Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v BOM –St. Mary's Mumias Girls High School (Employment and Labour Relations Cause E006 of 2023) [2023] KEELRC 2531 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2531 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2023

JW KELI, J

OCTOBER 18, 2023

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS ..... CLAIMANT

AND

BOM –ST. MARY'S MUMIAS GIRLS HIGH SCHOOL ..... RESPONDENT

JUDGMENT

1. The Claimant was a trade union registered and recognised under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals and workers in the hotel industry. The respondent was the Board of Management of a public school. The parties have a valid recognition agreement.

2. The Claimant on 6th June 2023 filed the Statement of Claim dated 11th May 2023 supported by the Verifying affidavit sworn on even date by the Branch Secretary- Kakamega and National Treasurer of the Claimant, Mr. Thomas Mboya.

3. The suit had been triggered by the decision by the Respondent to re-negotiate the period of Notice of Termination of Employment or period to pay salary in lieu of notice under Clause 8(i)(ii) and (iii) on the parties' previous Collective Bargaining Agreement(CBA) downwards to a standard One Month period in lieu of notice or Notice period of one month. Vide the Statement of Claim, the Claimant has prayed for the following reliefs:

    a. A declaration that the Respondent action was unfair, unlawful and/or illegal.

    b. That the Honourable Court guide the Respondent to stop retrogressing the CBA considering gains voluntarily made by the parties in the previous CBAs. The same will enhance fair labour

practices as enshrined in *the Constitution* of Kenya, 2010 and the *Employment Act*, 2007 Sec. 26 (2).

c. That the Honourable court compels the Respondent to retain the status quo of the CBA.

d. That the costs of this application be awarded to the claimant.

e. Any other relief the court deems fit.

4. Further filed together with the Statement of Claim dated 11th May 2023 was the Claimant's list of witnesses of even date; a list of Documents of even date, various documents comprising of the Recognition Agreement of 28th September 1995; CBA for the Period 1st January 2016 to 31st December 2017 and various correspondences.

5. The Respondent did not enter appearance even after the leave of Court granted on 10th July 2023. The claim was thus unopposed.

Written submissions

6. The court on the 18th September 2023 directed that the claim be canvassed by way of written submissions. Only the Claimant filed its submissions. The Claimant's written submissions dated 29th September 2023 were filed by Justin Waningu Kamuye a representative of the Claimant on 3rd October 2023.

Claimant's Submissions

7. The Claimant submitted that the parties voluntarily entered into the Recognition Agreement dated 28th September 1995(App.1)(pg. 9-15) which provided under Clause 2 that all approved negotiations between the Claimant and the Respondent relating to wages and terms and conditions of services would be the applicable terms to all employees who were members of the Claimant, employed by the Respondent.

8. That through the CBA (App-2))(pg.16-29), under Clause 6 parties agreed on the Appropriate Notice period in case of termination of employment. That when the parties tried to renegotiate the 1st January 2016 to 31st December 2017 CBA(App-2) to a new CBA for the period of 1st October 2021 to 31st September 2023(pg. 30-34), the Respondent proposed to revert to issuing a one-Month Notice across board contrary to the previous CBA provisions allowing three months, four months and five months respectively.

9. The Claimant states that even after various correspondences the Respondent did not give in which prompted the matter to be referred to the Ministry of Labour and Social Protection for Conciliation(App-9)(pg. 35-40).

10. The Claimant submits that by dint of section 26(2) of the *Employment Act*, and Section 59 of the *Labour Relations Act*, 2007, where the terms and conditions of a contract of service are regulated by any regulations in any CBA; contract between parties or other written law and which terms are more favourable than those available under PART VI of the *Employment Act*, then the favourable terms and conditions apply.

11. The Claimant submits that the terms of clause 6(Termination) should be retained as to do otherwise is retrogressive, which offends the basic principles of CBA negotiations on progressive growth.

12. The Claimant submits that it has exerted enough effort to negotiate with the Respondent to no avail and the Respondent should bear the costs of the suit and that the claim be allowed.

Determination

Issues for determination

13. The claimant identified the following issues for determination in the claim:-

    a. Whether the Respondent should abide by the negotiated and agreed terms of the parties CBA on termination clause without Retrogressing the same.

    b. Whether the Respondent should pay costs of the suit.

14. The court having considered the Claimant's submissions will address the following issue:-

    a. Whether the court should compel the retention of the terms of clause 6 (i) to (iii)of 2016-2017 CBA where the proposed new terms of CBA are retrogressive .

15. Clause 6 (a)(i, ii &iii)of the 2016-2017 CBA (App-2) provided as follows:-

> " 6. Termination of Employment
>
> (a) in the normal circumstances, it shall be a condition that employment shall be terminated by either party giving written notice or pay in lieu of such notice as follows:-
>
> i) For any employee who has completed his period of probation but with less than five years – 2 months pay in lieu of notice.
>
> ii). For any employee who has completed five years continuous service and above but less than ten years- 4 months' notice or 3 months' pay in lieu of notice.
>
> iii) For any employee who has completed 10 years continuous service or more -4 months' notice or 5 months' pay in lieu of notice. ..."

16. The sanctity of a CBA is addressed pursuant to Section 59(1) of the *Labour Relations Act*, 2007 in the following terms;

> 1. A collective agreement binds for the period of the agreement—
>
> a. the parties to the agreement;
>
> b. all unionasable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or
>
> c. the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees."

17. The central element of a registered CBA is that it becomes part of the employment contract pursuant to section 59(3) of the *Labour Relations Act*, 2007;-

> " (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement".

18. The rationale is that once the CBA is registered with the court it becomes a binding and enforceable agreement against the parties to it pursuant to section 59(5) of the *Labour Relations Act*,2007 to wit:-

> " (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties."

19. The Claimant and the Respondent had entered into a CBA 2016-2017 signed on 13th March 2020, which under Clause 40 of the said CBA was to be in force with effect from 1st January 2016 to 31st December 2017.

20. The said Clause 40 further provided that " thereafter the agreement shall remain in force until both parties propose amendments for revision after one party giving the other one month's notice".

21. The said CBA having expired the Claimant wrote to the Respondent through various correspondence produced(1st April 2020; 26th January 2021; 18th June 2021; 1st September 2021, & 30th May 2022) for the negotiation of a new CBA for the period of 1st October 2021 to 31st September 2023.

22. The Claimant's contention is that during the said negotiations the Respondent's proposed an amendment to Clause 6 of the outgoing CBA to revert to the One month notice or one month salary in lieu of Notice.

23. The Claimant annexed the submissions made during the conciliation (pg-39-40) where the Respondent had argued that the previous notice periods were unfavorable to them and they wished to revert to the One month notice or one month salary in lieu of Notice.

24. The *Labour Relations Act* provides in sections 62-73 for dispute resolution mechanism. The mechanism requires that the dispute be reported to the Minister of Labour first, who then appoints the conciliator and if the dispute is not resolved, reference to the Industrial Court should be resorted to. This was done.

25. What the court is asked is to order the parties retain the term of the expired CBA relating to the Termination Notice under clause 6 of the outgoing CBA being more favourable terms.

26. Collective bargaining agreements are voluntary by nature and the parties cannot be coerced into negotiations. Then what is the role of the Court when there is a dead lock even after invoking the conciliation process. The role of the Court in resolution of the trade dispute was stated by the Court of Appeal in Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR which decision I adopt for the purposes of this suit. The court observed: -

> '38. We reiterate that the appeal herein turns principally on this issue: what role, if any, does the ELRC play where parties are unable to agree on the terms of a CBA? In determining that issue an examination of the ELRC's jurisdiction is imperative.
>
> 39. The starting point would be Article 162 (2)(a) of *the Constitution* which stipulates that-
>
> " 1...

2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) employment and labour relations;..."

40. That provision delineates the broad principles and aspirations of the people of Kenya for the formation of a court specifically to determine disputes relating to employment and labour relations. The details and actualization of those aspirations and principles were left to several Acts of Parliament and Regulations relating to such disputes which have since been enacted.

41. The ELRC Act establishes the ELRC and sets out its jurisdiction. The court's jurisdiction is also set out in various legislations relating to employment and labour issues. Of relevance to the case at hand is the LRA which not only recognizes CBAs but also sets out the procedure to be followed in their negotiation and registration. The Act also provides an elaborate procedure for settling trade disputes arising thereunder in Parts VIII and IX. A trade dispute under Section 2 of the LRA is described in the following manner:-

> "trade dispute? means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers? organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;..."

42. Under Part IX when a trade dispute is not resolved through conciliation Section 73(1) of the LRA stipulates that such a dispute may be referred to the ELRC by either of the parties. The role played by the ELRC in that instance is clearly indicated by the title of Part IX which reads 'Adjudication of disputes'. The Black?s Law Dictionary 9th Edition defines adjudication as:-

> "The legal process of resolving a dispute; the process of judicially deciding a case."

43. It follows therefore that the ELRC at this stage is tasked with the responsibility of determining the trade dispute between the parties which in our view, includes the disagreement with regard to the terms of the CBA or what the parties refer to as the economic dispute between them."(emphasis mine being the summary of the role of the Court in a dispute on negotiations of terms of a new CBA)I uphold this decision to apply in the instant suit.

27. It was alleged by the Claimant that the Respondent wishes to revert the Notice period for termination and the salary in lieu of notice to one month which the Claimant argues is retrogressive in purporting to change pre-existing protections undermining the rights of negotiators and beneficiaries.

28. Section 35(a,b,c) and 36 of the *Employment Act*, 2007 provides that :-

> " 35. Termination notice
>
> (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—
>
> (a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;
>
> (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or
>
> (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing....
>
> 36. Payment in lieu of notice Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section."

29. The minimum statutory period allowed under the *Employment Act*, is based on the nature of employment as per Section 35 above and in most instances for unionasable employees the said period is under Section 35(1) (c) (supra)being notice period of twenty-eight days.

30. The nature of CBAs is to provide for better terms of service, but which terms must be in compliance with the law either providing better terms over and above the statutory terms or at par with the statutory provisions.

31. The Claimant quoted Section 26 of the *Employment Act* to urge that the Terms of the CBA should prevail. Section 26 provides as follows –

> " 26. Basic minimum conditions of employment
>
> (1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

32. The claimant pleaded that as they negotiated a new CBA they disagreed on the clause for termination as the union was for status quo while the management proposed retrogressive change to reverse to a notice period of one month notice or one month pay in lieu of the notice across the board.

33. The Court of Appeal considered the role of this Court where a trade dispute is declared on basis of lack of agreement on the terms by parties during negotiation of new Collective Bargaining Agreement in Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR and held:-

'45. Having expressed ourselves as herein above what is the extent of the ELRC's role in resolving the dispute pertaining to the terms of the CBA in question? Is it as suggested by the appellant that the court is restricted to implementing the minimum standards set out under the EA or wages orders published by the government under the *Labour Institutions Act*?

46. Section 26(2) of the EA provides that-

"Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the EA and Wages Order but also empowers the ELRC to issue such favourable terms..... 47. However, the power to do so by the ELRC ought to be exercised judiciously and on a case by case basis where parties are unable to agree on the terms of a CBA. The court should ensure it does not substitute its preference with that of the parties' freedom to agree on the terms of employment.'' In this said decision I found that the Court of Appeal upheld to apply in the new CBA the previously negotiated terms under the outgoing CBA in dealing with the trade dispute on retirement age as follows:- '58. Last but not least, we find that the learned Judge had no basis for reviewing the retirement age as had been agreed to by the parties in the previous CBA.'(emphasis mine)I do uphold the decision in determination of this dispute to find that the previously negotiated and agreed terms under the outgoing CBA were relevant in event of deadlock in new negotiations of CBA.

34. The contested previous/outgoing CBA 2016-2017 Clause 6 (a)(i, ii &iii)of the CBA (App-2) provided as follows:-

> " 6. Termination of Employment
>
> (a) in the normal circumstances, it shall be a condition that employment shall be terminated by either party giving written notice or pay in lieu of such notice as follows:-
>
> i) For any employee who has completed his period of probation but with less than five years – 2 months pay in lieu of notice.
>
> ii). For any employee who has completed five years continuous service and above but less than ten years- 4 months' notice or 3 months' pay in lieu of notice.
>
> iii) For any employee who has completed 10 years continuous service or more -4 months' notice or 5 months' pay in lieu of notice. ..." The respondent who did not file response had proposed a notice period across the board for one month contrary to the previous CBA. It was pleaded that even the earlier CBA had same terms as clause 6 meaning the previous two CBAs had more favourable notice.

35. The court guided by the Court of Appeal in Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR and section 26 of the *Employment Act* finds that the terms for notice under the expiring CBA clause 6 i, ii, and iii were more favourable than those under the *Employment Act* or proposed one month notice or payment of 1 month in lieu across the board. That the employees had been enjoying the superior terms.

36. The court then consequently holds that it was unfair labour practice to reduce the notice period across the board in the proposed new CBA negating gains under the outgoing CBA. The court exercises its judicial power in resolving the trade dispute by holding in favour of retention of the notice period under the outgoing CBA 2016-2017 to apply in the new CBA.

Conclusion

37. The Court holds that the proposal by the respondent for one month notice or payment in lieu which is inferior to existing terms under clause 6 (i,ii and iii) in the 2016-2017 CBA amounts to unfair labour practice.

38. The Court in resolution of the dispute Orders the parties to retain the existing terms under clause 6 (a)(i, ii &iii)of the outgoing CBA 2016-2017 into the new CBA.

39. On costs of the claim, just like in the Court of Appeal decision on costs (supra) this being an employment dispute I make no order as to costs.

40. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18th OCTOBER 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : Shiraku for the Union

For Respondent:- No Appearance