



REPUBLIC OF KENYA



KENYA LAW
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**Nyanyuki & 71 others v Polysack Limited (Cause 1013 of 2017)
[2023] KEELRC 688 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 688 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1013 OF 2017
JK GAKERI, J
MARCH 16, 2023**

**BETWEEN
BERNARD NYAKINA NYANYUKI & 71 OTHERS CLAIMANT
AND
POLYSACK LIMITED RESPONDENT**

JUDGMENT

1. The Claimants initiated this claim by a Memorandum of Claim filed on May 31, 2017 claiming salary arrears.
2. The Claimants aver that they were employees of the Respondent as Machine Operators, general workers, mechanic and electricians having joined the Respondent on divers days and worked diligently for different periods until January 27, 2015 when the 2nd – 10th Claimants were retired and on September 24, 2015 when the 1st, 11th – 72nd Claimants were declared redundant and paid terminal dues excluding salary arrears as provided by the Collective Bargaining Agreement signed on July 11, 2016.
3. That when the 2nd – 10th Claimants were retired, on January 27, 2015, they were paid terminal dues excluding the arrears as per the CBA.
4. That the Respondent indicated that the salary arrears would be paid later.
5. That the salary arrears could not be paid due to the dispute between the Respondent and Kenya Chemical Workers Union in ELRC Cause No 2280 of 2014 and judgement was delivered on January 10, 2016 and the Claimants were awarded a salary increment of 10% for 3 years back dated to August 1, 2012.
6. The Claimants further aver that despite several meetings with union representatives over the arrears, the Respondent has refused or neglected to pay for 2 years after the Claimants were declared redundant.



7. That on March 31, 2017, the Respondent paid some employees their salary arrears leaving the Claimants herein.
8. That the Respondent and the union had agreed on the computations but payment was not forthcoming.
9. That the Respondent had indicated that it would close its business on June 1, 2017.
10. The Claimants aver that the Respondent's failure to pay them salary arrears was unlawful, illegal and unconstitutional.
11. That by holding separate meetings and entering into agreements with different sets of employees and paying some their salary arrears, amounted to discrimination.
12. Paragraph 16 of the Memorandum of Claim lists the amount due to individual Claimants.
13. The Claimants pray for;
 - i. A declaration that the Respondent's refusal to pay the Claimants salary arrears is unconstitutional and illegal.
 - ii. Payment of the salary arrears amounting to Kshs 2,465,968.22.
 - iii. Costs of this cause.
 - iv. Interest at court rates.
 - v. Any other relief which the court deem fit, just and expedient to grant.

Respondent's Case

14. The Respondent's response filed on August 3, 2017 consists of mere denials of the Claimants allegations without more.

Claimant's Evidence

15. The Claimants executed an undated letter of Authority authorising Mr Bernard Nyakina Nyanyuki to testify on their behalf. However, one Mr Wilson Busienei Kipsongok the 34th Claimant testified on behalf of the Claimants.
16. The Claimants witness statement rehashes the contents of the Memorandum of Claim and the witness rehashed the same in court with no cross-examination.
17. For unknown reasons, the Respondent did not participate in the proceedings.
18. When the parties appeared in court on November 30, 2021, counsels reported that the parties were negotiating an out of court settlement and prayed for a mention to confirm status of the negotiations and a mention was slated for February 1, 2022 on which date the Claimants counsel reported that the Respondent had planned to re-open the factory and had planned to re-employ some of the Claimants. Counsel prayed for a hearing date.
19. The Respondent's counsel confirmed the status and prayed for a mention date.
20. The court scheduled a hearing on June 30, 2022 on which date counsel for the Respondent was not ready as the Respondent had just resumed operations and prayed for time for the Respondent to develop a payment plan to settle the matter amicably.



21. Counsel for the Claimants who had been informed of the proposal was not agreeable as he perceived it as a time buying gimmick by the Respondent and requested the Respondent's counsel to file a witness statement.
22. The court granted the last adjournment and hearing was scheduled for December 13, 2022 and took place.
23. The Respondent's counsel did not attend the hearing.
24. At the conclusion of the hearing, the court gave the parties 14 days a piece to file and serve submissions. Only the Claimants counsel filed submissions dated January 30, 2023 as confirmed during a mention on January 31, 2023. A judgement date was given.

Claimants Submissions

25. According to the Claimants counsel, the issues for determination are;
 - i. Whether the Respondent's refusal to pay salary arrears in accordance with the CBA was lawful and fair.
 - ii. Whether the Claimants are entitled to the reliefs sought.
26. As regards refusal to pay salary arrears, counsel submitted that the Respondent had not disputed that the Claimants were its former employees and worked until January 2015 for the 2nd – 10th Claimants and September 2016 for the 1, 11 – 72 Claimants. That while the former group was retired, the latter was declared redundant.
27. Counsel submitted that the court entered judgement on January 19, 2016 in ELRCC No 2280 of 2014 between the Respondent and the union and registered a CBA in which the Claimants were awarded a 10% salary increment effective 2012.
28. On the reliefs sought, counsel submitted that the Respondent was bound to pay salary arrears of the Claimants and the refusal was in breach of Section 17 of the *Employment Act, 2007* which obligates an employer to pay employee salary.
29. Reliance was also made on the sentiments of Rika J in *Hezron Ziro V Three Ways Shipping Services Ltd* (2018) eKLR to buttress the Submission.
30. Finally, counsel submitted that the Respondent entered into an agreement with the unions but failed to honour its part or make payment as agreed after the CBA was registered. That although it had promised to do so during mediation, it did not.
31. It was submitted that the Claimants had proved their case for salary arrears on a balance of probabilities and the court was urged to enter judgement as prayed.
32. The Respondent did not file submissions notwithstanding service by the Claimants' counsel.

Determination

33. Having considered the pleadings, evidence on record and submissions by the Claimants counsel, the only issue for determination is whether the Claimants are entitled to the salary arrears claimed.



34. As regards the burden of proof in an undefended suit, the court is guided by the sentiments of Maureen Onyango J in *Humphrey Munyithia Mutemi V Soluxe International Group Hotels* (2020) eKLR as follows;
- “In the case of *Monica Karimi Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
35. Abuodha J expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR as follows;
- “The burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”
36. These decisions re-emphasize the requirements of the provisions of the *Evidence Act* whose effect is that he who alleges must prove the allegations.
37. Section 107 of the *Evidence Act* provides;
- “1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
38. Further, Section 109 provides;
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in any particular person.”
39. It is against the foregoing background that I now proceed to determine whether the Claimants are entitled to the salary prayed for.
40. Although the Respondent averred that the Claimants were not its employees, there is sufficient documentary evidence on record to disprove the averment.
41. Equally, the Respondent adduced no evidence in court.
42. Similarly, although it is unclear by what letter the 2nd to the 10th Claimants were retired, documentary records reveal that as early as January 19, 2015, the Kenya Chemical and Allied Workers Union (KCAWU) had written to the Respondent informing it that those who had been retired should benefit from the CBA and in particular salary arrears.
43. Subsequently, the Respondent notified the union that it was laying off 30 employees from March 2015 owing to the harsh business environment. This was followed by another letter dated September 8, 2015 on reduction of shifts from 3 to two (2) which occasioned the redundancy of 98 employees. A total of 72 redundancy letters were filed and one discharge voucher dated January 8, 2015 for Festus Wafula Murenga, the 7th Claimant.



44. Relatedly, the Respondent and the union entered into a settlement agreement dated March 31, 2017 where the Respondent undertook to clear all CBA arrears for the period 2012 – 2015 amounting to Kshs 4,337,258.86 due to 75 former employees. However, it is unclear whether the 75 employees were the Claimants whose employment relationship with the Respondent ended in 2015. The agreement makes reference to termination of employees on February 4, 2017.
45. CWI, Mr Wilson Busienei testified that the tabulations of the amounts due to the employees were done by the employer who had agreed to pay but did not.
46. Finally, in addition to the fact that the Claimants evidence remain uncontroverted coupled with the cogent documentary evidence of engagement between the Respondent and the union, the Respondent neither alleged nor adduced evidence to the effect that the Claimants were not members of the union or that the union had no mandate to represent them in the negotiations.
47. As regards entitlement to salary and allowances due to an employee, Section 17 of the [Employment Act, 2007](#) provides;
1. "Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya –
 - a. in cash;
 - b. into an account at a bank or building society designated by the employee;
 - c. by cheque, postal order or money order in favour of the employee; or
 - d. in the absence of an employee, to a person other than the employee if the person is duly authorised by the employee in writing to receive the wages on the employees behalf."
48. Section 17(10) of the [Employment Act](#) renders non-compliance with the provisions of Section 17(1)(2)(3)(4) and (5) a criminal offence for which the employer may be held liable to pay a fine not exceeding Kshs 100,000/=.
49. Finally, Section 18 of the Act sets out the circumstances in which wages or salaries are due to an employee.
- Sub-section 2 provides as follows;
- "Subject to Subsection (1) wages or salaries shall be deemed due
- a. ...
 - b. ...
 - c. In the case of an employee employed for a period exceeding one month at the end of each month or part thereof."



50. In *Bernard Nyakina Nyanyuki & 71 others V Polysack Ltd* (2019), Rika J. stated as follows;
- “Section 17 of the Employment Act, 2007 stipulates that an employer is bound to pay to the employee, the entire amount of salary earned by, or payable to the employee, when such salary is due for payment.”
51. It is common ground that the Kenya Chemical & Allied Workers Union sued the Respondent in ELRC Cause No 2280 of 2014 Kenya Chemical & Allied Workers Union V Polysack Ltd in which the court ordered the parties to sign a Collective Bargaining Agreement (CBA) with a 10% increment for 3 years and immediate compliance with the CBA to commence.
52. In furtherance of the court order, the parties negotiated and concluded a CBA on July 11, 2016 for the period August 1, 2012 to July 31, 2015.
53. Under clause 27 the CBA was effective from August 1, 2012, for 36 months and thereafter until amended by mutual agreement between the parties.
54. The salary increment under Clause 2 was as follows;
1. 10% effective August 1, 2012
 2. 10% effective August 1, 2013
 3. 10% effective August 1, 2014.
55. From the documentary evidence on record, it is clear that by the time the CBA was concluded, all the Claimants had left the Respondent’s employment. The CBA however, covered the duration of their employment effective August 1, 2012.
56. Although the court ordered immediate compliance with the terms of the CBA, the Respondent did not do so.
57. It is common ground that the Respondent has not denied owing the claimants the amount claimed individually and attempts to settle the matter out of court were on-going for some time as counsels reported to the court on November 30, 2021, partly because the Respondent closed shop.
58. The court accorded the parties sufficient time to negotiate and eventually the Respondent resumed business and indicated that it intended to re-employ some of the Claimants as it sought for more time to stabilize and the court obliged it.
59. The Respondent’s counsel did not attend the hearing notwithstanding the fact that the date was taken by consent as early as June 30, 2022.
60. Hearing took place on December 13, 2022.
61. The court accorded the Respondent 14 days to file its submissions but had not done so by February 13, 2023 when the court retired to prepare this judgement.
62. In the circumstances, the Claimants suit was unchallenged and based on the documentary evidence on record, the court is satisfied and finds that the Claimants have on a balance of probabilities demonstrated that they are entitled to the salary arrears in accordance with the CBA as agreed upon between the union and the Respondent.
63. In conclusion, judgement is entered for the Claimants against the Respondent for the sum of Kshs 2,465,968.22.



64. In light of the circumstance of the case, the Claimants are awarded 50% of the costs.

65 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023

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.

