**Kenya Union of Commercial, Food and Allied Workers v Jetlak Food Limited (Cause 664 of 2019) [2023] KEELRC 2963 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2963 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 664 OF 2019**

**JK GAKERI, J**

**NOVEMBER 21, 2023**

**BETWEEN**

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

**AND**

**JETLAK FOOD LIMITED ..... RESPONDENT**

## JUDGMENT

1. By a Memorandum of Claim filed on 8th October, 2019, the Claimant sued the Respondent alleging that the Respondent had refused to pay the grievant gratuity as provided by Clause 14 of the Collective Bargaining Agreement between the Claimant Union and the Respondent.
2. The Claimant prays for;
   i. Gratuity at 15/26 x 14,743 x 12 = 102,070/=.
   ii. Full compensation because of time wasted at 12 months Kshs.176,916/=.
   Total Kshs.278,986/=
   iii. Cost of the suit.
3. The Claimant testified that he joined the Respondent as a casual employee on 12th August, 2003 and served for 6 years before he was confirmed as permanent and worked as a Machine Operator until he voluntarily resigned on 1st July, 2015 after serving a one month's notice.
4. It is the Claimant's case that the Respondent's Operations Manager, Mr. Raju acknowledged the resignation.
5. According to the Claimant, the contract provided for termination by a 7 days notice by either party.

6. The Claimant testified that his gratuity remains unpaid.

**Respondent's Case**

7. The Federation of Kenya Employers (FKE) filed a Memorandum of Appearance on 3rd February, 2020 but neither filed a response to the Memorandum of Claim nor a witness statement and did not participate in the suit.

**Evidence**

8. Documentary evidence on record reveals that the Claimant union demanded the Claimants gratuity vide letter dated 1st July, 2015 and 9th July, 2015 citing Clause 14 of the Collective Bargaining Agreement (CBA) between the parties.

9. The earlier letter had requested for a meeting on 8th July, 2015.

10. Both letters elicited no response from the Respondent and the dispute was reported to the Claimant's Head Office for further action.

11. The dispute was reported to the Cabinet Secretary, Ministry of Labour, Social Security and Services vide letter dated 20th August, 2015 and a Conciliator was appointed on 8th September, 2015 and a meeting was scheduled for 21st October, 2015 at 2 pm.

12. By its letter dated 24th August, 2015, the Respondent contested the Claimant's use of the term "retirement" of the grievant since he had resigned and was 31 years old.

13. By letter dated 12th April, 2016, the Conciliator reported that the parties had failed to agree and attached the relevant Certificate duly executed by the parties.

14. It would appear that attempts to resolve the disputes thereafter fell through.

**Claimant's Submissions**

15. The Claimant identified two issues for determination on termination of employment and entitlement to gratuity.

16. On termination, the Claimant's General Secretary, Mr. Boniface Kavuvi submitted that the grievant followed the procedure in Clause 2B(iii) of the CBA and terminated employment effective July 2015 but was not paid gratuity which the Respondent was legally bound to pay, Mr. Kavuvi urged.

17. That under the CBA, all employees were entitled to gratuity at 15 days basic pay per completed year after termination of employment.

18. On entitlement of gratuity, it was submitted that the Claimant worked for the Respondent for 12 years and was entitled to gratuity under the CBA.

19. Strangely, the General Secretary did not identify the CBA he was making reference to and did not address the compensation sought in the Memorandum of Claim.

**Determination**

20. The singular issue for determination is whether the Claimant is entitled to the gratuity sought.

21. Before delving into the above-issue, it is essential to restate the principles governing undefended suits as a background to the determination of the suit.

22. Under Section 107 of the *Evidence Act*,

    1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

23. This burden is reinforced by the provisions of Section 109 of the *Evidence Act* as regard proof of any particular fact.

24. In *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, Onyango J. stated as follows;

> " In the case of Monica Kanini Mutua V Al-Arafat Shopping Centre & another (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment."

25. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2018) eKLR.

26. The letter of employment dated 26th November, 2013 appointing the Claimant as a Machine Operator effective 1st November, 2013 leaves no doubt that the Claimant was an employee of the Respondent before his resignation in July 2015 show that there was an employment relationship which the Respondent did not deny.

27. In sum, there is overwhelming evidence that the Claimant was an employee of the Respondent at least from 26th November, 2013.

28. As to whether the Claimant is entitled to gratuity under the CBA between the Claimant and the Respondent, the court proceeds as follows;

29. Mr. Kavuvi submitted that the Claimant was entitled to gratuity by virtual of Clause 14 of the CBA.

30. Puzzlingly, Mr. Kavuvi made no reference to the CBA he was referring to and adduced no evidence to show that the Claimant was a member of the union and thus covered by the CBA.

31. The Claimant adduced no evidence of the list of its members employed by the Respondent, his membership card or evidence of payment of union dues by the grievant.

32. A copy of the Claimant's payslip would have easily revealed that the grievant was a member of the union.

33. In his written and oral evidence, the Claimant made no reference to his membership of the union or when he registered as a member.

34. More significantly, however, the copy of the Collective Bargaining Agreement provided by the Claimant was effective from 1st January, 2016 to 31st December, 2017, a duration of 24 months as provided by Clause 1(b).

35. Clause 1(a) of the CBA is emphatic that;

> " The effective date of this agreement shall be 1st January, 2016."

36. Clause 14 of the CBA provides that;

> " Any employee shall be entitled to gratuity of fifteen (15) days monthly basic salary for every completed year of service (based on the last basic salary) on termination."

37. As correctly submitted by the Claimant, Section 59 of the *Labour Relations Act*, 2007 provides that;

    1. Collective agreement binds for the period of the agreement –

        a. the parties to the agreement.

        b. all unionisable employees employed by the employer, group of employers or members of the employer's organization party to the agreement; or

        c. the employers who are or become members of an employer's organization party to the agreement, to the extent that the agreement relates to their employees.

    2. . . .

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

38. Section 60 provides for the registration of a collective agreement by the Employment and Labour Relations Court for purposes of enforceability from the effective date which parties mutually agree.

39. In the instant case, the effective date was 1st January, 2016.

40. The court is struggling to find the basis of the Claimant's claim that the grievant is entitled to gratuity pursuant to the provisions of the CBA on record.

41. Even assuming that the grievant was a member of the Claimant Union, the provisions of the *Labour Institution Act*, 2007 are clear that a CBA has an effective date and it is only binding for the duration agreed upon by the parties.

42. According to the grievant, he resigned from employment by giving a one (1) month' notice and left on 1st July, 2015 and thus ceased to be an employee of the Respondent as evidenced by the letters exchanged between the Claimant, Respondent and the Ministry of Labour, Social Security and Services including the Conciliator.

43. Intriguingly, the Claimant has not alleged that there was another CBA before the one relied upon by the Claimant union.

44. The court is wondering how the grievant herein can take advantage of the term of a CBA negotiated and concluded after his resignation and whose effective date is five (5) months after the resignation. Which contract of employment would he be enforcing?

45. Contrary to the Claimant's submission that the parties had a collective agreement, and the same binds the parties thereto, a CBA is only effective for the period agreed upon by the parties as ordained by Section 159(1) of the *Labour Relations Act*, 2007.

46. For the foregoing reasons, it is evident that the Claimant's claim for gratuity is unsustainable and it is accordingly dismissed.

47. Similarly, the prayer for full compensation because of time wasted is not one of the remedies under the provisions of the *Employment Act*, 2007 or the *Employment and Labour Relations Court Act*, 2011.

48. More significantly, the Claimant adduced no evidence to substantiate the prayer and appear to have abandoned it altogether.

    The Prayer is Dismissed.

49. Having failed to establish his claim against the Respondent, the Claimant's suit is unsustainable and is for dismissal and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**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 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 has 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.