



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 14 OF 2007

(Before Hon. Justice Hellen S. Wasilwa on 31st May, 2017)

**KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE
ORGANIZATIONS (KUEVACO).....CLAIMANT**

VERSUS

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS
(KUCFAW).....RESPONDENT**

RULING

1. The application before Court is one by the Respondent dated 5.2.2016 wherein the Applicant seeks for orders:

1. That the Application for review of the Hon. Court's Judgment and Ruling dated 22.6.2015 and 16th December, 2015, respectively and/or any other consequential orders emanating from the said Judgment/Ruling be allowed.

2. That the Judgment and Ruling dated 22.6.2015 and 16.12.2015 respectively be reviewed by removing and/or deleting the service benefits from the tabulation of benefits due to retirees.

3. That the Judgment and Ruling dated 22.6.2015 and 16th December, 2015, respectively be reviewed to only allow retirees to benefit from gratuity and any other terminal benefits such as notice pay, days worked, leave due, overtime, if any.

4. A declaration that the term "terminal benefits" as in Clause 15 of the Collective Bargaining Agreement.

5. Any other relief this Hon. Court finds fit and proper to grant to meet the ends of justice.

2. The Claimant has responded to the application by filing a counter review application dated 1.8.2016, wherein they state that the Respondent is dissatisfied with the entire judgment and ruling of the Court dated and delivered on 22.6.2015 and 16.12.2015, respectively which amounts to an appeal before the same Court.

3. That there is no error apparent on the face of the record which would require correction of. That the ruling is not in breach of any law, there are no sufficient reasons to warrant review and there is nothing in the judgment that requires clarification. They pray that the Respondent's application be dismissed with costs.

Submissions

4. The Respondent Applicant state that the issues in dispute as brought to the Court by the Claimant was for unprocedural and wrongful retirement/redundancies of 26 of their members. They state that the decision of the Court in respect of those who were declared redundant is not in dispute; however in the Ruling delivered on 16th December 2015, the Court stated:

“On 22.6.2015, I ordered the parties to make submissions on quantum in this matter. From the submissions, I find as follows:

From the Claimant's Memorandum only 4 employees retired and these are the Benjamin Onyango, Phanice Okalo, John O. Owuor and Mary Indimuli. The rest were declared redundant. For those who retired, they were entitled to the following:- gratuity of 30 days for each year work and this is as provided for under Clause 25 of the Collective Bargaining Agreement. Under Clause 26, such retirees were also entitled to payment of all their terminal benefits. Under Clause 15(c) they were entitled to a service benefit of 30 days per year served. A retiring employee is not entitled to a notice or pay in lieu of notice.

5. The Applicant contends that the award of gratuity and service pay is a duplicity of the same benefit which they state is erroneous as the same is not provided for under the Collective Bargaining Agreement. They submit that the terminal benefits provided in Clause 26 of the CBA do not include service pay.

6. The Applicant submits that the service benefit provided under Clause 16(c) of the CBA applied to employees who separate from the Respondent by way of normal termination of employment. That employees who are declared redundant are only entitled to severance pay, leave earned and pay in lieu of notice.

7. The Respondent in response to the Counter review application state that they are not asking the Court to sit on appeal of its own decision but only asking the Court to relook at one aspect of the judgment i.e the double award of the same benefit that is gratuity and service pay.

8. They ask the Court to review the judgment and award as follows:

a. **Benjamin Onyango**

i. Gratuity 32 years of service x 11,857 = 379,424

ii. He was paid Kshs. = 480,062

iii. Balance = Nil

b. **Phanice Okalo**

i. Gratuity 38 years of service x 12,662 = 481,156/=

ii. She was paid Kshs. = 448,851/=

iii. Balance = 32,305

c. **John Owuor**

Gratuity 20 years of service x 13,081 = 261,620/=

He was paid Kshs. = 224,532/=

Balance = 37,088/=

d. Mary Indimuli

i. Gratuity 32 years of service x 9,706 = 310,592/=

ii. She was paid Kshs. = 374,615/=

iiii. Balance = Nil

9. The Applicant also prays that the Court finds that the terminal benefits as contained in Clause 26 mean any other benefit due to the retiree's e.g. leave due, days worked which accounts for the extra payment made to the retirees besides gratuity and that the same does not mean service benefits as in Clause 15(c) of the CBA.

10. They also pray that the Court finds that service benefits as contained in Clause 15(c) of the CBA is only applicable to employees ceasing employment by way of normal termination of employment and does not in any way mean the same thing as terminal benefits.

11. They also pray for the counter review application to be dismissed with costs.

12. The Claimant/Respondent have filed submissions wherein they state that the grounds raised by the Applicant in their application do not fall under the purview of review as envisaged by the law. That there is no error apparent on the face of the record, there is no evidence omitted by the aggrieved party, that the decision is not in breach of any written law and that there is no part of the judgment that requires clarification.

13. They pray for the review application to be dismissed and the counter review application be allowed with costs.

14. I have considered the application before me. Under Rule 32 of the Industrial Court (Procedure) Rule 2010 (now repealed):

“A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling:-

a) if there is a discovery of new an important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

b) on account of some mistake or error apparent on the face of the record, or

c) on account of the award, judgement or ruling being in breach of any written law; or

d) if the award, the judgement or ruling requires clarification; or

e) for any other sufficient reasons”.

15. The Applicants have come to Court on account of there being an error apparent on the face of the record, that the ruling is in breach of the law, the ruling requires clarification and that they have sufficient reason(s) to warrant review.

16. The Applicant/Respondent have pointed out that this Court erred in awarding retirees both service pay and gratuity which they contend is the same benefit and is not provided for under the CBA. They therefore want the award of service pay removed as is only payable to employees ceasing employment by way of normal termination of employment.

17. The Claimant opposed this application and submitted that there is no error on record nor is there any breach of law in the judgment and ruling of the Court.

18. In order to determine if this Court erred, I will relook at CBA between the parties. Clause 15 provides as follows:

“TERMINATION OF EMPLOYMENT

Employment may be terminated by management or the employee, as the case may be by each giving the other a notice in writing or pay in lieu of notice in the following manner:

a) Below five (5) years service, one (1) month notice or pay in lieu thereof.

b) Five (5) years service and above, three (3) months notice or pay in lieu thereof.

c) He/she shall be paid a service benefit at the rate of thirty (3) days per year”.

19. On redundancy, Clause 23 of the CBA sets out the steps to be taken and further states at Clause 23(d):

“The redundant employee shall be entitled to cash payment before work ceases to effect redundancy:-

i) Notice as provided for under Clause 15 herein;

ii) Leave due;

iii) Days worked;

iv) Overtime worked and

v) Severance pay at the rate of thirty (3) days for each year of service or prorated for each month of service”.

20. Under Clause 26:-

“RETIREMENT

An employee may opt to retire from employment after serving for not less than ten (1) years, and he/she shall be entitled to all terminal benefits and gratuity”.

21. In my judgment I awarded the Claimants both gratuity and service. I note that Clause 15 deals with normal termination of employment and Clause 23 with redundancies.

22. The 4 Grievants herein having retired, they should be governed by the provisions of Clause 26 of the CBA as set above. The question then is what are terminal benefits other than gratuity that these employees are entitled to?.

23. Under Clause 25 of the CBA, every employee is entitled to service gratuity.

24. Gratuity is an allowance that is given without an obligation to do so. In Blacks Law Dictionary- 9th Edition page 89 a gratuitous allowance is defined as “a pension voluntary granted by a public entity”.

25. Payment of service pay on the other hand is a legal requirement under Employment Act at Section 35(5) which states as follows:

“An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed”.

26. My provision for payment in the judgment for both service pay and gratuity is borne from the fact that gratuity was provided for in the CBA and service pay is provided for in the law and the CBA had also alluded to payment of all terminal benefits.

27. It is my finding that the application for review must fail as there is no error on the record nor any flouting of the law as submitted. The Judgment and Ruling is therefore left undisturbed.

28. Costs to Claimant Respondents.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Henry Nyumba for Respondent Applicant – Present

Odin Otieno for Claimant – Present