



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E471 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION (K)

CLAIMANT

VERSUS

MUA INSURANCE (KENYA) LIMITED

RESPONDENT

JUDGMENT

The claimant is a trade union registered under the Labour Relations Act to represent employees in the banking sector and the wider financial sector. The Respondent is a limited liability company operating under the Insurance Act. The claimant and Respondent have a valid recognition agreement and have negotiated several collective bargaining agreements (CBAs). The last CBA was for the period 1st January to 31st December 2017. By letter dated 30th November 2017, the Respondent proposed a new structure of collecting bargaining to address the following: -

- a. Amend the existing structure of the CBA to mirror the changing technology and work methods.*
- b. The need to simplify some of the clauses to save on negotiation time.*
- c. The need to restructure remuneration and reward staff on merit based on individual performance so as to promote fairness in remuneration.*
- d. The need to align some clauses with the current employment laws.*
- e. The need to reconsider the cycle of negotiations as the period at the time was too short in the Respondents opinion.*

At the negotiations that followed, the parties failed to agree and the CBA dispute is currently pending resolution before this court under **Nairobi ELRC Cause No. 1583 of 2018.**

In the claim before me for determination, the claimant alleges that the Respondent has discriminated against union members by failing to pay them bonus, which was paid to non-union staff.

It is common ground between the parties that on 13th May 2020 the Respondent's Chief Executive Officer held a meeting with the staff at which he informed them that the company had posted a growth of 7% and profits. That as a result the Respondent's Board had approved the distribution of a bonus to be based on the Company's overall financial performance and the individual employee performance as per the Performance Management System (PMS) in place.

It is the claimant's averment that the Respondent's Human Resource Manager Mr. Stanley Wilunda thereafter called the workers' representatives to his office and gave them an option to lead their members out of the union in order to be paid the bonus which the workers' representatives declined on grounds that joining or leaving membership of a union is an individual's choice. That at the end of May 2020 the non-unionised employees were paid bonuses while the union members were not.

It is the claimant's case that this is in total disregard of Labour Laws, International Labour Convention No. 111 and the Constitution of Kenya. That the Respondent is acting in bad faith and using the bonus as a bait to remove employees from the membership of the claimant in order to defeat the CBA suit pending in court.

It is further the claimant's averment that the Respondent's Human Resource Manager has been constantly harassing the claimant's members by calling them to his office and via phone to urge them to leave the union to start benefiting from the bonus. That he has further threatened

them with termination.

The claimant avers that this has subjected its members to psychological torture, a miserable life and demotivation.

The claimant prays for orders as follows: -

- i) The Respondent is directed to pay all outstanding bonuses to all unionisable employees in accordance with its bonus Policy and as communicated to all staff by e-mail of 13th May, 2020.*
- ii) The quantum computation of all bonuses payable to be filed in court within seven (7) days from the date of judgement.*
- iii) Interest payable from May, 2020.*
- iv) Costs of the Claim.*
- v) Any other relief court finds fit and expedient to grant.*

Together with the claim, the claimant filed an application under certificate of urgency seeking the following orders: -

- 1. Spent.*
- 2. That this court be pleased to issue orders compelling the Respondents to pay bonuses to union members as approved by the board without discriminating them for being in a trade union of their choice.*
- 3. That this court do issue an order prohibiting the Respondents from discriminating, harassing, intimidating, victimizing and terminating employees who have chosen to **belong to a trade union of their choice.***
- 4. That the statement of claim be fixed for hearing and determination on priority basis.*
- 5. That the costs of costs of this application be provided.*

This Application is premised on the grounds **THAT**:

- (i) That on 13th May 2020, Mr. Ashraf the CEO of the Respondents held a meeting with staff and informed them that the company had posted a profit in 2019 based on the recently concluded audited accounts.*
- (ii) That the CEO of the Respondent informed staff that the company had not only posted a 7% growth in the top line but also made a commendable level of profit.*
- (iii) That the CEO of the Respondent also advised that the Board had approved the distribution of the bonus to all staff with no exception whether one is in the union or not.*
- (iv) That the basis of paying bonus is to improve the employee morale, innovation and productivity.*
- (v) That the Human Resource Manager of the Respondent called the workers representatives to his office and gave them an option to lead their members out of the union in order to be paid the bonus.*
- (vi) That the worker's representatives (shop stewards) refused and said the choice to belong to a union is purely an individual's choice.*
- (vii) That on various dates the Human Resource Manager of the Respondent then started pursuing members to leave the union in order to be paid bonus but members refused to leave the union.*
- (viii) That at the end of May 2020, non-unionized employees were paid bonus while those in the union were not paid.*
- (ix) That the Respondents are in total disregard of the Labour laws, International Labour Convention 111 and the Constitution of Kenya have gone ahead to discriminate union members by not paying them bonus as had been approved by the board while other staff who are unionisable and have left the union through intimidation have been paid.*
- (x) That our members (union members) have been subjected to psychological torture as other employees are enjoying the bonus which is a fruit of their hard work also.*
- (xi) That the Respondent's Human Resource Manager has been constantly harassing our members by calling them to his office and via phone to tell them to leave the union to start enjoying their benefits. He has even threatened to terminate them.*

(xii) That the Respondent is acting in bad faith by using bonus as a bait to remove our members from the union by discriminating against them in order to defeat the CBA suit pending before this court in Employment and Labour Relations Court Cause No. 1583 of 2018.

(xiii) That our members will be subjected to unnecessary miserable life due to demotivation caused by discrimination in payment of bonus and other benefits while their fellow colleagues are enjoying.

(xiv) That the orders sought are within the jurisdiction of this court.

(xv) That any other grounds to be adduced during the hearing hereof.

The Application is further supported by the Affidavit of **GEORGE KARATU**, the workers representative having been elected as the chief shop steward sworn on 1st September 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion application.

The Respondent filed a response to the claim in which it denies the averments of the claimant and states that upon being informed of the approved criteria for disbursement of the bonuses, the union members insisted on being paid the bonuses without subscribing to the PMS as a basis for assessment of the same. That the unionised employees thereafter caused the union to write a letter to the Respondent alleging discrimination of its members. The letter is dated 11th June 2021 and has been annexed to both the claimant' and Respondent's bundle of documents.

The Respondent avers that it invited the claimant to a meeting on 24th June 2020 to discuss the matter. That at the meeting, the claimant stated it was unwilling to subscribe to PMS as a basis for remuneration and reward being incorporated in the CBA.

The Respondent avers that this was the first time it was paying bonuses and thus there was no prior or other criteria through which the Respondent could use to distribute the said funds save for the already established PMS system which the union was not willing to be bound by and had challenged the inclusion of the said system in the Collective Bargaining Agreement amongst other proposals that caused an impasse.

The Respondent further avers that in order to optimise performance by all employees and in turn by the Company, all employees are required to subscribe to the PMS, which is a system that is accepted worldwide as a tool for determining remuneration and reward. It would also ensure uniformity throughout the company as the formula is already in use in determining remuneration and reward for non-unionised employees.

The Respondent avers that it implemented the use of the PMS in 2017 and also sought to include it in the Collective Bargaining Agreement. It is as a result of the said implementation that the Respondent was able to turn a profit for the first time in 2019- 2020 financial year.

The Respondent avers that failure to use the PMS will undermine its ability to optimise its performance and growth while at the same time, not using the PMS causes discrimination and unfairness.

The Respondent avers that the claimant is not entitled to its prayers as per the Statement of claim or at all. The respondent avers that the claimant's cause is misconceived, frivolous, and abuse of this Court's due process and should be dismissed with costs to the respondent

In the replying affidavit of STANLEY WILUNDA he reiterates the averments in the response to the claim. He further states that the PMS was designed to determine both remuneration such as salary review and reward such as bonuses based on individual performance as opposed to an automatic yearly increase of salaries regardless of the company and individual performance some of whom may be skating on the hard work of others thus causing discrimination among the staff.

That as the Claimant has an active case in court whose origin was due to the respondent's proposal to introduce the PMS in the Collective Bargaining Agreement, the Respondent has decided to put on hold the payment of bonuses to the union members.

That by virtue of the fact that the Applicant is challenging the concept of fully implementing a PMS, the Respondent is estopped from employing the same on members of the Applicant as the matter is yet to be determined by this court.

That the claims by the George Karatu that he (the Affiant) tried to force members of the Claimant to resign from it are baseless and untrue. He reiterated that he had never at any point in his career at the Respondent ever threatened and/or discriminated against any employee.

That the Claimant's claims of discrimination because its members are part of a union are merely an attempt to hoodwink this court from the real issue which is that the Claimant is being hypocritical on the use of the Performance Management System.

Evidence

The claim and application were by consent of the parties, consolidated and disposed of by way of written submissions. When the suit came up for highlighting of submissions, both parties informed the Court that they wished to rely on their pleadings on record and their submissions as filed.

Claimant's Submissions

The Claimant submits that the Chief Executive Officer of the respondent company on the 13th of May 2020 informed the staff in a meeting that the company having posted a profit of 7% the board had approved distribution of bonus to all the staff. The applicant further submits that the Human Resource Manager paid all the non-unionised employees their bonuses and failed to pay all the unionised employees and further states that there was no plausible ground for the said distribution.

The claimant submits that the respondent in its response has admitted its willing to distribute the bonus due to the claimant's members provided they agree to the PMS as the basis for reviewing remuneration and reward as part of the CBA case. The claimant submits that the Respondent is misguiding the court in its response as it has been intimidating the unionised employees. The Claimant submits that the respondent should not equate remuneration under CBA to discretionary pay.

The Claimant submits that once discretionary bonus has been declared it becomes a wage payable to the employees and relies on **Civil Appeal No. 127 of 2016 NEC Corporation v Samuel Gitau Njenga (2018) eKLR**.

The Claimant further relies on the decisions in the following cases:

ELRC No. 2105 of 2014 Communication Workers Union of Kenya v Telkom Kenya Limited (2018) eKLR which was applied in **Kenya Chemical Allied Workers Union v Bamburi Cement Ltd (2013)** where the Court stated –

“The payment of bonuses is discretionary and in the instance case the court holds that the payment was discretionary per policy provisions but once the respondent exercised the discretion to pay the exercise was chained by the relevant statutory provisions against discrimination and furtherance of fair labour practices...”

The Claimant also relied on the case of **Kenya Union of Domestic Hotels Educational Institutions and allied workers v M. P Shah Hospital (2018)** which relied on **Belgian Linguistics (No. 2) (1979-1980) 1 EHRR** where it was held that for discrimination to be justified it must be reasonable, assessed according to its aims and effects, considered against prevailing principles of normality in democratic societies, seen to pursue a legitimate aim, established that there is a relationship of proportionality between the means employed and the aim sought.

The Claimant submits that the payment of bonuses scheme by the respondent should be declared discriminatory and that unionised employees are entitled to payment of bonuses as declared by the Respondent.

Respondent's Submissions

The Respondent in its submissions states that there was a CBA between the claimant and the respondent dated 8th May 2017 and the same expired on 31st December 2017. It further submits that it invited the claimant for negotiations on a new CBA and among the issues for discussion was the need to restructure remuneration and reward staff on merit based on individual performance so as to promote fairness in remuneration.

The Respondent submits that parties could not agree on the PMS, which gave rise to **ELRC cause number 1583 of 2018** pending in court hence the delay to have a CBA in place.

The Respondent submits that it used the PMS to evaluate the performance of non-unionised employees and the bonus reward.

The Respondent submits that there being no CBA in place and there being a dispute on the PMS tool being used, it did not have a tool that could be used to pay the unionised employees bonuses. The respondent submits that the delay in payment of the bonuses is wholly caused by the claimant's refusal to be bound by the terms of the PMS.

The Respondent relies in the case of **Kenya Chemical & Allied Workers Union v Bamburi Cement LTD (2013) eKLR** where Radido J. stated

“If the parties had reached agreement and incorporated this particular issue as part of the collective bargain agreement nothing would stop this court or any other court from requiring a recalcitrant party from implementing or enforcing such clause of an agreement. In the instant case it was not an express term of the collective bargain agreement that a 13th Month salary or bonus would be paid.”

The Respondent submits that the claimant's insistence on non-recognition of the PMS system is preventing the respondent from effecting any remuneration reviews and the award of the bonuses.

The Respondent further relied in the case of **Kenya Chemical & Allied Workers Union (Supra)** where Radido J. categorized bonuses as follows.

- a) *Gratuitous payment is a recognition of a job well done or for going the extra mile.*
- b) *Performance bonus normally paid for good performance and usually calculated as a percentage of an employee's basic salary.*
- c) *Production Bonus based not on performance but rather on production measured against targets.*

The Respondent submits that in the instant case the bonus intended to be paid out was performance bonus, which is measured against objectives and competencies under the PMS tool which the claimant does not currently subscribe to. That as such it is arduous for the respondent to determine how much would be due for the members of the Claimant and how their input would be measured.

The Respondent submits that the claimant has not demonstrated how the members of staff have been discriminated against therefore urges the court to dismiss the Claimant's case with costs to the respondent.

Analysis and Determination

I have considered the pleadings and submissions of parties. The issues arising for determination are the following: -

1. Whether there is a valid CBA in place between the parties.
2. Whether the Respondent has discriminated against union members.
3. Whether the Claimant is entitled to the orders sought.

Is there a valid CBA between the Parties?

The Respondent has submitted that the CBA between the Claimant and Respondent having run its course from 1st January to 31st December 2017, there is no valid CBA between the parties. In its opinion therefore until a new CBA is agreed upon, there is no basis upon which it can pay bonus to its unionisable staff. That the CBA did not provide for payment of bonuses. It relies on the decision of Radido J. in **Kenya Chemical & Allied Workers Union v Bamburi Cement (supra)** where the Court held that bonus was not an express term of the CBA and declined to grant it.

Section 59(3) of the Labour Relations Act provides that a CBA shall be incorporated into the contract of employment of every employee covered by the agreement.

Further, Section 26 of the Employment Act provides that terms and conditions of service are regulated by any regulations, as agreed in any CBA, contract, written law or judgment or order of the court, whichever is more favourable.

The two Sections confirm that the terms of a CBA go beyond the date on its face as it becomes part of the terms of contract of the employees who are subject thereto. This is confirmed by the last clause of the CBA, which provides for duration of the CBA as follows: -

PART 4 – DURATION AND IMPLEMENTATION OF THE AGREEMENT

*This Agreement shall be effective from 1st January 2017 and shall remain in force for a period of one (1) year up to 31st December 2017. **Thereafter the Agreement shall continue in force until amended or terminated by either party giving one month's notice in writing of its terminate or to amend the Agreement.***

[Emphasis added]

It is for the foregoing reasons that I find and hold that there is a valid CBA between the Claimant and the Respondent, which will remain in force until amended, and whose terms are already incorporated in the contracts of the employees subject thereto.

Whether the Respondent has discriminated against the Union members

The Respondent has admitted that it paid bonus to non-unionised employees but did not pay the unionised employees on grounds that there is no formula for the same in the CBA. The Respondent has however not informed the Court whether or not it has a policy on payment of bonuses or even a policy on Performance Management System (PMS).

In view of the fact that bonus is not covered in the CBA, and that it is the Respondent who has proposed the inclusion of the same in the CBA but which has not been agreed upon, the Respondent cannot use the fact that the bonus is not in the hCBA to deny unionised employees payment of the same.

The respondent's averment that it has no tool to use to determine bonus payable to unionisable employees begs the question what tool it used to assess the same for non-unionised employees. The Respondent cannot blame the claimant for the non-inclusion of the clause or use the same to deny the claimant's members payment of bonus. The Respondent's argument that it is estopped from paying bonuses to union members because the Union has challenged the inclusion of PMS in the CBA is also illogical as the CBA only covers the clauses therein and not clauses that are not part of the same. A CBA ordinarily does not cover all the terms of employment of unionisable employees. Any term or condition of employment not covered by the CBA is covered by the employer's policy or guidelines at the workplace. Denying any category of employees a benefit because such benefit is not covered in the CBA would amount to discrimination, which is prohibited under Section 5 of the Employment Act. Section 5(2) and (3) provides that: -

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

The letter dated 11th June 2020 from the Claimant to the Respondent specifically requests that the payment of bonus be made in accordance with the company policy. The paragraph is reproduced below: -

*“... In conclusion we request that you pay all outstanding bonuses to unionized members **in accordance with the company policy** within the next fourteen (14) days from today, failing which we shall have no option but to seek intervention of the court and we shall also be seeking interest to be payable. This is an issue we would wish to be settled without any extra cost on the company...”*

[Emphasis added]

There was therefore no excuse for the Respondent to refuse to pay the Union members the bonus on grounds that the CBA does not provide for the method of assessment thereof.

Whether the claimant is entitled to the prayers sought

Having found that the refusal of the Respondent to pay bonus to Union Members is discriminatory, the Respondent is directed to forthwith assess and pay bonus to the unionisable employees in accordance with the bonus policy used for assessment and payment of the same to non-unionised employees of the Respondent and file the computation in court within 30 days.

The Respondent shall pay costs of this suit to the Claimant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF APRIL 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE