Moseti v University of Nairobi (Appeal E014 of 2021)
[2023] KEELRC 233 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 233 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E014 OF 2021

JK GAKERI, J

FEBRUARY 1, 2023

BETWEEN

CALLEN N MOSETI ..... APPELLANT

AND

UNIVERSITY OF NAIROBI ..... RESPONDENT

JUDGMENT

1. This is an appeal by the appellant/claimant against the decision by Hon Lilian Lewa, Principal Magistrate delivered on January 28, 2021 where the appellant had sought various orders including;
   i. Declaration that refusal to pay her correct gratuity dues was irregular and unlawful.
   ii. Terminal benefits amounting to Kshs 2,128,596.72.
   iii. Costs and interest.
2. The gravamen of the claimant's case was that she was an employee of the respondent from June 1, 1989 as a custodian at Kshs 24,468/= per month until June 30, 2018 when she retired. That her gratuity was computed at Kshs 511,119/= and deposited in his bank account while his entitlement was 31% of basic pay.
3. That her gratuity for 29 years at 31% was Kshs 2,639,715.72 less the amount paid and the balance outstanding was Kshs 2,128,596.72.
4. It was not in dispute that the respondent had a CBA with KUDHEIHA dated July 1, 2015.
5. The CBA was effective from July 1, 2013 to June 30, 2017, a duration of 4 years but the implementation date was July 1, 2015.
6. After hearing the parties and considering the submissions, the learned trial magistrate found no merit in the claim and dismissed it with costs to the respondent.

7. The dismissal of the suit precipitated the current appeal.

8. The appellant's counsel filed a memorandum of appeal dated February 22, 2022.

9. The impugned judgement is assailed on the ground that;

    1. The trial court erred in fact and law by finding and upholding the express terms in the active CBA would be to act retrospectively (unclear what this was supposed to mean).

    2. The trial court erred in holding that two CBAs can both operate/used to calculate gratuity of an employee.

    3. The trial court erred in fact and law in finding that the appellant had not proved her case against the respondent whereas there was overwhelming evidence to the contrary.

    4. The trial magistrate erred in fact and law by disregarding the claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.

    5. The trial court erred in fact and law by dismissing the appellant's claim.

10. The principles governing the hearing a first appeal has been articulated in countless decisions, such as *Selle & another v Associated Motor Boat Co Ltd* (1968) EA 123 where the court stated as follows;

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955) EACA 270)".

11. Similar sentiments were expressed in *Peters v Sunday Post Ltd* (1958) EA 424.

12. In the instant case, the appellant's evidence was exclusively on employment date and salary, amount paid as gratuity, duration worked, CBA and its provision on 31% gratuity counsel's demand letter and the amount claimed.

13. The 2nd claimant's statement was in support of the claimant's case and had nominal effect on the claimant's case.

14. Documentary evidence on record showed that the appellant was a member of the union until June 2018 when she retired.

15. Further evidence on record reveal that the appellant's gratuity was computed as follows; June 1, 1989 to June 30, 2015 and at the rate of 31% of basic salary from July 1, 2015 to June 30, 2018, an amount the appellant's counsel described as meagre.

Appellant's Submissions

16. On the first ground of appeal, the appellant's counsel relied on clause 8 and 40 of the CBA on gratuity and retirement to urge that the appellant retired during the subsistence of the CBA and was thus entitled to gratuity for every year served since 1989. That clause 40 used the word shall.

17. That applying 28 days on a non-existent CBA was illegal.

18. Reliance was also made on section 26(2) of the *Employment Act*, 2007 on applying the more favourable terms.

19. As regards the two CBAs, counsel relied on the trial court's judgement to urge that section 59 of the *Labour Relations Act*, 2007 provided that a CBA was binding on the parties to the agreement and its terms became part of the agreement between them.

20. Counsel submitted that there was only one CBA not two. That using two CBAs allowed the employer to undercut the employee.

21. The decision in *Benta Achieng Odinyo v University of Nairobi* was relied upon to reinforce the submission on the effect of clause 40 of the CBA.

22. On the probative value of the evidence, the trial court was faulted that it did not consider all the evidence before it and the appellant was unaware of how the sum of Kshs 511,119/= was arrived at and the CBA was never changed.

23. That the trial magistrate did not consider the evidence as a whole.

24. Finally on dismissal of the claim, it was urged that computation of the appellant's gratuity for the 29 years served was opaque.

25. The decision in *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR was relied upon to urge that computation was done for all the years of service.

26. Reliance was also made on the decisions in *H. Young & Co (EA) Ltd v Javan Were Mbango* (2016) eKLR, *Pathfinders International Kenya Ltd v Stephen Ndegwa Mwangi* (2019) eKLR and *Paul Billy Nyagilo v East African Portland & Cement Co* (2018) eKLR to urge that gratuity was governed by the CBA or contract of employment.

Respondent's Submissions

27. The respondent's counsel isolated two issues for determination;

    i. Whether the appellant's claim was grounded on factual or legal basis.

    ii. Whether the appellant was entitled to the relief sought.

28. On the first issue, counsel urged that the CBA had no provision for retroactive application. The decisions in *Municipality of Mombasa v Nyali Ltd* (1963) EA 371, *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd and 2 others* (2012) eKLR and others were relied upon to urge that retroactive application of law was not permitted unless there was a clear intention to that effect.

29. Reliance was also made on section 59 (5) of the *Labour Relations Act*, 2007 on the effective date of a CBA.

30. Similarly, the decisions in *Kenya Chemicals and Allied Workers Union v Milly Glass Works Ltd* (2009) eKLR and *Teachers Service Commission v Kenya National Union of Teachers (KNUT) and 3 others*

(2015) eKLR were relied upon to urge that retroactivity in contracts was possible with consent of the parties.

31. It was submitted that backdating of the CBA to 1989 would be absurd and unfair to thE Respondent.

32. The court was invited to rely on ordinary rules of construction to avoid rewriting the CBA.

33. On the reliefs sought, it was urged that using the literal rule of interpretation, the computation of gratuity should be from the date the CBA took effect to July 1, 2013 as opposed to the date of employment. That the CBA had an implementation date as July 1, 2015.

34. Finally, it was submitted that if the parties intended 31% gratuity from the date of employment of an employee(s), the same should have been agreed upon.

Determination

35. From the submissions by counsel and the memorandum of appeal, the only issue for determination is the date from which the appellant's gratuity at 31% of the basic salary should be computed and incidental issues.

36. Section 59 of the *Labour Relations Act*, 2007 provides;

> 2. A collective agreement shall continue to be binding on an employer or employee who were the parties to the agreement at the time of its commencement and include members who have resigned from that trade union or employers association.
>
> 3. The terms of a collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
>
> 5. A collective agreement becomes enforceable and shall be implemented upon registration by the industrial court and shall be effective from the date agreed upon by the parties.

37. While the appellant urged that the effective date of the CBA signed on February 24, 2016 was his date of employment on June 1, 1989, the respondent urged that the effective date was June 1, 2013 under the literal rule of construction.

38. In *Teachers Service Commission v Kenya National Union of Teachers* (KNUT) and 3 others, the Court of Appeal expressed itself as follows;

> " There is a general presumption against retroactivity and the law frowns on retrospectivity in contract unless it is by consent of the parties . . .

39. Similarly, in Industrial Court cause No 152 of 2012 *Kenya Engineering Workers Union v Kenya Marine Contractors (EPZ) Ltd*, Radido J stated as follows;

> " The court in performance of its functions notes that many a times Collective Bargaining Agreements negotiations take time beyond the expiry dates (when the normal two year come to an end) and therefore backdating the effective date has been the practice/norm."

40. These sentiments prove beyond peradventure that retrospectivity in contractual engagements is a matter of agreement between the parties and backdating of CBAs was not uncommon in collective bargaining.

41. The court is in agreement with the appellant's counsel submission that enforcing the express terms of the CBA would amount to retroactivity.

42. In this case, paragraph 43 of the CBA on record stated that;

    a. "This agreement shall be effective from July 1, 2013 and shall remain in force upto June 30, 2017. It shall continue to be in force until revised jointly in writing by the parties or another is signed.

    b. The implementation date of this agreement shall be with effect from July, 1st 2015."

43. Clause 43 of the CBA between the parties addressed not only the effective date but the duration the CBA was to remain in force and by the date the appellant retired, no other CBA had been negotiated and none was placed on record. This is also consistent with the position taken by the respondent in the computation of gratuity as evidenced by an internal memo from the Director SWA to the Finance Officer dated July 2, 2018.

44. It is common ground that CBAs have a sunrise and sunset clause and being a contract, a CBA is operational within the duration agreed upon by the parties.

45. This reasoning finds support in the sentiments of Mbaru J in *Kenya Chemicals & Allied Workers Union v KEL Chemicals Ltd* (2017) eKLR where the judge held that;

> " With regard to a CBA taking effect, the terms agreed upon by the parties are binding for the period of the CBA term from the date it takes effect. Such date must be agreed upon by the parties. However, in negotiating a new CBA, parties are bound by the overriding objective of negotiating within the realm of fair labour relations so that one party does not negotiate so as to defeat the purpose and engage in bad faith. To negotiate a CBA in a manner that takes advantage of one party such is to negate and circumvent fair labour practices and go contrary to article 41 of the *Constitution*."

46. Similarly, in *Mukiria Farmers Co-operative Society Ltd V Jacob Rukaria & 5 others* (2017) eKLR, the Court of Appeal held;

> " As evident from that section (59) of the *Labour Relations Act*), a collective agreement is only binding on the employer, the trade union and unionisable employees 'for the period of the agreement.' The period of the agreement in the matter before us was two years between January 2009 and December 2010. It was the period mutually agreed upon by the parties after structured negotiations guided by the law. The rule of the court in that case as in all contractual matters, would be to enforce the intentions of the parties otherwise it would be violence to time honoured legal principles.

It was possible for the parties to have framed the clause on duration in a manner that made it clear that the CBA would continue to bind them after expiry but before negotiating another one. We have examined a large number of CBAs signed in Kenya after 2007 and invariably, they all contain an effective date of commencement and duration of operation. Many of them make the intention of the parties clear when an expired CBA shall continue to operate before another one is signed . . .

We have said enough to persuade ourselves that the CBA signed between the parties in this matter on April 24, 2009 had a time limit of 2 years and there was no intention expressed to extend its operation after expiry. It had a sunrise date January 1, 2009 and a sunset date December 31, 2010. Like an employment contract which has a time limit, it expired without more on the sunsent day. It is not clear why the union did not negotiate another CBA with the society."

47. In the instant case, clause 43 of the CBA made no reference to what would happen after expiry of the CBA on June 30, 2017.

48. The appellant's counsel faulted the trial magistrate on the ground that there was only one CBA not two as the trial court's judgement appeared to suggest. It is correct to argue that there was only one CBA during the claimant's employment by the respondent and the only one on record is for the period July 1, 2013 to June 30, 2017, a duration of 4 years, which the parties signed on February 24, 2016.

49. As held by the Court of Appeal in *Mukiria Farmers Co-operative Society Ltd v Jacob Rukaria & others* (supra), a collective agreement binds the parties thereto only 'for the period of the agreement'. In the absence of another CBA or continuation of the earlier one, the *Constitution* of Kenya, 2010 as well as employment and labour laws govern the relationship. There is no vacuum.

50. From the foregoing, it appears to the court that the respondent's formula of computation of the appellant's dues was erroneous in that the sunrise date of the CBA was July 1, 2013 not July 1, 2015 and the sunset was June 30, 2017.

51. Since the respondent paid gratuity at the rate of 31% of the basic pay from July 2015 to June 2018, even though there was no CBA in 2018, it still owed the appellant the gratuity from July 1, 2013 to June 30, 2015.

52. Backdating the gratuity to 1989 when the appellant was employed by the respondent as suggested by the appellant's counsel has no contractual justification and had not been agreed upon by the parties.

53. In addition, it would be burdensome on the respondent as the parties had not agreed that the 31% gratuity payment would extend to all unionisable employees from the date they were engaged by the respondent.

54. It is trite law that in the construction of contracts, the role of the court is to give effect to the intentions of the parties as opposed to rewriting the agreement.

55. The foregoing analysis disposes of the appellant's 2nd and 3rd and 4th grounds of appeal.

56. Finally, counsel submitted that the learned trial magistrate erred in fact and law by dismissing the appellant's claim,

57. In *Bamburi Cement Ltd v William Kilonzi* (supra) cited by the appellant, where the appellant had worked for 22 years and was paid gratuity for the entire duration, the memorandum of agreement between the appellant and the union stated that gratuity was payable to all employees who were in service as at November 7, 2005 and the clauses were specific on the number of years an employee had served. For instance, those who had served for over twenty years gratuity would be computed at 3 months basic pay for each completed year of service. The Court of Appeal upheld the decision. Such specificity was lacking in the instant case. This decision is distinguishable from the instant case.

58. The other decisions relied upon to urge that the appellants be awarded gratuity from June 1989 are consistent with the foregoing analysis that the gratuity payable is dependent on the relevant provisions of the agreement between the parties or the CBA.

59. In either case, the issue remains one of interpretation of the contract or the CBA.

60. The upshot is that this appeal is partially meritorious and is allowed to the extent that computation of the appellant's gratuity at the rate of 31% of the basic salary was supposed to commence on July 1, 2013 as opposed to July 1, 2015.

61. Consequently, the respondent shall pay the appellant gratuity from July 1, 2013 to June 30, 2014 and July 1, 2014 to June 30, 2015 with interest at court rates from the date hereof till payment in full.

62. In view of the partial success of the appeal, parties shall bear own costs.

63. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE