



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 749 of 2010**

KENYA UNION OF DOMESTIC,  
HOTELS,  
EDUCATIONAL INSTITUTIONS,  
HOSPITALS

AND ALLIED WORKERS UNION [KUDHEIHA].....  
CLAIMANT

**VERSUS**

ASSOCIATION FOR THE PHYSICALLY  
DISABLED  
OF KENYA [APDK]

.....RESPONDENT

*Rika J*  
CC. Elizabeth Anyango

*Mr. Mwari S. Njiru, Industrial Relations Officer of the Claimant, instructed by the Claimant*

*Mr. Abisai Ambenge, Senior Executive Officer of the Federation of Kenya Employers, instructed by the Respondent*

**ISSUES IN DISPUTE:**

- a) NON-IMPLEMENTATION OF COURT AWARD/  
CBA;
- b) UNFAIR TERMINATION OF CLAIMANT MEMBERS' CONTRACTS OF EMPLOYMENT;  
AND
- c) UNLAWFUL RETIREMENT BY THE RESPONDENT OF CLAIMANT MEMBERS.

**AWARD**

1. The Claimant Union initiated this Claim, through which it seeks remedies of a collective nature, in an economic dispute, as well as individual remedies for some employees who are said to have left employment unfairly. It would have been tidier if the Claimant separated the economic dispute from the dispute on unfair termination. It is always easier for the Court to understand the issues in dispute better,

when the issues are isolated and dealt with systematically and in a structured manner. This is more so particularly because the economic dispute appears to originate from an Award made by this Court earlier, in Industrial Court Cause Number 2 of 2007, involving the same Parties. The issue of implementation of that Award should have been made in an application under the original Cause, instead of being brought as a new Claim, accompanied by other peripheral Claims.

2. The Claimant filed the Statement of Claim on 28<sup>th</sup> June 2010. The Respondent filed its Statement in Reply on 8<sup>th</sup> January 2011. Mr. Njiru for the Claimant made brief oral submissions on 26<sup>th</sup> September 2012. He adopted the contents of his pleadings, closing his case the same day. The Respondent called the Executive Officer and Financial Controller of its Mombasa Branch, Mr. Francis Kithuka Kivulli, who testified on 5<sup>th</sup> December 2012 when proceedings closed.

3. The Claim may be summarized as follows:-

a) The Respondent refused to adjust general wages by 8% ordered in Cause Number 2 of 2007. The Respondent only paid the arrears as from 1<sup>st</sup> August 2004, but did not adjust the wages after paying the arrears;

b) The Respondent refused to adjust the salary of Violet Njaramba, a Filing Clerk/ Cashier as from 1994 to-date.

c) The Respondent refused to pay the correct house rent allowance as provided in all Grades. [i] Employees on Grade 1 to 4 are entitled to 20% of their salaries as house rent allowance under the CBA, while [ii] employees on Grade 4 to 6 are entitled to 24% of their salaries as house rent allowance;

d) The Respondent disregarded Clause 9 of the CBA and continued to pay traveling allowance at Kshs. 1,400 instead of the correct figure of Kshs. 1,800;

e) The Respondent has continued to employ Claimant members on casual/piece rate arrangements which, is against the CBA, with the result that employees are deprived of terminal benefits when they leave employment;

f) The Respondent refused to pay Safari Allowance to employees when they are out of their normal workstation; and,

g) The Respondent refused to implement the long service increment as required under the CBA;

Following these economic grievances, the Claimant desires that the Court makes these Orders:-

**I. All employees in employment from 1<sup>st</sup> August 2004, do have their salaries adjusted and be paid arrears, as occurred from 1<sup>st</sup> August 2006 to-date;**

**II. The Respondent be ordered to comply and implement the CBA, and pay all the outstanding sums, in the disputed clauses; and**

**III. Employees, who are casuals/piece rate workers, be confirmed as permanent in accordance with the CBA.**

4. On the second limb of this overloaded Claim, the grievances are laid out as follows:-

a) The Grievant John Irungu Kihungi, who is disabled, was employed by the Respondent on 1<sup>st</sup> June 2005 as a Leather Technician. His contract was terminated by the Respondent on 15<sup>th</sup> December 2005. Notice given to Kihungi, was for a mere 2 days, contrary to the CBA in place; and,

b) Mrs. Violet Njaramba, Miss Rehema Suleiman, Miss Teresia Wakarima Kariuki and Mr. John Chomba

Mugo, all Persons with Disabilities, were retired by the Respondent at the age of 55 years in 2008/2009. This was against the Persons with Disabilities Act 2003 and in violation of the CBA;

With regard to these individual Claims, the Claimant prays the Court to grant:-

**I.To John Irungu Kihungi, one month salary in lieu of notice; compensation for wrongful termination; unutilized annual leave be paid in cash; traveling allowance at Kshs. 1,800; and certificate of service; and,**

**II. To Njaramba, Suleiman, Kariuki, and Mugo, an Order for Reinstatement to their former positions, with all their full benefits until they reach the age of 60 years, as required by the Act and the CBA.**

Kihungi earned Kshs. 4,000 on termination; Njaramba Kshs. 8,002 on premature retirement; Kariuki Kshs. 8,274; and Mugo Kshs. 8,896- all per month. The rate for Suleiman is not apparent on the face of the record. Njaramba served as a Copy-Typist; Kariuki was a Stamp Cleaner; and Mugo a Leather Artisan. The designation of Suleiman is not captured in the Records filed by the Claimant.

5. In his short oration before the Court, Mwari S. Njiru submitted that the Respondent acted contrary to the Persons with Disabilities Act and the CBA. The 60 year retirement age was disregarded. The protections guaranteed by the Employment Act 2007, against unfair and unlawful termination of employment were disregarded. The 4 employees retired early are presently not earning anything to sustain themselves. Mr. Njiru asked the Court to send a strong signal to employers who are mistreating their disabled employees.

6. The Respondent's position, as contained in the Statement of Response and the evidence of Kivulli, may be inventoried as follows:-

a) The Respondent is a non-profit Organization, registered as an NGO, devoted to the rehabilitation of the disabled people in Kenya;

b) It has a Recognition Agreement and CBA with KUDHEIHA;

c) Salaries of the Respondent's employees were adjusted at 8% across all the Grades, in accordance with the Award of the Court in Cause Number 2 of 2007. The Respondent attached a schedule of payments made to the employees, signed by the employees upon receipt of the increments;

d) The dispute relating to Njaramba was settled between the Parties, and an agreement signed by the Parties and the Grievant on 25<sup>th</sup> May 2000. The belated Claim is in any event time-barred;

e) The Clause on house rent allowance was implemented at 20% and 24% of the basic salary for the respective Grades given by the Claimant. The Respondent supported this response with Master Payroll for December 2008;

f) Traveling allowance had similarly been adjusted in accordance with the CBA. The Respondent again availed the Master Payroll for December 2008 to demonstrate this adjustment;

g) All employees on irregular terms are regulated through the CBA and the Labour Laws. Employees on piece rate at the Bombolulu Workshops in Mombasa are involved in craft production. They receive benefits like all other employees. They sometimes earn more than regular employees, if their production value exceeds the minimum wage;

h) Safari allowance is paid at higher rates than what is agreed. The Respondent supported this position with payment vouchers taken from its drivers and therapists;

i) Long Service Increments have been acted upon. The Respondent again invited the Court to look at the

Master Payroll;

j) Kihungi was employed under a contract that started 1<sup>st</sup> June 2005, lapsing 31<sup>st</sup> December 2005. He was paid all his dues at the end of the contract. Another contract was executed between the employee and the employer for the period between 2<sup>nd</sup> June 2006 and 31<sup>st</sup> May 2007. These contracts were made in accordance with the CBA, and the Union did not object at the time; and,

k) The retirement age of 55 years was agreed between the Claimant and the Union, in the negotiations leading to their CBA. The Claimant Union attempted to introduce the 60 year limit, but what was agreed was 55 years. When the Claimant forwarded the CBA to the Minister and the Court, certain clauses had unilaterally been changed, which the Respondent brought to the attention of the Claimant. The CBA containing the altered items was sneaked to the Court for registration. The errors were pointed out to the Court, which ruled that the CBA had already expired, and the errors should be corrected at the next round of negotiations. The Claimant agreed that the errors would be rectified. The 60 year-age was not part of the Award made in Cause No. 2 of 2007. Parties agreed on the 55 year retirement age, and the 4 employees Violet Njaramba, Rehema Suleiman, Teresa Wakarima Kariuki, and John Chomba were retired regularly. The Respondent also pointed out to the Claimant, that the Provision under the Persons with Disabilities Act [2003] on retirement at the age of 60, had not been operationalized. The Respondent had written to the Kenya Law Review Commission, alerting the Commission that the retirement Provision in the Act, was drafted to cater for persons with disabilities employed in the private and public sectors, where 5% of their workforce was reserved for persons with disabilities. The law did not make provision for Special Rehabilitation Institutions such as the Respondent. Persons with Disabilities become less productive as they age, and for the Respondent to be forced to retain them until they are 60 years, would mean the Rehabilitation Workshops end up being economically unsustainable. The Respondent proposed to the Kenya Law Commission, that minimum retirement age for Persons with Disabilities be 60 years, provided that such Persons employed in Organizations such as the Respondent, may voluntarily retire, or be retired from the age of 50 years and be paid retirement benefits. The Commission responded to the proposal, conceding that the philosophy of the retirement provision in the Act of 2003 was unsound. It promised to review section 15[6] in light of the concerns raised by APDK. The Respondent stated that all the 4 employees accepted their retirement and the retirement benefits paid to them. Several other employees have retired at the age of 55 years, and the Claimant has not raised the issue of their retirement. The retirement age in the APDK Human Resource Policy is 55 years.

Against this backdrop the Respondent urges the Court to:-

**§ Reject the Claim;**

**§ Order the retention of the 55 year-retirement age in view of the intended review of the Act, and the dishonest manner in which the Claimant managed to have the CBA registered adopting the 60 year-retirement age; and**

**§ The Claimant to meet the costs of the Claim.**

*The Court Finds and Awards:-*

7. The Court is satisfied that the Respondent adjusted the wages for its employees by 8% as granted in Cause No. 2 of 2007. The payroll of the Respondent for October 2008 reflects payment of the wage increments, across the board. The employees acknowledged receipt. The Claimant appears to take issue with the lack of movement in the basic wage after the arrears were paid. The Respondent's witness explained that the Respondent has been adjusting wages in accordance with the law, even before the arrears became due. The Respondent has availed evidence, to demonstrate its compliance with the wage increment order. The Claimant on its part offered no evidence whatsoever to show that there was no compliance. No records of employees' wages after the Award in Cause No. 2 of 2007, showing non-adjustment were provided to the Court by the Claimant. The earlier Award declined the prayer to raise the basic wage. Furthermore, the Court feels the proper forum to canvass wage adjustment would have been under Cause No. 2 of 2007, not in the present overloaded dispute. The further intervention of the Court is

withheld.

8. It is not plausible that the Claimant would wait from 1994, to raise the issue relating to underpayment of wages to Mrs. Violet Njaramba. The Claimant and the Respondent met, of their own volition, and made an agreement with respect to the wages payable to Njaramba, on 25<sup>th</sup> May 2000. Why is it necessary to revisit the issue in 2010, after this employee retired? This claim is declined.

9. The Respondent Master Payroll for October 2008 shows that Charity Wanjiru earned a basic pay of Kshs. 8,002. Her house rent allowance is indicated at Kshs. 1,600, translating into 20% of the basic pay. Anne Mueni and Regina Mumbua earned basic pay of Kshs. 7,012, and house rent allowance of Kshs. 1,402, which is 20% of the basic pay. Francis Mackenzie, Ruth Nyambura and Mathias Shamola earned basic pay of Kshs. 5,195. Their house rent allowance is given at Kshs. 1,247, or 24 % of the basic pay. The trend for most of the employees is similar. The assertion by the Claimant that the respondent refused to pay 20% and 24% of the basic pay for the various Job Grades, in the absence of documents to contradict what was availed by the Respondent, cannot be believed. This claim is rejected.

9. The same Master Payroll records that employees were paid Kshs. 1,800 in traveling allowance. The Claimant did not offer any other records, to shore up its contention that the Respondent continued to pay Kshs. 1,400 under this item. In the absence of such counter-evidence, this claim must fall by the wayside.

10. The allegation that casual / piece rate work is not provided for in the CBA, and that employees on such terms are denied benefits on leaving employment, was not supported by evidence. The Respondent explained that employees on piece rate work earn more than their counterparts, when their production is high. The workshops are involved in craftsmanship, and the nature of the activities requires piece rate arrangements. It would have been of assistance to the Court, if the Claimant had brought some of the affected employees or ex-employees to testify. Although Mr. Njiru has the full mandate of presenting his members' grievances to this Court, there are certain claims which he cannot, on the basis of his statements from the floor of the Court, establish without some real evidence, from the real grievants. Why did the Claimant not even file some affidavits from some of the affected employees? This claim cannot stand.

11. Safari allowance is not paid to employees when they work out of their station, according the Claimant. The Respondent disproved this position by production of payment vouchers, on safari allowance paid to its drivers and therapists. The amounts paid exceed the minimum given under the CBA. The allegation by the Claimant is baseless and is disallowed.

12. The Claimant seeks an order for implementation of long service increment. Again the Court is not availed names of employees, their period of service and computation of dues owed under long service increment. It is just a bare statement made, informing the Court what the CBA says. There is not a shred of evidence of non-compliance. Not a single employee testified, or swore an affidavit, demonstrating long service and deprivation of the increment. The Respondent submitted that it has complied, and referred the Court to the Master Payroll attached as appendix 7. The document does not clearly show payment of the item, but it was not for the Respondent to prove a case brought by the Claimant. Specific employees ought to have given some form of evidence to establish the correctness of the claim. The claim on long service increment is refused.

13. The termination of Kihungi's contract took place on 15<sup>th</sup> December 2006. The claim that termination was irregular is made way out of time, and under the wrong procedure. The Union ought to have reported a dispute to the Minister on termination under the repealed Trade Disputes Act Cap 234 the Laws of Kenya, not wait until 2010, to claim termination was unfair. It is mind-boggling, why in any event a claim for unfair and unlawful termination has to be made alongside a collective economic dispute. The claim is improperly before the Court and is rejected.

14. The dispute with regard to the retirement age, raises weightier issues of fact and law, much more so than all the other issues discussed above. Clause 22 of the registered CBA that came into effect on 1<sup>st</sup> August 2004 says that:

“ [a] *Disabled employee be retired at 60 years, and able-bodied employees be retired at 55 years;*

*[b] Provided a retiring employee shall be entitled to 5 months’ salary and Kshs. 15,000 as retirement benefits.’”*

The CBA was signed by both parties and registered in Court. It is difficult to understand the explanation by the Respondent that what was registered is not what was agreed to. For a party to alter a negotiated document, and present it for registration at the Industrial Court, would take the daring of a criminal gang, not the action of a reputable trade union. The Respondent has asked the Court to order that the current retirement age of 55 years be retained. This is not the current retirement age under the prevailing CBA. It is not for this Court to look into the circumstances under which the CBA was registered. The CBA was to remain in force after expiry, until amended by the parties. The 55 years cannot, in absence of an amendment through subsequent CBAs, be deemed as the current retirement age.

15. Secondly, the Court cannot uphold the position of the Respondent as the Persons with Disabilities Act 2003, specifically places the mandatory retirement age for the disabled at 60 years. The CBA cannot adopt an age, that on the face of it confers less benefit to the disabled, than what is given by the law. There is merit in the argument by the Respondent on its preference for the 55 year-retirement age, particularly in the letter by its Chairman Hon. Moody Awori addressed to the Law Commission on 12<sup>th</sup> March 2009. Most disabled persons did not have equal opportunities in education and professional development. They entered the labour market much later than persons without disabilities. The introduction of the 60 year-retirement age was aimed at compensating disabled persons for the lost years, as they enter the labour market late. However, APDK trains and employs disabled persons at an early age. They are involved in work that is physically draining. They have limited productivity as they become older. APDK as an institution wholly devoted to the rehabilitation of the disabled, would not run sustainably, if forced to retain senior citizens in its labour force.

16. The Commission found this argument to resonate. It promised to relook into Section 15[6] and make some exceptions to the 60 year - retirement rule, to accommodate players such as APDK. There is no amendment to this law, however, and the Court would be jumping the gun by upholding what remains a proposal by a party on legislative reform. The Court upholds the law as it is, not as it ought to be. Section 15 [6] is a valid law and is in force. The Act itself came into force On 16<sup>th</sup> January 2004. Sections 22, 23, 24, 35 [1] 35 [2] 39 and 40 were not effective until 1<sup>st</sup> January 2010. The Court has not come across any legislative material that suggests Section 15[6] has not commenced.

16. Indeed, the 60 year retirement rule for disabled persons appears to become more entrenched in Case Law and Public Policy. It does not seem likely that there is going to be a reversal to the 55 year retirement age. In the ***Nairobi High Court [Constitutional and Human Rights Division] Petition No. 157 of 2011 between Frank Gitau Kimani v. the Attorney General and 2 Others [2012] e.KLR***, Hon Justice Isaac Lenaola upheld the right of Persons with Disabilities not to be retired before the age of 60. The Judge found the Petitioner’s right as a Disabled Person, not to be discriminated under Article 27 [4] [5] [6] and [7] of the Constitution, and Article 7 of the Universal Declaration of Human Rights, to have been violated. Failure by the Petitioner’s employer to apply the 60 year retirement rule under the Persons with Disabilities Act, the Court concluded, amounted to a violation of the Petitioner’s right not to be discriminated against on the grounds of health, age and disability.

17. Disabled Persons in the Public Service have had their mandatory retirement age raised to 65 years. The Ministry of State for Public Service issued Circular MSPS HRM/2/2/2/76 in the year 2010, clarifying that Public Servants with disabilities, would retire at the age of 60 years, like all other Public Servants. The Disabled Public Servants petitioned the Government. A second Circular MSPS /HRM/2/2/2/Vol. 11 [21] acceded to the petition. With effect from 1<sup>st</sup> July 2012, the retirement age for Disabled Public Servants was fixed at 65 years.

18. The prevailing law and policy does not favour the 55 year-retirement age preferred by the Respondent. The age adopted by the parties in the CBA appears to have the sanction of the law, and agrees with the policy applicable in the Public Service. The Court would be going against the grain were

it to endorse the position advanced by the Respondent. The Respondent can only be encouraged to continue pursuing its case with the Law Commission, but must be cautioned this is not going to be a walk in the park, considering the direction the Constitutional Division of the High Court has given on the matter.

19. The Respondent retired the four employees Suleiman, Wakarima, Chomba and Njaramba in 2009, relying on the 55 year retirement rule. There was no amendment to Clause 22 of the CBA, and the Persons with Disabilities Act was still in force. The Respondent knew of this position, but went ahead and retired the four employees early. It was not right to agitate the Law Commission for amendment, and at the same time act relying on the desired amendments. The upshot is that the Court agrees with the Claimant that the retirement of the four employees before they clocked 60 years, was unfair and unlawful.

20. Should the employees be reinstated as prayed by the Claimant? The Court does not think this would be a reasonable remedy. The employees were 55 years old in 2009, which would place them at around 59 years today. They would only serve for about 1 year before they reach the statutory and contractual 60 year- retirement age. They have been out for four years. They received what retirement benefits were offered by the Respondent and moved on. To have them back at the Workshops would disrupt their lives, and that of the Respondent. The Court finds that compensation would be an adequate, suitable and fair remedy. They shall be paid by the Respondent five months' gross monthly salary at the rate applicable on the day of their respective retirement. In sum:

***[a] The retirement of the four grievants at the age of 55 years amounted to unfair and unlawful termination of employment;***

***[b] The Respondent shall pay to each Grievant five months' gross monthly salary at the rate applicable on the date of retirement;***

***[c] All other claims are rejected; and***

***[d] No order on the costs.***

Dated and delivered at Nairobi this 30<sup>th</sup> day of May 2013

James Rika  
Judge