



**Amalgamated Union of Kenya Metal Workers v Mohamed t/a Rizwan Metal Craft
(Cause E095 of 2021) [2023] KEELRC 2305 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2305 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E095 OF 2021
M MBARÚ, J
SEPTEMBER 21, 2023**

**BETWEEN
AMALGAMATED UNION OF KENYA METAL WORKERS CLAIMANT
AND
RAIZ ULL HAQ ALI MOHAMED T/A RIZWAN METAL
CRAFT RESPONDENT**

JUDGMENT

1. The claimant is a registered trade union with mandate to represent employees in the metal and motor trade sectors. The respondent is a registered business and core activity is steel fabrication and mechanical engineering.
2. The parties have a valid recognition agreement.
3. The claimant drafted and forwarded CBA proposal to the respondent for perusal and analysis pending negotiations. By consent, parties agreed to all clauses of the CBA except 5 clauses on;
 - a. Annual leave travelling allowances;
 - b. Termination gratuity;
 - c. Retirement;
 - d. General wage; and
 - e. Effective date.
4. The matter was reported for conciliation and two issues on leave travelling allowance and wage increase were agreed.



5. Further negotiations addressed the effective date but parties are yet to agree on the rate of gratuity payment.
6. The claim is that the claimant is aware that any CBA that is negotiated, signed and registered has a gratuity payment and a CBA is an improvement on the statutory provision which sets the irreducible minimum terms and conditions of service rate. Parties can only go above the legal minimum rate.
7. The respondent had agreed to pay the rate of 10 days per completed year of service to the retiree employee and 5 days per completed years of service to the terminated employee but in the last conciliation meeting on 28 August 2021 this was retracted.
8. The joint meeting on 28 August 2021 the claimant was given time to research on any CBA that is registered without gratuity clause at the rate of not less than 15 days per completed year of service but none exists. The respondent relies on Section 35 of the *Employment Act*, 2007 (the Act) to assert its position that no gratuity is payable. The CBA is a negotiated document and parties have the Act as the minimum and Section 54(1) of the *Labour Relations Act*, 2007 (the LRA) allow parties to negotiate a CBA once recognition is achieved.
9. The claimant is seeking for orders that;
 - a. The court do find that there is need for any employee in Kenya to benefit from years of service he has put in by way of gratuity and determine for the parties the following gratuity rates;
 - i. Gratuity upon redundancy pay at 22 days per completed year of service being gross pay of salary and house allowance.
 - ii. Gratuity upon termination and retirement pay at 20 days per completed year of service being gross pay of salary and house allowance.
 - b. The court be pleased to order pay of costs.
10. The response is that a CBA ought to be with effect from the date it is concluded and executed. CBA under negotiations by the parties is for 2 years which means it is backdated to 2019 and effectively it will have expired by the date of execution which is unreasonable to take parties back to the detriment of the respondent. it has not been the fault of the respondent to delay the conclusion of the CBA.
11. Gratuity is a matter open for negotiations like all matters in the CBA and this is based on the standard set by the law. whereas the CBA is meant to improve the terms of employment, these must be reasonable and sustainable especially the financial ability of the employer.
12. The CBA of the parties herein ought to be registered on its merits and not in comparison with others and based on Section 35 of the Act and Section 54(1) of the *LRA*.
13. On the claim, parties agreed to address by way of written submissions.
14. The claimant submitted and reiterated the Memorandum of Claim and attached the decision in *Amalgamated Union of Kenya Metal Workers v M/S Load Trailer (EA) Limited* Cause No 1340 of 2016.
15. The respondent submitted that a CBA is a contract binding between the parties whose effect is provided under Section 59 of the *LRA* as held in *Kenya National Private Security Workers Union v Wells Fargo Limited* [2020] eKLR. a CBA must be registered with the court to take effect in terms



of Section 59(5) of the *LRA*. Parties cannot impose a term of gratuity payment on each other outside agreement as such would be contrary to Article 41(5) of the *Constitution* which grants parties the right to engage in collective bargaining as held in *National Union of Water & Sewerage Employees v Mathira Water & Sanitation Co. Ltd & 2 others* [2013] eKLR.

16. The respondent in good faith has implemented the draft CBA;
 - a. The proposed 7% salary increase for the year 2020 and a further 7% for 2021;
 - b. Allowed 24 leave days per year;
 - c. Effectuated traveling allowance;
 - d. Effectuated funeral allowance of Kshs. 40,000.
17. The orders sought to impose payment of gratuity is untenable and should not be allowed.

Determination

18. The parties agree that the draft CBA is largely agreed save for the clause on payment of gratuity. The claimant has proposed that upon redundancy, gratuity be paid at 22 days per completed year of service being gross pay of salary and house allowance. That gratuity be paid upon termination and retirement of an employee at 20 days per completed year of service being gross pay of salary and house allowance.
19. The respondent asserts that a CBA is a negotiated agreement and cannot be imposed.
20. Indeed, under Article 41(5) of the *Constitution*, a CBA takes prominent feature and set threshold is that;

Every trade union, employers' organisation and employer has the right to engage in collective bargaining.
21. The active word being 'engage'.
22. As an active verb, 'engage' is a word in its ordinary meaning defined as being or become involved with and try to understand something or someone.
23. The true meaning of a CBA is given under Part VII of the *LRA*. An employer is allowed to recognise a trade union with simple majority of unionisable employee for the purpose of negotiating a collective agreement. Section 57(1) of the *LRA*;
 - (1) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.
24. In a CBA, parties are allowed to negotiate terms and conditions of service.
25. In this regard, the issue of payment of gratuity is not agreed.
26. Payment of gratuity as the word imply is purely gratuitous. As such, this is not a benefit in law under the *Constitution*, the Act of *LRA* and unless this is provided for under a CBA registered with the court



in accordance with Section 59(5) of the LRA. Once agreed and the CBA is registered with the court, such term is binding on the parties;

- (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Court and shall be effective from the date agreed upon by the parties.
27. Being gratuitous, the payment of gratuity has to engage, go through negotiations and agreed by the parties as held in Kenya Kazi Services Ltd v Dickson Onjwaya Wasike & 42 others [2021] eKLR. Further, Court of Appeal in Bamburi Cement Ltd v William Kilonzi [2016] eKLR held that in employment, every party has legitimate expectations, the employee expects graduated terms of employment and the employer expects productivity.
28. In this regard, to balance these rights, the payment of gratuity must be on terms negotiated by the parties in good faith within the balance of legitimate expectations and rights. Where gratuity becomes due, the respondent as the employer may provide the same under any applicable conditions. The general practice being where a contract provides for gratuity, it is payable as a general rule. And like with any general rule, there are exceptions. The CBA can have a restrictive condition on eligibility for gratuity, that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct.
29. In this regard, the court brings to the attention of the respondent the provisions of Section 57(2) of the LRA which allow for negotiations over any contested matter in good faith;
 - (2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees.
30. And the court brings to the attention of the claimant the provisions of Section 57(3) and (4) of the LRA:
 - (3) All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations.
 - (4) An employer is not required to disclose information that—
 - (a) is legally privileged;
 - (b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or an order of any court;
 - (c) if disclosed, may cause substantial harm to the employer or employee; or
 - (d) is private personal information relating to an employee, unless an employee consents to the disclosure of that information.
31. On the orders sought, the draft CBA largely agreed save for the terms on the gratuity, the draft CBA largely enforced by the respondent, parties have the liberty to engage and agree on payment of gratuity in the next phase of CBA negotiations as outlined under paragraph (28), above.

Orders sought herein are declined. Parties enjoy recognition and each to bear own costs.



DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

