



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 38 OF 2019

MICHAEL LUNANI.....CLAIMANT

VERSUS

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By an order of the court issued on 27th March, 2019, the Claimant was granted leave to file a representative suit on his own behalf and on behalf of 107 others as against the Respondent. The Claimant's Statement of claim is dated 15th April, 2019 and filed in court on similar date.
2. The Claimant seeks various declarations amongst them a declaration that the Respondent has violated the constitutional rights of supervisors through discrimination, violation of their contracts of employment, payment of Kshs. 154,136,694.55/-, payment of statutory dues and salary arrears, payment for extra hours worked amongst others.
3. The Respondent entered appearance on 8th May, 2019 and filed a statement of response to the Claimant's claim dated 20th November, 2020 and filed in court on 27th November, 2020.
4. During the hearing, the Claimant testified in support of his case. He adopted his witness statement of 8th March, 2021 and produced his bundle of documents of 18th April, 2019.
5. The Respondent presented one Moffat Omondi, their former Acting Head of Human Resources and currently a Strategy Manager, to testify on their behalf. Mr. Omondi adopted his witness statement dated 13th February, 2021 and produced a bundle of documents filed in support of the Respondent's case and dated 20th October, 2020.
6. Submissions were filed for both parties.

The Claimant's Case

7. The Claimant's case is that he was employed by the Respondent as a motor vehicle mechanic; a position he held for 24 years. It is his case that in the year 2010, he was promoted to the position of supervisor, where he served until his retirement in September, 2018.
8. The Claimant states that his working conditions became an issue upon his appointment to the position of supervisor, owing to the fact that supervisors did not fall under the unionisable cadre of the Respondent's staff. It is his case that staff at this cadre were isolated in that they were not given salary increments, allowances, overtime pay and retirement packages for those who attained the retirement age were not favourable compared with unionisable staff.
9. It is the Claimant's case that they reported an economic dispute and the Minister for Labour appointed a conciliator who conciliated the issue, and made recommendations to the Respondent. It is his assertion that the recommendations were not adhered to necessitating the filing of this claim.
10. It is his case that his 13 months' salary arrears were never paid until his retirement. The Claimant further states that the Salaries and Remuneration Commission approved a structure and new salary scales, but which were not implemented until after he had retired.
11. On cross-examination, the Claimant stated that he was not a unionisable staff, and his salary was depended on the employment contract negotiated between him and the Respondent. He further stated that unionisable staff on a lower cadre, including those he supervised, earned a

higher salary than he did, and which he states was the actual problem.

12. The Claimant prays for the award of the prayers listed in his statement of claim.

The Respondent's Case

13. The Respondent states that the Claimant was appointed to the employ of the Respondent on 26th May, 1986. It is the Respondent's case that the Claimant was promoted to the position of supervisor, which position falls under junior management, and hence was not unionisable.

14. It is the Respondent's case that the lowest earning staff under the junior management cadre earns Kshs. 53,000/- up from Kshs. 38,000/-. The Respondent's witness confirmed the Claimant's assertion that there were disparities in salaries, where the highest earning unionisable staff earned a higher salary than the lowest earning Junior Management Staff.

15. The Respondent's witness (RW1) stated that issues concerning the salary disparities dates back to the year 2014, where senior staff earning lower salaries than their juniors launched complaints.

16. It is RW1's case that the Claimant retired three years before the salary increments were effected and hence he never benefited from the increments that were effected on 2nd June, 2020.

17. RW1 further states that the list of employees on whose behalf the Claimant instituted this claim, are all in junior management and the issues concerning their complaints have been escalated to the SRC but no communication has been received by the Respondent on the issues.

18. It is RW1's further case that the advisory received by SRC on salaries for management staff, was complied with six years later due to the Respondent's Company's inability to pay owing to financial challenges. It is his position that the documents produced in evidence before court, indicate that the Company had a negative Bank balance, hence the failure to comply with the SRC's advisory addressing the disparities.

19. RW1 states that he was aware of the Conciliator's report and the attendant recommendation. He further states that the company could not comply for reasons of financial challenges. He states that the Respondent's Company did not operate for a whole year and hence the financial challenges.

The Claimants' Submissions

20. It is submitted for the Claimant that the Salaries and Remuneration Commission reviewed salaries for all supervisory staff together with the other staff in management and that the parent ministry gave its concurrence but the Respondent failed to pay the recommended salaries.

21. It is submitted for the Claimant that the Respondent's failure to address the evident salary disparities, is breach of the Claimant's right to fair remuneration which right is protected under Article 41 of the Constitution.

22. It is the Claimant's submission that they are entitled to the prayers sought.

The Respondent's Submissions.

23. The Respondent submitted that the Claimants were employed under contracts of employment which they signed and agreed to, and hence the pay they were receiving was in accordance with their contracts of service and cannot therefore claim breach of their constitutional rights. The Respondent cited the case of *David Ithau Wambua v Liberty Kenya Holdings Limited (2019) eKLR* for the holding that where the Claimant had accepted the contract terms as negotiated, he could not plead discrimination on discovering that another employee was earning a higher salary than he was.

24. It is submitted for the Respondent that without business, it would not have been possible to implement the harmonized salaries and annual increments. They sought to rely on the Court of Appeal decision in *Kenya Tea Growers Association v Kenya Plantations & Agricultural Workers Union (2018) eKLR* for the holding that a court faced with a question of wage increment, ought to take into account productivity, costs of living and the employer's ability to pay.

25. It is further submitted for the Respondent that the Claimant and all former employees of the Respondent are not entitled to backdated revision of salaries and benefits, and have no basis upon which to seek compensation from the Respondent. It is submitted that the Claimant's reliance on the doctrine of continuing injury is misconceived for reason that their terminal dues were paid at the point of retirement.

Determination

26. I have considered the pleadings, the witnesses' oral testimonies and the submissions by both parties. The issue for determination is whether the Claimants are entitled to the remedies sought.

27. It is not disputed that disparities existed in salaries paid to unionisable staff and those that were not unionisable particularly, supervisors who were under the junior management cadre. It is also agreed by both parties that the Salaries and Remuneration Commission (SRC) and the parent ministry granted an approval to implement a harmonized salary structure in a bid to cure the disparities that existed in the

Respondent's company salary structure.

28. The Respondent's position was that the Claimants were under contracts of service which they negotiated and agreed to the terms therein, and should therefore not be heard to claim discrimination when they don't receive increments and benefits like their unionisable counter parts, whose employment was regulated by a Collective Bargaining Agreement that expressly provided for annual salary increments.

29. The Respondent has also pleaded financial incapacity as the reason it did not implement the SRC advisory on the harmonization of salaries. It is important at this juncture to note that the advisory by SRC is not mere advice, it has been held to be binding. The advisory in issue was given vide a letter dated 22nd August, 2014 and the parent ministry's granted authority to the Respondent to implement the advisory vide its letter of 26th November, 2014.

30. The letter by the Ministry of Agriculture, Livestock and Fisheries stated as follows in regard to the salary structure given by SRC:

***“....I have also noted that the new salary structure will cost the company Kshs. 2,431,673.09 per month to implement. This Ministry has assessed your request and noted that the new salary structure is catered for in the 2014/2015 FY approved budget. In addition, the Ministry considers that implementing the new structure will give the staff the required motivation to spur productivity and growth in the company.*”**

In view of the above therefore, authority is hereby granted to Chemelil Sugar Company Limited to implement the new salary structure for supervisory and Management staff.”

31. The Respondent's position is that her factory was closed for over a year and hence the reason it did not comply with the advisory by the SRC. It goes without saying that the SRC's advisory, and the subsequent authority to implement the advisory by the parent ministry, were triggered by the Respondent's letter seeking to harmonize her salary structure. The question then become, why the Respondent was asking for advice and authority if indeed it did not have the money to implement the structure? Secondly, the letter by the Ministry clearly refers to the Respondent's approved budget and the fact that it is capable of taking in the harmonized salary structure.

32. The Respondent's failure to comply is neither founded nor justified. The case of ***Kenya Tea Growers Association v Kenya Plantations & Agricultural Workers Union (2018) eKLR*** cited by the Respondent, relates only to minimum wages which is distinguishable from the circumstances in this case as the Claimants are not seeking to enforce minimum wages, but annual salary increments, and which were approved for payment by the relevant entities.

33. In light of the foregoing, I find and hold that by virtue of the binding advisory by the SRC and the authority granted to implement the salary structure, the Claimants' salary increments per the harmonized structure recommended by the SRC, is a benefit that had crystalized as soon as the advisory was given, and for which the Claimants could claim.

34. The next question for the court is to determine the time within which the salary increments are payable. The approvals relied upon were granted between August and November, 2014. In my opinion, upon these approvals being granted, a cause of action accrued upon which the Claimants could and ought to have claimed.

35. The letter by the Ministry indicated that the approvals were within the 2014/2015 FY approved budget, which ordinarily was to run between 1st July, 2014 to 30th June, 2015. The Claimants ought therefore to have lodged their claim any time within this financial year as the cause of action accrued immediately the approvals were granted.

36. The Claimants lodged this suit on 15th April, 2019. This period per Section 90 of the Employment Act, is way after the statutory time limit. Section 90 of the Employment Act 2007, provides as follows in regard to filing of employment related claims;

“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”.

37. According to the ***Black's Law Dictionary (10th Edition)*** the word “accrue” means ***“to come into existence as an enforceable claim or right.”*** In my opinion, the moment the approvals for the salary structure and authority to implement was given, a cause of action for which the Claimants could enforce had accrued.

38. In view of the foregoing, I find the Claimants' claim dated and filed on 15th April, 2019, statute barred and is hereby dismissed in its entirety.

39. Parties shall bear thereon costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF APRIL, 2022.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MR. ODENY PRESENT FOR THE CLAIMANTS

MR. OJURO PRESENT FOR THE RESPONDENT

CHRISTINE OMOLLO- C/A