



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 248 OF 2019

(CONSOLIDATED WITH ELRCC NO. 247 AND 249 OF 2019)

MUSA MOHAMED KALEVE 1ST CLAIMANT

PETER NDUNGU MATHERI.....2ND CLAIMANT

CHARLES MAINA JESSE3RD CLAIMANT

-VERSUS-

EAST AFRICAN PORTLAND AND CEMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimants filed separate suits on 12.4.2019 but they were consolidated on 28.5.2019 under this file. The claimants seek the following reliefs:

- a. Declaration that the failure by the respondents to pay their rightful gratuity was unfair and unlawful.
- b. Order that the respondent pays them full gratuity as quantified in the respective suits.
- c. Costs and interest at court rates.

2. The claimants' case is that they all were employed by the respondent in various position until 2017 when they were retired on account of age. The claimants started off as casual employees but later they were employed on fixed term contracts which were renewed consecutively in writing until the retirement date. During their tour of duty, the claimants were members of the Kenya Chemical and Allied Workers Union, which had signed a Recognition Agreement and concluded a Collective Agreement (CBA) with the respondent.

3. It is further claimants' case that upon retirement the respondent paid them gratuity at the rate of 15 days pay per year of service as provided under their respective individual written contracts as opposed to 72 days pay per year of service as provided under the CBA. They have now brought this suit contending that the CBA signed between their union and the respondent was incorporated in their respective contract of service under section 59 of the Labour Relations Act and urged the court to award their gratuity based on the CBA.

4. The respondent admitted that she employed the claimants until 2017 when they retired. She further admitted that she paid the claimants gratuities based on their respective contracts of employment and averred that the CBA referred to by the claimants was not applicable to them at the time of their retirement. She therefore prayed for the suits to be dismissed because she paid the claimants all their lawful gratuities.

5. The parties agreed to dispense with hearing of witnesses and opted to dispose of the suit by written submission on the strength of the record.

Claimant's submissions

6. The Claimants submitted that their union negotiated a CBA with the respondent which provided for retirement benefits under Clause 21. They further urged that under the said Clause the gratuity payable to the claimants upon retirement was 72 days pay per year of service; They therefore contended that the respondents decision to pay them gratuity at the rate of 15 days pay per year of service under the contract signed between them individually and the respondent was unlawful because the terms of the CBA were incorporated to the terms of their individual contracts.

7. They urged that the expiry of the CBA period did not discharge the employer from the terms of the CBA. According to the claimants a CBA is a hiring document and it does not expire until it is replaced or amended by a subsequent CBA. They therefore urged that they should be paid their gratuity in accordance with clause 21 of the CBA.

8. For emphasis the claimants relied on **East African Portland Cement Co. Ltd vs Kenya Chemical and Allied Workers Union** where the court of appeal held that the terms of a CBA are incorporated into the contract of service of the individual employees who are covered by the CBA. They further relied on Section 59 of the Labour Relations Act to fortify their submission that the terms of a CBA are incorporated into the employees contract of service and it continues to bind both the employer and the employees who are parties to the CBA even after its expiry date.

Respondent's submission

9. The Respondent submitted that the claimants were paid all the dues under their respective contracts of employment which were applicable to them at the time of their retirement, namely, the addendum to their contracts. She maintained that the CBA in issue herein had lapsed as at the time when the claimants' retired and the same had not been renewed or extended. She therefore urged that the claimants cannot enforce rights under a CBA whose validity ran its course.

10. For emphasis the respondent relied on the said section 59 of the **Labour Relations Act and Mukiri Farmers Cooperative Society Ltd. Vs Jacob Rukaria & 5 others [2017] eKLR** where the Court of Appeal held that after lapse of a CBA period, the terms thereunder ceases to apply to the parties unless the CBA provides for continuation until a subsequent CBA is signed. Consequently, the respondent prayed for suits to be dismissed with costs because the mandate of the court herein is only to enforce the intention of the parties to the contract.

Issues for determination

11. There is no dispute from the pleadings, evidence and submissions that the claimants were employed by the respondent until 2017 when they retired upon attaining the mandatory age of 60 years. It is also common ground that the claimants were employed on fixed term contract basis and they were members of a trade union which had a CBA with the employer. It is also a fact that the respondent paid the claimants gratuity under the terms of their individual contract which were inferior to the terms under the CBA which had expired on 1.8.2015. The issues for determination are:

- a. Whether or not the terms of service in the expired CBA were applicable in assessing their gratuities in 2017 when they retired.
- b. Whether the claimants are entitled to the reliefs sought in their respective suits.

Applicability of the expired CBA

12. Section 59 (1) and (3) of the Labour Relations Act provides that :

“1. a collective bargaining agreement binds for the period of the agreement-

a. The parties to the agreement:

b. All unionsable employees employed by the employer, group of employers or members of the employer's organization party to the agreement; or

c. The employers who are or become members of an employers organization a party to the agreement, to the extent that the agreement relates to their employee.

3. The terms of the CBA shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

13. It is clear from subsection (3) that the terms of the CBA become part of the contract of employment of everyone covered by the collective agreement. In my view, what subsection (3) means, is that even after the agreed period of the CBA lapses, the benefits granted to the individual employees under the CBA continues to be enjoyed. The employer cannot alter the acquired benefits downwards without the consent of the employee because the said benefits are protected by section 10(5) of the Employment Act, which provided that:

“where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

14. The foregoing view is corroborated and amplified by section 59 (2) of the Labour Relations Act which states that:

“2. A collective bargaining agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.”

15. It is clear from foregoing provisions that, whether or not the CBA provides for continuation of its application until a subsequent CBA is signed, the terms in CBA automatically continues to bind the parties who were parties to it at the time when the CBA commenced, even if

the employee or the employer resigns from their trade union or employer's association. In this case the CBA was signed on 19.12.2013 and it was registered by Industrial Court on 4.2.2014. Consequently its clear that when the CBA commenced, the claimants were still in employment.

16. In the South African case of vs Samwa City of Tshwane and Municipal Manager, City of Tshwane Case no. J877/13 the Labour Court of South African held that :

“[18] It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees’ contract of employment. It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees’ employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals’ contracts.”

17. In view of the foregoing express provision of section 59 (2) and (3) of the Labour Relations Act and the South African precedent above, I respectively decline to be bound by the decision of the Court of Appeal in Mukiria Farmers Case supra, and I return that the terms of service granted by a CBA are infallible and they do not lapse when the CBA's period expires. Consequently the answer to the first question for determination is that clause 21 of expired CBA on payment of gratuity referred to herein applied to the claimants by dint of section 59 (2) and (3) of the Labour Relations Act.

Reliefs

18. In view of the foregoing holding, I agree with claimants that the gratuity paid to them at the rate of 15 days pay per year of service under their individual contract was erroneous and below their rightful gratuity under the expired CBA. I therefore return that they are entitled to gratuity assessed at the rate of 72 days per year of service as provided under clause 21 of the said CBA which commenced on 2.8.2014 when the claimants were members of the trade union which signed the CBA with the respondent.

19. The amount assessed will be paid less the amount paid to them upon retirement. The award is based on the basic salary from the claimants respective job grades under clause 2 (ii) of the CBA signed on 19.12.2013.

Musa Mohammed Kaleve - Job Grade C

Kshs. 75188 x 72/16 x 29 years + Ksh. 6,038,174.76

Less paid Kshs. 558,471.220

= Kshs. 5,982,333.54

Peter Ndungu Matheri – Job Grade C

Kshs. 75,188 x 72/26 x 20 years = Kshs. 4,164,258.46

Less paid Kshs. 469000

= Kshs. 3,695,258.46

Charles Maina Jesse – Job Grade G

Kshs. 114,310 x 72/26 x 16 years = Kshs. 5,064,812.30

Less paid Kshs. 516,063/-

= Kshs. 4,548,749.30

Conclusion and disposition

20. I have found that the terms of a CBA are incorporated into an employee's contract of service and it continues to bind the employee and the employer even after the expiry day unless the same is amended by consent of the parties or replaced by a subsequent CBA. I have further found that the payment of gratuity by the respondent to the claimants on the basis of the individual contracts as opposed to clause 21 of the expired CBA was unlawful and to say the least, breach of the claimant's contract of service by dint of section 59 (2) and (3) of the Labour Relations Court. Finally, I have found that the claimants are entitled to payment of their gratuities under the CBA signed on 19.12.2013 and registered by the court on 4.2.2014. Consequently I enter judgment for the claimants as follows:

Musa Muhamed KaleveKshs. 5,982,333.55

Peter Ndungu Matheri.....Kshs. 3,695,2588.45

Charles Maina JesseKshs. 4,548,749.32

The said awards are less statutory deductions but in addition to costs plus interest at court rates from the date of filing suit.

Dated, signed and delivered in open court at Nairobi this 14th day of February, 2020.

ONESMUS N. MAKAU

JUDGE