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IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 279 OF 2003

LAWRENCE NDUTTU & 156 OTHERS..... PLAINTIFFS

- V E R S U S -

KENYA BREWERIES LTD..... DEFENDANT

JUDGEMENT

1) The plaintiffs, numbering 157 filed this representative suit on their behalf and on behalf of former employees of Kenya Breweries Ltd, the defendant herein, whose terms and conditions of employment were governed by a memorandum of agreement dated 5th December 1997 and 29th July 1999 and whose contract of employment were affected by the defendant's re-engineering process which began in 1994. The aforesaid action is by way of the Further Amended plaint dated 2/12/2015 where the plaintiffs sought for judgement as follows:

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- a) *A declaration that decision to cause their early retirement was unlawful and breached Section 80 and 82 of the Constitution and was wrongful and a nullity.*

- b) A declaration that the defendant's action to cause early retirement of the plaintiffs was unlawful and unfair and amounted to breach of the plaintiffs, contracts of employment.
- c) A declaration that the defendant's calculation of the plaintiffs' terminal benefits were wrong, arbitrary and they helped the defendant to withhold huge sums due to the plaintiffs.
- d) An order that the defendant should pay all the plaintiffs all the outstanding dues and salaries until their retirement age at sixty years.
- e) An order that the defendant do supply to the plaintiffs and each of them audited statement of account detailing their dues.
- f) An order that the plaintiffs and each of them be paid all outstanding dues and other consequential entitlements pursuant to prayer (b) above.
- g) AND or alternatively, general damages for loss of employment being 12 months salary for each and every plaintiff.
- h) Costs of (b) and (c) with interest covers at court rates.
- 2) The defendant on its part, filed a defence dated 8th May 2018, and amended on 12.11.2008 and further amended 6.1.2016 in which it denied violating the plaintiffs' constitutional or other rights. The defendant also stated that the redundancies were declared in accordance with the applicable Labour and Employment laws. The defendant further averred that the

plaintiffs' termination was lawful and that they were paid their dues.

3) When the suit came up for hearing, the plaintiffs summoned James Sibili (P.W.1), Michael Kimonyi (P.W.2) and Lawrence Kyalo Ndutu (P.W.3) to testify in support of their case. The defendant on the other hand summoned one Evans Kipngetch Mutai (D.W.1) to testify in support of its defence.

4) It is the evidence of James Sibili (PW1) that he together with Michael Kimonyi (P.W.2) and Albanus Ngwiri were appointed to represent over 820 former employees of Kenya Breweries Ltd in this suit. PW1 adopted the contents of his witness statement as his evidence in this suit. He claimed that he together with his colleagues were unfairly sacked by the defendant in contravention of the law through a flawed process known as Early Retirement Scheme which began in 1994. PW1 further stated that the process for early retirement had conditionalities. PW1 also stated that he did not opt for retirement but he was nevertheless issued with an early retirement letter on 15.6.1998.

P.W.1 further stated that they were retired in breach of the memorandum of agreement between their union and the

employed new employees to replace those who were unlawfully forced to take early retirement and or declared redundant like him. P.W.1 averred that he was claiming for a refund of ksh.50,000/=, an amount which was retained by the defendant when he was forced to leave the defendant's employment. P.W.1 also pointed that there was a schedule showing what was due to each employee as a refund. In his evidence in cross-examination, P.W.1 stated that his contract of employment was based on the memorandum of agreement between their union and their employer, the defendant herein. He also averred that whatever agreement reached between the union and the employer bound them. P.W.1 conceded in cross-examination that they had no evidence that the defendant employed new employees after they were retired. P.W.1 also stated that though he had alleged that the defendant discriminated him he had no evidence to prove the allegation levelled against the defendant.

5) Michael Kimonyi (P.W.2) adopted the contents of the witness

statement he executed as his evidence. He stated that he worked at the security section having been employed at the age of 24 years. PW2 claimed that he was forced by the defendant to take

up early retirement after working for only 9 years, vide a letter dated 17.8.1999. He alleged that he has never been paid the money the defendant deducted and retained after he left employment. P.W.2 claimed that there was no clause in the contract of employment which provides an early retirement. He also alleged that the defendant employed new employees after retiring them. PW2 stated in cross-examination that he was actually paid ksh.50,000/= but others were not paid. PW2 re-affirmed in his evidence in re-examination that there were no sufficient consultation before the implementation of the early retirement scheme.

6) Lawrence Kyalo Ndutu (P.W.3) also adopted the contents of his witness statement as his evidence in support of his claim and those plaintiffs whom he represented. In cross-examination P.W.3 stated that there was a memorandum of agreement between the union and the defendant which gave rise to the joint Industrial Council where he was a member. P.W.3 pointed out

that the memorandum of agreement set out the amounts payable to him. P.W.3 conceded that he was paid the amount specified.

P.W.3 also stated that the memorandum of agreement indicated

that he was to receive computation from the financial accountant which he received but was not paid as was computed therein. P.W.3 was emphatic that the defendant has not paid all the amounts due the plaintiffs.

7) In support of the defence case is the evidence of Evans

Kipngetich Mutai (D.W.1) the defendant's Human Resource Director. D.W.1 adopted the contents of his witness statement as his evidence. He stated that the memorandum of understanding between the defendant and the union was to determine the wages, hours of work and the conditions of employment of unionisable workers. D.W.1 stated that in the year 1997 the defendant underwent a re-engineering process in which a radical review of business to cut costs and improve efficiency by automation. This exercise, D.W. 1 said led to the closure of the defendant's Mombasa and Kisumu plants. D.W.1 stated the employees were allowed to opt for early retirement. This witness denied the allegation that the plaintiffs were discriminated. D.W.1 stated that there was an agreement between plaintiffs' union and the defendant that the defendant would retain ksh.100,000/= to cover debts and or liabilities due

to the defendant or Tembo Cooperative. In cross-examination, D.W.1 stated that the retirement age was set at 60 years. He also stated that the defendant came up with the idea of Voluntary Early Retirement before attaining the age of 60 years. DW1 stated that employees would write to the defendant requesting to take an early retirement. It is the evidence of D.W.1 that the document used to operationalise the early retirement scheme had given the defendant the discretion to reject or accept such requests. DW1 stated that the defendant reviewed its business and found that it had excess employees who needed to be of loaded having invested heavily in technology to improve efficiency. He stated that the Unions were engaged to set up the terms of redundancies and the defendant settled for redundancy and abandoned the Voluntary Early Retirement Scheme. D.W. 1 further stated that the defendant undertook what it called re-engineering to reduce costs of production and improve efficiency.

8) D.W. 1 claimed that there was a joint industrial council who met and agreed on Voluntary Early Retirement Scheme but he failed to tender in evidence the minutes of council meetings held.

D.W.1 also stated that part of the initial payments were retained by the defendant. As for management employees, a sum of ksh.100,000/= was retained while a sum of kshs.50,000/= was retained in respect of unionisable staff. In his evidence in re-examination, D.W1 stated that there was an early retirement package which was voluntary but the same was subsequently there was termination which was not voluntary. D.W.1 denied that the calculations of the exit package were arbitrary. He stated that the defendant used the Kenya Revenue Authority tax calculation guidelines to employers to tabulate what was due to the employees leaving.

- 9) At the close of evidence, parties were invited to file and exchange written submission. Learned counsels appearing in the matter were also allowed to make oral highlights. Having considered the evidence together with the rival submissions, the following issues commend themselves for the determination of this court.

i) *Whether or not the early retirement scheme was*
~~*carried out in contravention of the constitution and*~~
the existing contracts of employment.

ii) Whether or not the plaintiffs are entitled to a refund of the monies allegedly withheld by the defendant.

iii) Whether or not the plaintiffs are entitled to be paid their salaries upto the date of retirement. 777

iv) Whether or not the plaintiffs are entitled to general damages for loss of employment. —

v) Whether or not the terminal benefits claimed by the plaintiffs are properly computed.

10) On the first issue, it is the submission of the plaintiffs that defendant developed a voluntary early retirement scheme in which any employee who desired early retirement had to fill a given form and present it for consideration by the management and there was no guarantee that the request would be accepted by the employer. It was pointed out that some of the conditions which were to be fulfilled before an employee could be allowed to take up a voluntary early retirement included inter alia poor or low productivity, poor disciplinary record, poor health and that one should have attained the age of 50 years. It is also the submission of the plaintiffs that employees who were aged above 50 years would earn his/her salary upto the retirement age of 60

years. The plaintiffs have pointed out that the Voluntary Early Retirement Scheme did not achieve the desired results of getting many employees retire from their service. It is further the submission of the plaintiffs that without consulting their union the defendant unilaterally crafted a scheme to send home a number of employees. It is said that the defendant would send an employee on compulsory leave and upon his/her return, he/she would be issued with a letter of early retirement, letter of service and a schedule of computation of his/her dues and thereafter the employee would be asked to sign documents to clear and leave the company premises. The plaintiffs referred to this latter scheme as Unilateral Forced Early Retirement Scheme. In response to the plaintiffs' submissions, the defendant argued that the plaintiffs' union was consulted and made aware of the intended implementation of the voluntary early retirement scheme. The defendant relied in evidence minutes of a meeting of the Joint Industrial Council held on 11.08.2000. The defendant further stated that in implementing the early retirement scheme it did not discriminate against any employee. The defendant further denied breaching Sections 80 and 82 of

the 1963 constitution. It also denied breaching the terms of the memorandum of understanding entered between it and the plaintiffs' union. I have carefully examined the minutes heavily relied upon by the defendant in respect of the meeting which took place on 11th August 2000. It is apparent that the early retirement scheme took place between the year 1997 and 2001. The minutes relied upon are in respect of a meeting of Joint Industrial Council meeting held on 11.8.2000. It is evident that the early retirement scheme was done more than three(3) years before the consultative meeting was held. The defendant did not tender minutes of any meetings held between the defendant and the plaintiffs' union prior to the commencement of the forced early retirement scheme. A critical examination of the minutes tendered by the defendant will show that the union had clearly stated that it had never been party to the forced early retirement scheme. In fact, the union clearly stated that the defendant had turned the initial voluntary retirement scheme to forced early retirement. After a careful evaluation of the evidence, I am convinced that the plaintiffs have shown that they were forced to take an early retirement without being consulted nor the

participation of their union. The initial scheme was voluntary but the same was later forced through the plaintiffs throats. The documentary evidence presented by both sides show that the plaintiffs' were employed by the defendant on permanent and pensionable terms and were each expected to retire at the age of 60 years. The plaintiffs have complained that their rights as enshrined under Sections 80 and 82 of the constitution (now repealed). The defendant has argued that the plaintiffs have failed to tender evidence showing that they were discriminated in the implementation of the early retirement schemes. It has emerged from the evidence tendered that though there was no open discrimination against the plaintiffs, it was not clear what criteria was applied in identifying those to take up early retirement. In the absence of a clear explanation, this court is entitled to infer that there was subtle discrimination as against the plaintiffs vis-a-vis those who remained in employment. The plaintiffs have also argued that their right to fair labour practices ~~guaranteed under Article 41 of the Constitution of Kenya, 2010~~ were breached. In response to this submission, the defendant cited the case of Alfred Asidaga Mulima and 2 others =vs=

Attorney General and 8 others, Nairobi C.A no. 179 of 2015 in which the Court of Appeal held *inter alia*, that a court cannot enforce rights created under the new constitution unless those rights were recognised and protected under the previous constitution. With respect, I agree with the defendant's latest submission. In the circumstances this court by inference finds that the plaintiffs' right to protection from discrimination under Sections 80 and 82 of the Constitution of Kenya (now repealed) was breached. ✓

11) The other question which is related to the above is whether the implementation of the early retirement scheme was in breach of the contract of employment between the plaintiffs and the defendant. The plaintiffs have argued that the letters sending them home for early retirement cannot be treated as redundancies. They are of the view that the same were unilateral forced early retirement scheme.

12) The defendant on the other hand is of the view that as ~~unionisable employees, the plaintiffs' terms of employment as per~~ the memorandum of understanding provided for a declaration of redundancies described as loss of employment through no fault

the contract of employment redundancy is stated to be one of the methodology in which an employees' employment could be brought to an end. It is expressly stated that redundancy should be with clearly laid down procedures. The C.B.A and the labour laws are very clear on what conditions must met for redundancy to be applied. First, it must be justified and proven that there is need to reduce the number of employees in order to save the employer from collapse. Secondly, that the redundancy process and package must be negotiated and explained in advance to the persons affected. Thirdly, that there must be a clear criterion as to which employee would exit and why must be laid down. In this case the defendant failed to produce its annual statement of account to show its financial status despite having been served with a notice to produce by the plaintiffs. The plaintiffs' assertion that the defendant was then and has continued to-date on an upward profitability trend remains uncontroverted. There is no evidence that the process was negotiated by the employees affected. In the absence of the above mentioned features, it cannot be said the defendant's early retirement scheme can be treated as redundancy. With respect, I am convinced that the

plaintiffs were justified to plead that the defendant's scheme was left at the whims of sectional head and was imbued with extreme favourism and discrimination. The plaintiffs were therefore right to claim discrimination since there were no guidelines to justify why they were retired while others of similar qualifications were left to continue to work. It is clear in my mind that the plaintiffs were removed from employment whimsically and without following the laid down labour laws and procedures. Consequently, the plaintiffs' termination and or dismissal is declared to be unlawful and therefore the plaintiffs are entitled to be compensated. ✓ 777

14) The second issue to be determined is whether or not the plaintiffs are entitled to be refunded monies withheld by the defendants. It is the submission of the defendant that the plaintiffs are not entitled to be refunded the aforesaid sum because the plaintiffs failed to specifically plead and prove save for the two plaintiffs who testified. The defendant further argued that most of the plaintiffs were paid back the refund after it was established that they did not owe the company money. The defendant also argued that the claim was not similar to each plaintiff. The

defendant further pointed out that the schedules of payments prepared by the learned advocates were never admitted as exhibits in evidence. The defendant also argued that it has set up the defence which is to the effect that the claim for a refund is time-barred therefore the claim for ksh.20,775,152/= is not justified. The plaintiffs have beseeched this court to order the defendant to refund the monies it withheld as security. It is pointed out that the defendant has admitted having deducted the aforementioned amounts from the plaintiffs. The plaintiffs have urged this court to order the defendant to pay the claim as per the schedules provided by two firms of advocates. I have considered the evidence provided by both sides plus the submissions over this claim. There is no doubt that this claim was pleaded in the plaint. The plea may not have been precise due to the numerous number of plaintiffs. It is not in dispute that three plaintiffs testified on behalf of the rest of the plaintiffs and this is not unusual in representative suits like in this case. The defendant has stated that the claim is timebarred. It is unfortunate that the defendant has failed to lay both the factual and legal basis of this ground but it has instead made a general

submission which did not help its defence. Both the plaintiffs and the defendant concur that the defendant retained from each employee either a sum of ksh.50,000/= or ksh.100,000/= as security for the defendant company liabilities. The plaintiffs provided a full list of names and amounts of refunds due to each plaintiff. I have already stated that defendant has stated that the amounts were repaid to the plaintiffs. The defendant summoned its Human Resource Manager, (DW1), to testify in its defence. Unfortunately, DW1 did not produce in evidence any documents or form of evidence to prove reimbursement or repayment of the amount withheld. The plaintiffs produced in court in compliance with this court's directive two lists of claimants and the pay off schedules to confirm the deductions. The schedule filed by the firm of Namada and Co. Advocates dated 11th day of May 2016 shows that the defendant has withheld a sum of ksh.20,775,152 in respect of the plaintiffs whom the aforesaid firm represents. This document has guided this court to ascertain the amount withheld and not repaid by the defendant. The defendant has not controverted the schedule. It cannot therefore lie in its mouth to deny the same. There is no reason why the plaintiffs

defendant that at the time of plaintiffs' dismissal, the remedy available was damages if a defendant was liable, was limited to the period of notice applicable under the employment contract. The defendant was of the submission that since the plaintiffs' employment was terminated by way of redundancy, they were not entitled to claim damages for loss of employment. It is the submission of the plaintiffs that the entire process they were subjected to was an illegality hence they are entitled to compensation in damages on the basis of a multiplier of their salaries but being capped to 12 months' gross salary. The plaintiffs asked this court to award each plaintiff a sum of kshs.10,000,000/= on this head. Having considered the rival submissions over this claim, I am satisfied that the plaintiffs' exit from the defendant's employment cannot be treated as redundancy. The defendant simply dismissed the plaintiffs through a process not recognised by the C.B.A and the contracts of employment signed by each plaintiff. In other words, the plaintiffs were unlawfully dismissed. The plaintiffs are therefore entitled to receive damages equivalent to the period of notice stated in the contract or the C.B.A. There is no dispute that the

plaintiffs' employment with the defendant was terminated before the coming into force of the Constitution of Kenya 2010 and the Employment Act, 2007. In the case of Mary Wakhubi British Airways PLC (2015) eKLR the Court of Appeal considered the remedies available to an employee dismissed in 2000. In finding that the remedies in the Constitution of Kenya 2010, and the Employment Act 2007 did not apply in such a case the court held *inter alia*:

"All that said, then is to say that this court only has jurisdiction to award the remedies available at the time of the wrongful dismissal or unfair termination, that is, when the cause of action arose. These are remedies that are provided for under the repealed Employment Act, Cap 226 Laws of Kenya and the repealed Trade Disputes Act, Cap 234 Laws of Kenya."

In D.P. Bachhetha =vs= Government of the United States of America (2017) eK.L.R the Court of Appeal held *inter alia*:

~~"That an employee whose dismissal was wrongful was only entitled to damages equivalent to the salary he~~

would have earned during the period of notice applicable in his contract."

18) In this case, it is clear from the contract of employment and the memorandum signed between the plaintiffs' union and the defendant that the defendant was required to pay one month's salary in lieu of notice. I am of the view that the plaintiffs are each entitled to a sum equivalent to one month's salary as at the date of termination as damages for loss of employment. I make the award in favour of the plaintiffs. The plaintiffs and their advocates file and serve the defendant schedules showing the monthly salary each plaintiff was earning as at the time of termination of employment. [Mention on 6/2/2018 to determine the issue.]

19) The final issue to be determined is whether or not the defendant's calculation of the plaintiff's terminal benefits were wrong, arbitrary and helped the defendant to withhold huge sums due to the plaintiffs. It is the submission of the defendant that the aforesaid payments were calculated as required under the Regulations of Wages (General) and in accordance with the law governing employees who have been declared redundant.

The plaintiffs are of the view that since they were not consulted, then the defendant's calculations should be treated as arbitrary. I have considered the material placed before this court and it is clear to this court that though the defendant did not consult the plaintiffs on the computation of their terminal benefits, the defendant nevertheless gave a schedule showing how the figures were arrived at. What is clear in my mind is that the defendant proceeded to compute those dues as though the plaintiffs were declared redundant which is not the case here. In the circumstances, I am unable to make a declaration that the process was wrong or arbitrary.]

20) In the final analysis this court enters judgment in favour of the plaintiffs as follows:

- a) It is hereby declared that the decision to cause the plaintiffs to take early retirement was unlawful and in breach of the constitution and the plaintiffs' contract of employment. ✓
- b) The defendant is hereby ordered to pay each of the plaintiffs ~~damages for loss of employment~~ a sum equivalent to one (1) month's salary as at the time of termination of employment. 72 ✓
- c) The defendant is ordered to refund to the plaintiffs a sum of

ksh.30,180,685/= being the amount withheld in terms of the schedules filed by the firms of advocates of Namada & Co.

Advocates and the firm of J. Harrison Kinyanjui & Co.

Advocates tabulated

1. Ksh.20,775,144

2. Ksh. 9,405,541

Total


ksh.30,180,685/=

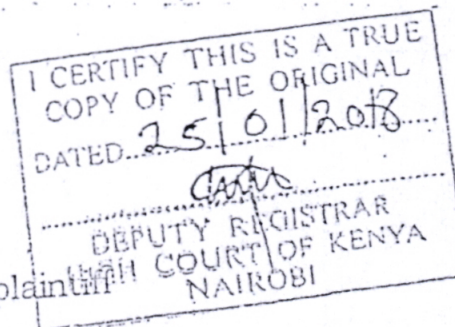
d) The plaintiffs to be paid by the defendants costs of the suit. 27 ✓

e) The defendant to pay interest on (b), (c) and (d) above at ✓

court rates from the date of judgment until the date of full payment.

Dated, Signed and Delivered in open court this 24th day of January, 2018


J. K. SERGON
JUDGE



In the presence of:

TUMA

for the plaintiff

N/A FOR KINYANJUI

for the Respondent

GACHAU

for the defendant