Telkom Kenya Limited v Communication Workers Union (Civil Appeal 96 of 2019) [2025] KECA 449 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 449 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 96 OF 2019

DK MUSINGA, K M'INOTI & FA OCHIENG, JJA

MARCH 7, 2025

BETWEEN

TELKOM KENYA LIMITED ..... APPELLANT

AND

COMMUNICATION WORKERS UNION ..... RESPONDENT

(Appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Ongaya, J.) dated 23rd November 2018inELRCC No. 2105 of 2015)

JUDGMENT

1. In a judgment dated 23rd November 2018, the subject of this appeal, the Employment and Labour Relations Court at Nairobi (ELRC, Ongaya, J.) issued a declaration that the appellant, Telkom Kenya Ltd., had violated Articles 41(1) and (2) (c) of *the Constitution* by failing to pay its employees who were members of the respondent, the Communication Workers Union, bonuses in accordance with the appellant's policy. The court further ordered the appellant to pay the said employees all outstanding bonus in accordance with its Human Resources Policy Manual by 31st December 2018, failing which the said amount would attract interest at court rates from the date of judgment till payment in full. By a further order, the court directed the respondent to compute the quantum of its claim and file the same in court within seven days. Lastly, the appellant was ordered to pay 75% of the respondent's costs of the suit.

2. On 30th November 2018, the respondent filed in the ELRC a computed claim for Kshs 23,489,718.09.

3. The appellant was aggrieved and filed this appeal, in which it contends that the ELRC erred by:

    i. failing to hold that payment of bonuses to the claimants was discretionary, not subject to consultation or agreement with the respondent, and not covered in the Collective Bargaining Agreement (CBA) between the parties;

ii. holding that the appellant's refusal to pay bonuses to the claimants was discriminatory, yet the non-payment was based on fair, reasonable and justifiable differentiation;

iii. directing the appellant to pay the claimants in accordance with its Human Resources Policy Manual, yet such payment is dependent on performance reviews, which were not available; and

iv. directing the respondent to compute the claimants' bonuses, which is a prerogative of the appellant, and in any event is contrary to the procedure and criterion in its Human Resources Policy Manual.

4. In the meantime, the appellant obtained from this Court on 6th November 2020 an order of stay of execution of the judgment of the ELRC, pending the hearing and determination of its appeal.

5. In support of the appeal, the appellant relied on two sets of written submissions dated 16th May 2024 and 26th September 2024, which its learned counsel, Ms. Lubano, appearing with and Mr. Kamara, highlighted. The appellant also relied on several authorities in a list dated 16th May 2024.

6. On the first ground of appeal, counsel submitted that under clause 33 of the CBS, payment of bonuses and promotion was not subject to consultations. Further, that under the Human Resources Policy Manual, payment of bonuses was at the discretion of the appellant and was dependent on an employee's high performance and the appellant's business financial performance. Counsel cited clause 8:3 of the Human Resources Policy Manual and some five letters which she contended supported the appellant's position as regards the agreed parameters for payment of bonuses.

7. Turning to the second ground of appeal, the appellant submitted that during the CBA negotiations, the respondent had vehemently opposed salary increments based on performance review for its members and as a result the parties settled on 6% automatic salary increment for a period of two years. However, that automatic salary increment did not apply to non-unionisable members, who were entitled to bonuses based on performance.

8. The appellant contended that the differential treatment between its unionisable and non-unionisable members did not constitute unconstitutional discrimination and was a justifiable limitation under Article 27 of *the Constitution* and was also permissible under section 5(4) (a) and (b) of the *Employment Act*. It was the appellant's argument that because it had provided for automatic salary increments for the unionisable employees in the CBA, for purposes of equality it was necessary to provide bonuses based on performance review for non-unionisable employees, which the appellant perceived as affirmative action.

9. On the third ground of appeal, it was the appellant's submission that bonuses could only be computed and paid on the basis of performance review and in accordance with the Human Resources Policy Manual. Relying on clause 5 of the Manual, the appellant submitted that the parameters for payment of bonuses were clearly set out, namely, a percentage of fixed salary; as a reward for high performance; at the discretion of management; and on the basis of business financial performance. Clause 8(3) was cited as stipulating the procedure, process and criteria for computation of bonuses.

10. The appellant submitted that to the extent that the claimants were not subject to bonuses review, it was not possible to compute bonuses for them because the prescribed performance review information was not available and in addition, the prescribed procedure in clause 8(3) could not be followed.

11. On the last ground of appeal, the appellant submitted that since the computation and payment of bonuses was its prerogative, the same could not be undertaken by the claimants or the respondent. The appellant also took issue with the ELRC for delegating to the respondent the computation of the

amounts claimed by the claimants, instead of determining the issue itself, which was a non- delegable judicial function. In support of that submission the appellant relied on Telkom Kenya Ltd. v John Ochanda [2014] eKLR. It was also contended that once the ELRC pronounced its judgment, it became functus officio and had no jurisdiction to order the respondent to compute the quantum. The appellant also complained that the computation undertaken by the respondent was not based on the parameters provided in the Human Resources Policy Manual, but was an arbitrary award based on a flat rate of 47.5% of the basic salary for each claimant.

12. The respondent, which was represented by Mr. Kamotho, learned counsel, opposed the appeal vide submissions dated 17th May 2024. The essence of the respondent's case was that the decision by the appellant to pay bonuses to non-unionisable members to the exclusion of unionisable members was discriminatory and in violation of section 5(2) (c) (i) of the *Employment Act*. It was contended that by a letter dated 5th September 2014, the appellant had relented and offered to consider payment of bonuses to members of the respondent in appreciation of their contribution and that on 24th September 2014 the appellant offered to pay each member of the respondent Kshs. 2,000 bonus not based on any parameters, which they rejected because the non-unionisable members were being paid bonuses of 47.5% of their fixed salaries.

13. In the respondent's view, the appellant's refusal to pay the unionisable members bonuses on the same footing as the non-unionisable members was intended to prejudice and penalise the respondent's members because of their membership in the union and therefore was in violation of section 5(2) (c) (i) of the *Employment Act*. The respondent argued that as a result of the appellant's discriminatory practice, some of its members had tendered letters of resignation from the union so as to earn a higher bonus. It was also contended that the appellant had indeed paid bonuses to non-unionisable members, but only those that had not joined the union. The cases of Odhiambo Ongadi and John Ochola Ndolo were used as example of payment of bonus of 47.5% to a unionisable employee who was not a member of the respondent and a paltry Kshs 2,000 to another unionisable employee, but who was a member of the respondent. It was submitted that both employees were covered by the CBA and that under the Human Resources Policy Manual, all employees were entitled to bonus payment, including those who had elected to join the union.

14. It was also the respondent's submission that the 6% annual salary increment was not limited to non-unionisable employees as contended by the appellant, but covered the unionisable ones as well, and was payable without regard to individual performance. In support of the contention the respondent cited the applicant's circular dated 20th June 2023.

15. Next, the respondent denied the applicant's contention that members of the respondent were entitled to automatic annual salary increment in lieu of bonuses. It was submitted that the CBA did not have any such provision and that clause 5 of the Human Resources Policy Manual provided for payment of bonuses without regard to whether the employee was a member of the union or not. In the respondent's view, its members were entitled under the Manual, to fixed salary and variable pay (annual bonus or monthly commission), just like the non-unionisable employees. The respondent emphasised that the Manual did not make non-membership in a union a condition for payment of bonus and submitted that whereas no employee had a right to payment of bonus, the moment the appellant agreed to pay bonus to all employees, it could not pay only some and not others. The respondent also contended that in previous years the appellant had paid bonus to all its employees without any distinction between unionisable and non-unionisable members.

16. Regarding the appellant's contention that it could not pay bonus to the claimants due to lack of performance appraisal, the respondent submitted that the appellant had not adduced any evidence to show that the employees it paid bonuses of 47.5% of their salaries had been subjected to performance

appraisal. The respondent faulted the appellant for offering to pay the claimants a flat rate bonus of Ksh. 2,000 whereas under the Human Resource Policy Manual, payment of bonus was pegged on a percentage of fixed salary.

17. On the last ground of appeal, the respondent contended that the appellant had the means and wherewithal to compute the bonus payable to the claimants, and having applied the flat rate of 47.5%, the appellant should have applied the same rate to the claimants. It was also contended that when the parties appear before the ELRC, the appellant will have an opportunity to comment and be heard on the figures as computed by the respondent and to make its counter computation. In the respondent's view, the trial court was not functus officio when it made the order for the respondent to compute the claim and that the court had jurisdiction to perfect the judgment and to render substantive justice. In support of the submission the respondent relied on County Government of Garissa & another v. Idriss Aden Mukhtar & 2 Others [2020] eKLR and Samura Engineering Ltd. v. Don Woods Ltd. [2019] eKLR.

18. We have carefully considered the record of appeal, judgment of the trial court, the submissions by both parties and the authorities they relied upon. In our perception, this appeal turns on the interpretation of the applicable CBA between the appellant and the respondent as regards payment of bonus.

19. It is common ground between the parties that bonus is paid at the employer's discretion as an incentive or in appreciation of the employee's individual performance and contribution towards the good business performance realised by the employer. The Black's Law Dictionary, 8th Ed. 2004, defines "bonus" as follows:

> " A premium paid in addition to what is due or expected...In employment context, workers' bonuses are not a gift or gratuity; they are paid for services or on consideration in addition to or in excess of the compensation that would ordinarily be given."

20. The "consideration" referred to in the above definition is the employee's individual good performance leading to good business results for the employer. No one would expect payment of bonus where the employee has been lethargic and dilatory in the financial year and when the employer's business has suffered loses and deficits. No one appreciates or rewards that kind of conduct or result.

21. In Nicholas Mbuya & 4 others v. Alice Gesare Moninda [2015] eKLR, this Court held as follows on the issue of bonus:

> "Our labour laws are silent on the issue of bonus payment. It would then appear that where a bonus dispute arises, such dispute is left exclusively to the province of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract."

22. See also the decisions of the Employment & Labour Relations Court in Kenya Chemical & Allied Workers Union v Bamburi Cement Ltd. [2013] eKLR and Stephen K. Kachila v Bamburi Cement Ltd [2015] eKLR).

23. The relevant CBA was signed on 18th June 2013 and covered the period 1st January 2013 to 31st December 2014. By dint of section 59 of the *Labour Relations Act*, the CBA was binding upon the appellant, the respondent and the appellant's unionisable employees and its terms were incorporated into the contract of employment of every employee governed by it. Upon registration, the CBA became enforceable in law. The CBA was registered on 29th October 2013.

24. The CBA had express provision on salary increment for unionisable members but did not expressly address the issue of bonus. As regards increment of salary, clause 31 of the CBA provided as follows:

> " Salary
>
> It was agreed that salary for the unionisable staff be increased at the rate of 6% for the period 1st January 2013 to 31st December 2013 and thereafter another 6% increment for the period 1st January 2014 to 31st December 2014."

25. Clause 36 of the CBA addressed other terms and conditions of service as follows:

> " Other Terms and Conditions of Service.
>
> The other terms and conditions of service will continue to apply as provided for in the existing Company regulations issued through circulars from time to time and the Human Resources Manual will continue to be used as a guideline. At the expiry of this CBA, all the terms and conditions shall continue to apply until another CBA is put in place."

26. It is crystal clear that by clause 36 the parties incorporated the appellant's Human Resources Manual as part and parcel of the CBA, to serve as a guideline for the other terms and conditions of employment that were not expressly spelt out in the CBA.

27. Clause 5 of the Manual contained the appellant's compensation policy, which was expressly stated to be applicable to all employees of the appellant. The objective of the compensation policy was stated to be to provide guidance on compensation and non-salary benefits offered by the appellant to its employees and to ensure that the compensation scheme was clear and transparent to all.

28. It is apt to reproduce the relevant provisions of clause 5 verbatim.

> 5. 1 Salary and Variable Pay
>
> ...[C]ompensation shall recognise differences in job complexity, responsibility and individual Performance. Each compensation package shall comprise of :-
>
> Fixed salary
>
> Variable Pay (annual bonus or monthly commissions)
>
> Fixed Salary
>
> Fixed salary is the amount as stated in the employee's offer letter or subsequent communication, and is paid monthly.
>
> Salary ranges are applicable to all employees in the company apart from external expatriates on secondment. Full details of the salary ranges and the schedule of corresponding positions may be published in staff circulars and may be revised in line with business demands. For the sales team, the On Target Earnings (OTE, which is the sum of monthly fixed salary plus monthly variable salary will be considered while aligning their pay with the company's salary ranges.
>
> Salary is normally paid by bank transfer by the last day of each month. Based on the employee's gross salary, the Company will make all mandatory statutory deductions as required by legislation.

Salary advance may be considered on request but recoverable in full within the month of application as per Kenya Revenue Authority (KRA) guidelines.

(ii) Variable Pay Bonus

Annual bonuses are variable amounts paid as a percentage of fixed salary as a reward for high performance at the discretion of the Management and business financial performance. Employees issued with warning letters will not qualify for bonus payment if the letter was issued within the period of assessment."

29. Because the parties had reached agreement in the CBA and expressly provided for salary increment and payment of bonus, payment of bonus to the claimants was no longer within the realm of the appellant's discretion. It was a crystallised right under the CBA, in respect of which the appellant could not invoke its discretion to pay or not to pay.

30. Under clause 31 of the CBA, the claimants were entitled to annual salary increment at the rate of 6%. From that clause the annual salary increment was not conditional upon the claimants foregoing the bonus that they were entitled to under the Human Resources Policy Manual or upon payment of a higher rate of bonus to non-unionisable employees. While it is true that the parties may have discussed and negotiated along the lines asserted by the appellant, there is no evidence on record that they ever came to any agreement. The failed conciliation and the litigation before the trial court leading to this appeal is clear evidence that the parties never reached any agreement as contended by the appellant.

31. Section 59(4) of the *Labour Relations Act* requires a CBA agreement to be in writing. In light of the clear terms of the written CBA as regards salary increment for unionisable members and payment of bonus to them as provided in the Human Resources Policy Manual which the parties incorporated as part and parcel of the CBA, the appellant is not permitted to introduce extrinsic evidence to contradict, vary or modify the clear terms of the written CBA. If any authority is required in support of the proposition, it is section 97(1) of the *Evidence Act*, Cap 80 Laws of Kenya. In Fanikiwa Ltd & 2 others v Sirikwa Squatters Group & 17 Others (Pet. No. 32 (E036) of 2022), the Supreme Court cited with approval the following statement of the law on extrinsic evidence as explained in Halsbury's Laws of England, 4th Ed., Vol 12, para 1478:

> "Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

32. Once it is accepted that the payment of bonus was regulated by the Human Resources Policy Manual as incorporated in the CBA, the question of the appellant paying the claimants a flat rate bonus of Kshs 2,000 each, did not arise, in light of what was provided in the Manual. We note too, the perplexing practice adopted by the appellant, which its counsel did not respond to, of paying bonus at the rate of 47.5% of the salary to some unionisable members who were not members of the respondent but a flat rate of Kshs 2,000 to the unionisable members who had joined the respondent. In the absence of any rational explanation for this differentiation of people in exactly similar circumstances, the inescapable inference is that the differentiation was not justified and constituted impermissible discrimination

under section 5 of the *Employment Act* and Article 27 of *the Constitution* as well as unfair labour practices contrary to Article 41(1) of *the Constitution*.

33. For the same reasons, we cannot fault the ELRC for holding that the appellant was deliberately using the payment of bonuses for the illegitimate reason of forcing members of the respondent to resign from or abandon the union. There is compelling evidence on record of members of the respondent resigning en masse from the union after the appellant indicated to unionisable members that they stood to receive bonuses if they relinquished their membership in the respondent. The ELRC found that for the first ten months of 2014, membership in the respondent fell from 1,014 to 956 members.

34. The appellant made heavy weather of the fact that there was no performance review on which to base payment of the claimants' bonuses, contrary to the procedures and timelines set out in clause 8 of the Manual. We note that clause 8 sets out the appellant's performance management policy whose purpose is to provide guidance on performance management and appraisal procedure. Under clause 8 (3) of the Manual, the primary responsibility for ensuring observance of the prescribed procedure and timelines lay with the appellant's Human Resources Department. In these circumstances, it cannot lie in the appellant's mouth to claim inability to pay bonus due to lack of performance review information, when it was the one that engineered and precipitated the lack of performance review. To allow this argument to prevail is to enable a party to benefit from its own deliberate breach of the CBA.

35. The only issue in this appeal that has occasioned us considerable anxiety is the final orders made by the ELRC, which basically surrendered the final resolution of the quantum due to the claimants to the respondent, an aggrieved party. Contrary to the respondent's assertion that the appellant was afforded room to be heard on the quorum computed by the respondent, the relevant order of the trial court provided as follows:

> "b) The respondent to pay all outstanding bonuses to claimant's union members in accordance with its Human Resource Policy Manual by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment; and for that purpose the claimant to compute the quantum and to file and serve within 7 days for recording on a convenient mention date."

36. In our understanding of the above order, the respondent was to compute the quantum within 7 days and thereafter the same was to be recorded by the Court. There was no provision for any further address by the parties. We agree with the principle set out by this Court in Telkom Kenya Ltd. v John Ochanda (supra), that the court cannot delegate to the parties or one of them the responsibility vested own the court of determining and declaring the parties' entitlements. The responsibility must remain with the court.

37. In the circumstances of this appeal and in the interest of justice, the order that best commends itself in the circumstances is to remit this matter back to the ELRC to hear the parties and pronounce itself limited to the quantum of bonuses due and payable to the claimants.

38. Save to that limited extent, we do not find any merit in this appeal. Taking into account the circumstances of the appeal and the fact that the parties continue in an employer-employee relationship, the best order to make as regards costs of this appeal is that each party should bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

D. K. MUSINGA, (PRESIDENT)

JUDGE OF APPEAL

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. A. OCHIENG

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.