Iminti v University of Nairobi (Appeal E200 of 2022)
[2025] KEELRC 1603 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1603 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E200 OF 2022

SC RUTTO, J

MAY 30, 2025

BETWEEN

GILFORD IMINTI ..... APPELLANT

AND

UNIVERSITY OF NAIROBI ..... RESPONDENT

(Being an appeal from the Judgment, Orders and Decree of the Principal Magistrate Hon. Makau PM) delivered in Nairobi on 25th October 2022)

JUDGMENT

1. The Appellant herein commenced a suit against the Respondent at the Chief Magistrate's Court at Nairobi, being CMEL Cause No. 1437 of 2019. It was the Appellant's case at the Trial Court that he was employed by the Respondent with effect from 10th April 1979 in the catering department and was earning a monthly salary of Kshs 27,694/=.

2. The Appellant averred that he worked for the Respondent with due diligence and faithfulness until on or about 27th January 2019, when he was retired from service and informed that his terminal dues would be processed promptly after clearing.

3. The Appellant further averred that the Respondent deposited Kshs 799,001/= in his bank account, terming the same as gratuity pay. According to the Appellant, this was way below his entitlement upon retirement as per the Collective Bargaining Agreement [CBA] in force, which provided for 31% of yearly basic pay.

4. To this end, the Appellant averred that the Respondent irregularly and unilaterally worked out his gratuity without relying on Clause 40 of the CBA, which provides for 31% of basic salary for each completed year of service as gratuity.

5. Against this background, the Appellant sought a declaratory order that the Respondent's deliberate refusal to pay his terminal dues was irregular, wrongful and unlawful. In addition, the Appellant asked the Court to award him the sum of Kshs 3,296,110.78 being his terminal benefits. He further prayed for the costs of the suit plus interest.

6. The Respondent opposed the Claim through a Memorandum of Response dated 19th December 2019, in which it denied the Appellant's averments that his gratuity was irregularly and unilaterally calculated. According to the Respondent, the implementation of the CBA was to take effect on 1st July 2015.

7. The Respondent further contended that the computation of gratuity cannot be calculated retrospectively.

8. It was the Respondent's further contention at the trial Court that the Appellant had calculated his gratuity erroneously and or misinterpreted the CBA to suit his circumstances.

9. That further, the Appellant's computation of gratuity is a stark departure from the terms of the CBA he seeks to peg his claim on.

10. According to the Respondent, the Appellant was paid all his dues and is not entitled to Kshs 3,296,110.78 or any other greater or lesser sum other than as per the CBA applicable when he was appointed.

11. At the trial Court, both parties filed written submissions and upon evaluating and analyzing the evidence on record, the trial Court found in favour of the Respondent, thereby dismissing the Appellant's Claim with costs.

12. In her judgment, the learned trial Magistrate concurred with the Respondent that, as per Clause 43 of the CBA, the effective date was 1st July 2015. The learned Magistrate further found that under Clause 40 [ii] of the CBA, the new rates of gratuity were not to apply in retrospect. Consequently, the trial Magistrate found that the Appellant had failed to discharge his burden of proof on a balance of probabilities.

The Appeal

13. The Appellant was dissatisfied with the findings and orders of the Trial Court, hence has sought to challenge them on the following four [4] grounds listed in his Memorandum of Appeal:

    1. That the learned trial magistrate erred in fact and law by finding that in upholding the express terms in the active Collective Bargaining Agreement would be rewriting a contract between the parties.

    2. That the trial magistrate erred in fact and in law in finding that the appellant had not proved his case against the Respondent whereas there was overwhelming evidence to the contrary.

    3. That the trial magistrate erred in fact and in law by disregarding the claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.

    4. That the learned magistrate erred in fact and in law by dismissing the Appellant's claim.

14. Accordingly, the Appellant seeks the following orders from this Court:

a. This appeal be allowed, the judgment of the subordinate court issued on 25/10/2022 in Nairobi CMEL NO.1437 of 2019; Gilford Iminti vs University of Nairobi be set aside in its entirety.

b. The Honourable court enters judgment against the Respondent for; -

i. A declaration that the deliberate refusal to pay full gratuity pay upon promotion was irregular, wrongful and unlawful.

ii. The Appellant be paid his unpaid gratuity arrears amounting to Kshs. 3,296,110.78

iii. The Respondent to pay the costs of this Appeal and the main claim in any event.

iv. Interest on the above at Court rates from the time of filing suit.

Submissions

15. The Appeal was canvassed by way of written submissions. On his part, the Appellant submitted that having retired on 27th January 2019, the active CBA in place was the one for 2013-2017 and which is in force to date.

16. The Appellant further submitted that the finding of the trial Magistrate was erroneous in light of the provisions of Section 59 of the *Labour Relations Act* which stipulates that collective agreements bind the parties to the agreement and that all those terms shall be incorporated into the contracts of employment of every employee covered by the collective agreement.

17. Still on this issue, the Appellant submitted that once a new CBA is registered, the old one ceases to exist and cannot be used to calculate gratuity pay for an employee who is covered under the new CBA.

18. In support of the Appellant's submissions, the Court was invited to consider the case of Benta Achieng Odinyo v University of Nairobi [2021] eKLR.

19. The Appellant further argued that gratuity only becomes due upon retirement and could not have been claimed under the older CBAs.

20. According to the Appellant, there have never been any amendments/changes and/or addenda to the CBA.

21. To buttress his submissions, the Appellant invited the Court to consider the decisions in Bamburi Cement Limited v William Kilonzi [2016] eKLR, H. Young & Company [EA] Limited v Javan Were Mbango [2016] eKLR and Paul Billy Nyagillo v East Africa Portland Cement Limited [2018] eKLR, Ali Buule Isaak v University of Nairobi [2021] eKLR, Reuben Ondigu Orodo v University of Nairobi [[2023] KEELRC C 2454 [KLR], University of Nairobi v Livingstone Mayaka [2024] KEELRC C 2715 [KLR].

22. On the other hand, the Respondent submitted that the CBA cannot be applied retrospectively as the same did not exist at the time of entering into his contract of employment in 1989. To this end, reliance was placed on the case of Municipality of Mombasa v Nyali Limited [1963] E.A 371 and Samuel Kamu Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.

23. Referencing the case of Kenya Chemical and Allied Workers Union v Milly Glass Works Limited [2019] eKLR, the Respondent submitted that the Appellant is asking the Court to entertain backdating of the CBA to the time he was employed. According to the Respondent, this is not only absurd but is unfair.

24. Citing the case of Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR, the Respondent urged the Court to be guided by the ordinary rules of interpretation and avoid the temptation of rewriting the CBA.

Analysis and Determination

25. This being the first appellate Court, it is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent determination on whether or not to allow the appeal. The Court is further empowered to subject the entire evidence to fresh scrutiny and draw its own conclusion, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. Such was the determination in Selle & another vs Associated Motor Boat Co. Ltd.& others [1968] EA 123.

26. Having reviewed the record before this Court, the rival submissions, as well as the law applicable, the twin issues isolated for determination are;

    a. Whether the trial Court erred in finding that the effective date for the computation of the new rates of gratuity as per the CBA was 1st July 2015;

    b. Whether the Appellant is entitled to the reliefs sought.

Computation of the Appellant's Gratuity

27. The crux of the Appellant's case is that, according to the CBA that was in place at the time he retired from the Respondent's service, his gratuity pay was to be computed at the rate of 31% of his last basic annual pay for all the years worked.

28. The Respondent has taken a different position on this issue and has contended that the effective date of the CBA was 1st July 2015 and that the computation of the gratuity cannot be applied retrospectively.

29. It is common cause that the Respondent and the Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied [KUDHEIHA] Workers executed a CBA which was to cover the period 2013 to 2017.

30. A reading of Clause 43 of the said CBA reveals that the agreement was to take effect from 1st July, 2013 and was to remain in force up to 30th June, 2017. Further, it was to remain in force until revised jointly in writing by the parties or another CBA is signed. More importantly, part [b] of the CBA provided the implementation date as being 1st July, 2015.

31. It is the Appellant's position that it is highly prejudicial for an employer to be allowed to calculate gratuity using two or more Collective Bargaining Agreements. In his view, there cannot be two or more Collective Bargaining Agreements running concurrently and the old must pave way for the new one.

32. According to the Appellant, the claim for gratuity had not become due prior to the coming into effect of the CBA so as to exclude him from benefiting from it. It is his contention that his gratuity became due on 27th January 2019 and at the time, the operational CBA was the one for the period 2013-2017.

33. Disputing the Appellant's position, the Respondent has submitted that the Appellant is asking the Court to entertain backdating of the CBA to the time he was employed.

34. It is evident from the record that following the registration of the CBA, a dispute arose between the parties regarding the computation of gratuity for employees who had retired from service.

Consequently, KUDHEIHA, acting on behalf of the aggrieved employees, reported a trade dispute to the Ministry of Labour and Social Protection vide a letter dated 4th April 2018.

35. The said trade dispute was resolved by the representatives of the Respondent's Council and KUDHEIHA [UON Chapter] executing an Agreement dated 16th October, 2018. A copy of the said Agreement, which was exhibited before the trial Court, reads in part: -

It is Hereby Agreed as Follows:

i. That implementation of 31% payment of service gratuity for each completed year of service takes effect upon registration of the agreement in the Employment and Labour Relations Court.

ii. That the 31% payment of service gratuity be applicable only to employees who were in the University employment at the time the agreement was registered in Court. The new rate of gratuity shall not apply in retrospect.

iii. That payment of service gratuity based on 28 days of employees' basic salary covers the entire period that the agreement was not in place, upto and including the last year preceding effective date of the agreement [i.e prior to and including June 30, 2015]. This means that any employee who left employment prior to the registration of CBA [2013-2017] will be entitled to 28 days for each completed year of service. Service gratuity will be applied at the rate of 31% on the employee's basic salary effective July 1, 2015.

36. It is this Court's considered view that the Agreement dated 16th October 2018 was to be read in conjunction with the provisions of Clause 40 of the CBA in computing the gratuity pay for the Respondent's employees. It was part and parcel of the CBA in question.

37. My construction of the aforementioned Agreement is that computation of gratuity was to be based on 28 days basic salary for every year served with regards to the duration when the CBA was not in place that is prior to 1st July, 2015 and for the remaining period of service, gratuity was to be payable at the rate of 31% of the employee's basic salary. Therefore, the period in which the rate of 31% was applicable was after 1st July, 2015. To state otherwise would be tantamount to rewriting the parties' contract.

38. Submitting in support of the Appeal, the Appellant has invited this Court to apply the determination in similar cases, to wit: Benta Achieng Odinyo v University of Nairobi [2021] eKLR, Ali Buule Isaak v University of Nairobi [2021] eKLR, Reuben Ondigu Orodo v University of Nairobi [[2023] KEELRC C 2454 [KLR] and University of Nairobi v Livingstone Mayaka [2024] KEELRC C 2715 [KLR].

39. The Court has carefully perused the said precedents and notably, the Courts did not have the occasion to interpret the Agreement executed by the parties on 16th October 2018. As such, there was no finding in that regard and specifically, the implication of the Agreement on Clause 40 of the CBA.

40. For the foregoing reason, the Court is unable to fault the finding by the learned trial Magistrate.

41. Having so found, the reliefs sought by the Appellant cannot be sustained.

Orders

42. Ultimately, I find no reason to cause me to overturn the decision by the learned trial Magistrate. Accordingly, the instant Appeal fails and is dismissed in its entirety with an order that each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant Ms. Kerubo instructed by Mr. Onenga

For the Respondent Mr. Simiyu instructed by Mr. Kipkorir

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159[2][d] of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* [Chapter 21 of the Laws of Kenya] which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE