



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.185 OF 2013

[formerly Nakuru High Court Civil Suit No.217 of 2005]

LAWRENCE O MOSETI & 22 OTHERS.....CLAIMANTS

VERSUS

THE COUNTY GOVERNMENT OF NAKURU.....RESPONDENT

JUDGEMENT

1. The suit herein commenced at Nakuru High Court Suit No.217 of 2005. On 7th June, 2013 the file was transferred to this court and listed at Cause No.185 of 2013.

2. The court allowed the amendment of the claim on the 19th May, 2014 and which was filed on 5th June, 2014 and an Amended Reply to the Claim filed on 11th November, 2014.

Claims

3. The claimants are seeking the following;

a. A declaration that the claimants are still in service of the respondent and that they are entitled to their monthly salaries from the date of retirement to date.

b. Kshs.2,089,656.30

Being Claims for loss and comprised of the following;

(a) Un issued uniforms

Teresia E Kiratu Kshs.41,526.00

Muraya E Balayo

(b) Unpaid overtime

Lawrence O Moseti for 8 months Kshs.68,000.00 Teresia N Kiratu for 8 days Kshs.2,300.00 Total Kshs.70,300.00

(c)Tupendane Sacco Society Kshs.777,089.00 Total 2,089,656.30

(c) Costs and interest of (a) and (b) above at court rates.

Claim

4. The claimants were employed by the Local Government Authority, now the respondent County Government. The claimants have since retired from service.

5. vide letters dated 26th March, 2004 the respondent retired the claimants with effect from 1st January, 2005.
6. By a Collective Bargaining Agreement (CBA) between the Kenya Local Government Workers Union and the respondent, it was agreed that where it was not possible to pay out full entitlements, the retirees would be employed or retained in service on temporary basis till the full entitlement were paid. Pursuant to the Pensions (Amendment) Bill 2009 where the claimants fall under a pension, the person to whom a pension or other allowance is payable is entitled to be retained in service until the payment in full of gratuity is paid.
7. In breach of the terms of the Pensions (Amendment) Bill 2003, the respondent unlawfully and wrongfully discharged the claimants without paying their entitled benefits. In breach of the CBA and the Pensions (Amendments) Bill 2003, the respondent has refused to pay the monthly entitlements of salaries for January, 2005 to date.
8. The claimants are therefore seeking for the payment of due salaries, uniforms not issued, unpaid overtime, dues to the Tupendane Sacco Society and costs of the suit.
9. In evidence, the claimants called on witness the 1st claimant, Lawrence Moseti and who testified that he was employed by the respondent, then Municipal Council of Nakuru in the year 1968 and retired in the year 2004 and was not paid overtime work hours. He did not sign the clearance Certificate with the respondent as his overtime and terminal dues had not been paid to him.
10. While in employment, the claimant were supposed to be issued with uniforms every year which was not done and in lieu an allowance is payable. The respondent would deduct co-operative contributions and sent to the Sacco.
11. Upon cross-examination, Mr Moseti testified that his official work hours were 8 per day from 8am to 5pm with a lunch break at 1pm but he would be at work from 6am to 6pm each day. He was supervised by Mr Kimondo and he earned overtime when he was the supervisor. The revenue officer had to sign the reports and upon retirement he was paid for all accrued leave days not taken the claim for overtime work was not paid.
12. The 2nd witness for the claimants was Raphael Ngatia and testified that he was employed by the respondent as a Labourer through letter dated 16th June, 1989 and retired in the year 2004. In the December, 1997 the claimant was promoted to Artisan III and was entitled to be issued with uniform. He asked to be issued with the uniform and the respondent failed to do so. He was entitled to be issued with gumboots, overall and bush hat, soap and these were not issued to him. upon retirement, the claimant was entitled to gratuity computed at 15 days for each year worked and some employees were paid leaving out the claimants. Other employees who left the year before filed Nakuru CMCC No.2728B of 2008 and were paid.
13. Mr Ngatia also testified that his claim is based on the due gratuity and the uniforms he was entitled to over the years running to 15 years.
14. The third witness for the claimant was Muraya Kaguanyu who testified that he was employed as a labourer by the respondent on 5th May, 1979 and was promoted as Senior Headman by letter dated 1st December, 1997. He was getting protective gear every year and was entitled to a raincoat, gumboots, military hat, and soap and tetrex suit. The uniform was issued for some years but he did not get the raincoat and gumboots for many years.
15. Mr Kaguanyu also testified that on 9th February, 2005 the medical officer wrote to the respondent on the unissued uniforms. His claims relates to uniforms and work tools not issued by the respondent for 25 years he was in the service. the due gratuity was also not paid.

Defence

16. The respondent has denied all the claims made by the claimants and admits that there was a CBA with Kenya Local Government Workers Union and the Association of Local Government Employees and which involved the respondent. the CBA did not make it mandatory for retirees whose full entitlements were unpaid to be retained in service of the respondent and the claims made in this regard are not due.
17. The defence is also that the claimants were lawfully discharged from service of the respondent and there is no breach of the CBA of the law as alleged. The monies claimed as monthly salaries from January, 2005 to date are not due as the claimants have not been in the service of the respondent since.
18. The CBA between the parties provided that uniform was to be issued to employees of the respondent who required the use of the same. The respondent did not require the claimants to wear uniform and hence there was no loss on the part of the claimants. The CBA provided that a claim for overtime can only be paid in accordance with arrangements prescribed which the claimants have failed to demonstrate was done.
19. The claims made for dues to Tupendane Sacco relates to a different agreement between the respondent and the said Society, a separate legal entity which the claimants have no authority to act on its behalf and the claims made should not arise.
20. The defence is also that the claims made are without merit and should be dismissed with costs.
21. In evidence, the respondent called Moses Bii the human resource officer who was employed by the Municipal Council and remains with the respondent County government. The claimants were employed by the respondent on permanent and pensionable terms and retired at the mandatory age of 55 years. Not all the claimants were pensionable as some had been upgraded and others were not.

22. Those pensionable were;

- a. Lawrence Moseti,
- b. Nemwel O Sanganyi,
- c. James Kabui,
- d. Francis Kigundu,
- e. Joseph Omolo, and
- f. Monica Makori.

23. All the others were not pensionable and were under the NSSF while the pensionable employees/claims were under the Lap Trust – the Local Authority Provident Fund, now the Superannuation Fund.

24. Mr Bii also testified that while the claimants were in the employment of the respondent, there was a CBA covering the period 2002 and provided that upon becoming 55 years, the employee was issued with 6 months' notice prior to retirement and all the claimants got the due notice issued on 26th March, 2004. The terminal dues were paid as regulated by the CBA.

25. Clause 29 of the CBA on retirement made provision for retirement at age 55 and issuance of an advance notice of 6 months.

26. Clause 25 of the CBA provided for the issuance of uniform which the respondent issued to those who required them and did not issue those who did not qualify. Where not issued, it was not convertible to cash. All issued uniforms became the property of the employee and where not issued, no employee was required to go out and buy.

27. On the claims for overtime by Mr Moseti and Teresia Kiratu, such is not due as there was a prescribed process when one had worked overtime. Mr Moseti work hours were 8am to 5pm and not 6am to 6pm and where he occasionally worked overtime due to exigencies of duty such had to be approved and authorised and paid for at the end of the task. The payment had to be certified by the head of department and without such approval no claim was allowed.

28. All permanent and pensionable employees had to undertake clearance with the respondent so as to be paid their terminal dues. Mr Moseti was such an employee who should clear with all departments and upon clearance his benefits can be claimed. Where one was contributing to the NSSF, the respondent was already contributing a 50% therein and once cleared the due benefits can be processed and paid.

29. Mr Bii also testified that all the claimants were legally discharged by the employer upon proper notice. All the claims made are without basis.

30. The Permanent Secretary issued Circular to clarify with regard to the Pension Act and the former Local Authority employees upon retirement and the claimants were not supposed to be retained in the service of the respondent as claimed.

31. The 2nd witness for the respondent was **Wilson Waweru Kinyua**, Administrative Officer and who testified that he has been an employee of the respondent since the year 1987. He was in the legal office, Personnel and Human Resource office when the claimants were in the service of the respondent.

32. The claimants were placed in different departments of finance, town engineer and public health. The claims for uniform refunds should be guided by the CBA clause 25. The claimants had their heads of departments who issued reports who required uniform. The CBA served as a guide and where the respondent required employees to wear uniform, they were issued with the same and where not necessary, they were not issued.

33. Mr Kinyua also testified that where uniform was not mandatory it was not issued. Wearing of uniform was not mandatory as a condition to report to work. Even the askaris would wear civilian clothes. Such uniform could not be converted into cash. Upon retirement, the issued uniforms were to be returned to the respondent.

34. The Permanent Secretary had issued a circular to retain employees who had retired and had not been paid their dues but there was a follow up clarification that the former Local Authority employees should not be retained. By this time the claimants had already been retired vide notice issued on 26th March, 2004 and the PS circular is dated 8th May, 2004.

35. Patties filed written submissions.

36. The claimants submits that their employment was covered under a CBA which was bidding upon the parties. In seeking compliance with the CBA, the claimants were entitled to provisions under clauses 29(i)(e) retention in service; for provision with uniforms and under Clause 25; and for the provision of compensation for overtime work in line with clause 12. Adherence to the terms and conditions of the CBA was required as held in the case of **Kenya Union of Printing Publishing Paper Manufacturers & Allied Workers versus Highland Paper Mills Limited, Cause No.93 of 2013.**

37. The claimants also submit that they had colleagues and contemporaries who filed **Nakuru CMCC No.2728B of 2008 James Kariuki Gikonyo & others versus Municipal Council of Nakuru** and also **Nakuru Judicial Review No.29 of 2012 Republic versus Municipal Council of Nakuru & Harrison Nyangala Kataka & 5 others** where court awarded the claimants sufferance benefits, unpaid uniform claims, severance pay and overtime pay.

38. The claimants herein are entitled to the payment for uniforms not issued as they served in the departments where such uniforms were required and based on the terms of the CBA.

39. The respondent submits that Clause 29 of the CBA, 2002 makes provision for retirement and for the employee to collect the terminal dues before the retirement date. Where not possible to get such dues, the employee to be retained on temporary basis until the dues are paid.

40. In this case the claimant were issued with retirement notice and cleared with the respondent. none remained in service so as to claim payment of salaries to date.

41. On the claims for loss of uniforms not issued, overtime not paid and dues to Tupendane Sacco, the respondent submits that the Sacco is not a party herein to make the claims made by the claimants. The respondent issued its employee with uniform as required and those not required to wear uniform were not issued and such cannot convert to cash. Clause 25 of the CBA regulated the issuance of the uniforms and the claimants are not entitled in cash. The court cannot revise management policy as held in **Peter Mbutia Gitau versus Kenya Revenue Authority [2016] eKLR**.

42. Overtime was paid when due and at month end and upon the head of department certification that such overtime work was approved. The records submitted by the claimants for overtime pay have not been approved. The requirements are set out under clause 12 of the CBA.

Determination

Whether the claimants are entitled to payment of salaries due from January, 2005 to date;

Whether the claimants are entitled to uniform allowances, overtime pay and Sacco dues to Tupendane.

43. It is common cause that during the employment of the claimants with the respondent they were governed by the CBA which spelt out the terms and conditions of employment. Such CBA covered the period of the year 2002.

44. The claimants have set out specific prayers;

- a. A declaration that they are still in the service of the respondent and should be paid salaries from January, 2005 to date;
- b. Payment of Kshs.2,089,656.30 for uniform,
- c. overtime and
- d. Tupendane Sacco Society, and
- e. costs with interests.

45. With regard to the claim for salaries from January, 2005 to date the basis is that the claimants were covered by the CBA under clause 29 and where their terminal benefits were not paid in full, they were to remain in the service of the respondent and paid salaries until the due were fully paid.

46. In reference to Clause 29 (e) of the CBA, it provides as follows;

An officer should be able to collect his full retirement benefits as near as possible to the day of retirement. Where it is not possible to pay out the full entitlement, the officer shall be employed on temporary basis until paid subject to a replacement not being employed until the officer's services are completely terminated.

47. The clause above thus requires the payment of full benefits upon retirement as due. it is also a provision that where not possible to be paid the full benefits, such officer *shall be employed on temporary basis* until paid.

48. The court reading of the entire Clause 29 of the CBA was to allow parties to ensure retirement of an officer was as smooth as possible and that full benefits were paid. Also that where such full benefits were not paid and noting the employee had attained the retirement age and notice issued, the employee was to be employed on temporary basis and be retained in service until paid in full.

49. From the record, the pleadings and evidence of the claimants, they all confirm receipt of retirement notice dated 26th March, 2004. None testified that they were employed on temporary basis after the due retirement age. None pleaded or testified to have remained in the service of the respondent. to read the provisions of Clause 29 of the CBA without rendering any service to the respondent and then claim a salary therefrom would negate the very essence of the CBA as a binding and legal document with terms and conditions enforceable by the court. without a temporary contract of service/employment or giving work to the respondent, the threshold within which Clause 29 (e) of the CBA

is premised is lost. Pay for work not done, service not rendered should not arise. Such cannot be enforced by application of this sub-clause of the CBA.

50. Without prove of a temporary contract or work from January, 2005 to date, no salary is due.

51. With regard to the overtime claims by the claimants, the CBA provides for a very elaborate procedure. Clauses 11 and 12 of the CBA must be read together. On sets out the work hours and the other the overtime.

52. With regard to overtime, Clause 12(a)(i) (ii) provides as follows;

Payment for overtime in accordance with arrangements approved by the Head of Department, after normal working hours for officers in Job group 10-20 shall be paid as overtime provided that such overtime has been specifically authorised in writing by the officer's head of department.

For overtime worked doctors will be paid a fixed allowance determined by the Council.

53. Where work hours for all employees are outlined under Clause 11 of the CBA, to claim under Clause 12 for overtime, the employee has to demonstrate that the overtime work was in accordance with the arrangement approved by the head of department and that is had specifically been authorised by such head of department. A report to work an hour before and exit an hour late does not demonstrate approval of such overtime work by the head of department where clause 11 of the CBA has already prescribed the hours of work.

54. The claimants have submitted schedules of work from 6am to 6pm but there is no corresponding approvals in accordance with the term and conditions of the CBA they seek to rely upon. Save for doctors whose overtime pay was regulated by the Council, other employees of the respondent had conditional overtime payments.

55. Claims for overtime pay cannot suffice.

56. Uniform claims are made on the basis of clause 25 of the CBA. Indeed under the CBA the officers of the respondent were required to be issued with two sets of uniforms in each year and on the conditions that such uniforms were to be worn at all times when on duty unless ordered not to wear the uniform. Such uniform became the property of the officer to who it had been issued upon issuance of new uniforms but an officer whose employment was terminated was to surrender the uniforms.

57. The claim is that the claimants were not issued with uniforms and other work tools such as gumboots, hat, soap and suit. The defence is that the respondent did not require the claimant to wear the uniforms and thus did not issue and it was not mandatory.

58. Clause 25 of the CBA does not distinguish which employees were to wear uniform. The clause covers the whole. However, where uniform was not issued, such employee did not wear uniform and neither was the employee required to source for own uniform and the duty was upon the respondent as the employer to provide. The CBA does not provide for compensation thereof.

59. The claimants have not articulated what damage or loss occurred for not being issued with uniforms in accordance with clause 25 of the CBA. The quantification of the claims made for the uniforms not issued therefore lacks a basis.

60. As submitted by the respondent, the claims with regard to Tupendane Sacco Society relate to a third party. Where the dues claimed relate to a benefit owing to the claimants did not stand out in the pleadings, evidence or the submissions.

61. The claimants' relied matters filed in **Nakuru CMCC No.2728B of 2008 James Kariuki Gikonyo & others versus Municipal Council of Nakuru** and also **Nakuru Judicial Review No.29 of 2012 Republic versus Municipal Council of Nakuru & Harrison Nyangala Kataka & 5 others** however, the court reading of the matters therein, the foundation is different from matters addressed herein. Such matters before the Chief Magistrates Court and the High Court cannot form sufficient basis and evidence to claim for benefits not an entitlement under the employment or under the applicable CBA.

62. There is no specific claim pleaded on the due gratuity as set out above. Where such gratuity is due to the claimants, putting clause 42 of the CBA into context and into account, the applicable Rules should apply.

63. Reliance is made by the claimants to the breach by the respondent of the Pensions (Amendment) Bill 2003 that the claimants were wrongly discharged by the respondents. There is no corresponding remedy sought in this regard. However, even where a remedy was sought, the reliance here is on the *Bill* and not a *Statute*.

Where the Pensions Act is to apply, there are appropriate provisions under the law regulating retirement of officers in the service of former Local Authorities and now absorbed under the County Government noting the terms of any applicable CBA, terms and conditions of employment and any prevailing benefits at the time retirement. The motions of clearance with the employer are imperative to access the benefits due under any statutory provisions for retirement benefits for NSSF, Retirement Benefits Act or the Pensions Act.

Accordingly, the claims made lack basis and noting the claimants have since been retired, each party shall bear own costs.

Dated and delivered in open court at Nakuru this 22nd of November, 2018.

M. MBARU

JUDGE

In the presence of: