REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO 594 OF 2002

CONSOLATA KIHARA & 241 OTHERS…..……… APPLICANTS

VERSUS

DIRECTOR KENYA, TRYPANOSOMIASIS

RESEARCH INSTITUTE………..………………..… RESPONDENT

JUDGMENT

In this notice of motion, dated 17th June, 2002, the applicants seek orders *certiorari* to quash the decision of the Director of the Kenya Trypanosomiasis Research Institute compulsorily retiring or retrenching the applicants on the terms specified in the decision communicated to the applicants on 15th May, 2002; and prohibition to prohibit the Director from implementing that decision.

It is an application based on the grounds that the decision contravenes the principles of natural justice in that no representations have been sought from the applicants and the guidelines on the process of retrenchment have been disregarded; the notice given was unreasonably short, being only 15 days; the decision contravenes the general provisions of the Public

Service Commission Act and the Public Service Code of Regulations, the decision is discriminatory, because the colleagues of the applicants retrenched the year prior to the applicants' retrenchment, received more favourable terms, in that they received Shs.100,000 while the applicants got Shs 40,000, each, by way of what they call "golden handshake", gross salary without deductions while deductions were made in respect of the salaries of the applicants, no service pay is being given to the applicants while it had been made the previous year, and the Director favoured persons who originate from Nyeri District by not retrenching them even if they qualified for retrenchment.

In what is headed as "Several and Joint Affidavit" of applicants Consolata Kihara, Justus Omoke and Nixon Ntabo Mauti "and 239 others", reiterating the contents of a statutory statement, it is argued that since the notices given to the applicants "talk of early retirement" the applicants should be adequately compensated for the balance of the years which they would have remained on the job, and so, the Shs 40,000 is inadequate. "Those of us who were retrenched last year were paid Shs 100,000 each".

It is further argued that a decision to retire the applicants on no specific ground other than general desire to retrench staff ought to be based on specific principles and ought not to contravene the Public Service Code of Regulations and the Public Service Commission Act; but in their case the applicants were given only 15 days' notice and were not required to make any representations. The compulsory retirement must follow certain steps ignored by the respondents.

Finally, it is said in that affidavit, that when the applicants were given letters notifying them of early retirement, they were asked to sign them

as evidence of having received notice, not as an acceptance of the early compulsory retirement. They said that they were "pressurized to sign the letters", and the respondent has proceeded to deposit by cheque the inadequate funds on the accounts of the applicants as payment for their retirement or retrenchment.

The fuller story of what has brought the applicants is contained in an account of the facts in the statutory statement showing that the applicants are public servants under the Public Service Commission Act governing their terms and conditions of service in addition to their specific contracts; but in 2001 the respondent (employer) started a retrenchment or retirement programme, under which the applicants were compulsorily retired by letters, on terms and conditions less favourable than those under which other employees were earlier retired without giving reasons for the different treatment, and without taking into account the aforesaid Act and Code of Regulations or employment terms and conditions, which do not provide for retrenchment or retirement in the manner adopted by the respondents.

In that statement of facts the applicants further state that the respondent ignored the specific terms of the contracts of employment, offered inadequate compensation, acted capriciously and with a great deal of favouritism and discrimination, denying the applicants any opportunity to be heard before deciding to retrench or retire them, and issuing an oppressive, inadequate and unreasonable notice of retirement.

It was stated that the only principles and guidelines for early retirement or retrenchment are "discipline, age, medical conditions, last in first out, first in first out, academic/professional qualifications, family status, physical condition and hardship in areas of origin", but the respondent

"has retained personnel of bad discipline records, those of age, those with poor medical records, recent employees", and then gone ahead and

"retrenched people highly qualified, from hardship areas and those physically handicapped."

On those grounds and stated facts, the applicants seek the reliefs I have already stated, by way of judicial review. The application was opposed as being incompetent, and in respect of prohibition as having been overtaken by events, while in respect of *certiorari* as being inapplicable here; and denying a breach of any Rule of Natural Justice, or acting in a discriminatory way.

Having carefully studied the whole record on this file, I agree with Mr Akhaabi (for the applicants), that the issues raised by Mr Munene about joinder and misjoinder of parties, are not of significance to these proceedings, because no miscarriage of justice, or any form of injustice is alleged as a result of the choosing of parties to this litigation; and I shall adjudicate on the questions of substance and merit between the parties actually before this Court: the applicants and their employer, the institute against which the applicants are really making their complaints and seeking the reliefs.

I also entirely find and agree with Mr Akhaabi that what the applicants are really complaining about is

what they see as a breach of the terms and conditions of the employment contract. As Mr Akhaabi submitted, “when the applicants were retrenched there was a breach of the employment contract”. That, I think is where the controversy centers; and since that is the real issue, the question is whether the reliefs sought by way of orders in judicial review, namely, *certiorari* and prohibition, are the right reliefs to be sought by the applicants.

I think it is an elementary principle in our law, that in the ordinary situation of employer and employee cases, or cases which are sometimes referred to as cases of master and servant, if an employer or master wrongfully dismisses an employee or servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. In a straightforward relationship of employer and employee, normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of employer and employee. Dismissal might be in breach of contract and so unlawful, but it would only sound in damages. See the House of Lords of England, in the case of *Vine v National Dock Labour Board*, [1957] AC 488, especially at p 500, per Lord Kilmuir. Indeed, in that case, the House of Lords approved the dissenting judgment which had been given by Jenkins, LJ, in the Court of Appeal, in the course of which Jenkins, LJ, said [1956] 1

QB 658, at p 674:

“But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract, and the contract having been wrongfully put an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more”.

See also the Judicial Committee of the Privy Council in *Francis v Kuala Lumpur Councillors*, [1962] 1 WLR 1411. These cases are not binding on me, but they, being on a jurisprudence similar to ours, and appearing to carry sound principle of broad application, I find them persuasive, and worth bearing in mind. They clearly show, that in normal situations of ordinary occurrence, there cannot be specific performance of a contract of service, and an employer can terminate the contract with his employee at any time and for any reason or for none; but if he does so in a manner not warranted by the contract he must pay damages for breach of contract.

As it was also put by Lord Morris of Borth-y-Gest in the Judicial Committee of the Privy Council in *Vidyodaya University of Ceylon v Silva* [1965] 1 WLR 77, at p 79:

“The Law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract, the servant cannot obtain an order of *certiorari*. If the master rightfully ends the contract there can be no complaint: if the master wrongfully ends the contract then the servant can pursue a claim for damages.”

That case concerned a university professor who was dismissed from his post without having been given an opportunity of being heard. *Certiorari* to quash the decision was refused by the Judicial Committee of the privy Council, as the case was treated as one of ordinary contract between an employer and an employee. It seems reasonably clear that in ordinary contracts of employment, an employee may be dismissed by his employer without any prior observance of natural justice; and if the dismissal was contrary to the terms of contract, the appropriate remedy is a suit in damages for unlawful dismissal, or the employee may have a remedy for unfair dismissal before an industrial court, but the court will not review the employer’s decision to dismiss, or quash the decision on the ground that natural justice has not been observed. This applies to private and public contracts of employment alike.

So, as it was stated by Lord Reid in *Ridge v Baldwin*, [1964] AC 40, at p 65, the question in an ordinary case of master and servant does not at all depend on whether the employer has heard the employee in his defence it depends on whether the facts emerging at the trial prove breach of contract.

It therefore becomes important to consider whether the applicants had any other position or status than that of employees or servants. In this case they had none other. They say they were employees, and no more than that.

On the foregoing principles, these applicants have sought wrong reliefs in these proceedings. Their application for judicial review is, therefore, dismissed.

As the notion of retrenchment is relatively novel here, I leave each party to bear its own costs of this litigation. It is so ordered.

Dated and delivered at Nairobi this 3rd day of April, 2003

R.C.N KULOBA

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JUDGE

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