



IN THE HIGH COURT OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO 1956 OF 2015

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERSCLAIMANT

VERSUS

NATIONAL MUSEUMS OF KENYARESPONDENT

JUDGMENT

1. The Claimant union brought this suit on behalf of six employees of the respondent herein after called “**the grievants**” seeking the following orders: -

a) Pay the six employees transferred from Kitale to Kapenguria Transfer and Baggage Allowance in accordance with Clause 9 (a) and 13 (f) (i) of the parties Collective Bargaining Agreement which entitles employees on transfer to payment of:

i. One month basic salary being Transfer Allowance.

ii. Kshs. 20,000/- being Baggage Allowance.

b) Pay costs of this claim to the claimant union.

2. The Respondent denied liability to pay the said allowances and averred that the CBA cited by the claimant was negotiated within the provisions of the Government Code of Regulations. She therefore prayed for the suit to be dismissed with costs.

3. On 29.10.2019 the parties agreed to dispose off the suit by written submissions.

Claimant’s case

4. The Claimant’s case is that the parties herein have a CBA and Recognition Agreement. In the year 2013, the respondent transferred the grievants from Kitale in Trans Nzoia County to Kapenguria in West Pokot County, a distance of 39 kilometers. Under Clause 9 (a) and 13 of the CBA, an employee who was transferred from one county to another is entitled to transport of Person and Baggage allowance of Kshs. 20000 and a transfer allowance amounting to one month basic salary.

5. It is further claimant’s case that the code of regulations cited by the respondent in refusing to pay the grievants the said allowances forms part of the grievants contract as the basic terms but contended that the terms of service under the CBA supersedes the code of regulations.

6. For emphasis she relied on section 59 (1) (2) and (3) of the Labour Relations Act which provides that a CBA binds the parties, employees and employers alike and the terms herein are incorporated into the contract of employment.

7. She further relied on Article 41 (2) and (5) of the Constitution to urge that every employee is entitled to reasonable working conditions and the right to engage their employer in collective bargaining. She therefore prayed for the reliefs sought to be granted.

Respondents case

8. The Respondent submitted that it is a State Corporation established by an Act of Parliament, the Museums and Heritage Act, 2006 and is governed by the provisions of the Government Code of Regulations revised in 2006. She further submitted that the claimant's suit should be dismissed entirely because it has not been proved. More particularly, she contended that claimant did not adduce evidence of the alleged transfer from Kitale to Kapenguria, and that they were eligible to payment of the said allowance under the provisions of the CBA she therefore prayed for the suit to be dismissed for being vexatious and without merits.

9. She further submitted that special damages must not only be pleaded but also proved. For emphasis, she relied on **Equity Bank Ltd –vs Gerald Wang'ombe Thuni [2015] eKLR, National Social Security Fund Board of Trustee v Sifa International Ltd [2016] eKLR and Bangue Indozeux vs DJ Lowe and Company Ltd [2006]2KLR 208** where the courts underscored the importance of pleading and proving special damages. In the end the respondent prayed for the suit to be dismissed with costs.

Issues for determination

10. There is no dispute that the grievants are employees of the respondent. There is further no dispute that the contract of service between the respondents and the grievants is governed by the Government Code of Regulations and the CBA negotiated between the claimant and the CBA. The issues for determination are:

- i. Whether the grievants transferred from Kitale to Kapenguria
- ii. Whether the grievants were eligible to payment of transfer allowance and baggage allowance.
- iii. Whether the reliefs sought by the claimant should be granted.

The transfer

11. The Respondent contended in her submissions that the claimant did not prove that the grievants were indeed transferred from Kitale to Kapenguria as alleged. I have carefully perused the court records and found several correspondences which are relevant to this issue.

12. The letter dated 12.8.2014 Ref. NMK/HRO/STG/1(3) 198 by respondents Acting Director HR and Administration to the claimant's General Secretary was about refusal to pay Transfer Allowance to employees who had been transferred from Kitale to Kapenguria. The letter referred to letter Ref. MLSS/LD/12/2/96/2014 which had raised the same subject of the said failure. The said letter was actually from the conciliator appointed to conciliate the dispute herein and it is dated 16.2.2015. The letter listed the names of transferred employees who are also the grievants herein, namely:

- 1. Jenifer Kugar**
- 2. George Ndiwa**
- 3. Jane Misoi**

4. John Otieno

5. Benjamin Wafula

6. Raymond K. Ogune

I therefore find and hold that the claimant has proved by the several correspondences annexed to the claim that the grievants were indeed transferred from Kitale to Kpenguria.

Eligibility to transfer and baggage allowance

13. The respondent relied on section 11.19 of her Terms and Conditions of Service and section J8(1) of the Government Code of Regulations Revised in 2006 to deny the grievants transfer and baggage allowance. Section J8 (1) of the said code of Regulations provides that transfer allowance is payable where the distance to the new station is not less than 40 kms from the old station. Section K9 of the Code of Regulation provides that an employee going for transfer shall be provided with a Government vehicle to transport his luggage and in the absence of a vehicle, the officer will be eligible for a baggage allowance at the rate of the prevailing government rates.

14. The claimant, however contended that the grievants are entitled to transfer allowance and baggage allowance by dint of clause 9 and 13 of the CBA. Clause 9 provides that an employee who is transferred from one county to another shall be paid a non accountable baggage allowance of Kshs. 20000 or Kshs. 10000 if the transfer is to another district within the same county. Clause 13 (i) provides that an employee who is transferred is eligible for transfer allowance of one-month basic pay which is payable before he/she leaves the station.

15. The question that begs for answer is which of the documents between the Code of Regulations and the CBA should supersede the other. The respondents contended that the Government Code of Regulations supersedes the CBA because the latter was negotiated within the provisions of the Code of Regulations. However, the claimant contended that the CBA supersedes the code because under section 59 (1) (2) and (3) of the Labour Relations Act, a CBA binds the parties there to, employees and employers and the terms thereof are incorporated into the contract of employment. Subsection (3) provides that: -

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

16. After considering the material before the court I am of the opinion that the CBA herein supersedes the Code of Regulation. First, the code is provides HR Policy guidelines for public service and it is of general application and forms part of the employees’ contract of service unless the employees negotiate better terms either individually or collectively.

17. Section 26 of the Employment Act provides that:

“(1) The provision, of this part and part VI shall constitute basic minimum terms and conditions of service.

a) Where the terms and conditions of service are regulated by any regulations as agreed in any collective agreement or contract between the parties or enacted by any other law, decreed by any judgment, award or order of the Industrial Court are more favourable to an employee than the terms provided in this part and part VI, such favourable terms and conditions of since shall apply.”

18. The Code of Regulations cited by the respondent were revised in 2006 while the CBA cited by the claimant was negotiated and signed on 30.4.2013 but the effective date was back dated to 1.7.2011. The respondent knew or ought to have known about the existence of section J8(1) and K9(1) of the Code of Regulation but accepted to allow her unionisable staff better terms and conditions of service under Clause

9 and 13 of the CBA in 2013.

19. Under Section 59 of the Labour Relations Act *Supra* and the General Principles of Contract or Common Law, the respondent is bound by the terms negotiated under the CBA herein. Accordingly, I return that the claimant has proved on a balance of probability that the grievants are eligible for payment of transfer allowance and baggage allowance under Clause 9 and 13 of the CBA.

Reliefs

20. In view of the foregoing I am satisfied that the grievants are entitled to the reliefs sought. Clause 9 (a) of the CBA provides that;

***“An employee, traveling to a new station in a different county shall be paid a non-accountable baggage allowance of Kshs. 20000 and Kshs. 10000 where the transfer is to a different district within the same county.*”**

In this case the grievants were all transferred from one county to another and as such I award each of them Kshs. 20000 for baggage allowance.

21. Clause 13(f) (i) of the CBA provides that;

“An employee who is transferred from one station to another (unless it is his/her request) will be eligible for transfer allowance amounting to one month basic salary at the date on which he/she leaves his/her station on transfer . . .”

Accordingly, I award each grievant herein one month basic salary as transfer allowance as prayed based on their salary as at the date of the respective transfer.

22. The respondent is hereby directed to pay the grievants the allowances for transfer and baggage award above within 60 days and in default the same shall attract interest at court rates from date of filing the suit and the claimant will become entitled to costs of the suit.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE