



Banking, Insurance and Finance Union (Kenya) v Standard Chartered Bank (Kenya) Ltd (Cause 480 of 2016) [2023] KEELRC 103 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 103 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 480 OF 2016
SC RUTTO, J
JANUARY 20, 2023

BETWEEN
BANKING, INSURANCE AND FINANCE UNION (KENYA) CLAIMANT
AND
STANDARD CHARTERED BANK (KENYA) LTD RESPONDENT

JUDGMENT

1. The claimant union has brought the instant dispute on behalf of Jemima Mwenesi Kisia, the grievant herein. The undisputed facts of this case are that, Jemima was employed as a clerk by the respondent with effect from 15th November, 2013. Her contract was fixed for one year and was due to expire on 14th November, 2014. Upon expiry, the contract of employment was extended for three and a half months with effect from 18th November, 2014 to 31st March, 2015. This was followed by a further extension of three months from 1st April, 2015 to 30th June, 2015. Thereafter, the grievant served the respondent from 1st July, 2015 to 7th August, 2017 when she exited its employment. It is that exit that has triggered the instant suit.
2. The claimant avers that in the months of July, and August, 2015, Jemima worked without any written contract. That she only received a letter dated 31st July, 2015 informing her that the respondent will not extend her contract upon lapse on 7th August, 2015. That this had been precipitated by a disciplinary hearing conducted on 18th June, 2015. That there was no subsequent disciplinary hearing as earlier proposed in the minutes of 18th June, 2015.
3. The claimant further avers that at the time she was asked to leave employment, Jemima was not under any fixed term contract and that she had been allowed to work indefinitely. That in the alternative, Jemima's disciplinary hearing was ongoing and was yet to be concluded hence the respondent could not have relied on the same to terminate her employment.



4. It is on account of the foregoing that the claimant seeks on behalf of the grievant, the sum of Kshs 1,916,529.00 being one month's salary in lieu of notice, encashment of 14 leave days, underpaid salary for 20 months, compensation for loss of employment, salary and allowances for 8 months, gratuity benefits and leave allowance for 2014/2015.
5. The respondent has opposed the claim and avers that Jemima was on a fixed term contract with effect from 5th November 2014 up to 7th August, 2015. It avers that during her employment, she was not a member of the claimant union hence it lacks locus standi to bring the instant suit on her behalf.
6. It is also the respondent's case that Jemima was informed that her contract which was to lapse on 7th August, 2015, would not be renewed and consequently, upon effluxion of time, she was let go. That prior to this, Jemimah had been invited to attend a disciplinary hearing owing to poor performance. That she had difficulties meeting her targets and she was offered on the job training but little improvement was noted. That therefore, her contract terminated owing to effluxion of time hence cannot be considered as unfair termination. That her dues were tabulated but she declined to collect the same or clear with the respondent for reasons best known to her. Consequently, the respondent has asked the Court to dismiss the suit with costs.
7. The matter proceeded for hearing on diverse dates being 27th October, 2021, 4th November, 2021 and subsequently 7th July, 2022. At the trial, each side called one witness.

Claimant's Case

8. The grievant testified in support of her case. At the commencement of the hearing, she sought to adopt her Memorandum of Claim, witness statement and the documents filed on her behalf by the claimant, to constitute her evidence in chief.
9. It was her evidence that she was employed as a clerk and her duties included loan processing and bank office support for lending operations. That her position was a unionisable cadre and her consolidated salary was Kshs 36,000.00. That upon expiry of her contract on 30th June, 2015, she continued to work without a written contract and the respondent continued to pay her salaries for the months of July, 2015 upto 7th August, 2015.
10. That the respondent accused her of under performance and to this end, invited her for a disciplinary hearing on 18th June, 2015. That at the end of the hearing, the panel agreed to reconvene at a later date in order to clarify some areas of disconnect. That there was no such meeting as agreed by the panelists. That on 7th August, 2015, she received a letter dated 31st July, 2015 from the respondent, claiming that her contract will not be renewed when it expired on 7th August, 2015. That there was no such fixed term contract which was meant to expire on 7th August, 2015. That surprisingly, the reference of the letter was a disciplinary hearing which was never concluded.
11. She further stated in evidence, that during her employment with the respondent, she received recognition for good work.
12. That upon her termination, she reported the matter to the claimant union who subsequently reported a trade dispute to the Cabinet Secretary in charge of labour matters. That a conciliator was thereafter appointed and after several conciliation meetings, the parties agreed to disagree and a certificate was issued to that effect. That the certificate was accompanied by a report of the conciliation which agreed with the claimant that the grievant's termination was unfair. The grievant further stated that she was treated unfairly by the respondent since her termination from employment had no basis or any justifiable reasons.



Respondent's Case

13. The respondent called oral evidence through Ms. Lorraine Oyombe who testified as RW1. Ms. Oyombe identified herself as the respondent's Employee Relations Manager. She asked the Court to adopt the respondent's Memorandum of Response and documents to constitute her evidence in chief.
14. Ms. Oyombe testified that the respondent has a recognition agreement with the claimant union through the Kenya Bankers Association. That the grievant was not a member of the claimant union.
15. It was her testimony that the grievant was on a one year fixed term contract that was set to expire on 14th November, 2014. That she had other contracts which were renewed, all the way to 7th August, 2015. That Ms. Evelyne Abuya was the grievant's line manager. That the grievant had performance issues and she was given opportunities to improve and change how she was working. That she was even allowed an opportunity to explain herself.
16. She further testified that the grievant's core duties entailed working in the loans section and inputting data. That she was expected to do her work with minimal errors and with a turnaround time. That the disciplinary hearing of 18th June, 2015 was due to the fact that the grievant's performance had deteriorated. That she was given an option to be accompanied by a colleague and to appear with witnesses for the disciplinary hearing and was also allowed to make representations. That after the disciplinary hearing, the grievant was informed that her contract would not be extended upon lapse.
17. With regards to the recognition certificate awarded to the grievant, Ms. Oyombe told the Court that the same was in respect of her support during a sale campaign which was not within her core duties. It was Ms. Oyombe's further testimony that the matter proceeded for conciliation and the respondent did not agree with the conciliator's findings and the dispute remained unresolved.
18. She further told Court that the agreement between the claimant and the respondent with regards to employees on fixed term contracts was entered into after the grievant had left its employment. That the terms of the said agreement were not to apply retrospectively.
19. That the grievant's outstanding dues are Kshs 51,407.62 and she is yet to collect the same. Concluding her testimony, Ms. Oyombe told the Court that the grievant is not entitled to any other sums sought in the claim. She thus asked the Court to dismiss the claim with costs.

Submissions

20. It was the claimant's submission that from 1st July, 2015 to 7th August, 2015, there was no contract between the grievant and the respondent. That the contracts purportedly entered into during the said period were written by the respondent in anticipation of defending the suit. That by failing to renew the fixed term contract which expired on 30th June, 2015, the contract was deemed to have renewed itself as from 1st July, 2015. In support of its position, the claimant placed reliance on the case of [*Linda Ndenego Mwakugu vs Open Society Institute Company Limited*](#) (2020) eKLR.
21. In further submission, the claimant stated that the respondent has completely failed to answer the question whether the termination was due to poor performance or was termination of contract which had expired on effluxion of time. That after 30th June, 2015, the claimant's contract was deemed to have been renewed and the same was converted into a non-fixed term contract.
22. The claimant further argued that the grievant being a clerical staff, was clearly and lawfully unionisable employee hence privy to the terms and conditions of the Collective Bargaining Agreement (CBA). In



support of this argument, the claimant invited the court to consider the determination in the case of East Africa Portland cement Co. Ltd vs Kenya Chemical and Allied Workers Union (2017) eKLR.

23. On the other hand, the respondent submitted that the grievant was not a member of the claimant union at the material time hence lacks locus standi to purport to represent her. In support of this argument, the respondent cited the case of [KUDHEIHA Workers vs Board of Management Kibumbuini Secondary School](#) (2015) eKLR.
24. It was the respondent's further submission that come the 7th August, 2015, the grievant's contract effluxed once the fixed term contract had run its course. That the last two contracts beginning 1st July, 2015 to 7th August, 2015 were within the grievant's knowledge and her challenge of the same is an afterthought.
25. The respondent further urged that this was a case of effluxion of contract and not termination. That either party including the grievant was at liberty to terminate the contract. That the fact that the contract effluxed while the outcome of the disciplinary process was pending, does not negate the factors of effluxion of time. To buttress its argument, the respondent placed reliance on the case of [Katiwa Muthoka vs English Press Limited](#) (2019) eKLR. The respondent thus urged that the questions of unfair and unlawful termination does not arise.

Analysis and Determination

26. I have carefully considered the facts of the case, the evidence on record, the rival submissions and authorities cited by the parties and find the following issues falling for the Court's determination: -
 - i. Whether the claimant has locus standi to bring the instant suit on behalf of the grievant.
 - ii. Whether the grievant's exit from employment was due to effluxion of time or termination on account of poor performance.
 - iii. If terminated, was the grievant's termination unfair and unlawful?
 - iv. Is the grievant entitled to the reliefs sought?

Locus standi of the claimant union

27. The respondent raised the issue of locus standi in its response and submissions. Its contention is that the grievant was not a member of the claimant union at the material time. It is worth mentioning that the claimant neither addressed the issue by way of a reply nor in its submissions.
28. Notably, the claimant did not aver that the grievant was its member at the material time. Be that as it may, I do not find any issue with the claimant bringing the instant suit on behalf of the grievant. On this issue, I echo the determination of the Court in the case of Kenya [Shoe & Leather Workers Union vs Falcon Tanners Ltd](#) [2013] eKLR, where it was held that:

“Litigation in the Trade Unions own names, grants Trade Unions the opportunity to define, clarify and concretize Trade Union and Employee rights. Without the associational standing granted to the Trade Unions right from the early era of the Trade Disputes Act to the modern Constitutional era, labour law would be all the poorer. Employees have severe barriers to self advocacy. If the Court were to declare that Employees must bring termination claims in their individual names, this would expose disadvantaged Employees to orders for costs, barriers of a technical nature, and discourage Employees from pursuing remedies for workplace injustices. Allowing Trade Unions associational standing insulates



Employees against some of these realities of litigation. Associational standing also ensures that Trade Unions are able to enforce CBAs through Court intervention. Without the direct involvement of the Trade Unions in the litigation history of the Industrial Court, most of the developments in Kenyan Labour Law would not have been actualized. The new Constitution of Kenya has strongly endorsed the concept of associational standing, and in the view of this Court, it would be retrogressive to Industrial Relations, if the Court were to hold that Employees, who are Members of Trade Unions, or beneficiaries under CBAs concluded by Trade Unions, must now come to Court in their own names. The rights of disadvantaged individuals and groups in the society cannot adequately be protected and promoted, if only the real parties in interest are permitted to file and prosecute claims in their individual names.

29. Therefore, in following with the above determination, I find that the claimant union had all the right to move the Court on behalf of the grievant to enforce her rights. Holding otherwise would be tantamount to placing technical barriers thus locking her from accessing justice.
30. Further, it is notable that the claimant union initially reported a trade dispute with regards to the grievant's case and conciliatory proceedings ensued. The parties to the conciliatory proceedings were the claimant union and the respondent. Worthy of mention is the fact that the respondent did not at any time raise the issue of the claimant's locus standi. It gave the impression that it had no problem with the claimant standing in for the grievant. It is therefore not clear why the respondent would raise the issue of the claimant's locus at this point in time.
31. Over and above, the respondent does not stand to suffer prejudice with the claimant standing in for the grievant in the instant dispute.
32. Therefore, it is my finding that the claimant has locus standi to bring the suit on behalf of the grievant.

Effluxion of time or termination on account of poor performance?

33. It is common ground that the grievant was on a fixed term contract from, 15th November, 2013 upto 14th November, 2014; 18th November, 2014 upto 31st March, 2015; and thereafter from 1st April, 2015 upto 30th June, 2015. What is in dispute is whether the grievant was on a fixed term contract from 1st July, 2015 upto 7th August, 2015 when she left the respondent bank.
34. Whereas the respondent maintains that the grievant was still on a fixed term contract as at 7th August, 2015, the claimant holds otherwise and maintains that she was not on any fixed term contract and that she continued to serve the respondent from 1st July, 2015 to 7th August, 2015 without any written contract.
35. The respondent exhibited two contracts dated 29th June, 2015 and 31st July, 2015. The first contract provides the period as being from 1st July, 2015 upto 31st July, 2015 while the second contract indicates the period as being 1st August, 2015 upto 7th August, 2015. What is common to both contracts is that they have only been signed by the respondent's side and do not bear the grievant's signature. The contracts can thus be termed as one sided.
36. The respondent did not proffer any plausible explanation as to why the same were not signed by the grievant whereas the other contracts being for 15th November, 2013 to 14th November, 2014, 18th November, 2014 to 31st March, 2015 and 1st April, 2015 to 30th June, 2015, were signed by both parties. This leads me to conclude that the parties were not on the same page with regards to the last two contracts. In other words, there was no meeting of the minds with regards to the contracts dated 29th



June, 2015 and 31st July, 2015. Without the grievant's signature on the said contracts, it cannot be said that she was on a fixed term contract from 1st July, 2015 all the way upto 7th August, 2015.

37. That said, it is not in dispute that the grievant continued to work for the respondent for the period starting 1st July, 2015 upto 7th August, 2015 and was paid for the same. Therefore, she was still an employee of the respondent though not on a fixed term contract hence it follows that her contract of employment cannot be said to have been terminated by effluxion of time.
38. It is also not contested that the grievant had pending disciplinary proceedings on account of poor performance prior to her exit from the respondent's employment. Indeed, the disciplinary hearing took place on 18th June, 2015 which was during the pendency of her contract which had commenced on 1st April, 2015 and was to run upto 30th June, 2015. As stated herein, this contractual period which was fixed, was undisputed.
39. It is therefore odd that the respondent would commence disciplinary proceedings when the grievant's contract of employment was due to terminate on 30th June, 2015, which was 12 days away. If at all the respondent was not satisfied with the grievant's performance, it had the option to let the contract run its course upto 30th June, 2015. As it is, fixed term contracts carry no expectation of renewal. Hence why didn't the respondent exercise its right on or before 30th June, 2015? This is particularly noting that the grievant's performance issues went as far back as 2014.
40. In addition, the grievant's termination was effected through a letter dated 31st July, 2015 which made reference to the disciplinary hearing and the performance issues which had been raised against her. The said letter reads in part:

“Re: Disciplinary Hearing

Further to the disciplinary hearing held on 18th June, 2015, we wish to inform you that (sic) panel has established performance issues on your part in the following main areas:

High error rates
Low processing volumes
Poor turnaround times

It has also established that these matters had been brought to your attention on a number of occasions with no satisfactory improvements on your part.

In view of the above and in terms of your employment contract, we wish to inform you that the bank will not extend your contract when it lapses on 7th August, 2015....”

41. In light of the manner in which the grievant's letter of termination has been couched, one wonders why if at all her contract had ended by effluxion of time, why would the respondent refer to her disciplinary hearing and raise the issues of poor performance.
42. The foregoing issues when taken as a whole, leads me to conclude that at the end of the day, it is apparent that the respondent disengaged from the grievant on account of her alleged poor performance as opposed to effluxion of time.
43. Having found as much, this takes me to the next issue which is whether the grievant's termination from employment was fair and lawful.

Unfair and unlawful termination?

44. The entry point in determining this issue is section 43 as read together with sections 45 and 41 of the [Employment Act](#). Overall, for termination to be fair, an employer must satisfy two elements, the



first being substantive justification and second being, procedural fairness. I will start by considering substantive justification.

45. Under section 43(1) of the Act, the respondent was required to prove the reason or reasons for the termination, and in default thereof, such termination shall be deemed to have been unfair within the meaning of section 45. In terms of subsection (2), the reason or reasons for termination of a contract are the matters the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
46. In respect of section 45(2) (a) and (b) of the Act, it is considered unfair to terminate an employee's contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, compatibility or is based on its operational requirements.
47. As stated herein, the grievant's termination was on account of poor performance. The question thus, is whether there was justification for the same.
48. In support of its position, the respondent exhibited a trail of emails which relate to the grievant's performance. I will sample a few:

In an email of 3rd October, 2014, one Nyambwengi Erick wrote as follows to Evelyne Abuya, the grievant's line manager:

“Hi Eve,

Please assist the client has been following up Kisia NEVER responds”

In another email dated 30th January, 2015, the grievant's line manager, addressed her as follows:

“Hi Jemima,

As per our discussion today. Below are the matters we agreed on:

1. To improve on the error rates; your errors for the month were the highest. - Jemima to action
2. To Improve productivity in terms of number of applications processed currently your numbers are trailing-Jemima to action
3. To confirm if distribution of work is done equally or you are given less than the rest-Eve to action
4. To take more time on your desk working and avoid any unnecessary trips to other floors and departments to ensure more time is spent in your productivity-Jemima to action
5. To take more time in concentrating on your current role as much as you have other interests to ensure your current performance can propel you to where your interests lie-Jemima to action

Please confirm if I have captured the issues as discussed and let's work as agreed.

I will give feedback on number 3 on my return from leave on 4th Feb 2015.

Regards,

Evelyne Abuya”



In response, the grievant stated as follows through her email of 9th February, 2015:

“Hi Eve,

I confirm all the points raised below were discussed. However, I disagree on point two because it is not that I leave work pending. I process all applications that have been assigned to me unless work comes in very late and that I handle like the rest of the team. I process up to 5.30 p.m. that which I can and leave the rest for the next morning. The numbers being low I believe is mainly explained by number 3.

Regards”

In a further email of the same day, 9th February, 2015, the said Evelyne wrote as follows:

“Hi Jemima,

I am yet to get your acknowledgement of the email below. Please do.

Feedback on my action: I have confirmed that work was shared equally, then when FIFI and Doc review officer don't have work at their desks, they would pick applications for processing from those who are remaining with many, most of the times it happened to be you. This led to you having fewer applications than other staff. I have advised them to stop doing this to give you a chance to do your full application numbers. I will allocate them extra duties instead.

Regards”

In another email of 2nd February, 2015, one Njagi James wrote to the grievant and copied Evelyne Abuya as follows:

“Hi.

You never acted on the attached. Such delays will increase LC TAT unnecessarily.”

The said Njagi James further addressed Evelyne Abuya in an email of 2nd February, 2015 as follows:

“Subject: Work Distribution

Hi

I found out that she's not giving her best in terms of speed and commitment, Elizabeth shares equally then when Ruth and herself don't have work at their desks, they pick the applications for processing from those who are remaining with many, most of the times it happens to be Kisia causing her to remain with fewer than other staff.”

In yet another email dated 25th March, 2015, Evelyne Abuya addressed the grievant as follows:

“Hi Kisia

There are two issues I need you to look into:

1. Reporting to work late: we discussed this on Monday when you came in late. I need you to inform either James Njagi or I whenever you are running late. But always strive to be at work on time.



2. On Tuesday when you went for training and we had to redistribute your pending work, I noticed that you still had 2 applications from Friday pending data capture. This was beyond our TAT. Do you have any god reasons for the delay?

Regards”

Further, on 29th May, 2015, Njagi James raised issues relating to the grievant’s performance as follows:

“Subject: JK’s performance issues

Hi Eve,

As per our discussion the following are areas I found as requiring attention/improvement by Kisia.

Time management: she arrives late (normally after 8:30 am) then disappear, tentatively for breakfast upto between 9 & 9:30 am and sometimes 10 am. In the course of the day she may disappear without a word.

Related to time management is speed: she does personal activities that affects her speed of processing such that at the end of the day she holds more applications than the rest of the team members.

Work prioritisation: she was not arranging her applications by time received, such that I would get applications requiring data entry for 9 am later yet they are for the same date. On the same, on applications requiring data entry corrections, she would keep them below the rest and work on them as opposed to working on them soonest possible.

Regards”

49. In addition to the foregoing, the respondent exhibited what it termed as a summary of the errors for the period January to May, 2015. From that record, the grievant had the highest rate of errors.
50. What manifests from the foregoing is that the grievant had problems with regards to her performance from as far back as 2014 and her line manager had raised the issue with her.
51. Therefore, the respondent had justified reason to take disciplinary action against her on account of performance and her attendance to duty.
52. The grievant defended her performance as not wanting and to this end, exhibited a certificate of recognition awarded to her. I have considered the said piece of evidence and note that the same is in respect of “exceptional support during the grand sale campaign 2014”.
53. The respondent contends that the award was in respect of a sale campaign which was not within the grievant’s duty. As stated herein, the grievant testified that her duties entailed loan processing and bank office support for lending operations. From the evidence tendered before Court, data entry was also part of the grievant’s roles. Indeed, there was no mention of sales and the grievant did not state that her role covered sales. Therefore, if at all her performance was to be evaluated, the main parameters would be within her core duties. Granted, other factors may as well be considered, but the bulk of the evaluation would be centred on her core duties.
54. Therefore, the fact that she was given a certificate of recognition did not take away the fact that performance of her core duties was not meeting the respondent’s expectations.



55. It is therefore my finding that the respondent was justified in taking the grievant through a disciplinary process on account of poor performance.
56. The next issue for consideration is whether the respondent subjected the grievant to a fair process prior to exiting her from employment. Section 45(2) (c) of the Act requires an employer to prove that an employee's termination was in accordance with fair procedure. The specific requirements as to what constitutes fair procedure are to be found under section 41 of the Act. This requires an employer to notify the employee of the reasons for which it is considering terminating his employment and affording him or her the opportunity to defend himself in the presence of a fellow employee or a union representative of own choice.
57. From the record, the grievant was invited for a disciplinary hearing through a letter dated 12th June, 2015 and was allowed to be accompanied by a colleague and witnesses. She was notified through the same letter that the disciplinary hearing was to discuss her performance deterioration. On record, are minutes in respect of the said disciplinary hearing which the grievant was in attendance.
58. After the disciplinary hearing, the following actions were agreed upon:
- “Both EA (Evelyne Abuya) and JK (Jemima Kisia) to compile data and send by Monday 22nd June, 2015. Data should be volume processed errors, TAT delay, email proof of not working on instruction,s minutes of meetings and proof of distribution of work.
- PG(Patrick Gikonyo) to share data submitted from EA to JK and vice versa.
- PG clarified that JK is free to share the data with the witnesses.
- PG to schedule the next meeting for next week to proceed with the hearing.”
59. There is no evidence that a further meeting was scheduled to determine whether the agreed actions had been undertaken and a final resolution arrived at in regards to the grievant's continued employment.
60. It is therefore evident that the disciplinary proceedings did not terminate logically. They did not go full circle and ended mid-stream, as what followed was the grievant's termination referencing the disciplinary proceedings and her poor performance.
61. Noting the action areas identified, it would seem that feedback on the same is what would have informed the respondent's subsequent action against the grievant. At the end of the day, it cannot be determined that the process applied in terminating the grievant's employment was procedurally fair.
62. Accordingly, despite being justified to commence disciplinary action against the grievant on account of poor performance, the respondent did not apply the process in a fair manner.
63. Therefore, it is my considered finding that the grievant's termination was procedurally unfair and unlawful within the meaning of section 45 (2) (c) of the *Employment Act*.
64. Having found as such, what reliefs then avail the grievant?

Reliefs

65. Having found that the grievant's termination although with good reason, was procedurally unfair, I will award her four (4) month's gross salary as compensatory damages. This award has taken into consideration the length of the employment relationship.
66. With regards to the claim for salary underpayments, the same is declined. Here is why. The grievant has based her claim on the CBA entered into by the parties. The respondent contends that the grievant was



not a member of the claimant union hence could not draw benefit from any CBA negotiated between itself and the said Union. As a matter of fact, the grievant did not state or even suggest that she was a member of the claimant union.

67. Membership to a union can be evidenced through various means, for instance, the register of members, proof of deductions etc. In this case, no evidence of membership was availed before Court.
68. The question is whether in absence of membership to the claimant union, can the grievant benefit from the terms of the CBA?
69. On this score, I draw guidance from the case of *East Africa Portland Cement Co. Ltd vs Kenya Chemical & Allied Workers Union* [2017] eKLR, the Court of Appeal held as follows: -

“Payment of union dues is a condition for membership in a Union. As the CBA applies to members, it goes without saying that non-members of a Union cannot be beneficiaries of negotiations for wages and conditions of service negotiated for members of a Union. Section 48 of the *Labour Relations Act* deals with the issue of payment of union dues and membership in a trade union and it is implicit that terms negotiated by a Union on behalf its member’s benefit all members on whose behalf the Union has negotiated.”
70. As such, the provisions of a CBA are only enforceable by and against members of the union that is a signatory to the said CBA or where there is an order for payment of agency fees by non-members. Therefore, it is only logical that the grievant could only benefit from the terms stipulated under the CBA subject to proof of her membership to the union.
71. It will not be proper to confer the grievant automatic membership of the union on account of serving the respondent in the cadre of a clerical staff. It is trite that membership to a union is by choice and not by force or implied. Indeed, it is on the foregoing premise that Article 41(1) (c) of *the Constitution* grants every worker the right to form, join, participate in the activities and programmes of a trade union.
72. It is also instructive to note that the respondent exhibited an agreement entered into with the claimant union on 16th March, 2016. From the agreement, clerical staff on fixed term contracts were to enjoy the terms of the CBA. This included remittance of union dues for staff who had subscribed to the claimant union and agency fees for staff who had had not subscribed to the union but were enjoying the terms of the CBA.
73. It is notable that by the time the parties reached the agreement, the grievant had left the respondent’s employment hence she cannot draw the benefits therefrom. To this end, I agree with the respondent that the terms of the said agreement cannot be applied retrospectively.
74. I must add at this juncture that my finding on this issue would have been different had the grievant proved membership to the claimant union, the agreement notwithstanding. This would have meant that she was entitled to the terms of the CBA by virtue of her membership to the claimant union.
75. With regard to the claim for leave allowance, it is notable that the same was payable as part of the agreement of 16th March, 2016, which as I have found, was executed after the grievant had left the respondent’s employment. Therefore, there is no basis for the award.
76. The grievant has also claimed payment of her gratuity. However, the same was not specifically pleaded. Besides, the respondent appears to have factored gratuity in the tabulation of the grievant’s final dues. The grievant did not state whether it disagreed with the said figures and if so, to what extent? As such, the claim falls on that account.



77. Notwithstanding the foregoing, the grievant is entitled to the terminal dues as tabulated by the respondent, being notice pay, salary for the period worked leave days balance and gratuity balance.

Orders

78. In the end, Judgment is entered in favour of the claimant against the respondent and the grievant is awarded:

- a. Compensatory damages in the sum of Kshs 144,000.00 which sum is equivalent to 4 months of her gross salary.
- b. Interest on the amount in (a) at court rates from the date of Judgement until payment in full.
- c. The claimant shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

.....
STELLA RUTTO
JUDGE

Appearance:

For the Claimant Mr. Odera

For the Respondent Ms. Bonyo

Court Assistant Abdimalik Hussein

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

