



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NUMBER 438 OF 2013**

**BETWEEN**

**STEPHEN K. KACHILA..... CLAIMANT**

**VERSUS**

**BAMBURI CEMENT LIMITED .....RESPONDENT**

Rika J.

Court Assistant – Mr. Kombe

Mr. Stephen Oddiaga Advocate, instructed by Stephen Oddiaga & Company Advocates for the Claimant

Mr Njeru Advocate, instructed by Njeru & Company Advocates for the Respondent

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**ISSUE IN DISPUTE: TERMINAL BENEFITS**

**AWARD**

(Rule 27(1) (a) of the Industrial Court (Procedure) Rules 2010)

1. The Claimant Mr. Stephen K. Kachila filed his statement of Claim on 10th December, 2013. He states he was employed by the Respondent Cement Company as a Senior Miller. He worked from 1978 to April, 2011 when he retired after attaining the age of 55 years.

2. He claims the Respondent did not pay him the correct amount of retirement benefits. He was a Unionisable Employee from 1978, upto 1985 when he joined the Management. Gratuity for 6.96 years during which the Claimant was unionisable, should have be calculated under CBA as follows.

**Kshs. 216,927 x 2.5 x 6.96 = Ksh. 3,774,530**

**Less the amount received by the Claimant of Kshs 1,977,794, gratuity is claimed at ksh 1,330,343**

3. Mr. Kachila also claims Production Bonus at Kshs.182,000 and Salary Increment at Kshs. 18,000.
4. The Respondent filed its Statement of Response on 16th April, 2014. Its position is that the Claimant was paid the correct amount of benefits. He accepted the sum paid, and cannot revisit the mode of computation.
5. Gratuity for the period 1978-1985 was properly calculated and paid. The Claimant was no longer in the Trade Union when he retired in 2011. To calculate gratuity based on the CBA in 2011, would result in conversion of the Claimant's status from Management back to Unionisable Employee
6. The Claimant's performance did not warrant salary increment. No increment is payable. Bonus is discretionary. The Respondent based this item on satisfactory performance by individual Employees. The Claimant's performance was not satisfactory.
7. Parties agreed to have the dispute considered by the Court on the strength of their Pleadings, Bundles of Documents and Submissions on record.
8. On the first item, the Claimant submits gratuity is a creation of the CBA, The CBA is not static; it is amended from time to time, to the benefit of the beneficiaries.
9. After the Claimant was promoted in 1985, the Respondent alleged to remove him from CBA coverage. The Claimant however, was not paid his accrued gratuity. One remained to enjoy gratuity as long as he had a spell in the Trade Union. The guiding principle should have been the CBA in force on the date of retirement. The Claimant should be paid the balance of gratuity under this mode, at Ksh.1,330,343
10. The Respondent failed to pay the Claimant bonus for the year 2009. The figure of Kshs. 182,000 under this item is not disputed. The Claimant performed so well, that his salary was renewed upwards.
11. Salary increment is merited.
12. The Claimant finally argues that the Statement of Response is improperly before the Court. The Statement of Claim and the Summons were served upon the Respondent on 29th January, 2014. The Response was filed on 16th April, 2014, 78 days after service of the Summons. This contravened Rule 13(1) of the Industrial Court (Procedure) Rules 2010, which requires the Statement of Response to be filed within 14 days of the service. The Claimant urges the court to allow the Claim, and expunge the Statement of Response from the record.
13. The Respondent answers that the Claimant accepted transfer of gratuity for the period served as a Unionisable Employee. He signed this acceptance on 30th May, 2011. He joined the Pension Scheme on becoming Management staff. The mode of calculating gratuity based on the CBA on the date of retirement is incorrect. The Claimant ceased to be a Member of the Trade Union in 1985; he ceased to pay Union Dues; he contributed monthly to the Pension Scheme; and presently receives monthly pension which is not paid to the Union Members. An Employee who is not part of the Union cannot seek to benefit from the CBA concluded between the Employer and the Union.
14. The Claimant was undergoing a disciplinary process in 2009/2010. He was not entitled to bonus. This is a discretionary payment, governed by the Respondent's Bonus Policy, aimed at rewarding and motivating Employees. The Claimant cannot compel the Respondent to pay a discretionary payment, once the discretion has been exercised, and is not in his favour.
15. Salary increment likewise, is discretionary. It is effected after a performance appraisal. The Claimant was not underpaid or discriminated against. His performance appraisal did not warrant review of salary. The Respondent urges the court to dismiss the Claim.

*The Court Finds:-*

16. It is common ground that the Claimant was employed by the Respondent on 2nd February, 1978 as a General Operative. He was issued a letter of employment, which together with the CBA concluded between the Respondent and the Kenya Chemical Workers Union, regulated the employment relationship. It is not disputed the Claimant left the unionisable ranks on 6th March 1985, upon promotion to the position of Senior Miller. Lastly, it is agreed he retired on 30th April 2011, on attaining the contractual normal retirement age of 55 years, and was paid kshs. 1,977,794 as gratuity.

17. The Claim raises the following issues for the determination of the Court:-

- a) Whether the Claimant was paid the correct amount of gratuity.
- b) Whether he merits Production Bonus and Salary Increment.
- c) Whether the Response is properly on record.
- d) Who should bear the costs.

18 The first question has been the subject of this Court's rulings in cases involving the Respondent Company and its former Employees represented by Mr. Oddiaga.

19. The Court has no reason to move away from its earlier position on the issue. In the ***Industrial court at Mombasa Cause Number 117 of 2013 between Thomas Sila Nzivo v. Bamburi Cement Limited***, the Court found:-

- The Claimant had moved from a Unionisable Position to a Management Position.
- He became eligible for, and joined the Respondent's Pension Scheme upon promotion.
- Parties did not agree that the Employee would continue to be covered by the CBA upon promotion, or that the CBA would be incorporated in the Employee's contract as a Management Staff.
- The Claimant signed acceptance of transfer, and by doing so, accepted he was no longer covered by the CBA.
- It is improper of the Claimant to seek gratuity under the CBA, while he was entitled to pension, and continued to draw pension, under the Pension Scheme.

20. These findings are totally relevant and applicable to Mr. Kachila. They are adopted as the findings of the Court in this Claim.

21. Mr. Kachila left the Union in 1985. He cannot seek to enjoy the CBA applicable to Unionisable Employees in 2011. The formula in computing gratuity contained in the CBA, is not a term of employment that could be read into the Claimant's contract of employment in the years after 1985. ***The prayer for additional gratuity is declined.***

22. The Claimant did not establish that Production Bonus is payable. It is not in his contract of employment. The Bonus Policy was in fact introduced irregularly in the proceedings by the Respondent through its closing submissions. Closing submissions are not meant to be an avenue for introduction of further evidence.

23. Nonetheless the Claimant has not founded his prayer for bonus on any substantive record. The figure of Ksh 182,000 is not explained. The Claimant floats the figure, and then challenges the Respondent to table its own figure. It was for the Claimant to bring evidence showing Production Bonus is due, and give details on the figure of Kshs 182,000. This was not done.

24. Even without the introduction of the Bonus Policy the explanation by the Respondent that Bonus is paid at the discretion of the Employer is persuasive. It is an incentive, which is ordinarily paid based on

the Employer's overall performance, and the Individual Employee's performance. The Claimant did not assist the Court with any evidence of performance, and the mode of computing Bonus. ***His claim for kshs 182,000 in Production Bonus is made in a vacuum and is rejected.***

25. This goes for the prayer on Salary Increment of Kshs 18,000. The Court was not made to understand how the amount of Kshs. 18,000 was arrived at. It is not grounded on any contractual clause. No performance appraisal results were availed to the court as evidence of good performance, upon which a claim of Salary Increment could be pursued and considered. ***The claim for salary increment is rejected.***

26. In the ***Industrial Court at Mombasa Cause Number 308 of 2013 between Joseph Kilinda v. Bamburi Cement Limited*** a similar problem of late filing of Pleadings by the Respondent arose.

27. The Court, while agreeing with the Claimant that late filing offended Rule 13 (1) of the Industrial Court (Procedure) Rules 2010, concluded the consequence should not be the closing out of the Response altogether; it should be, in the interest of Justice, an order for costs against the indolent Respondent.

IT IS ORDERED;-

***a) The claims for additional gratuity, salary increment and production bonus are rejected in their entirety.***

***b) Costs to the Claimant.***

Dated and delivered at Mombasa this 22nd day of May 2015.

**James Rika**

**Judge**