



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT UASIN GISHU
COURT NAME: ELDORET LAW COURT
CASE NUMBER: ELRC.PET/12/2019
CITATION: MICHAEL OKELLO OSEDO VS KEN- KNIT

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
EMPLOYMENT AND LABOUR COURT
AT ELDORET
PETITION NO 12 OF 2019
MICHAEL OKELLO OSEDO AND OTHERS.....CLAIMANT
VERSUS
KEN-KNIT (KENYA) LTD AND ANOTHER.....RESPONDENT

JUDGEMENT

Through a petition dated 28th August, 2019 the petitioners alleged among others that: -

The Petitioners are former employees of the 1st Respondent who had worked for the company diligently since youth till attaining age of retirement and upon whom notices retirement were served.

On retirement the employer offered them a single month's salary and blackmailed the Petitioners to execute a discharge of liability form exonerating the company from any further obligations in terms of terminal retirement benefits.

The Petitioners aver that as former employees they are entitled to such package in benefits as negotiated between the Employer and the Union without regard to status a any differences would amount to discrimination that has been outlawed by Article 27 of Constitution which provides

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Equality includes the full and equal enjoyment of all rights and fundamental freedom.

Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

The state shall not discriminate directly or indirectly against any ground, including race, sex, pregnancy, marital status, health status, ethic or social origin, color, age disability religion, language or birth.....

The Petitioner avers that the act of the 2nd Respondent without any justification in withholding their contributed benefits amounts to unfair administrative action contrary to Article 47 of the New Constitution of Kenya 2010 which provides: -

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Parliament shall enact legislation to give effect to the rights in clause(i) and that legislation shall: - Provide for the review of administrative action by a court or, if appropriate an independent and impartial tribunal and

Promote efficient administration.

(v) The petitioner aver that they are entitled to the following benefits on retirement

Below is a list of CBA Clauses that non-members should not benefit from which amounts to discrimination.

Clause 3 Annual leave.

According to the letter dated 13th May 2015 addressing the management of the 1st Respondent

The Petitioners further averred that:

The Petitioners aver that while in gainful employment the 1st Respondent maintained 2 payrolls, one whose pay slips complied with the statutory minimums and the records kept at the Company offices, and a lower pay record, whose pay slips are used to pay the workers.

The Petitioners contend that when they applied for credit from a financial institution, the 1st Respondent showed that pay slips complying with statutory requirements, but on application using supplied pay slips, were rejected as not meeting the statutory minimum approved pay:

The maintenance of the 2 payrolls is meant to mislead the administrative authorities as to compliance with statutory requirements when actually the 1st Respondent is committing unfair labour practices contrary to Article 41 of the Constitution of Kenya 2010.

The Petitioner aver that they hence incapacitated in calculating their true fair and commensurate entitlement as the 1st Respondent servants/agents have barred their representative, from accessing the 1st Respondent office, with a view of collecting true and fair data for the computation.

Petitioners further avers that the Chief Officer of the 1st Respondent and without due regards have withheld Petitioners final month's salary unless they sign a document which would certify that they have received all the expected benefits which amounts to unfair labor practice contrary to Article 41 of the Constitution of Kenya 2010.

The Petitioners therefore sought orders among others that:

An order of Mandamus to compel the 2nd Respondent to release to the Petitioners their benefits forthwith.

A declaration that the 1st Respondent in compelling the Petitioners to execute a discharge of liability amounts to an unfair administrative action meant to deny the Petitioners access to justice as provided for by Article 50 of the Constitution of Kenya.

A declaration that the Petitioners are entitled to benefit and enjoy similar terms and conditions of employment pursuant to Article 41 of the Constitution of Kenya 2010.

Damages for unlawful withholding Petitioners benefits and payment in lieu of notice from time issuance of notice to the date of judgement.

The 1st respondent in opposition to the application stated inter alia that: -

The 1st Respondent denies the contents of paragraph 5 of the Petition and more particularly that it blackmailed them to sign a discharge of liability and shall put them to strict proof thereof: -

The 1st Respondent vehemently denies that the Petitioners are entitled to a package of benefits negotiated between the 1st Respondent and the Union and that they have been discriminated against. The 1st Respondent shall put the Petitioners to strict proof thereof.

The 1st Respondent deny that it has conspired with the second Respondent as alleged or at all to withhold the petitioner's benefits thereby subjecting the petitioners to suffering. The Petitioners shall at the hearing hereof be put to strict proof thereof.

The 1st Respondent denies that the Petitioners are entitled to the benefits set out in paragraph 9 of the Petition and shall at the hearing hereof put the Petitioners to strict proof thereof.

The 1st Respondent shall at the hearing hereof aver that it is only union sable employees that are entitled to the benefits set out in the

Collective Bargaining Agreement and therefore there is no breach whatsoever on its part of Article 27 of the Constitution.

The 1st Respondent will aver further that this court has no powers whatsoever to order that the terms of the Collective Bargaining Agreement to the Petitioners.

The 1st Respondent will at the hearing hereof aver that the Petitioner have been paid all their dues as provided for in law and therefore it does not owe them any money or at all.

WITHOUT PREJUDICE to a foregoing, the 1st Respondent shall aver at the hearing that if there are any dues that have not been paid, the same have not been paid because the Petitioners are claiming what they are not entitled to and therefore want to reap from where they have not sown.

The 2nd respondent in opposition to the petition stated among others that: -

The Second Respondent denies that it has without justification withheld the Petitioners contribution benefits as alleged or at all and shall at the hearing hereof put the Petitioners to strict proof thereof: -

The Second Respondent denies that it has willfully withheld the Petitioners benefits through its servants and that it has conspired with the 1st Respondents in subjecting the Petitions to suffering as alleged or at all and shall at the hearing hereof put the Petitioners to strict proof thereof.

The Second Respondent is a stranger and is not a party to the Petitioner claims as set out in paragraph 11(1) and 11(16).

The Second Respondent will aver at the hearing hereof that under the NSSF Act No. 45 of 2013, once a contributor has reached the age stipulated in the Act, it is incumbent upon the Fund member to visit the nearest office and lodge their application to facilitate the processing of their benefits.

The Second Respondent will further aver at the hearing hereof that indeed some of the Petitioners have already been paid their benefits albeit fraudulently through falsifying of their retirement's documents.

The Second Respondent shall aver further that no claim has been made against it for failing to process payment for the Petitioners who qualify and have lodged claims.

The Second Respondent filed a statement through one, Nelson Tonui who stated among others that it was true that the Petitioners were members of the second respondent and made contributions to the fund. He further gave names of Mr. Michale Osedo, Ms Grace Masinde, Allan Malesi, Morris Matunda, Phyllis Aseka and Gebriel Siambi as among those who irregularly applied for and drew their benefits from the fund.

In his submissions in support of the petition Mr. Angu for the petitioners submitted that by dint of being employees of 1st respondent, the petitioners were entitled to such packages and benefits negotiated between their employer and their union without regard to status. According to Counsel, anything less would amount to discrimination contrary to article 27 of the Constitution. Mr. Angu further contended that the withholding of the petitioners' contributions was contrary to article 47 of the Constitution.

Counsel further submitted that the decision to bestow benefits of the CBA specifically under the head of Annual leave to the exclusion of the petitioners breached article 27 of the Constitution.

Further the action by the 1st respondent of maintaining two payrolls for the duration of the petitioner's employment misled administrative authorities as to compliance and ultimately incapacitate the petitioners with regard to the calculation of their true fair and commensurate entitlement.

Mr. Kitiwa for the 1st and 2nd respondent on the other hand submitted that the 1st respondent prepared the petitioners' final dues but they declined to collect the same hence the respondent could not be blamed for refusal by the petitioners to collect their dues. The respondent was willing to pay the petitioners' terminal dues.

On the issue of discrimination, Counsel submitted that the CBA was signed between the 1st respondent and the union hence was meant to benefit members of the union only and since the petitioners were not members having failed to pay agency fees as provided under Section 49(1) of the Labour Relations Act, the terms of the CBA were not applicable to them. In this regard, Counsel relied on the case of East Africa Portland Cement Co. Ltd.v. Kenya Chemical & Allied Workers Union (2017) eKLR.

Concerning severance pay, the 1st respondent contended that the petitioners were not entitled to severance pay as they were not declared redundant and that they were members of NSSF. Counsel further submitted that the payment of gratuity was discretionary upon the employer to pay at the end of a contract and was subject to the terms of contract of employment. Further that petitioners had individual contracts and none provided for payment of gratuity.

Regarding unpaid leave and overtime Mr. Kitiwa submitted that each of the petitioners proceeded for their annual leave as well as public holidays.

With regard to the 2nd respondent and allegations against it, Counsel submitted that the petitioners were eligible to their benefits upon

attainment of the age of 50 years and no longer in employment, however some of the petitioners fraudulently claimed and were paid their benefits while still in employment.

Further that whatever the petitioners were claiming had already been paid to them hence claiming the same for the second time was an illegality which court should not be used as an avenue to aid unscrupulous litigants.

The Court having carefully reviewed and considered the petition herein, the facts, documents and submissions by both sides, is of the view that the main issues to be decided are whether it would amount to discrimination if the 1st respondent were to maintain and pay the petitioners their terminal dues at a rate different from unionisable employees and second whether the 1st respondent is liable in damages to the petitioners for failure to pay to them their terminal dues.

The court noted that in the petition, the petitioners raised other heads of claim such as underpayment of wages, unpaid leave allowance, payment in lieu of notice, travelling allowance, overtime dues and gift package. Whereas these heads of claim could be raised in constitutional petition they were best done as a matter of last resort and especially where there are weighty constitutional issues which could not be addressed alongside other claims in an ordinary suit.

The Court has considered the alleged violations of the Constitution raised by the petitioners and does not think they could not have been adequately addressed through an ordinary suit. The allegation that if the petitioners were to be paid at a rate different from their colleagues because they were not members of the union would be discriminatory is adequately covered under section 49(1) of the Labour Relations Act. Even admitting it was a constitutional question, it is the only one in the petition. Issues such as overtime, severance pay, gratuity, unpaid leave allowance and so on, raised by the petitioners, do not strictly speaking amount to constitutional issues to be addressed by way of a Constitutional petition.

The Court further observes that whereas the petitioners have tabulated what they consider are their rightful terminal dues, no documents or factual background was presented before me to support them. For instance, nothing was laid before me to support the claim for overtime, for unpaid leave, severance pay and so on. These heads of claim therefore remain unproved and the court is unable to make any pronouncement over the same.

This therefore leaves me with the only two issues earlier framed which are the issues of discrimination and whether the petitioners are entitled to any damages.

Section 49(1) of the Labour Relations Act provides in paraphrase as follows: -

“a trade union that has concluded a collective agreement registered by the Industrial Court with an employer, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union”

The import of section 49(1) is that once a CBA is concluded it should apply to all unionisable employees whether they are members of the union that concluded the CBA or not. What this implies is that it would be discriminatory for an employer to pay or extend employment benefits to unionisable employees who are members of the union that concluded the CBA, different from their The Judiciary of Kenya unionisable colleagues who are not members simply because they are not members of the union.

The provisions of Section 49(1) states that the union may request the Minister to authorize the deductions of agency fees. The use of discretionary “may” in the section is limited to the union asking the Minister to authorize deduction of agency fees from Unionisable employees who for one reason or another are not members of the Union but would inevitably benefit from the terms of the CBA. It does not create an option for an employer to have two sets of employees who despite the fact that they are performing the same work are paid or enjoy benefits different from their unionisable colleagues who are members of the Union that negotiated the CBA.

To this extent the argument by the 1st respondent that the petitioners not being members of the Union that settled the CBA could not benefit from it, is therefore flawed.

The Union which concluded the CBA during the period the petitioners were in employment never requested the Minister for the deduction of agency fees. They slept on their rights and furthermore are not parties to the suit. The Court in the circumstances cannot create a windfall for them and order that they be paid agency fee at this point. The Court however orders that the calculation of the petitioners’ benefits and terminal dues including salary, include salary and benefits payable to all unionisable employees regardless of whether they were union members or not.

It was alleged by the 1st respondent and not denied by the petitioners, that the respondent calculated the petitioner dues but they refused to collect the same. The 1st respondent did not disclose to the Court the nature and extent of these benefits to compare and contrast with what the petitioners alleged as their benefits.

For this reason and in view of the Court’s direction that the calculation of benefits do factor in salaries and benefits of all unionisable employees including the petitioners, the same is hereby ordered to be recalculated as directed.

With regard to the 2nd respondent, the Court hereby directs that no liability attaches against it from those petitioners who have since drawn their retirement benefits and for those who have not, their dues be paid in accordance with the 2nd respondent’s constitutive statute and regulations in force.

In conclusion the petition will only be allowed to the extent that the 1st respondent shall recalculate and forward to the petitioner's Counsel concurrence, the petitioner's terminal benefits taking into account all the concluded CBAs in force during the time the petitioners were each in employment of the 1st respondent.

The matter shall be mentioned after 60 days from the date of this judgement for the recording of final orders. That is to say on 20th September, 2021.

The petition being partially successful each party shall bear their own costs.

It is so ordered.

DELIVERED AT ELDORET THIS 11TH DAY OF JUNE, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

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