



Mukuria v Chuna Co-opertive Savings and Credit Society Limited (Cause 607 of 2017) [2023] KEELRC 1842 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1842 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 607 OF 2017
BOM MANANI, J
JULY 27, 2023**

BETWEEN

MARTIN WAWERU MUKURIA CLAIMANT

AND

**CHUNA CO-OPERTIVE SAVINGS AND CREDIT SOCIETY
LIMITED RESPONDENT**

JUDGMENT

1. This is an action by the Claimant to recover terminal benefits from the Respondent following his retirement from the Respondent's employment. The Respondent does not admit the claim.

Claimant's Case

2. According to the Claimant, he was initially engaged by the Respondent in the position of an assistant accountant before rising to the position of acting credit officer. Although it is not clear from the Claimant's pleadings and evidence when his services were engaged, the Respondent indicates that this was from December 2, 1992.
3. The Claimant states that he worked until 2018 when he retired from employment at the age of 60 years. According to the Claimant, he was earning gross salary of Ksh. 108,673.00 per month at the point of his exit from employment.
4. It is the Claimant's case that prior to his retirement, the trade union representing him at the workplace entered into a Collective Bargaining Agreement (CBA) with the Respondent. Pursuant to the CBA, a retiring employee is entitled to be paid an exit package that is equivalent to his salary for two months for every year worked. This payment is in addition to other benefits that are due to such employee.
5. At the point of his retirement, the Claimant avers that he had been in the Respondent's service for 26 years. Therefore, his claim under the aforesaid head of benefits totals Ksh. 5,650,996.00.



6. The Claimant states that despite clear provisions of the CBA, the Respondent has not paid him the benefit. This is despite the fact that other individuals who had retired from employment were paid the benefit.

Respondent's Case

7. In response, the Respondent does not deny that this retirement benefit is anchored in the CBA between the parties. However, the Respondent avers that it did not pay the benefit to the Claimant following a directive from the Ministry of Co-operatives not to pay the amount to retiring employees who had been engaged on permanent and pensionable terms.
8. According to the Respondent, the Ministry's advice was that such benefit was available to fixed term employees only. Payment of the benefit to permanent and pensionable employees amounted to double payment of pension which is allegedly illegal.
9. The Respondent admits that some of its retired employees received these payments. However, it's asserted that the Ministry has issued a directive to surcharge them.
10. The Respondent further avers that even if it were factual that the Claimant is entitled to claim this benefit, it cannot be computed based on his exit salary of Ksh. 108,673.00. It is the Respondent's case that the Claimant was engaged on a much lower salary when he joined the organization and that the exit pay of Ksh. 108,673.00 was on account of the last pay rise to him in 2018. Therefore, it is inappropriate to consider this figure as representing the Claimant's monthly salary for the duration of his employment.

Issues of Determination

11. The parties do not contest the fact that they had an employment relation. Neither do they dispute the fact that this relation ran from December of 1992 to December of 2018 when the Claimant retired.
12. It is also not disputed that prior to the Claimant's retirement, the Respondent entered into a CBA with Kenya Union of Commercial Food and Allied Workers. The CBA dated April 7, 2016 was produced in evidence.
13. It is also not contested that the Claimant was a beneficiary of the CBA. From the evidence on record, there is no denial by the Respondent of the Claimant's assertion in this respect.
14. The main issue in dispute is whether the Claimant is entitled to draw the retirement benefit that is equivalent to his salary for two months for every year worked as captured under clause 7D of the CBA. Concomitant with this is the issue relating to what kind of reliefs the court ought to order.

Analysis

15. It is important to begin by restating the truism that, except where the law provides otherwise, employment contracts are founded on the general principles of contract. Parties to a contract of service are free to agree on the terms and conditions of the contract as long as the agreement does not seek to circumvent the floor that has been prescribed by statute.
16. In this respect, the parties are at liberty to agree on the terminal benefits that are payable on closure of employment including on retirement. The only catch is that whatever agreement that is crafted it must not derogate from the minimums that are prescribed by law.



17. Whilst employment relations are underpinned by individual contracts of service between the employer and the employee, some of these contracts end up being supplemented by additional terms that arise from the process of collective bargaining. This happens where an employee becomes a member of a trade union which enters into and concludes collective bargaining with the employer. This will also be the case where an employee, though not a member of the trade union, draws a benefit from the concluded CBA against remitting agency fees to the trade union.
18. Indeed, the legal position is that once signed, a CBA is infused into the individual contracts of service for employees on whose behalf the CBA was negotiated or those that the CBA ends up benefiting. In this respect, section 59(3) of the [Labour Relations Act](#) provides as follows: -

“The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”
19. It is a cardinal rule of contract that parties to a contract cannot unilaterally vary its terms. Therefore, once clause 7D of the CBA dated 7th April 2016 was infused into the Claimant’s contract, it became part of his terms and conditions of employment which the Respondent could not vary unilaterally. This position is further fortified by section 10 (5) of the [Employment Act](#) which requires consultation between an employer and an employee before varying a term of the employee’s contract of service.
20. In its evidence, the Respondent argues that it did not pay the Claimant the benefit under clause 7D of the CBA because the Ministry had advised against it. It is the Respondent’s case that the Ministry had in effect, advised that clause 7D of the CBA which provides the retirement benefit that the Claimant is pursuing and which had been infused into his contract of service be done away with.
21. This change amounted to varying a clause in the Claimant’s contract of service. There is no evidence that the Respondent took this decision in consultation with the Claimant. To this extent, the decision to remove the retirement benefit at clause 7D of the CBA in question was null and void.
22. Even assuming that I am wrong in my views above, the Respondent did not produce in evidence the circular that it says was issued by the Ministry and on the basis of which the decision to withdraw the benefit was founded. Absent this evidence, the assertion that the Ministry had advised against paying the benefit remains just that: an unproven assertion.
23. Finally on this aspect, it is noteworthy that the Respondent’s contention is that the basis of the Ministry’s advisory to withdraw the benefit is that it was contrary to law to pay it to individuals who had been serving on permanent and pensionable terms. Yet, no specific provision of law that outlaws this arrangement was cited.
24. Having regard to the totality of the evidence on record, I find that there was no basis to justify the Respondent’s decision to withhold the benefit from the Claimant. The decision was irregular. Further and to the extent that it is admitted by the Respondent that other individual who had retired from its employment had benefited from this retirement package, the decision to withhold the benefit from the Claimant reeks of discrimination against the Claimant which the law does not countenance.
25. Having found thus, the other critical matter in dispute relates to what, if at all, ought to be paid to the Claimant. I have studied the CBA in question. Clause 24 of the instrument deals with its term and effective date. According to the clause, the CBA came into force on January 1, 2015. It was to run for up to three years or until it was jointly revised, whichever was to happen earlier.
26. There is no provision in the CBA giving it retroactive application beyond January 1, 2015. Therefore, the instrument cannot be relied on to backdate the retirement benefit provided under clause 7D



thereof to the period before January 1, 2015. My understanding of the clause is that it sanctioned payment of the benefit for every year worked effective the date of the CBA which was January 1, 2015. Otherwise, it will be difficult to explain why the authors of the instrument opted to appoint a date they describe as its “effective date”. Absent evidence that the CBA in force before January 1, 2015 granted the Claimant a similar benefit, I will not rely on the 2016 CBA to grant him the benefit for the period between December 1992 and December 2014.

27. The Respondent has argued that the Claimant cannot use his salary of Ksh. 108, 673.00 as the determinant of the benefit if at all. I agree. There is nothing in the CBA to suggest that the Claimant’s exit salary was to be applied as the determinant of the benefit. To do so is to turn a blind eye to the truism that the Claimant kept benefiting from salary increments over time. Such approach will be inequitable.
28. The parties did not present any pay slip for the years 2015 and 2016 to provide an indication of what the Claimant’s salary was over this period. The only slip provided is for July 2017. It shows that as at July 2017, the Claimant was earning gross salary of Ksh. 101,565.00. Absent evidence that the Claimant was earning a lesser or higher amount between 2015 and 2016, I take it that his salary for the period between January 2015 and July 2017 is as depicted in his pay slip for July 2017, that is to say, Ksh. 101,565.00.
29. After the July 2017 pay slip, the parties provide no documentary proof of the Claimant’s monthly salary until August 2018. The Claimant filed and produced in evidence a pay slip for August 2018 showing that his gross monthly salary had dropped to Ksh. 96,255.00. This was to remain the case until October 2018 when the Claimant was issued with a pay slip for similar amount.
30. It is unclear what the Claimant’s salary for November 2018 was as no pay slip for this month was produced. However, it is safe to presume that his salary for November 2018 remained Ksh. 96,255.00 since the Respondent asserts and the Claimant does not deny that the latter’s salary review to Ksh. 108,673.00 was effected in December 2018 just as he was due to retire.
31. The totality of the foregoing leads me to the conclusion that between January 2015 and December 2017, the Claimant was on a monthly salary of Ksh. 101,565.00. Between January 2018 and towards the tail end of the year 2018, the Claimant was on a monthly salary of 96,255.00.
32. Clause 7D (4) of the CBA on retirement provides as follows: -

“Upon leaving employment a staff to be paid two months’ salary for every year worked.”
33. This clause entitled the Claimant to a benefit that is equivalent to his salary for two months for every year worked once he retired. Therefore, the Claimant is entitled to be paid the foresaid benefit for the years 2015, 2016, 2017 and 2018. For the years 2015 to 2017, the Claimant is entitled to Ksh. 101,565.00 x 6 = Ksh. 609,390.00. For the year 2018, the Claimant is entitled to Ksh. 96,255.00 x 2 = Ksh. 192,510.00.

Determination

34. I enter judgment for the Claimant as follows: -
 - a. The Claimant is entitled to the retirement benefit stipulated under clause 7D of the CBA but limited to the period running from January 2015 to the date that he retired.
 - b. The Claimant is awarded Ksh. 801,900.00 to cover this benefit for the aforesaid duration.
 - c. The Claimant is awarded interest on the sum awarded at court rates from the date of institution of the suit.



d. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF JULY, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.

B. O. M MANANI

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