



**University of Nairobi v Ilevé (Employment and Labour Relations Appeal E047, E188, E164 & E178 of 2022 & E066 & E070 of 2020 & E160, E162 & E135 of 2021 (Consolidated)) [2023] KEELRC 3136 (KLR) (17 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3136 (KLR)

**REPUBLIC OF KENYA**

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

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E047, E188, E164 & E178 OF 2022 & E066 & E070 OF 2020 & E160, E162 & E135 OF 2021 (CONSOLIDATED)**

**NJ ABUODHA, J**

**NOVEMBER 17, 2023**

**BETWEEN**

**UNIVERSITY OF NAIROBI ..... APPELLANT**

**AND**

**BERNARD NYAMAI ILEVE ..... RESPONDENT**

*(Being appeals from the judgment and decree of different Hon. Magistrates issued in Chief Magistrate's Court at Milimani on diverse dates)*

**JUDGMENT**

1. Through the memorandum of appeals dated on diverse dates, the appellant appeals against the judgment of Honourable Magistrates Court.
2. The Appeals were based on the grounds that were grouped by this court as follows:
  - i. One set of judgment holds that the University correctly computed the Claimant's gratuities hence no cause of action. The claimants being dissatisfied have appealed.
  - ii. The second set of judgements is that the University wrongly computed the gratuities and hence the trial court went ahead and made computation and entered wrong judgment against the University. The University has therefore appealed.
  - iii. The third limb is that a CBA cannot run retrospectively hence the error in computation.
3. The court identified three issues for determination in these Appeals which are
  - a. Whether the University correctly computed the gratuity hence no cause of action.



- b. Whether the University wrongly computed gratuity hence the trial court was justified in computing the same and making an award against the University.
  - c. Whether a CBA can apply retrospectively.
4. The Court therefore invited the parties to file submissions on those three issues.

### **Appellant's Submissions**

5. The Appellant in its submissions dated 10<sup>th</sup> July, 2023 submitted on the issues above but first submitted that from the perusal of the Appeals they had observed there was a jurisdictional issue that ought to be determined prior to considering the main issues namely;

Whether the chief Magistrates court was vested with jurisdiction to determine the service gratuity claims as presented by the Claimants.

6. On this issue the appellant submitted that section 2 of the *Labour Relations Act* defines trade dispute to include a dispute or difference between employers and trade unions concerning any employment matter. That it was evident that there was a dispute on the interpretation of clause 40(h) of the 2013-2017 CBA as read with Clause 43 of the 2013-2017 CBA. The Magistrates in different judgements appreciated that the dispute revolved around interpretation of section 40(h) of the CBA (2013-2017).
7. The Appellant therefore submitted that pursuant to section 12 of the *Employment and Labour Relations Court Act*; Section 73 of the *Labour Relations Act* and Gazette Notice No. 6024 of 10<sup>th</sup> June, 2018 the Chief Magistrates court had no jurisdiction to hear and determine the claims by employees relating to the computation of gratuity due under CBA (2013-2017).
8. The Appellant relied on the cases of *National Social Security Fund of trustees vs Kenya Tea Growers Association & 14 Others* (2023) KECA 80(KLR), Jamal *Salim vs Yusuf Abdulahi Abdi & Another* (2018) eKLR and *Geo Chem Middle vs Kenya Bureau of standards*(2020) eKLR among others to submit that the Chief Magistrates did not have jurisdiction hence the decisions were a nullity.
9. On the issue of computation of the gratuity, the Appellant submitted that CBAs bind parties for the period of the agreement and is effective from the date agreed upon by the parties and relied on section 59 of the *Labour Relations Act*. The CBAs governing the terms and conditions of service of KUDHEIHA's members signed between UON and KUDHEIHA provided for the duration within which it was to be applicable and applicable rate of gratuity for the period covered under the CBA.
10. It was the Appellant's submission that the terms of CBA in force in respect of each period were incorporated into a contract of employment of every employee of UON covered by CBA for the period the CBA remained in force. The Appellant relied on the case of *Mukiria Farmers Co-operative society Ltd vrs Jacob Rukaria & 5 Others* (2017) eKLR.
11. The Appellant submitted that there was no provision in the CBA for a retrospective application hence the employees' assertion that the rate prescribed in the CBA (2013-2017) should apply from their respective dates of employment cannot hold. There were prevailing terms and conditions of service which were applicable to the Employees prior to signing the CBA (2013-2017).
12. The Appellant relied on the case of *Kenya Union of Sugar Plantation and Allied Workers vs West Kenya Sugar Company Limited* (2022) eKLR where the court agreed that a CBA did not apply retrospectively unless parties agreed it to be. The CBA had an effective date of 1<sup>st</sup> July 2013, an implementation date of 1<sup>st</sup> July,2015 and was registered on 6<sup>th</sup> March 2017.



13. The Appellant submitted that the CBA is a contract which operates prospectively not retrospectively which was the spirit behind a further addendum agreement signed by the University and trade union on 16<sup>th</sup> October,2018 clarifying the correct timeframe bench mark for calculating gratuity dues.
14. The Appellant requested this court to be guided by the decision of Hon. Justice Dr. Jacob Gakeri among other cases in the case of Callen N. Moseti vs University of Nairobi, Appeal No. E014 of 2021 where a judgment delivered in 1<sup>st</sup> February,2023 disallowed the retrospective application of the 2013-2017 CBA.
15. The Appellant further submitted that clause 40(h) of the 2013-2017 CBA provided for 31% of the basic salary for every completed year hence the reference by employees of annual basic salary in the computation is erroneous as it tries to rewrite the CBA. The payment per annum was provided for those employees on contract under clause 40(c) but the employees herein were not on contract.
16. The Appellant also submitted that the implementation date of the CBA was when the CBA was registered in court which was 6<sup>th</sup> March,2017 hence not 1<sup>st</sup> July 2015. In the computation of gratuity parties were entitled to compute from 1<sup>st</sup> July 2013 which was provided as effective date in the CBA.
17. The Appellant submitted that it would occasion the University a lot of injustice on its finances if the CBA would be applied retrospectively. The Appellant submitted that the UON internal memo dated 18.01.2017 relied upon by the Magistrates to allow Bernard Nyamai's claim was incapable of varying the Employee's terms and conditions of service. This was because Nyamai had already retired on 31<sup>st</sup> December,2016 so the memo could not apply to him. The gratuity applicable to him was 28 days prior to application of the new CBA at 31% from 1<sup>st</sup> July 2013 to 31<sup>st</sup> December 2016.
18. The Appellant therefore submitted that the trial court was erroneous in calculating gratuity from the time of employment of the Employees and prayed that the 31 % of the basic salary for every completed year should apply to the last basic pay before employee exited the University.
19. The Submissions by the Appellant's Advocates dated 3<sup>rd</sup> July ,2023 reiterated the above position and submitted that the CBA was to be read together with the MOU on clause 40 and internal Memo and it was to apply from 1<sup>st</sup> July,2015 of every completed year and not retrospectively.
20. The Respondent filed their submissions dated 25<sup>th</sup> July,2023 as a rejoinder to the Appellant's submissions. On the issue of jurisdiction of the lower court adjudicating the claim. The Respondent submitted that Gazette Notice No.6024 excluded trade disputes under Labour Relations Act. However, the Magistrates were empowered to deal with disputes arising from contracts of employment where employees gross monthly pay did not exceed Kshs 80,000/=.
21. It was the Respondent's case that the dispute here was not commenced as trade dispute since it was not reported to the Minister for labour and the Claimant was an individual who sued the Appellant. He was earning a basic salary of Kshs 20,937/= and a gross salary of Kshs 45,618/= before he retired. His salary was therefore not above Kshs 80,000/= . It was his case that the court was called upon to look at the CBA as an exhibit in support of employees' claim.
22. It was the respondent's case that for the matter to be termed as a trade dispute it ought to have been referred to conciliation and had to be a dispute between the union and employer. KUDHEIHA was not a party to the proceedings. The Respondent relied on the case of Benta Achieng Odinyo v University of Nairobi (2021) eKLR where on appeal it was decided that the employee could enforce terms of CBA as an individual contract depending on pecuniary criteria set out in the Gazette Notice No. 6024. The Court held that the lower court had jurisdiction since it was not a trade dispute between the union and the employer.



23. The Respondent further stated that the facts of the above case were similar to these cases where the Respondents want the court to determine their rightful gratuity based on clause 40 of CBA which was now a right under their contracts of employment by dint of sections 59(3) of the *Labour Relations Act*.
24. On the retrospective application of the CBA the Respondent submitted that the CBA 2013-2017 was registered in accordance with provision of section 60 of the *Labour Relations Act*, was in force and agreed upon by both the union and University. Further that it would be effective from 1<sup>st</sup> July, 2013 to 30<sup>th</sup> June, 2017 and would continue to be in force until revised jointly in writing by parties or another was signed. The implementation date was 1<sup>st</sup> July, 2015.
25. The Respondent submitted that the employees having been retired and or promoted on dates after the registration of the CBA, the active CBA in place was the one for 2013-2017 which was in force and applicable to date. It was the respondent's case that the appellant assertion to be paid 28 days as per old CBA was made in bad faith as the said CBAs could not be enforced in a court of law. The Respondent urged this court to find that the applicable gratuity payable to be 31% of each year worked as per 2013-2017 CBA.
26. On the issue of several CBAs being used to calculate gratuity of an employee the Respondent faulted the Appellant for not providing what the other CBAs provided and why it took the 28 days alone and not 15 days payable in 1999 or 21 days payable in 2004. He gave an example of Mr. Ileve who was employed in 1<sup>st</sup> July 1985 and retired on 31<sup>st</sup> December, 2016 which was a period of 31 years. What happened between 1985-2005 when there was no CBA and why did it apply retrospectively? And such questions drew a line on the 2013-2017 CBA that it did not to apply retrospectively. It was his submission that the Appellant was acting in bad faith and relied on the case of *Republic v Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair works Saloon*(2019) EKLK.
27. On the issue of basic salary for every year worked equalling to annual basic pay the respondent submitted that all employees had contracts of employment and were entitled to 31% of basic pay per annum as per clause 40(c) of the 2013-2017 CBA. The Respondent further submitted that in the event of conflict the law stipulated that the terms and conditions that confer superior benefit to the employee to be upheld. He relied on the case of *Kenya Union of Domestic Hotels Education Institutions and Hospital Workers(KUDHEIHA) v North Coast Beach Hotel*(2015) eKLR. The Respondent also relied on the case of *Alfred O. Amombo v Lake Victoria North Water Services Board*(2020) eKLR where the court allowed calculation of gratuity at 31 % of basic salary earned.
28. On the issue of whether the Works Committee Member's resolutions of 16<sup>th</sup> October 2018 can alter or amend the CBA the Respondent submitted that the same did not apply to Respondent who had retired.

### **Analysis & determination**

29. The duty of a first appellate court was well stated in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123 thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to



take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

30. In determining the Appeal herein, this Court shall similarly seek to re-analyse the evidence tendered before the trial court vis-à-vis the court’s conclusion and disposition.
31. In this case, the court identified three issues for determination in these Appeals which are: -
- a. Whether the University correctly computed the gratuity hence no cause of action.
  - b. Whether the University wrongly computed gratuity hence the trial court was justified in computing the same and making an award against the University.
  - c. Whether a CBA can apply retrospectively.
32. The Appellant introduced the issue of jurisdiction of the lower court in adjudicating the claims. The Appellant argued that the same revolves on interpretation of clause 40 of the *Labour Relations Act* hence a trade dispute. Section 2 of the Act defines trade dispute as follows: -
- 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;
33. It is clear the Gazette Notice No. 6024 excludes trade disputes under the *Labour Relations Act* which the magistrates handling employment and labour related disputes cannot deal. The Magistrates are empowered to deal with disputes arising from contracts of employment where the employees gross monthly pay does not exceed Kshs 80,000./= as per the *Employment and Labour Relations Court Procedure Rules*.
34. The Respondent has illustrated that all the Claimants were earning less than the Kshs 80,000. This being an individual contract I am not persuaded that it fell under the Trade Dispute Act. The claimants sought to be paid their gratuity amounts as per CBA in place. A trade dispute has to be reported to the minister for labour for conciliation under section 62(1) of the Act and if conciliation fails, the matter will be referred to the court under section 73(1) of the Act. The Dispute has to be between the union and the employer. KUDHEIHA was not a party in this suit.
35. I agree with the decision of *Benta Achieng Odinyo v University of Nairobi* (2021) eKLR where Justice Onesmus Makau held that the Chief magistrates court had jurisdiction to adjudicate a dispute between an employer and individual employee while a trade dispute is between trade union and employer. In conclusion I find the Chief Magistrate Courts had jurisdiction to hear and determine the claims filed before them.
36. I will group the first and second issues as follows which leads to the issue of retrospective application of the CBA: -

**Whether the University correctly or wrongly computed the gratuity to the Respondents hence retrospective or prospective application**

37. Section 59 of the *Labour Relations Act* provides as follows: -
- (1) A collective agreement binds for the period of the agreement.



- (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.
- (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.
38. The 2013-2017 CBA in question had an effective date of 1<sup>st</sup> July,2013, an implementation date of 1<sup>st</sup> July,2015 and was registered on 6<sup>th</sup> March,2017. It is the Appellant’s position that there were terms prior to this CBA which governed the terms of service of employees and it proposed 28 days prior to the CBA 2013-2017 and 31% of the basic salary of every completed year with effect from 1<sup>st</sup> July,2013.
39. The Respondents on the other hand faulted this approach since there was no CBAs between 1985 and 2005. The CBAs kept on changing from 15 days to 21 days in different years applying retrospectively yet the Appellant now finds an issue with the 2013-2017 applying retrospectively. The Respondent has wondered why the Appellant decided to go by 28 days prior to the CBA 2013-2017.
40. It was the position of the Appellant that the CBA did not provide for retrospective application and the parties had not agreed to such application. The Parties attached different authorities with the appellant’s authorities submitting that the CBA 2013-2017 did not have a retrospective application while the respondent’s authorities submitting that the CBA 2013 2017 was applicable in calculation of the gratuity.
41. Clause 40(h) of the 2013-2017 CBA provide that the gratuity payable shall be 31% of the basic salary for every completed year. The Respondents on the other hand relied on clause 40(c)of the CBA which provides that staff on one or more years of contract will be paid gratuity at the rate of 31% of basic pay per annum at the end of contract. It is clear the Respondents were not on contract so this provision does not apply but clause 40(h).
42. CBAs are contracts just like any other contracts they bind the parties. The 2013-2017 CBA had an effective date of 1<sup>st</sup> July,2013 even though it was registered in 6<sup>th</sup> March,2017. This meant that the parties agreed that it would be effective on 2013 and not before this date. The University which is a government body considered the financial effect hence there was an effective date of the CBA. The university was also aware of the employees who had joined the University before the effective date and did not provide for retrospective application of the CBA to such employees.
43. It is therefore clear that the applicable CBA before the effective dates was the 2012-2013 CBA which provided for 28 days payment gratuity. The former CBAs as old as 2006 provided for the said 28 days. In addition, from the reading of the above provision it is clear a CBA applies from the period of agreement. This was the position in the case of *Mukiria Farmers Co-operative society Ltd vs. Jacob Rukaria & 5 Others* (2017) eKLR. There is no provision in the CBA for retrospective application and I agree with the Appellant’s submissions on that issue as was held in the case of *Kenya Union of Sugar Plantation and Allied Workers vs West Kenya Sugar Company Limited* (2022) eKLR that;
- “ The Court agrees with the position taken by the Claimant being that the applicable CBA is one in existence during the periods in question. A CBA is applicable during its valid period. It is not retrospective unless the parties agree it to be”.
44. I also agree with the decisions of Hon.Justice DR. Jacob Gakeri and Hon.Lady Justice Stella Ruto in the cases *Callen N. Moseti vs University of Nairobi*, Appeal No. E014 of 2021 and *University of Nairobi vs Florence Alusa* ,Appeal No. E161 of 2021 respectively. The two courts faced with the same issue held that backdating the gratuity to the time the employees were employed had no contractual



justification and had not been agreed by parties. The applicable gratuity was 28 days prior to the period of 2013-2017 when the new CBA provided for gratuity at 31% with effect from 1<sup>st</sup> July,2013.

45. The Appellant also produced an addendum of 2018 which was giving a clarification of the payment of the gratuity that it would not be retrospective. Holding otherwise would be tantamount to the Court rewriting the CBA for the parties when the court's role is to uphold the parties' intentions in the CBA just like any other contract.
46. In conclusion the Court hereby allows the Appeal in part as shown below.
  - a. That the University correctly calculated the gratuity hence no cause of action arises.
  - b. The 2013-2017 CBA did not provide for retrospective application hence cannot apply to the period prior to 2013.
  - c. Each party bears its own costs.
47. It is so ordered.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2023 DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2023**

**ABUODHA NELSON JORUM**

**JUDGE**

