



REPUBLIC OF KENYA



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Atsyaya v Standard Chartered Bank Kenya Limited; Banking Insurance & Finance Union (Interested Party) (Petition 30 of 2018) [2019] KEELRC 743 (KLR) (17 September 2019) (Judgment)

Aggrey Onzere Atsyaya v Standard Chartered Bank Kenya Limited; Banking Insurance & Finance Union (Interested Party) [2019]eKLR

Neutral citation: [2019] KEELRC 743 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 30 OF 2018
HS WASILWA, J
SEPTEMBER 17, 2019

BETWEEN

AGGREY ONZERE ATSYAYA CLAIMANT

AND

STANDARD CHARTERED BANK KENYA LIMITED RESPONDENT

AND

BANKING INSURANCE & FINANCE UNION INTERESTED PARTY

JUDGMENT

1. The Petitioner herein was employed by the Respondent on 24th April 1979 as a Clerical staff. He held the position of acting Administration Manager from 17th December 1993 to 1st February 1994 and was thereafter promoted to a managerial position Band 8 (M16) until 25th December 2015 when he was declared redundant.
2. He avers that the Respondent discriminated upon him in respect of his salary and emoluments despite the fact that he had positive performance ratings and that unionised members were receiving salary increments. He therefore seeks the following Orders in his Petition filed on 13th April 2018:-
 1. A declaration that the Respondent's conduct amounts to and is discriminatory against the Petitioner under Article 27 of *the Constitution*.
 2. A declaration that, the Respondent's conduct, act and or omissions are unlawful, illegal and or unfair and the same violates Article 28,29,40 and 41 of *the Constitution*.



3. A declaration that the Petitioner was forcefully and unfairly terminated on grounds of redundancy.
 4. An order that the Petitioner is entitled to compensation by way of damages for violations under Article 23, Article 27 (1), (2) and (4), Article 28, Article 29 (f), Article 31 (c) and (d) Article 35 (1) (a) and (b), Article 41 (1) and (2) (a), Article 43 (1) (e), Article 47 (1), Article 48 and Article 50 of *the Constitution* taking into account damages for loss of employment, carrier stagnation, injury to reputation and loss of future income.
 5. A declaration that the Petitioner is additionally entitled to the benefits and special damages enumerated in the Petition.
 6. Any other further and better Orders as this Honourable Court shall deem just and fit.
3. The Petition is supported by the Affidavit of the Petitioner sworn on 3rd April 2018 in which he reiterates the averments in his Petition.
 4. In response, to the Petition the Respondent filed a Replying Affidavit sworn by Patrick Gikonyo the Senior Human Resource Business Partner at the Respondent, on 29th November 2018.
 5. The Petition was heard by way of written submissions with each party filing its submissions. In respect to the Interested Party, it neither entered appearance nor filed a response to the Petition.

Petitioner's Case

6. The Petitioner avers that he was summoned by his superior, Mr. Makale on 23rd March 2015 and advised to consider taking up the Respondent's redundancy, which he begrudgingly did in his email added 24th November 2015.
7. It is however, his case that he was largely targeted in the then restructuring due to grievances and concerns he had previously raised in the past and which were not satisfactorily addressed by the bank for actively being a member of a union yet he was a manager.
8. He avers that 2010 Constitution had permissive provision on union membership thus he joined the Banking Insurance and Finance Union (BIFU) in March 2013.
9. He avers that for the years 2010, 2011 and 2012 the Respondent did not make any salary adjustments to him despite the fact that he had positive performance ratings, the Respondent had made massive incremental profits and that unionisable employees did get a salary increment of 6.5%, 9% and 10%.
10. He avers as a result of the stagnated pay and lack of salary increment he was supervising sectional heads who had similar or lesser years of experience than him but were earning a much higher pay than he was in the year 2009, 2010 and 2011.
11. He avers that he invited the Respondent to the several meetings to resolve his demand for increment and arrears to no avail. He avers that the Interested Party (the Union) wrote to the Respondent on 26th September 2013 asking the Respondent to make salary adjustments and pay arrears due to the Petitioner but the Respondent replied in its letter dated 3rd December 2013 specifying that the Petitioner was a Manager hence his job did not fall within the recognition agreement between them.
12. He avers that he was discriminated against because of his union membership from the time he was appointed as a Manager to the time of joining the Union. He avers that after joining the union he was treated differently and separately from other members of the union who were receiving salary increments.



13. He avers that his grievances including discrimination were discussed in a grievance meeting held on 8th April 2014 where he explained his dissatisfaction on the increments awarded to union members as he was only awarded 5% increment while the union members were awarded 8% increment.
14. He avers that in spite of his concerns the Respondent indicated that he was not entitled to the commensurate increment given to union members and that his pay was not adjusted for 2 years as he was above the market median.
15. He further avers that he was denied occupier allowance of Kshs. 12,000 per month although he had purchased a house with full knowledge of the Bank, which he was in occupation for 30 years. He avers that he lodged a complaint on discrimination with the Kenya National Commission of Human Rights (KNCHR), which the Respondent responded to by restating its previous position on his managerial position.
16. He avers that he was grossly underpaid his redundancy package as his salary was based on his last pay not what he deserved due to the discriminative practices by the Respondent.
17. He avers that the two years after retrenchment non-unionisable staff entered into a settlement agreement with the Respondent in Cause 970 of 2017 wherein the staff were paid a severance pay at the rate of 1.5 months' salary for each year served.
18. He contends that the Respondent's Human Resource Manual 2014 downgraded his grade from that of manager to that of supervisor thus entitling him to union membership. It is therefore his case that the Respondent discriminatively treated the him as a manager yet he was a supervisor entitled to all benefits of unionised employees.
19. According to him the inhumane treatment on the part of the Respondent amounted to inhuman degrading treatment which is a clear violation of Articles 29 and 30 of *the Constitution* of Kenya.
20. Further, that the Respondent treated him in violation of his right to fair labour practices, fair remuneration and the right to reasonable working conditions as provided under Article 41 (1), (2) (a) and (b) of *the Constitution* and that the Respondent interfered with his right to form, join or participate in activities of a trade union therefore violating his freedom of association under Article 36 and rights to join a union as provided under article 41 (2) (c) of *the Constitution*.

Respondent's Case

21. In his Replying Affidavit, Patrick Gikonyo admits that the Petitioner was initially employed as a clerical staff and was promoted to Managerial Grade E Bank 8 (M16) effective 1st September 1994 until he left employment.
22. He avers that a meeting was convened between the Petitioner, one Mr. Mbindu and himself on behalf of the Respondent alongside 2 union officials to deal with the Petitioner's complaint on the his salary increment from August 2010 to February 2013 and his union membership.
23. He avers that the Petitioner and the Union officials were informed that the Petitioner was not entitled to salary increment by reason that his grade (band 8) was not covered under the CBA and that he was also part of management. He avers that the Petitioner never raised an appeal on the subject matter of the meeting.
24. He avers that the Respondent did reply to the Interested Party's letter dated 26th November 2013, on the non-payment of salary effective 1st March 2013 where it was alleged that the Petitioner had not been



- paid benefits under the CBA, by informing the union that the Petitioner was a Manager whose job title did not fall within the preserve of the Recognition Agreement and he was not covered under the CBA.
25. He further avers that in response to the Petitioner's letter dated 25th March 2014 on his alleged discrimination, he was invited to a grievance meeting on 8th April 2014, which he attended and was informed that he was not covered under the CBA and that the salary increment depended on several factors including individual performance and bank performance.
 26. He avers that they responded to the allegations raised by KNCHR on behalf of the Petitioner in its letters dated January 2015 and 13th My 2015 but did not receive any further correspondence from the Commission.
 27. He avers that on 24th November 2015 when the Respondent was undergoing a restructuring process the Petitioner applied and was considered for the package being offered to staff, was notified of the redundancy and that his last date of service would be 28th December 2015.
 28. He avers that the Petitioner's allegation that there was an unresolved grievance regarding his salary had been resolved and was not outstanding at the date of his redundancy.
 29. He further avers that the Interested Party's allegation of underpayment and uprocedural redundancy in its letter dated 18th April 2017 were responded to that the Petitioner was not covered under the CBA and that he had voluntarily elected to exit through redundancy.
 30. He contends that the Interested Party, the Labour Officer and the Governor of the Central Bank were informed of the impending redundancy. He therefore urged the court to dismiss the suit as the Petitioner elected to exit employment under the enhanced redundancy package and that the suit is an abuse of the Court process.
 31. The Petitioner filed a Further Affidavit on 29th January 2019 in which he avers that the CBA under clause AB 28 A viii provided that one would be in an acting capacity for 6 months after which he would be confirmed yet he served in acting capacity for 5 months without confirmation and put on probation for a lower grade contrary to the provisions of the CBA. He maintains that the discrimination against him was aimed at making him resign and that the reporting lines with his colleagues who were unionised and acting as clerical staff were similar to his.
 32. The Respondent filed a Supplementary Affidavit on 18th March 2019 sworn by Partrick Gikonyo. He avers that it is untrue that the provisions of the CBA were breached while the Petitioner was in an acting capacity and according to the organisational structure, at the time, a line manager would have both managers and clerical staff reporting to him based on the nature of the activities within the department.

Petitioner's submissions

33. The Petitioner in his written submissions argued that his position did not become redundant and that he was coerced out of employment on the basis of the grievances raised on the discriminative treatment of managers.
34. He submitted that the Respondent did not inform the Petitioner's union or the Labour Office that there was any impending redundancy as provided under Section 40 (1) (a) and (b) of the *Employment Act*. In support of this, he relied on the decisions in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR and Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR.



35. He relied on section 43 of the *Employment Act* and submitted that the Respondent has shown no evidence to prove that it was justified in terminating him.
36. It was his submission that there should be no distinction or discrimination between employees who are members of the Union and those that are not. He submitted that there was serious prejudice against his quest for his rights to belong to the Union. In support of this argument he relied on the decision in *RM & another v Attorney General (2008) 1 KLR 574*.
37. He submitted that the discrimination against the him was based on the violation of the right to equal pay for equal work or work and that the comparative salaries of the Petitioner's colleagues are evident of discrimination practices. He urged the Court to award a sum of Kshs. 10,000,000 as damages for the violation of his constitutional rights and freedoms.
38. He submitted that the Respondent violated his constitutional rights under Articles 22 (1), 23 (1), 28, 29 (2) (d) and 41 (2) of *the Constitution* as the Respondent's actions against him show a clear disregard of his dignity which arises from his ability to earn a decent livelihood.

Respondent's submissions

39. The Respondent submitted that the Petitioner is attempting to sneak into Court claims, which he had initially abandoned, and that the claims are time barred by dint of Section 80 of the *Employment Act* disguised as a Petition in order to circumvent Court processes.
40. It further submitted that the claims for allowances, differences in salary, unpaid increments, unpaid owner occupier allowance and leave allowance that date back to 20 years are time barred within the strict interpretation of section 90 of the *Employment Act*.
41. It submitted that the only acting allowance arrears that are claimed are those for the period between 1st April 1994 to 16th June 1994 and that no claim was made for an acting allowance for the period between 1st June 1994 and 1st September 1994 as allowance arrears were paid to the Petitioner in October 1994. It was therefore its submission that the Petitioner was afforded an acting allowance in addition to his salary thus he is not entitled to salary entitlement.
42. Its submitted that when the Petitioner was promoted to Grade M16 effective 1st September 1994 he earned a higher salary than his predecessor as evidenced by his payslips. It further submitted that the Petitioner was paid a salary commensurate to his grade and as per the contract.
43. It submitted that the claims for increments between 2011 and March 2013 are unjustified for the reason that the Petitioner attempts to retrospectively benefits for periods he had not joined the Union while the claims for the years 2013 to 2015 are unmerited because he was awarded the increment in 2014 but was only unhappy with the increment.
44. It further submitted that the Petitioner was not entitled to join the union as his job designation was not listed and he ought not to benefit twice. In support of this, it relied on the decision in *Kenya Chemical and Allied Workers union v Bamburi Cement Limited [2017] eKLR*.
45. In respect of unpaid owner occupier allowance it submitted that this allowance did not form part of the Petitioner's contract but was provided in the CBA however the Petitioner was non-unionisable therefore ineligible to receive the allowance. It submitted that the claim for leave allowance is derived from a rate that is not provided for in the CBA and this notwithstanding the CBA rate did not apply to the Petitioner.



46. It submitted that the Petitioner was paid his redundancy package of Kshs. 6,282,870.71 which he acknowledged receipt of being full and final settlement of all claims. It submitted that this disclaimer amounts to a binding contract between the parties as held in *Coastal Bottlers v Kimathi Mithika* [2018] eKLR.
47. It submitted that the unpaid contribution to the pension fund at the rate of 16% should fail as there is no document to demonstrate that 16 % was the contributory percentage and that the Petitioner who was in management cannot extrapolate terms of the CBA to apply to him.
48. It submitted that the Petitioner was declared redundant on his own election thus the provisions of section 40 of the *Employment Act* became inapplicable however, the remaining procedures were employed as both the Petitioner and the Labour Officer were duly notified of the redundancy. Further, despite being in management there was no need to inform the Union though the Respondent notified the union of the redundancy in respect to its members.
49. It submitted that the Petitioner has failed to demonstrate that he was treated differently from persons of similar managerial grade and that though the Petitioner unilaterally remitted dues to the Union does not take away the fact that he was non-unionisable.
50. It submitted that the provisions of Article 28, 29 and 41 are inapplicable to the circumstances as the Petitioner was accorded all human dignity, his mortgage discounted , he was never deprived of his freedom or detained and that he was accorded fair remuneration and reasonable working conditions. In conclusion, it submitted that the Petitioner has failed to prove his claim.
51. I have examined all the averments and submissions presented by both Parties. The main issues for this Court's consideration are as follows:-
 1. Whether the Petitioner was unfairly declared redundant.
 2. Whether the Petitioner was discriminated against by the Respondent.
 3. Whether any rights of the Petitioner were infringed upon by the Respondent through its acts or omissions.
 4. Whether the Petitioner is entitled to the remedies sought.

Redundancy

52. In respect of redundancy, the Claimant had on 24.11.2015 written an email to Kenneth Makale on the subject of restructuring as follows:-

“ Good morning,
Trust you are well.
As the bank pursues its restructuring exercise, I will be grateful if I would be considered for the package being offered to staff who will be affected under the current exercise.
Thank you for your consideration,
Kind regards.
Atsyaya Ongene.....”
53. On 25.11.2015, in response to this, the Claimant was issued with a redundancy notice to take effect from 25/12/2015. On 18/12/2015 the Claimant was issued with another letter reminding him that the



redundancy was inevitable and also indicating the redundancy package which totalled 6,282,870.71 and which the Claimant received and acknowledged on 28/12/2015. In the circumstances, the issue of unfair redundancy does not arise on the Claimant.

54. On the second issue, the Petitioner has averred that he was discriminated against by the Respondent in that he was paid lower salary than the unionisable employees who he was supervising.
55. He also avers that he was not paid some acting allowances between April 1994 to 10th June 1994 and also owner occupier house allowance as indicated in the Collective Bargaining Agreement (CBA).
56. In respect of owner occupier house allowance, the Claimant was not a unionisable employee and these payments were made for deserving and eligible unionisable employees. Other than this house allowance, the issue of acting allowance, the Respondent demonstrated that the Petitioner was indeed paid these money as per his payslip at page 48 of his bundle.
57. That notwithstanding, the claims being made for acting allowance and owner occupier house allowances are for claims before 1994 and these are definitely time barred.
58. The issue of discrimination arises where an employee in the same category of other employees is treated differently from the rest. In the case of the Petitioner he was a Manager and therefore not a unionisable employee. He could not expect to benefit from terms of a CBA for which he was not party to. This was the holding of the Court of Appeal in *Kenya Chemical & Allied workers Union vs Bamburi Cement* (2017) eKLR where the learned JJA Makhadia, Ouko and K. M’Inoti rendered themselves as follows:-

“Since in Kenya, employment is governed by the general Principles of the law of contract, as now contained in and modified by various statutes, it must follow that employment is essentially an individual relationship negotiated by the employee and the employer in accordance with their respective needs. Parliament has passed laws specifically dealing with different aspects of the employer-employee relationship. Similarly, a collective agreement functions as a labour contract between an employer and a union preceded by negotiation between representatives of a union and employers represented in most cases by the management. Because CBA is a contract, for the appellant to rely on it and benefit from it, it has to be demonstrated that the employees were privy to it. They could only have been privy to it through the appellant itself. In the absence of such evidence we are left with no alternative but to agree with the learned Judge in dismissing the claim and with the report of the conciliator that the ten employees were entitled to payment of gratuity for the period prior to joining the salaried echelons; that the respondent to work out other entitlements enumerated in the conciliator’s report to which they were entitled in accordance with the terms they served”.

59. It is therefore my finding that the issue of discrimination does not arise. In the same vein, issue of breach of some rights does not arise.
60. In the circumstances, I find that this Petition has no merit and is therefore dismissed accordingly. There will be no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF SEPTEMBER, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:



Miss Nafula holding brief Enonda for Petitioner – Present

Mbeche holding brief Boyo for Respondent – Present

