



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1314 OF 2011

PETER MBUGUA KANOI1ST CLAIMANT
PETER MUGAMBI LINTARI2ND CLAIMANT
PETER KIEMA KALUTU.....3RD CLAIMANT
FLORENCE M. MALA.....4TH CLAIMANT
JULIUS KIAUTHA KENITO.....5TH CLAIMANT
WILLIAM OKALIO EPAYE6TH CLAIMANT

VERSUS

COFFEE BOARD OF KENYARESPONDENT

JUDGMENT

By a Memorandum of Claim dated 5th August 2011 the Claimants PETER MBUGUA KANOI, PETER MUGAMBI LINTARI, PETER KIEMA KALUTU, JULIUS KIAUTHA KINITO and WILLIAM OKALIO EPAYE allege that they were all employees of the Respondent COFFEE BOARD OF KENYA, that they were retrenched by the Respondent but their terminal benefits were wrongly computed. They seek the following orders;

- a. Special damages of Kshs.19,586,212.00 being balance of unpaid severance pay.
- b. Costs of the suit.
- c. Interest at court rates of 14% from 1st December 2009 till payment in full.

The Respondent filed a Reply to the Memorandum of Claim on 29th September 2011 and a Supplementary Response on 14th May 2012 in which it denies the claim and avers that claimants were served with notices of early retirement, that the Respondent did not intend to apply the Employment Act, that the Claimants were paid more than they were entitled to under the Employment Act, that the claimants acknowledged receipt and are estopped and/or barred from claiming or stating otherwise. The Respondent further avers that the early retirement package paid to the Claimants was based on the Respondents Production Incentive allowance and that the decision to categorize the retirees into 2 groups was made by a tripartite committee after taking into account the prevailing collective Bargaining Agreement, Employment and Retirement Laws and Regulations and precedents of Public bodies that had concluded similar retrenchment exercises in the past.

The case was heard on 15th November 2012 and on 25th January 2013. The Claimants were represented by Mr. Koceyo Titus while the Respondent was represented by MS. Mumbo. Mr. Peter Mbugua Kanoi, the 1st Claimant testified on behalf of the Claimants while Mr. Bernard Humphrey iro Amadi, a Senior Human Resource and Administrator Officer testified on behalf of the Respondent.

A summary of the testimonies of the 1st Claimant is that he was employed by the Respondent on 16th October 1989. That he knew all the other claimants who were his workmates. That all the claimants left employment on 31st December 2009 through early retirement due to implementation of a new organizational structure by the Respondent. He was to be paid notice, 30 days pay for each year remaining to retirement, golden handshake, transport and earned leave. He was paid all these items. He, however, did not agree with item 2 which is 30 days pay for each year remaining to retirement. This was because the other employees retrenched with them were paid for years worked and not years remaining to retirement, that he would have been paid more if paid for years worked, that it is a contractual obligation of the respondent to pay him the difference between what he was paid and what he should have been paid. He testified that a total of 46 employees were retrenched. That there was discrimination as the employees aged over 50 years who were paid for years remaining to retirement could only be paid a maximum of 10 years unlike those under 50 who were paid for all years worked. He testified that he did not agree with the Respondent that under the Employment Act he would be paid at 15 days per year worked because 15 days is the minimum, that even if he was paid as computed by the Respondent he would have been paid more.

RW 1 testified that the Claimants were all employees of the Respondent and that their services were terminated in November 2009 due to change of mandate of the Respondent resulting in its marketing mandate being taken away. This had an impact on the Respondents financing and necessitated realigning of staff skills to the new mandate. The Claimants were individually notified of the intention to terminate their employment and the reasons for termination. The retirement package came from a tripartite committee made up of Inspectorate of State Corporations, Directorate of Personnel Management and Ministry of Finance. He testified that the Respondent being a state corporation is bound by the State Corporations Act vide Section 7(1) of the state Corporations Act, that the source of the funding was to come from the Ministry of Finance. The package was categorized as officers above 50 years and officers below 50 years, the distinction was informed by previous practice and also the Pensions Act which provided for early retirement at age 50. The employees above 50 could access their pension while those below could not. The committee considered the Collective Bargain Agreement, employment laws and also Public Service Commission Act. The Claimants who were all members of the Respondents Retirement Benefits Scheme were paid their pension. The payment of the package was made into the accounts of the employees. The employees signed discharge vouchers and also applied for payment of their retirement benefits. He testified that if the claimants had been paid under the Employment Act they would have been paid 15 days per year worked and therefore the payment made to them was more advantageous. He further testified that the Respondent pursued and obtained exemption from income tax.

In cross examination RW1 admitted that had the claimants been paid as provided by Employment Act based on 15 days for each year worked they would have been paid more than what the Respondent paid. For example the 5th Claimant would have been paid Shs.1,275,000 instead of Shs.838,521 that he received. For Claimant no. 3 the payment would have been Shs.1,485,495 instead of Shs.399,585 that he was paid. That the Respondent did not check whether or not the package was in accordance with the Employment Act, but paid as directed by the tripartite committee. He further admitted that the Pensions Act is not applicable to claimants whose pension was governed by the Respondents Pension Scheme Rules.

I have considered the pleadings, the evidence on record the written submissions and the authorities cited by the parties.

The main facts of the case are not contested. The only issue for determination is whether or not the claimants are entitled to the prayers sought, that is, payment of severance pay based on Employment Act Section 40 and interest at 20% from date of retrenchment to date of filing suit and thereafter interest at

court rates of 14%.

As agreed by both parties, the early retirement of the claimants was a direct consequence of the retrenchment process that was being undertaken by the Respondent. The term retrenchment is not used under the Employment Act or any other Employment Law. The term is however one of the circumstances falling under the definition of the term redundancy which is defined in Section 2 of the Employment Act to mean:

“The loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving the termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”

The respondent has stated that the retrenchment was necessitated by the change of mandate of the Respondent following the removal of the marketing function through an amendment of the Act that creates the Respondent. This therefore means that the claimants termination of employment was a redundancy and therefore fell under the provisions of section 40 of the Employment Act.

The Section is couched in mandatory terms as follows;

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
- b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- c. the employer has, in the selection of employees to be declared redundant had 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;***
- d. where there is in existence 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;***
- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- f. the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and***
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

Section 40 (1) is the relevant law for purposes of this case and provides that the employer shall not terminate a contract of services on account of redundancy unless he has paid **severance pay at the rate of not less than fifteen days pay for each completed year of service.** The Respondent admitted paying employees who had not reached 50 years at the rate of 30 days pay for each year worked, while those above 50 years were paid at the rate of 30 days for each year remaining to date of retirement. The consideration here must have been that the longer the employee had worked the higher the severance pay

and therefore it was cheaper to pay the claimants using the cheaper option of payment for the years remaining to retirement.

The Respondent has argued that this was the decision of a tripartite committee comprising of members from Ministry of Finance, Inspectorate of State Corporations and Directorate of Personnel Management and the Respondent was bound to comply with the decision of the tripartite committee. The Respondent has stated that the State Corporations Act requires that they comply with the committee's decision.

Section 3 of the Employment Act states that the Act applies to all employees employed under a contract of service and that the Act binds the Government.

The Respondent has not shown that the tripartite committee has any powers to exempt any employer including the Government from the provisions of the Employment Act. Only the Minister for Labour can do so as provided in the same section 3. The Respondent did not submit any instrument exempting it from the provisions of section 40 of the Employment Act, which as stated in section 3(6) are the minimum terms and conditions of employment and any agreement to relinquish, vary or amend the terms in the Act **shall be null and void**.

The Respondent further argues that the Committee considered the terms of the Collective Agreement, The Pensions Act, Employment Act and Retirement Benefits laws and regulations and practices of other public bodies. They did not mention what these Acts are and which public bodies applied the same criteria used by the Respondent. As pointed out by the Claimant, the Pensions Act does not apply to the Respondent's employees. The Act applies to civil servants whose pension is drawn from the Consolidated Fund. The Respondent has a staff Retirement Benefits Scheme which is governed by the Retirement Benefits Act. All these legislation in any event do not provide for payment of severance pay but for retirement benefits which are separate and payable in addition to severance pay in the event of redundancy.

As demonstrated by the claimant during cross examination of RW1, the Respondent paid the claimants less than they would be entitled to had they been paid severance pay as provided under the Employment Act. The Respondent also applied a criterion that is alien to any of the legislation they have cited, that is, payment based on years remaining to retirement. I agree with the claimants that they were discriminated against as the Respondent deliberately paid them through a formula that would result in and indeed resulted in their being paid less than what other employees who had served for similar length of service were paid. The payment was also less than what they would have been paid under the Employment Act.

The Respondent relied on the case of *Lawi Duda & Others Vs Bamburi Cement Co. Ltd (2012) eklr*. I find the case to support the case of the claimant rather than the Respondent's. The case confirms that the employer paid benefits which were more favourable than those provided for in the severance clause. In the present case the Respondent paid one category based on severance pay at the rate of 30 days per year worked in line with the Employment Act which provides for "**not less than 15 days**". In the claimants' case, no severance pay was paid. Instead they were paid for years remaining to retirement and the resulting payment was less favourable.

I have also considered the authority cited by the claimants that is *Industrial Court Cause No. 562(N) of 2009 Pauline Kamangara and 2 others v forum for African Women Educationists (FAWE)*. I find the authority irrelevant to this case as it was making reference to service pay and not to severance pay.

For the foregoing reasons I find that the Claimants have proved that they were discriminated against by the Respondent and that as a consequence they were not paid severance pay but instead were paid for years remaining to retirement which resulted in their payments being less favourable than they would have been paid had the Respondent complied with the law and paid severance pay.

1. I accordingly enter Judgment for the claimants against the Respondent for the balance of severance pay as follows.

1st claimant - Kshs. 1,999,085.00

2nd Claimant - Kshs. 2,731,554.00

3rd Claimant - Kshs. 4,034,394.00

4th Claimant – Kshs. 1,696,687.00

5th Claimant – Kshs. 2,987,979.00

6th Claimant – Kshs. 1,058,607.00

The said sums shall attract interest at court rates from the date of filing this claim that is 4th August 2011 to the date of full payment.

2. The claim for payment of interest at the rate of 20% per annum from 31st November 2009 to 23rd July 2011 is rejected as the Claimant has not proved the legal basis for payment of such interest.
3. The Respondent shall pay the Claimants' costs to be taxed by the Deputy Registrar.

Read in open Court this 12th day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Amadi for _____ for Claimant

Ms. Mumbo _____ for Respondent