Kenya Engineering Workers Union v Kisumu General Engineering Employers Group of FKE (Cause E054 of 2024) [2024] KEELRC 2817 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2817 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E054 OF 2024

JK GAKERI, J

NOVEMBER 14, 2024

BETWEEN

KENYA ENGINEERING WORKERS UNION ..... CLAIMANT

AND

KISUMU GENERAL ENGINEERING EMPLOYERS GROUP OF FKE ..... RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 5th July, 2024, the Claimant sued the Respondent alleging refusal by the Respondent to sign a Collective Bargaining Agreement (CBA) occasioned by the clause on service gratuity.

2. It is the Claimant's case that it has a recognition agreement with the Respondent and has negotiated and concluded CBAs with clauses on service gratuity.

3. The Claimant avers that the gratuity clause in the previous CBA covered only those who retired at 55 years for men and 50 years for women or give notice on grounds other than gross misconduct or are terminated on medical grounds and have completed 5 years of continuous service qualify for gratuity at the rate of 20 days each completed year and months of service.

4. It is the Claimant's case that although it forwarded a CBA proposal to the Respondent on 7th December, 2022, containing six (6) clauses to be amended, the Respondent made no counter proposal and its proposal for the expunction of the clause on service gratuity culminated in the dispute being reported to the Kisumu County Labour Office and a conciliator appointed but the parties could not agree and a certificate of unresolved trade dispute was issued with certain recommendations.

5. The Claimant avers that removal of the clause on service gratuity will disadvantage all other companies, associations and groups whose CBAs have such clauses and most companies in the sector pay both NSSF and pension scheme higher than the service gratuity clause in the last CBA.

6. That removal of the clause will discriminate the Respondent's employees against employees in the sector.

The Claimant prays for:

i. Finding that the Respondent's action of removal of service gratuity from the CBA is in bad faith and thus null and void.

ii. Order that the parties sign a CBA as negotiated and agreed upon with the clause on service gratuity as per the outgoing CBA within the shortest time frame possible.

iii. Costs of Kshs.250,000.00 as throw away costs.

iv. Any other relief the Court may deem fit to grant.

Respondent's Case

7. The Respondent admits that there exists a recognition agreement between itself and the Claimant and equally admits having participated in the conciliation exercise invoked by the Claimant.

8. It is the Respondent's case that it explained why it rejected retention of the service gratuity clause, that the clause had financial implications that were not sustainable and gratuity takes the form of social security analogous to the enhanced NSSF captured in the reconciliation report.

9. The Respondent avers that since NSSF is a mandatory social security system, service gratuity ought to give way as it cannot continue in perpetuity.

10. The Respondent avers that while service gratuity has previously cushioned workers against the low NSSF deductions and eventual dues, enhanced contributions of the NSSF have rendered service gratuity superfluous.

11. That the Respondent had agreed to pay gratuity until January, 2023 when the enhanced NSSF came into operation.

12. The Respondent prays that the Claimant be directed to sign a CBA without the clause on gratuity for purposes of its registration.

Claimant's submissions

13. The union submits that the Respondent's proposal to remove service gratuity violates the outgoing CBA between the parties and had not given a written notice or served the proposed amendment having also failed to make a counter proposal.

14. The union further submits that the Respondent's proposal is in bad faith as it was made by word of mouth on 16th February, 2024 yet the Claimant had served its proposal on 7th December, 2022.

15. That removal of the clause on service gratuity will disadvantage other prayers in the sector as other CBAs in the sector have such a clause.

16. Reliance was made on the sentiments of Radido J. in Kenya Engineering Workers Union V Abyssina Iron & Steel Ltd [2016] eKLR

Respondent's submissions

17. Counsel for the Respondent submits that service gratuity was necessary to cushion employees against the low NSSF contributions and when the contributions were enhanced, gratuity was rendered

redundant. In any case, Counsel submits gratuity is not a basic term in the *Employment Act* and was consensual.

18. It is submitted that the Respondent had agreed to pay accrued benefits of gratuity up to January, 2023 when the enhanced NSSF came into effect Counsel urges that the CBAs attached by the Claimant relate to the period before NSSF contributions were enhanced, profile of employees are not comparable with those based in Nairobi, and one of the CBAs was signed in 2013.

19. Counsel urges that the CBAs used to justify the argument on gratuity are not comparable in the context of enhanced NSSF deductions and contributions.

20. Counsel submits that gratuity is a negotiated item to be agreed upon by the parties and cannot be imposed by the Court against the backdrop of enhanced NSSF which serves the same purpose.

21. Reliance was made on the decision in Amalgamated Union of Kenya Metal Workers V Raiz UII Haq Ali Mohamed [2020] KEELRC 148(KLR).

22. Counsel submitted that payment of gratuity was conditional upon enhancement of NSSF but accrued dues subsisted.

23. In conclusion Counsel submits that gratuity was a negotiated issue and parties could not agree so be it.

24. In its supplementary submissions the union argues that service gratuity was not a negotiated item as per the outgoing CBA and clause 3 of the former CBA was not complied with.

    The union argues that the prayers sought are grantable.

Analysis and determination

25. From the evidence on record, it is clear that the Claimant and the Respondent have a Recognition Agreement and concluded a previous CBA.

26. It is also not in contest that the only bone of contention between the parties is the Respondent's proposal that the clause on service gratuity be removed from the proposed or draft CBA.

27. Minutes of the meeting held by the parties on 16th February, 2024 reveal that the issue of service gratuity was discussed but parties could not agree.

28. Management of the Respondent expressed the view that they were being over-burdened by the new NSSF Act 2013 and sought removal of the clause of service gratuity.

29. The union's proposal was that clause remains as it was in the previous CBA.

30. The Claimant faults the Respondent in that, it inter alia did not give a counter proposal after it was served with the draft CBA, did not give written notice of its objection to the inclusion of the clause on service gratuity and only raised it the last minute by word of mouth and thus did not act in good faith.

31. The Respondent did not controvert the Claimant's averment on how it treated the Claimant's proposed CBA.

32. In the circumstances, it is the finding of this Court that the Respondent did not act in good faith in the promotion of social partnership between the parties.

33. As held by Radido J. in Kenya Engineering Workers Union V Abyssinia Iron & Steel (Supra).

> "...Industrial relations require utmost good faith. Capital requires labour. It is a social partnership for the benefit of capital and labour, without labour there would be no profit for capital".

34. It does not augur well for industrial relations when an employer treats union proposals disrespectfully and objects to a single clause late in the hour to stall the process, the reason notwithstanding.

35. It is common ground that the dispute between the parties was referred to the Cabinet Secretary Ministry of Labour and Social Protection a conciliator appointed and a Certificate of Disagreement issued vide letter dated 10th June, 2024 after a meeting on 28th May, 2024 and filing of submissions.

36. Significantly, the conciliator, who in the Court's view acted expeditiously recommend that.

    a. All accrued gratuity up to 31st January, 2023 be paid in full. The Respondent was in agreement with this recommendation as the gratuity had already accrued.

    b. Service gratuity clause be maintained at the prevailing rates per year.

    c. On separation, the monies paid to the NSSF (employers contribution) be computed for each year worked and also gratuity for the period and if the gratuity is higher that the money paid to tier 2 of the NSSF, the balance be paid to the employee as gratuity.

37. Intriguingly, neither of the parties appear to have accorded the reconciliators proposal any serious consideration which is regrettable as it would have demonstrated the real differences between service gratuity asserted by the Claimant and the impact of tier 2 of the NSSF.

38. The fact that neither of the parties expressed its position on the recommendations leaves no doubt that each party stood its ground thereby impending the realization of a CBA.

39. It is patently clear that the parties have agreed on all the other contents of the CBA save for the clause on service gratuity on which they are deadlocked with each party relying on various grounds to justify its case which is the Court's view are logical but unhelpful for purposes of negotiations.

40. It must be appreciated that a Collective Bargaining Agreement (CBA) is an agreement between the parties thereto analogous to any other agreement and only becomes an enforceable contract upon registration as ordained by the provisions of Section 59(5) of the *Labour Relations Act*.

41. Relatedly, it is a special contract as it is highly regulated, from negotiation, registration and enforceability and in certain circumstances, a proposed CBA is not registrable.

42. What is before the Court is a draft or proposed CBA and parties are still at the negotiation period, the fact that the conciliator has pronounced herself on the way forward notwithstanding.

43. This is because, there is no CBA capable of being registered or enforced and parties are at liberty to renegotiate any clause mutually.

44. It is trite law that the Employment and Labour Relations Court has no role to play in the negotiation of a CBA or incorporation of terms into the agreement.

As observed in ELRCC No. 229 of 2022

> " These are instruments provided by law to enable employers and trade unions agree on terms and conditions of employment. That's why it is referred to as a Collective Agreement and the Court is not part of that agreement. Its mandate is to register and enforce the agreement".

45. In Amalgamated Union of Kenya Metal Workers V Kenya Vehicles Manufacturers Ltd [2018] eKLR Nzioki Wa Makau J. exquisitely captured it as follows:

> " The court cannot descend to the area of negotiations of terms of employment at the workplace. This court guided by the Court of Appeal decision in Teachers Service Commission V Kenya National Union of Teachers (KNUT) & 3 Others (2015) eKLR has no business settling terms of the CBA".

46. In Teachers Service Commission V Kenya National Union of Teachers & 3 others (Supra) the Court of Appeal expressed itself as follows:

> " The very essence of a Collective agreement is that the terms and conditions thereon contained are voluntarily agreed upon between the employer and the union...
>
> If the Labour Court fixes basic salary 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".

According to Odek JA in TSC V KNUT & 3 OTHERS (Supra)

> " It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntary 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 right is grounded on the concepts of social dialogue freedom of contract and autonomy of parties in collective bargaining...
>
> The Article emphasizes the ability of the employer and trade unions to operate as partners not adversaries... The constitutional recognition of the right to collective bargaining is not a right to blackmail a party into collective bargaining".

47. The Court is bound by the foregoing sentiments of the Court of Appeal. The extent to which the Employment and Labour Relations Court may intervene is cases of a deadlock between a union and the employer or federation on employers remains indeterminate.

48. In Kenya Tea Growers Association V Kenya Plantation & Agricultural Workers Union, the Court stated thus:

> " ...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...under the guidelines the prime elements of determining wages are listed as realised productivity gains, the ability of the economy and employers to sustain increased labour costs and the cost of living".

49. Clearly, the intervention by the ELRC envisioned by these sentiments are specific to determination of wages or salary as opposed to other terms of the CBA as exemplified by the following redition.

> " 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".

50. Guided by the provisions of the *Employment Act* on wages and other entitlements of an employee and the foregoing sentiments, and bearing in mind that service gratuity is exclusively a negotiated term of the CBA, the Court is not persuaded that a sustainable case has been made for its intervention in this instance.

51. Concerning the reliefs sought, it is clear that having found as herein above, the Claimant's case is for dismissal and it is accordingly dismissed.

52. Parties are however encouraged to re-engage in an endeavour to resolve the impasse in the interests of the employees who have been awaiting a new CBA, and if need be engage the Ministry of Labour and Social Protection to assist them conclude the CBA with or without the clause on service gratuity or negotiate a contributory pension scheme.

53. In the circumstances it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 14TH DAY OF NOVEMBER, 2024

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE