Kenya Hotels and Allied Workers Union v Panari Hotel; Gitau (Interested Party) (Cause 218 of 2019) [2024] KEELRC 1076 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1076 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 218 OF 2019

NZIOKI WA MAKAU, J

MAY 8, 2024

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION ..... CLAIMANT

AND

THE PANARI HOTEL ..... RESPONDENT

AND

MATHEW MWANGI GITAU ..... INTERESTED PARTY

JUDGMENT

1. The Claimant Union filed this claim against the Respondent through a Memorandum of Claim dated 5th April 2019. The Union sought various reliefs against the Respondent Hotel for effecting early retirement of seven (7) of its members – Grievants – in breach of the law. The Grievants - Thomas Kamanda Mokua, Silvester Odhiambo Ojwang, Julius Onyiego Omariba, Pius Gitonga Ndambuki, Jacktone Odhiambo Ong'aro, Justus Okari Jackson, and Edward Angaga Odoyo, are all former employees of the Respondent in the level of management who had been employed on diverse dates in different cadres; being security guard, P.A attendant/cleaner, doorman, cashier, chef de parte, and driver. In support of the Claim, the Union produced copies of the Grievants' appointment letters, retirement notices, I.D cards, pay slips, and correspondence between it and the Respondent, from the Chief Industrial Relations Officer to the Respondent, the Conciliator's findings and recommendations, and a Cashiers Summary Report.

2. The Claimant's case was that the Grievants were unfairly retired on 31st December 2017 after being issued with a Notice dated 27th October 2017 on 30th October 2017. That at the time of the unfair retirement, the Grievants earned basic pay and house allowance as tabulated in the Claim and the annexed Witness Statements of the Grievants. That the Works Committee endeavoured to resolve the dispute but failed, prompting the matter to be referred to the Claimant Union and thereafter to

the Cabinet Secretary, Ministry of Labour. The Claimant Union averred that the Conciliator invited parties for mediation and in the end, made findings and recommendations which the Respondent has declined to implement. It asserted that the Respondent's decision was unconstitutional and unlawful and that this Court ought to protect the said aggrieved former employees from discrimination and recommend their reinstatement or in the alternative, award them maximum compensation. The Claimant Union thus prays that the Court orders:

a. That, the Respondent's decision to retire the aggrieved employees before retirement age was unfair.

b. That, the Respondent reinstate the aggrieved employees in their previous position or in the alternative compensate them within the meaning of section 49 of the *Employment Act* of 2007.

c. That, the Respondent pays salary for the remainder of the period of the Grievants' rightful retirement age of 60 years.

d. That, the Respondent to pay cost of this suit.

3. In response, the Respondent filed a Statement of Response dated 14th February 2024 admitting that the Grievants were formerly its employees under the terms averred in the Claim but denying that the said Grievants were unfairly retired as claimed. The Respondent averred that it is a member of the Kenya Association of Hotel Keepers and Caterers (KAHKC) and it has not signed any Collective Bargaining Agreement (CBA) with the Claimant Union. The Respondent notified this Court that KAHKC signed a CBA with the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) on 1st October 2016, which CBA was to remain in force until 30th September 2018. That article 27(a) of the CBA provided that an employee who has attained the age of 55 years may retire or be retired and further provided how the retirement package will be paid. The Respondent argued that therefore in the prevailing circumstances, it was guided by the said CBA that was in force at the time the Grievant were being retired. According to the Respondent, the only CBA it recognizes is the one which its Union negotiated on its behalf together with other hotel owners. It thus prays that the Grievants' claim be dismissed with costs. The matter was canvassed by way of written submissions.

4. Claimant's Submissions

The Claimant submitted that the following are the issues for determination by this Court:

a. Whether the Grievant were entitled to remain in service up to the attainment of the age of sixty (60) years?

b. Whether the retirement of the Grievant for having attained the age of fifty-five (55) years was unfair termination of the Grievants' employment?

c. Whether the Grievant are entitled to the remedies, as prayed.

5. The Claimant submitted that it is undisputed that the Grievants' letters of appointment were silent on the retirement age of employees appointed by the Respondent. It questioned which of the two, between the CBA signed between Kenya Association of Hotel Keepers and Caterers (KAHK) and KUDHEIHA and The Regulation of Wages and Conditions of *Employment Act* (Regulation of Wages (Hotel and Catering Trades) Order), should take precedence in the determination of the retirement age. While acknowledging that The Regulation of Wages and Conditions of *Employment Act* (Cap

299) was repealed by the *Labour Institution Act* of 2007 and is thus inoperative, the Claimant cited the case of *Robert Kithinji Kiugu v AAA Growers Limited* [2019] eKLR wherein this Court held thus:

> " Quite evidently there is no mandatory retirement age specified in statute within the private sector unlike the public sector. More often than not, the retirement age is specified in the individual contract of employment in the private sector. The Respondent in this case chose to rely on Regulation 17(2)(b) of the Regulation of Wages (Protective Security Services) Order on the normal retirement age and gave the Claimant a one month's notice of such retirement in line with the employment contract. The Claimant has argued that the said Regulation 17(2)(b) has been repealed. Although the *Labour Institutions Act* was indeed repealed in 2007, Regulation 17(2)(b) is saved by Section 24 of the *Interpretation and General Provisions Act* which provides as follows:-
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> "when an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder"."

6. It was the Claimant's submission that the Grievants were therefore entitled to remain in employment up to and until attainment of the retirement age of 60 years, as provided for in the Hotel and Catering Trades Order under Cap 299. The Claimant further submitted that the Respondent having averred that it has no CBA with the Claimant, it is noteworthy that the Respondent never raised a Notice of Preliminary Objection as to the Claimant's *locus standi* to commence, represent or maintain this cause. It argued that the Claimant's right to institute this suit on behalf of its members is anchored under Article 22 of the *Constitution* of Kenya, 2010 and section 73(3) of the *Labour Relations Act*. That Article 36 of the *Constitution* further provides that every person has the right to freedom of association, including the right to join or participate in the activities of an association of any kind and that a person shall not be compelled to join an association of any kind. That 41(2)(c) also provides that every worker has the right to form, join or participate in the activities and programmes of a trade union, which position is echoed in section 4 of the *Labour Relations Act*. The Claimant urged the Court to be persuaded by the Court's finding in the case of Kenya Hotels & Allied Workers Union v Bidwood Suites Hotel Limited [2019] eKLR in which Radido J. dismissed a Preliminary Objection raised as to the non-existence of a recognition agreement after observing that giving sections 54(2) & (3) of the *Labour Relations Act* a purposive and contextual meaning leads to the conclusion that a recognition agreement is not decisive in anchoring locus standi upon a trade union to institute legal proceedings on behalf of its members, where there is no recognition and where it can demonstrate that it is agitating on behalf of its member(s) even before recognition. It was the Claimant's submission that the Court should thus find that since the Grievant were not members of KUDHEIHA, they were not subjected and bound by the provisions of the CBA entered between KAHKC and KUDHEIHA. Consequently, the Claimant submitted that the retirement of the Grievants by the Respondent, for having attained the age of 55 years, was unfair termination of their employment. It argued that Article 27(1) of the *Constitution* of Kenya provides that every person is equal before the law, and has the right to equal protection and equal benefit of the law. That section 5(2) of the *Employment Act* of 2007 further provides that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice. That in the case of Kenya Union of Domestic Hotels, Educational Institutions and Allied Workers v MP Shah Hospital [2018] eKLR, Ongaya J. affirmed that the clause in the CBA signed between the parties providing for members of the trade union to normally retire at 57 years of age, amounted to unequal treatment of the members and

was discriminatory contrary to section 5(2) of the *Employment Act*, as compared to the Respondent's management cadre or employees eligible to join the union but had not done so, being retired at the age of 60 years as per the Respondent's applicable policies. The said Court went on to find that such provision in a collective agreement is thus amenable to challenge as unconstitutional or unlawful. It was the Claimant's submission that in light of the foregoing, this Court ought to find that the retirement of the Grievant by the Respondent, for having attained the age of 55 years, was unfair termination of their employment.

7. Regarding the remedies sought, the Claimant submitted that having demonstrated that the early retirement of the Grievant amounted to unfair termination of their employment, the Grievant should be awarded the reliefs sought in the Claim herein. That in the Conciliator's Report dated 30th May 2018, the Conciliator recommended, "that the retirement age of the six employees be benchmarked on the government's retirement age of 60 years. Consequently, the six employees be reinstated back to the positions they occupied in the hotel until they attain the age of 60 years. Besides, they be paid salaries for the period they have been out of work which was not their own doing." However, the Claimant admitted that the prayer for reinstatement of the Grievants is untenable as they have all surpassed the retirement age of 60 years. That the Court should consider the alternative prayer of compensation within the meaning of section 49 of the *Employment Act* of 2007 and a prayer that the Respondent pays salaries for the remainder of the period of the Grievants' rightful retirement age of 60 years, as pleaded in their individual Witness Statements dated 5th April 2019.

Respondent's Submissions

8. According to the Respondent, this Court ought to find that the Grievant had reached retirement age and thus service of their employment came to an end, that the Respondent did not therefore unfairly and wrongfully terminate their employment, and that the Grievant are consequently not entitled to the reliefs sought. The Respondent submitted that the Grievant, having been employed by the Respondent, were bound by the CBA signed by KAHKC because the articles of the said CBA bound both the Grievant and the Respondent, as provided in section 59 of the *Labour Relations Act* of 2007. The Respondent noted that it had adopted and incorporated the provisions of the said CBA in every letter of appointment for each of the Grievant as directed by section 59(3) of the *Labour Relations Act* and that it was therefore not in breach of any constitutional right as claimed by the Grievant. It submitted that courts have explained the binding nature of CBAs as shown in the case of Kenya Union of Journalists v Nation Media Group Limited & another [2013] eKLR (Industrial Court Cause 799 of 2010), in which Rika J. observed that CBAs are not like commercial contracts in that they bind beyond the parties to the agreement; members who resign from the trade union or the employers' association continue to be bound for the duration of the CBA; and the terms of the CBA are incorporated in the individual contracts of every employee covered by the CBA. It was the Respondent's submission that the Grievant were not entitled to remain in service up to the age of 60 years as the CBA that was in place then was very clear on the retirement age. That the Grievant cannot claim not to be members of KUDHEIHA, which Union the Respondent now contends is representing the Grievant in this matter. The Respondent reiterated that the Grievant are bound by the said CBA even after ceasing being members of the Union, as provided in section 59 of the *Labour Relations Act*, 2007.

9. As to whether the Grievants were unfairly terminated from employment, the Respondent submitted that it had demonstrated that the retirement of the Grievant and the subsequent issuance of retirement notices to them was in accordance with the law and CBA. It acknowledged that the fairness of any termination of employment is pegged on both procedural and substantive aspects of the termination; in terms of a valid and justifiable reason for the same and following due process, as set out under section 45 of the *Employment Act*, 2007. The Respondent relied on the case of Pius Machafu Isindu

v Lavington Security Guards Limited [2017] eKLR in which the Court of Appeal elaborated on the statutory burden placed on an employer when terminating an employee in terms of inter alia proving the reasons for termination/dismissal (section 43); proving that the reasons are valid and fair (section 45); proving that the grounds are justified (section 47(5); and proving that the mandatory and elaborate process set up under section 41 have been adhered to. It was the Respondent's submission that the Claimant had not made any case on whether the Grievant were entitled to remain in service up to the attainment of the age of 60 years. That the Respondent, on the other hand, had shown that it was bound by the CBA, which clearly provided under clause 27(a) that the age of retirement is 55 years. The Respondent thus urged the Court to find that the Grievant were therefore not entitled to remain in its service up to the age of 60 years and to disregard the Claim entirely with costs to the Respondent.

10. The *Labour Relations Act*, Cap 233 of the Laws of Kenya makes provision for the interface between parties in the labour space be it from an employer, union or employee perspective. The provisions of Part II of the Act are instructive. The sections from 4 to 8 make provision for the employee's right to freedom of association, protection of employees, the employer's right to freedom of association, protection of employers' rights, as well as the rights of trade unions, employers' organisations and federations. Under Part VII, there is provision for the recognition of trade unions. In particular, section 54(1) of the Act makes provision as follows:-

> An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees
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> [Emphasis supplied]

11. Recognition is the process whereby an employer acknowledges a particular trade union as having met the threshold for representation of the employees in the company. This recognition triggers discussions with the union on issues concerning the workers so as to ensure smooth collective bargaining. It assures industrial peace and harmony. Once the union is recognized, it serves as the bargaining agent for the workers in a particular enterprise. The Claimant is a registered union in terms of section 19 of the *Labour Relations Act*. The Claimant is however not a recognised union for purposes of the Act as it has no recognition agreement with the Respondent. The Respondent is a member of the Kenya Hotel Association Caterers Union which has a recognition agreement and CBA with the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA). Secondly, and more telling, clause 27(a) of the CBA in force at the time provided that the employees who had attained the age of 55 could retire or be retired. It is against the retirement of the 8 employees of the Respondent that the suit was mounted. The claim by the Union before me was tenuous and was a stretch of a representation of employees. Trade unions are not activists in the strict sense of the term. They cannot go around taking up briefs that do not apply to them. In this case, the Claimant had no business meddling in the matter as the Grievants were not demonstrated to be members of the Claimant Union. In fact, their payslips indicated deductions made to KUDHEIHA. The employees could have articulated their own case through KUDHEIHA or in their own names. As the claim was not properly presented, the Court will strike out for purposes of the suit, the name of the Claimant and substitute therefore the names of the Grievants and the Interested Party as Claimants in the suit. The 8 Claimants (former Grievants and Interested Party) sought reliefs relating to the termination of their employ. They unfortunately sought a variation of an existing CBA without going through the formal process to engineer such a change. CBAs are registered for a reason. They encapsulate the agreements between employers and the union representing the employees in a particular enterprise or sector and where the CBA is registered, it governs the conduct of parties, their rights and obligations in addition to the provisions of the law or policies and procedures manuals in place at the workplace such as the Code

of Regulation of Teachers, to name but one example. In this case, the 8 Claimants had their contracts terminated on account of age. They assert they ought to have enjoyed a longer duration of employment as Government employees who have a retirement age of 60. The 8 Claimants unfortunately cannot obtain benefit of terms under the civil service as their sector has a differentiation in terms of retirement. Perhaps this is an area the future collective bargaining agreements as may be entered into could explore. Granted there was no reason for an extension of the period of service so as to equate the retirement age with that in the civil service, the claim by the 8 Claimants is misplaced and is one for dismissal as it is devoid of any merit. Granted the 8 Claimants were misguided by the Union in presenting a dispute to the Ministry of Labour and later mounting a spurious claim, I will make no order as to costs. Suit dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE