



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 622 OF 2013

PATRICK OUMA OWINYOCLAIMANT

VERSUS

PAPER CONVERTERS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 6th May 2013. In his claim he sought resolution of a dispute he framed as wrongful withholding of gratuity. He averred that he was employed by the Respondent on 18th November 1994 and was confirmed in employment on 9th February 1995. He averred that he worked for the Respondent and was promoted to position of Production Assistant. He averred that he resigned after the Respondent's management declined to grant him 14 days unpaid leave to attend to a dispute at home. He instructed the Respondent to deduct a two-month notice payment from his terminal benefits. The Claimant averred that his gratuity payment was withheld contrary to the provisions of the CBA Clause 12(e). He thus sought payment of gratuity of Kshs. 212,372.30, compensation of the maximum 12 months plus costs of the suit.
2. The Respondent filed a Memorandum of Defence on 11th June 2013. In it, the Respondent averred that the Claimant applied for his annual leave from 18th to 23rd August plus an unpaid leave from 24th August to 4th September 2011. The Respondent averred that the Claimant went on the leave applied for and reported for duty on 5th September 2011 as expected. The Claimant applied for a further extension of his leave due to unfinished private business at his home. The Claimant's request was not granted and the Respondent averred that a letter was issued to the Claimant requiring him to report to work before expiry of 7 days of the letter and failure to do so would mean he was a deserter. The Respondent averred that the Claimant tendered a resignation dated 8th September 2011 and asked that his terminal dues be calculated and paid to him. The Respondent avers that the Claimant wrote to it on 30th August 2012 seeking to be paid in terms of the 2011/2013 CBA which was to take effect from 1st September 2011 and the Respondent wrote back informing the Claimant that he could not benefit under the CBA as at the time he had resigned the CBA he was relying on had not been registered. The Respondent averred that as at the time of resignation the Claimant had exhausted all his leave days and owed the Respondent notice or payment in lieu of notice.
3. The Claimant appeared in person while the Respondent was represented by Mr. Molenje. Just before the hearing started on 9th March 2015, Mr. Molenje sought to introduce into evidence the CBA for the period 2009 to 2011 which he submitted applied to the case. The Claimant was

opposed to the introduction of the 2009-2011 CBA and instead stated that he relied solely on the 2011-2013 CBA that came into effect on 1st September 2011. The Court upheld his objection for reasons stated in a short Ruling made before the Claimant testified.

4. The Claimant testified that he was employed by the Respondent as a casual and later was confirmed as a dark room technician before promotion to the position of production assistant. He stated that he decided to resign after he was denied 14 days unpaid leave to attend to a land dispute in Mbale. He testified that the board was sitting and he needed to be physically present. He opted to resign so that he could attend the dispute. He testified that under Clause 12(e) of the 2011-2013 CBA there was provision that if an employee voluntarily resigns from employment the employee would be paid 15 days basic for each completed year of service. He stated that he had worked for 16 years and thus was in the category of staff to whom sub clause (f) applied. He testified that the failure by the Respondent to pay is unlawful. He stated that he did not deserve the treatment that was meted out as he was entitled to the payment under the CBA of 2011/2013. He testified that the arrears of the increment were backdated to 1st September 2011. At the time he left he was earning a salary of Kshs. 23,007/- and a house allowance of 3,000/-. He thus sought payment of the terminal dues in accordance with the 2011/2013 CBA as well as costs of the suit.
5. In cross-examination by Mr. Molenje, the Claimant testified that he had applied for leave and also sought extension and the leave was granted from 8th August to 23rd August and an extension from 24th August to 4th September. He stated that from 8th August was his normal leave which he was to go for and that was granted. From 24th August to 4th September was unpaid leave and this was granted. He denied that he had exhausted all his leave days. He testified that he sought extension of the leave from 5th September 2011 for 14 days and this was not granted. The Claimant testified that the CBA for 2011-2013 was signed on 3rd March 2012 and confirmed that he was not an employee as at that date. He testified that the CBA was registered on 16th May 2012. He stated that clause 12(e) was not in the previous CBA. He testified that the duration of the agreement was from 1st September 2011 and he left on 8th September 2011. He stated that the CBA prior to that did not make provision for gratuity. He stated that once the 2011-2013 CBA came into force, the other CBA become null and void. The new CBA started to apply from 1st September 2011 and the previous CBA became ineffective.
6. Mr. Molenje had intended to call one witness but after the cross examination of the Claimant stated that he would be comfortable to file submissions. The Claimant was agreeable to this course of action.
7. The Claimant filed his submissions on 23rd March 2015 while the Respondent filed submissions on 16th April 2015. The Claimant submitted that he was entitled to payment of service in accordance with the 2011-2013 CBA which came into force effective 1st September 2011. He submitted that the Respondent's failure to call evidence was wrong and bad practice in law and that the evidence attached to the response had not justification. He submitted that he was an active and fully paid up union member and that he reported the dispute to the union to fulfill its obligation towards an amicable settlement but the union had not taken any action. He submitted that he resorted to an alternative dispute settlement procedure pursuant to Section 87(1) of the Employment Act. He submitted that the decision by the Respondent to refuse to grant permission to attend to a family matter was frivolous and vexatious against the Claimant's rights. He submitted that the Respondent had prior knowledge of the whereabouts of the Claimant. He thus urged the Court to grant him the reliefs sought. He unprocedurally attached documents, which were evidence, to his submissions.
8. The Respondent on its part submitted that the Claimant voluntarily resigned and was paid all the final dues in accordance with the then existing CBA as at 8th September 2011. The Respondent submitted that the CBA for the period 1st September 2011 to 31st August 2013 whose provisions the Claimant seeks to rely on had not been negotiated, signed and registered by this Court to

entitle the Claimant to seek or rely on any benefit under the said CBA. The Respondent relied on the cases of **Kenya Chemical & Allied Workers Union v E.A. Industries (Unilever (K) Limited) Cause No. 41 of 2001** and **Kenya Engineering Workers Union v Heavy Engineering Works Ltd Cause No. 100 of 2010** where the Court (Cockar and Chemuttutt) held that the CBA becomes effective after it is registered by the Court and only applies to those employees who are in employment after the CBA is registered and that those employees who left employment before the registration of the CBA are not entitled to any arrears. The Respondent also relied on the case of **David Getare Nyangau v Houseman General Contractors Ltd [2013] eKLR** for the proposition that he who alleges must prove. The Respondent thus sought the dismissal of the suit and judgment be entered for the Respondent against the Claimant for prorated leave days taken by the Claimant and one month salary in lieu of notice.

9. It is not disputed that the Claimant was an employee of the Respondent and that he earned Kshs. 23,007/- plus 3,000/- house allowance as at the time he ceased being an employee. The Claimant and Respondent are in agreement that the Claimant proceeded on leave between 8th August 2011 and 4th September 2011. Part of the leave comprised the normal leave days the Claimant was entitled to and a portion between 24th August 2011 to 4th September 2011 made up of unpaid leave the Respondent granted to the Claimant. The Claimant sought extension of the leave from 5th September for a further 14 days. This is the period that led to the resignation of the Claimant. The Claimant resigned on 8th September 2011. As at the time of resignation, the CBA for the period 2011-2013 was not signed. When the CBA was signed it was to come into force effective from 1st September 2011. The Claimant is of the firm view that he is entitled to benefit from the CBA which was registered in 2012 and was to cover the period from 1st September 2011 to 31st August 2013. The Claimant produced a copy of the CBA which had provisions on the payment to be made on dues available to an employee on resignation from service. The Respondent was of the view that the Claimant was not entitled to benefit from the 2011-2013 CBA as he was not an employee when the CBA came into force.

10. In the cases cited by the Respondent, there is an exposition by Cockar J. that bears repeating. The learned judge stated thus:

“...the CBA becomes effective after it is registered by the Court and applies only to those employees who are in employment after the CBA has been registered. Those who left employment before the registration of the CBA are not entitled to any arrears as it is a principle of the law of contract that a person can only be bound by an agreement if he/she is privy to the contract.”

11. The Claimant was not an employee at the time the CBA was registered. Though the CBA was to take effect from 1st September 2011, the CBA was only to benefit those in employment as of the time the CBA was registered. The CBA was signed in March 2012 long after the Claimant had left employment. He cannot benefit from it even though it covers a period he was an employee. The Claimant's claim is thus fit for dismissal and I do so hold. The Respondent sought payment of prorated leave and one-month notice. Unfortunately the Respondent did not make a counterclaim upon which a finding could be made.

12. The upshot of the foregoing is that there is no basis for the claim that the Claimant is entitled to benefit from clause 12(e) and (f) of the CBA entered into between the Respondent and the relevant union. I dismiss the suit but make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of May 2015

Nzioki wa Makau

JUDGE