



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1997 OF 2014

CONSOLIDATED WITH

CAUSE NO.CAUSE NO.15 OF 2015 (KERICHO)

KENYA PLANTATION & AGRICULTURAL WORKERS UNION CLAIMANT

VERSUS

KENYA TEA GROWERS ASSOCIATION [KTGA] RESPONDENT

JUDGEMENT

Background

1. The parties herein, the Kenya Plantation & Agricultural Workers Union (the Union) and the Kenya Tea Growers Association (the KTGA) have a Recognition Agreement from 9th May 2008 and have negotiated several Collective Bargaining Agreements (CBA) with the last CBA registered and dated 6th June 2012. A new CBA has not been agreed upon; parties held negotiations but several issues were not resolved and on 22nd October 2014, a Certificate of Disagreement was issued. Each of the parties filed suit both now consolidated herein.

Claim by the Union

2. The case by the Union is that upon recognition by the respondent, they have several CBAs and the last one under review is from 1st December 2013. 25 items of the CBA were concluded while 10 items went for negotiations and parties failed to agree on 9 items;

- a) Rates of pay;
- b) Gratuity;
- c) Annual leave;
- d) Annual leave travelling allowance;
- e) Medical treatment & sick leave – g(i) & (ii);
- f) Retirement age;
- g) Day of worship; and

h) Baggage allowance.

3. The union's case is that on the items of disagreement, they propose an increase of 50% on the rate of pay for two (2) years each at 25% respectively to cover the period under review on the grounds that there is erosion of purchasing power due to change in consumer price indices; productivity; to narrow the poverty line gap; and wage differentials. That gratuity should increase from the current 22 days to 27 for each complete year of service in recognition of the continuous service; annual leave to increase from 26 to 27 days for long service employees of over 5 years; annual leave travelling allowance to increase by 12% per year to compensate for the changes in the cost of transport; medical treatment and sick leave is proposed to increase from 27,000.00 to 32,000.00 and a grant of 4 days leave with full pay. The proposal is also that retirement age should be reviewed from 55 years to 60 years; days of workshop should in accordance with article 32 of the constitution; and the baggage allowance should increase to 30,000.00.

4. The union's case is also that rates of pay should be regulated by the Wage Guidelines of 2005 which provides for an automatic right upon which such wages should be increased by a 100% based on the CPI parameters as compensation of purchasing power due to inflation, changing economic environment. The proposal to increased pluckers kilos per month would amount to enslavement of hand pluckers.

5. Gratuity should be increased to 27 days for each full year of service noting the NSSF Act, 2013 was stayed vide Petition No.11 of 2014 (Nakuru) pending hearing of Petition No.50 of 2014 (Nairobi). It is therefore *sub judice* for the Court to consider gratuity in the CBA 2014-2015 in the context of a law not in operation. To impose terms on gratuity as proposed by KTGA would defeat the spirit of collective bargaining.

6. On Annual leave, the Union opts not to contest the same and should remain at 26 days. This is done as an act of good faith.

7. The medical treatment and sick leave should be enhanced to cover for funeral expenses inclusive of transport and coffin due to financial trends covering costs of burials. On retirement age, the proposal by KTGA is meant to freeze the same contrary to collective bargaining. On the day of worship, the Court has no jurisdiction to make changes to the constitutional provision on the day of worship. Baggage allowance is reasonable and should be allowed in the spirit of collective bargaining. Hours of work should be reviewed to include a clause that entitles each employee a one (1) rest day with full pay in each 7 days period.

Claim by KTGA

8. The KTGA case is that as an association, they have a membership which include James Finlay Kenya Limited, the Sotik Tea Company Limited, Sotik Highlands Tea Estate Limited, Williamson Tea Kenya Limited, Kapchorua Tea Co Ltd, Kipkebe Limited, Nandi Tea Estate Limited, Karirana Limited, Kaisugu Limited, Tea Research Institute of Kenya, Gakoe Tea Limited, Mogusii Farmers Co Ltd, Itibo Estate, Kerumbe Farm and Kamiti Tea. The parties have a Recognition agreement and several CBAs have been negotiated and parties entered into negotiations of the 2014-2015 CBA in June 2013. Parties not able to agree on 10 items;

a) Rates of pay;

b) Gratuity;

c) Hours of work;

d) Annual leave;

e) Annual leave travelling allowance;

f) Medical treatment & sick leave;

g) Summary dismissal;

h) Retirement age;

i) Day of worship; and

j) Baggage allowance.

9. The dispute was reported to the Minister and a conciliator was appointed. Upon commencement of negotiations, the item on summary dismissal was resolved. The other items remain unresolved. The Union failed and or refused to consider the KTGA submissions that it was unable to afford the high percentage wage increase and benefits sought as a result of tea industry's economic downturn caused by among other things depressed market, low tea prices in the international market, increased taxes, increased production costs. The Union has unreasonable demands and had refused to reduce the percentage wage increments demands or benefits which are not provided for in law.

10. The KTGA case is also that the rates of pay and productivity is to have an increase of a minimum 2% for the 1st year and a similar increase of 2% for the 2nd year [2014 and 2015] to be applied on the current basic minimum rates in the CBA. This is due to the economic hardship that the tea industry is facing as well as factors of annual wage increment for the last 10 years which has been between 8% to 12%. These increments have always been above those provided in the General Wages and Agricultural Wages order which has resulted in cumulative wage increases running well ahead of general inflation, a situation that needs to be reversed to give the industry a chance of survival. The government did not increase wages in the 2014 financial year. Union members enjoy benefits such as free housing, water, medical care, schooling, and better salaries comparable to other agricultural sectors. The new NSSF Act has increased both the employer and employee contributions by 4% which can be construed as an increase to the wage. Previous wage increments were done without consideration to productivity as set in the 1960s and which should be done in the 2014/2015 CBA review at the rate of 1170kgs. The law does not provide an automatic wage increase and the offer of 2% for 2014 and 2015 is made in good faith noting that the price of tea fell below the cost of production. It should be taken into account factors of productivity, comparability, productivity, ability to pay and cost of living in arriving at a decision herein.

11. Parties have a current gratuity provision of 22 days' pay for every complete year of service. The NSSF Act has increased monthly contributions and to continue paying gratuity will result in duplication of the cost. From the commencement of the NSSF Act, gratuity pay should cease and the CBA provision be voided. The employees who have qualified for such gratuity before the effective date of the NSSF Act will be paid in accordance with the outgoing CBA.

12. Hours of work should be retained as per the current CBA and pursuant to section 27(2) of the Employment Act as there is no justification for a change. Annual leave change from 26 to 27 days is not justified as what exists is already beyond the legal minimum and there is no legitimate reason for an enhancement. The Annual Travel Allowance at 12% demand is not justified and the KTGA has offered an increase as follows;

0-30km at 3%;

31-60km at 3%;

61-610km at 0%; and

Over 611km at 3%.

13. Medical Treatment and Sick Leave is largely agreed save for clause (g) in the CBA where the Union demand is for an increase from 27,000.00 to 33,000.00 being a 20% and the addition that the KTGA should cover funeral expenses of children below 18 years as well as an 8 days paid leave to attend burial for the nuclear family. That the current support under the CBA should suffice. The item on retirement age

should be voluntary at 50 years and compulsory at 60 years. Days of worship is not a negotiable item and KTGA will invoke the provisions of section 27(1) of the Employment Act in regulating hours of work and the right to a day of worship. Baggage allowance clause is a new item introduced in the CBA and is punitive to the employer as it adds to the overall costs of employment which is not sustainable.

14. The KTGA therefore seeks that the CBA for the period 2014-2015 be set at 2% for 2014 and 2% for 2015; the pluckers monthly productivity rate be set at 1170kgs for the CBA period 2015-2015; clause 32 of the 2012-2013 CBA relating to gratuity be henceforth deleted and removed from the CBA 2014-2015 and be in terms of the NSSF Act, 2013; hours of work at clause 5 be retained as under the 2012-2013 CBA; leave entitlement be retained as in the 2012-2013 CBA; rates of annual leave transport allowance be retained as in the 2012-2013 CBA; medical treatment and sick leave should retain at Kshs.27,750.00; retirement age be retained as at the 2012-2013 CBA; and no clause should be introduced with regard to baggage allowance and days of worship in the 2014-2015 CBA.

Hearing

15. The Union supported their case through oral submissions. The KTGA called two witnesses.

16. The Union submitted that they have set out the reason for a variation of why an increment as at December 2013 is necessary at the rate of 50% comprising 25% for 2014 and 25% for 2015. This follows the Wage Guidelines by the Minister of Finance on 23rd November 2005 which should apply with regard to the determination of what is fair. The second aspect is the question of productivity – the KTGA report that the tea sector has done very well. There has been an enhancement of tea production. Workers have done their best to enhance production. The tea industry has grown in production. The sector can therefore cushion the 100% increase. The employer has to demonstrate the increase on financial ability and the KTGA offer of 2% to the Union has no basis as there are no audited accounts to tell where the sector is at this point. The KTGA profit is not disclosed so as to determine the profit. The Court has to look at the cost of living, everyday prices of consumer goods are high and the statistics by Kenya National Bureau of Statistics (KNBS) show inflation is high.

17. The KTGA has submitted the KNBS *Overall CPI and Inflation Rates for February 2009* which confirm that cost of living as at 2013 was overall inflation rate of 7.15% in December 2013. The CPI consumer prices were at 13.85%. The annual figures submitted by the Union are therefore based on the annual CPI as the workers purchase power has gone down and the employer has a duty to give a just wage and not a living wage. A *just wage* is what an employer can compensate a worker for and a *living wage* is what an employer can pay. In this case, a worker is entitled to a *just wage*.

18. The Union also submit, in the agricultural sector – plantations, the Union has a CBA, and there was an agreement for $24\% \div 2 = 12\%$ each year. The argument is that the KTGA members pay higher than the other sectors. However the Union and other agricultural sector employers' Association such as the Agricultural Employers' Association (AEA) have a CBA on increment was at 24% and the KTGA is offering the Union 2% on the reason that they are not able to afford more as labour costs would be pushed higher but have failed to set out such costs for 2014 or 2015 compared to the profits made and allocations made for the labour costs for a comparative analysis. In the absence of finance statements, the KTGA has no evidence and has left the Court and the Union to speculations.

19. The report by the KTGA economist, Dr George Kosimbei, at Figure E.3, *national Comparative Basic Wage – General Worker* is related to the tea sector but is not related to the national sector as it should be so as to give a correct analysis in comparison. The source of information for these analysis is KTGA annual report and no financial records/figures are disclosed so as to arrive at the table/figures set out. The comparatives done relate to the international market with Malawi, Uganda, Rwanda and Tanzania and not Kenya. The KTGA membership is Kenyan and to relate to other countries without taking into account the Kenyan tea sector is not a proper comparison. The KGTA is set out as paying high salaries which is not the case.

20. The KTGA economic report, at clauses 2.3 sets its objective as *to review performance of tea industry*

at the local, regional and global level and narrow down to KTGA therefore making the purpose and objectives set to support KTGA offer of 2% and thus not a fair report. The Court can only be guided by figures and data which the respondent has failed to give to support affordability. In terms of comparability, the AEA CBA with the Union is at 24% and the KTGA sector is doing much better than AEA. The KTGA state that the tea sale has gone down but costs of living has gone up for the workers. Affordability must therefore be put into account.

21. The Union also submit that the Court should be guided by the fact that the KGTA has failed to submit material to support their proposal while the Union has made a case for an award of 25% per year for 2014 and 2015. The offer of 2% is too little. The claim for gratuity is based on an existing benefit that cannot be taken away as there is no justification. The Union is seeking 27 days per each full year served instead of 22 days. The KTGA submission that this should be removed because the NSSF Act exists is not correct as the NSSF Act relates to statutory dues for every employee and not negotiable. The Court cannot remove but boost the benefit.

22. On annual leave, the Union in good faith will not challenge the current provision.

Annual leave and travel costs should be enhanced to factor the increase costs. Medical should be enhanced as claimed to ensure a healthy work force. The retirement age is currently 55 years which is young and seek an enhancement to 60 years. The KTGA submission that the retirement age be reduced is retrogressive. There is the option to retire at 55 years which will serve both parties well. The day of worship should factor the Seventh Day Adventist members which should be respected and the employees can make up for it on any other day of the week. Baggage allowance should be confirmed as when workers retire, die or as the case may require them to leave employment, have to relocate to their homes. This should be factored as a benefit to workers to avoid the works relying on handouts from fellow employees. It is a negotiable item that parties can agree or disagree and on the basis that this is not resolved, the Court can make a just finding.

23. The KTGA made their submissions and called two witnesses.

24. KTGA submit that the tea sector is not doing well, tea prices have plunged down resulting in costs of production being higher than the unit price for tea and therefore offering the Union 2% for 2014 and 2% for 2015 in the CBA. The low prices apply to the entire tea sector including Kenya Tea Development Authority (KTDA).

25. The KTGA also submit that there is no statutory right to a wage increase and the Court has no jurisdiction to award wage increase than the legal minimum in agricultural sector. In this regard the Court has to consider factors of affordability, comparability, ability to pay and cost of living. Ability to pay is central to wage increase and the Union has failed to demonstrate the KTGA has such ability as tea prices have gone down. The Union has also failed to take into account the benefits given to its members – free housing, water, electricity. On productivity, the KGTA has since improved husbandry activities and the benefit should not be to the employee and therefore seek an increase to 1170 kgs increase per month in the CBA. The KGTA has not produced financial statements as there is no submission to challenge the fact that the costs of production is higher than the price of tea and therefore not commercially viable to increase wages as there are losses. On the item of gratuity, with the enactment of the NSSF Act to award gratuity will be a duplication as the law provides an enhanced pay which serve the same purpose as gratuity. If this clause continues in the CBA there will be double pay to the employees.

26. KTGA called Dr George Kipkoskei Kosimbei and Dr Kiprono as witnesses. Dr Kosimbei testified that he compiled a report dated 26th February 2015 after collecting data from KTGA members, farmers and reviewed countries that deal with tea. He also did a critique of the Union economic paper. He also got data from KNBS which show January 2012 inflation was at 18.3% and December 2013 it was at 7.15%. The workers at Kericho are therefore not entitled to 100% inflation rate increase as they are not based in Nairobi city. The components of CPI that are taken into account are – water, gas, nature of house maintenance, health – and the primary data indicate that these benefits are provided to the KTGA employees – health facilities, clean water, schools for education of children, electricity, housing.

27. Where these factors are taken into account, the KTGA members have supported their workers as a best practice for other employers. How the CPI is used by the Union is different from the KGTA use. The Union has given a 3.5% without putting into account the provision of the outlined benefits which increase on the labour costs.

28. From his report, Dr Kosimbei notes that there is growth of inflation which is faster but workers have a higher pay than the inflation rate; tea production by KTGA is labour intensive and labour costs/volume of staff is high vis-à-vis costs of production which is high and the KTGA members are left to innovate to make ends meet; Due to high number of workers the KGTA members are able to produce more tea but the challenge is cost of fuels, wood fuel is high due to logistical costs and the transport of produce has to be delivered to Mombasa; and There are increases in exchange rates noting the Kenya shilling versus the US dollar. Taxation is a major issue for KTGA to factor in wage increases. With devolution the Counties have a number of levies to producers. In the tea sector, prices are the main challenge as the producers do not determine prices but sell per market prices and when production costs go up the commercial viability becomes a challenge.

29. The trends in the collected data show fluctuations in tea prices that went up but in 2012 there was a slump with prices going down. The KGTA has no control over tea prices; the risks are passed to commercial viability; while the costs of production went high the cash flow was down and farms may be forced to close down if tea prices at the market go further down; and the farms are making a loss.

30. Such factors do not require financial statements as Dr Kosimbei testified that he went round the KGTA members and accessed the finance department and made an assessment and even if he got the finance reports these would not give a change. The KTGA members are registered at the NSE and such statements [finance] are public can be accessed by anybody. Kenya was affected by the tea prices in the market even for KTDA with small holder farms who use family labour and do not factor labour costs into their model were affected. The price of tea went below production rate. The KGTA cannot afford increased wages; the trends show an increase in output and supply of tea is depressed and to increase costs of wages make farms not viable.

31. Consumers of tea show it is a popular beverage and there are many small holders who have come into the market with other new products like Argentina are new in the market plus new small holders farmers have invested in tea making the KTGA not able to afford the 25% increase in wage as proposed by the Union – the KGTA cannot tell the price and revenue is reduced meaning they cannot hold wage increase as costs of production has increased.

32. Dr Kosimbei also testified that The KTGA offer of 2% is a good will indicator as all the CBAs have increased and his paper has made a case to help ascertain what is possible, but affordability is still key. The Union does not address the issue of affordability. Increase on wage will affect labour.

33. Dr Kosimbei also testified that on the factor of productivity, in assessing productivity, farms are not homogeneous and therefore a look at micro-level data must be looked at against macro-level data in the tea sub-sector. Farms are not the same; some producers are well endowed than other; not all can afford the same investments especially small holder farmers. The plucking per worker at 862 kgs must factor the KTGA member's investment in the tea bushes. Some workers achieve this target by midmorning and work more instead of going home and whatever is plucked over and above is more pay as they surpass the set target. The KGTA members are not able to get the investment benefits that has improved the husbandry and made the workers able to pick more kilos of tea per day beyond the set target and therefore this should be increased to 1170 kgs. The last time there was a review to the target was a long time ago. The yield has improve and the increase in target will be 35.7%. Production has increased and the reason is better husbandry which can be attributed to the good practices by the KTGA members. The KGTA members have incurred costs of grafting tea bushes, fertilisers, bush productivity and overall investment in good tea bushes. The tea-leaf weight and its quality has increased, which should then directly impact on the amount of kilos each worker should pluck per day and overall per month from 862 to 1170 in the new CBA.

34. Dr Kosimbei also testified that the rate of pay by KGTA compared to other employers is higher. In the flower sector, the pay is lower than the rate of KGTA. In the AEA CBA the increase was 12% and the KGTA proposes increase, this cannot be marched as other sectors are much lower. Compared to the agricultural sector, KTGA is doing well in their pay and if challenged, they have options to move elsewhere, move to other countries which have lower wages. In competition terms, the producers of tea are attracted to other countries with a scale down in operations.

35. The Wage Guidelines provides that all different facets can be handled differently and each considered individually. On the issue of sustainability, to increase wages every 2 years must factor that the producers are price-takers. The price of tea should increase and production to stop so as to allow wage increases. At the moment any increase is not sustainable. If the wage is increased, KTGA members will reduce the development budget and this will affect tea sector that has been incurring losses.

36. The 2nd witness was Dr Paul Kiprono, an economist in the tea sector working with the Tea Research Institute, a member of KTGA and KTDA. The Union did not seek for any audited accounts and the paper done has not been challenged or ask for unit and production costs. The Union has done an economic paper but the basis of CPI should not be annual but monthly to get the cumulative monthly wage/pay as the monthly expenses determine the CPI. The marginal increases indices were not put into account by the Union in assessing the CPI as the KTGA members have cushioned workers with various benefits – they have stored food to take care of month to month CPI to reduce the effect of inflation; provision of housing and the cost of rent is removed cushioning the worker 3.5%; water is provided, medical facilities, schools in each estate, transport has been put into account – these are factors that have to be considered in addressing the CPI.

37. Dr Kiprono also testified that the KTGA is not responsible for inflation, it affects both the employer and employee especially in the tea which is a commodity enterprise. The KTGA is not cushioned against inflation as the level at which inflation is informing business is not covered. Price-takers impact on the KTGA members who are not able to adjust their costs. Like any business, inflation affects investment. The KTGA has to eat into their investment or adjust costs of production. As a price-taker, for KTGA to realise any returns they must adjust costs of production – fertilizers, labour.

38. The Tea Research Institute as a parastatal and member of KTGA undertake public audit and all profit and loss statements are available and the CBA for KGTA as provider of labour, costs due for staff are per contract. The finance books are not important in this case. The matter does not relate to shareholders that require books of accounts. The labour force is to pluck tea and sale takes place in Mombasa where unit price are fixed. The reduced price for tea at the global level has affected tea returns. At the national level tea production has gone up with smaller holder farms giving marginal increases.

39. The Tea Research Institute has developed tea variety that produces more tea. On individual farms, there are tea bushes replacement and tea yield has improved over time which is attributed to investment by the KTGA members/employer – bulldozers uproot the old tea bushes, new variety is planted and maintained over a number of years; and harvests only realised from the 3rd year and full costs of the investment can only be fully realised in the 10th year after planting. The KTGA has created an enabling environment for the Union members to produce more harvest. The 862 kgs production by a worker is a benefit to them and not the employer. The new varieties when picked at 2 leaves and a bud, this increases the net weight per worker and a loss to the employer and this should be increased to 1170 per workers so as for the employer to recoup the investment. Due to the good husbandry investment, the worker has less hand movement in achieving the 862 kgs and end up with 3 times more.

40. The 2% offer by the KTGA based on the study done is not sustainable for a price-taker enterprise. The increase for each CBA for 2014 and 2015 is not supported by the total earnings. The ability set to pay and sustainability set out by the Union does not consider the costs of production and tea prices and should not be awarded the proposed 25% for 2014 and 2015 CBA.

41. Upon cross-examination, Dr Kiprono testified that the economic paper presented by Dr Kosimbei was part of his work but he did not participate at the negotiations table to share his findings. The proposal

made by KTGA for increase of per worker kilograms from 862 to 1170 was not part of the negotiations agenda. Tea prices are not determined by workers, this is done by global buyers and an investor in the sector has to determine competition factors so as to get returns. Employees are not supposed to know how a company is doing financially as they do not earn bonuses, this is for shareholders while workers get a salary. The KTGA has created employee benefits that add to the wage and to cushion them from inflation which is a national concern. A worker can only be covered from wage adjustments through negotiated CBA. For the KTGA to determine returns on their investment, they have to put into account the volumes of tea sold, labour costs – which all go into the financial statement which is not produced in court. The Tea Research Institute has workers who are beneficiaries of CBA which has put into account wage guidelines in terms of production, affordability and sustainability.

42. Dr Kiprono also testified that when an employer makes losses, there is the option to retrench staff but this is not a recommendation in this case. Production of tea doubled due to heavy investment and employee are part of the production costs. The 2% proposed as an increase in the CBA is based on a welfare economy as there should be no increase. Such an increase will have an impact on KGTA member costs. It is the obligation of the employer to provide benefits which has a cash impact and has been one to the employees. The 1170 kilos can be achieved by a worker in a month. Due to the high yield, this can be achieved within 8 hours.

Submissions

43. The Union submit that the question of jurisdiction of the Court has been raised by the KTGA in their submissions. the Court has jurisdiction to determine economic disputes under the provisions of article 162(2)(a) of the Constitution which allow for the establishment of the Court and the enactment of the Employment and Labour Relations Court Act as section 12, the Court jurisdiction is set out. The current dispute is part of what the Court can directly address; employment case; economic cases that affect the terms and conditions of work; and the challenge that the Court has no jurisdiction to award an increase of wages outside what parties have agreed on lacks basis. The parties have failed to agree and the Court has the power to consider what the Union is seeking and what the KTGA has offered and apply the Wage Guidelines to determine what fair and reasonable pay is for workers in the sector. To allow the challenge on jurisdiction would render the workers without justice as they would have nowhere to go when an employer refuses to increase wages upon reasonable proposal.

44. The Union also submit that they have 10 issues in dispute that were procedurally addressed as required under sections 62 to 64 of the Labour Relations Act. Upon conciliation, one issue was resolved on summary dismissal leaving 9 items unresolved - Rates of pay; Gratuity; Annual leave; Annual leave travelling allowance; Medical treatment and sick leave; Retirement age; Day of worship; Baggage allowance; and hours of work.

45. The Union also submit that on the rate of pay and productivity the demand of 25% per year wage increase is countered by KTGA with a 2% per annum but without mention on increment in the production levels of tea leaves from 862 to 1170 the rationale being the economic report of Dr Kosimbei. However the issue of increase in tea leaves from 862 to 1170 was not part of the conciliation items for it to be introduced at this level. Dr Kosimbei never consulted the Union members while preparing his report so as to consider their views on fair remuneration for work done contrary to fair labour practices set out under article 41 of the Constitution.

46. The Union is seeking an award in their favour for;

a) Rates of pay increment of 25% per year for 2 years;

b) Gratuity increment for 22 days to 27 days;

c) Annual leave increment from 26 days to 27 days;

d) Annual leave travelling allowance increment of 12% per annum;

e) Medical treatment & sick leave an increment from 27,500/- to 32,000/-;

f) Retirement age increase from 55 year to 60 years;

g) Day of worship to comply with article 32 of the constitution;

h) Baggage allowance proposed at 30,000.00 to be paid on termination; and

i) Hours of work to provide for 1 rest day with pay any working week.

47. That the KTGA has rejected the Union proposal and only proposed a 2% rate of pay increase per year; that gratuity be replaced with the provisions of NSSF Act and annual leave increment be by 3% per annum; while all other items are stated as not having a legal basis. Both parties have filed economic reports where the KTGA called their expert witnesses. That the emerging issue are whether the Court has jurisdiction to award the Union as claimed which the Court has under the powers and jurisdiction under article 162 of the Constitution and section 12 of the Employment and Labour Relations Court Act respectively. The expert evidence submitted by KTGA is not binding on the Court where there are express guidelines on how the Court is to determine the matter at hand which Guidelines were issued on 23rd November 2005 and whose effect is to enable the Court determine economic disputes appropriately. The Union has heavily relied on these Wage Guidelines based on the fundamental principles of affordability, ability to pay, productivity and costs of living (CPI). The KTGA has not submitted any material evidence to challenge the Union on the set principles as no financial statements or audited accounts for its members are before Court for the Court to determine how KTGA members are doing. There is nothing to demonstrate economic hardship. There is evidence that there is increase in production in the tea sector and the Union members have done their work well and should be compensated for their work under the provisions of section 31, 33 and 34 of the Employment Act which obligates the employer to supply its workers with wages, salaries, housing, water and food. The KTGA can afford the 25% increase in wage sought by the union

48. The KTGA on their part submit that section 12(1)(j) of the Employment and labour Relations Court Act give the Court specific mandate with respect to recognition and registration of CBA but has not given the Court any mandate to impose terms and parties. Section 58 and 60 of the Labour Relations Act does not give the Court mandate to impose terms upon parties and these sections must be strictly construed. The Court of Appeal in **TSC versus KNUT & Others [2015] eKLR**, the Court held that a CBA is a contract between the employer and the Union and in the law of contract, the terms and conditions of a contract can only be negotiated and concluded by the parties to the contract.

49. The KTGA also submit that the burden of proof in a wage dispute lies with the Union which did not call any witness and the KTGA called expert witnesses. The KTGA evidence is that they are unable to pay an increase of 25%:25% demand by the Union which evidence has not been challenged as held in **Evelyne Shivachi versus Thara Trading Co & Francis Murage & Another versus Pauline Gitau [2015] eKLR**.

50. In a wage dispute, the Court should consider factors of CPI productivity, ability to pay and sustainability, wage differences and competitiveness. The Wage Guidelines 2005 should be revised to cover the present realities of complicated liberalised economies and take into account entities which are price takers. KTGA called 2 witnesses, experts in the tea and economic sectors and relied on data collected from farms, did a quantitative analysis and interviews and with the listed companies, their financial reports/statements are public information and Union could access. The employees were not interviewed as the information required relate to unit production costs, unit tea prices, yields, improved crop husbandry, which all relate to the management of KTGA members. To arrive at the CPI, the trends, data and factors of inflation are relevant. Based on the CPI, and the KNBS data these show inflation as at December 2013 was at 7.5% which is a reduction. The employees are not entitled to 100% as they reside outside Nairobi as per the Wage Guidelines. The KTGA members provide employees with housing, health, transport, clean water and electricity which benefits add a wage increase of 35% to the wage costs of labour. These benefits should be taken into account in computing CPI. Even though these benefits are

provided for under the Employment Act, the same cushion the employees from the full effect of CPI/inflation. Such inflation affects both the employer and employee and for KTGA being a price taker means that it cannot adjust its prices to cater for inflation. To realise any returns, the KTGA as a business enterprise has to adjust the costs of production.

51. On productivity, the KTGA submit that their expert witness Dr Kosimbei testified that the Union productivity figures of 24.9% were inaccurate as farms are not homogeneous. KGTA members are just a part of the total tea producers in Kenya, with some producing value added products while others have raw commodities. Profitability and production costs differ. Firm level productivity must therefore be measured to assess productivity. The Wage Guidelines requires that the growth of firm productivity should be followed.

52. On ability to pay, the KTGA has evidence of fall of tea prices and the rise in production costs and cannot be able to pay a 50% pay increase. The model of salary increase every 2 years is not sustainable. The KTGA members have high input costs for other factors like fertilisers and exchange rate fluctuations. Finance statements were not necessary in these proceedings as KTGA has accounted for unit price of tea. There is a collapse of tea prices in the world market matters that were submitted during negotiations and the Union did not ask the KTGA to provide financial statements. That fact of such prices drop is therefore not challenged by the Union. The Court cannot direct any back pay for the rate of pay/wage increase in terms of the Court of Appeal finding in the **TSC case** cited above.

53. On the tea yield increase to 1170 kgs, the KTGA submit that during the negotiations, they submitted on the same on the need to increase the yield rate as a result of the high yielding bushes and improved husbandry whereby a plucker has been able to harvest on average 1170 kgs to 1560kgs. The KTGA expert witnesses explained that the increased yield is a function of time and new clones which was an expensive process carried out by the employer. The employer can only recover the costs of investing in the crop after 10 years and currently it is only the employee benefiting from this investment. By 10am the pluckers are able to achieve the set target of 33.2kgs per day and are able to surpass this within the day to 1170 which would be reviewed. The last such review was in 1970.

54. On retirement age the KTGA submit that the age should not be imposed on the parties from 55 years to 60. There should be voluntary retirement at 50years and the retirement age should be at 55years. On the other hand gratuity should be addressed in terms of NSSF Act which takes care of the CBA provisions and to pay any gratuity would be duplication as held in **Elijah Tonui versus Ngara Optician [2014] eKLR**. Hours of work, the Employment Act does not make mandatory for the employer to pay casual or daily employees' wages for their rest day and the current CBA provisions should be retained as it is in accordance with section 27(2) of the Employment Act as held in **KPAWU versus Unilever Tea Kenya Limited, Cause No.1148 of 2011**. That there is no legal justification to increase the annual leave days from 26 to 27 days or increase annual leave travelling allowance and medical treatment and the baggage allowance is not sustainable in the circumstances of this case. Days of worship are regulated in law where an employee is entitled to one day in a week and article 32 of the Constitution does not provide that an employer is bound to allocate Saturday as a day of worship. The employer should be allowed to allocate days of work and one rest day.

Determination

Whether the Court has Jurisdiction to determine a wage (trade) dispute;

Whether the Court has power to determine terms and conditions of employment;

Whether the claims by Union and KTGA are justified; and

Whether the items not agreed in the CBA 2014/2015 should be reviewed by the Court.

55. Before delving into the issues noted above, the Union admit that of the 10 items up for negotiations, the item of Summary dismissal was resolved at the negotiations table. Also as a sign of good faith, the

Union submitted that the demand on annual leave is conceded. The current provisions in the 2012/2013 CBA shall suffice.

56. At the close of the case the union items in dispute were;

- a) *Rate of pay;*
- b) *Gratuity;*
- c) *Annual leave travel allowance;*
- d) *Medical treatment and sick leave;*
- e) *Retirement age;*
- f) *Day of worship;*
- g) *Baggage allowance; and*
- h) *Hours of work.*

57. The KTGA items in dispute with regard to the Amended memorandum of Claim were;

- a) *Rate of pay and productivity;*
- b) *Gratuity;*
- c) *Hours of work;*
- d) *Summary dismissal;*
- e) *Annual leave;*
- f) *Annual leave transport allowance;*
- g) *Medical treatment and sick leave;*
- h) *Retirement age;*
- i) *Baggage allowance;*
- j) *Day of worship; and*
- k) *Tea yield increase to 1170kgs;***

58. The item on *Tea yield increase to 1170kgs* was included in the prayers set out in the Amended Memorandum of Claim in Cause No.14 of 2014 (Kericho) consolidated herein. The KTGA also made submissions on the item.

59. The jurisdiction of the Court with regard to collective bargaining agreement(s) is derived from Article 162(2) and section 12 of the Employment and Labour Relations Act read together with sections 57, 60 to 73 of the Labour Relations Act.

60. Article 162(2) provides:

“Parliament shall establish courts with status of a High Court to hear and determine disputes

relating to –

(a) Employment and labour relations;”

61. Section 12 of the Industrial Court Act 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(1) 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)”

62. The other relevant legislation is the Labour Relations Act. According to the definition in section 2, a trade dispute means

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. [Emphasis added].

63. The Labour Relations Act provides in sections 62-73 for dispute resolution mechanism. The mechanism requires that the dispute be reported to the Minister first, who then appoints the conciliator and if the dispute is not resolved, reference to the Employment and Labour Relations Court should be resorted to as held by the **Court of Appeal in Civil Appeal No.196 of 2014, Teachers Service Commission (TSC) versus Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR**. In this regard, reason must be given to the fundamental difference between a CBA and any other commercial contract and the submissions by KTGA that parties have the freedom to contract with regard to terms and conditions of employment like the case is in under the law of contract. However, a CBA is not equivalent to an ordinary commercial contract for the sale of law or goods. I note the finding by the Court of Appeal in the referenced case and add that a CBA or a contract of service and or employment made under the provisions of Labour Relations Act or the Employment Act cannot be equated to a contract under the Law of Contract for sale of goods. In **Rajab Barasa & Others versus Kenya Meat Commission [2016] eKLR** the Court held;

... 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 unionised 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

65. Both parties have a stake herein. Each filed a claim which is now consolidated – **Cause No.1997 of 2014 (Nairobi) and Cause No.14 of 2014 (Kericho)**.

66. It is common cause that parties herein underwent conciliation upon a dispute being reported to the Minister and on 22nd October 2014 a Certificate of Disagreement was issued. Parties have a right under Section 62 of the Labour Relations Act to report a trade dispute to the Minister who in return appoints a Conciliator pursuant to the provisions of section 65 of the Act and where there is no resolution of the dispute, a Certificate of disagreement is issued in accordance top section 69(a) of the Act.

73.(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the National Labour Court in accordance with the rules of the National Labour Court.

67. By each party herein filing suit, each submitted to the jurisdiction of the court. When a dispute was reported to the Minister as required under section 62, and a conciliator issued a Certificate of Disagreement, the next cause of action was to file the dispute with the Court pursuant to section 73 of the Labour Relations Act. Section 73 of the Labour Relations Act must also be read with section 12 of the Employment and Labour Relations Court Act which at 12(1) (b) and (f) give the Court jurisdiction to hear and determine all disputes between an employer and a trade Union and disputes between an employers' organisation and a trade Union. Further, the Court is given exclusive jurisdiction over disputes relating to the registration and enforcement of collective agreement pursuant to section 12(1) (j) of the Employment Act.

68. The KTGA also raised another issue with regard to the Court jurisdiction on the grounds that the Court cannot increase wages and can only apply the legal minimum. I will trace this issue back to article 41 of the Constitution thus;

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

69. In this regard therefore, the right to collective bargaining is entrenched in the Bill of Rights, article 41(5) of the Constitution. This is to promote the effective functioning of another right, the right to associate [see ILO Convention 87 on the Freedom of Association], as the purpose to collectively bargain carries more weight than usually may be the case. Regard must be gone into what is fair labour practice in the realm of a labour practice(s) and the determination of employment terms and conditions of employment are therefore further regulated by a specific legislation, the Labour Relations Act that set out how parties are to collectively bargain and set mutual terms and conditions of employment. Where there is no consensus on any given term(s) or condition(s) in the collective agreement bargain process, such is to be registered with the Minister and where there is no consensus, the parties must register the same with the court. Upon being seized of the matter, the Court must arbitrate based on the fair labour practice rule. Therefore, all disputes arising from the application and interpretation of shop agreements/collective agreements must, as opposed to other commercial agreements, be referred to the Employment and Labour Relations Court of Kenya. Section 60 of the Labour Relations Act requires the Court to register such collective agreements – the Labour Relations Act requires that such collective agreement should contain terms and conditions of employment, which include payment of wages.

70. The right under article 41(5) of the Constitution therefore composes of the rights to – freedom to bargain collectively; the right of one of the parties to the bargaining process to exercise economic power or withhold labour against the opposing party; and the duty to bargain collectively on both the employer and the employee. This imposes a duty to act in good faith and which compels disclosure of information and therefore a regulation on unilateral changes to terms and conditions of employment. However, where forces of capital and labour are left unguarded, chaos will result. The court, seized of a dispute between capital and labour retain the discretion in wage determination as the institution with mandate to make a judicial determination with responsibility, reason and independence.

71. As noted above, matters pertaining to CBA disputes where not resolved by the Minister come to this court. the Court has the original jurisdiction over all matter of employment and labour relations and where parties are not able to agree on any item of the CBA negotiations particularly on wage increase, hours of work, payment of gratuity, rest and day of worship, annual leave - the Court is guided by factors of affordability, comparability, ability to pay and cost of living. In this regard, each party herein have gone to great lengths, to demonstrate these factors and how each relates to their case. It can therefore not be a proper case that the court, faced with such a dispute cannot apply these factors, put into account the submissions of each party and arrive at a decision. The submission by KTGA that the Court lacks jurisdiction to determine the wage increase would therefore defeat the purpose of CBA negotiation, the rationale for the conciliator issuing the Certificate of Disagreement and the application of the Labour Relations Act allowing parties aggrieved to file the matter before this Court noting the areas of such

disagreement.

72. Where there is an existing CBA, the Court is bound to put it into account in making any award with regard to review of its terms. An existing CBA becomes the starting point of setting the minimum threshold for negotiations. The ongoing/current registered CBA terms and conditions cannot be applied to negate the set minimum terms and conditions, so as to operate retrogressively. The CBA terms and conditions therefore forms the negotiated rate for that year, which essentially takes into account the legal minimum conditions and the purpose of negotiations is to improve on the current the same. The submissions by the Union in this case is to have rate of pay at 25% for 2014 and 25% for 2015 while the KTGA has offered a 2% for 2014 and 2% for 2015; gratuity at 27 days and the KTGA is seeking that this be removed; annual leave allowance be increased by 12% and the KTGA seek for an increase of 3%; medical treatment and sick leave be increased to 32,000.00 and KTGA seek for no change; retirement age be increased to 60 years and the KTGA is seeking to have no change; day of worship to be in compliance with article 32 of the constitution and KTGA seek to have this as a non-negotiable item; baggage allowance be at 30,000.00 and KTGA seek this be removed as it has no legal basis; and hours of work to provide for a one (1) rest day with pay in any working week and KTGA submit that there should be no change. this is the starting point. The legal minimum wage is already negotiated upwards by the parties. For the Court to revert to the current legal minimum wage would be to take the parties backwards many years. This is not the purpose of this court. The Court must endeavour to secure a purposive finding that complies with the wishes of the parties and guided by the Wage Guidelines give an appropriate award.

73. The question to the jurisdiction of the Court herein by KTGA lacks merit.

74. On the question of the Court addressing wage or trade disputes, Wage Guidelines are issued by Treasury and reflect factors developed by the Employment and Labour Relations Court in making awards and or judgements on wage or trade disputes. Section 15(5) of the Employment and Labour Relations Court Act recognises that the Court is bound by the Wage Guidelines in making a determination on minimum wage and standards of employment and other terms and conditions of employments that may be issued from time to time by the Minister. Emphasis is also given in this regard under section 60(6) (b) of the Labour Relations Act thus;

... the Industrial Court [Employment and Labour Relations Court Act] shall not register a Collective Bargaining Agreement that does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister.

75. As noted above, the Awards of the Court have endorsed the same standards sought to be achieved by the wage guidelines. In the case of **Kenya Ferry Services Ltd versus Dock Workers Union (Ferry Branch) [2015] eKLR**, the Court in making reference to the use and application of Wage Guidelines quoted the following;

The Court has to consider various factors before wage increase is granted. An increase in the cost of living is only one such factor. One of the other important factors which cannot be overlooked is that the Worker should be able to get something more than compensation for the loss of money value, in order to move towards the ultimate objective of a higher standard of living. But this can be granted only if under competitive conditions, an Industry can be shown to be capable of paying a full living wage. This has further got to be consistent with the growth of the Country and its Development Plan

76. I have keenly gone through the expert reports submitted by the KTGA, Dr Kosimbei and Dr Kiprono. The KTGA has justified the submission of these reports on the basis that they relied on data and analysis undertaken from their member farms noting the financial statements and other annual reports. That it was not necessary to interview the Union members as employees as the reports have put into account unit costs and costs of production of which labour was factored. I must admit that the reports are quite intensive as they have done comparatives within Kenya and abroad. However, these experts shield the KTGA by failing to produce the referenced documents under the justification that financial statements were never requested for by the union, the firms are registered with the NSE and the financial records are

public documents that parties can access and that as a price taker, by providing the unit costs, KTGA has given sufficient information. What is left are comparables without an indication of income, expenses and a balance sheet. Indeed the KTGA submit that the member firms are not homogeneous, which is a high possibility as such membership is situated differently and factors of production and investment differ and with the environmental changes, there can only be difference. What is admitted in all the analysis is that the employees have undertaken the work directed and required of them. This has resulted in improved production. The employee has done his/her part. The market forces facing the KGTA members, though not stated in financial statements to indicate deficit, surpluses or profits, such was submitted as matters that concern the shareholders and not for the consumption of employees. This is correct, employees are entitled to their wage. Such wage is up for negotiation and there is no agreement.

78. The Union urges the Court to consider that competitive pay is arrived at by comparing what the employer pays, with that of the other institutions in the same sector and consider a just wage rather than a living wage. A salary and allowance survey conducted by the KTGA revealed its compensation package to its Employees, was leading and thus proposes a 2%:2% increase to the 2014/2015 years. The KTGA has in its proposals considered the need to retain skilled Labour; achieve internal equity; recognize performance and productivity; the ability to pay the wage demands; and the cost of living indices. The KTGA has offered the Employees what it is able to pay. The basis as noted above is that they are price takers and have considered the unit costs.

79. However, the KTGA The financial challenge is not demonstrated, such is only available in financial statements/report that show deficit or profits. As the employer, the duty is vested upon the KTGA to submit such reports. It cannot be left to the employee plucking tea in the farms. It cannot be for the Union as well, the employer alleges inability to pay, and the duty to submit records to this effect rests upon the employer at all material times.

80. The factors, upon which the wage determination is made, largely remain unaffected by the legal or business form, adopted by the Employer. Productivity must be demonstrated; the ability to pay the wage demanded must be demonstrated; and the cost of living indices must factor the Wage Guidelines issued by the Minister for Labour. The CPI referenced in the reports of Dr Kosimbei directly from The Kenya National Bureau of Statistics is used in many sectors of the economy. Each sector must therefore pick their part relevant to the type of data/statistics they use and converts it appropriately. For employment and labour statistics, the Ministry of Labour CPI with the set base year apply, and in this case the plantations sector. Such is updated monthly to show the rise or fall in CPI noting the indices for Nairobi, Kisumu or Mombasa which have different factors of consideration. In this case, the KNBS CPI rate for outside Nairobi for the period January 2012 to December 2013, with application of the CPI for 2013 and the CPI for 2012 following the guidelines, the correct computation result into 8.89. These factors were not put into account by the KTGA experts and had they made such an analysis, taken into account the profit and loss or the financial statements relevant herein, a different outcome should have been achieved.

81. The 2 experts should have as a matter of course applied the CPI from the Minister which have been tested and adopted by the Court as a guiding tool in wage negotiations and indexation. The referenced materials and data, remain incomplete without inclusion of such. The production of the reference material(s) particularly the finance statements would have confirmed the assertion that there are losses and the KTGA as a price taker is indeed having a deficit.

82. Dr Kosimbei, figure E.3, the findings that;

... There is a large discrepancy in the basic wages paid by members of KTGA and other small employers in the agricultural sector, many of whom are involved in tea production or are operating in the same communities such as the KTGA. These other employers are paying general agricultural workers just over half the KTGA daily rate.

83. There is a fundamental difference between an employee in an employee/employer relationship and an employee in an employee/employee or own/employee context. On the one part, an employee employed for a wage is totally removed from own environment to the employer's environment and is fully occupied

in the employment with terms and conditions as unlike an own employee in their own environment or farm where there are no set terms or condition that must be met with targets. The driving force in each case is to pluck tea but the control is centred differently.

84. I agree with both economic experts in that the financial statements of the KGTA are due to its shareholders and not the workers. The workers are bound by their employment contracts. They are employed to offer labour. The KGTA are price-taker and prices of tea are fixed at the auction. Prices of tea and fertilizers are fixed at the auction, unit price of tea are determined by an enterprise based on the costs of production. The labour force is to pluck tea. The essence of the above is that, one the one hand are employees picking tea as directed by the employer and are bound by their employment contracts and in this case the CBA. On the other hand are the KTGA members who trade in tea, they are price-takers at the auction and other factors affecting costs of production include labour, taxes, country collections, inflation, which all eat into the investment. It is therefore clear that the KTGA members are in business where the Union members serve as employees. Such employees have done their work without fault. They have met the end of their contractual bargain. Their contract term is long overdue as it has been undergoing negotiations for the last two years covering 2014 and 2015 culminating into this cause.

85. In the overall, the experts analysis of Dr Kosimbei should have put into account revised Guidelines for determination of wage awards under Guideline 1 & 2 which give clarity on how to apply CPI on wage awards;

***Guideline No.1:** The wages of workers are a primary determinant of worker's standard of living. The workers are entitled to be accorded, at least, a just minimum standard of living. The Industrial Court will, in its awards, endeavour to decide the levels of wage earner's remuneration that will protect the desired minimum standard of living and guarantees the worker an existence worthy of human dignity as shown by attainment of basic human needs. Towards this end, the Court will consider how the lower unionized wage earners and statutory minimum wages as well as the average small-scale farmer in rural areas compare, with a view to reducing wide income differentials and promoting employment creation.*

*Guideline NO.2: Collective agreements and revision of wages should be in line with **productivity increases** in order to protect Kenya's competitiveness and increase employment; Wage claims by wage earners arising from erosion in their purchasing power owing to inflation, or claims arising as a consequence of greater labour productivity in their firms should be considered along the following lines:*

a) (i) Allow the lower wage earners up to 100% compensation measured by the Nairobi Lower Income Group Consumer Price Index since the most recent revision of wages. Compensation as a decreasing percentage of the rise in the cost of living should be awarded to the higher wage earners so as to narrow overall wage differentials. To the extent that price increases due to taxation can be identified, these should not be compensated.

...

[Emphasis added]

86. Therefore, wage adjustments follow the growth of a firm productivity so that productivity forms the major factor for any additional wage compensation Considerations. As noted above, in the absence of audited financial statements, the balance sheet is eschewed to show a deficit. Noting the above 2 Wage guidelines, the KTGA as the employer has failed to address the core factors upon which the wage determination is made, which largely remain unaffected by the legal or business form, adopted by the Employer – productivity, real wages, and ability to pay. Such can be confirmed by submission of financial (audited) accounts.

87. I also find, In CBA negotiations it is upon the Employer to demonstrate the trend(s) from the most current financial statements for the past 3-5 years so as to establish the element of inability to afford and

sustain any additional wage bill. In his critique, Dr. Kosimbei has not done that. He should have shown the current wage bill, then apply the percentage demanded by the Union to get the additional wage, then compare with the profit margins to see if it is sustainable. With financial statements (audited accounts), number of employees, wage bills, it is sufficient to work out affordability and sustainability in the absence of audited financial statements which is crucial. The KTGA as an association of employers alleging inability to pay or that it is not sustainable have failed to prove a case against the counter proposals made by the Union. Without the submission of the wage bill, numbers of employees and or total costs of production, to compare the KTGA circumstances with other actors in the agricultural sector such as AEA would be erroneous. Where the Union has concluded a CBA with AEA, such must be seen on its own factors and material presented in support or challenge to the same.

88. I agree with KTGA submissions to the extent that the Wage Guidelines of 2005 need a review to factor current economic realities. The factors that were considered relevant to employer and employees in 2005 have had a circle of Over 10 years and based on changes in global factors, the changes in the Kenya legal regime and constitutional changes as pertains to labour relations, such a review is prime.

89. For KTGA to realise any returns as a price taker, they have to adjust the costs of production. Such adjustments must however take into account the employees who toil each day to ensure production is achieved. Such adjustments should not be undertaken at the sole expense of the employees who are not the cause of inflation or the reason for the KTGA being a price taker.

Award

90. in reference to **Cause No. 89 of 1966 between Kenya Union of Commercial Food and Allied Workers and Twentieth Century Fox Organisation (East Africa)**, the Court in the Case of **Kenya Teachers Service Commission versus Kenya National Union of Teachers & Others, Petition No.3 of 2014** held that;

The Court has to consider various factors before a wage increase is granted. An increase in the cost of living is only one of such factors. One of the other important factors which cannot be overlooked is that the worker should be able to get something more than the compensation for the loss of money value, in order to move towards the ultimate objective of enjoying a higher standard of living. But this can be granted only if under competitive conditions an industry can be shown to be capable of paying a full living wage. This has further got to be consistent with the growth of economy in the country and its development plan.

91. Therefore, noting the above, submissions by the parties and the analysis made on the item of rate of pay, in due recognition of the increments sought and noting the counter offer by the KTGA, I find that benefits at work cannot be applied against an employee by an employer to justify non-negotiation of a CBA. Such a CBA must be addressed on its own merits and negotiated in good faith but in the context that legal rights exist and cannot be applied to the disadvantage of an employee to re-negotiate a CBA downwards. Section 31, 32, 33 and 34 of the Employment Act requires an employer to provide an employee with housing, water, food, and medical attention. Such are mandatory provisions of the law due to an employee as of right. Such should not affect the rate of pay while negotiating a new CBA upon recognition of a Union and having entered in previous CBA with an association of employers such as the KTGA. The demand by the Union at 25%:25% for 2014/2015 CBA is countered with an offer of 2%:2% by the KTGA, and noting the above and the CPI rate applicable for the subject period, an award of 15%:15% for the period of 2014/2015 CBA is appropriate.

92. The item of retirement age is in dispute. The Union submit that retirement age should be increased from 55 to 60 years while the KTGA submit that the public sector age of retirement at 60 years should not be imposed on the parties herein as the Employment Act does not set the minimum retirement age. The issue of retirement age and the implications of government policy vis-à-vis the private sector are well gone into in the case of **David Mwangi Gioko & 51 Others versus Nairobi City Water & Sewerage Company Limited [2013] eKLR**, the employer disregard for variation in the retirement age is not a best practice and the Court must exercise caution in acceding to the rigid position advanced by such an

employer. The KTGA submitted that the employees have been able to add production. I find, the best practice is to have employees retire at 60 years with the option to voluntarily retire at 55 years.

93. Gratuity increment is challenged by the KTGA on the grounds that this should be removed from the CBA as this is double pay/benefit with the enactment of the NSSF Act that has increased contributions. I find, gratuity is a negotiable item which parties can negotiate its terms while NSSF contributions is a statutory item whose terms are set in law. The 6% deduction as provided for in the NSSF Act, 2013 has not yet come to force. It remains a negotiable item in a CBA and my reading of the NSSF Act, 2013 does not forbid parties from making an agreement on gratuity. Nothing stops parties from having NSSF contributions and gratuity running concurrently as in each there are distinct benefits. For the subject CBA 2014:2015 the gratuity rate shall remain the same at 22 days.

94. Hours of work are regulated in law and the Union propose to include a rest day with pay in any working week and the KTGA submit that section 27 of the Employment Act provides for a day of rest but does not include pay. The law is clear to the extent that the rest day provided for under section 27(1) of the Employment Act is also open to provisions that ... *An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.* A CBA being regulated under the Constitution and the labour Relations Act, where parties are allowed to negotiate terms and conditions of employment, such hours of pay are negotiable. As an item identified for negotiation, to make provision for pay for the rest day is not outside the law as this is contemplated under any written law where the Employment Act has not addressed the same. Such a day of rest cannot be made one and separable from the employee unless such an employee is on day wage or employed on casual terms that is regulated under section 37 of the Employment Act. I have analysed clause 7 of the 2012/2013 CBA which set out a comprehensive computation of hours of work but does not grant pay for the rest day. The proposal is reasonable and there shall be 1 rest day with pay in every working week.

95. On Annual leave allowance the Union propose a 12% increase and the KTGA at the negotiations proposed a 3% increase. The Union conceded on the annual leave day's demand and only fair and just to review the allowance due for the annual leave due. The disparity is not major and such shall be at 6% as a reasonable increase noting the CPI rate noted above.

96. On medical treatment and sick leave the Union is seeking an increment from 27,500.00 to 32,000.00 on the basis that costs in this regard are high and should be enhanced and the KTGA propose that this should not be changed on the basis that such costs are not provided for in law. The CBA under review has a provision for medical treatment and sick leave allowance as a terms the parties have already agreed upon. I find no justifiable challenge by the KTGA as to why the same should not be reviewed. The Union proposed rate being on the higher side and KTGA being on the lowest end, the rate is enhanced to Kshs.30, 000.00.

97. The introduction of Baggage allowance in the CBA by the Union was challenged by the KTGA on the basis that there is no legal provision for the same. I find the demand by the Union reasonable and justified. Where there are reasonable causes where this is not justified, parties are at liberty to set out such matters. The CBA shall be reviewed with the inclusion of baggage allowance at kshs.30, 000.00 upon termination of employment.

98. Day of worship is a constitutional right and not to be understood as similar to the hours of work or day of rest as one is covered under article 32 of the Constitution and the other under section 27 of the Employment Act. The KTGA submit that they have complied with section 27 of the Employment Act and that article 32 of the Constitution does not provide that an employer is bound to allocate Saturday as a day of worship and should therefore be allowed to allocate the days of work provided that one rest day is included in the allocation of duties. When the rights and fundamental freedoms of the individual are under consideration, citing a one fit all policy will not do. Where an employer has a workplace policy that is in conflict with any constitutional provisions, the Constitution must prevail. A policy that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable as held in ***Kituo Cha Sheria & 8 Others Vs Attorney General [2013] eKLR***. The day of Worship shall be secured as a right in the CBA 2014/2015, the parties shall review the CBA 2014/2015 and any antecedent policy

to accommodate the Union member's right to observe their day of worship within reasonable limitations.

99. The KTGA has also extensively submitted on the tea yield increase from 862 to 1170kgs. The basis of this is that the last time there was a review was over 10 years ago. That due to improved husbandry and investment in quality tea bushes and the costs of production going up due to taxes and costs of labour, fertilisers and overall investment, the pluckers are able to achieve the target daily rate early in the day and earn more. That the investment made by the employer is only benefiting the employees. The Union has challenged this as being an item that was not part of the items for negotiations and was only introduced in the Amended memorandum of Claim. Indeed The issue of plucker targets from 862kgs per month to 1170kgs per month was not in dispute. From the proceedings at the negotiations, the KTGA only put this issue across with regard to improving productivity. The changes in the increase on tea yield was therefore not on the table for the Union to make appropriate submissions. However, noting what the KTGA has extensively addressed and gone into in the expert report of Dr Kosimbei, this is a matter ripe for introduction in the next CBA negotiations.

Based on the above analysis and findings, Court awards as followings;

1. The CBA for the period 2014/2015 shall be reviewed in the following terms and conditions;

- a) Rate of pay (basic wage/salary) awarded at 15%:15% for the 2014/2015 CBA across the board;**
- b) Retirement shall be at 60 years with the option to voluntarily retire at 55 years;**
- c) On hours of work there shall be 1 rest day with pay in every working week;**
- d) Annual leave travelling allowance awarded at 6%;**
- e) Medical treatment and sick allowance awarded at Kshs.30,000.00;**
- f) Baggage allowance awarded at Kshs.30,000.00 upon termination of employment; and**
- g) Parties shall review the CBA 2014/2015 and any antecedent policy to accommodate the Union member's right to observe their day of worship within reasonable limitations.**

2. Annual leave shall remain as under the CBA 2012/2013; and

3. Gratuity shall remain as under the CBA 2012/2013.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF JUNE 2016.

M. MBARU

JUDGE

In the presence of:

Lilian Njenga: Court assistant

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