IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, SICHALE, & KANTAI, JJ.A)

CIVIL APPEAL NO 36 OF 2016

BETWEEN

THE BOARD OF MANAGEMENT

NG'ARARIA GIRLS SECONDARY SCHOOL.....APPELLANT

AND

KUDHEIHA WORKERS.....RESPONDENT

(Appeal from the judgment and decree of the Employment and Labour Relations Court at Nyeri (Ong'aya, J.) dated 4th December, 2015

in

NYERI ELRC No. 40 of 2015

****

JUDGMENT OF THE COURT

The appellant, the Board of Management, Ng'araria Girls Secondary School (the then Respondent) was sued by the respondent (the then Claimant) vide a Memorandum of Claim dated **14th February, 2015** and lodged at the Employment and Labour Relations Court (hereinafter 'ELRC') on **12th March, 2015**. The respondent framed the issue in dispute as ***"unfair termination of five (5) (sic) employees"*** namely:-

(i) BONIFACE NDUNG'U GICHU

(ii) JOSEPH MWAI MWANGI

(iii) PETER NDUATI KARIUKI

(iv) SUSAN NJOKI

(v) PATRICK GATHAIYA NJIIRI; and

(vi) *GABRIEL MIAKO MWANGI.*

The Respondent took up the responsibility of representing the above named employees before the trial court pursuant to its mandate as the Union representing employment interests of all non-teaching staff in all educational institutions, or anyone employed by the defunct Board of Governors (B.O.G.), which has since been replaced by Boards of Management (B.O.M.'s).

At the crux of the dispute between the parties herein was the alleged advertisement and unprocedural change of terms of employment of the above named individuals by the appellant from permanent to contractual, for those who were intent on being re-engaged. It was further contended by the respondent that during the foregoing motions, the terms of a **Collective Bargaining Agreement** (hereinafter 'C.B.A.') dated **18th March, 1986** it entered into with the appellant were flouted with reckless abandon. Consequent thereto was the ushering in of terms of service which were disadvantageous to its members in form of underpayment of a host of emoluments which they had rightfully bargained for. Attendant thereto was the unfair and unlawful termination of employment of the respondent's members by the appellant.

In a lengthy and detailed **Memorandum of Response** dated **16th April, 2015**, and filed on the same date, the appellant admitted some of the Respondent's claims and denied the rest. **Eleven (11)** issues emerged therefrom to the effect that:-

· ***The grievants were not Civil Servants, as they were employees of the appellant employed pursuant to the relevant terms and conditions of employment.***

· ***Review of the terms and conditions of the grievants were occasioned by an audit report which cited overstaffing at the appellant's establishment.***

· ***Redundancy would have been the way to go, but the said change of terms was viewed as the most favourable in the circumstances.***

· ***The grievants were undeserving of the claim to gratuity having been members of the National Social Security Fund (NSSF) who received terminal payments by virtue of such membership.***

· ***The law was scrupulously followed as a whole.***

· ***The claim is statute barred by dint of Section 87 and 90 of the Employment Act of 2007 (hereinafter 'E.A. of 2007').***

· ***The respondent allegedly concealed payments received by its members from N.S.S.F.***

· ***Discharge agreements entered into by the respondent's members in the course of departure from their employment were binding.***

· ***Conciliation between the parties prior to the suit fell outside the confines of law, notably Section 62 (3), 67 (1) and 69 (b) of the Labour Relations Act (hereinafter 'L.R.A. of 2007').***

· ***The verifying affidavits of the respective grievants were laden with malicious falsehoods, were erroneous, contained misleading averments; and were bad in law.***

· ***The jurisdiction of the trial court was admitted save for statute barred causes of action.***

In due course, the parties herein framed agreed issues and those which consensus had proved elusive were left for the trial court's determination. From the former cluster flowed a consent judgment, while from the latter cluster came written submissions from the respective parties in a bid to persuade the trial court to rule in their favour. The **consent judgment** of **17th July, 2015** was entered in favour of the respondent leading to the making of the following orders by the trial court:-

(i) The appellant to pay the grievants 6 months salary compensation for unfair termination

(ii) The appellant to pay salary in lieu of notice per the C.B.A.

(iii) The subject of gratuity under the C.B.A. and the claim for underpayment to proceed to trial; and

(iv) ***Hearing on 27th October, 2015 at 9a.m.***

The said orders ran their course, culminating in a judgment dated **4th December, 2015** wherein the trial court found in favour of the Respondent by holding that:-

(i) "The respondent to pay the grievants gratuity per clause 31 of the C.B.A. by 31.12.2015 and in default interest at court rates to be payable thereon from the date of retirement on 31.12.2012 till payment in full".

(ii) "The respondent to pay the claimant's costs of the suit".

Aggrieved by the said findings, the appellant has lodged the present appeal and summarized its complaints in its **Memorandum of Appeal** dated **23rd June, 2016** wherein it advances **three (3)** grounds of appeal to wit:-

· ***"The learned judge of the superior court erred in law by failing to properly and sufficiently appraise, interpret and apply the provisions of Section 35 (6) of the Employment Act, 2007 hence he arrived at an inconsiderate finding and decree.***

· ***The learned judge erred in law by failing to failing (sic) to properly and sufficiently appraise, interpret and apply clauses 29 and 31 of the Collective Bargaining Agreement between the claimant and the respondent, thereby arriving at an erroneous finding and per incuriam judgment.***

· ***The learned judge erred in law by failing to failing (sic) to properly and sufficiently appraise the evidence on record and the applicable legal principles in assessing the Respondent's payable social security benefit."***

On 27th June, 2016 this appeal came up for plenary hearing before us on which occasion Mr. Warutere, learned counsel appeared for the Respondent. There was no appearance for the appellant. At the outset Mr. Warutere was eager to have this appeal dismissed for want of prosecution as the hearing date was taken by consent. However, upon perusing the record we noted that directions had been issued at the case management conference that the appeal be canvassed by written submissions followed by highlights by the respective parties. Both parties had complied with the Court's directions. Mr. Warutere gave highlights of the respondent's submissions by submitting that the ***Employment Act of 2007*** provided for a floor not a ceiling for payment of retirement benefits. He contended that **Section 35 (6)** of the ***Employment Act* of 2007** prescribes the minimum benefit, but does not preclude parties from agreeing over and above what was provided therein. Moreover, the ***'Memorandum of Agreement'*** between the parties herein had been implemented, with the deduction of N.S.S.F. dues and gratuity mentioned therein.

Finally, counsel urged us to dismiss the appeal with costs to the respondent.

This being a first appeal our mandate as is enunciated in the case of *KENYA PORTS AUTHORITY V KUSTON (KENYA) LIMITED 2 E.A. 212* wherein this Court stated thus:-

> ***" On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".***

We have read the record in its entirety, considered rival written submissions and oral submissions in opposition to the appeal, and reflected upon both facts and law underpinning the appeal. In our considered view, this appeal turns solely on the validity or otherwise of the C.B.A. entered into by the parties herein as read with ***SECTION 35 (6)*** of the ***Employment Act of 2007.***

SECTION 2 of the ***Labour Relations Act of 2007*** defines a C.B.A. as:-

> ***"A written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organization of employers".***

Applying the above definition, it suffices to state that the document by the title: - ***"MEMORANDUM OF AGREEMENT BETWEEN MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY AND KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS AND ALLIED WORKERS (KUDHEIHA WORKERS"*** dated 18th March, 1986 qualifies as a valid and binding C.B.A.

Accordingly, it follows that the terms and conditions contained in the said C.B.A. were binding upon the parties thereto and the Respondent's members were entitled to derive benefits therefrom. Whereas the appellant had impugned the applicability, reliance, relevance, admissibility and effect of the C.B.A. in question, it had no difficulty using it as the basis for payment in lieu of notice per the said C.B.A. In effect, the appellant had admitted to its existence and applicability thus negating its assertion to the contrary in its Memorandum of Response.

Having ascertained that the impugned C.B.A. stands on a sound footing legally, we turn to clauses 29 and 31 thereof. Clause 29 addresses the subject of contributions to the N.S.S.F. decreeing that the same is open to both male and female employees of B.O.G.'s and is compulsory and clause 31 addresses the subject of Service Gratuity and provides that employees employed by B.O.G.'s who retire or are retired shall be paid at the rate of one twelfth of each completed month of salary based on his or her salary. On the other hand, ***Section 35 (6)*** of the ***Employment Act. of 2007*** states as follows:-

> ***"35.***
>
> ***(1) …***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) …***
>
> ***(5) …***
>
> ***(6) This section shall not apply where an employee is a member of-***
>
> ***(a) A registered pension or provident fund scheme under the Retirement Benefits Act;***
>
> ***(b) A gratuity or service pay scheme under a collective bargaining agreement;***
>
> ***(c) Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and***
>
> ***(d) The National Social Security Fund."***

Based on the foregoing proviso, the appellant was of the view that the respondent members were not entitled to service pay.

Section 35(6) of the **Employment Act, 2007** disentitles an employee from double payment of Social Security benefit from NSSF and a service pay scheme established under clause 31 of the CBA. However, be that as it may and as rightly held by the trial Judge ***"… section 35 of the Employment Act 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement***".

But should an employee then benefit from a CBA as well as the NSSF contributions as decreed by the Employment Act.?

In the persuasive authority of the then Industrial Court Case No. 871 of 2012, Rika, J. held as follows:

> "***This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35(5) only to employees who are not covered under the different social security mechanisms elaborated under section 35(6).***"

In that case the court found that the claimant was entitled to enter into a CBA and which agreement provided superior terms vis-à-vis the NSSF contributions and further that so as not to unnecessarily punish an employer, the NSSF deductions would be deducted from any benefits accruing in respect of the NSSF contribution.

In our view therefore, we find and hold that the parties herein were bound by the CBA and further that an employee is entitled to have more than one social security scheme and that any pension monies paid to a scheme, such as NSSF, should be deducted from the benefit conferred by the superior social security scheme. We further find and hold that the appellant shall pay to the respondent service pay as decreed in the CBA less any pension made by the appellant to the NSSF. To this extent, this appeal succeeds partially as we have varied the trial court's orders directing that the appellant to pay the respondents gratuity under the CBA without making provision for the deductions of the sums paid to NSSF. As this appeal has succeeded partially we direct that each party to bear its/their own costs in this court and the court below. It is so ordered.

Dated and delivered at Nyeri this 20th day of December, 2017

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR