



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 282 OF 2012

BETWEEN

GEORGE WESONGA

OJWANG'.....CLAIMANT

VERSUS

THE KENYA NATIONAL UNION OF TEACHERS

[KNUT].....

RESPONDENT

Rika J

CC. Leah Muthaka

Ms. Kamar instructed by Kounah & Company Advocates for the Claimant

Mr. Makori instructed by Oraro & Company Advocates for the Respondent

ISSUE IN DISPUTE: TERMINAL BENEFITS PAYABLE TO GEORGE WESONGA OJWANG'
RETIRED CHAIRMAN OF KNUT

AWARD

1. The Claimant was employed by the Respondent Teachers' Trade Union in April 1986 as Executive Secretary, Busia Branch. In January 2004, he was elected 1st National Vice-Chairman. He became the National Chairman in 2007. He was placed on terminal leave on 1st February 2011. Retirement took effect on 31st July 2011, when the terminal leave ended. The Acting National Treasurer Albanus Mutisya was authorized by the Respondent to prepare and start paying the Claimant's retirement benefits immediately. Payment has not been made in full, and Parties did not agree on the sum due, prompting the filing of this Claim on 22nd February 2012. The Claimant seeks award of the following sums:-

- a. Balance of terminal dues amounting to Kshs. 16,616,209.70;
- b. Payment of allowances from July 2011 to January 2012 at Kshs. 5,981,038;
- c. Organization allowance from January 2011 to January 2012 at Kshs. 50,000 per week, totaling Kshs. 2,400,000.
- d. Traveling allowances on 30th August 2011 for meeting at Kshs. 39.45 x 996 Km= Kshs.

39,292.20;

- e. Daily allowance for 3 days between 30th August 2011 to 2nd September 2011 at the rate of Kshs. 18,300 per day= Kshs. 54,000;
- f. Costs of the Claim; Interest on the above sums; and any other relief the Court may find fit to grant.

2. The Respondent filed its Statement of Reply on 17th April 2012. Its position is that the Claimant's terminal dues were regulated by the Respondent's Staff Retirement Benefits Scheme Rules of January 2003, attached to the Response as annexure 'B.' His terminal dues were correctly tabulated and paid to him. The Respondent notified the Claimant in a letter dated 21st January 2012 of the following payments:-

- a. Terminal benefits at Kshs. 4,674,494.30;
- b. Gratuity at Kshs. 2,182,294.60 ;
- c. Motor Vehicle at Kshs. 6,800,000

Total..... Kshs. 13,656,788.90

The Respondent deducted tax of Kshs. 1,874,617 and advance payments made to the Claimant between May 2008 and May 2010 amounting to Kshs. 5,800,000. It also deducted the sum of Kshs. 5,711,396 that was transferred to the Claimant's Account No. 0124336571300 National Bank Bungoma. The Respondent concluded the Claimant's balance to be Kshs. 270,000, which it promised would be paid soon.

3. Before he became the National Chairman, the Respondent explained that the Claimant was the Executive Secretary of KNUT Busia Branch. He was paid terminal dues on leaving the Branch, and after he had sued the Respondent at Milimani Commercial Courts Civil Case Number 13491 of 2004. He would not therefore claim anything for the period before 1st January 2004. At no time did the Respondent agree that the Claimant's terminal benefits were Kshs. 22,347,606.60 as alleged to be in paragraph 7 of the Statement of Claim.

4. The Parties came for hearing before the Court on 11th October 2012. Upon hearing the Claimant's testimony in brief, the Court was of the view that this was a matter KNUT and its former Chairman could settle out of Court. Parties were directed to negotiate. They were not able to resolve the difference. They however agreed in Court on 21st January 2013, to file submissions and have the Court make a determination on the basis of those submissions and the pleadings, under Rule 21 of the Industrial Court [Procedure] Rules 2010. The dispute was last mentioned on 3rd May 2013 when it was confirmed the submissions had been filed, and parties were advised Award would be delivered on notice.

5. The Claimant submitted there was an agreement signed between him, David Okuta Osiany who was then the Acting Secretary General KNUT, and Albanus Mutisya, then Acting KNUT Treasurer. This agreement, appendix 2 of the Claim, was signed on 2nd February 2011. The terms were as follows:-

- a. Terminal benefits be calculated based on 25 year- period as in the KNUT Headquarter Staff Terms as by July 31st 2011;
- b. The February, March, April, May, June and July 2011 salaries be paid as contained in the retirement notice dated January 20th 2011;
- c. The normal weekend allowances be paid up to July 31st 2011 the retirement date;
- d. The 2 ½ [two and a half years gratuity for the remaining term be paid which totals Kshs. 1,527,606.60- one million five hundred and twenty seven, six hundred and six and sixty cents];
- e. The salary in lieu of notice for the year 2011 be paid with the salary for January 2011;
- f. The Claimant be provided with motor vehicle [Volvo] at the cost of Kshs. 6,800,000 as contained in the terms.

According to the Claimant these added up at Kshs. 22,347,606.60. This is the amount that the Claimant

demanded from the Respondent through his then Advocate Paul Muite, in a letter before action dated 20th January 2012. The Respondent transferred Kshs. 5,711,396.90 to the Claimant's Bank Account, the balance being Kshs. 16,616,209.70.

6. The Respondent submitted that the applicable terms and conditions of the Claimant's employment would be the appointment letter dated 19th December 2003. He entered employment on a salary of Kshs. 61,470. Other benefits were: medical allowance at Kshs. 6,075; commuter allowance of Kshs. 6,147; national allowance of Kshs. 39,024; entertainment allowance of Kshs. 9,000; and pension of Kshs. 19,055. He was an Official of the Respondent from 5th January 2003 up to July 2011, as per the appointment letter of 19th December 2003. The Claimant's employment and terminal dues were regulated by Staff Retirement Benefit Scheme Rules and the Union Constitution. Any contract, agreement or document that went contrary to the said Rules was illegal. The Rules applied to all National and Branch Officials.

7. Under the Rule 5 the sums due on retirement would be calculated as follows:-

Total Monthly Emoluments x Total Number of Months of Service divided by 10 = the Lump Sum Payment. The total monthly emoluments were arrived at using various components dependent on the category of the employee. The allowances used in assessing total monthly emoluments were basic salary; house allowance; medical allowance; commuter allowance; and entertainment allowance. The total number of months of service comprised the uninterrupted months of employment. The Rules restricted the period of service for the Staff at the Head Office to 15 years or 180 months. The Claimant served for 7 years and 6 months or 90 months. This was how the Respondent arrived at the figures in paragraph 2 above. The only sum due to the Claimant is Kshs. 270,000. He had requested as was the practice in the past, to be advanced various sums in the course of employment, which were deducted from his final package. The Rules have not been amended. The total monthly emolument taken from his last pay slip was calculated as follows:-

- a. Basic Salary at Kshs. 289,180;
- b. House allowance at Kshs. 114,000;
- c. Medical allowance at Kshs. 12,075;
- d. Commuter allowance at Kshs.35,918; and
- e. Entertainment allowance at Kshs. 20,000;

Total..... Kshs. 471,173

8. The agreement between the Claimant and certain Officials on 2nd February 2011 could not override the Staff Retirement Benefit Scheme Rules and the Union Constitution. The agreement contravened the Rules and the Constitution, in particular Article 11 of the Constitution. There was no precedence in the history of the Union where an Official received such an exorbitant retirement package. The applicable period remained 7 years and 6 months, not 25 years. Only the National Executive Council duly constituted, could vary the terms, as purported to be done in the agreement of 2nd February 2011. The Respondent asked the Court to order that the Claimant receives the sum of Kshs. 270,000, and pays the Respondent costs of the Claim.

The Court Finds and Awards:-

9. The Claimant was employed by the Respondent sometime in April 1986 as the Executive Secretary Busia Branch. He became the National 1st Vice-Chairman in January 2004 and the Chairman in 2007. He retired on attainment of the age of 60 years, as demanded by the Respondent's Constitution. It is not contested that he was paid terminal benefits for the period he served as the Executive Secretary of Busia Branch, after he filed a Civil Case against the Respondent for payment, at Chief Magistrate's Court in Milimani Nairobi. The core issue in dispute is the number of years that should guide payment of the retirement package that became due after the Claimant's retirement in July 2011. Should it be the entire 25 years in employment, including the 18 years spent at Busia, or the 7 years worked at the Head Office

in Nairobi?

10. The Staff Terminal Benefits Scheme Rules of January 2003 state that the total lump sum payable to KNUT Staff shall be based on two factors: the total monthly emoluments [TME] in the last month of service and the total number of months of service [TMS]. The TME applicable to the Claimant is not disputed, both Parties having proposed the sum of Kshs. 471,173.00.

11. These Rules were reviewed through an Ad- Hoc Committee of the Respondent on 5th July 2007. Among the proposed amendments were to remove the restrictions placed on the TMS for the Staff of the National Office under Rule 5.3, [ceiling of 15 years or 180 months], replacing them with a maximum number of 25 years. TMS was to be replaced by total years of service. It was proposed to replace the formula on LSP given in this Award paragraph 7, with a simplified LSP= TME x TYS. The National Executive Committee of the Respondent convened on 19th September 2007, and adopted the Report of the Ad- Hoc Committee on the Terms and Conditions of Service. The understanding of the Court is that the 25 year period became the maximum limit on the TYS applicable to National Officials in assessing retirement benefits.

12. The Claimant announced to the NEC meeting of 3rd January 2011 that he had attained retirement age, and would be leaving employment. This was 4 years after the adoption of the amendments on the Staff Terminal Benefits Retirement Rules. The Respondent wrote to the Claimant on 20th January 2011, directing him to proceed on terminal leave. He was also advised he would continue to earn his full salary and allowances up to the retirement date on 31st July 2011. The National Treasurer was directed to prepare the Claimant's terminal dues and start paying immediately.

13. Following this, the Claimant, the Acting National Secretary General and the Acting National Treasurer entered into an agreement dated 2nd February 2011, whose terms are stated in paragraph 5 of this Award. The Respondent did not honour the agreement, and has opted instead to argue that the agreement was invalid, in violation of the un-amended Staff Terminal Benefits Retirement Rules and the Union Constitution. The Respondent calculated the terminal benefits adopting what it deemed to comply with the Rules, and in disregard of the agreement of 2nd February 2011. It also alleged to have made advance payments of terminal dues to the Claimant from as early as May 2008.

14. The agreement concluded on 2nd February 2011 between the Claimant of the one part, the Acting Secretary General and the Acting Treasurer of the other part, was a binding contract, superseding all the other terms of retirement expressed elsewhere. The Staff Terminal Benefits Retirement Rules, contained the minimum standards of retirement, which like all standards in the employment relationship, can be varied and improved to the benefit of the employee. The Rules at any rate appear to have been amended by NEC, and endorsed the maximum of 25 TYS adopted in the agreement of 2nd February 2011. There was no reason to justify departure from what the Principal Officials of the Respondent agreed to pay their former Chairman. The agreement came against the background of NEC meeting at which the Claimant announced his retirement. The Secretary General and the Treasurer acted within their mandate, in committing to pay the Claimant his dues in accordance with the agreement of 2nd February 2011.

15. The Rules, in the original and amended forms, did not support the position of the Respondent that the terminal benefits paid to the Claimant for the period he served in Busia should have any effect on the total years served upon retirement. The period was stated under Rule 5.3 to be the time the *'employee has been in continuous, uninterrupted employment of the union, at branch, national or both, prior to the date on which the lump sum payment is due, including months of terminal leave.'* The Claimant joined the Respondent in April 1986 and left on 31st July 2011- a period of 25 years. The submission that he ought to have been considered for the 7 years only served at the Head Office had no basis under the Rules.

16. There was no material placed before the Court to show that the Respondent paid the Claimant any of his terminal dues in advance of July 2011. There is no such suggestion in any of the meetings, discussions, letters or agreements leading to the retirement. The agreement of 2nd February 2011 in

particular, does not allude to advances made to the Claimant in terminal benefits. Why would the Claimant have been advanced terminal benefits as early as 2008 when he had just become the Chairman? The Claimant submitted the payment of Kshs. 5,800,000 was made as bonuses over the years, for work done. The Court finds there was nothing given by the Respondent to relate these payments to terminal benefits that became payable only after retirement. The Respondent negotiated the terms of the Claimant's retirement with him, and reached an agreement on 2nd February 2011. It was only after he was gone, that the Respondent shifted its position and dug out its archival materials to delay meeting its obligation. The Claimant was denied the right to have his full retirement benefits within a reasonable time of retirement, and has instead been compelled to move from one Advocate to the other, travel, and persistently knock at the doors of the Respondent, before finally coming to this Court at a cost. This is a matter that KNUT should have settled voluntarily, involving as it does, a top retired and long serving Official. **In sum the Court shall allow the Claim and Award as follows:-**

[a] The remaining balance of terminal dues of Kshs. 16,616,209.70 shall be paid by the Respondent to the Claimant within 30 days of the delivery of this Award.

[b] Costs to the Claimant.

[c] Other prayers are rejected.

Dated and delivered at Nairobi this 20th day of December 2013

James Rika

Judge