REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.3 OF 2015

(Before D. K. N. Marete)

KENYA PLANTATION AND AGRICULTURAL

WORKERS UNION.....…….....….....CLAIMANT

.VERSUS

JAMES FINLAY KENYA LIMITED (FINLAY FLOWERS).....RESPONDENT

JUDGMENT

This matter is brought to court vide a Memorandum of Claim dated 14th August, 2015. The issues in dispute are therein cited as;

a. *Rates of Pay (Clause 5).*
b. *Retirement Age (Clause 27).*
c. *Gratuity (Clause 28).*

The respondent in a Respondent's Memorandum of Defence and Counter-Claim dated 24th March, 2015 denies the claim and ushers in a counter-claim.

The claimant's case is that the parties have a valid Recognition Agreement and have in the past negotiated several Collective Bargaining Agreement's (CBA's.) The current one is due for review from 1st December, 2013. The parties have been able to conclude all other items of the Collective Bargaining Agreement with a balance of these three.

The claimant's further case is that on the issue of wage increase, she proposes an increase of 50% for two (2) years. This broken into 25% for the 1st and 2nd years

respectively. The claimant further proposes an enhancement of the mandatory retirement age from 55 to 60 years and an increase in the days for computation of gratuity from the current 22 to 24 days.

She prays for;

1. A declaration that the respondent implement as submitted by the claimant above.

2. That the respondent meets the costs of this suit.

The respondent's case is that the parties entered into negotiations for the CBA – 2014/2015. They were, however, unable to agree on these three (3) contested items and the matter was referred to the Ministry of Labour as per S. 62 of the Labour Relations Act. They disagreed and came out with a certificate of disagreement, ostensibly due to the claimant's unreasonableness.

The respondent's further case is that one of the main challenges is a static flower market where a producer would not be able to set the price. This is coupled by her production in an inflation prone environment whereas the UK, her main market is an inflation free economy. This dwindles the possibility of calling for a price increase in flowers.

The respondent's further case is that for the last ten (10) years, wage increment has been between 7% to 11%. This is unsustainable and has resulted in increments well above the inflation level. These were 9.4% in 2012 and 5.4% in 2013. These have placed the respondent at a competitive disadvantage. She is also the highest payer in the flower sector and if this continues, the business is likely to be unsustainable and end up in redundancies. Again, besides these improved and better salaries, these employees enjoy other benefits like free housing, water, free medical care and free primary education. These services are also sustained by 140 workers or 6% of the labour force with a consequence of increased labour costs for the respondent.

The respondent also contends and avers that over the last twelve (12) months, the Euro has weakened against the Kenya shilling thus occasioning heavy losses for sales made in Europe.

It is the respondent's further case that there is no automatic right to wage increase under the Employment Act and offers an increase of 2% for 2014 and another 2% for 2015 as a sign of good faith taking into account the stagnated flower prices as aforesaid. She contends and submits that the Consumer Price Index (CPI) cannot in the circumstances be utilized as a single guideline in respect of the issues in dispute.

The respondent further argues and avers that this court has no jurisdiction to award and impose any wage increase that is higher than the statutory minimum wage due to the fact that the claimant's wages are, as we speak, substantially higher than the statutory minimum agricultural wage and also wages paid by other agricultural sector employers. Alternatively, the court would have to consider and take into account factors of affordability, capability, productivity, cost of living and especially long term sustainability in arriving at a scientific basis for its decision as set out on the wage guideline. Any increment beyond the offered 2% in the next five (5) to ten (10) years would render the respondent's flower business uncompetitive resulting in dire and disastrous consequences to the business.

On the last issue of gratuity, the respondent avers that these employees enjoy 22 days for every completed year of service per the CBA of 2012/2013. She argues that a continuation of payment of gratuity will result in duplicity of costs due to the financial impact of the NSSF Act, 2013 where there will be a 4% increase of wages. She therefore proposes a cessation of gratuity clause on the commencement of the NSSF Act aforesaid. This comes with a rider that those due for payment of gratuity at this moment becomes payable at the time of retirement or other exit from employment.

On the issue of retirement age, the respondent argues and submits that employees should retire while energetic and capable of engaging in gainful life after work. It is her further case, that there is no statutory justification for increasing retirement age to sixty (60) and further retirement age at fifty-five (55) allows a younger workforce as is necessary in this highly manual sector.

She in the penultimate and Counter-Claim for a wage increase of 2% for 2014 and another 2% for the 2015 CBA's respectively. She prays as follows;

> *9.1.1 An order that the wage increase for the Collective Bargaining Agreement for the period 2014-2015 be set at a rate of 2% for 2014 and 2% for 2015.*
>
> *9.1.2 An order that Clause 28 of the 2012-13 CBA relating to gratuity be henceforth deleted and*

removed from the Collective Bargaining Agreement for 2014-2015. Clause 28 be replaced with the following wording: "Upon the implementation of the NSSF Act. 45 of 2013, there shall henceforth be no payment of gratuity provided that the employees who will have qualified for gratuity under the CBA of 2012-3 CBA will be paid their accrued gratuity dues in accordance with the terms of clause 28 of the 2012-2013 CBA before the implementation date of the NSSF Act 45 of 2013 at the basic rates that the employees were earning at the time of cessation of the gratuity clause and the entitlements thereof will be payable at the point of retirement from employment or at the point of exit from the member company.

9.1.3 A declaration that the wording of clause 27 of the CBA 2012-13 in respect of retirement age shall be retained in the CBA 2014-2015.

This matter came to court variously until the 9th March, 2016 when it was heard *inter parties.*

The issues for determination therefore are;

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

2. Who bears the cost of the claim?

The 1st issue for determination is whether the claimant is entitled to the relief sought. The parties as is usual disagree on their opinions on this. The claimant in evidence called Peter Mulwa, an expert witness from the Central Planning and Monitoring Unit (CPMU) from the Ministry of Labour, Social Security and Services who testified in favour of the claim. The witness sought to rely on a report filed on 9th March, 2016 as opposed to the one filed on 12th February, 2016. He however, testified that the only differential in this report was that the later report's page 8, table 4 where he introduces a designated calculation of the Consumer Price Index, herein after referred to as CPI.

Mr. Mulwa in his examination-in-chief testified that the report (s) relied on had been compiled after consultations with the parties to this cause. He further testified that page 5 of the report confirms that the annual wage bill for both unionisable and management staff had increased during the period under review. The financial performance of the company was healthy during the period under review and this meant that the respondent was not making losses. It had posted profits in this period.

He further testified that page 8 of the report indicated that the rise in the cost of living (CPI) was 8.9%. This analysis is based on wages guideline and therefore the claimant's (lead grievant's) are entitled to a 100% wage increase as dictated by the CPI. It was his further testimony that the company offered additional benefits and welfare to its employees' - page 12 paragraph 1.5 of the report but this does not hinder or affect wage increase as these are fringe benefits of the employment.

The expert witness rubbished annexture 6 of the respondent defence and testified that he was not aware of the allegations that they were doing better than other sectors in the industry on payment of salaries to their workers. This is because at annexture 6, the employers listed do not have the same number of employees or even capital. He also faulted the respondent's supplementary list of documents filed on 15th February, 2016 raising issues with his calculation of the CPI by testifying that the CPI is the property of the Kenya National Bureau of Statistics (KNBS) and the CPMU only applies and uses it as it is provided. This calculation of the CPI is based on the effective dates of the CBA to its end and this is an attested methodology for resolving economic disputes as in the present case.

On cross-examination, the witness testified that he did not enquire on the reasons for the increase of unionisable wages. He further testified that according to the respondent's report dated 25th January, 2016 - historically, wages have been increasing more than inflation rates. He also noted that at page 6 & 7 of the CPMU report, profits of the firm were declining but he had not calculated the percentage decline.

The witness further sought to testify in the respondent's report filed on 25th January, 2016 – page 10 by saying that he was not given an explanation for the increase. The report also indicated that there was

financial gain arising from foreign exchange gains. This was not highlighted in his report which only incorporated the figure.

The witness on further cross-examination reiterated his earlier position that the respondent was making profits and not losses. The reduction in profits indicated in this (respondents) report was therefore a cause of worry to the witness. A comparative of revenue and profits at page 6 indicates that the firm is not doing well and therefore the alarm. The witness however noted that the respondent was not in a position to determine the prices of her products in the market, she being a price taker. This was determined by the forces of demand and supply.

The witness further touched on and testified that the respondent's products are sold in the United Kingdom (UK) whose inflation rate is lower than ours. He however differed with the use of a five data point of in calculating CPI as done by the respondent and testified that CPI takes into account all goods and services consumed by the employees and this include housing, water, electricity *et al* and where these are provided, they are not taken into account as they comprise fringe benefits.

The witness further testified that as per page 10 of the CPMU report, ability to pay (wage increase) is established by the profit and loss account which had not been provided by the respondent. The union's demand for Kshs. 188,000,000.00 is higher than profit also the figure of Kshs. 30,000,000.00 in the CPMU report was high. The most critical factor in the entire debate on wage increament is the issue of ability to pay and sustainability of this pay both of which were considered in his report.

The witness in further cross-examination noted and testified on the importance of checking wage differentials. This is a comparative of wage differentials by different firms in different sectors and provided for in guideline No.3. Page 8 of the CPMU report indicates that the respondent is not at a disadvantage as compared to its competitors because the other firms are given a lower entry point wage. This is provided at page 66 of the Defence and Counter-Claim and differs with page 6 of the respondent report on figures for 2013 for Shalime where these are lower in comparison to the respondent's. These gives the respondent a lower edge as captured at page 8 of the CPMU report.

In the penultimate, the witness testified that he used the wage guidelines as a comparative to the respondent's report it was also his testimony that under the government agricultural report the figure is Kshs. 4,854.00 whereas the respondent's is Kshs. 10,538.00 which is double. He noted the need to compare wage differentials with competitors.

On re-examination, the expert witness testified that the respondent had not furnished him with the earlier CBA or even wages payable to Shalime**.** The data provided was mere figures and did not communicate whether they were maximum or otherwise. He further testified that the wage guidelines for 2013 do not apply to a CBA related firm therefore the CPI is followed in the circumstances. This takes into account cost of living, productivity, and wage differentials. As to whether the company was capable of sustaining a wage bill of 8.9%, the witness testified that he did not know.

In defence, the respondent called two witnesses to testify in support of her case. She opened with DW1- Dr. Seth Omondi Gor an expert witness with accolades in the field of economics. DW1 testified that he prepared a report dated 14th February, 2016 which comprises a critique of Kenya Plantation & Agricultural Workers Union (KPAWU's) Economic Background Paper. He on the onset testified that CPI was computed by taking certain basic consumables and putting these in basket and further giving weight to each of them. These weight define each of these items is more important than the other. Examples of these consumables are *inter alia*, transport, housing, healthcare, education and communication.

The witness moves on to rubbish page 8 of the CPMU report and page 4 of the union's paper on their indicator of 8.9% CPI. He testifies that this is wrong for being based and data supplied by Kenya National Bureau of Statistics (KNBS) and also being calculated on a month to month basis instead of a calculation on an annual basis. He further argues and testifies it is not based on any formula but only data by the KNBS and a formula, if at all, it is not provided.

His testimony on page 12 of the CPMU paper – benefits provided by the respondent is that this should be factored into a computation of the CPI. They form a list of consumables relevant to the CPI and constitute 35% of the consumer basket of the claimant/grievant's which should be taken into account as they reduce the grievant's cost of living by 35% as and when this goes up.

Page 4 of the union's paper on productivity, the witness testifies that firm productivity relates to one enterprise whereas industry level relates to many business enterprises in the same sector. In the circumstances of this case, firm level productivity is applicable and therefore the figure of 24.93% provided by the union is not accurate as it refers to the entire industry. This has no bearing on the respondent.

He also testifies that page 9 of the CPMU report is an indicator of improved productivity while table 3 indicates that revenues declined in 2013 to 2014. With an increment in the cost of labour these two imply that productivity fell and therefore disapproving the improved productivity on page 9 as this would not be borne out of tables 1 and 3 therein. It is his further testimony that the poverty line is not correct either as this is based on the wrong formulae. The ability to pay, he testified is determined by whether the firm is a price taker and not a price giver. The respondent is a price taker and therefore does not have control over prices of products offered for sale in the market. The witness further testifies that the proposed model is sustainable – table 3 and that wage differentials makes it not competitive as her bill on costs will be much higher.

On cross-examination the witness admitted that the formulae at table 4 of the CPMU report is similar to that at table 1 of the union report. He, however, adds that these are not formulae but an extraction of data from KNBS. They do not comprise cumulative CPI's and that the long tested formulae as presented are incorrect**.** He however admits that benefits do not take away their entitlement to a right of wages rising out of CPI. This is because benefits are part of the CPI basket and these and other provisions dictate the inflation index.

The witness further testified that the union would be entitled to a claim of the share of productivity if this was applicable but this was denied on re-examination. The figure of 17,478 as provided by the union is inaccurate as the Overall National Urban Poverty Line as determined by the Kenya Integrated Housing Basic Survey is 2,913. The figure of 17,478 is arbitrary, baseless and unacceptable.

The witness in further cross-examination testified that annual increases are not sustainable even on the figures supplied by the CPMU as the bottom line is the ability to pay.

DW2 – Stephen Cray Scott, the General Manager of the respondent duly affirmed testified that the general trend in wage versus inflation is one in favour of the wages. He further testified that there has been an increase in unionsable members' wages.

The witness further testified labour accounts for 40% of production cost. Table 3 page 6 of the CPMU report indicates a decrease in productivity in 2013. There was, however, an increase in profit occasioned by a gain in exchange rate. He explained and testified that the reason for decrease in profit is that price of their commodities is cut. They trade in an economy (UK) where inflation is almost nought as compared to ours where inflation increases daily due to wage increases. The respondent's other short falls is that they are uncompetitive in that their biggest competitor pays half of what they do to their unionisable employees – see page 45 and 47 of the defence.

He also cites and testifies that the respondent's other undoing is the cost of inputs. It is his testimony that the CPMU report emphasis on profits is fallible in that the in thing should be a comparative of profits vis-à-vis revenue. In the instant case this is not good or healthy as is only a margin of 2.8%. He also notes and testifies that benefits provided by the respondent, to wit, housing, medical care, free primary education, piped water and recreation grounds are costly and have led to the current situation.

The witness further faults the amount of Kshs. 188,000,000.00 and Kshs. 30,000,000.00 called for by the union and CPMU reports for being unaffordable. The amount of Kshs. 30,000,000.00 as provided is half

of the 2014 profits and unsustainable. Again, the model of two year increaments for the workers is not sustainable as the respondent is a price taker and operates in an industry where prices are fixed.

The witness in finality testified that any wage increase other than the offer of 2% made by the respondent is not sustainable and that page 10 of the CPMU report does not address the issue of ability to pay or even sustainability. The respondent, he testifies and says must be competitive to be sustainable. Anything contrary to this would lead to a risk of closure.

On cross-examination, the witness testified that the increase wages at page 52 of the defence were negotiated on a voluntary basis between parties. At this period the prices of commodities were constant. Pressed further, he answered that he was not able to know this.

He further testified that increase has been upward for unionisable staff, the wage bill for the staff has increased but overall the labour costs has not been the same for these two cadres of employees. He did not attribute the declining in profitability to workers input and also admitted that inflation is not static and affects workers. This was, however, with a rider that workers are compensable but not at the expense of the business. He also reiterated his earlier testimony on a decline in productivity with 2013 being an exception. Again, he touched on his earlier evidence that fringe benefits affect wage increament and further that wage increases on an annual basis are not sustainable and that they should be negotiated and upheld when profits are made.

On re-examination the witness reiterated his earlier position that percentage increase is not sustainable based on the current trend on profits and that unionisable employees have contributed to a decline in profits. The benefits

provided are an expense to the employer.

In furtherance of her case, the claimant further seeks to rely on her written submissions dated 4th April, 2016 in which she reiterates the parties respective cases and their testimonies 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 a 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,

> *(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.*

Further, she submits as follows;

> *(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.*

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.

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** the Honourable Justice Rika J observed in paragraph 21 and 22 that:-

> *21. The major compensable factors in wage adjustment are-*
>
> - *Rise in the cost of living.*
> - *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 further submits that guideline No.2 (a) emphasis the trade level and wage remuneration should enable employees to attain a desired level of living and guarantee the workers existence worthy of human dignity as indicated by the attainment of basic human needs. She 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 rubbishes the respondent's critique on her economic paper at page 5 and submits that Dr. Gor's assertions on partial labour productivity reflecting time, effort and skill would be affected by age differential as proposed as not based on any evidence. Further 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"*

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 29th 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 answers her 1st issue 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**, where 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."*

She further sought sought to rely on the authority of **Republic vs Inspector of Police David Kimaiyo (2014) eKLR;** where Odunga J. held as follows;

> *"Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body of authority must operate within those limits and ought not to expand its jurisdiction through executive craft or innovation."*

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 National Union of Teachers & 3 Others ("The TSC case")** (2015) eKLR stated;

> *"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 would be the court contrary to the authority *"in* ***James Nyang'au v Heritage Insurance Company Ltd (2014) eKLR***. *In addition, we 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.

> *"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 sageguarded through the restriction of payment of double social security benefits. Nonetheless, it shoud 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. Gratuity

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 fast track 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. …"*
>
> d.

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

These shall be analysed in unison of 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, education 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 (clause 27)

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. Gratuity New Terms (clause 28)

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 the 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;

1. Rates of pay;

- Unionisable employees: 2014 – 15%
- Unionisable employees: 2015 – 15%

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

v. 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