



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 655 OF 2015**

**KENYA UNION OF JOURNALISTS.....CLAIMANT**

**VERSUS**

**THE B.B.C MONITORING EAST AFRICA UNIT.....RESPONDENT**

**JUDGMENT**

1. Kenya Union of Journalists instituted this suit against The B.B.C Monitoring East Africa Unit seeking for non-payment of salary increment and allowances to eight former employees as agreed by the parties and Order of Court in Industrial Cause No. 21(N) of 2010. The Claimant Union averred that it is a trade union duly registered under the Labour Relation Act Notice of 2007 of Kenya and that it has a duly signed Recognition Agreement dated 22<sup>nd</sup> September 2006 and a registered Collective Bargaining Agreement with the Respondent. It was averred that the Claimant and Respondent did not agree on some items during the negotiation period and the same resulted in the filing of a dispute being Industrial Court Cause No. 21(N) of 2010 where O.N. Makau J. pronounced his Judgment on 25<sup>th</sup> October 2012. The Claimant averred that on 19<sup>th</sup> April 2013 it consequently demanded payment for the eight employees from the Respondent and when the Respondent failed to make payment, it reported a trade dispute to the Cabinet Secretary, Ministry of Labour through a letter dated 31<sup>st</sup> January 2014. The Claimant averred that the appointed Conciliator, Mr. G.A. Omondi, invited the parties to appear before him on various dates and thereafter made his recommendations on the findings and communicated the same to the parties through a letter dated 12<sup>th</sup> August 2014. The Claimant averred that the claim herein was then filed after parties failed to agree on the settlement of the matter. The Claimant asserts that the Respondent's action is bent on malice as it has failed to comply with the parties' CBA Clause 25(b) on the wage increment which states that "all journalists, who were members of the union and who were in employment as 31<sup>st</sup> July 2010, will receive a salary increase of Eleven percent (11%) of their salary with effect from 1<sup>st</sup> August 2010 to cover the second year of the agreement." That the effective date for the CBA as agreed by parties was 1<sup>st</sup> August 2009 and therefore the Respondent's failure to pay the 8 Grievants amounts to unfair labour practice as provided for under Article 41 of the Constitution of Kenya 2010. The Claimant further averred that the Respondent is also in violation of Section 59 of the Labour Relations Act No. 14 of 2007. The Claimant prays that this Court finds the non-payment of the 8 Grievant's salary and allowance by the Respondent as unlawful and contrary to the parties' CBA. It further urges the Court to Order the Respondent to pay the 8 Grievants as under paragraph 3.2 of the Claim; for the Respondent to be compelled to meet the costs of the claim together with interest at court rates; and for the Court to issue any orders it deems just and fit.

2. Pursuant to Order 3 Rule 2 (c) of the Civil Procedure Rules 2010, the Respondent filed a Witness Statement made on 28<sup>th</sup> November 2019 by a Senior Digital Journalist with the Respondent, Joan Simba. Ms. Simba states that the Judgment delivered on 25<sup>th</sup> October 2012 awarded among other things as follows,

- a) A wage increase of 11% effective from 1<sup>st</sup> August 2010 to 31<sup>st</sup> July 2011
- b) Leave Travelling Allowance of Kshs. 15,000/-

And that further, the said Judgment was incorporated in a Collective Bargaining Agreement signed by parties on 12<sup>th</sup> November 2012 and registered by the Industrial Court on 26<sup>th</sup> March 2013. That the 8 Grievants left the Respondent's employment before delivery of judgment in the dispute and before execution and registration of the CBA in issue and could not as such be covered under the registered CBA. That the said Grievants exited the organisation through resignations, redundancies and termination of employment and were paid their final benefits in full in accordance with the terms and conditions of service in existence at the time of their exit. Further, it was stated that 4 of the Grievants who resigned in 2011 never indicated they would come back to claim any other payments while 3 who were declared redundant effective 28<sup>th</sup> February 2011 were given an opportunity to individually discuss their positions including appeals for *ex gratia* payments for softer landing and that their redundancy was thus through mutual agreement. That the remaining 1 Grievant had her case settled under Industrial Cause No. 777 of 2011 and left after being paid her dues.

3. When the matter came before Court on 27<sup>th</sup> January 2021, parties agreed to dispose the dispute by way of Written Submissions and the Claimant had also been allowed to file its List of Issues. However, the Claimant was yet to file its submissions or list of issues as at 27<sup>th</sup> April 2021.

4. The Respondent submitted that there is no evidence that 7 of the 8 Grievants have shown any interest in this dispute and that any claim made on their behalf by the Claimant is not proved nor justified and should therefore be dismissed with costs. That the case for the remaining 1 Grievant should also be dismissed because he left for greener pastures before the CBA had come into effect. The Respondent denies that it has violated the provisions of Section 5(a) of the Labour Relations Act, 2007 and Article 41 of the Constitution of Kenya 2010 and submitted that the Claimant has no *locus standi* in this dispute, especially as regards the Grievant Sarah Moller. The Respondent submitted that once an employee leaves employment of an organisation and is paid their dues based on their last salary, unless there is an agreement to the contrary, such employee cannot come back to the employer to demand for terms and conditions of employment that became effective after they had

left employment. That though the Claimant has failed to file its Submissions or List of Issues and has shown little interest in pursuing the case, justice dictates that this dispute be finalised so that the parties can move on with their lives.

5. The Respondent notes that as per the Conciliator's report, he relied on the case of **Simon P. Kamau v Teachers Service Commission [2008] eKLR** which was upheld by the Court of Appeal in **Teachers' Service Commission v Simon P. Kamau & 19 Others [2010] eKLR**, to arrive at the opinion that the grievant in this case are entitled to benefits contained in the CBA signed after their exit from employment. It submitted that the said case is not applicable herein because in the mentioned case, the signed CBA was to be implemented in phases due to Government financial constraints and the plaintiffs were still in the employ of the TSC when the agreement was registered, but retired before full implementation. The Respondent submitted that the said plaintiffs were thus still entitled to their pensions calculated on the full terms of the CBA because they had received accrued benefits from the said CBA. That in the instant case however, the CBA was signed after the Grievants had left employment of the Respondent and cannot be equated to the case cited by the Conciliator.

6. The Respondent relied on the case of **Patrick Ouma Owinyo v Paper Converters Limited [2015] eKLR** that the CBA becomes effective after registration by the Court and only applies to those employees who are in employment after the CBA is registered and that those employees who left employment before registration of the CBA are not entitled to any arrears. The Respondent submitted that the Court in the Patrick Ouma case dismissed the claimant's claim and affirmed a similar position stating that the CBA was signed long after the claimant had left employment and he cannot benefit from it even though it covers a period he was an employee. The Respondent submitted that the grievant in this case have thus no right to benefit from the CBA which was registered on 26<sup>th</sup> March 2013, long after they had left employment of the Respondent on diverse dates in 2011. Further, that this Court has also pronounced itself in **Amalgamated Union of Kenya Metal Workers v General Motors East Africa Limited [2016] eKLR** where Abuodha J. stated that not all employees get to benefit from changes that occur in employment such as salary increment, enhancement of retirement age and improvement in general terms and conditions of employment as some will always retire or leave employment without benefiting from them. The Respondent submitted that it would be an injustice upon it to demand that the grievant benefit from terms and conditions that came into force after they had left employment.

7. The Claimant filed the case on behalf of 8 Grievants – Said S. Abdirahman, Martin Kazenga, Sarah Moller, Abdullah Abdi, Charles Bigirimana, Abdullahi Noor, Haydee Bangerezako and Jared Obuya. Of the 8, Sarah Moller's case was settled out of Court, for Said S. Abdirahman, Martin Kazenga, Abdullah Abdi and Abdullahi Noor, they all resigned on various dates in 2011 and were paid their terminal dues. In effect therefore the claim related only to Charles Bigirimana, Haydee Bangerezako and Jared Obuya. For Charles Bigirimana, he received his final dues as did Jared Obuya and Haydee Bangerezako. The Claimant union attached their payments which were made upon resignation and declaration of redundancy.

8. The CBA the Union wishes to rely on was signed in 2012 after the departure of the staff whose claim is before me. The Grievants had been paid their dues calculated on the basis of the CBA that was in force at the time of their departure and as former employees could never benefit as would an employee still in employment. Even if the effective date on a collective bargaining agreement is backdated, the employee who has already left employment has no valid claim against the employer as he or she is NOT an employee. The upshot of this finding is that the suit herein was misconceived and a total waste of judicial time and resources. It is only fit for one thing – dismissal with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of June 2021**

**Nzioki wa Makau**

**JUDGE**