



Kenya Union of Commercial Food and Allied Workers v Ruchu Gacharage Farmers Cooperative Union Limited (Cause E021 of 2021) [2023] KEELRC 2397 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2397 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E021 OF 2021
ON MAKAU, J
OCTOBER 6, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

**RUCHU GACHARAGE FARMERS COOPERATIVE UNION
LIMITED RESPONDENT**

JUDGMENT

1. The claimant is trade union and has concluded a collective Bargaining Agreement with the respondent. The two have differed over the payment of gratuity to five (5) employees (hereinafter referred to as ‘The grievants’) who are members of the union. The grievants were employed by the respondent in various positions and on diverse dates until 1st May, 2020 when they retired on attaining the age of 60 years. Consequently, the union has brought this suit on behalf of the grievants, seeking payment of their gratuity balances as follow: -
 - a. David Karanja Kinyanjui Kshs.1,393,825
 - b. John Njuguna Njoroge Kshs. 632,047
 - c. John Kamau Nguthuku Kshs. 1,022,938
 - d. James Kimani Mwangi Kshs 1,609,973
 - e. Absolom w. wagama Kshs 1,406,826
 - f. Interest at court rates from the date of retirement.
 - g. Costs of the suit.



2. The respondent filed a response to the claim admitting the claim save for the arithmetical issues and the tax deducted from the part payment. Basically, the defense case is grounded on the doctrine of frustration and force majeure.

Evidence

3. The Claimant filed witness statements and documents for each grievant. Each grievant then testified and produced his /her documents as exhibits without any objection. CW1 was David Karanja who adopted his written statement dated 23rd December 2022 as his evidence and produced the a Collective Bargaining Agreement, Retirement Letter and another Letter showing part payment. He testified that he was entitled to Kshs. 1,996,140.00 upon retirement but he was only paid Kshs. 399,228.00 leaving an outstanding balance of Kshs. 1,596,912.
4. In cross-examination, CW1 admitted that there was a meeting that was held on 3rd September 2018 between management and staff but he could not remember the details as he never read the minutes. He also admitted that Linus Ngure and Joshua Njihia were his colleagues but denied ever seeing any affidavit signed by them or filed in Court by the Respondent. He further admitted that there was the Covid 19 breakout and the weather was also bad at that time but maintained that their work activities went on as usual.
5. He reiterated that the Respondent had failed to pay his gratuity as required under clause 4 of the CBA that provided for payment of 3 months' salary for every year of service. He clarified that the matter was not resolved through mediation hence the suit.
6. CW2, Mr. John Njuguna, also adopted his witness statement dated 23rd December 2022 and produced the appointment letter plus retirement letter to support of his case. He testified that he served the Respondent for 17 years and his retirement benefits was Kshs. 790,092.00 of which only Kshs.158,018.00 was paid leaving a balance of Kshs. 632,047.00.
7. On cross examination, he stated that he was not aware of any meeting between the management and staff on 3rd September 2018 since he never attended it. He also testified that Linus Ngure and Joshua Njihia were their elected shop stewards then Mr. Njihia is now the Secretary Manager (C.E.O) of the Respondent. He stated that the minutes of the meeting of 3rd September 2018 was proof that he never attended the meeting. He further stated that the Shop stewards had no authority to change the CBA without the Union Leadership.
8. CW3, Mr. John Kamau, the 3rd grievant adopted statement dated 23rd December 2022 that he wished to adopt as his evidence. He also produced his letter of retirement and letter of part payment of gratuity as exhibits. He stated that he served the respondent for 25 years and retired on 1st May 2020. His terminal dues were Kshs. 1,540,812.00 but only Kshs. 308,162 was paid leaving a balance of Kshs. 1,232,650.00. He testified that the terminal dues were wrongly calculated as it was supposed to be 3 months basic pay times the years of service as per the CBA. He therefore prayed that the balance be paid in cash together with interest.
9. In cross examination, he admitted that Linus and Joshua were their elected shop stewards. He further stated that the two were their colleagues but he did not agree to the changes that they made to the CBA. He contended that he saw the statement by Margaret Kavuka in court during the hearing and denied being aware that their shop stewards attended the meeting of 3rd September 2018. Finally, he clarified that CBAs are not concluded by shop stewards.



10. CW4, Mr. James Migwi, the 4th grievant, also adopted his witness statement dated 23rd December 2022 as his evidence and he further produced his retirement letter and letter of part payment of gratuity. He testified that he worked for 29 years before retiring on 1st May 2020 and his gratuity was Kshs. 2,305,134.00. however, he was only paid Kshs. 461,027 leaving a balance of Kshs. 1,844,107.00 which he prayed for together with interest.
11. In cross examination, CW4 admitted that the Respondent was paying his NSSF. He further admitted that Linus and Joshua were their elected shop stewards. He denied having attended the meeting of 3rd September 2018 or having authorized the shop stewards to act without the authority from the union.
12. CW5, Mr. Absolom Mburu, the 5th grievant, also adopted his written statement filed on 23rd December 2022. He also produced his letter of part payment of gratuity as exhibits. He testified that he had worked for 34 years and retired on 1st May 2020. His gratuity amounted to Kshs. 1,810,296 but only paid Kshs. 402,859.00 was paid leaving a balance of Kshs. 1,407,437.00. Therefore, he prayed for judgement for the balance plus costs and interest.
13. On cross examination, he admitted that their shop stewards were Joshua Njihia and Linus Nguni. He denied having attended the meeting of 3rd September 2018 and further denied he refused to go for his dues. He stated that he attended mediation but they disagreed on the amount payable. He denied that the Respondent paid NSSF for him.
14. Finally, he clarified that mediation failed to resolve the case the formula for calculating his dues. He also clarified that the employees never authorized the shop steward to change the CBA.
15. The respondent called its Treasurer, Ms. Margaret Wariga Karanja, as RW1. She stated that she previously was the Respondent's secretary. She adopted her written statement dated 24 January 2022 as her evidence and produced a bundle of documents in the list dated 22nd June 2022 as exhibits.
16. In brief, she testified that the Respondent experienced financial problems from the years 2017 to 2018 and decided to retire the old staff members. A meeting was then held on 3rd September 2018 between shop stewards, management and the Supervisory committee. Some staff members also attended the meeting and it was agreed that payment of gratuity would be reduced from three months to two months for each year of service, and further, the payment would be made by five installments.
17. She stated that the first installment was paid but when the Respondent called the grievants for the second instalment they refused to collect the same and demanded for full payment as per the CBA. She testified that the Respondent does not have the money to pay the grievants at once but it is ready to follow the agreement between it and the shop stewards.
18. On cross examination, she stated that Trade Union did not attend the meeting on 3rd September 2018 and that she did not know who negotiated the CBA. On being shown the CBA for 2014-2016 that was in force, she confirmed that the same was signed by the General Secretary of the Union, Branch Secretary and shop steward. She admitted that they never invited the union officials to the meeting on 3rd September 2018 and no CBA was concluded that day.
19. She, however, testified that they had documents signed at the meeting and affidavit from the lawyer to compute the gratuity payable. She admitted that the said documents were not registered in court as a CBA. She noted that clause 4 of the applicable CBA provides for service gratuity to be calculated using 3 months basic pay for each year of service and further admitted that the Respondent contravened the CBA by paying less than the sum provided under clause 4 of the CBA.



20. She testified that when they called the 5 grievants to collect their cheques they refused and informed them that they had taken the matter to court. She also testified that she did not know whether the union was notified about the agreement between the Respondent and the shop stewards.
21. Finally, she clarified that the Respondent had not invited the union to the meeting of 3rd September 2018 because the shop stewards had not seen the need. She reiterated that the Respondent had no funds to pay the Claimants at once and that during the mediation the grievants declined to receive cheques for part payment. She confirmed that Mr. Joshua Njihia is the current Secretary Manager of the respondent.

Submissions

22. The Claimant submitted that the grievants were entitled to their terminal dues as per clause 4 of the Collective Bargaining Agreement upon their retirement and urged the court to make that finding. It relied on the case of Kenya Union of Commercial Food and Allied Workers v Murang'a Farmers Co-Operative Union [2022] eKLR where the Court held that:

“This to me is a very simple matter, the figures of payment not being in dispute. I agree with the Claimant’s case and submissions that the Respondent has not adduced or submitted any evidence of disability to pay the amount owing. I therefore find that the Respondent should be compelled to pay the amount owing.”
23. The Claimant contended that the Respondent admitted that the applicable CBA was the 2014-2016 which according to it was in force at the time of the grievants’ retirement as the parties were yet to conclude the reviewing process for a new CBA. It based that submission on the provisions of section 59 and 60 of the *Labour Relations Act* 2007 and Clause 1 of the CBA which provides that:

“the agreement will remain in force from month to month until a new agreement is concluded and signed.”
24. The Claimant submitted that the Respondent had not produced any evidence to substantiate its calculations and thus the only document that could be legally used in calculations is the CBA. It contended that the minutes filed by the Respondent in support of its case were a nullity as there has been no time since 2008 that parties negotiated with the shop stewards in the absence of the trade union. Therefore, it submitted that the minutes produced were not applicable to the five grievants since as at the time of their exit there was no new CBA in place.
25. The Claimant submitted that as per the conciliator’s report, the Respondent refused to sign the 2016-2018 CBA. It clarified that what was before the Court was dispute on terminal dues and not negotiation for CBA.
26. The claimant argued that the shop steward in the year 2018, Mr. Joshua Njihia was compromised by the Respondent to try and change the terms of the CBA in exchange of the position of Chief Executive Officer of the Respondent.
27. In its supplementary submission dated 29th May 2023, the Claimant submitted that the Respondent’s submission that the calculations were based on the 3 months rate was inaccurate as the same was far below that rate. Further, the Claimant contended that the CBA required that the service gratuity be invested in a provident fund every month from the time of employment of the employee, and therefore the excuses given by the respondent for non-payment of the dues lacked merit. Finally, the claimant



submitted that the Respondent is in contravention of the CBA by calculating the benefits below the correct amount and for its failure to pay the same within the one-year time limit.

28. The Respondent submitted that the grievants were employed in 1982 and left the employment in 2020 after attaining retirement age. It submitted that the 1st grievant earned basic salary of Kshs. 19,570.00 and was entitled to Kshs. 1,330,760.00 gratuity but upon Part payment there was an outstanding balance of Kshs. 931,532.00; that the 2nd grievant was entitled to Kshs. 526,728.00 and upon part payment, his balance was Kshs. 368,710.00; that the 3rd grievant earned a salary of Kshs. 19,754.00, his dues were Kshs. 1,331,100.00 but the balance is Kshs. 719,046.00; the 4th grievant earned Kshs. 19,702.00, was entitled to Kshs. 1,536,756.00 but his balance is Kshs. 1,075,729.00; and that the 5th grievant was entitled to Kshs. 1,342,864 but his balance is Kshs. 940,005.00.
29. The Respondent submitted that the gratuity was calculated at the rate of 3 months salary multiplied by the number of years of service as agreed upon during the 3rd September 2018 meeting in which the grievants were represented. The Respondent submitted that it is willing and ready to perform its obligation but it was constrained by factors beyond its control such as the climate change affect production and the covid-19 pandemic which occasioned the Respondent significant losses as was verified by the independent reports by the ministry.
30. In support of its submission, the Respondent relied upon the case of Ryde vs Bushell & Another (1967) EA 817 where the Court clarified on what can be quantified as an act of God. Further, the Respondent argued that the unexpected weather and climatic condition have been regarded by Courts as acts of God for emphasis it relied on the case of Blyth v Birmingham Waterworks Co. English Court- 1856 11 Exch. 781.
31. Further reliance was placed on the case of Pankaj Transport PVT Limited v SDV Transami Kenya Limited [2017] eKLR where the Court defined what force majeure means. Again, it cited the case of Eric Kanja Wairiuko v Mary Muthoni Njue & Another; Epicenter Africa Limited (interested party) [2021] eKLR where the Court held that a party pleading force majeure must prove that the failure to perform an obligation was due to an impediment beyond its control and which he could not have reasonably foreseen at the time of contract.
32. The Respondent argued that there have been studies and research that have been conducted into the effects of climate change and coffee production which have indicated that the rise in temperatures could result in a 50% reduction in the areas suitable for coffee farming. The Respondent submitted that its responsibilities under the CBA could not be performed due to the frustration of the contract.
33. The Respondent relied on the case of Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR where the Court laid down the basis of frustration and on the case of Lucy Njeri Njoroge v Kaiyaha Njoroge [2015] eKLR where the Court provided guidance on when a contract can be held to have been frustrated. Based on the cited cases, the Respondent submitted that its contractual obligations were genuinely impossible to perform by no fault of theirs.
34. On the issue on over taxation, the Respondent submitted that it adhered to Kenya Revenue Authority (KRA) rates of taxation of gratuity as demonstrated in the photostat of the itax portal it filed in Court. It further argued that the Claimant did not provide any proof of over-taxation and cited section 107 and 108 of the *Evidence Act* that provides that a person who alleges must prove his allegations. The Respondent also relied on the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the Court held that the Appellant was obliged in law to prove his allegation that the Respondent did not pay the sum claimed as agreed. In view of the foregoing, the Respondent



prayed that the Claimant's suit be dismissed and the Court do allow the Respondents to continue paying the gratuity in installments.

Issues for determination and analysis

35. I have considered the Memorandum of Claim, the evidence by both parties, submissions by counsel for the parties and the authorities relied on. There is no dispute the 5 grievants were employees of the Respondent and they have since retired from service. It is also a fact that grievants are entitled to service gratuity and that there has been a part payment of the same. The issues therefore that arise from the circumstances of this case are as follows:
- a. What is the correct quantum of gratuity payable to the 5 grievants
 - b. Whether the grievants were overtaxed and by how much
 - c. Whether the doctrines of frustration and force majeure are applicable in this case

Quantum of gratuity payable

36. The claimant's case is that the contract between the grievants and the respondent at the time of separation on 1st May 2020 was governed by the 2014-2016 CBA. Clause 4 the said CBA provided that: -

“where the services of an employee is terminated by either party for any reason other than dismissal on gross misconduct or redundancy and after completing three years of service, such employee shall be paid service gratuity at the rate of three months current salary multiplied by the number of years of service. The service gratuity should be paid within twelve months from the date of the termination to all employees who have retired/ resigned or terminated their services for any other reason other than dismissal. Such gratuity shall be invested with a provident fund scheme for the benefit employee. (Emphasis added).

37. The claimants contended that the respondent did not comply with the above clause when it computed gratuity for the grievants but the respondent maintained that it calculated the gratuity at the rate of three months salary for each year of service as required under the CBA. The respondent has not tabled employment records for the grievants to disprove the dates pleaded by the claimant as the time when they started working for it. I have also perused the retirement letters on which the respondent computed the gratuity payable to the grievants and noted that there is no indication of when each started working for it.
38. Under section 10 of the *Employment Act*, an employer has the burden of disproving, by use of employment records, any verbal allegations by his employee in legal proceedings, concerning his employment contract. In this case the claimant has pleaded that the first grievant employed on 1st March 1987, 2nd grievant in January 2003, 3rd grievant on 1st August 1996, 4th grievant on 1st November 1982 and the 5th grievant 1st June 1987. The claimant has computed the gratuity payable using the basic pay for each respective grievant multiplied by the years served less the amount paid after the retirement.
39. I agree with the following computation by the claimant that:
- a. 1st grievant served for 34 years x Kshs 17,579 x 3 = Kshs1,703,058 – Kshs 399,288 paid leaving a balance of Kshs. 1,393,825.
 - b. 2nd grievant served for 17 years x Kshs. 5,492 x 3 = 790, 092 – Kshs. 158,018 paid leaving Kshs.632,047



- c. 3rd grievant served for 25 years x Kshs 17,748 x 3 = Kshs1,331,100 – Kshs 308,162 paid leaving a balance of Kshs. 1,022,938.
 - d. 4th grievant served for 39 years x Kshs 17,700 x 3 = Kshs 2,070,900 – Kshs 461,027 paid leaving a balance of Kshs. 1,609,873.
 - e. 5th grievant served for 34 years x Kshs 17,742 x 3 = Kshs1,809,684 – Kshs 402,859 paid leaving a balance of Kshs. 1,406,825.
40. I am satisfied that the claimant has proved on a balance of probabilities that the said figures represent the correct quantum of gratuity payable to the respective grievants.

Over-taxation

41. The claimant alleged that the grievants were deducted more tax than what is due from them. The respondent denied the said allegation. Having considered the material placed before the court, the said allegation has not been substantiated and if the claimant believes that the deducted tax is more than expected, it can raise the matter with the relevant authority.

Frustration and force majeure

42. The Respondent has maintained that it is incapable of performing its contractual obligation due to the change in climatic conditions and the covid-19 pandemic which have occasioned loss to it and thus should not be held liable to perform the obligations as per the CBA 2014-2016. Its prayer is that the Court should allow it to pay the service gratuity in installments at the agreed rate that is not laid down rate in the CBA. I take the respondent to be admitting its obligation under the CBA that it was supposed to pay the terminal dues within a given period of time but it is seeking to be excused from the same.
43. The Clause 4 of the CBA cited above provided that the Respondent would deposit the service gratuity in a provident fund and pay its retiring employees within 12 months from the date of separation. However, the Respondent claims financial constraints due to covid-19 and climatic changes. It committed itself to settle the gratuity by five instalments vide the retirement letters. The letters were the same but I have copied the one to the 1st grievant.

“MR. DAVID KARANJA KINYANJUI 23rd APRIL 2020.

FACTORY MANAGER: - KAMICHEE

Dear Sir,

RE: RETIREMENT FROM EMPLOYMENT

Subject matter refers:

This letter serves to inform you that the Board of Management Committee: - Ruchu/ Gacharage F.C.S. Ltd has under Min No. JNT. 9/2019/2020 dated 23rd April 2020 resolved that:

With effect from 1st May 2020, to retire you from service to the society (society payroll), this is after attaining the statutory age of retirement (60 years.)Your accumulated terminate benefits (gratuity) to a tune of Kshs. 1,330,760/= (one Million Three hundred and Thirty Thousand Seven Hundred and Sixty only) will be paid in five (5) years installments commencing the financial year 2019/2020 as follows:



- 1st Installment: - 30%- May 2020

- 2nd “ : - 25% - May 2021

- 3rd “ : - 20% - May 2022

- 4th “ : - 15% - May 2023

- 5th “ : - 10% - May 2024

You should note that the respective amount of Tax deduction will be computed and remitted to income tax.

The Board of Management greatly appreciated your tireless long service to the society members, the stake holders and wishes you prosperous good life as we continue farming together in future.

Thank you,

Yours Faithfully,

For and on behalf of: -

Ruchu Gacharage Farmers Co-op Soc. Ltd.

..... CHAIRMAN

..... V/CHAIRMAN

..... TREASURER

..... COMM/MBR

..... HON./SECRETARY

..... SEC./MANAGER

44. The evidence before the court is that the respondent owes each of the five grievants service gratuity calculated above which it has not settled. No good reason has been shown as to why the respondent is in default. The money ought to have been paid from a provident fund invested by the respondent as per clause 4 of the CBA. Even if the said money was not invested as contemplated in the CBA, the only outstanding balance according to the retirement letters would be 10% of the total amount which would be due in May 2024.
45. Having said that, I must observe that the suit herein is about whether, and not how the gratuity owing to the grievants will be paid by the respondent. Whereas the first issue is the present concern of this court, the latter question can only arise after entry of judgment. It follows that the defence of frustration or force majeure does not arise in this case because the respondent is not denying liability. It's inability to pay the money should be raised when execution will be initiated.

Conclusion

46. I have found that the claimant has proved its case on a balance of probability and computed the correct quantum of gratuity payable to each grievant. I have further found that the defence of force majeure is not relevant in the instant suit as the respondent has admitted that it is liable to pay the grievants service gratuity under the CBA and even committed itself to settle the same by five instalments. I have further found that the time for payment of the first four instalments has lapsed. Finally, I have found that the alleged excess tax deduction has not been substantiated by evidence.



47. Consequently, I enter judgment for the claimant ordering the respondent to pay the following-

1st grievantKshs. 1,393,825

2nd grievantKshs.632,047

3rd grievant..... Kshs. 1,022,938

4th grievant..... Kshs. 1,609,873

5th grievantKshs. 1,406,825

The awards will attract interest at court rate from date of filing the suit less statutory deductions. The claimant will also have costs of the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF OCTOBER, 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

