University of Nairobi v Alusa (Employment and Labour Relations Appeal E161 of 2021) [2023] KEELRC 1592 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1592 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E161 OF 2021

SC RUTTO, J

JUNE 30, 2023

BETWEEN

UNIVERSITY OF NAIROBI ..... APPELLANT

AND

FLORENCE K. ALUSA ..... RESPONDENT

(Being an appeal against the Judgement and Decree of Hon. D.M Kivuti delivered in Milimani Commercial Courts, CMEL No. 1442 of 2019 on 10.09.21)

JUDGMENT

1. The respondent commenced the suit through a Statement of Claim filed on August 20, 2019, at the Chief Magistrates Court at Milimani being CMEL No 1442 of 2019, in which she averred that she was employed by the appellant with effect from September 1, 1987 and on or about August 23, 2016, she was promoted to grade AB, hence was automatically entitled to payment of gratuity for the period 1987-August 23, 2016 as per the Collective Bargaining Agreement in place. She further averred that the respondent wrongfully and unilaterally went ahead to work out her gratuity pay using 28 days for each year worked to Kshs 504,423/= as gratuity pay which amount was below her entitlements as per the Collective Bargaining Agreement in force which provided for 31% of yearly basic pay. On this account, the respondent sought against the appellant the sum of Kshs 2,052,117.24 being the amount due to her in respect of unpaid gratuity.

2. The claim was opposed with the appellant stating that the Collective Bargaining Agreement it entered with three staff unions being UASU, KUSU and KUDHEIHA provided the effective date as July 1, 2015. The appellant contended that computation of gratuity cannot be retrospectively calculated as it would be prejudiced. It further termed the respondent's computation of gratuity as a stark departure from the terms of the Collective Bargaining Agreement. It contended that the respondent was paid all her dues for the years worked. Consequently, the Court was asked to strike out and/or dismiss the suit with costs.

3. At the trial Court, the matter was canvased through oral evidence, production of exhibits and written submissions. Upon evaluating and analyzing the record, the trial Court entered Judgment in favour of the respondent against the appellant as prayed.

The Appeal

4. Being aggrieved by the Judgment of the trial Court, the appellant instituted the instant Appeal through which it raises the following eight grounds: -

    a. That the Learned Trial Magistrate misdirected himself and erred both in fact and in law by holding that the Appellant applied an erroneous formula in computing gratuity contrary to the parties' agreement.

    b. That the Learned Trial Magistrate misdirected himself and erred both in fact and in law by interpreting that the collective bargaining agreement between the Appellant and the Respondent provided for 31% of yearly back pay.

    c. That the Learned Trial Magistrate misdirected himself in failing to consider the Memorandum of Understanding dated October 16, 2018 and internal Memo dated April 5, 2019.

    d. That the Learned Trial Magistrate misdirected himself and erred both in fact and in law by interpreting that the Internal Memo excludes the Respondent from the gratuity claim.

    e. That the Learned Trial Magistrate misdirected himself and erred both in fact and n law by totally ignoring the Appellant's submissions and authorities cited and provided.

    f. That the Learned Trial Magistrate misdirected himself and erred both in fact and in law by failing to uphold precedent and Doctrine of Stare decisis.

    g. That, the impugned judgment contravenes and contradicts established case law.

    h. That, the tenor of the judgment discloses a corrupt judgment.

5. Pursuant to the Court's directions of October 4, 2022, the Appeal was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

The Submissions

6. It was the appellant's submission that the gratuity is only payable where it is contractually provided for. Citing the case of the *Board of Management Ngararia Girls Secondary School vs KUDHEIHA Workers (2017) eKLR*, the appellant submitted that the subsequent Memorandum of Understanding was binding on the parties as the rest of the CBA. It was the appellant's further submission that the mosaic documents to be considered are not only the CBA but also the Memorandum of Understanding on Clause 40 and the Internal Memo which collectively become a right under the respondent's contract of employment. In this regard, the appellant cited the case of *Benta Achieng Odinyo vs University of Nairobi (2021) eKLR*.

7. The appellant further submitted that the CBA and more particularly the provisions of Clause 40 were to operate from the effective date being July 1, 2015 and not retrospectively. That to apply the provisions in retrospect would amount to this court creating a debt where non existed in contract and law and/or rewriting the contract between the parties. In support of this position, the case of *Teachers Service Commission vs Kenya National Union of Teachers and 3 others (2015) eKLR* and *Mukirira Farmers Cooperative Society Ltd vs Jacob Rukaria & 5 others (2017) eKLR* were cited.

8. On the part of the respondent, it was submitted that at the time of her promotion, the CBA for 2013-2017 was in force and had been agreed upon by both the Union and the University. It was further submitted that unless it can be shown that the CBA is in conflict with the *Labour Relations Act* or that it does not comply with the guidelines concerning wages, salary and other employment parameters as issued by the Minister, it remains in force and is incorporated to the individual employee's contract as of right.

9. It was further submitted on behalf of the respondent that applying a rate of 28 days founded on a non existent CBA (older CBA) was an illegality. The respondent further submitted that it is highly prejudicial that an employer can be allowed to calculate gratuity pay using two or three CBAs. That in using two CBAs, the employer undercuts the existing bargaining relationship and rolled back the hard won clause on payment of gratuity to the respondent. To fortify the respondent's submissions the case of Benta Achieng Odinyo vs University of Nairobi (2021) eKLR was cited. The Court was further invited to consider the determinations in *Bamburi Cement Limited vs William Kilonzi (2016) eKLR*, *H Young & Company (EA) Limited vs Javan Were Mbango (2016) eKLR* and *Paul Billy Nyagillo vs East Africa Portland Cement Limited (2018) eKLR*.

Analysis and determination

10. This being the first appellate court, it has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In so doing, the Court ought to remind itself that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Peters vs Sunday Post Ltd [1958] EA 424* and Selle & another vs Associated Motor Boat Co Ltd & others.

11. Upon considering the entire Record of Appeal, the submissions by both parties as well as the law, to my mind the issue that stands out for determination is whether the trial Court erred in finding that the appellant applied an erroneous formula in computing the respondent's gratuity.

Computation of the Respondent's Gratuity

12. It is the appellant's contention that the trial Magistrate misdirected himself in finding that the Collective Bargaining Agreement (CBA) provided for 31% of yearly back pay. The appellant further urged that the trial Magistrate misdirected himself in failing to consider the Memorandum of Understanding dated October 16, 2018 and Internal Memo dated April 5, 2019.

13. On the other hand, the respondent maintains that at the time of her promotion, the CBA for 2013-2017 was in force and had been agreed upon by both parties. She further argued that she cannot be bound by consultations and agreements done on October 16, 2018 which is 32 months after she had been promoted.

14. It is not in dispute that the appellant entered into a CBA with the Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied (KUDHEIHA) workers for the period 2013 to 2017. According to Clause 43 of the CBA, it was to be effective from July 1, 2013 upto June 30, 2017 whereas its implementation date was identified as July 1, 2015.

15. Clause 40 which provides for gratuity is couched as follows: -

    a. Subject to the provisions of this agreement gratuity shall be payable to an employee as follows:

    i. .

iv. The employer shall pay such an employee gratuity at the rate of 31% of basic salary and the gratuity shall be payable upon the expiry of the employee's appointment.

(h) Unless otherwise stated herein, the gratuity payable also under this agreement shall be at the rate of 31% of basic salary for every completed years of service.

Agreed

That a joint committee of University of Nairobi Council and KUDHEIHA Workers to be constituted to review the clause and make suitable recommendations.

16. As it would be, a problem arose with regards to the interpretation of the aforementioned Clause 40 of the CBA and calculation of gratuity pay. This resulted in a trade dispute which was resolved by the parties executing an Agreement dated October 16, 2018. A copy of the said Agreement which was exhibited before the trial Court reads in part: -

It Is Hereby Agreed As Follows:

i. That implementation of 31% payment of service gratuity for each completed year of service takes effect upon registration of the agreement in the Employment and Labour Relations Court.

ii. That the 31% payment of service gratuity be applicable only to employees who were in the University employment at the time the agreement was registered in Court. The new rate of gratuity shall not apply in retrospect.

iii. That payment of service gratuity based on 28 days of employees' basic salary covers the entire period that the agreement was not in place upto and including the last year preceding effective date of the agreement (i.e prior to an including June 30, 2015). This means that any employee who left employment prior to the registration of CBA (2013-2017) will be entitled to 28 days for each completed year of service. Service gratuity will be applied at the rate of 31% on the employee's basic salary effective July 1, 2015.

17. According to the respondent, the said Agreement is unmerited as she was promoted on August 23, 2016 hence cannot be bound by consultations and agreements done on October 16, 2018. With due respect, this position is incorrect for the reason that first, it is evident that the execution of the Agreement was in accordance with the provisions of Clause 3 of the CBA which provides that interpretation of any portion of the memorandum of agreement shall be considered by the joint negotiating committee of the Employer and the Union and thereafter, if necessary in accordance with the procedure laid down in the Recognition Agreement. Second, the rider under Clause 40 of the CBA provides that a joint committee of the appellant and the Union was to be constituted to review the clause and make suitable recommendations. Third, the agreement was executed by the same parties who executed the CBA.

18. In light of the foregoing factors, it is clear that the Agreement cannot be read in isolation of the CBA. Therefore, it forms part and parcel of the CBA and I am enjoined to consider the same alongside the CBA. Indeed, the respondent cannot run away from the Agreement and just the same way, she has premised her case on the CBA, is the same way the Agreement of October 16, 2018, is binding on her. It is also notable that it is the respondent who exhibited the said Agreement at the trial Court hence one wonders why she has sought to disown it at this juncture?

19. It is therefore apparent that the parties intended to have gratuity payable under Clause 40 of the CBA computed in accordance with the terms of the Agreement of October 16, 2018.

20. With regards to computation of gratuity payable to the respondent, my interpretation of the Agreement is that the same was to be calculated based on 28 days basic salary for every year served with regards to the duration when the CBA was not in place that is prior to 1st July, 2015 and for the remaining period upto the time of her promotion, gratuity was to be payable at the rate of 31%.

21. As I have stated herein, the CBA cannot be read in exclusion of the Agreement of October 16, 2018 which expressly state that service gratuity at the rate of 31% on the employee's basic salary was to be effective from July 1, 2015. Therefore, the period in which the rate of 31% was applicable, was after July 1, 2015.

22. To this end, it is my finding that the trial Court fell into error by determining that the applicable formulae in computing the respondent's gratuity was 31% yearly for the duration served.

Order

23. In the circumstances, the Court finds that the Appeal is meritorious and is hereby allowed.

24. Accordingly, the Judgment of the trial Court in Milimani CMEL No 1442 of 2019 delivered on the September 10, 2021 is hereby set aside.

25. Each party to bear its own costs in this Court and at the trial Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Mr. Korir instructed by Mr. Kipkorir

For the Respondent Mr. Onenga

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