



Musau & another v Microsoft East Africa Limited (Petition 223 of 2019 & 6 of 2020 (Consolidated)) [2023] KEELRC 578 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 578 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 223 OF 2019 & 6 OF 2020 (CONSOLIDATED)**

J RIKA, J

MARCH 10, 2023

BETWEEN

GLORIA MELI MUSAU 1ST PETITIONER

MOSES MWANGI 2ND PETITIONER

AND

MICROSOFT EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Petitioners filed their Petitions on 20th November 2019 and 17th January 2020 respectively.
2. The 1st Petitioner was employed by the Respondent on 1st April 2014 as a Senior Technical Accountant. She resigned on 4th September 2019.
3. The 2nd Petitioner was employed by the Respondent on 1st March 2016 as a Senior Technical Accounts Manager. He resigned on 30th August 2019.
4. The Petitions are founded on Affidavits filed by the Petitioners and various documents, which include the contracts of employment, executed between the Petitioners and the Respondent.
5. The dispute revolves around bonus payment, which was regulated by clause 7.1 of the Petitioners' respective contracts of employment.
6. The 1st Petitioner's contract dated 2nd February 2014, states under clause 7.1: -

“You will also be eligible for an annual performance incentive payment opportunity. The Commitment Based Incentive [CBI] can range from 0- 33.75 % of your eligible earnings during the review period. The CBI target opportunity is 15% of your eligible earnings. Your actual CBI can be higher or lower than the target and will be based on your performance against your commitment as evaluated during the performance review process. You must



satisfy all the eligibility requirements in order to receive a CBI payment. CBI payments are made annually in conjunction with the performance review. Your first eligibility for a CBI will be determined on your start date. Any subsequent incentive eligibility will occur according to the performance review timetable in place for Microsoft Employees at the time.

7. The 2nd Petitioner's contract clause 7.1 is worded slightly different. It reads: -

“You may be awarded a performance bonus on the basis of performance as evaluated and determined by the Company at its sole discretion during the performance review cycle. The bonus potential ranges between 0% and 16% of your remuneration during the review period. Your first bonus will be determined with reference to the Commencement Date. Full details of the Company's incentive plan applicable will be provided by your Manager. For the avoidance of doubt, there shall be no legal entitlement to the bonus, whether the performance targets have been met or not.”

8. The Petitioners' position is that they were entitled to bonus payment for the Financial Year 2019; bonus was not paid; they were discriminated against, in contravention of their right against discrimination guaranteed under Article 27 of Commitment Based Incentive , as 2 other Employees from Egypt and the Netherlands, who resigned from the Respondent around the same time as the Petitioners, were paid bonus for the Financial 2019; and the Petitioners suffered contractual breach, as well as violation of constitutional rights.

9. They pray for bonus payment of Kshs 2,869,773 and Kshs 1,551,840 respectively. They also pray for declaration that their right to equality and freedom from discrimination under Article 27 of the Constitution, has been violated by the Respondent; grant of general, exemplary and aggravated damages; damages for breach of contract; and any other suitable remedies.

10. In responding to the 1st Petitioner's demand for bonus, the Respondent explains that bonus was awarded on various eligibility requirements, that were not restricted to quota achievement. The 1st Petitioner had to satisfy all eligibility requirements. Employee performance was typically measured and evaluated on key individual commitments; contribution to the work of others; and results that build on the work and ideas of other team members. Performance was not oriented to comparison with peers. The 1st Petitioner resigned and left the Respondent, before the rewards discussions were completed and rewards snapshots were released through the internal portal on 13th September 2019. The Petitioner was advised that while she made efforts in the Financial Year 2019, she did not have the level of impact that was sufficient to warrant bonus payment.

11. The Response to the 2nd Petitioner is likewise that he resigned before the rewards discussions were complete and rewards snapshots released, through the Microsoft internal portal, on 13th September 2019. He was informed that there were delays in communicating the rewards outcome, because Mr. Wahid who oversaw the process had been transferred to another subsidiary and time zone. The Respondent apologized to the 2nd Petitioner for delay in communicating the outcome. He was advised like the 1st Petitioner that bonus was awarded based on various eligibility requirements, not only restricted to quota achievement. Key individual commitments; contribution to the work of others; and results that build on the work and ideas of other team members, were eligibility requirements. The 2nd Petitioner was advised that the outcome of evaluation confirmed he made his contributions, that were all appreciated by his Manager. He however did not have the level of impact that was sufficient to warrant bonus.



12. On allegation of discrimination, the Respondent holds that this is a generalized complaint and supposition that is not anchored on facts. The Petitioners are merely playing the race card, by alleging that their former colleagues, who were Egyptian and Dutch, who left at the same time as they did, were paid bonus. The Respondent considered individual merit, not race. The Petitioners did not attain the level of impact considered sufficient, to warrant bonus. The allegation of racial discrimination is absurd, and a sorry attempt to stir up emotions.
13. The Respondent urges the Court to find that the Petitioners are not entitled to bonus; they have not demonstrated the formula applied in coming up with the bonus amounts pleaded; they were not discriminated against; and are not entitled to any form of damages, compensation or declaratory orders.
14. Adopting their Pleadings, Affidavits and Documents on record, the Parties agreed to argue the Petitions through Witten Submissions, which were confirmed to have been filed and exchanged, at the last mention before the Court, on 25th October 2022. The Submissions mainly rehash the contents of the Pleadings and Affidavits on record.
15. The issues are, whether the Petitioners were discriminated against; whether they were eligible for bonus payment; and whether they merit the prayers sought.

The Court Finds: -

16. It is not disputed that the Petitioners were employed by the Respondent, for the number of years pleaded in their Petitions, and in the positions of Senior Technical Accountant, and Senior Technical Accounts Manager respectively. It is common ground that they resigned.
17. Discrimination: The Petitioners allege that they were discriminated against, because their Egyptian and Dutch former colleagues, who left employment around the same time with the Petitioners, were paid bonus.
18. There is no proof of discrimination. The Petitioners were not able to present evidence of bonus paid to their colleagues, or show that they were themselves denied bonus on account of race. The claim concerning race appears to have been aimed at stirring up emotions, and inciting the mind of the Court. Bonus payment was pegged on certain eligibility requirements, which had nothing to do with the colour of the Employee's skin. The Petitioners did not show that their Egyptian and Dutch colleagues, did not meet the eligibility requirements, or that they were paid bonus on account of their race, while the Petitioners met eligibility requirements, but were denied bonus on account of their race.
19. To prove discrimination, the Petitioners ought to have provided the Court with employment records of their comparators. They did not avail to the Court, details of what work their Egyptian and Dutch colleagues did; who supervised them; how they were evaluated and rated; and whether they had similar contracts with the Petitioners, with similar rules on bonus payment.
20. Bonus payment as seen in clauses 7.1 of the Petitioners' contracts, was not uniformly paid, across the board at the workplace. It was individualized, and governed by contracts between the Respondent, and Individual Employees. It was a matter of contract, rather than workplace policy. The Petitioners did not hold contracts with the same terms and conditions of employment. They did not exhibit the contracts of their comparators, and show that they were similarly crafted, but selectively implemented. Different treatment, in the circumstances, could be attributable to different set of terms and conditions of employment. Such treatment would not amount to discrimination at the workplace.



21. The Court is not persuaded that evidence has been led by the Petitioners, sufficient to establish discrimination at the workplace, under Section 5[3] of the Employment Act, and Article 27 of the Constitution.
22. Consequently, the Court declines the prayer for declaratory order, that the Petitioners' right to equality and freedom from discrimination under Article 27 of the Constitution has been violated by the Respondent. Award of Damages under Article 23[3] of the Constitution, is not merited.
23. Bonus: The Petitioners' bonus clauses as suggested above, were pointedly different in some aspects. The 1st Petitioner's contract stated

“you will be eligible for an annual performance payment opportunity.” The 2nd Petitioner's stated, “you may be awarded a performance bonus on the basis of performance as evaluated and determined by the Company at its sole discretion, during the performance review cycle.”
24. Although 'will' and 'may' are both modal verbs, used in making offers, they are different, in that 'will' talks about the future, while 'may' talks about possibilities. In the 1st Petitioner's contract, the offer for bonus was more definitive, while in the 2nd Petitioner's, the offer remained in the realm of possibilities.
25. The 2nd Petitioner's contract includes a problematic clause, that “For avoidance of doubt, there shall be no legal entitlement to the bonus, whether the net performance targets have been met, or not.”
26. This disavowal clause is not contained in the 1st Petitioner's contract.
27. Both contracts use conditional verbs, 'will' and 'may.' Conditional verbs are employed to show that the occurrence of an event, depends on another event or action, to happen. Simply stated, bonus payment depended on a series of conditions, which the Petitioners were required to meet, before bonus could be paid.
28. It is those conditions that the Respondent argues the Petitioners did not meet, while the Petitioners submit that they met the conditions, to justify their claims for bonus payment.
29. The Respondent explained that eligibility was not restricted to quota achievements; it extended to key individual commitments; contribution to work of others; and results that build on the work of others and ideas of other team members. Performance approach was not oriented to a comparison with other team members.
30. The Petitioners explain that they met, and even exceeded the conditions. The 2nd Petitioner submits that he closed the premier contract with Equity Bank at USD 83,000; he supported the growth of azure product at Equity Bank through trainings of technical teams, planning workshops, resulting in growth of consumption at 466%; he extended trainings to Equity Bank in Kigali Rwanda, resulting in the product's growth at 233%; he worked with the Accounts' team in Kigali, leading to signing of a 3-year agreement between the Respondent and Equity Bank; he assisted in closure of a deal between the Respondent and the Ministry of Education of Rwanda; and played a major role in driving the modern workspace seats.
31. Other achievements listed by the 2nd Petitioner, include working closely with the Government of Rwanda on Licences, Premier and Consulting Services; work with 4-Africa team leveraging on drive Office 365 at University of Rwanda, heralding online communication between the University Students and their Lecturers; through discussions with colleagues, John Mugendi of Kenya and Karen Kocher of the Global GM Education, leveraging on their knowledge, expert and advice, successfully completing



- 9 modules in the Respondent's Data Science Program; and before disconnection of the azure service by the Government of Kenya, the 2nd Petitioner had driven consumption to 100%.
32. The 1st Petitioner submits that she had received several customer testimonials who lauded her for her work and service. She had impact on her colleagues, bringing in a majority of the new seats for Office 365 in 2019. She championed Infrastructure Total Cost of Ownership exercise for Kenya Commercial Bank on behalf of the Respondent's consulting team; she worked with the Respondent's Account team, in planning and executing 4-Key Marketing Buzz Events; she planned and aided in the execution of the Respondent's Executive Centre; she hosted Customers to the Respondent's Data Centre; and, she was involved in the launch of Women In Software Engineering [WISE], which saw lady students from Strathmore University, gain virtual and in-person coaching, on emerging technologies.
33. The 1st Petitioner had been garlanded by the Respondent with the champion award for 2018, given for her extraordinary contribution to Respondent's objectives; and was granted monetary awards for her performance in February, May, August, November 2018, and for May 2019 and August 2019.
34. The 2nd Petitioner similarly states that he was awarded special recognition by the Respondent for driving cloud revenue by over 80%; and was recognized in the Respondent's Company as Customer and Partners Experience Hero [CPE] in the Middle East and Africa [MEA] region in the month of May 2017. [The Court notes the dispute relates to Financial Year 2019, and this award may not be relevant].
35. Both Petitioners were paid bonus for the previous Financial Years. The 1st Petitioner was paid bonus for the Financial Year 2018 at 10%, on a quota achievement of 87.52%, while her Financial Year 2019 quota achievement was 104%.
36. In the view of the Court, and going by the evidence availed by the Petitioners above, the Petitioners seem to have satisfied the requirements for bonus payment, and there is no sufficient reason shown by the Respondent, why bonus for the Financial Year 2019 was not paid to the Petitioners.
37. The reasons gleaned from the record, include that the Petitioners left employment before the rewards discussions were completed, and rewards snapshots released through the Microsoft Internal portal. It was also explained that Mr. Wahid who was responsible for bonus clause implementation, had left the Respondent's local offices, and was in a different role, in a different subsidiary, in a different time zone, and there would be challenges in discussing bonus payable to the Petitioners.
38. The Respondent was being evasive, in these explanations. The Petitioners had worked for the Financial Year 2019, and if bonus had accrued by the time they left, it could not be clawed back, simply by the fact that they had left before discussions surrounding it, had been concluded. The departure of Mr. Wahid could not be a challenge, because there must have been a relevant Manager who took over his docket, with the mandate to engage the Petitioners fully, on all separation claims. The resignation of the Petitioners did not prohibit further discussions on their entitlement to bonus. This position by the Respondent was evasive.
39. Although the contracts gave discretion to the Respondent on payment of bonus, this discretion was subject to the clause relating to performance parameters. The Respondent gave to the Petitioners conditions, which in the view of the Court, were satisfied, leaving the Respondent with no discretion whether or not to pay bonus.
40. Bonus had been paid unfailingly to the Petitioners in the past Financial Years, upon their satisfaction of the requirements given in their respective contracts. The Respondent did not explain what was the difference between the Petitioners' performance in the past Financial Years when they received bonus, and the Financial Year 2019, when they resigned. Were they denied bonus because they resigned?



41. Bonus payment is not entirely at the discretion of the Employer. A lot depends on the wording of the contract, and principally if there are conditions in the contract, for payment of bonus. If the conditions have been met, there is no justification is withholding bonus payment.
42. It is acknowledged that there exists in the labour market, discretionary bonus and nondiscretionary bonus.
43. Discretionary bonus is one given at the sole discretion of the Employer. It is paid on case-by-case basis by the Employer, according to the Employer's judgment. It is discretionary if the Employer has not set the expectation of bonus payment. The amounts and timing of discretionary bonus are not known in advance. The Respondent paid Petitioners bonus, in all previous financial years. They expected payment, subject to satisfaction of set standards, in the Financial Year 2019. The contracts included the timing and percentages of bonus payment.
44. Nondiscretionary bonus is a standing offer. The bonus clause in the Petitioners' contracts gave the Petitioners standing offers. Nondiscretionary bonus clause designates specific conditions to be met, and specific formula to be adopted in bonus payment. This type of bonus is based on completion of predetermined conditions. These elements can be read in the Petitioners' contracts.
45. Employment law distinguishes legal rights and contractual rights. There is frequently an overlap, but the two sets of employment rights, are distinguishable. Legal rights comprise minimum standards, established under the *Employment Act* and other Legislative Instruments such as the Wage Orders. These rights cannot be abrogated or negotiated down; they can only be enhanced through contracting or legislation.
46. Bonuses are not statutory benefits. Legal benefits cannot be taken away, even in the absence of a contract. Bonuses are entirely contractual. They are created and regulated through contracts, not through statute. The bonus clause in the 2nd Petitioner's contract, stated that there was no legal entitlement to bonus, whether net performance targets had been met or not. The Court does not think that this clause would have the effect of denying the 2nd Petitioner bonus payment, which was a contractual, rather than a legal entitlement. It would be absurd to grant a contractual benefit, and at the same time, make the benefit inaccessible to the Employee, whether or not he has satisfied the conditions upon which it was made accessible. The 2nd Petitioner was not legally entitled to bonus; he was contractually entitled to bonus.
47. The Court is persuaded that bonus is payable to the Petitioners. They have not however, established the formula they adopted, in arriving at the amounts of Kshs 2,869,773 and Kshs 1,551,840 respectively. The 1st Petitioner's contract adopted a percentage of 0- 33.75% of her eligible earnings during the review period. The 2nd Petitioner's contract adopted 0-16%. The 1st Petitioner was paid at the rate of 10% in the last Financial Year, against a quota achievement of 87.52%. Her quota achievement for Financial Year 2019, subject of this dispute, exceeded the last quota impressively, at 104%. The 2nd Petitioner did not clearly state what percentage was adopted in the last Financial Year, against what quota achievement. The Respondent submitted that there were other parameters, above quota achievements, which the Court has concluded, were met by the Petitioners. In the end the Court still does not have evidence to conclude the amounts pleaded by the Petitioners as bonus for Financial Year 2019, are the correct amounts, which would have been paid to them.
48. The gap appears to have been created by their resignation before consultations on bonus payment were complete, and perhaps by the departure of the responsible Manager, Mr. Wahid. This gap can be sealed, by the Parties resuming their discussions on the amount of bonus payment due to the Petitioners. The Court does not have doubt that bonus is merited, and had accrued, by the time the Petitioners left



employment. Parties should be accorded an opportunity to discuss the amounts due, relying on the evidence before the Court, and on evidence they may have omitted from the proceedings, subsequently accessible to them. It is noted that the 1st Petitioner sought to introduce fresh evidence of her good performance, through a belated Application, presented and declined by the Court yesterday, 9th March 2023.

49. Lastly, the prayer for contractual damages is declined. The purpose of an award of damages, for breach of contract is to compensate the injured party. Damages are meant to place the Claimant in the same position he would have been, had the contract been performed. The Court has endeavoured to place the Petitioners in the same place they would have been, had the Respondent honoured clause 7.1 of the Petitioners' contracts. Award of damages would amount to double compensation, for the same economic injury.

It is ordered: -

- a. The claims for compensation and/or damages for discrimination at the workplace, are declined.
- b. It is declared that the Petitioners are entitled to bonus payment for the Financial Year 2019.
- c. Parties shall discuss and agree on percentages to be adopted in bonus payment, for the Financial Year 2019 within the next 30 days.
- d. In event of disagreement, the Petitioners to be paid at the percentages paid, in the Financial Year 2018, based on their exit earnings, in final and full settlement of the Petitions.
- e. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH DAY OF MARCH 2023.

JAMES RIKA

JUDGE

