



University of Nairobi v Kenya Union of Domestic Hotels Educational Institutions & Hospital Workers & another; Iminti & 72 others (Interested Parties) (Cause E722 of 2022) [2023] KEELRC 2926 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2926 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E722 OF 2022
L NDOLO, J
NOVEMBER 16, 2023**

BETWEEN

THE UNIVERSITY OF NAIROBI CLAIMANT

AND

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS & HOSPITAL WORKERS 1ST RESPONDENT

COUNTY LABOUR OFFICER, NAIROBI COUNTY 2ND RESPONDENT

AND

GILFORD IMINTI & 72 OTHERS INTERESTED PARTY

JUDGMENT

1. The background to this claim consists of several cases filed by some of the Interested Parties, who are either employees or former employees of the Claimant, and members of the 1st Respondent. The common subject in these cases arises from the rate applied by the Claimant in payment of gratuity.
2. By a Statement of Claim as amended on 20th September 2022, the Claimant seeks interpretation of Clauses 40 and 43 of the Collective Bargaining Agreement (CBA) for the period 2013-2017, on payment of gratuity.
3. In this regard, the Claimant seeks a determination as to whether a CBA can be applied retrospectively.

The Claimant’s Case

4. The Claimant and the 1st Respondent have over the years, negotiated and signed cyclic CBAs, through the Federation of Kenya Employers (FKE) and the Inter Public Universities Councils Consultative Forum (IPUCCF) on behalf of the Claimant’s employees.



5. The 2013-2017 CBA, which is the subject of this dispute, provides for duration and effective date as follows:
 43. Duration And Effective Date Of Agreement
 - a. This Agreement shall be effective from July 1, 2013 and shall remain in force upto June 30, 2017. It shall continue in force until revised jointly in writing by the parties or another is signed.
 - b. The implementation date of this agreement shall be with effect from July 1, 2015.
6. The Claimant states that the terms and conditions of service as set out in the CBA are applicable to employees in Grades I to IV employed on permanent terms.
7. The Claimant further states that in relation to gratuity, Clause 40(h) of the CBA provides that the gratuity payable shall be at the rate of 31% of basic salary for every completed year of service.
8. According to the Claimant, since the effective date of the CBA is clearly provided for as 1st July 2013, the computation of gratuity payable to the 1st Respondent's members at the rate of 31% for every completed year of service should be with effect from 1st July 2013. In addition, the completed years of service ought to be computed effective 1st July 2013.
9. The Claimant avers that prior to the signing of the 2013-2017 CBA, the applicable CBA was the one for 2012-2013, which provided that gratuity would be payable at the rate of 28 days' wages for every completed year of service. The Claimant adds that this rate was also applicable for the periods covered under the 2006-2008, 2008-2010 and the 2010-2012 CBAs.
10. The Claimant asserts that the 2012-2013 CBA was in place until 1st July 2013, when the 2013-2017 CBA was executed and gratuity thus became payable at the rate of 31% of the basic salary.
11. The Claimant states that the Interested Parties, who are members of the 1st Respondent, have instituted several suits against the Claimant, seeking retrospective application of Clause 40 of the 2013-2017 CBA on payment of gratuity.
12. These suits are also based on the 2nd Respondent's recommendation contained in a letter dated 7th October 2021 stating that 'the University to pay service gratuity to all employees who were in service by the time when the new CBA was signed at the rate of 31%.'
13. The Claimant lists 64 suits in this regard and states that payment of the amounts demanded by the 1st Respondent's members, arising from a retrospective application of the CBA is unaffordable and unsustainable in the long term.
14. The Claimant therefore seeks the following remedies:
 - a. A declaration that a CBA runs and binds parties for a duration of the agreement and that it is a distinct and separate agreement from terms and conditions of service and only applies during agreed/specified period, and does not extend or extrapolate staff terms and conditions of service beyond what is periodically agreeable in the CBA cycle;
 - b. A declaration that the terms and conditions of service set out in the 2013-2017 CBA entered into between the Claimant's Council and the 1st Respondent do not apply retrospectively;
 - c. A declaration that pursuant to Clauses 40 (h) and 43 of the 2013-2017 CBA entered into between the Claimant's Council and the 1st Respondent, computation of gratuity due to the



Claimant's former and current employees who are covered under the aforesaid CBA shall be at the rate of 31% of the basic salary for the completed years of service, such years of service being calculated with effect from 1st July 2013 which is the effective date of the 2013-2017 CBA;

- d. A declaration that computation of gratuity due to the Claimant's former and current employees who are members of the 1st Respondent for the completed years of service prior to 1st July 2013 shall be at the rate of 28 days' wages for every completed year of service, which is the rate that was prescribed in the CBA preceding the 2013-2017 CBA;
 - e. An order directing that the orders issued in this suit shall apply mutatis mutandis to all suits filed by members of the 1st Respondent in respect of payment of gratuity under the 2013-2017 CBA;
 - f. A declaration that the 2nd respondent's letter dated 7th October 2021 under Ref No. MLSP/NBI/TD/2518/2020 on recommendation of calculation and payment of gratuity pursuant to the 2013-2017 CBA is null and void.
15. The Claimant further asks for costs of the case.

The 1st Respondent's Case

16. The 1st Respondent filed a Response dated 30th May 2023, stating that the 1st to 72nd Interested Parties are its members and employees of the Claimant.
17. The 1st Respondent accuses the Claimant of failing to pay gratuity at the rate of 31% for every completed year of service, an express term under Clause 40(h) of the CBA for 2013-2017.
18. The 1st Respondent relies on an internal memo dated 24th October 2018, issued by the Claimant's Registrar, Administration directing the Finance Officer to implement Clause 40 of the CBA by paying gratuity at the rate of 31%.
19. By letter dated 17th February 2020, the 1st Respondent reported a dispute on this matter to the Ministry of Labour and Social Protection.
20. According to the 1st Respondent, an amicable agreement was reached at the conciliation stage, with the Claimant agreeing to pay gratuity at 31%. The Conciliator issued a report dated 7th October 2021.
21. The 1st Respondent also refers to a further agreement dated and signed on 16th October 2018 by which the Claimant allegedly agreed to pay gratuity at the rate of 31%.
22. The 1st Respondent further relies on a memo dated 14th December 2000 issued by the Directorate of Personnel Management, stating that after 11th September 2000, gratuity was to be paid at the rate of 31%.
23. The 1st Respondent disagrees with the Claimant's interpretation of the 2013-2017 CBA and accuses the Claimant of renegeing on a mutual agreement as contained in the 2nd Respondent's recommendation dated 7th October 2021.

The 2nd Respondent's Case

24. The 2nd Respondent, who served as Conciliator in the dispute between the Claimant and the 1st Respondent is a reluctant party in these proceedings.
25. The 2nd Respondent's case is that he is not a proper party because his involvement in the dispute was as regulated by law.



The Interested Parties' Case

26. The 1st-55th, 57th-59th, 61st-63rd and 65th – 73rd Interested Parties filed a joint Response dated 23rd May 2023.
27. They state that the Interested Parties are a mix of employees and former employees of the Claimant engaged in various capacities in Grades I-IV. They add that the Interested Parties are unionised members of the 1st Respondent while others pay agency fees on account of deriving benefits from the negotiated CBA for 2013-2017.
28. The Interested Parties aver that in their claims filed in several courts, they have annexed the CBA for 2013-2017, not for interpretation but as an exhibit in advancing their claims on gratuity.
29. It is the Interested Parties' case that once a new CBA is registered, the old one ceases to exist and cannot be used as a basis to calculate gratuity pay for an employee covered under the new CBA.
30. The Interested Parties challenge the legitimacy of an agreement signed on 16th October 2018 authorising review of Clause 40 of the CBA for 2013-2017.

Determination

31. The Claimant presents a convoluted mix of pleadings and prayers, some of which touch on matters that have either been concluded or are pending in other courts.
32. I must state from the outset, that this Court cannot legitimately mop up all cases touching on the issue of payment of gratuity to the 1st Respondent's members by the Claimant. I say so because every case has its own litigation cycle and no one court can call up cases pending in other courts for determination in a guillotine fashion.
33. That said, there are two issues falling for determination in this case:
 - a. Whether the 2nd Respondent is a proper party in these proceedings;
 - b. Whether the provision on gratuity in the CBA for 2013-2017 applies retrospectively.

The 2nd Respondent's Joinder

34. From the pleadings filed by the parties, it is evident that the only reason why the 2nd Respondent has been joined in these proceedings is because he rendered a recommendation that the Claimant did not agree with.
35. Conciliators, such as the 2nd Respondent, play a critical role in the conciliation process, established under the *Labour Relations Act*. These are public servants who perform an important function in fostering industrial peace and it would, in my view, be counterproductive if every time they take up a trade dispute, they have to worry about being dragged to court, for actions taken in the course of duty in good faith.
36. There is no need to take this treacherous route because in any event, the recommendation by a Conciliator is subject to challenge by the parties and is not binding on this Court.
37. On the whole, I find no reason, why the 2nd Respondent was made a party in these proceedings. He is therefore discharged.



Retrospectivity of the CBA (2013-2017)

38. In urging its case against retrospectivity of the CBA, the Claimant relied on Section 59 of the *Labour Relations Act* which provides that a CBA is binding for the period of the Agreement and shall be effective from the date agreed upon by the parties.
39. In his letter dated 7th October 2021, the 2nd Respondent stated as follows:
- “the issue of paying gratuity at 31% for a certain period and 28% for the remaining period is incorrect and should not be allowed at all otherwise it will negate the purpose of negotiating collective bargaining agreements periodically”.
40. The Interested Parties support the position taken by the 1st and 2nd Respondents. They state that they are entitled to pursue payment of their gratuity based on the 2013-2017 CBA which embodies superior terms compared to the retired CBAs.
41. On its part, the Claimant faults the 2nd Respondent for misconstruing the CBA for 2013-2017. The Claimant cites the Court of Appeal decision in *Mukira Farmers Co-operative Society Ltd v Jacob Rukaria & 5 others* [2017] eKLR to support this proposition.
42. The Claimant’s case is that gratuity payable to the 1st Respondent’s members ought to be computed on the basis of successive CBAs and that retrospective application can only be upon mutual agreement between the parties.
43. In this regard, the Claimant relied on the decision in *Kenya Union of Sugar Plantation and Allied Workers v West Kenya Sugar Company Limited* (Cause 14 of 2021) [2022] KEELRC 1394 (KLR) (13 July 2022) (Ruling) where it was affirmed that a CBA is applicable during its valid period and is not retrospective unless the parties agree as such.
44. The Claimant further relied on the decision in *Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 Others* [2015] eKLR where the Court of Appeal affirmed its earlier holding in *National Bank of Kenya Limited v Pipeplastic Samkokit (K) Ltd & another* [2001] eKLR 112 that the law frowns upon retrospectivity in contracts unless it is by consent of the parties.
45. In this case, I find nothing to suggest that the parties had agreed to a retrospective application of the CBA for 2013-2017. It follows therefore that computation of gratuity accrued prior to the coming into effect of the CBA for 2013-2017 could not benefit from the CBA that is the subject of this dispute.
46. In the end, I make a declaration that the provision for gratuity in the CBA for 2013-2017 shall not apply retrospectively.
47. Each party will bear their own costs.
48. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF NOVEMBER 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Nyaga for the Claimant

Ms. Omondi for the 1st Respondent



Ms. Mbilo for the 2nd Respondent

Mr. Onenga for the 1st, 6th, 13th – 57th Interested Parties

Mr. Nyabena for the 58th and 62nd Interested Parties

