REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 16 OF 2013

(Formerly Nairobi Cause No. 72 of 2011)

FREDRICK NGARI MUCHIRA, HOWARD KIPKOECH KORIR & 98 OTHERS.....CLAIMANTS

-VERSUS-

PYRETHRUM BOARD OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2013)

RULING

The court delivered the judgment in this case on 31.05.2013. Judgment was entered for the claimants against the respondent for:

1. A declaration that the redundancy of the claimants was unfair to the extent that the respondent did not comply with some of the mandatory redundancy conditions in section 40 of the Employment Act, 2007 as per the findings in this judgment.
2. The respondent to pay the claimants as follows:

i. the respondent to pay the claimants of or above the age of fifty years (as at effective date of redundancy) severance pay at the rate of fifteen days pay (being wage or basic salary) for union employees and thirty days pay (being wage or basic pay) for management staff and less the amount paid under the erroneous principle of computation based on the period pending attainment of the mandatory retirement age of sixty years;
ii. the respondent to pay the claimants deductions that the respondent made but remittance was not conveyed to the respective recipients and as claimed by the claimants;
iii. the respondent to pay claimants outstanding payment for leave days as per the schedule in the folios 53 to 55 and the leave bonus as per folios 45 to 52 of the bundle annexed to the certificate of urgency filed on 26.05.2011;
iv. the respondent to pay the management staff four months gross salaries and the union staff two months gross salaries as at time of termination in view of the unfairness involved in the redundancy process; and
v. the respondent to pay claimants No. 48 Renison Kiprono Langat and No. 49 Ferdinand Kisiangani Wanjala, half salary withheld during the interdiction and the redundancy package withheld in view of the wrong computation owing to the interdiction

3. The claimants to compute their respective payments in order (2) above and to file in court and serve the respondent by 4.06.2013 and the respondent to file and serve any objections to the computation by 11.06.2013 and parties to agree upon a convenient date to hear any objections and to record the particulars of the payments.
4. Taking into account the financial status of the respondent and its public service status, the respondent to pay the claimants the dues as ordered in (2) above by 1.11.2013 failing which interest to be paid on the amount at court rates from the date of this judgment till the date of full payment.

5. The respondent to pay costs of this case.

The claimants filed an application for review on 17.06.2013. The respondent also filed an application for review on 24.06.2013. The applications were heard on 11.07.2013. The court has considered the applications and the submissions and makes the following findings:

1. For both parties, it was submitted that the letter prescribing the rates of payment dated 30.06.2010 being folio 38 to 40 on the bundle of the certificate of urgency as signed by the head of public service Amb. Francis K. Muthaura was misquoted in the judgment because the retrenchment package for unionisable staff and the management staff was mixed up. The court has revisited the judgment and finds that the application for the review is valid as submitted and the correct version of the letter is as follows:

"STAFF RATIONALIZATION AT PYRETHRUM BOARD OF KENYA (CBK)

Reference is made to your letter Ref. No. MOA/B.1.11a/4 Vol.II (10) dated 15th September, 2009 on the above subject and more particularly your letter Ref. No. MOA/B.1/11A/4 Vol. II/33 dated 22nd June, 2010.

The Tripartite Committee analysed the retrenchment package in accordance with this office circular No. OP.13.19A of 1995. In view of your confirmation of availability of Ksh.85,220,904/= to pay the retrenched staff and further assurance that the balance of Ksh.44,708,597/= has already been factored in the 2010/11 budget, the retrenchment package of the 157 members of staff is hereby ratified as follows:

Unionisable staff

1. **Payment in lieu of notice in accordance with Collective Bargaining Agreement.**
2. **Thirty (30) days pay for each year worked for those below 50 years of age or thirty days pay for each year remaining to reach age 60 for those aged 50 years and above.**
3. **Lump sum pay of Kshs.80,000/=.**
4. **Transport expenses of Kshs.40,000/=.**

Management staff

1. **Three months pay in lieu of notice.**
2. **Fifteen days pay for each year worked for those below 50 years of age or fifteen days pay for each year remaining to reach age 60 years for those aged 50 years and above.**
3. **Lump sum pay of Kshs.100,000/=.**
4. **Transport expenses of Kshs.40,000/=.**

The proposed pay out is expected to be recovered through the resultant saving at the rate of Ksh.7 million per month over the next 21 months.

The purpose of this letter is therefore to convey the approval of the package indicated above for necessary action.

By a copy of this letter the Ministry of finance is requested to grant necessary tax exemption on the 157 employees' early retirement benefits.

Yours sincerely,

Signed

Amb. Francis K. Muthaura, EGH

Permanent Secretary, Secretary to the Cabinet and Head of Public Service

Harambee House

NAIROBI."

The court finds that the parties are entitled to the review of the judgment by quoting the correct contents of the letter now set out above.

2. For the claimants, it was submitted that the severance payment for union staff should be thirty days as per the collective agreement and the provisions of the letter quoted above. The respondent did not object and the court finds that the claimants are entitled as prayed for.
3. The claimants also submitted that the management staff be paid at thirty days for severance and not the fifteen days as per the letter quoted as the same would disadvantage the management staff. For the claimants, it was submitted that it was discriminatory and contrary to section 40(1) (d) which provides that where there exists a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union. The court has considered that section and finds that it applies to unionisable employees so that while an employee is eligible to join the union and decides not to join the union, then in event of redundancy the employee opting not to join the union or being a union member will thereby not suffer disadvantage in view of the redundancy clause in the collective agreement. In making the finding, the court considers that such unionisable employee opting not to be a union member or to be such member is liable to pay agency fees or union dues respectively under section 49 of the Labour Relations Act, 2007 and therefore entitled to benefit from the provisions of the collective agreement. In the opinion of the court, the section does not apply to the management employees who essentially are not eligible to be union members. Accordingly, in absence of more favourable agreement between the management staff and the respondent, the court finds that the claimants in the management cadre are entitled to 15 days pay for each completed year of service as per section 40 (g) of the Act as there is no established basis for the court to order the respondent to pay at a higher rate of thirty days per year served.
4. The claimants submitted that the computation for severance pay should be on the basis of gross monthly pay. It was submitted that section 40 (f) of the Employment Act, 2007 provides that notice pay is for one month's **"wages"** so that the pay was beyond the net pay for labour, the wage, and it was to include allowances. Section 40 (1) (g) provides severance pay on the basis of **"fifteen days pay for each completed year of service".** The court has considered the submissions and finds that whenever the Act desires to make a reference to payment beyond the wage or salary as a basic or net pay for labour, the Act elaborately provides as much such as in sections 18(4) by using moneys, allowances, and benefits due; section 20 (2) (a) which refers to the gross amount of the wages or salary of the employee; section 25 (1) referring to repayment of any remuneration withheld or deducted; and section 49 (1) (c) referring to payment based on the gross monthly wage or salary of the employee. In section 40 on redundancy, the Act uses month's wages for notice pay and then fifteen days pay per each completed year of service for severance. The court's view is that where the Act desires payments beyond basic pay or wage or salary, it states as much and section 40 on redundancy is not one such instance.

In the judgment under review, the court stated as follows at page 24 to 25:

"Subsection 40(1) (f) is clear that the payment is on the basis of at least one month wage. Wage is not defined under the Act. The Black's Law Dictionary, 9th Edition defines wage as payment for labor or services based on time worked or quantity produced and for which the employer must withhold income tax. The meaning is elaborated when the phrase "minimum wage" is considered and which the Dictionary defines to mean lowest permissible hourly rate of compensation for labour. Thus, the court's opinion is that wage as used in the subsection means the net price the employer pays for labour as a factor of production and whose traditional measure is the amount of time worked or the output of production attributable to the individual employee. It is the further opinion of the court that work-related expenses such as those for transport, medical care or housing that may be paid to the employee by the employer as allowances or imprests or other form of payment do not form part of the wage; such are costs that facilitate labour as a factor of production towards production and do not constitute the consideration of price paid for labour and called wage or salary or more precisely, basic salary.

Accordingly, to answer the first issue for determination the court finds that in view of the relevant provisions in the Act and the CBA, the computation of redundancy package was to be on the basis of the basic salary or the wage and the claimants are not entitled to a computation on the basis of remuneration or the gross monthly pay or gross salary as claimed. The court further holds that the statutory principle that the computation is on the basis of the wage or basic salary is a minimal standard and parties were at liberty to agree upon a criteria more advantageous to the employees but which was not agreed upon in this case."

In the opinion of the court and as submitted by counsel for the claimants, wages may take varied forms such as salaries, commissions, vacation pay, bonuses, reasonable cost of boarding, payments in kind, and similar advantages received from the employer. In typical employment where the employer pays a consolidated or single head of a salary or wage, the difficulty in the meaning of wage or salary does not arise. In other common cases, it happens that the employer incurs expenses to realize the benefit of labour as a factor of production. In our legal system, such may include provision of housing in section 31 of the Employment Act, 2007, provision of sufficient clean water in section 32, provision of food as may be agreed in section 33 and provision of medical attention in section 34 of the Act. To achieve administrative efficiency and effectiveness, the employer may pay the reasonable money for such expenses to the individual employees by way of allowances appearing as such on the pay slip. In the opinion of the court, such was the case between the claimants and the respondent and such allowances, in absence of statutory or contractual intervention does not, in the opinion of the court, form part of the wages or salary. Thus, for the factors of production, to land is paid rent, to capital is paid interest and to labour is paid wage or salary. In the opinion of the court, expenses facilitative of labour being proper expenses on the part of the employer do not constitute wage or salary even where the employer pays them out to the employee to achieve administrative efficiency and effectiveness. The only exception is where the contractual or statutory provision deems such otherwise expenses of the employer to be part of the wage or salary. In the present case, such exception has not been established and the court finds that the severance pay shall be calculated on the basis of the basic pay. The court further observes that for the unionisable employees, the parties expressly agreed in clause 21 (g) that an employee who is declared redundant by the Board after one year's continuous service will be granted severance pay of thirty (30) days basic pay. The agreement, in the opinion of the court, does not offend any statutory provision and is evidence that the parties understood the effect and meaning of section 40 of the Act as construed by the court in this ruling and the judgment. The application for review on that account as submitted for the claimants shall fail. The court has found and holds that the management staff were not eligible to be unionisable employees and the submission that they were disadvantaged in view of the three months flat rate for pay in lieu of notice is unjustified and consideration of years worked like for the unionisable staff is ungrounded. The court considers that the three months were more advantageous than the one month statutory minimum and no injustice has been established. The review as submitted for the claimants in

that regard shall fail.

5. The claimants applied for review of the order in judgment on interest. The court considered the need to give chance to the respondent to pay up in satisfaction of the judgment failing which interest would run. The court considers the order as made to have been purely within the court's discretion and no material going to manifest injustice has been shown to exist to justify variation of the order as made. As for the claimants' substantive prayer for interest to be payable on the entire redundancy package, the court upholds its finding at page 37 of the judgment where it was stated thus:

> **"The claimants have prayed for interest on the redundancy package in view of the delay in the payment. The respondent has opposed the claim on the ground that the delay was to facilitate tax exemption and which was advantageous to the claimants. The court considers that the issue of interest was within the capacity of the parties to agree upon because its waiver did not contravene any statutory provision. The undertaking by the claimants, therefore, precluded them from claiming interest on the redundancy package as prayed for. The undertaking binds the parties on the issue of interest claimed on the package and the court finds that the claimants are not entitled as prayed for."**

6. As relates to compensation for unfair and unlawful termination, the claimants submitted that the court in the judgment ordered the management to be paid four months and the unionisable employees to be paid two months gross salaries for the unfair and the unlawful termination. On that issue, the court stated as follows at page 39 to 40 of the judgment:

> **"It is obvious that the claimants were not prepared or sensitized about the looming redundancy and the court finds they were unfairly treated and they must have suffered anguish as claimed. Taking into account all the enumerated circumstances and the findings, the court finds that the management staff be paid four months gross salaries and the union staff two months gross salaries as at time of termination in view of the unfairness involved in the redundancy process. While making the finding, the court has considered that serious mitigating factors have emerged in this case including the elaborate remedies that have been prayed for and found justified as well as the demonstrated respondent's financial difficulties so that twelve months gross salaries for the unfair termination and ensuing claimants' suffering would not be justified as it was in the judgment of 22.03.2013 in the case of <u>Douglas Kariuki Kagai –Versus- The Attorney General and Pyrethrum Board of Kenya, Industrial Cause No. 24 of 2012 at Nakuru."</u>**

In view of the submissions made for the claimants, the court does not find any error or manifest injustice or new material to deviate from its findings in the judgment. The court has found that in a redundancy scenario, parity of treatment must be upheld. The court has also found that the employees in the management cadre were not eligible to join the union and therefore could not validly claim discrimination as against the union staff that essentially belonged to a different cadre. The management staffs were disadvantaged, in the findings of the court, because the respondent had not instituted policies or agreements to govern the redundancy situation as it had been done in the CBA for the unionisable employees. The union employees had enjoyed all more favorable dues under the CBA which in the opinion of the court substantially mitigated the effect of the unfair termination by way of the redundancy. Accordingly, the court finds that the application for review on that account as submitted for the claimants shall fail. The respondent submitted that the pay for unfair termination should not have been ordered on the basis of gross pay. The court holds that unlike in the instance of severance and notice pay in redundancy, for unfair termination, section 49 (1) (c) is clear that the pay is on the basis of gross monthly wage or salary of the employee at dismissal or termination and the review as submitted for the respondent shall also fail.

7. The respondent submitted that the judgment be reviewed so that the respondent is not ordered to pay the claimants the deductions for the remittances that were never made to the respective recipients. On that issue, the court has revisited the judgment and upholds its opinion at page 35 of the judgment where it was stated thus:

> **"The claimants have prayed for payment of the deductions from the claimants' salaries being contributions to Pareto Sacco, Staff Welfare Fund, self help groups, Insurance Companies and banks which the claimant did not remit. The respondent's witness RW2 confirmed that the deductions were made but remittance was not conveyed to the respective recipients. The court finds that the claimants are entitled to recover the deductions because they were deductions wrongfully withheld as they were fictitious or not remitted. Section 25 of the Employment Act, 2007 is clear that the employer shall be required to repay any remuneration wrongfully withheld or wrongfully deducted from the employee. Section 19 (4) of the Act requires the employer to pay the deducted amount in accordance with the relevant time period. The court finds that in this case it is obvious that the time period for payment or remission of the deductions from the claimants has lapsed in view of the termination of the employment relationship and the claimants are entitled to recover the same from the respondents. Thus, the claimants are entitled to the remedy as prayed for."**

The application by the respondent to review the order on the refunds will therefore fail.

8. The respondent prayed for review that the interest commence running from the date of the computation of the due sums and not from 1.11.2013 as ordered. The court considers that the computation is within the parties' power and under the scheme of the judgment, it was to be concluded within 30 days from the date of the judgment but for the applications for review now before the court. In the circumstances, the court finds the application for review as submitted for the respondent is unfounded.

In conclusion, the court finds that the applications for review shall be allowed to the extent of the court's findings in this ruling; parties shall bear own costs of the applications for review; and consequential to the review the final decree shall issue for judgment for the claimants against the respondent for:

1. A declaration that the redundancy of the claimants was unfair to the extent that the respondent did not comply with some of the mandatory redundancy conditions in section 40 of the Employment Act, 2007 as per the findings in the judgment.

2. The respondent to pay the claimants as follows:

i. the respondent to pay the claimants of or above the age of fifty years (as at effective date of redundancy) severance pay at the rate of thirty days pay (being wage or basic salary) for union employees and fifteen days pay (being wage or basic pay) for management staff and less the amount paid under the erroneous principle of computation based on the period pending attainment of the mandatory retirement age of sixty years;
ii. the respondent to pay the claimants deductions that the respondent made but remittance was not conveyed to the respective recipients and as claimed by the claimants;
iii. the respondent to pay claimants outstanding payment for leave days as per the schedule in the folios 53 to 55 and the leave bonus as per folios 45 to 52 of the bundle annexed to the certificate of urgency filed on 26.05.2011;
iv. the respondent to pay the management staff four months gross salaries and the union staff two months gross salaries as at time of termination in view of the unfairness involved in the redundancy process; and
v. the respondent to pay claimants No. 48 Renison Kiprono Langat and No. 49 Ferdinand Kisiangani Wanjala, half salary withheld during the interdiction and the redundancy package withheld in view

of the wrong computation owing to the interdiction and in line with the findings in this ruling and judgment as to the computation applicable.

3. The claimants to compute their respective payments in order (2) above and to file in court and serve the respondent by 25.07.2013 and the respondent to file and serve any objections to the computation by 30.07.2013 for hearing of any objections and to record the particulars of the payments on 31.07.2013.
4. Taking into account the financial status of the respondent and its public service status, the respondent to pay the claimants the dues as ordered in (2) above by 1.11.2013, failing which interest to be paid on the amount at court rates from the date of the judgment till the date of full payment.

5. The respondent to pay costs of the case.

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 19th July, 2013.**

BYRAM ONGAYA

JUDGE