



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2105 OF 2014

COMMUNICATION WORKERS UNION OF KENYA.....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 24.11.2014 through Kamotho Njomo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent's criteria, policy or practice for payment of bonus to its employees is unlawful, unfair and illegal and the same violates Articles 27(5) and 41 of the Constitution of Kenya, 2010.
- b) An order directing the respondent to pay bonus to claimant's union members in accordance with its Human Resource Policy Manual.
- c) General damages on account of breach of the constitutional right to picket.
- d) The settlement in (b) and (c) above to be paid with interest from September, 2014 until full and final payment.
- e) Costs of the suit.
- f) Any other relief or remedy that the Court may deem appropriate to grant.

The respondent entered appearance on 09.12.2014 through Hamilton Harrison & Matthews (Incorporating Oraro & Company Advocates) Advocates.

By consent of the parties the suit is to be determined on the basis of the pleadings and documents on record as well as the final written submissions.

The parties are in a recognition agreement dated 03.12. 2009. They have concluded a collective agreement for the period 01.01.2013 to 31.12.2014. The respondent has categorised its employees as R1, R2, R3, R4 and R5. Categories R3, R4, and R5 are unionisable from which categories the claimant recruits its members.

In the year 2013 the respondent paid all its employees (non-unionisable and unionisable) performance based bonus in respect of the year 2012. By the letter dated 19.03.2013 the respondent's Managing Director informed all employees that that they would be paid performance linked bonus and the parameters to apply were enumerated.

The CBA was signed on 18.06.2013 and the respondent issued the letter dated 20.06.2013 informing its employees of the benefits of the CBA which included a salary increment of 12% to be in graduated amounts at 6% in 2013 and 6% in 2014 for unionisable employees. The same letter indicated that non-unionisable employees would receive an average increase of 6% per year and that the bonus would be paid half yearly based on their performance.

In 2014 the respondent's performance improved and the management invited its employees for a cocktail on 15.07.2014 to celebrate its half year (HI, 2014) achievements. In July 2014 the claimant was informed by its members working for the respondent that the respondent was planning or preparing to award bonuses to employees who did not belong to the claimant union and the claimant opposed the respondent's

action. On 21.07.2014 the respondent and the claimant met and the respondent indicated that it would pay bonuses to all employees without discrimination. The record of that meeting is not filed.

On 23.07.2014 the respondent's Chief Executive Officer (CEO) one Mickael Ghossein wrote an email maintaining that unionisable employees would not be paid bonuses because they did not qualify for such payment. The email titled "**bonus on performance**" stated thus,

"Dear all

I would remind the eligible employees for the bonus performance

§ Non-union employees

§ Employees not getting any variable part and commissions

Hope I informed you well

merci"

By the letter dated 17.07.2014 the claimant wrote to the respondent thus:

- a) The respondent to consider paying bonuses to all employees of the company including union members bearing in mind that union members have more than 80% input in whatever profits the company makes.
- b) The respondent's management including the respondent's CEO to desist from intimidating union members from belonging to the union because that would be unconstitutional.
- c) To stop discriminating staff because they belong to the trade union.

The respondent replied by its letter dated 13.08.2014 thus:

- a) The criterion for consideration of bonus payment is based on performance.
- b) Bonus is not covered under the current CBA and is paid at the discretion of management. Thus there is no contractual basis for the demand that bonuses be paid to union members.
- c) Bonus is awarded to non – unionisable employees based on individual performance ratings. Further the payment is not automatic as it depends on the individual ratings, the achievement of the Company and departmental performance targets.
- d) As per the current CBA, unionisable staff is given automatic negotiated increments and are not subjected to performance management.
- e) The management in its negotiations with the union has severally asserted that all members of staff are welcome to participate in the bonus scheme provided they meet set performance targets under the HR Policy, criteria that the union has persistently opposed in favour of automatic salary reviews. Thus, if the union intends to subject its members to a compensation model based on performance and thereafter performance related pay, the same can be discussed in the upcoming 2015/2016 CBA negotiations and thereafter implemented accordingly.

The letter concluded that the management will not therefore consider payment of bonus to unionisable staff. Further in line with section 5(3) (3) (b) of the Employment Act, it was not discriminatory to distinguish, exclude or prefer any person on the basis of the inherent requirements of the job.

By the letter dated 22.08.2014 the claimant wrote to the respondent that the claimant was dissatisfied with the respondent's letter of 13.08.2014 because:

- a) All employees of the respondent including the unionisable are on targets related performance. All the workers contributed to the respondent's overall performance – unless if the respondent implied the entire claimant's members were not performers and hence not qualified for bonus.
- b) The respondent had missed the point by introducing issue of CBA because payment of bonus was an extra payment that had nothing to do with CBA negotiation. Further, CBA negotiated wage increase was accompanied with increase for management or other staff.

The respondent replied the claimant's letter of 22.08.2014 by the respondent's letter of 05.09.2014 thus, "**In response, we are pleased to inform that management at its discretion has decided to consider a bonus payment to the Unionisable staff as a token of appreciation for their contribution to the Company performance in Half 1 2014 . Details of the same will be availed during our consultative meeting on the 24th September 2014.**"

The parties met on 23.09.2014 and the respondent offered to pay each unionisable employee a token of Kshs. 2,000.00 in bonus as per payslips issued. The claimant wrote to the respondent the letter dated 24.09.2014 stating that the bonus had not been negotiated and that the union had rejected the token bonus offer of Kshs.2, 000.00. The letter stated in part, **“Kindly note that our members have refused the offer and on their behalf, we request you withdraw the pay slip and pay them their normal salary. To pay our members Kshs. 2, 000.00 in what you call a token while other staff members are paid bonuses ranging from 50% to 75% of their salary is unfair Labour practice and discriminatory.”**

The claimant then issued a 7 days’ strike notice as per the letter dated 29.09.2014. The respondent challenged the strike notice by the letter dated 29.09.2014 urging that parties were in negotiation and the agreed dispute resolution process had not been exhausted.

The matter went for statutory conciliation and the claimant stated its case thus,

“1.Discrimination on payment of staff bonus

Managerial and Non-Union staff have been paid a bonus of between 50% and 75% of their salary resulting in amounts between Kshs. 30,000/= and Kshs. 1, 000, 000/= while union members have only been given a mere token of Kshs. 2, 000/=. This amount was only given after we bitterly protested on learning that they had been excluded from the payment totally.

The company has a policy of rewarding staff through payment of bonus periodically. In the year 2012, all staff were paid bonus, but come the year 2013 to date, the company has been paying the bonus discriminatorily to managerial and non-union members only. The payment is based on overall performance of the Company. All employees including union members are on target related performance. We therefore do not understand why our members have only been given a token payment of Kshs. 2, 000/= while the rest of staff have been paid huge bonuses.

Whereas the management is introducing the issue of the CBA, Bonus payment is an extra payment that has nothing to do with the CBA. Moreover, bonus is not an item in our CBA because we left it at the discretion of the management. We have since realized that the management is using it as a tool to persuade our members to resign their union membership.

In line with the provision of section 5 of the employment act 2007, this is clear discrimination against a category of employees. We therefore demand that all employees be paid bonus equitably.”

The conciliator convened the parties’ meeting of 03.10.2014 and on the issue of bonus to staff members, it was agreed that both parties consult further on the issue and convene for another joint meeting at NSSF on 06.10.2014 at 2.30p.m. At the meeting of 06.10.2014 the parties disagreed and the conciliator issued a certificate that either party at liberty to proceed to the next level in dispute settlement procedure as provided for under section 73 of the Labour Relations Act, 2007.

By the letter dated 07.10.2014 the claimant called upon its members to go on strike effective 08.10.2014 at 8.00am. By the letter dated 07.10.2014 the respondent urged staff to maintain calm and sobriety as a conclusive solution was found to the dispute including through the next CBA for 2015/ 2016 that was due for discussion in October 2014.

On 15.10.2014 the parties signed a return to work formula for the striking workers to resume work on 16.10.2014 as the remaining dispute was pursued in accordance with the law.

The claimant’s case is that its members are aggrieved by the decision of the respondent to pay 47.5% of salaries as bonus to its employees that do not belong to the union and Kshs. 2, 000.00 only to the union members. Further the union members like other respondent’s employees are on targets related performance and the respondent is using the bonus payment as a means to punish, victimise and prejudice union members in a bid to irregularly force them to exit from union membership. Due to the anti-union practices, the claimant has recorded declining union membership from 1, 014 employees in January 2014 to 956 employees in October, 2014. For example, category R3 employees are unionisable but the respondent has told such employees to relinquish union membership if they have to benefit from bonuses. The union members are on target based performance management and some of them have received warnings, in 2012, as exhibited, about the performance targets. Under Article 41 of the Constitution of Kenya, it is clear that claimants’ members are entitled to fair labour practices which include trade union membership. Further it is alleged for the claimant that Article 27(5) of the Constitution outlaws discrimination based on trade union membership. The Article states **“27(5). A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”** Article 27(4) provides, **“The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, age, disability, religion, conscience, belief, culture, dress, language or both.”**

The claimant’s further case is that section 5 of the Labour Relations Act, 2007 affords protection of employees by outlawing discrimination and subsection (2) (c) thereof is categorical that no person shall in any way prejudice an employee because of present trade union membership. The respondent’s design to weaken the union membership based on discriminate payment of bonuses contravenes section 5(3) of the Labour Relations Act, 2007. The union members being the respondent’s employees worked hard and they had a legitimate expectation to be paid bonuses like it was done in 2012. Further, the employees being unionisable but not being union members were paid bonuses not based on their individual performance rating but based upon a flat rate of 47.5% while the unionisable staff being the claimant’s members were paid only Kshs. 2, 000.00 token in bonus. Further, the respondent’s Human Resource Policy Manual on Compensation and Benefits Policy states that annual bonuses are variable amounts paid as percentage of the fixed salary as a reward for high performance at the discretion of the management and business financial performance. It is the claimant’s case that once the respondent decides to pay bonuses to its employees, the same should be paid across the board and the criterion thereof should not include membership of an employee to a trade union.

The Court has considered the matter in dispute and the parties’ respective submissions and determines the matters in dispute as follows.

The **1st issue** for determination is whether Article 27(5) of the Constitution outlaws discrimination based on trade union membership. It is clear that the purpose of the Article is to apply discriminatory standards imposed on the state under Article 27(4) upon individual actors. It is also clear that membership to a trade union is not specifically mentioned in Article 27(4). The Court returns that trade union membership is not a proscribed ground of discrimination under Article 27(4) and therefore it is not a contemplated or specified ground as envisaged in Article 27(5).

The claimant has submitted that it is clear that discrimination or harassment on account of trade union membership is not specifically provided for in section 5(a) of the Employment Act, 2007. The section provides that no employee or prospective employee shall be discriminated or harassed on account of grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status. The grounds are substantially similar to those in Article 27(4) and by that submission, the Court finds that the claimant indeed reckons that it was misconceived, by reason of contemplation or specification, to allege discrimination on account of provisions of Article 27(5) as read with Article 27(4). The Court returns as much.

The **2nd issue** for determination is whether the respondent discriminated the union members based on statutory provisions in the manner bonus was paid to non-union members and the union members. As far as the evidence is concerned, the Court returns that respondent's employees eligible to join the union were paid more favourable bonus than such eligible employees having become the union members. By way of example, Ruth Adhiambo Ongadi in category R3 was unionisable but had not joined the union and was paid bonus of Kshs. 36,364.00 being 47.5% of her basic salary. On the other hand John Ochola Ndolo was also in category R3 and had joined the union and was paid bonus of Kshs. 2000.00.

It is submitted for the claimant that section 5(2) of the Employment Act, 2007 provides, **“(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”** Further, Article 41(1) of the Constitution provides that every person has the right to fair labour practices. Further, Article 41(2) (c) provides that every person has the right to form, join or participate in the activities and programmes of trade union. The claimant further submits that section 5(1) of the Labour Relations Act, 2007 provides that no person shall discriminate against an employee or any person seeking employment for exercising any right conferred in the Act. Section 5(2) thereof provides that no person shall give an advantage, or promise to give an advantage, to an employee or person seeking employment in exchange for the person not exercising any right conferred by the Act or not participating in any proceedings in terms of the Act - provided that nothing in the section shall prevent the parties to a dispute from concluding an agreement to settle that dispute. It is submitted for the claimant that the CBA had nothing to deny the union members the bonus based on the respondent's policies to pay bonus and under the cited provisions it was discriminatory and unfair labour practice for the respondent to deny the union members the bonus while paying the bonus to employees not being union members but eligible to join the union.

For the respondent it is submitted that section 5(3) (b) of the Employment Act, 2007 provides thus, **“(3) It is not discrimination to-(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”**. Further, section 59(1) of the Labour Relations Act Cap 233 Laws of Kenya provides that a collective agreement binds for the period of the agreement the parties to the agreement, all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement, or the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees. Further section 59(2) thereof provides that a collective 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 employers' association. Further section 59(3) of the Act provides that the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement. Rule 4 (e) of the Employment and Labour Relations Court (Procedure) Rules entitles a party to proceedings to rely upon a policy, industrial relations issue or management practice to prove a claim.

It is submitted for the respondent that it is clear beyond per-adventure that there is no statutory basis for the payment of a bonus or any other benefit unless specifically agreed upon in a contract or CBA. It was submitted for the respondent that as was held in **Kenya Chemical & Allied Workers Union –Versus- Bamburi Cement Ltd [2013]eKLR** (Radido J), a bonus was gratuitous payment in recognition of a job well done or for going an extra mile or is a performance bonus based on good performance usually calculated as a percentage of an employee's basic salary or a production bonus based not on performance but rather on production as measured against targets. In that case the Court held that the trade union had failed to establish any statutory right for payment of bonus or 13th salary. It was therefore submitted for the respondent herein that the union's demand for fixed or any bonuses for that matter is unenforceable under statute unless contractually agreed upon.

The Court has considered the submissions made for the parties. Is there a contractual provision on payment of bonuses? The CBA on record at clause 31 provides for salaries thus, it was agreed that salary for unionisable staff be increased at the rate of 6% for the period 01.01.2013 to 31.12.2013 and thereafter 6% increment for the period 01.01.2014 to 31.12.2014. Clause 32 on unionisable staff stated that R3 employees may be recruited to join the union subject to management vetting and every unionisable R3 employee shall benefit from the provisions of the subsequent CBA. Clause 36 on other terms and conditions of service provided thus, **“The other terms and conditions of service shall continue to apply as provided for in the existing company regulations, issued through circulars from time to time and the Human Resources Manual will continue to be used as a guideline. At the expiry of the CBA all the terms and conditions shall continue to apply until another CBA is put in place.”** Clause 5.1(ii) (a) on variable pay (of the respondent's Human Resource Policy Manual) provides that annual bonuses are variable amounts paid as a percentage of the fixed salary as a reward for high performance at the discretion of the management and business financial performance. Employees issued with warning letters will not qualify for bonus payment if the letter was issued within the period of assessment.

The Court has considered clause 36 of the CBA and finds that the respondent's policies including the provisions of the Human Resource Policy Manual on bonus are incorporated in the CBA and therefore into the individual employees' contracts of service being union members as per section 59 (3) of the Labour Relations Act, 2007.

As held in **Kenya Chemical & Allied Workers Union –Versus- Bamburi Cement Ltd [2013]eKLR** the payment of bonuses is discretionary and in the instant case, the Court holds that the payment was discretionary per policy provisions but once the respondent exercised the discretion to pay, the exercise was chained by the relevant statutory provisions against discrimination and furtherance of fair

labour practices. The Court returns that the claimant has established that the respondent in exercising the discretion to pay bonus acted contrary to section 5 (2) and (3) of the Labour Relations Act, 2007. The manner the respondent exercised the discretion amounted to unfair labour practice in contravention of section 5(2) of the Employment Act, 2007. It was not open for the respondent to implement the discretion in arbitrary or clear discrimination of the union members. Thus, as submitted for the claimant, the discriminate payment of bonus to unionisable employees based on whether they had joined the union or not amounted to violation of Article 41(1) and (2) (c) of the Constitution.

The Court returns that under section 59(1) (b) and (c) of the Labour Relations Act, the CBA binds all unionisable employees including those who have resigned from the union. It is therefore held that it was not open for the respondent to exercise the discretion to pay bonuses discriminately based on whether a unionisable employee had joined or not joined the union or resigned from the union.

The Court has found that there was discrimination on account of contravention of section 5(2) of the Employment Act, 2007 and section 5 (2) and (3) of the Labour Relations Act, 2007 thereby amounting to contravention of Article 41(1) and (2) (c) of the Constitution. The Court further observes that Article 19(3) (b) of the Constitution provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with Chapter 4 of the Constitution on the Bill of Rights. The Court holds that the rights or freedoms as conferred in section 5(2) of the Employment Act, 2007 and section 5 (2) and (3) of the Labour Relations Act, 2007 are thereby incorporated in the Bill of rights because their constitutional inconsistency has not been established at all and their violation by the respondent amounted to serious constitutional violation as read with Article 41(1) and (2) (c) of the Constitution.

In Kenya Union of Domestic Hotels Educational Institutions and Allied Workers –Versus- M.P Shah Hospital [2018]eKLR, this Court stated, “The clause has an effect of treating differently and without any reasonable justification, the members of the union, the employees eligible to join the union but have not done so, and the employees in the management cadre. Thus the Court follows Belgain Linguistics (No.2) (1979 – 1980) 1 EHRR where it was held that for discrimination to be objectively justified it must be reasonable; assessed according to its aims and effects; considered against prevailing principles of normality in democratic societies; seen to pursue a legitimate aim; and established that there is a relationship of proportionality between the means employed and the aim sought (Discussed in Robin Allen & Rachel Crasnow, Employment Law & Human Rights, Oxford University Press,(2002) page 216).

The Court returns that in the instant case it has been established that the respondent’s discriminate exercise of the discretion in its policy to pay performance and target based bonuses to union members has the unconstitutional and illegal effect of the unionisable employees resigning from the union or being reluctant to join the union. It has also been shown to result in to unexplained denial of the union members their due bonus within the exercise of the respondent’s discretion to pay bonus. Finally, the respondent has failed to show that as urged for the respondent, the union members are not serving upon performance measurement and targets like the other employees not being union members but eligible to join the union or, the management cadre not eligible to join the union. It has not been shown that the policy performance provisions and appraisals do not apply to the union members. The evidence is that such appraisal and performance policy provisions apply to the union members and some had actually received warning letters in that regard. The payment of the bonus is also based on the overall respondent’s financial performance and departmental performance and paid as a percentage of the fixed salary as reward for high performance. The Court returns that within such criterion, there is no established ground not to pay members of the union because they equally contribute to organisational and departmental performance and within such criterion, the Court returns that the exercise of the discretion to pay the bonuses must be in an equal manner. Needless to state, where as the respondent has discretion to pay the bonus, the discretion was chained by the relevant constitutional and statutory provisions such as section 5(2) of the Employment Act, 2007; section 5 (2) and (3) of the Labour Relations Act, 2007; Article 41(1) and (2) (c) of the Constitution; and Article 10(1) of the Constitution. The Court therefore returns that the respondent has failed to establish that the claimant’s members in its employment are not entitled to bonus pay within the policy provisions upon any justifiable reason. The Court finds that the failure to pay amounted to unfair and illegal discrimination and to unfair labour practice.

The 3rd issue for determination is whether the claimant is entitled remedies as prayed for. The Court returns as follows:

- a) The claimant prayed for a declaration that the respondent’s criteria, policy or practice for payment of bonus to its employees is unlawful, unfair and illegal and the same violates Articles 27(5) and 41 of the Constitution of Kenya, 2010. The Court has found that the respondent’s failure to pay members of the claimant being its employees the due bonuses contravened section 5(2) of the Employment Act, 2007 and section 5 (2) and (3) of the Labour Relations Act, 2007 thereby amounting to violation of Article 41(1) and (2) (c) of the Constitution. A declaration will issue accordingly.
- b) The Court returns that the claimant is entitled to an order directing the respondent to pay all outstanding bonuses to claimant’s union members in accordance with its Human Resource Policy Manual.
- c) The claimant prayed for general damages on account of breach of the constitutional right to picket. The Court returns that the issue was outside the matters referred to the Court by the conciliator and the prayer was misconceived. It will fail.
- d) The parties are in a continuing relationship and in furtherance of amicable industrial relationship, the respondent to pay 75% of the costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the respondent’s failure to pay members of the claimant being its employees the due bonuses per prevailing respondent’s policy contravened section 5(2) of the Employment Act, 2007 and section 5 (2) and (3) of the Labour Relations Act, 2007 thereby amounting to violation of Article 41(1) and (2) (c) of the Constitution.
- b) The respondent to pay all outstanding bonuses to claimant’s union members in accordance with its Human Resource Policy

Manual by 31.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment; and for that purpose the claimant to compute the quantum and to file and serve within 7 days for recording on a convenient mention date.

c) The respondent to pay 75% of the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this **Friday 23rd November, 2018.**

BYRAM ONGAYA

JUDGE