allowance; 5 years' commuter/ fuel allowance; 5 years' leave allowance; and 31% yearly salary as gratuity**. The main difference is that while the Respondent feels it was in a peculiar situation and recommended a realistic, rather than a legal solution to the problem, the Claimants feel they are entitled to a legal solution, and should not receive anything less than they would have earned in the 5 years taken away from them in premature retirement.

17. Although the Court finds the Respondent to have created this dispute by its disregard for variation in the mandatory retirement age, the Court must exercise caution in acceding to the rigid position advanced by the Claimants. This Court has in the past held that there is need in resolving employment disputes to pay heed to the principle of ***a fair go all round***. This principle requires the Court to balance the interest of the employer and that of the employee. It is regularly invoked in the Commonwealth Jurisdiction, particularly Australia, to correct outcomes arising from the natural higgling of the marketplace. The Court must carefully evaluate the circumstances in which the default or violation by the employer occurred, and also the voluntary effort made by the employer to remedy the economic injury suffered by the employee. It is relevant to consider the nature and purpose of the business undertaken by the Respondent. As seen in the High Court decision of ***the Eldoret Water and Sanitation Company***, the Respondent is not a commercial entity, out in the market to make a private profit; it is an instrumentality and agency of the Local Authority, serving the residents of Nairobi in a very important role. In ***Industrial Court Cause Number 611[N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited***, this Court gave the view that the purpose of any employment compensation is not to unjustly make rich aggrieved employees, but to redress their economic injuries in a proportionate way. The Court went on to say that, ***'courts, even in advanced economies hardly award compensation based on the remainder years of service. Compensation must be reasonable and not appear to punish the employer. The law of unfair termination requires that the Court observes the principle of a fair go all round.'*** Employees are paid salaries for contributing their labour. When there is no contribution, there is no compensation. A ***fair go all round*** is based on an employment relationship of equal and reciprocal responsibility. The Claimants did not voluntarily with-hold their labour; they were denied the opportunity to continue

working for 5 years. It is not their fault, but should they be paid for the entire duration when they have not contributed any labour? Some other young Turks were recruited by the Respondent, have been rendering labour and getting compensated at the end of every month. To ask the Respondent to pay the Claimants for the entire 5 years would clearly be burdensome, and inhibit the Respondent's ability to render public service to the residents of Nairobi. The Court is persuaded that the Claimants must be compensated for the economic injury, but not in the proportion demanded by them. Reinstatement and re-engagement are not suitable remedies, granted that it is now over three years since the Claimants left employment. It is little over one year to December 2014, the date they would all be ripe for retirement. The Court does not think that their early retirement violated Article 41 of the Constitution; this Article came into being in August 2010, after the early retirement in December 2009. The Court does not think that by employing new persons after retiring the Claimants, the Respondent acted in breach of Section 5 of the Employment Act 2007. The Respondent may have acted out of ignorance, rather than willful discrimination.

18. The Claimants seek house rent allowance; commuter/ fuel allowance; leave allowance; uniform allowance; soap allowance; raincoat allowance; gumboots; and industrial boots allowance, all for the entire 5 years to 2014. They at the same time ask for gratuity of 5 years. These claims are grossly out of proportion with the idea of fair work. Why would they be asking for allowances which are in the nature of facilitating work? Allowances such as soap, gumboots, and raincoat- are given to facilitate actual work. If they have not contributed any labour for 5 years, why would they need soap? This is not a fair demand. It is not consonant to the principle of *a fair go all round*. The law expects the Claimants to have moved on, and made some efforts in mitigating the loss of their 5 years of employment. They made a lot of Engineer Gichuki's letter that offered they would *be compensated for the time they will not be working*. This does not appear to the Court to be a commitment by the Respondent to pay the Claimants all their demands listed above. It was an offer to compensate. The Respondent then went on to compute what Naliaka explained to be a reasonable separation package to compensate the Claimants for the forcible early retirement. The Respondent offered compensation as advised in the letter of Engineer Gichuki comprising golden handshake of Kshs.50,000; 2 months' basic salary for each of the remaining 5 years of service; 1 month basic salary in lieu of notice; and baggage allowance of Kshs.50,000. The Court appreciates the effort made by the Respondent in redressing the problem. It however did not go far enough in redressing the collective economic injuries occasioned to the Claimants. In particular, 2 months' basic salary for each year left in service, appears to have failed to capture the full gravity of the economic injuries suffered by the Claimants. An offer of golden handshake of Kshs.50,000, to some employees whose monthly salary was more than Kshs.50,000 appears downright contemptuous. The staggered release of what was promised to employees is an added insult to injury. The Respondent ought to have put in place an elaborate plan to pay the early retirees their dues with some sense of urgency, to cushion them against the problems attendant to early retirement. The conduct of the Respondent in retiring the Claimant's early and in subsequent payment of terminal benefits in fits and startles, amounted to unfair termination under Section 43 and 45 of the Employment Act, for which compensation is awardable. This should not be confused with the compensation offered by the Respondent for lost service period, which is effectively a terminal benefit. The Court in the end will assist the parties by rejecting the claim for full compensation made by the employees, but improve on the offer made by the Respondent. It is also clear to the Court that some employees may have received some portion of what was initially offered by the Respondent. It was alleged some of the employees may even be dead, while others may have compromised their claim one way or the other. There are some grey areas as shown by Mr. Owuor's amendment of the pleadings, and withdrawal of the claims by certain Claimants in the course of the proceedings. There are other employees such as Nyururu whose bona fides have seriously been questioned. Some of the employees are alleged to have retired before January 2009. There were some employees who allege what was paid to them comprised arrears of pre-retirement salaries. The evidence by the various witnesses did not assist the Court much in shedding light to these grey areas. The decision arrived at by this Court will call in the assistance of the Nairobi Provincial Labour Office to interrogate the employment records of the employees whose capacities in bringing this claim have been questioned. In the end the Court Orders:-

[a] The premature retirement of the Claimants by the Respondent amounted to unfair termination;

[b] The Respondent shall pay to each un-disputed Claimant 5 months' gross salary in compensation for unfair termination;

[c] The Respondent shall pay to the un-disputed Claimants the following terminal benefits-

- i. Golden handshake of Kshs. 75,000.***
- ii. 4 months' basic salary for each of the remaining 5 years of service.***
- iii. 1 month basic salary in lieu of notice; and***
- iv. Kshs. 75,000 in baggage allowance***

[d] The Respondent shall ensure these amounts are paid within 60 days of the delivery of this Award;

[e] The Nairobi Provincial Labour Officer is directed to investigate the bona fides of the disputed Claimants; any arrears of salaries owed to the employees prior to retirement; and any part payments made to the employees, and the nature of those payments.

[f] The Respondent shall forthwith avail all the employment records with regard to such employees to the Nairobi Provincial Labour Officer and the Respective parties' Advocates.

[g] The Nairobi Provincial Labour Officer shall file a report in Court with details on the questions arising under [e], within 60 days of the delivery of this Award;

[h] Parties to list the dispute for mention at the end of the 60 days for further orders; and

[i] No order on the costs.

Dated and delivered at Nairobi this 22nd day of March 2013

James Rika

Judge