IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 25 OF 2016

BETWEEN

KENYA CHEMICAL AND ALLIED WORKERS' UNION…APPELLANT

AND

BAMBURI CEMENT LIMITED ……RESPONDENT

(Being an appeal against the Judgment/award of the Industrial Court of Kenya at Mombasa (Radido, J.) dated 27th June, 2014 in Mombasa Industrial Cause No. 6 of 2014 Originally Nrb Industrial Cause No. 472 of 2013.)

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JUDGMENT OF THE COURT

The undisputed facts in this appeal are that the ten individuals represented by the Kenya Chemical Workers and Allied Union (the appellant) were employed on different dates by the respondent; that at the time of their employment they were union members of the appellant and their terms and conditions of service governed by the terms of the Collective Bargaining Agreement (CBA) entered into from time to time on their behalf by the appellant with the respondent; that afterwards they were promoted to the management echelons of the respondent that upon accepting their promotion each of the employees entered into separate contracts of employment with the respondent and were issued with letters spelling out their new terms of employment; and that they remained in the service of the respondent for periods ranging between 28 to 33.8 years before retiring normally. It would appear that even after joining the management the employees continued to make their membership contributions to the appellant. That is the extent to which the undisputed facts.

When the employees retired, a dispute arose as to whether their terms and conditions of service were governed by the letters issued to them on promotion or by the CBA. While the appellant maintained that the employees remained under the CBA, the respondent on the other hand argued that the employees had moved to a different category of employees which removed them from the application of the CBA.

Following this stalemate the dispute was referred to a conciliator whose report was rejected by the employees, forcing the appellant to institute Nairobi Industrial Cause No 472 of 2013 on their behalf. The suit was subsequently transferred to Mombasa where it was allocated Mombasa Industrial Cause No. 6 of 2014, where it was heard and determined. Most of the claims brought by employees against the respondent were similar in nature. For example, they alleged to be entitled to salary for the month of retirement, service gratuity, long service award, *ex gratia* payment, severance payment, bonus, personal

pension contribution, leave, travelling allowance, house allowance, heat allowance, dust allowance, noise allowance, utility allowance, mileage allowance, overtime allowance and baggage allowance. These claims were specifically based on the terms of the CBA, with each employee seeking to be paid, in aggregate as follows;

i. Thomas Oluoch Kshs.15,949,252.20

ii. Humphrey Mwazighe Kshs. 7,184,021.90

iii. Eliud Kamande Kshs. 27,101,803.00

iv. Philip Thoya Siryah Kshs. 8,911,296.00

v. Patroba Obel Owino Kshs. 10,075,760.70

vi. John Kimbio Msabaa Kshs. 22,378,600.00

vii. Said Aslam Kshs. 10,585,080.00

viii. Ingnatius Kaggira Gichira Kshs. 21,729,326.00

ix. Mohamed Jan Mohamed Kshs. 12,525,441.00

x. Elijah Kahindi Yaa Kshs.10,046,652.00

The respondent denied their liability to the employees as claimed, contending that the claims were misconceived and did not lie in law; that the CBA upon which it was premised did not apply to the employees who, voluntarily and willingly accepted to change their terms of employment upon promotion; and that in accordance with their new status they could only rely on the terms contained in their letters of employment.

Regarding the specific claims by the appellant, the respondent explained that, with respect to gratuity, four of the ten employees were paid this claim plus interest directly, while six of them have never exercised the option and communicated to the respondent either to pay it directly to them or into their pension scheme; that since the salaries of the employees were consolidated, house allowance was never paid separately. The respondent, however conceded that it had not paid some dues such as salaries for the month of retirement, payment *in lieu* of leave and baggage allowance in respect of some employees like Thomas Oluoch, John Kimbio Msabaa and Ignatius Kiggira Gichira after they refused or failed to comply with the respondent's clearance and discharge procedures.

By consent the claim was canvassed through written submissions. The trial court (**Radido, J.)** considered the submissions, framed a single question; whether the terms of the CBA were applicable to the ten employees at the time of retirement, and answered it in favour of the respondent, holding that from about 2008 the employees' terms were transferred to a new cadre in the management; that from the CBA of 2008 the ten employees were not covered, even though under **Articles 36** and **41(2)(c)** of the Constitution and **sections 4(1)(b)** and **59(1)(b)** of the Labour Relations Act it would appear to suggest that even those in the management can be unionisable and indeed can be members of the union. The learned Judge, guided by Paragraph 11 of Part B of the Industrial Relations Charter, 1984, (the Charter) was however of the view that, that was not correct as the Charter specifically excludes certain cadres from the union. He concluded that in terms of Appendix C of the Charter, the ten employees were excluded by virtue of belonging to;

> **"<u>Any category</u> of staff who may, in the case of any particular undertaking, be excluded from union representation <u>by mutual agreement"</u>**. (Our emphasis)

The learned Judge found such mutual agreement in the Recognition Agreement of 1967 between the

appellant and the respondent which allowed the parties to designate certain cadres of employees as non-unionisable. The learned Judge, however found difficulty in the case as the new designations of the employees were not disclosed throughout the trial, except that of Elijah Yaa, who was described as a Production Records Clerk in 2009. The Judge nonetheless concluded that after they accepted the promotions and new designations, the employees could not rely on the terms of the CBA for their retirement packages; that even though the employees continued to pay union dues directly to the union, that alone did not entitle them to benefit from its terms which only bound the appellant and the respondent on behalf of unionisable employees. For these reasons the court upheld the recommendations in the report of the conciliator that the service gratuity the employees were entitled to related to the period prior to their promotion under the CBA and not beyond; and that after that period they were entitled to pension based on their salaries at the date of retirement. The appellant's claim on behalf of the employees was, in the result dismissed with each party directed to bear its own costs.

This appeal has been brought on four grounds which were argued before us through written submissions in two clusters. The respondent has also cross appealed against the order on costs. The two grounds raised by the appellant are that, the learned Judge erred by failing to properly evaluate the evidence before him in that after finding that the employees were unionisable and indeed members of the appellant, he erroneously held that they could not benefit from the CBA; that as a matter of fact the CBA applied to all employees, including the ten who were members of the appellant; that indeed the employees were covered by the provisions of the CBA which explains why they were retiring at the age of 55 years as provided for under the CBA, and not 65 years under the respondent's policy.

Secondly, the decision is impugned for being against the weight of the evidence; that the evidence, particularly that relating to the retirement age pointed to the application of the CBA to the employees. On cross the appeal it was submitted that it offended **rule 93(2)** of the Court's rules as it was brought after the 30 days limit.

The respondent's submissions, on the other hand maintained that the employees were initially members of the union and bound by the terms of the CBA; that from the categories of employees specified in the CBA itself and the meaning assigned to "unionisable" employees by **section 59 (1)(b)(3)** of the Labour Relations Act, the employees did not belong to any of those categories; and that retirement letters relied on by the appellant made no reference to the CBA because their terms of service were governed by their respective letters of employment issued to them upon their promotion.

We have most carefully considered those submissions, which clearly, from the foregoing summary, were not straightforward. However in our view, like the learned Judge found, there were only one issue raised; whether, at the time of their retirement the terms of employment of the employees were governed by the CBA so as to be qualified to benefit from its terms.

The answer to that question lies in the construction of and reading together of **Article 41** of the Constitution, **section 4** of the Labour Relations Act and the Charter. **Article 41(2)** of the Constitution guarantees every employee the right to fair labour practices, the right to fair remuneration, the right to reasonable working conditions and the right;

> **"(c) to form, join or participate in the activities and programmes of a trade union".**

Obviously the right to join also invariably entails the right and freedom to leave a trade union. That is what **section 4** of the Labour Relations Act sets out to explain. It stipulates that every employee has the right to-

> **"(a) participate in forming a trade union or federation of trade unions;**
>
> **(b) join a trade union; or**
>
> **(c) leave a trade union".**

Through the trade union the relations between employees and employers, including any employers' organisation are regulated. The regulation is through a collective agreement process in which an agreement is made between a trade union on the one hand and an employer or organization of employers on the other hand, regarding the terms and conditions of employment of the employee. Although by **section 32** of Labour Relations Act any employee who is above 16 years of age is entitled to enjoy the rights of membership of a trade union, this rights are however limited by **section 59** of that Act to the extent that any CBA made between a trade union and an employer will only bind-

> **"(a) the parties to the agreement;**
>
> **(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or**
>
> **(c) the employers who are or become members of an employers'organisation party to the agreement, to the extent that the agreement relates to their employees."(Emphasis)**

Unionisable employee in relation to any trade union is defined under **section 2** to mean only those employees who are eligible for membership of that trade union. That definition does not sufficiently answer the question, who a unionisable employee is, or even who is eligible to be a member of the union. The only feature or characteristic of a unionisable employee is that given by **section 59(3)** of the Labour Relations Act;

> **"(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement."**

So that by merely looking at the letter of appointment of an employee one would be able to tell whether or not an employee is unionisable.

The next document we must turn to is the Charter, which is recognised by the Labour Relations Act where it is defined as;

> **"….. a tripartite agreement between the Government, the most representative employers' organisation, and the most representative employees' organisation for the regulation of labour and industrial relations in Kenya."**

Apart from this definition the Charter is not mentioned anywhere else in the Act or in any of the other labour statutes. The first time the Charter was signed was in 1962 by the late J.T. Mboya as the Minister in charge of Labour on behalf the Government of Kenya, on the one part, the Federation of Kenya Employers and the Central Organization of Trade Unions (then known as the Kenya Federation of Labour) on the other part. It was last revised in 1984. It is today one of the primary documents used in industrial relations in Kenya. Rika, J in **Kenya Game Hunting & Safari Workers Union** v **Lewa Wildlife Conservancy Limited** Industrial Cause No. 1567 of 2011, described the Charter as **'the cornerstone of industrial jurisprudence'**. **Clause B (10)** and Appendix C of the Charter provide for the level of unionisation of employees while prohibiting certain categories of employees, who by virtue of their positions in the organization, having authority to hire, transfer, appraise, suspend, promote, reward, discipline or handle grievances, from being represented in the union. It must follow from this that those in the management of an organisation cannot form or belong to a trade union. Under the Charter, the parties mutually agreed that the following categories of staff be excluded from being represented in the union: –

> **"1. persons who are formulating, administering, co-ordinating and/or controlling any aspects of the organization's policy;**
>
> **2. staff who perform work of a confidential nature as shall be defined by a tripartite Committee;**

3. the Executive Chairman, Managing Director, General Manager (and his deputy) and functional Heads – that is, departmental Heads (and their deputies);

4. the Branch Manager (and his deputy);

5. persons in-charge of operations in an area (and their deputies);

6. persons having authority in their organisations to hire,transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Charter Clause No. 11-1;

7. persons training for the above positions (including Under-studies);

8. personal Secretaries to persons under 1 above;

9. persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties;

10. any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement."

So that by the nature of their undisputed salaried staff terms, the employees fell in the category enumerated above. Those in the management can, however form a staff association to protect and promote their interests in so far as their terms and conditions of employment are concerned. But such an association does not have similar legal status as a trade union unless it conforms to the requirements of **sections 12, 13** and **14** of Labour Relations Act.

We think we have sufficiently set out the law and must now apply it to the facts of the case. It is common factor that the employees were initially members of the appellant; that at some stage they were promoted to higher posts. However, like the learned Judge found it is not apparent at all from the record to what cadres or grades they were promoted and served up to the time of their retirement. What is clear to us is that all of them served for long periods of time having been employed between 1977 and 1981. At the time of his employment in 1986, for example, Humphrey Mwazighe was designated as a welder/fabricator, Eliud Kamande in 1977 as motor vehicle mechanic, Said Islam Said in 1980 as a welder Grade 2b, to give only a few examples. That omission notwithstanding, there is no dispute that the employees moved out of the unionisable category of employees. Their cause of action before the court below was concisely stated on their behalf by the appellant thus;

"The said employees although during <u>some previous years were transferred by the company to the salaried staff cadre</u> and the respondents stopped to deduct or to remit union dues from their salaries to the union, although we had nothing on the record that they had denounced their union membership, these workers have been paying directly since 2008, as is allowed by the law under Labour Relations Act, section 52…the union constitution allow union dues to be paid directly by its members, as the respondent refused to be deducting them through check-off……..

The jobs the salaried staff are doing are the same as those being done by unionisable employees of the company, and <u>calling them salaried staff has denied them the CBA benefits when they retire…</u>….The respondent did not transfer the amount of gratuity for the years they had worked before being transferred to the salaried staff cadre nor were their contracts terminated to start (sic) **fresh terms." (**Our emphasis).

Clearly the employees conceded that they had been transferred to a cadre they called salaried. They also appreciated that by that transfer the respondent was not bound to deduct and remit their dues to the appellant; and that they could not benefit under the CBA upon retirement. Their only grievance was that the transfer of terms did not make any difference in the work they performed yet it denied them the

retirement benefits they would have otherwise received had they remained unionisable.

Section 52, dealing with direct payment of trade union dues, levies, subscriptions or other payments authorised by the constitution of the trade union, with respect only applies to those who are members of a trade union. The fact that the employees continued to make direct payments to the appellant was not a relevant factor in the determination of the dispute. In any case the CBA ceased to apply to them as soon as they voluntarily accepted new terms. The CBA itself specifically categorised from Grade A to E the employees to whom it applied. The ten employees did not claim to belong to any of the grades.

A party who has made a conscientious election that has led the other party to believe that he intends to adopt a particular position going forward is estopped from going back on his election. The doctrine of election as enunciated in the famous case of **Scarf** v **Jardine** (1882) 7 App Cas 345, has found relevance in our jurisdiction and has been applied in **Rogers Mwema Nzioka** v **The Attorney General & 8 Others** H.C Pet.No.613 of 2006, **Gimalu Estates Ltd & 4 Others** v **International Finance Corporation & Another**, H. C. Civil Suit 606 of 2003, among a series of other cases. At the trial the learned counsel sought to rely on the following passage extracted from the opinion of Lord Blackburn in **Scarf** v**Jardine** (supra), which unfortunately the learned Judge did not consider.

> **"Now on that question there are a great many cases ; they are collected in the notes to Dumpor's case 1 Sm L C 8th edn 47, 54 and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered.'Quod semel placuit in electionibus, amplius displicere non potest.' …….. and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things, you cannot retract it and do the other thing; the election once made is finally made**."

The employees were quite happy for the many years they served in salaried category of employment and obviously enjoyed the benefits and perquisites that came with the elevated office. We have seen that the Constitution, the Labour Relations Act and the Charter grant freedom to an employee to join a union of his choice and leave it at will. The Charter has identified those in the management, who by reasons of conflict of interest cannot be members of the union. The union represents the interests of workers in negotiating and articulating issues that affect them with the management. That can only effectively be done in the absence of any conflict of interest.

Since in Kenya, employment is governed by the general Principles of the law of contract, as now contained in and modified by various statutes, it must follow that employment is essentially an individual relationship negotiated by the employee and the employer in accordance with their respective needs. Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship. Similarly a collective agreement functions as a labour contract between an employer and a union preceded by negotiation between representatives of a union and employers represented in most cases by the management. Because CBA is a contract, for the appellant to rely on it and benefit from it it has to be demonstrated that the employees were privy to it. They could only have been privy to it through the appellant itself. In the absence of such evidence we are left with no alternative but to agree with the learned Judge in dismissing the claim and with the report of the conciliator that the ten employees were entitled to payment of gratuity for the period prior to joining the salaried echelons; that the respondent to work out other entitlements enumerated in the conciliator's report to which they were entitled in accordance with the terms they served.

We reiterate the evidence on record that out of the ten employees in the dispute some have accepted and complied with the respondent's retirement claim procedures and conditions, completed and filed the pensions form and have been paid their pensions, both lump sum and monthly dues as well as gratuity which was earned prior to transfer to salaried scale.

For these reasons, we find no merit in both the appeal and cross appeal. The learned Judge did not improperly exercise his discretion in declining to award costs to the respondent.

That discretion is provided for under **section 12 (4)** of the Employment and Labour Relations Court Act. Both the appeal and cross appeal are dismissed with no orders as to costs.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR