



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospitals
Workers v Board of Management Igwamiti Secondary School (Cause
E041 of 2022) [2023] KEELRC 1274 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E041 OF 2022
ON MAKAU, J
MAY 26, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITALS WORKERS CLAIMANT**

AND

**BOARD OF MANAGEMENT IGWAMITI SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

1. The Claimant is a registered trade union and it brings this suit on behalf of its members, Daniel Gakuo, Margaret Wanjiku Wambugu, Dorcas Njeri Muthiani and Richard wanyama Masibo (hereinafter called the grievants). The Claimant avers that the grievants were employed by the Respondent in various capacities until December 31, 2020 when they all retired on account of age. Upon retirement, they sought payment of benefits under the CBA of 1986 but they were told that their only retirement benefits was NSSF contributions. Efforts to resolve the dispute through conciliation failed and the claimant brought this suit seeking the following reliefs:
 - a) Underpaid salary and house allowance
 - b) Service gratuity
 - c) Unpaid two months' salary in lieu of notice
 - d) One month special terminal leave
 - e) Interest on the above
 - f) Compensation for denial of grievants legal rights.



2. The respondent denied liability to pay the above claims and averred that it paid the claimants all their salaries and allowances until their retirement. Further, that the grievants were given sufficient notice before retirement and the claims sought are baseless. It also averred that the grievants were not members of the claimant until retirement and therefore they joined the union for the purpose of filing this suit. Finally it prayed for the suit to be dismissed with costs.
3. The suit was heard on February 15, 2023 when one grievant testified in support of the suit while the respondent's Deputy Principal testified to oppose the suit. Thereafter both parties filed written submissions.

Evidence

4. Dorcas Njeri Muthiani (Cw1) relied on her written statement dated September 21, 2022 and a bundle of 18 documents filed by the claimant. In brief she stated that he was employed by the Respondent on February 5, 2004 as Cook earning kshs 2500 per month. The employer started remitting NSSF and NHIF for her in 2009. She joined the claimant trade union on May 3, 2019 and on December 31, 2020 she was retired on account of age. As at then her salary had been increased to Kshs 8000. The retirement was preceded by a notice of one month. They were not expecting the said retirement and they were even more shocked when the principal told them that they were not entitled to any service gratuities and directed them to the NSSF for their retirement benefits.
5. On cross examination, she stated that her correct salary was over kshs 10,000 per month as at the time of her retirement. She admitted that all her NSSF contributions were remitted to the Agency. She further admitted that the issue referred for conciliation was terminal benefits. She contended that whenever she requested for salary increment the principal said the school had no money to do so.
6. In order to avoid repetition and also save on time, the written statements by the three other grievants were adopted as evidence for the claimant and it closed its case.
7. Mr Boniface Ngari Kariuki, the Deputy Principal Igwamiti Secondary School testified for the respondent as RW1. In brief he admitted that the grievants were formerly employed by the respondent and as at the time of retirement the grievants had been paid all their salaries. Upon retirement, they were not paid any service gratuities but they were directed to the NSSF to claim their benefits because the school had fully remitted all their contribution there. Therefore, he urged the court to dismiss the suit with costs.
8. On cross examination he confirmed that the Principal never brought the issue of the grievants' terminal benefits to the respondent. He admitted that Clause 31 of the CBA between the claimant and the Ministry of Education provides for payment of service gratuity at the rate of one twelfth (1/12) for each completed month of service. He further admitted that Clause 20 of the Circular from the Ministry of Education dated June 27, 1996 provides for payment of service gratuity at the rate of one month salary for each completed year of service, before the employee leaves service. However, he maintained that the only benefit to the grievants was NSSF contributions and contended that the claimant misled the grievants by filing this suit since it had no CBA with school.
9. Rw1 further stated that the grievants were given sufficient written notice of one month before the retirement. He admitted that they were not given three months' notice under clause 6 of the CBA which provided for a three months termination notice to employees who had served for over years like the grievants. However, he contended that the notice served herein was not for termination but retirement.



10. He contended that each grievant was given appointment letter but admitted that the Ministry guides BOMs on the salaries to be paid. Such guidelines include the Regulations made under the [Basic Education Act](#) 2015 which requires that the salaries paid to the BOM staff ought to be the same as in comparable positions in the Public Service Commission (PSC).

Submissions

11. The Claimant submitted from the onset that the grievants are entitled to the reliefs sought and that the respondent was not correct in its allegation that it faithfully remitted NSSF contributions for the grievants. It was pointed out that the remittances in NSSF statements produced do not match with the dates of appointment in the letters produced by the respondent. Further, it was submitted that the alleged section 35(6) of the [Employment Act](#) excludes NSSF members from gratuity is not correct because by dint of section 26(1) of the [Act](#), the provisions of the Act are only the bear minimum and the parties are free to negotiate more favourable terms and conditions of service.
12. Accordingly, it was submitted that there is a binding CBA between the claimant and the Ministry of Education and a Circular from the Ministry dated June 27, 1996 to all secondary schools providing for better terms than the [Employment Act](#). Clause 31 of the CBA and Clause 20 of the said Circular from the ministry provided for payment of service gratuity to staff who had served for five years and had attained mandatory retirement age. It was argued that the CBA and the Circular are still applicable today and they remain valid and binding on the parties. It was submitted that the grievants were members of the claimant paying their subscriptions directly.
13. As regards salary in lieu of notice, it was submitted that Clause 6 a (ii) of the CBA provided for notice of three months' notice to employees who had served for over five years. The same notice period was provided for in clause 4 a (ii) of the said Circular from the ministry. In this case the grievants were given only one month notice and they now claim for salary for the remaining two months. Reliance was placed on cause no 114 of 2009 *Stephen Murimi Mbuchi v Board of Governors Mumbi Secondary School* (UR) where the defunct Industrial Court upheld clause 6(ii) of the said CBA.
14. As regards the claim for special terminal leave, reliance was placed on clause 11 of the said CBA which provided for a 30 days special terminal leave before retirement. Therefore the court was urged to award one month salary for the special terminal leave not granted.
15. It was further submitted that clause 19 of the Legal Notice No 39 of 2015, provides that BOM employee be paid the same salaries with employees of the PSC possessing comparable qualifications. It was argued that the PSC schemes of service provided that all support staff be enrolled in job Group A but those with KCE Division iv or KCSE grade D plain be enrolled in Job Group D.
16. Accordingly, it was further argued that Dorcas Njeri Muthiani and Margaret Wanjiku were supposed to be in Job Group D earning kshs 14,610 basic salary while the other two grievants were supposed to be in Job Group A earning a basic salary of kshs 13,280. However, the grievants were receiving very low salaries compared to what was provided by the said Regulations and the respondent maintained a hardline position that it had no money pay higher salaries.
17. Finally, it was submitted that the grievants were entitled to Certificate of Service by dint of section 51 of the [Employment Act](#).
18. The respondent, on the other hand maintained that the grievants are not entitled to the reliefs sought and further that the said CBA and the Circular of 1996 do not apply to this case. It was submitted that section 35(6) of the [Employment Act](#) disqualifies an employee who is member of a registered pension scheme or the NSSF or gratuity or service pay scheme established under a CBA from claiming service



pay. Therefore it was submitted that the grievants being registered members of the NSSF they were disqualified from payment of service gratuity. For emphasis, reliance was placed on the case of *Kennedy Nyangucha omanga v Bob Morgan Services Limited* [2013] eKLR.

19. As regards the claim for underpayment it was submitted that the relationship between employer and employee is governed by the contract of employment and the *Employment Act*. Further that, under section 59 (p) of the *Basic Education Act*, the BOM has the sole mandate to negotiate its own terms for engaging its staff. It was clarified that the decision in the case of *Dadson Maina & 33 others v BOM Nyeri Primary School* cited by the claimant was overturned on appeal by a judgment delivered on October 8, 2021 where the court held that under Regulation 19 of the Basic Education Regulations, the BOM has the sole mandate of appointing and determining the terms and conditions of service for its semi-professional and subordinate staff.
20. Accordingly it was submitted that the claimant has failed to prove a case on underpayment and the balance of two months' salary in lieu of notice. Therefore the court was urged to dismiss the suit with costs.

Analysis and Determinations.

21. I have considered the pleadings, evidence and submissions presented by both sides. There is no dispute that the grievants are former employees of the respondent having retired from service on December 31, 2020 on account of age. The issues for determination are:-
 - a) Whether the CBA between the claimant and the Ministry of Education signed on 18th March 1986 and the Guidelines on Personnel in government maintained/assisted secondary schools dated June 27, 1996 (hereinafter referred to as Guidelines) are applicable to this case.
 - b) Whether the claimant is entitled to the reliefs sought.

Application of the 1986 CBA and the 1996 Guidelines

22. The claimant contends that the aforesaid CBA and the Guidelines apply to this case but the respondent is in denial. He who alleges is obliged to prove and therefore the claimant herein has the burden of proving that the said CBA and the Guidelines apply to this case. However, the record shows that the claimant has not tendered any documentary evidence to prove that the CBA and the Guidelines apply to this case. On the other hand the respondent has produced the appointment letters for each grievant and none of them refers to the CBA or the said Guidelines as forming part of their employment contract.
23. Besides, it has been admitted in evidence that the grievants were not members of the claimant union until a few years before the retirement. They were therefore strangers to the said CBA and Guidelines all through until the claimant came knocking. Consequently the presence of the claimant cannot apply the CBA to the grievants retrospectively. The CBA of 1986 between the Ministry of Education and Kudheihia only applies to the members of the union who were in employment when the CBA was concluded and those whose employers have accepted to apply the same to the employees recruited by the school Boards after the transition from civil service. The said CBA was therefore not immortal and applying automatically to all employees recruited by school Boards.



24. The foregoing view is fortified by the provisions of Regulation 17, 18 and 19 of the Basic Education regulations, 2015 which states that: -

“ 17. Every Board of Management shall, pursuant to section 59(p) of the Act, recruit, employ, remunerate, promote, demote or terminate the services of any of its employees.

18. Persons belonging to professional cadre and employed by the Board of Management shall be employed on such terms and conditions of service similar to those recommended for the equivalent posts in the Civil Service and as per applicable schemes of service.

19. The Board of management may appoint suitable semi-professional and subordinate staff, on such terms and conditions as shall be determined by the Board.”

25. I gather more support from the Court of Appeal decision in the Board of Management Nyeri Primary School v Danson Maina & 33 others [2021] KECA 63 (KLR) where the court held that: -

“Indeed, it is the Appellant that was mandated to determine the terms of service for the respondents and not the public service commission or the State Department for Public Service from whom the two Circulars emanated.”

26. Flowing from the foregoing provision and Court of Appeal decision, it is clear that the terms of service applicable to the grievants were those determined by the respondent. Therefore the CBA concluded in 1986 between the Ministry of Education and the Kudheihia, and Guidelines of 1996 or any other given administratively thereafter by the government did not and do not apply to grievants herein or any other employees appointed by school boards who are not professional teachers or researchers. This, however, is without prejudice to the minimum terms and conditions of service set out by the Employment Act and the Wage Guidelines gazetted under the Labour Institutions Act from time to time.

27. Evidently the only cadre of employees of the Boards that benefit from terms of service fixed by Guidelines and Circulars administrative given by the government are the professionals. All the grievants in this case were not professionals but subordinate staff and therefore their terms and conditions of service were those determined by the respondent as the claimant has not proved that it had a recognition agreement with the respondent and that they had together concluded a CBA with superior terms than the ones contained in the appointment letter, Employment Act and the General Wage Orders.

Reliefs

28. All the reliefs sought by the claimant are all grounded on the CBA of 1986 and the Guidelines of 1996. I have already made a finding of fact that the said CBA and the Guidelines are not applicable to this suit. Consequently I hold that the grievants are not entitled to the reliefs sought and the suit stands dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF MAY, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

