REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 98 OF 2015

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

KENYA VEHICLE MANUFACTURERS LIMITED.……RESPONDENT

RULING

1. The parties herein apparently have a disagreement concerning unresolved issues for piece rate employees. The parties filed submissions on the areas of disagreement and invited the court to make a ruling. The case has a judgment given by Ongaya J. on 30th October 2015.

2. The Claimant submitted that the Respondent had 2 groups of employees namely permanent and piece rate and that for the permanent employees there was a collective bargaining agreement (CBA) setting terms and conditions. The piece rate employees are said to be without a collective bargaining agreement setting their terms of service. The Claimant submitted that the piece rate workers remain at the mercy of the Respondent and had become a source of cheap labour to the Respondent. The Claimant isolated the issues for determination as:-

1. House allowance
2. Effective date of the CBA
3. Basic minimum wage
4. Termination gratuity
5. Baggage allowance
6. Permanent position
7. Piece rate work for genuine piece rate

The Claimant submitted that the piece rate workers were entitled to house allowance in terms of Section 31 of the Employment Act. The Claimant submitted that the supplementary CBA was to be included in the next main CBA whose effective date is 1st January 2017 and lapses on 31st December 2018. The Claimant submitted that there was heavy underpayment and that the total labour cost should be 30% of the material cost. The Claimant submitted that after assembling 9 new Daimler Mercedes 917 vehicles spending slightly over 3 weeks the employees earned Kshs. 4,900/- consolidated. The Claimant submitted that there is an agreement on the main CBA on the issue of service gratuity and that there is no reason to discriminate against piece rate employees. The Claimant also submitted on baggage allowance which is a provision for transport of household effects upon cessation of employment. The submission on the permanent position was that should any permanent position in the Respondent be available the Respondent should consider the piece rate workers first.

3. The Respondent isolated the issues for determination as follows:

1. Whether the law provides for piece work type of employment
2. What is the basis of piece rate contract of employment
3. What are the benefits accruable to employees under piece work employment

4. Whether this court has jurisdiction to determine this matter

5. Whether this court has jurisdiction to impose terms to the Respondent

6. Whether the court can unilaterally impose terms on the Respondent

The Respondent submitted that in **Krystalline Salt Limited *v* Kwekwe Makale *&* 67 Others [2017] eKLR** the Court of Appeal held there are 4 main types of contracts of service under the Employment Act – contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment. The Respondent submitted that the definition of piece work is under Section 2 of the Act. The position of the Respondent is that in piece rate work, the emphasis is on the amount of work not the time expended in doing it. The Respondent asserts that the offer of service for piece rate is not coerced but is between the willing employee and the employer and that the piece rate worker is not exploited or discriminated against. Reliance was also placed on the case of **James Heather-Hayes *v* African Medical and Research Foundation (AMREF) [2014] eKLR**. The Respondent asserts that the benefits payable to a piece rate worker is provided for under Section 18(1) of the Employment Act and that had the makers of the law thought it necessary they would have made provision for conversion such as that of casual workers in the Act. The Respondent cited the case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union (KUDHEIHA) *v* Association for the Physically Disabled of Kenya (APDK) [2013] eKLR** where the court held that assertions from the floor of the court without real evidence cannot establish the claim. The Respondent asserts that the Respondent is not bound to extend the benefits applicable to other employees to the piece rate workers. The Respondent relied on the case of **Teachers Service Commission (TSC) *v* Kenya Union of Teachers (KNUT) *&* 3 Others [2015] eKLR** where the Court of Appeal held that the as a general principle, a judge of the Industrial Court has no jurisdiction to conduct conciliation or mediation proceedings under Section 15 of the Industrial Court Act as read with Article 159(2) of the Constitution. Relying on the case of **Kenya Plantation *&* Agricultural Workers Union *v* Unilever Tea (K) Limited [2016] eKLR** the Respondent submitted that the court has no jurisdiction to impose terms which are not set out in the Employment Act. As to whether the court can unilaterally impose terms on the Respondent, the Respondent cited the case of **Alfred Nyungu Kimungui *v* Bomas of Kenya [2013] eKLR** where the court held that management prerogatives are a purview of the employer.

4. The court cannot descend to the arena of negotiations of terms of employment at the workplace. This court guided by the Court of Appeal decision in **TSC *v* KNUT & 3 Others** (supra) I have no business settling the terms of the CBA. After the decision of the court was rendered the court became *functus officio* and as such I have no basis considering the matters being raised in the motion by the Claimant. The suit is marked as settled. Should a fresh dispute have arisen then a suitable reference to the Minister for Labour would have to be made for settlement in that forum but not before the court. I therefore dismiss the application and mark this suit as settled. Parties are not at liberty to apply. Litigation must come to an end!

It is so ordered.

Dated and delivered at Nyeri this 11th day of July 2018

Nzioki wa Makau

JUDGE