



Osawo v Chuna Co-operative Savings and Credit Society Limited (Cause 606 of 2019) [2024] KEELRC 2372 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 606 OF 2019
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

VITALIS OTIENO OSAWO CLAIMANT

AND

**CHUNA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY
LIMITED RESPONDENT**

JUDGMENT

1. The Claimant filed his claim on 26th August, 2019 and pleaded inter alia as follows: -
 - a. The Claimant was employed by the Respondent wherein the Claimant had been engaged for 34 years and in the said period he worked continuously with due diligence and to the Respondent's satisfaction.
 - b. The Claimant averred that after several years of diligent service he opted to retire early as per the terms and conditions of service and the CBA between the Respondent and the Claimant's union.
 - c. The Claimant averred that though his request for early retirement was duly acknowledged or accepted and the Claimant indeed adhered to all requests made by the Respondent as he vacated office, the Respondent has since denied, neglected and/ or failed to pay his dues as required or set in the CBA.
 - d. The claimant averred that he is entitled to 2 months' salary for every year worked, his salary being Kshs 104,525 and also baggage and passage allowance of Kshs 12,120/- that the claimant is owed Kshs 7,119,820/- by the Respondent as per the CBA.
 - e. The Claimant averred that the sum has not been issued to him and he has since leaving office attempted to have the sum paid to him unsuccessfully.



- f. The Claimant further averred that he is entitled to payment of compensatory damages over and above the claim as a result of the unlawful acts of breach of contract by the Respondent.
2. The Claimant in the upshot prayed for the following against the Respondent;
 - a. An order for the Respondent to pay the Claimant his dues totaling to Kshs. 7,119,820/=.
 - b. An award for compensatory or general damages for breach of contract.
 - c. Costs of suit and interests.
3. The Respondent filed its Statement of Response dated 11th November, 2019 and averred inter alia as follows;
 - i. The Respondent averred that it had complied with the terms of the CBA in favour of the Claimant and averred that the gross salary scale of the Claimant varied between the years and that it is not true that the Claimant's salary was Kshs 104,525/=. That the scales and salary receipts attached in his appointment and promotion letters set out the actual salary of the Claimant.
 - ii. The Respondent averred that it had complied to the demand and notice of intention issued for they were vehemently exaggerated and all dues were fully paid.
 - iii. The Respondent averred that Claimant was employed as an office messenger/cleaner by the Respondent from 1st May 1984 and on 18th January 2013 moved to FOSA Cashier's office. That all the Claimant's dues owed were paid by the Respondent thereafter.
 - iv. The Respondent averred that the Claimant's gross salary started at Kshs 2,155/- in 1989 to Kshs 91,630/- in 2016 where it was increased over the years hence it was not true that the Claimant was earning Kshs 104,525/- as alleged.
 - v. The Respondent averred that the Claimant was on permanent and pensionable terms as per the employment letters. That gratuity was payable to those in contract terms and not those on permanent and pensionable terms.
 - vi. The Respondent further averred that it has faithfully contributed an amount equal to 12.5% of the Basic Salary for the Claimant to the Chuna Sacco Staff Pension Scheme on behalf of the Claimant where he was a scheme member.
 - vii. The Respondent averred that the State Department for Co-operatives noted in an Inquiry [Report of 2018](#) after conducting an inquiry into the affairs of Chuna Sacco that it was illegal in law to contribute pensions for permanent and pensionable employees and also pay gratuity for the same and consequently the regulator dissolved the entire board of Directors.
 - viii. The Respondent averred that the Claimant's claim is frivolous, vexatious and made to embarrass the Respondent. That the Claimant was not entitled to his prayers in the claim and the same ought to be dismissed with costs to the Respondent.
4. The Claimant filed its reply to the Statement of Response and averred inter alia as follows: -
 - i. The Claimant averred according to the CBA, the salary scale to be utilized when calculating gratuity are the final terms (Latest salary issued) and that gratuity is offered to all employees not just to those under contract and the same has by no means been declared illegal.



- ii. The Claimant averred that the Response to the Memorandum of Claim is an afterthought, far-fetched and a non-starter and ought to be disallowed summarily.

EVIDENCE

5. Both the Claimant and Respondent's case were heard orally on 6th March, 2024. The Claimant called two witnesses, the Claimant (CW1) and former colleague (CW2). CW1 testified in court and adopted his witness statement together with the pleadings and documents filed in court dated 26th August, 2019.
6. CW1 testified that the case was based on the CBA between the Respondent and the Claimant's union. That he started working for the Respondent in 1984 as a cleaner/Messenger until 2018. That he was a unionisable employee. He relied on clause 7, sub clause 3 and 4 as well as clause 2 (Baggage and passage allowance) of the CBA.
7. In Cross-examination CW1 confirmed that he claimed Kshs 7,128,000/- in the demand letter and that page 19 of the RBD shows that in 2016 his salary was Kshs 91,630/-. He further confirmed that the CBA was effective for 3 years from 1st January, 2015 as per clause 24 of the CBA.
8. In re-examination CW1 confirmed that from his knowledge, the CBA had never been revised.
9. The Claimant called the second witness CW2 who adopted his witness statement dated 28th February 2020 as his evidence in chief. He further testified that he worked together with the Claimant and that he left employment in 2015 and that he was paid provident fund dues, baggage and passage allowance and gratuity for the period of the contract which payment was based on the CBA herein. CW2 further stated that he was paid under clause 7(d) of the CBA on retirement and Clause B on baggage and passage allowance. That he was unionisable staff and so was the Claimant. In cross-examination CW1 confirmed that he did not have a bank statement to illustrate payment and that he did not file proof of membership to union.
10. The Respondent on the other hand called one witness RW1 who testified and adopted the Respondent's documents filed in court as his evidence in chief. He further testified that he works at Chuna Sacco as the acting CEO and that the CBA was from 2015 to 2018. The Claimant's salary had been varying from 1989 to the time he left.
11. RW1 further testified that the Claimant computed his claim by using the last year as 2018, the effective date for CBA was from 2015-2018 and that the Respondent had been paying Provident Fund hence the claim lacked merit.
12. In Cross-examination RW1 confirmed that he was aware of the CBA signed between the Union and the Sacco. That the CBA was to run for 3 years effective from 1/1/2015 and remain in force until jointly revised by the parties which he confirmed was never revised. RW1 further stated that the Claimant was a member of the union. In Re-examination RW1 clarified that the effective period in reference to the Claim showed the time an employee can use to claim compensation from the Sacco.

Claimants' Submissions

13. The Claimant through his written submissions dated 13th March, 2024 submitted that under clause 24 of the CBA the agreement was still in force since it had not been revised by both parties. It was the Claimant's submissions that the allegations by the Respondent's witness of the alleged inquiry were mere allegations with no probative value since the Respondent's witness did not table evidence before



court to show that the Claimant was a party to the alleged inquiry and /or that the Claimant was involved in any way and /or results were ever communicated to him.

14. The Claimant submitted that since it was not disputed that he was a member of the union he was entitled to payments claimed on retirement as per the CBA agreement which was in force at the time he retired.

Respondents Submissions

15. The Respondent filed its written submissions dated 3rd May,2024 and submitted that the Claimant did not prove that the CBA was registered in court as required hence he could not rely on it. The Respondent submitted that the State Department for Cooperative Inquiry *Report of 2018* found that it was illegal in law to contribute pensions for permanent and pensionable employees and also pay gratuity for the same employees. That since the Claimant was a permanent and pensionable employee he could not purport to claim gratuity when the Respondent faithfully contributed an amount equal to 12.5% of basic salary for the Claimant to Chuna Sacco Staff Pension Scheme on behalf of the Claimant where he was a scheme member.
16. The Respondent relied on the case of Bamburi cement Limited vs William Kilonzi(2016) eKLR and Bamburi Cement Limited vs Farid Aboud Mohamed (2016) eKLR to submit that gratuity could be paid once provided for in the contract or CBA. The Respondent submitted that the CBA did not have a provision for gratuity and that the only gratuity provided for in the CBA was upon death. That it would be detrimental to the Respondent to pay the Claimant Pension and gratuity at the same time as that would result in double payments to the Claimant.

Determination

17. The court has reviewed and considered the pleadings by both parties and testimony by both parties and I have come up with two main issues;
 - a. Whether the Claimant's is entitled to the gratuity pay of Kshs 7,119,820/= upon retirement.
 - b. Whether the Claimant is entitled to compensatory or general damages for breach of contract.

Whether the Claimant's is entitled to the gratuity pay of Kshs 7,119,820/= upon retirement.

18. This court notes that it was not in dispute that the Claimant was a member of the union. The Respondent has raised the issue of whether the CBA was registered by the court which issue as an employer he was better placed to guide the court since the CBA was between itself and the union representing the Claimant. Without leading any evidence to the contrary this court finds the CBA to be binding between the parties since an agreement is always binding between parties.
19. On the legality of the CBA clause 24 of the CBA provided that it was valid for 3 years from 1st January,2015 and thereafter to remain in force until jointly revised by both parties. This therefore meant the CBA was still in force at the time the Claimant retired in 2018. It was confirmed during oral hearing that the CBA was never revised hence it was still binding.
20. This claim is based on clause 7(D) 4 on retirements which provided as follows;

“Upon leaving employment a staff to be paid two month's salary for every year worked”.
21. The Claim was also based on clause on 2 Baggage and Passage allowance which were to be paid upon termination of services.



22. The Respondent alleged that the Claimant was not entitled to the gratuity pay because he was a permanent and pensionable employee where the Respondent was contributing of 12.5% of his basic salary to the pension scheme. That this gratuity pay was available for those on contract and it would amount to double payment. The respondent further relied on the State Co-operative Inquiry [report of 2018](#).
23. The Respondent further disputed the Claimant's last salary and stated it was Kshs. 91,630/= which this court notes was for 2016 yet the Claimant worked up to 2018 and he attached his last three pay slips which showed that his last salary was Kshs 104,525/=. The court therefore adopts this as the correct salary since the Respondent had not adduced any evidence to the contrary.
24. This court notes that under Section 35(6)(b) of the [Employment Act](#) there is an exception on gratuity or service pay under CBA. Nothing bars the parties from entering in to CBA agreement for gratuity. The Court of Appeal in the case of Board of Management Ng'araria Girls Secondary School v KUDHEIHA workers [2017] eKLR held as follows; -

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.

25. The court echoes the above finding while balancing the interests of the two parties herein and order that the Claimant is entitled to gratuity pay as provided in the CBA which had better terms. Out of this amount in order to serve justice to the Respondent who used to make 12.5% contributions to the Pension Scheme as well as NSSF; it will be in the interest of justice to subtract the amounts contributed by the Respondent to the Pension Scheme and NSSF.



Whether the Claimant is entitled to compensatory or general damages for breach of contract.

26. This court notes that there must be strong basis for the prayer of general damages for breach of contract in employment matters. The court is guided on what to compensate claimants under Section 49 of the [Employment Act](#). In the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR the court of Appeal held as follows on this issue:-

We have considered whether the appellant was entitled to an award of general damages and we find that he did not sufficiently lay out a basis for the same. In the circumstances, this is not a fit case for the award of general damages. First, the appellant was granted his alternative prayer for unfair termination and secondly, he has failed to lay a basis which would justify the grant of an award of further compensation. This prayer therefore fails.

27. In conclusion the Court hereby orders that the claimant be paid his gratuity pay of Kshs 7,119,820/- less contributions made by the Respondent to the Pension Scheme and NSSF.

28. Considering the nature of the claim, each party shall bear their own costs.

29. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024.

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024.

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

