REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.32 OF 2014

(Before D. K. N. Marete)

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....…….....…..CLAIMANT

VERSUS

UNILEVER TEA (K) LIMITED.....RESPONDENT

JUDGEMENT

This matter is originated by way of a Memorandum of Claim dated 3rd October, 2014. The issue in dispute is therein cited as;

> *"Failure to agree on wage increases, hours of work (f), gratuity new clause (d) and retirement age for the C.B.A applicable for the period 2014-2015."*

The respondent in a Memorandum of Defence and Counter-Claim dated 2nd December, 2015 denies the claim and proffers a Counter-Claim instead.

The claimant in return and answer to the Counter Claim denies the same and reiterates her prayers at paragraphs 12,14,15,16 and 17 of the claim dated 3rd October, 2014.

The claimant's case is that the parties enjoy an employment relationship governed by a Recognition Agreement and regulated by a CBA that has been reviewed severally ending with one for 2012/2013.

It is the claimant's further case that the parties have been involved in negotiations for the CBA due for review on 1st January, 2014 and agreed on all other items of the CBA except for four (4) of these. These are;

i. Wage increase.
ii. Hours of work
iii. Gratuity, and
iv. Retirement Age

This is expressed as follows;

> *7. We sought the order for CPMU to conduct an analysis and file a report in court because we*

have proposed a 70% wage increase based on economic reasons which are:-

- *High inflation rate*
- *Increased cost of living*
- *Compensation for wage differentials*
- *Improved labour productivity and*
- *Reduction of poverty*

8. Further on; hours of work we have proposed that "irregular" employees earn "rest days with pay".

9. On gratuity we have rejected management's proposal to introduce a sub clause (d) where gratuity is payable above the net contributed as NSSF and on.

10. Retirement age we have proposed 60 years to be the mandatory age of retirement and at the age of 50 years upon which one can opt to retire.

11. Your Lordship the Honourable court on 5th December, 2015 having heard all the parties' submissions and arguments granted Order item 3 and 4 of our notice of motion dated 3rd October, 2014 while making its decision known in paragraph 12 to 25 of the Ruling.

She prays as follows;

12. That the Honourable court do issue a declaration that the claimant is entitled a general wage increase of 70% being increase for cost of living, labour productivity to compensate the claimants for erosion of purchasing power suffered due to inflation rate and increased cost of living during the subsequent CBA of 2012-2014.

13. That Honourable court do issue a declaration that the claimant is entitled to rest day with pay.

14. That gratuity is a meritorious award for service rendered and shall not be payable on the net of NSSF contribution.

15. That retirement and or pensionable age shall be on attainment of 60 years of age.

16. That the respondent do forthwith implement the CBA incorporating the above declarations within the next 30 days in default execution to issue.

17. That cost of this suit be provided for.

The respondent's case is a denial of the claim and further that the claimant is disentitled to the relief sought. It is as follows;

2. The respondent denies the claimant's claims in this cause and further denies that the Claimant is entitled to the orders as sought and states as follows;

a) The respondent reported the CBA dispute herein to the Ministry of Labour for conciliation. There has been no conciliation to date. See Appendix 1.

b) The Respondent is unable to afford high percentage wage increases demanded by the claimant union as a result of inter alia low tea prices, the fact that the overall cost of production has increased significantly and the fact that there are flat productivity levels.

On the disputed issue of wage increase, the respondent avers that the proposal for a 37% wage increase in the 1st year and a similar percentage for the 2nd year is not only unreasonable but unaffordable. It is her

case that she had earlier offered an increament of 2% for the two years respectively but revised this and on 25th November, 2015 made an offer of 5% on a without prejudice basis. This was for the year 2014 and 2015.

The respondent's other case is that this proposal on the following factors;

> *5.2 The tea industry in 2012-2013 suffered from difficult economic conditions with a depressed market and low prices. The cost of doing business has increased significantly due to:*

i. *Increased energy costs: Electricity costs are high volatile depending on the changes in international oil prices.*
ii. *High labour costs as the wage increases have been ahead of the inflation rates see (Appendix 2 – page 7 of Unilever Tea Kenya economic paper)*
iii. *Increased costs of farming products*
iv. *Higher packaging costs*
v. *High priced transportation costs*
vi. *Depressed tea prices taking 2012 as the base year, Mombasa auction prices dropped by 16% in 2013 and 29.5% in 2014.*
vii. *There has been a reduction in yield, loss of bushes and increased need for replanting leading to increased cost of production.*
viii. *Tea prices dropped by 20% in 2013 to 2014 and the prices were significantly lower than the cost of production for 2014.*
ix. *More than 40 levies have been imposed on the tea industry some of which are new or have been increased recently e.g Ad Valorem.*

5.3 The respondent values the welfare of its employees and despite the harsh business conditions the company is facing, it has made and continued with a multimillion investment in its employee's welfare programmes such as; provision of solar lighting in all houses, security lighting in the villages, lighting arrestors in all houses and improved sanitation facilities.

5.4 *The respondent sought an independent expert, an economist (Dr. Seth Gor) to compile a report on the various economic factors which impact wage formation in Kenya (see Appendix 1). as noted by Dr. Seth Gor, in assessing CPI, various items are food, housing, water, electricity, gas and other fuels, transport and health. Since the respondent provides housing, water, solar heating, transport and health benefits, the impact of these costs to the employees has been reduced by 30.1% of the weight of the basket. Consequently, the employees are insulated from the effects of inflation whereas the company bears the increase in costs of provision of these benefits. The CPMU report has not taken into account the benefits provided to the employees by the respondent. Dr. Gor has estimated the cost of living/inflation to be. 3.9%. In addition, in accordance with Dr. Gor's report, labour productivity has been flat and the percent change is -0.03%.*

5.5 In the period 2011 to 2014, there has been a decline in the Respondent's profits, and for 2014 the respondent suffered a loss of Kshs. 677,635,000/ as set out in the CPMU report.

5.6 There are no wage differentials between the respondent and KTGA. Further, the repondent's wages are significantly higher than the statutory minimum agricultural wage especially when one takes into account the various benefits accorded to the respondent's employees. It is not clear on what basis the CPMU report has made reference to KTDA & KETEPA CBA's as the underlying business model in respect of these entities has not been explained. Further, the two cannot be compared to the respondent as they do not have plantations and do not have the same cost base as the respondent it should also be noted that the claimant union has finalised a CBA with the Limuru Tea Group where the current plucking rate is Kshs. 11.28 whilst the respondent's rate is currently 11.64 (and this is before the resolution of the current CBA.) The Limuru Tea Group plucking rate is lower than the Respondent's rate.

5.7 The respondent further avers that there is no automatic right to a wage increase under the Employment Act and the interim increment of 5% for 2014 and 5% for 2015 is made as a sign of good faith which the court should take into account in its final analysis. The interim increment was made on a without prejudice basis considering the fact that the court lacks jurisdiction to impose a wage increment higher than the minimum agricultural wage as this would amount to an imposition of terms upon the parties. Such an imposition would be against the respondent's constitutional right to freely negotiate its contractual terms.

5.8 Further, any increase in basic wages will have a knock on effect on other benefits such as leave, sick off and overtime rates thereby escalating labour costs which are in any even too high.

5.9 In the alternative and without prejudice to the above, the court ought to take into account the factors of affordability, comparability, productivity, cost of living and most importantly long term sustainability in arriving at a scientific basis for its decision. A wage increase of 74% as proposed by the claimant for every two years is unsustainable in the long term.

6. HOURS OF WORK

6.1 The union proposes to have all "irregular" employees earn rest days with pay. Section 27 (2) of the Employment Act requires an employer to grant each employee one rest day in every period of 7 days.

6.2 The respondent has contested the union's proposal on the basis that it has no legal basis and proposes to retain the current CBA clause at it is compliant with the Employment Act. The respondent already accords all employees one rest day in every 7 day period as required by the Employment Act. The Act does not place an obligation on employers to pay casual or daily workers their wages for the rest day. The respondent proposes to retain the current text of the CBA as it relates to the number of working hours which is in accordance with Section 27 (2) of the Employment Act. It should also be noted that this issue has already been adjudicated upon in ELRC 1148 of 2011 KPAWU vs Unilever Tea Kenya Limited and an award issued. See Appendix 3.

6.3 Allowing the aforementioned union's proposal would be imposing a substantial 15% increase on wages per month for the respondent. Indeed, the court has no jurisdiction to impose terms which are not set out in the Employment Act.

7. GRATUITY

7.1 The respondent has proposed to include a new sub-clause under clause 30 of the current CBA, stating the following;

NSSF Regulations 2013 Regulation 22 provides that where a contract of service provides for gratuity, the employer shall deduct and remit contributions in accordance with the provisions of Act. Provided that an employer may deduct its portion of contribution from the gratuity amount payable to the employee.

It should be noted that paying gratuity and NSSF contribution would be asking to paying of social security twice. There is a pending court case in respect of the NSSF Act 2013, ELC No. 38 of 2014, Kenya Tea Growers Association & Agricultural Employers Association -Vs- The Attorney General.

8. RETIRMENT CLAUSE

8.1 The union proposes to have an optional retirement age of 50 years and mandatory retirement age of 60 years.

8.2 The respondent proposes to retain the current CBA clause relating to retirement age. This clause provides that the voluntary retirement age for employees is 50 years and compulsory retirement age is 55. In addition, the work carried out is highly labour intensive and thus the company aims to have all employees retire while still energetic and capable of having a gainful life after work. This item is not provided for under the Employment Act and the Court has no jurisdiction to impose such a term on the respondent.

9. The respondent urges this Honourable court to dismiss the claimant's claims as imposing terms on the parties will be tantamount to infringing on the parties rights to freely negotiate.

10. Save as what has been expressly admitted hereinabove, the Respondent denies each and every allegation contained in the memorandum of claim as if the same had been set out herein and traversed seriatim.

The respondent disagrees with the union's proposal on hours of work. She sets this off by rubbishing the proposal for irregular employees to earn rest days with pay on the basis that employees are in law entitled to one (1) rest day in every seven (7). She avers that this proposal has no legal basis as she already practices the legal position. It is her further case that she is not obligated to pay causal workers their wages during their rest days. She proposes a retention of the current position which she avers is supported by S. 27 (2) of the Employment Act, 2007.

The respondent also makes a proposal for the inclusion of a sub-clause under clause 30 as hereunder;

> *"Where gratuity is payable as above it shall be paid net of NSSF contribution in accordance with the NSSF regulations 2013 Regulation 22."*

The respondent's case on the retirement clause is a proposal for retirement age be retained at 50 (voluntary) and 55 (compulsory.) It disputes the union's proposal for 55 (voluntary) and 60 (compulsory) on the basis that the law does not provide for this and courts have no business imposing this onto the respondent.

The respondent in the penultimate relies her opposition of the claim submits that this disagreement is a causative of the claimant unions unreasonableness and failure to negotiate and settle the matter amicably. She prays as follows;

i. *An order that the wage increase for the Collective Bargaining Agreement for the period 2014-2015 be set at a rate of 5% for the 1st year (2014) and 5% for the 2nd year (2015).*

ii. *The wording of clause 4 of the CBA 2012-13 in respect of hours of work be retained in the CBA for 2014-2015.*

iii. *A declaration that clause 30 of the CBA 2012-13, in respect of gratuity be amended insert a new sub-clause (d) stating the following;*

> *"Where gratuity is payable as above it shall be paid net of NSSF contribution in accordance with the NSSF regulations 2013 Regulation 22."*

iv. *A declaration that the wording of clause 29 of the CBA 2012-13 in respect of the retirement age be retained in the CBA for 2014-2015.*

The matter came to court variously until the 10th December, 2015 when the matter was heard *inter parties.*

The issues for determination therefore are;

1. Whether the claimant is entitled to the relief sought?

2. Who bears the costs of this claim?

An analysis of the evidence and submissions by the parties would come out with a determination of the issues in disputed. At the hearing, CW1- Mr. Benson Okwanyo testified in support of the claimant's case. He said that he is a Statistical Officer with the Central Planning & Monitoring Unit (CPMU.) He further testified that he was aware of this dispute and had investigated and prepared and filed a report dated 8th September, 2015 in court. A report is prepared in consultation with the parties and in the process an analysis of the issues in dispute is made on a one to one basis. This is finalized through a questionnaire to the parties, dialogue and submissions by the parties all of which culminate in the compilation of a report which is filed in court with copies to the parties.

It is the witness's further testimony at page 4 paragraph 3 of the report that there was an increase in management staff during the period under review. There is also an increase in the labour cost over management staff which is attributed to the improved terms and services of this cadre. Page 5 paragraph 3 of the report indicates a gradual increase in the annual wage bill of the unionisable staff. Page 6 of the report – the profit and loss account of the respondent indicates a profit whereas page 7 paragraph 3 puts this at Kshs. 983,000,000.00 in 2011, Kshs. 877,000,000.00 in 2012 and Kshs. 654,000,000.00 in 2013. All these are indicators of a healthy financial performance but in 2014 there was a loss of Kshs. 677,000,000.00 but this loss was attributed not to employees but other administrative affairs.

The witness further testified that during interviews and consultations with the respondent they expressed that they were facing challenges resulting from labour cost for all employees but not necessarily the unionisable ones. It is his further testimony that the claimant lay in the category of New Other Provinces at page 8 - table 4 of the report with a percentage rise of 8.89 in the Consumer Price Index (CPI.) They are therefore entitled to a full 100% of the consumer index.

The witness further testified that their questionnaire to the respondent indicating the new increase in the productivity but this was a modest 7.3% and is a major factor in determining productivity which is an entitlement of wage increase to the workers. The report at page 9 paragraph 3 also reports that a comparative of unionisable and management employees was not done due to absence and lack of data for such purposes. Page 12 paragraph 2.7 is a complaint on the claimant's diminishing purchasing power and a quest for increase pay through a salary rise. While at page 13 paragraph 2.8 the claimant's aver that other players in the industry have signed CBA's with improved terms of service. The witness testified that this had been verified and examples were KETEPA and KTDA. The quest for salary rise by the claimant's was in equal terms with these.

In cross-examination the witness testified that at page 3 and 5 of the report the number of unionisable employees had gone down in terms of numbers, while there is an upward trend in terms of costs. Again, in the management staff cadre the no. of workers have been going up with a corresponding upward trend on their labour costs. He also acknowledged his awareness of international employees but testified that he was not aware that they are the cause of escalated labour force. It is his further testimony that consultations with the respondent did not yield much on salaries for management staff.

On profits, the witness testified that the general trend was favourable for 2011 to 2013 with total silence on the matter for 2014. The management was supposed to explain this but did not. The issue of labour cost and competitiveness in the market posed challenges to the respondent performance. He also testified that the statement that workers should get a share of the wealth created is not in the wage guidelines as provided. The witness also distinguished Dr. Bans methodology as being different from the CPI one as the CPI looks goods in a basket.

The witness again was emphatic that KETEPA and KTDA though all dealing with tea like the respondent's would not be placed in the same category as these carried out different functions and operations. The respondent is mainly plantation while the others are packers and producers respectively.

On re-examination the witness testified that the difference in wages attributed to the assignees (international staff) was not revealed as a challenge to the wage bill the wage bill for the management's

balancing. Again, the ability to pay was not cited as a challenge. He affirmed and testified on the use of the CPI as a method of assessing the wage increase and further asserted that provision of housing, water *et al* are not suitable excuses for denial of an increase in wages.

The respondent called Dr. Seth Omondi Gor who testified that he prepared the report at page of the defence and counter-claim where he clarified the issues of cost of living, inflation and consumer index. He defines this as follows;

1. *Consumer price index is a partial measure of the cost of living. It is constructed on the basis of a number of goods and services that households consume. These are at a fixed selection but change from time to time. These are also weighted and carry different levels of importance. This is used to measure changes in the process of goods and services.*

2. *Inflation is closely related to this but measures the percentage change in price on the rate at which the price changes. With the consumer price index, one can estimate the rate of inflation.*

   There are two ways of estimating inflation viz monthly inflation and month on month inflation. Monthly inflation gives an impression of inflation change from month A to month B. Month to month inflation on percentages basis on a month in a year as compared to the other year.

The witness further testified that he used the month to month approach as this is more realistic in assessment of the wages. It is used in wage negotiation and policy decisions. Table 3 page 18 indicates this as 5.7% with a conclusion at page 18 paragraph 3.1 that the trend for 2014 to 2019 changes by 5.57%.

He differs with the CPMU report at page 8 and testified that the method of computation of table 4 is incorrect. This is because authors are taking the percentage change in CPI between January and December 2013. This is not month to month and is therefore fallacious. It is also the testimony of the witness that the formulae used in the CPMU report is not in the wages guideline as this provides for Nairobi Lower Income Group. He approves of his method and brings this out as standard and used by KNBS, World Bank, IMF, CIA World Fact Book which are authoritative sources for economies.

The witness touches and testifies on the goods and services provided by the respondent to her workers and faults the claimant's lack of accounting for these in the computation of the CPI. It is his testimony that these would affect CPI indices if applied. He also faults the union's report on productivity levels and methodology of coming up with the same as being faulty. Lastly, the witness testified on the price taker aspects of the respondent – that the respondent does not control prices but these are dictated by the market and that if a balance between revenue and expenditure is not had, a collapse would be inevitable.

On cross-examination the witness testified that he is familiar with CBA negotiations and has attended some but was not aware that CPI is factored in the life of a CBA. He further testified that productivity is a relationship between input and output and is not about efficiency and delivery of service.

DW2, Collins Bett duly affirmed testified that he was the Operational Manager for the respondent with a stint of nineteen (19) years and his involvement in CBA negotiations of the respondent. The witness further testified that he had gone through the CPMU report dated 8th September, 2015 in which the table on page 3 indicates an increase in trend in the wage bill and also the wage bill for the unionisable employees. This is in line with the wage bill from 2013 to 2014 with increments for 10% for 2010 and 10% for 2011 which are all above inflation. He also testified that labour costs is 60% of the total production cost. And therefore a wage increase would hurt the business.

DW2 further testified that the challenge here is that the respondent business is labour intensive. It is agricultural, not mechanized and largely manual with the larger bearing on labour costs being unionisable work force. This makes about 85% of the wage cost. Page 4 of the CPMU report explains that management cost has gone up but this can be attributed to international staff. The wage increase for

management staff was 2% and that for unionisable workers was 36%.

The witness further testifies that a wage increament would not be sustainable or affordable as this would by far exceed revenue accrued from the business. He also testifies that the respondent is a price taker and that there has been an oversupply of tea in the market and therefore poor prices. Again, the respondent offers the highest wages in the region and therefore the offer for 5% in 2014 and 5% in 2015 as opposed to the 37% proposed by the claimant is an affordable. He also distinguishes KETEPA and KTDA from the respondent in that these are packers and factory producers respectively. They are not plantation as in the instant case.

On cross-examination, the witness claims to have participated in CBA negotiations from 2009 to 2010 and thus aware of the subject. He, however, cannot account for his letter of 10th December, 2015 on its signature and receipt stamp. He does not also answer his relationship with the report. The witness further testifies to an increament in labour flow from management staff by 4% as a consequence of staff increase in the category.

On re-examination, the witness testifies the letter of 11th August, 2015 is from the respondent to the CPMU. It is an answer to ourselves to a report made to us by the CPMU. He further testified that employees are not entitled to profits made as this is for shareholders who take risks for profits and losses.

In furtherance of his case the claimant further seeks to rely on her written submissions dated 4th April, 2016 in which she reiterates her respective cases and testimony in evidence. While emphasizing the veracity and efficacy of her evidence in support of the claim, the claimant faults DW1's – Dr. Gor's evidence that the CPI index by the KNBS utilized by the claimant have not factored the *component of the basket on a month to month inflationary figures.* This is rebutted by reliance at page 4 of the New Consumer Price Index (CPI) users' guide of March 2010 obtainable at www.knbs.co.ke that defines CPI as follows;

> *"a measure of the weighted aggregate change in retail prices paid by consumers for a given basket of goods and services. Price changes are measured by re-pricing the same basket of goods and services at regular intervals and comparing aggregate costs with the costs of the same basket in a selected base period"*

Again, the claimant submits that;

> *(h) KNBS goes further to explain CPI as a very large "Shopping Basket" full of goods and services on which people typically spend their money and could include rice, maize flour, coffee, paraffin, electricity and clothes. The contents of the basket are fixed at a particular point in time, but as the prices of the individual commodities in the basket changes so does the prices of the basketful.*

It is the claimant's submission therefore that Dr. Gor's evidence - *that the CPI data and or indices relied upon by CPMU and or claimant in computing the percentage rise of cost of living increase of 9% as presented and filed by CPMU has already factored the "Shopping Basket" and or "market basket" by the time the CPI data is constructed and released by KNBS and we hold him to strictly prove to the contrary.*

Where does this leave the evidence of the respondent rubbishing the user of the CPI as provided by KNBS? I am of the view that this data is correctly applied and appropriate in the circumstances of the case.

Further, the claimant submits that;

> *(j) KNBS states in paragraph 2.2 of page 4 of the March 2010 users manual that among the CPI uses in Kenya one is its use a* ***"a tool in wage negotiation and indexation"*** *i.e CPI is used to adjust taxes and to determine, among other things, wage levels in the event of trade disputes.*

This testimony of efficacy, use, practice and application of the KNBS consumer price index in settling issues on wages and wage negotiations and increases.

The claimant further submits that according to page 7 – paragraph 2, 3 & 4 of the CPMU's report filed on 9th March, 2016 *"the respondent's financial performance over the period under review was healthy."* Indeed, this has been the claimant's position at both her pleadings and evidence at trial. She further relies on the authority of **Kenya Chemical and Allied Workers Union v Leather Life EPZ Limited (2014) eKLR** Rika, J observed in paragraph 21 and 22 that:-

> *21. The major compensable factors in wage adjustment are-*
>
> x. *Rise in the cost of living.*
> xi. *Improved labour productivity.*
>
> *The first factor endeavours to restore to the workers, the purchasing power of basic consumer goods and services. The purchasing power is normally eroded by inflation, during the lifespan of an outgoing CBA. The parties did not conclude the first CBA but agreed for the purposes of their negotiations that the effective date would be 1st April, 2011 to 31st March, 2013. As suggested by CPMU the period of compensation in respect of the rise in cost of living is 1st April 2011 to 31st March 2013. The claimants' members belong to the Lower Income Group. The consumer price indices for Nairobi Lower Income Group stood at approximately 16.4 %*
>
> *2.2 Wage guideline number 2 provides for compensation on improved labour productivity. The workers must have a share of the wealth created in the business during the period in question. The respondent made net profits of Kshs. 9.5 million in 2009, Kshs. 15.4 million in 2010 and Kshs. 13.1 million in the year 2011. The CPMU was not able to obtain the report for the year 2012. These were healthy profits and despite the respondent having acquired the business through a receivership and having inherited liabilities there is no suggestion that the business cannot meet additional wage bill and remuneration profitable.*

The claimant has therefore taken into consideration all relevant factors in wage determination as follows in calling for this increase. These are;

- *The cost of living as published by the GOK*
- *The Consumer Price Indices*
- *Annual Wage Inflation*
- *Erosion of workers purchasing power*
- *Productivity and living standards*

She prays for relief as sought.

On retirement age, the claimant basis this prayer on Section 5 (2) of the Employment Act which provides as follows;

> *(2) "An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice."*

She further relies on ILO Recommendation No.162 provides for equal opportunity and treatment of all persons and prevents discrimination in employment on account of age.

Further the claimant submits there is no evidential proof or justification for the averment that "*the employees should retire while still energetic and capable of having a gainful life after work*" and that "*a retirement age of 55 years allows for a younger workforce to come in as is as highly manual sector*" This, she submits is not supported by any evidence and fall short of the legal requirement that he who alleges must prove.

The claimant further submits a case for increament of gratuity from 22 to 24 days per completed years of service. This is to cater for the workers devotion, time, life, energy and loyal commitment in their service to respondent. It is her further submission that the respondent's arguments on the operation of NSSF Act are untenable as the Act is not in operation. This sounds sensible.

The respondent in her written submissions dated 22nd April, 2016 sets out the following as issues for determination by court;

a. (i) Whether there is any express statutory provision which gives the Employment and Labour Relations Court jurisdiction in the absence of a collective agreement by the parties to set wage increases and allowances for employees?

   (ii) Whether the setting of such terms is a breach of the respondent's constitutional right to freely negotiate terms contrary to Article 41 (5) of the Constitution and whether the said breach amounts to a deprivation of the respondent's constitutional right to property under Article 40(1) of the constitution?

   (iii) Whether the court has jurisdiction to impose and set contractual terms higher that the statutory minimum employment terms in the absence of a collective agreement by the parties?

b. Without prejudice to the foregoing, the various factors that the court takes into consideration when deciding on wage disputes?

c. Proposed amendment to the retirement age- Clause 27 of CBA 2012-13.

d. Proposed amendment to the gratuity clause – Clause 28 of CBA 2012-13.

The respondent 1st issue is answered in her favour. It is her position that Section 57 of the Labour Relations Act does not contain any statutory position that the labour court can impose terms in the absence of a collective agreement. This is also the case as provided under Section 12 (1) (j) and Section 15 (5) of the Employment & Labour Relations Act. She further relies on the authorities of **Ngobit Estate Limited -V- Carnegic (1982) KLR 437** the court of appeal (Potter JA at page 447 had this to say about the application of statute;

> *" … the function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it stands. To do otherwise would be to unsurp the legislative functions of parliament."*

As to the court's jurisdiction to impose other than the statutory minimum at issue No. 2 above she relies on the authority of **TSC vs Kenya Union of Teachers & 3 Others (2015) eKLR** where the court observed as follows;

> *"In the present case, there was no collective agreement in existence setting the basic salary and allowances of the teachers. The very essence of a collective agreement is that the terms and conditions therein contained are voluntarily agreed upon between the employer and the union... If the labour court fixes basic salary and allowances to be incorporated in a collective agreement as the labour court did in this case, the collective agreement ceases to be a collective agreement as envisaged by the law. From the foregoing, I find that there is no express statutory provision of the law which gives jurisdiction to labour court in absence of a collective agreement to set the basic salary and allowance of public officers... I further find that conciliation of mediation is a compulsory condition precedent before the labour court can assume jurisdiction. Though the Court of Appeal indicates that this rationale is applicable to public officers, the same rationale is applicable to employees in the private sector. There is no express statutory provision that gives the Labour Court the mandate to set the basic salary and allowances of employees in the absence*

of a collective bargaining agreement. Further Justice Odek JJA in the TSC case stated that "A CBA is a contract between the employer and the Unions. In contract law, the terms and conditions of a contract can only be negotiated and concluded by the parties to the contracts. This is the essence of autonomy of parties in collective bargaining, freedom of contract and privity of contract … In National Bank of Kenya vs Pineapple Samkolit this court held that a court of law cannot re-write a contract between the parties... The trial court erred in writing and providing terms for a future contract yet to be concluded by the parties."

On retirement age the respondent submits that Employment & Labour Relations Court Act does not contain a minimum retirement age and neither does it provide for 60 years. The public sector retirement age cannot be imposed on the parties and anything to this extent by the court would be contrary to the legal requirement that courts can neither re-write contracts for the parties or impose terms thereof. On this the respondent sought to rely on Rika, J's decision in **James Nyang'au v Heritage Insurance Company Ltd (2014) eKLR**. Further, she also sought to rely *on the TSC case the Court of Appeal held that a court should not impose contractual terms.*

She urges a retention of the retirement age under current CBA.

On gratuity the respondent submits that there is no basis for an increament 22 to 24 days as this would also amount to an imposition of terms by the court which in position overrides and contravene the TSC decision above cited. Again, emphasize should be made on the authority of social security where benefits were emphasized. This matter pends litigation. This is as follows;

*"The court should take note of Justice Rika's decision in **Elijah Tonui vs Ngara Optician (2014) eKLr** where the court indicated that the interests of employees should be safeguarded through the restriction of payment of double social security benefits. Nonetheless, it should be noted that this issue is the subject of pending litigation."*

An analysis of the respective cases of the parties would in the circumstances suffice to enable a conclusive determination of the issues in dispute. This would be pursued on the following limbs;

a. Jurisdiction of the court
b. Relevance of the CPI vis-a-vis Dr. Gor's method
c. Evidence on economic position of the respondent/Ability to pay
d. The place of fringe benefits or *extra* provisions by the respondent
e. Retirement age
f. Hours of work
g. Gratuity new clause

a. <u>Jurisdiction of the court.</u>

This court is a creature of Article 162 of the Constitution of Kenya, 2010. Article 162 (2) (a) and (3) provide as follows;

(2) (1) "Parliament shall establish courts with status of a High Court to hear and determine disputes relating to-

a. *Employment and labour relations and;"*
b. …

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Pursuant to the provisions of the Constitution, parliament has enacted the Industrial Act, 2011 and the Employment and Labour Relations Court to fasttrack and facilitate the functions of this court. This is as follows;

Section 12 of the Industrial Court provides in part;

> *12 (1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –*

a. …
b. *dispute between an employer and a trade union;*
c. …"

The Labour Relations Act, 2007 at Section 2 defines a trade dispute as;

> *"a dispute or reference, or an apprehended dispute or difference between employers and employees, between employers and trade unions, or between an employer's organization and employees or trade union, concerning any employment matter and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or recognition of a trade union."*

Section 67 to 73 of the Act provides for dispute resolution mechanisms. This requires that disputes be reported to the Minister on the first instance which Minister is called upon to appoint a conciliator and if the dispute is not resolved at this level, a reference to this court comes in as a last result. This is the position upheld in the Court of Appeal authority of **TSC vs Kenya Union of Teachers & 3 Others**, **(2015) eKLR**. We are therefore forced to distinguish CBA as a contract and any other commercial contract and the submissions by the respondent that parties should have the liberty to contract their terms and conditions of employment like in the law of contract. It is our position and finding that a CBA or employment contract within the provisions of Labour Relations Act or the Employment Act cannot be equated or similar to a contract under the law of contract for sale of goods. This was expressed in the authority of **Rajab Barasa & Others versus Kenya Meat Commission (2016) eKLR**, where the Court held as follows;

> *"…an employment contract of service unlike the case of any other commercial contract … (is) one relates to a work environment regulated by the Employment Act or the Labour Relations Act for unionized employees while the other contracts may be regulated under the law of contract, sale of good or as the case may be. For this purpose, an employment relationship is secured under an employment contract of service which is defined under section 2 of the Employment Act and a similar section under the Labour Relations Act."*

It is not in dispute that upon reaching a stalemate in CBA negotiations, the matter was reported to the Minister who undertook the necessary processes but all in vain. It all ended in a disagreement culminating in the dispute before court for determination. This subjects the parties to the jurisdiction of this court.

This court has original jurisdiction over all matters of employment and labour relations and where parties are not able to agree on these, the court takes charge. Further where parties are not able to agree on any items of a CBA as in the instant case this court comes into play and determines the same with guidance by the factors of affordability, comparability, ability to pay and cost of living. The parties have affordably presented their respective cases to this extent and any argument and submission on lack of jurisdiction to decide and determine this matter on its merits is fallacious and would not suffice. This also applies to the submission that the court cannot increase wages but only apply the minimum provided by law. I therefore dismiss the issue of jurisdiction by the respondent for lack of merit.

b. Relevance of the CPI *vis-a-vis* Dr. Gor's method

c. Evidence on economic position of the respondent/Ability to pay

d. The place of fringe benefits or *extra* provisions by the respondent

I propose to analyse these in unison for ease of application.

The evidence and submissions of the claimant overwhelmingly support a case for use of the CPMU report as a guide to the answer as to whether a wage increase is deserving in the circumstances. The CPMU report relies on the KNBS consumer price index in its formulation of a case for wage increase. Dr. Gor's evidence and the submissions of the respondent loudly rubbish the CPMU report in its critique to the same. The respondent in evidence has furnished expert reports and sought to rely on these in support of their case. These data was extracted on their member firms, financial statements and annual reports and it was not necessary to interview the claimant's members. The respondent has in total failed to produce financial statements and audited accounts as requested by the union and this leaves the claimant and this court in darkness as to the financial position of the claimant. The claimant has adduced evidence of increase production and this is not denied by the respondent. Evidence of a healthy economic position of the respondent has been adduced by the claimant but the respondent denies this and purports to be at the verge of collapse. She indeed testifies of inevitable collapse should this court award a pay rise beyond the concessionary offer of 5% for 2014 and 5% for 2015. I disagree.

All indicators of a healthy economic situation are apparent and these have not been rebutted by the respondent, or at all. The numerous excuses for denial of a wage increase, including the issue of fringe benefits afforded to the employees are not feasible. Housing, water, medical facilities, free education, solar panels, lightning arrestors and play areas are benefits entitled by the law and therefore cannot be inhibiting factors for a pay rise. The grievant's and claimant's members are entitled to a wage increase and in the absence of an agreement under the atmosphere of negotiations this court should rise to the occasion and award the same.

e. Retirement age

The age of retirement is also a disputed area. The respondent wishes to retain the current situation where this is pegged at 55 (mandatory retirement) with an option to retire at 50. The claimant prays for a revision of this to 60 (mandatory retirement) with an option to retire at 55. In the authority of **David Mwangi Gioko & 51 Others versus Nairobi City Water & Sewerage Company Limited (2013) eKLR**, where the employer disregarded a variation in the retirement age the court observed that is not best practice and the court must exercise caution in acceding to the rigid position advanced by such an employer. I find the submissions of the claimant on this subject compelling and disregard the rigidity of the respondent. An enhancement of the retirement age in terms of public policy and practice would not prejudice the respondent in any way and I therefore move on to award the claim on the subject.

f. Hours of work (clause f)

This is another controversial subject in the CBA. The parties have different approaches on it. I prefer a middle ground and award one (1) rest day for every seven (7) days of work for regular employees. This is the law. The border line between who is a casual and regular employee (permanent) is a thin area under S. 37 of the Employment Act, 2007. I shall suspend the matter for hours of work for casual employees in terms of S. 37 above for further negotiation in future CBA's.

g. Gratuity New Terms (new clause d)

This is another area of disagreement by the parties. The respondent buys a position of retention of the provisions of the subsisting CBA whereas the claimant prays for an enhancement from 22 to 24 days. Various submissions are had on this including a consideration of the incoming NSSF Act of the subject. This is controversial and antagonizing. It is not an emergency. The best option in the circumstances is to retain the *status quo* in readiness for negotiations in a future CBA.

All the issues in dispute in this cause touch on the welfare of the unionisable employees of the respondent. These are geared towards an alleviation of their laws of economic prowess occasioned by a

rise in the standard of living which results in higher consumer prices and inflation. Article 41 of the Constitution of Kenya, 2010 guarantees workers fair labour practices and this includes just paying for services rendered. A distinction must be had between just wages and a living wage. Just wages are those that incept the concept of fairness and justice in the payment of the worker. This takes all factors into account and includes an account for cost of living and resulting in inflation. It cautions against an employee's erosion of purchasing power. It ensures consistency in the value of goods and services acquirable through pay. A living wage is only an enabler and does not necessarily factor the atrocities above. This should be the case here.

The evidence and submissions of the parties in this cause are opposing. However, on a clear analysis of the cases of the parties this matter tilts in favour of the claimant. This is because the claimant has established his case on the basis of evidence and data in support of a wage increase, variation of retirement age and even consideration over variation in times (days) for computation of gratuity at retirement of departure. The respondent at all times faulted the case for the claimant on wage increase but did not offer controverting evidence in rebuttal. The claimant's evidence and submission that the respondent is enjoying a healthy economic status has not been rebutted in evidence, or at all. All that is established from the pleadings, evidence and submissions of the respondent appears mere denial and evasion from her responsibility to the unionisable workforce.

The rubbishing of the evidence of the claimant on her computation and analysis of the CPI as a criteria for determination of wage increase falls short of expectation. It is wanting on the face of the rider to the CPI provided by the KNBS as submitted by the claimant above. I therefore find a case for the claimant's entitlement to the relief sought and hold as such.

On the above premises, I allow the claim and award relief as follows;

i. Wage increase;

Unionisable Staff:	2014 – 15%
Unionisable Staff:	2015 – 15%
Management Staff:	2014 – 2%
Management Staff:	2015 - 3%

ii. Retirement age;

The mandatory retirement age for unionisable employees shall be 60 years with an option to retire at 55 years.

iii. Gratuity;

The time for computation of gratuity payable shall remain as in the subsisting CBA.

iv. Hours of Work;

a. There be and is hereby awarded one (1) rest day for every seven (7) working days for regular employees

b. The provision for hours of work for irregular employees be and are hereby suspended for further negotiation in a future CBA..

v. The respondent be and is hereby ordered to implement the terms of this judgment within thirty (30) days of the judgment of court.

vi. That each party shall bear its own costs of the claim.

And this answers all the issues for determination.

Delivered, dated and signed this 30th day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Khisa for the Claimant Union.
2. Mrs. Opiyo instructed by Kaplan & Stratton for the Respondent.