



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 207 OF 2017

BETWEEN

KENYA TEA GROWERS ASSOCIATION..... APPELLANT

AND

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION RESPONDENT

(An appeal from the ruling dated 28th May, 2015 and judgment dated 20th June, 2016 of the Employment and Labour Relations Court at Nairobi (Mbaru, J.)

in

ELRC Cause No. 1997 of 2014 consolidated with ELRC Cause No. 14 of 2014)

JUDGMENT OF THE COURT

1. Fair labour practices continue to receive recognition and protection as fundamental rights and freedoms under **Article 41** of our **Constitution**. Minimum standards are set out thereunder to promote the realization of those rights by both the employer and employee whose relationship is generally governed by the terms of an employment contract. In particular **Article 41(5)** recognizes the contractual freedom of an employee under the umbrella of a union and an employer either on its own or through an employer’s organization to engage in negotiations regarding terms and conditions of employment. An agreement towards that end is what is referred to as Collective Bargaining Agreement (CBA). See **Section 2** of *the Labour Relations Act (LRA)*.

2. The essence of a CBA is that the terms and conditions therein are voluntarily agreed upon between the employer and the union. This much was appreciated by this Court in *Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR*, wherein Odek, J.A in his own words stated-

“It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members. The Constitution in Article 41 (5) recognizes the right to engage in collective bargaining. The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining. Article 41 (5) recognizes that collective bargaining is the preferred method of determining terms and conditions of employment. The Article emphasizes the ability of the employer and trade unions to operate as partners rather than adversaries.”

3. So what happens when an employer or employer’s organization and the union are unable to agree on the terms of such a CBA? What role, if any, does the Employment and Labour Relations Court (ELRC) play in such circumstances? The appeal before us revolves around these fundamental questions.

4. A brief background will place this appeal in perspective. **Kenya Tea Growers Association** (the appellant) is an organization of employers within the tea sector. **Kenya Plantation Agricultural Workers Union** (the respondent) is an association of unionisable employees drawn from the appellant’s members. Both the appellant and respondent were registered under the **Trade Unions Act** which was repealed by the **LRA** and are now recognized under that Act.

5. Pursuant to a recognition agreement dated 9th May, 2008 the parties have successfully negotiated a number of CBAs. As it had become the norm, just before the CBA covering the 2012/2013 period came to an end, the parties' commenced negotiations with the aim of setting out terms for the next CBA relating to the 2014/2015 period. This time round they were unable to reach a consensus on 10 items. These items were rates of pay, gratuity, hours of work, annual leave, annual leave and travel allowance, medical treatment and sick leave, summary dismissal, retirement age, day of worship and baggage allowance. By dint of **Section 62 of LRA** the parties reported the same as a trade dispute to the Cabinet Secretary in charge of Labour who then appointed a conciliator over the dispute. Upon the conclusion of the conciliation the parties only managed to agree on the issue of summary dismissal and a certificate of disagreement was issued to that effect.

6. Subsequently, the parties filed suits at the ELRC seeking resolution of the stalemate between them. The appellant filed the first suit being ELRC Cause No. 14 of 2014 in Eldoret and the respondent filed the second suit being ELRC Cause No. 1997 of 2014 in Nairobi. Following a ruling dated 28th May, 2015 in the Nairobi suit, the Kericho suit was transferred to Nairobi and the two suits were consolidated.

7. The parties' positions on the disputed items were as divergent as day and night. On the rate of pay the respondent proposed a wage increase of 50% to be applied at the rate of 25% for the first year (2014) and 25% for the second year (2015). Its justification was that there was an erosion of the employee's purchasing power due to the change in the Consumer Price Indices (CPI) and generally productivity had gone up. The appellant deemed that proposal as unreasonable and countered it with an offer of a maximum wage increase of 2% for each year.

8. The reasons for the appellant's proposal were firstly, the economic hardship facing the tea industry. Secondly, that for the past ten years the annual wage increment given by the appellant's members have always been over and above that which was provided in the General Wages and Agricultural Wages Order. The same resulted in the cumulative wage increase surpassing the general inflation thus warranting reconsideration. Moreover, the general wage increase in the past had been awarded without due regard to productivity improvement. A new tea species which had been introduced into the market coupled with improved husbandry had resulted in the rise of tea production. Therefore, the productivity rate of each tea plucker ought to be revised upwards from 862kg per month to 1170 kg per month.

9. Thirdly, the employees enjoy benefits such as free housing, water, medical care and schooling. Fourthly, there is no automatic right to a wage increase and the appellant's offer was a sign of good faith considering that the tea prices had fallen below the cost of production. Fifthly, the appellant's members did not have the ability to meet the respondent's proposal.

10. The respondent pushed for the increase of the number of days to be taken into account in the calculation of gratuity from 22 days to 27 days for each complete year of service. On its part, the appellant making reference to the **National Social Security Fund (NSSF) Act, 2013** believed that continuing with the provision of gratuity would result in duplication of its members' costs. This was because the **NSSF Act** had increased the employer's monthly contribution from Kshs.200 to Kshs.360. As far as it was concerned the provision for gratuity should be completely done away with once the relevant provisions of the **NSSF Act** became operational. However, gratuity which would have accrued to employees on the effective date of that Act would be paid within the terms of the previous CBA.

11. With regard to annual leave the respondent suggested that the annual leave days ought to be enhanced for employees who had served for over five years from the then current 26 days to 27days in recognition of their loyalty. The respondent was also of the view that the annual leave travelling allowance should be elevated to 12% per annum so as to match changes in the cost of transport. The appellant was content with the number of annual leave days remaining as they were in the current CBA. Its offer on the annual leave, and travel allowance was for a reasonable adjustment comparable to the distance to be covered. Its proposal was that for a distance of 0-3km an adjustment of 3%, 31-60km an adjustment of 3%, 61-610 km an adjustment of 0% and over 611km an adjustment of 3%. The reason being that current rates in the former CBA were already in excess of the actual cost of public transport.

12. As for the terms of medical treatment and sick leave a substantial part thereof had been agreed between the parties save the issue regarding funeral expenses. The respondent recommended that the same should be increased from Kshs.27,500 to Kshs.32,000 with additional four days leave with full pay in respect of attending funerals of the nuclear family. The appellant's answer to that was that costs arising from death are not subject to the employer. Its members' contributions towards death or funeral arrangements were on compassionate grounds. Therefore, the amount should remain as it was in the former CBA.

13. The respondent also proposed that the retirement age be reviewed from the mandatory 55 years to 60 years. On this issue the appellant simply wanted to retain the voluntary retirement age at 50 years and compulsory retirement age at 55 years.

14. Relying on **Article 32 of the Constitution** the respondent suggested that a day of worship should be included in the CBA. According to the appellant, this was not a negotiable item under the recognition agreement. Be that as it may, it would invoke the provisions of **Section 27 (1) of the Employment Act (EA)** in appropriately regulating the hours of work in its members estates.

15. Last but not least, on baggage allowance, the respondent suggested that whenever an employee leaves the employer's service, be it through termination, retirement, death or medical disability a sum of Kshs.30,000 should be granted as baggage allowance. The appellant challenged this suggestion on the ground that it had no basis in law. Further, it was punitive to its members and only added to the overall cost of employment. The appellant also called two expert witnesses in support of its case.

16. After weighing the evidence before her the learned Judge (Mbaru, J.) entered judgment on 20th June, 2016 in favour of the respondent in the following terms:-

1) "The CBA for the period 2014/2015 shall be reviewed in the following terms and conditions;

a) Rate of pay (basic wage/salary) awarded at 15%:15% for the 2014/2015 CBA across the board;

b) Retirement shall be at 60 years with the option to voluntarily retirement at 55 years;

c) *On hours of work there shall be 1 rest day with pay in every working week;*

d) *Annual leave travelling allowance awarded at 6%;*

e) *Medical treatment and sick (sic) allowance awarded at Kshs.30,000.00;*

f) *Baggage allowance awarded at Kshs.30,000.00 upon termination of employment; and*

g) *Parties shall review the CBA 2014/2015 and any antecedent policy to accommodate the Union member's right to observe their day of worship within reasonable limitations.*

2) *Annual leave shall remain as under the CBA 2012/2013; and*

3) *Gratuity shall remain as under the CBA 2012/2013."*

17. It is that decision that has sparked the appeal before us which is predicated on a total of 23 grounds. In summary, the appellant complains that the learned Judge erred by-

i. *Failing to appreciate that she had no jurisdiction to impose and set contractual terms in respect of a CBA.*

ii. *Failing to appreciate that she had no jurisdiction to impose terms which were higher than the minimum wages and terms set by the government of Kenya.*

iii. *Failing to adhere to the doctrine of stare decisis with regard to this Court's decision in the TSC case.*

iv. *Holding that the appellant ought to have provided financial statements when the issue was not specifically pleaded or statutorily required.*

v. *Making awards on the disputed items as she did.*

vi. *In respect of the ruling dated 28th May, 2016 by ordering consolidation of the suits as opposed to dismissing the respondent's suit which was filed later in time.*

18. The appeal was disposed of by way of written submissions and oral highlights. Senior counsel, Mr. Ojiambo appeared together with Mr. Opiyo for the appellant while Ms. Guserwa appeared for the respondent.

19. Citing the *locus classicus* case of *The Owners of the Motor Vessel Lillian „S? vs. Caltex Kenya Ltd. [1981] KLR 1* on jurisdiction, senior counsel submitted that the learned Judge failed to appreciate that the question before her was not whether she had jurisdiction to deal with a dispute between an employer and union but rather whether she could impose terms under a CBA. To Counsel the ELRC had no such jurisdiction and **Section 57** of the **LRA** was clear on that. Similarly, such a jurisdiction could not be conferred upon the court by the parties. **Section 73** of the **LRA** merely permits the court to adjudicate on unresolved disputes between the parties limited to registration and enforcement of CBAs under **Section 12(1)(j)** of the **EA**. Besides, if Parliament was inclined to grant the ELRC jurisdiction to impose terms in a CBA it would have stated so expressly. Reliance was placed on this Court's decision in *Kakuta Hamisi vs. Peris Tobiko & Others [2013] eKLR*.

20. Counsel went on to state that the rationale behind **Article 41(5)** of the **Constitution** is the freedom of parties to negotiate and agree on contractual terms. Any imposition of terms by the court would take away that freedom. Even in the event parties are unable to agree the Article still did not grant ELRC jurisdiction to impose the terms thereunder. *The Right to Organize and Collective Bargaining Convention, 1949 (No. 98) (ILO Convention C098)* also emphasises on voluntary negotiations between parties.

21. Making reference to *Mohamed Abushiri Mukulu vs. Minister for Lands and Settlement & 6 Others [2015] eKLR*, Mr. Ojiambo faulted the learned Judge for not applying this Court's decision in the *TSC case* contrary to the doctrine of stare decisis. Specifically for not observing the following findings:-

“The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union... If the labour court fixes basic salary and allowances to be incorporated in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law.”

He added that the reason for this Court's stand in the aforementioned case is that it recognized that the ELRC ought not to make business/financial decisions for employers in relation to CBAs since it is not in a position to fully appreciate how their businesses are run and the challenges facing the businesses.

22. We understood the appellant to argue in the alternative that even if the ELRC had jurisdiction to impose terms in the CBA it could not impose terms which were higher than the minimum terms set under the **EA** and agricultural wages order. The court is only mandated to check and uphold the implementation of the prescribed minimum standards in line with **Section 26(1)** of the **EA** and **Section 15(6)** of the **ELRC Act**.

23. The appellant took issue with the learned Judge's finding that it ought to have produced financial statements to establish its members' inability to meet the respondent's request. It was submitted that neither was the production of those statements pleaded nor was it a statutory obligation for the same to be produced in court. There was cogent expert evidence on the appellant's members' inability to pay which the learned Judge ignored. The report titled '**Economic Background Paper**' which was produced by Dr. George Kosimbei contained an analysis of the unit price of tea and the unit production costs. It clearly indicated that the production costs were higher than the tea prices.

24. Accordingly, the learned Judge was wrong in awarding a wage increase of 30% without any legal basis or ascertaining the appellant's members' ability to pay. She further failed to appreciate that the inclusion of other monetary terms increased the wage bill to 50% which was not viable. Elaborating further, it was contended that the learned Judge made reference to a CPI figure of 8.89% in relation to the year 2013 the basis of which was unclear to the appellant. Assuming that CPI figure was a correct reflection of the inflation rate and was rounded off to 9% the reasonable wage increase for the 2014/2015 would have been 4.5%:4.5% respectively. The benefits offered to the employees which include housing, transport, education, water and health should have been taken into account because the employees are cushioned from the inflation of such items by the employer.

25. It was emphasized that inflation affects both the employer and employee. Dr. Paul Kiprono, the appellant's second expert witness had explained that the appellant was a price taker and could not determine the price of tea since the same was determined by the market. Therefore, the appellant's members could not adjust their prices to cater for inflation. The only way its members could realize any returns was by adjusting the cost of production. As far as the appellant was concerned the learned Judge should have adopted a CPI figure of 7.15% and awarded a wage increase of 3.5%:3.5% for the two years.

26. Challenging the wage increase the appellant urged that the same would distort the tea sector because small scale farmers would not be able to match such figures. What's more, the learned Judge failed to consider that there was a large difference between the basic wages being paid by the appellant's members compared to other similar employers in the agricultural sector. A case in point was the Agricultural Employers Association (AEA) where the minimum wages offered by its members is half of what is being offered by the appellant's members yet the wage increase negotiated between AEA and the respondent was much lower than what the respondent demanded from the appellant. Even compared to other regional countries like Malawi, Uganda and Rwanda the basic wages offered by the appellant's members was still higher. This placed the appellant's members at a disadvantage since they sold their tea in the same auction as the above named countries.

27. Going into the details of the award, it was submitted that the **EA** does not prescribe a minimum retirement age thus the learned Judge was wrong in imposing a retirement age of 60 years. Likewise, annual leave travel allowance, medical treatment and sick leave as well as baggage allowance were not provided under the **EA**. Both **Section 27(1)** of the **EA** and **Article 32** of the **Constitution** do not bind an employer to allocate Saturday or any other day as a day of worship. The appellant advocated for its members to be allowed to allocate days of work provided that one day of rest is included as per **Section 27** of the **EA**.

28. On the issue of gratuity, the learned Judge was criticized for not appreciating that the issue of **NSSF Act** was the subject of a pending suit *to wit*, **Petition No. 270 of 2014** involving the parties herein. The payment of gratuity and making NSSF contributions would be akin to paying social security twice. In the circumstances the proposal to do away with gratuity was reasonable. As for paid rest day it was submitted that the same had already been adjudicated by the ELRC in **ELRC No. 1148 of 2011- Kenya Plantation Agricultural Workers Union vs. Unilever Tea Kenya Limited** wherein Rika, J. held that there was no provision under the **EA** that rest days are payable.

29. In the appellant's opinion the learned Judge failed to appreciate that the proposal for increase in the productivity rate of tea pluckers had been tabled before the conciliator and in the joint meetings between the parties. The proposal was never opposed by the respondent. Therefore, there was no reason for the learned Judge to dismiss the same. It is on those grounds that we were urged to allow the appeal.

30. Ms. Guserwa in opposing the appeal begun by citing **Article 162(2)** of the **Constitution** and **Section 12** of the **ELRC Act** which she submitted clothed the ELRC with jurisdiction to determine economic disputes. In this case an economic dispute arose when the parties were exercising their rights under **Article 41** of the **Constitution** to negotiate a CBA. The dispute having failed to be resolved through conciliation, **Section 62** of the **LRA** gave the ELRC power to adjudicate on the same and determine what is fair and reasonable. She contended that the learned Judge exercised that power within the confines of the law. She had considered proposals made by both parties and made a determination in line with the wages guidelines provided by the government.

31. Distinguishing the **TSC case** Ms. Guserwa argued that in that case there was no CBA in force by the time parties therein went to court as opposed to the case at hand. While agreeing that terms of a CBA should be voluntarily determined the respondent urged that the freedom to negotiate should not be curtailed by an employer who is hell bent on denying an employee his rights.

32. Addressing the terms set out in wage guidelines by the government, Ms. Guserwa stated that those terms were minimum standards which are improved by parties through negotiations as provided under **Article 41(5)** of the **Constitution** and **Section 62** of the **LRA**. The appellant's stand that the learned Judge should not have gone above those minimum guidelines was a total misconception of the law. In alleging that the appellant's members were not able to meet the respondent's demands more evidence in the form of financial statements to that effect was required. This was a requirement under **Section 57(2)** of the **LRA** which obligated the parties to furnish any information that was useful in negotiating the terms of the CBA.

33. There was no reason to fault the learned Judge in finding that the appellant had failed to prove its allegations because it had not produced statements of accounts. Financial capability, or otherwise, of the appellant's members could only be established through such statements. The appellant's attempt to do so through its submissions to this Court was too late and mischievous. Ms. Guserwa urged the Court not to consider the financial statement on the alleged impact of the trial court's award on the appellant's members set out in the appellant's submissions.

34. The fact that the **NSSF Act** required the employer to make NSSF contributions did not bar such an employer from setting up, or as in this case continuing with a gratuitous scheme beneficial to the employees. Besides, the pending litigation in respect of that Act did not hinder the learned Judge from making a determination on the issue of gratuity.

35. The respondent was convinced that the learned Judge properly considered the expert evidence and arrived at a sound determination. The pertinent issue was not whether the expert evidence was controverted but whether the appellant had made a case in support of its proposal. As a whole the learned Judge's judgment was incapable of being faulted on any ground.

36. We have considered the record, submission made on behalf of the respective parties and the law. In doing so, we are aware of our power under **Rule 29 (1)(a)** of the **Court of Appeal Rules** to re-appraise the evidence and to draw our own inferences of fact, on a first appeal. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law.

37. It is instructive to note that none of the parties made any submissions with respect to the consolidation of the two suits. Perhaps the appellant abandoned that ground and without any submissions in that regard that is as much as we are prepared to say on the same.

38. We reiterate that the appeal herein turns principally on this issue: what role, if any, does the ELRC play where parties are unable to agree on the terms of a CBA? In determining that issue an examination of the ELRC's jurisdiction is imperative.

39. The starting point would be **Article 162 (2)(a)** of the **Constitution** which stipulates that-

“

1...

2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) employment and labour relations;...”

40. That provision delineates the broad principles and aspirations of the people of Kenya for the formation of a court specifically to determine disputes relating to employment and labour relations. The details and actualization of those aspirations and principles were left to several Acts of Parliament and Regulations relating to such disputes which have since been enacted.

41. The **ELRC Act** establishes the ELRC and sets out its jurisdiction. The court's jurisdiction is also set out in various legislations relating to employment and labour issues. Of relevance to the case at hand is the **LRA** which not only recognizes CBAs but also sets out the procedure to be followed in their negotiation and registration. The Act also provides an elaborate procedure for settling trade disputes arising thereunder in **Parts VIII** and **IX**. A trade dispute under **Section 2** of the **LRA** is described in the following manner:-

“ „trade dispute? means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers? organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;...”

42. Under **Part IX** when a trade dispute is not resolved through conciliation **Section 73(1)** of the **LRA** stipulates that such a dispute may be referred to the ELRC by either of the parties. The role played by the ELRC in that instance is clearly indicated by the title of **Part IX** which reads 'Adjudication of disputes'. The **Black's Law Dictionary 9th Edition** defines adjudication as:-

“The legal process of resolving a dispute; the process of judicially deciding a case.”

43. It follows therefore that the ELRC at this stage is tasked with the responsibility of determining the trade dispute between the parties which in our view, includes the disagreement with regard to the terms of the CBA or what the parties refer to as the economic dispute between them. Our interpretation is guided by the case of **Placer Dome Canada vs. Ontario (2006) 1 SCR 715**, wherein the Supreme Court of Canada observed that under the presumption against tautology in the interpretation of statutes, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. See also the sentiments of Viscount Simons in **Hill vs. William Hill (Park Lane) Ltd. [1949] AC 530** at page 546 thus,

“When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before.”

44. A careful reading of the **TSC case** reveals that this Court did not hold that the ELRC had no jurisdiction at all to determine economic disputes revolving around CBAs. The full bench appreciated that the ELRC had no jurisdiction to deal with the economic dispute therein because the compulsory jurisdictional procedure on dispute resolution as set out under **Part VIII** of the **LRA** had not been followed. The dispute was required to first go through conciliation and in the event it was not resolved thereunder the same could be referred to the ELRC. The long and short of it is that the ELRC can only assume jurisdiction to adjudicate on an economic dispute after the compulsory dispute resolution procedure under **Part VIII** of the **LRA** had been followed. In the **TSC case** Odek, J.A succinctly put it:

“Subject to statutory exceptions, the correct jurisdictional procedure is as followed in Tailors and Textile Workers Union vs. Ashton Apparels (EPZ) Ltd. Mombasa Industrial Cause No. 340 of 2014 where the parties did not resolve the dispute at their own level and the claimant reported the existence of the dispute to the Labour Minister; the parties were not able to agree upon conciliation and the Conciliator issued a Certificate of Disagreement paving way for referral of the dispute to the Employment

and Labour Relations Court.”

45. Having expressed ourselves as herein above what is the extent of the ELRC’s role in resolving the dispute pertaining to the terms of the CBA in question? Is it as suggested by the appellant that the court is restricted to implementing the minimum standards set out under the *EA* or wages orders published by the government under the *Labour Institutions Act*?

46. *Section 26(2)* of the *EA* provides that-

“Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.”

We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the *EA* and Wages Order but also empowers the ELRC to issue such favourable terms. To that extent we adopt with approval the sentiments of Rika, J. in *Kenya Chemical and Allied Workers Union vs. Leather Life EPZ Limited [2014] eKLR* that

“The Wage Orders fix the wage floors. Collective Bargaining between Employers and the Workers? Representatives on wage increment aims at fixing the cost of labour above the market benchmark, this benchmark being the minimum wage fixed under the Wage Orders. Traditionally, the Government has set the wage floor annually... In seeking to move beyond the benchmark regulated by the Government, Employers and Employees examine the compensable factors within the workplace, and are guided by economic indicators. The Court, whenever called upon to intervene in economic disputes is similarly guided by the relevant compensable factors, and economic indicators.”

47. However, the power to do so by the ELRC ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA. The court should ensure it does not substitute its preference with that of the parties’ freedom to agree on the terms of employment. The court ought to be guided by the Wage Guidelines issued by the government. In this case the applicable guidelines were the revised guidelines which came into force on 1st November, 2005. We note that those guidelines were brought to the attention of the ELRC then known as the Industrial Court by the Ministry of finance vide a letter dated 23rd November, 2005.

48. Under the guidelines, the prime elements of determining wages are listed as realized productivity gains, the ability of the economy and employers to sustain increased labour costs and the cost of living. Rika, J. in *Kenya Ferry Services Limited vs. Dock Workers Union (Ferry Branch) [2015] eKLR* was of the opinion that the ability by the employer to pay is a principal criteria in wage determination. Towards that end he observed and rightly so that:

“The CPI for the period 2011 to 2013 shows an average annual inflation of 5%. Whereas the Employees should be compensated for the loss of money value, it is important such compensation does not result in an unsustainable wage bill.” Emphasis added.

49. Equally, Abuodha, J. in *Kenya Game Hunting & Safari Workers Union vs. Micato Safaris [2016] eKLR* stated,

“The purpose of wage increment is to cushion the worker from inflation by enhancing purchasing power however this can only be effectively achieved against a background of improved performance and sustainability of the wage bill. A wage increment whose effect would be to trigger the journey to collapse of an organization is harmful to the selfsame worker it was intended to benefit.”

50. Consequently, a court faced with a question of wage increment ought to take into account productivity, cost of living and the ability to pay by the employer. In this case the learned Judge erred in the application of those factors by firstly, ignoring the expert evidence adduced on behalf of the appellant. Both experts namely, Dr. George Kosimbei who holds PhD, Masters and Bachelor degrees in Economics and Dr. Paul Kiprono also a holder of a PhD degree in Agronomy and a tea economist gave evidence that the cost of production at the material time was higher than the tea prices which had taken a plunge. More importantly they went to great length to explain that tea producers were not in control of tea prices which were normally fixed by the market. Wage increase as suggested by the respondent was not viable. This evidence was unchallenged and went to establish the appellant’s members ability to pay.

51. Dr. Kosimbei even prepared and produced a report to that effect which was also not challenged. The fact that the financial statements and documents relied on were not annexed to the report, in our view, did not affect the weight of the report. Dr. Kosimbei clearly set out in that report the sources of the data which formed the basis of his findings. The evidence adduced by the report was based on his expert opinion. The learned authors of *Phipson on Evidence 17th Edition at paragraph 33-10* observed:

“Expert witnesses have the advantage of a particular skill or training. This not only enable them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to lay person.”

52. We are also guided by the case of *Dhalay vs. Republic [1995 – 1998] EA 29* wherein it was held:

“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then

a court is not only entitled but would be under a duty, to reject it.”

53. The learned Judge also erred in the rate of inflation she relied on in determining the wage increase for that period. From the CPI and inflation rates released by the KNBS it is clear that the inflation rate stood at 7.15% in December, 2013. Taking into account that inflation rate as well as the evidence tendered on the productivity as well as the appellant’s members ability to pay we find that a wage increase of 8% across the board for the period of 2014/2015 is reasonable in the circumstances.

54. On the revision of productivity of a tea plucker, we are satisfied that the appellant adduced cogent evidence to warrant the revision of the productivity rate of a tea plucker from 862kg per month to 1170 kg per month. This is based on the evidence that tea yield had since improved as well as the leaf weight rendering the previous productivity rate unrealistic.

55. To the best of our knowledge the suit challenging the provisions relating to the NSSF contributions under the **NSSF Act** is still pending and it would not be prudent to make a finding on that issue. However, we, like the trial Judge, find that the gratuity for the period in question ought to remain as per the terms of the previous 2012/2013 CBA. The same applies to the annual leave which the respondent conceded to.

56. As to the annual leave and travel allowance we are persuaded by the appellant’s suggestion that the same be adjusted in accordance with the distance to be covered hence we adopt its proposal. On the provision of paid rest day we see no basis for the same in law. Under **Section 27** of the **EA** all an employee is entitled to, is at least one rest day every week. Similarly, we find that there is no provision under the **EA** or the **Constitution** that obligates an employer to set aside a particular day as a day of worship for any employee thus the inclusion of the same by the learned Judge had no basis.

57. There was also no justification to vary the amount of Kshs.27,500 paid by the employer to cover funeral expenses for an employee or his/her spouse. Equally, there was no justification of including baggage allowance which was never a term under the previous CBA.

58. Last but not least, we find that the learned Judge had no basis for reviewing the retirement age as had been agreed to by the parties in the previous CBA.

59. For the reasons we have set out herein above we find that the appeal has merit and we hereby allow the same in the following terms:-

- a) Rate of pay (basic wage/salary) is hereby awarded at 8%:8% for the 2014/2015 CBA across the board.*
- b) Retirement shall be at 55 years with the option to voluntarily retirement at 50 years.*
- c) There shall be one rest day every working week without any additional payment.*
- d) Annual leave travelling allowance is adjusted for a distance of 0-3km at 3%, 31-60km at 3%, 61-610km at 0% and over 611km at 3%.*
- e) Medical treatment and sick (sic) allowance awarded at Kshs.30,000.00 is hereby set aside and the amount of Kshs.27,500 provided for funeral costs in the previous CBA shall be retained in the 2014/2015 CBA.*
- f) Baggage allowance awarded at Kshs.30,000.00 is hereby set aside.*
- g) The order that parties review the CBA 2014/2015 and any antecedent policy to accommodate the Union member’s right to observe their day of worship within reasonable limitations is hereby set aside.*
- h) Annual leave and gratuity shall remain as under the CBA 2012/2013.*

This being an employment dispute we make no orders as to costs both in this appeal and in the ELRC suit.

Dated and delivered at Nairobi this 16th day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR