



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 765N of 2009**

**HUDSON MUKHWANA.....CLAIMANT/APPLICANT**

**VS**

**NATIONAL HOSPITAL INSURANCE FUND .....RESPONDENT**

**JUDGMENT**

**History**

This case has a long history and it would suffice to explain the journey taken to reach where we are at.

The plaintiff herein Hudson O. Muthwana first filed a plaint before the High Court at Milimani as HCCC No. 905/2002 on 29<sup>th</sup> May, 2002. He sought several orders amongst them orders for special damages to be proved at the hearing, damages for wrongful dismissal and mental anguish, and costs of this suit.

The respondents filed their response on 18<sup>th</sup> June 2002, seeking that the plaintiff's suit be dismissed accordingly. The suit was initially set to be heard on 23<sup>rd</sup> July, 2003 before Justice Kuloba (Retired) but the hearing did not take off. Subsequently adjournment followed with the file passing through the hands of several other Hon. Judges until 29<sup>th</sup> October, 2009 when Hon. Justice Waweru ordered that the file be referred to the Industrial Court for hearing and determination.

At the Industrial Court the file was allocated No. 765N/09. The Parties attempted an out of court settlement which did not bear much fruit. Hearing then began on 11<sup>th</sup> July, 2011.

**The Evidence**

The Claimant gave evidence and informed court that he was employed by National Hospital Insurance Fund (NHIF) the Respondent herein in 1988. He was initially employed by the Public Service Commission and posted to the Ministry of Health on 11<sup>th</sup> January, 1988. He was thereafter deployed to NHIF which was a Department of the Ministry. His position was Personnel Officer II. He worked for NHIF until August 2000. He rose up in rank up to Head of the Personnel and had no discipline issues with his employer. He states that in August, 2000, he received a suspension letter from the Personnel and Administration Manager alleging that he had been involved in payroll fraud. It was alleged that he authorized double payment of salary to two employees i.e. Chepkwony and Eunice Wachira.

He responded to the letter as per page 12 of his bundle of documents in which he stated that the anomaly

could have arisen as they were implementing a new salary structure after NHIF was declared a state Corporation, and that it is possible for some members of staff to have filed two personal particulars of service which may have led to this anomaly.

However, on 20<sup>th</sup> June, 2000, he discovered this anomaly and instantly wrote to the dues cashier to withhold the two salaries because the said officers had been paid through two pay points i.e. their bank account and by cash.

In July, 2000, he states that he discovered that the two names were still appearing on cash payroll. He again informed the cashier who assured him that the necessary procedures for remitting the money back to the Fund was being adhered to. He followed this by issuing a letter of the two names. He instructed an Assistant Computer Programmer to carry out the deletion process and that is when she announced that there had been fraud on 2<sup>nd</sup> floor involving payroll and so she could not delete the names besides the taxation aspects involved and that she could only hold back the pay. The Pay Change Advice to delete the two names from cash payroll was finally done on 1<sup>st</sup> August 2000.

He told court that on 21<sup>st</sup> August, 2000, one Mr. Isiaho stormed his office and pulled out all payrolls and proceeded to accuse him of having involved himself in payroll fraud. He never gave him a chance to explain himself on the matter.

The claimant states that NHIF conducted an Audit Inquiry into those allegations. He was never interviewed at any time by those who conducted the audit. He says he was not informed officially about the outcome of the audit. He was reposted back to the Ministry vide a letter dated 21<sup>st</sup> September, 2000 (No. 31 in his bundle). He was not given any reasons for the reposting and there was no mention of the suspension. At the time NHIF was no longer a department of the Ministry but a full Parastatal.

He reported to the Ministry of Health on 4<sup>th</sup> October, 2000 (page 32 of his bundle), he says that technically he could not work at the Ministry as the terms were different from those of NHIF. He stayed without salary until the 18<sup>th</sup> September, 2001 when the Permanent Secretary, Ministry of Health after consultation with Directorate of Personnel Management deployed him back to NHIF via a letter dated the same day. He reported to NHIF but he was not given any office or duties. The NHIF retrenched him in a letter dated 29<sup>th</sup> October, 2001 (page 49 of his bundles). They said they had lost confidence in him. In addition they referred to the technicality that arose from his deployment to the Ministry. He appealed against the retrenchment by the fund (via his letter of 18/12/2001 No.50 of his bundles). There was no response. The fund did not seek approval to retrench him. That the Public Service Commission letter of 4<sup>th</sup> September, 2002 (No. 55 of the bundle) had rejected the recommendation to retire him and asked NHIF to deal with his case. He says that as per the audit report done in this case, there was no concrete evidence that he committed the offences but proper procedures and controls were to blame rather than fraud. The report exonerates him from the double payments. Even the people who were alleged to have been double paid indicated in their statement that they had never been double paid. Claimant denies he received any money for the two concerned.

He says he was ultimately retrenched. Then he was 38 years, he had a young family and he never got any other job elsewhere. His career was destroyed. He says then his salary was Ksh.40,490/= per month plus medical allowance Ksh.2,400/=, and House allowance was Ksh.15,000/=. He now seeks prayers as per his plaint herein.

In cross examination the Claimant contents that he was not to blame for the double payments and that the audit report exonerated him from the same. He says NHIF went through a transition process and he was involved in it as head of department. They finalized retrenchment of 59 staff and some casuals. He says he was threatened with death as a result of this exercise. He says he was paid a retrenchment package as other retrenched but his retrenchment was done later.

In their defence, the Respondent called two (2) witnesses.

The 1<sup>st</sup> witness Wilbert Kurgat told that has been working with the Respondent since 1991 and was Chief Cashier. He used to pay vouchers on salaries and other things. He says he gave out some money to Claimant which was a payment to Eunice Wairimu. In cross examination he says the payment was signed but the Claimant did not sign any document to signify payment. He says the amount was about Kshs.3000/=.

DW2 Paul Katusya told that the claimant worked for the Respondent but was retrenched after the Respondent lost faith in him following some fraudulent payment. He says in cross examination that the Claimant was returned to the Ministry as he was no longer needed due to the restructuring. He says in an earlier letter, the reason for retrenchment was restructuring.

### **Submissions**

At close of evidence by both parties, Counsels on both sides agreed to file their written submissions.

The Claimants Counsel asked Court to find for the Claimant in that the reasons that led to the Claimants retrenchment are not as provided for under Section 40(1) of the Employment Act which provides as follows:-

- (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 employees employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended redundancy not less than a month prior to the date of intended date of termination on account of redundancy;**
- (b) Where an employee is not a member of a trade union, the employer notified 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.**

Further the Claimants submit that the Claimant was not given an opportunity to establish as to why the management had lost confidence in him. That the Claimant assumed that since the investigations had been concluded and allegations against him proved to be unfounded, he would be reinstated into his previously held position. Instead of reinstatement, he was declared redundant and retrenched. The Claimant was also not accorded any audience to explain his case as required by both the rule of natural justice and fair play as well as sound grievance handling procedures.

Furthermore, the Claimants submit that the letter of retrenchment did not set out reasons for the retrenchment in specific terms but went on to refer to general observation of apparently having lost confidence in the Claimants. The Claimants submit that this reason for loss of confidence was an afterthought.

The Claimant also submitted that there was no evidence that the Claimant actually received the alleged money.

The Claimant submit that the court finds in favour of the Claimant and make a finding that he suffered wrongful retrenchment.

They submit that he be paid Ksh.13,338,270/= as special damages as set out in paragraph 11 of the plaint dated 24<sup>th</sup> May 2002. The Claimants cited two cases which this court finds not binding as they relate to the Industrial Court when it was a Tribunal and not as currently constituted.

The Respondents on the other hand submitted that the Claimant was not a trustworthy person. That whereas Claimant states that he had never been involved in any wrong doing, the Respondent's bundle page 5 show that indeed on 31-10-90 the Claimant collected an imprest for a seminar in Mombasa for his own use "as a local tour package".

The Respondent also submitted that the Claimant did indeed receive payments for two workers as adduced in evidence by RW 1. The Respondent state that they carried out investigations in the payroll fraud and Claimant was found liable of malpractices and action was recommended against him.

In any event, the Respondent submit that their confidence in the Claimant's honesty and veracity had been shaken and doubt sown. They submit that the Claimant was retrenched as the Respondent had lost confidence in him.

The respondent cited 2 cases:-

*Race Njira Vs Sonyaco Sacco Society Ltd. HCCC No. 14/2002 and Civil Appeal No. 350/2002, Kenya Airways Corporation Ltd and Tobias Oganga Auma and others* where the matters in question related to redundancy as in the instant case.

In the Court of Appeal case, the Learned Judges of appeal allowed an appeal by the Applicants by finding that:

***"there can be no general damages in respect of suits based on a termination of employment contract. ... we would also think that it was unreasonable for the Respondents to believe that it was their entitlement and right to be employed by the appellant during their whole working life. The expectation has no basis in law as employment relationship is contractual and thus terminable under the terms of the contract"***.

Having heard and analysed the evidence of the parties herein and having considered submissions of their Counsels, the now frame the issues for determination:-

**Issues for determination:**

1. Whether the retrenchment of the Claimant by Respondent herein was wrongful.
2. If the answer to (1) above is yes, what remedies if any the Claimant is entitled to.

**Analysis of the facts and law**

The Claimant was an employee of the Respondent as proved by the Claimant and as admitted by the Respondent. However, due to certain wrong doings on which the Respondent lay blame to the Claimant, the Respondent decided to re-post the claimant back to the Ministry of Health. It is worth pointing out here that the Respondent had carried out some internal audit and investigations which however did not yield much against the Claimant as part of the report concluded that:-

***"I find no concrete evidence that Mr. Mukwana personally committed the offence highlighted in the***

**report. Most of the weaknesses and problem arise from lack of proper procedures and controls rather than direct fraud”.**

Other circumstances leading to the retrenchment of the Claimant show an attempt by the Respondent to push back the claimant to the Ministry of Health but the Ministry of Health returned him to the Respondent vide their letter dated 18/9/2001 stating that:

**“In his reply, the Permanent Secretary and Director of Personnel Management has communicated with the Ministry and has indicated that he is unable to authorize the return of Mr. Mukhwana back to the Ministry due to the existing service regulations. Once an officer has transferred his/her service from the Civil Service mainstream to a Parastatal, it becomes unacceptable for the same officer to revert back. He states that Mr. Mukwana followed the prerequisite procedures by opting to join NHIF and was subsequently taken over as a bona fide employee of the fund. As a result, you started paying him salary applicable to the fund after he had accepted the terms and conditions you offered to him. Admittedly, our acceptance of Mr. Mukwana back to the Ministry was erroneous as he was not an employee of this Ministry. Your attempt to return him back to the Ministry is a breach of employment contract with the fund. In addition, it is a violation of the existing reciprocal transfer arrangements that exist in the Public Service. The Ministry duly transferred his service to N.H.I.F. w.e.f. 1<sup>st</sup> March 2000, and his name was deleted from the Ministry payroll. He therefore, ceased to be governed by the terms and conditions of service of the civil servants since he had transferred his service to NHIF which had become a state corporation with different terms of service”.**

It was after this return by the Permanent Secretary, Ministry of Health of the Claimant that the Respondent now decided to retrench him.

Under section 40 (1) of the Employment Act, 2007, retrenchment, (read redundancy) can be effected in the following circumstances:-

**“40. (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.**

When the Respondent claim they retrenched the claimant, due regard should be had as to the circumstances of the same and whether due procedure was followed. The procedure in the year 2002 was governed by Section 16A of The Employment Act (now repealed) where wordings are now lifted verbatim into the Section 40 (1) of Employment Act, 2007.

The reasons given by the Respondent for retrenching the claimant are ***“they had lost faith in him”***.

I find that his reason is an afterthought as this was arrived at after an attempt to return him back to the Ministry of Health failed. In any case, if the retrenchment had to be done the procedures governing retrenchment had to be followed;

Section 40 (1) (b) states that:

***“where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer”;***

From the evidence it is apparent the employee - Claimant was never notified of the intended retrenchment. The letter addressed to Claimant on the issue of retrenchment just informed him that it had been decided that he be retrenched. He was not given any notice as required by law. His right to be heard was flouted. It is for this reason that I find that the retrenchment of the claimant was wrongful.

That answers may first question. Given that the Claimant was wrongfully retrenched, what remedies is he entitled to.

First the law is clear:

Section 16 A (f) of the repealed Employment Act states that:

***“An employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of serve as severance pay”***

Section 40(1) (g) of the current Employment Act, 2007 has the same provision.

Further given the wrongful manner in which the retrenchment was done, I find that the Claimant is entitled to payment of damages. The Court of Appeal had held in the authorities cited that his is not viable. However, his was under the old regime of the Industrial Court when the Court was a Tribunal. However parties having agreed to submit to the Industrial Court as currently constituted under Section 162 (2) of the Constitution, the parties have in principle agreed to be bound by the rules and procedures governing the court now.

Under Section 12(3) of the Industrial Court Act, the Industrial Court has jurisdiction to give orders for an award of damages in any circumstances contemplated under this Act or any written law. Under Section 49 of the Employment Act 2007, the court can order payment to the employee the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wages or salary of the employee at the time of dismissal.

Having said as above I now enter judgment for the Claimant and declare and order as follows:

1. The retrenchment of the Claimant by the Respondent was wrongful and unfair.
2. The Claimant be paid 15 days salary for each completed year as severance pay calculated at  
**12 years x 57890 divide by 2= 347,340**
3. That the Claimant be paid compensation equivalent to 12 months salary calculated at:

**57890 x 12 = 694680**

**Total= 1,042,020**

4. Claimant be issued with a certificate of service.
5. Costs of this suit be paid to the Claimant.

Dated, signed and delivered this 9th day of October 2012

before Court Clerk Elly Jometho, Miss Ashubwe for the Claimant and Miss Sechale for the Respondent.

**HELLEN WASILWA**

**JUDGE**