



Kenya Chemical Workers Union v Foam Mattress Limited (Cause E023 of 2024) [2024] KEELRC 13434 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13434 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E023 OF 2024
JK GAKERI, J
DECEMBER 16, 2024**

BETWEEN

KENYA CHEMICAL WORKERS UNION CLAIMANT

AND

FOAM MATTRESS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit on behalf of seven (7) grievants vide a Memorandum of Claim dated 26th March, 2024 alleging that the respondent had refused to pay the grievant's terminal dues.
2. The greivants are identified as Joseph Nyariki, John Kibor Motoko, Nyandimo Augustine, Mohammed Abduba, Mathia Kirop Too, Daniel Thomas Sure and Titus Ateswa Maina.
3. The Claimant avers that the parties have a Recognition Agreement and have negotiated several CBAs and the current one lapsed on 28th February, 2022.
4. It is the Claimants case that the respondent has declined to honour Clause 16, 23 and 25 of the CBA as regards severance pay/gratuity.
5. That the matter was referred to the Ministry of Labour and a conciliator appointed on 16th August 2023 and after several meetings the conciliator prepared a report dated 8th December, 2023 recommending that the grievants be paid gratuity, prorated leave and annual leave but the same was not paid.
6. The claimant prays for –
 - i. Payment of gratuity to the 7 grievants.
 - ii. That provident fund and other retirement benefits are not affected by the CBA and be awarded if they exist.



- iii. Maximum compensation under Section 49 of the *Employment Act*.
- iv. Costs of this suit and interest at Court rates.
- v. Any further Orders that the Court may deem fit, and just.

Respondent's case

7. By a response to the Memorandum of Claim dated 8th May, 2024, the respondent denies that there is a CBA between the parties involving the alleged grievants and avers that only Mr. Joseph Nyariki, John Kibor Motoko, Nyandimo Augustine and Mohammed Abduba were its employees and none was entitled to terminal dues. It admits that conciliation took place but avers that it disputed the report conciliator's in writing.
8. The respondent denies having violated the grievants' rights and prays for dismissal of the suit with costs.

Claimants evidence

9. Only Mr. John Kibor and Joseph Nyarika testified on their own behalf and none had authority to represent the other alleged grievants.
10. Not even their statements were availed as evidence.
11. Mr. Joseph Nyariki testified that he was not paid after retirement and further confirmed that the letter of retirement was dated 21st March, 2023 and was then aged 58 years having been born in 1963 and it was his 60th birth day.
12. He testified that the office knew his age and was unaware that the respondent had written to the County Labour Officer on the intended retirement.
13. The witness confirmed that he was in agreement with the letter and was only claiming retirement dues as he stopped working on 31st March, 2023 at Kshs.28,804.00 per month and was contented with it, was a member of the NSSF and deductions were remitted until the end of March 2023 and it was not a redundancy.
14. That the claim was grounded on the CBA.
15. The witness denied having received a cheque of Kshs.269,516 on record but admitted that he had a debt of Kshs.71,448.00.
16. He admitted that NSSF paid him Kshs.180,000.00 and there was no agreement between the respondent and the union . The witness admitted that he was paid for leave days in January and February.
17. That the CBA they relied on is dated 17th December, 2021 and was unaware of any other hitherto.
18. That the respondent was not paying union dues or deducting the same and had never seen the list of members of the union.
19. The witness testified that the retirement notice was not sufficient CWII Mr. John Kibore stated that he was employed in 2003, was born in 1964 and was informed that he had retained retirement age which was 55 years and above as per the CBA, a fact he was aware of and did not contest the retirement and his salary was Kshs.28,804.00 per month and was paid until March, 2023.



20. The witness stated that he was claiming service pay and NSSF had paid him Kshs.140,000.00 but could not recall when and was also paid in lieu of leave.
21. The witness maintained that he retired and his employment was not terminated and had been a member of the union for 2 years from 2021 to 2023.
22. That he was not paid terminal dues and had no debt.
23. He denied having received the sum of Kshs.275,767.00 or the cheque on record.
24. It was his testimony that the Ministry did not notify him that it was holding his cheque, though he was aware that the Respondent had computed the amount due to him but was claiming more than the amount stated on the cheque.
25. On re-examination, the grievant testified that the retirement notice was insufficient.

Respondent's evidence

26. RWI, Mr. Job Oloo confirmed that he had worked at Foam Mattresses as the Human Resource Manager since 2014 and knew the grievants as former employees.
27. It was his evidence that the grievants retired from employment in 2023.
28. That Joseph Nyariki was paid Kshs.340,963.00 and John Kibore Kshs.285,452.00 but could neither recall whether they collected the cheques sent to the Labour Officer nor having contacted them. It was his evidence that no complaint was received for non-payment.
29. That retirement was effective on 31st March, 2023 and they were paid in lieu of notice, in lieu of gratuity and they had exhausted their leave.
30. That the computation dues was based on the CBA and the respondent had an internal pension scheme.
31. RWII, Mr. Washington Omondi confirmed that he was an employee of Jakali Holdings which outsourced labour to the respondent and was unaware of any meeting with the conciliator or his report.

Claimant's submissions

32. On retirement, the union argued that the seven (7) days notice was insufficient and rendered the retirement unfair as per the CBA and undisclosed employment laws.
33. That clause 25 of the CBA on retirement required payment of gratuity for a number of days depending on the duration served.
34. That the CBA was the sole binding document on the terms of employment, retirement and payment of benefits.
35. Reliance was made on the decisions in Kenya Plantation & Agricultural Workers Union V Siret Tea Company Ltd [2016] eKLR on the effect of a CBA on retirement.
36. The decision in Kenya Engineering Workers Union V Strabag International Ltd [2019] was also cited.

Respondent's submissions

37. On employment of the grievants, counsel submitted that the CWI and CWII were employees of respondent while some of the grievants were not and the claims should fail.



38. Reliance was made on Robert Ngande Kathathi V Frances Kivuva Kitonde Machakos HCCCA No. 57 of 2017 on the place of averments and evidence in proceedings.
39. On union membership, counsel submitted that no document was availed to show that the grievants were union members and cited the provisions of Section 48 of the Labour Relations Act on union dues arguing that the respondent never deducted union dues.
40. Counsel urged the Court to find that the grievants were not union members and the Claimant had no standing to institute the suit on their behalf and dismiss it.
41. Counsel submitted that since only two grievants testified, the cases of the remaining 5 must fail as parties are bound by their pleadings as held in Elizabeth Odhiambo V South Nyanza Sugar Co. Ltd [2019] eKLR. Counsel urged that the Claimant's case of termination of employment was unsustainable as the grievants retired and cited the decision in Apex Steel Ltd V Dominic Mutual Muendo [2020] eKLR urging that no compensation was payable.
42. According to counsel, gratuity was not payable to the grievants as they were members of the NSSF, a fact that the two grievants admitted.
43. Counsel urged the Court to find that terminal dues were paid and dismiss the suit.
44. Counsel submitted that the conciliators report was objected to and no response was forthcoming and the conciliator failed to consider that it was not a termination but a retirement and severance was not payable and the grievants were pensionable under the NSSF.

Analysis and determination

45. It is common ground that CWI and CWII were employees of the respondent engaged as drivers in 1999 and 2003 respectively and both retired vide letters dated 21st March, 2023 and none of them contested the retirement as they were aware that retirement was at anytime after 55 years as per the CBA on record. They however contested the notice period. The CBA on record is silent on the notice nor does the law provide for any notice for purposes of retirement.
46. However, RWI testified that the respondent paid in lieu of notice as it had accorded the grievants a 7 days notice.
47. The grievants testified that their case was about terminal dues as per the CBA whose existence RWI acknowledged in evidence. He even admitted that the dues were computed as per the CBA though he admitted that the respondent paid in lieu of notice and gratuity.
48. Strangely, although the grievants alleged that they were entitled to more than the amount stated on the cheques written by the Respondent which they did not collect at the Labour Officers Office, neither the grievants nor the Claimant was sure of the amount being claimed as exemplified by the memorandum of claim filed on 28th March, 2024, which has no figures of what is being claimed or prayed for including the maximum compensation under Section 49 of the Employment Act.
49. The issues of determination of are –
 - i. Whether the grievants were members of the Claimant union.
 - ii. Whether the grievants' employment was terminated by the Respondent or they retired.
 - iii. Whether the grievants are entitled to gratuity.



50. Counsel for the Respondent argued that neither the Claimant nor the grievants availed evidence of union membership.
51. The grievants testified that they were members of the union. On its part, the union did not address the issue as to when the grievants joined its ranks and how it notified the employer on payments of dues.
52. Strangely, eight pages of a document Reference Authority to swear Affidavit printed on 25th November, 2024, at 1:48pm found its way into the court file. The documents therein are copies of receipts of Daniel Sure, Titus Maina Ateswa, Augustine Nyandimo, John Kibore and Joseph Nyariki for 2022 and a few for 2023 of monies.
53. It is clear as to when the document was filed and whether service was effected. Puzzlingly, the document is undated.
54. It is discernible that the document was placed in the court file as an afterthought as no document was attached to the original claim. Although the grievants testified that they were members of the union, none of them provided an iota of evidence of membership yet they admitted that they were paying union dues in cash.
55. CWII testified that he was paying Kshs.800 as union dues but could not avail a single receipt having been a member for 2 years as alleged.
56. Equally none of the grievants stated in their written statements that they were members of the Claimant union or attach evidence.
57. Union membership and payment of dues are not a secret. The former is a constitutionally guaranteed and the latter is expressly provided for by the Labour Relations Act. As the Claimant alleges to have had more than 5 members who were employees of the Respondent, the provisions of Section 48 of the Labour Relations Act were applicable and union dues deduction forms ought to have been sent to the Respondent, yet it did not happen.
58. Union membership in a question of fact which is easily provable by evidence of payment of union dues or membership card or the list given to the employer by the union for purposes of deduction of union dues.
59. The employer on the other hand denied that the grievants were members of the Claimant union.
60. RWI testified in his evidence in chief that Respondent's letter to the Industrial Relations Officer stated that although four of the grievants were its employees they were not members of the union, evidence the Claimant did not controvert by any verifiable evidence or any at all.
61. It is trite law that he who asserts must prove the allegations by adducing supportive evidence to substantiate the allegations as ordained by the provisions of Section 107, 108 and 109 of the Evidence Act.
62. Section 107 of the Evidence Act is unambiguous that
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
63. See *Kiema Mutuku V Kenya Cargo Handling Services Ltd [1991]*, *East Produce (K) Ltd V Christopher Astiado Osiro Civil Appeal No. 43 of 2001*, *Mbuthia Macharia V Annah Mutua & Another [2017]*



Eklr, Muriungi Kanoru Jeremiah V Stephen Ungu Mwarabua [2015] eKLR, Alice Wanjiru V Messias Assembly of Yahwel [2021] eKLR, Ahmed Mohammed Noor V Abdi Aziz Osman [2019] eKLR.

64. It requires no belabouring that in civil cases such as the instant case the standard of proof is on a preponderance of probabilities and thus not as onerous as it is in criminal cases, where the standard is beyond any reasonable doubt.
65. The claimant ought to have effortlessly proved that the grievants were its members but failed to do so in Court, which was the foundation of its case.
66. In the instance case the Claimant union had a CBA with the Respondent which expired in February 2022 and having found that the grievants have failed to prove the fact of membership, the union had no locus standi to initiate the instant suit as it has not demonstrated that it is acting in the interests of one or more of its members, the expired CBA notwithstanding.
67. In determining this issue, the Court is guided by the sentiments of Mbaru J in Kenya Union of Employees of Voluntary and Charitable Organisations (KUEVACO) V Board of Governors Maina Wanjigi Secondary School [2015] eKLR where the learned Judge expressed herself as follows;

Even where the law safeguard the rights of employees to unionise, such unionisation must be recognised in law to enable the union represent employees...

The standing of the Claimant thus held as wanting does not however effect the grievants claim where valid. The removal of the Claimant as the representative of the grievant is not fatal to the entire claim as the basis of the claim where legitimate must be established by the right holder – the grievant. The assumed role of the Claimant thus removed, the grievant must comply with the rules or requirements of filing his claim in person”.
68. However, granted that the Claimant has represented the grievants throughout the trial and no objection was raised by the Respondent till the tail end of the process, and it would be burdensome for the grievants to file their own suit, the scales of justice dictate that the Court ought not visit such burden on the grievants as they took that route believing that it would lead them to success.
69. In the interests of justice, it is only fair that the Respondent retrieves the stale cheques forwarded to the Labour Officer, computes the grievants dues clearly indicating the respective amounts under each head, including deductions as necessary, and pay the balance to the two grievants.
70. The upshot of the foregoing is that the Claimant’s suit against the Respondent is dismissed for want of standing with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 16TH DAY OF DECEMBER, 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

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