



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO. 1198 OF 2013

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS...CLAIMANT
VERSUS
B. S. MOHINDRA & COMPANY (K) LTD.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the refusal to pay gratuity to two (2) grievants, Dominic Kiilu and Alfred Litunya, the grievants under the Collective Bargaining Agreement (CBA) between the parties herein. Both parties agreed that the issues raised concerns the CBA and purely matters of law and thus made written submissions without calling any evidence.
2. The claimant's case is that the Claimant is the union representing employees in the commercial foods and allied sectors and had members in the Respondent Company who engage in the business of carvings and importing of electrical appliances. The parties have a Recognition Agreement and several CBA especially the ones subject of litigation here that took effect on 1st April 2007 to 31st March 2009 and 1st April 2009 to 31st March 2011.
3. Dominic Kiilu the 1st grievant was employed by the Respondent on 1st February 1994 as a General Worker at a salary of Kshs.1, 495.00 per month and was working in the Export Department. In 2012 Mr Kiilu was transferred to the Purchasing Department and he resigned from his position with effect from 20th July 2009 with his last salary being kshs.10, 021.00 per month and had served for 16 years.
4. He is seeking the following;
 - a. *Pay for 25 days for 16 years worked at kshs.154,169.25*
 - b. *20 days worked in July 2009 at kshs.7,708.50;*
 - c. *26 leave days 10,021.00*
 - d. *Wage arrears at kshs.9,309.60*
 - e. *Compensation.*
5. The 2nd grievant Mr Alfred Litunya was employed in November 2000 at a salary of Kshs.6, 000.00 per month that was paid in cash while other employees had a deposit in the bank. In May 2010 his salary was improved to Kshs.6, 100.00 and a house allowances of Kshs.2, 000.00 with duties of making deliveries to clients – Tusker and Uchumi head offices. On **10th September 2009** it was alleged

that on his way from making deliveries, the grievant, Mr Litunya drove Vehicle Registration No. KAS 137T to Bank of Baroda along Enterprise Road on his personal business. He parked the vehicle along a footpath and the City Council impounded and towed it away to Milimani police Station where the company paid a fine of kshs.7, 000.00 to have it released. This amount was then deducted from Mr Litunya's wages as a recovery. On **29th September 2007**, the grievant resigned from his position. He had by then served for 7 years, his salary had increased to kshs.7, 314.00 and house allowance at kshs.2, 600.00.

6. He is seeking;

- a. *Pay for 15 days for 7 years worked at kshs.40,037.30;*
- b. *29 days salary for September 2007 at Kshs.8,900.00;*
- c. *22 leave days at kshs.7,530.00;*
- d. *Compensation.*

7. When the Claimant intervened in the grievants cases, the Respondent stated that Mr Litunya escaped disciplinary action when he resigned and hence under clause 19 of the CBA, he was not entitled to any gratuity. That he only had 22 days of leave. The Mr Kiilu resigned without notice as under the CBA and thus the Respondent was entitled to summarily dismiss him for breach of discipline. That Mr Litunya was employed in 2004 and not 2000 and thus not entitled to gratuity and had resigned to avoid disciplinary action against him as before then he had two warning letters.

8. The Claimant reported the matter to the Minister who appointed a labour officer as conciliator but the parties did not agree. The Claimant is seeking that on the basis that the parties herein had a valid CBA gratuity was due to the two grievants once they resigned from their positions. The claims are that;

9. Dominic Kiilu is entitled to;

25 days for each year of service at kshs.154, 169.25

20 days worked in July 2009 at kshs.7, 708.50

26 days leave due at kshs.10, 021.00

Wages arrears payable at Kshs.9, 309.60

12 months compensation at Kshs.120, 252.00

10. Alfred Litunya

15 days for each year served at kshs.40, 037.30

Salary for 29 days in September 2007 at kshs.8, 900.00

22 days annual leave at kshs.7, 530.00

Wages arrears at kshs.15, 877.00

12 months compensation at Kshs.118, 969.00

11. The Claimant also submitted that clause 9 and 19 of the CBA for the periods 1st April 2007 to 31st March 2009 and 1st April 2009 to 31st March 2011 made provision for payment of gratuity once an employee had served for a period of 5 years and above at one month pay for each year served, service of up to 10 years at two months' pay for each year served and over 10 years' service was payment of gratuity at three months' pay for each year served. The CBA contemplated payment of such gratuity upon

termination of employment upon issuance of notice of where there was pay in lieu of such notice. The exception was that such gratuity was not payable in cases of dismissal for gross misconduct or where the employee resigned to avoid disciplinary action.

12. In this case, Mr Kiilu served for 16 years and resigned on 16th July 2009 without notice that was at 3 months. At the time he was earning Kshs.10, 021.00 per month.

13. Mr Litunya commenced employment in 200 but was only formally employed in 2004 until 10th September 2—7 when he was issued with a show cause letter following a vehicle in his custody being towed by City Council forcing the Respondent to pay Kshs.7,000.00 to have it released. On 29th September Litunya terminated his services with the Respondent and requested for his dues.

14. The Claimant also submitted that the grievants terminated their employment in accordance with the CBA and should be paid their gratuity. This was not a case of dismissal and there were no disciplinary proceedings taking place against them. Kiilu resigned upon being allocated new duties but was not compensated for the same while Litunya resigned after he had received a sanction and deduction of Kshs.7, 000.00 from his salary. He did not thus escape disciplinary action. The grievants resigned without notice and are willing to have this forfeited from their dues by 3 and 2 months respectively.

15. The grievants are also seeking compensation for suffering upon their termination in 2007 and 2009 without benefiting from their gratuity payments. This has been unfairly withheld by the respondent.

Respondent's case

16. The respondent's case is that they had employed the grievants with Dominic Kiilu earning Kshs.10, 021.00. On 16th July 2009 he was assigned new duties which he refused to take and on 18th July 2009 he resigned from his employment. Under clause 9 of the CBA the Claimant was supposed to give 3 months' notice which he failed to do and thus not entitled to any claim.

17. In the case of Alfred Litunya, he was employed as a Driver and earning Kshs.6, 100.00 and on divers' dates he refused to do his work as instructed when he failed to collect vehicle spare parts and on another occasion he was found using Respondent vehicle for personal purpose without authorisation. On 2nd February 2007 he was issued with a warning letter; on 4th December 2004 he failed to do his work diligently and thus he was suspended from employment. The grievant sent an apology letter. On another occasion the grievant was sent to Tusker and Uchumi head offices but stopped at bank of Baroda for personal reasons and while he parked the Respondent vehicle on a footpath it was towed by City Council officers forcing the responding to pay Kshs.7, 000.00 for its release which was recovered from his salary. The Respondent issued a show cause letter as to why he should not be dismissed but on 29th September 2007 he resigned from his employment without notice. The grievant is not entitled for any dues.

18. That under clause 19 of the CBA an employee who had served for less than 5 years has no gratuity payable. Litunya had served for 4 years and noting the circumstances of his resignation so as to escape disciplinary action, he is not entitled to the same. There was no notice before resignation.

19. The Respondent also submitted that both grievants resigned without notice. Kiilu resigned after failing to take up new duties allocated to him while litunya resigned upon being issued with a show cause letter following serious gross misconduct. Kiilu having served for 16 years he should have given 3 months' notice while Litunya should have given one month's notice having served for 4 years. There is no salary arrears as under the CBA owed to kiilu for the reason the subject CBA was signed on 7th may 2012 when he had left Respondent employment. Litunya resigned following serious misconduct and cannot claim compensation, gratuity or any dues as none are owing.

Determination

20. Parties enter into collective agreements so as to agree on the terms and conduction of

employment. In this regard the Claimant for and on behalf of its members negotiated a collective agreement with the Respondent so as to outline the terms and conditions of work applicable to their members. Such terms and conditions are to be respected by the Court unless the same are shown to be contrary to written law, constitution or fair labour relations. In this case there is reference to the collective agreements for the periods of 1st April 2009 and 1st April 2009 to 31st March 2011. The terms and conditions therein are applicable to both parties.

21. Both grievants admit that they resigned from their employment. Such resignation was without notice. Under the collective agreement, Kiilu having served for over 16 years he was supposed to give notice of 3 months. There is a contest as to the duration of Litunya's service but he admits he did not give notice at the time of his resignation. The claim for notice pay does not therefore arise in both cases as there is a provision under the collective agreement to give such notice before termination of employment.

22. Gratuity is a special arrangement that majority of unionised employees enjoy under the current labour law dispensation. This must be seen in view of the provisions under section 35(6) of the Employment Act where service pay is contemplated where an employer does not pay statutory dues. To therefore make provision for gratuity for an employee, a specific provision as under the parties CBA is important. In this case, parties had made conditional provisions for such gratuity in that under clause 19. The rider to the award of such gratuity is that;

... Provided that an employee who is dismissed for gross misconduct or who leaves in order to escape disciplinary action shall not be entitled to any gratuity.

23. Therefore with such a provision, an employee who had served for over 10 years had gratuity paid at 25 days for each year served while an employee who had served for 5 years and above had 15 days' pay for each year served. Such pay was subject to the conditions set out above.

24. What is paramount is that an employee is entitled to his dues for work done whatever the reason for termination of employment. Save for notice that should be issued, before computing any terminal dues owing, payment for work done should be outlined and then address the owing dues which may comprise notice required. For Kiilu, he resigned from his employment on 20th July 2009, he had thus worked for 20 days in the month and his pay was thus due. Leave was also due and payable but in this regard the Claimant did not outline when such leave was due or covering what duration to warrant a claim for 26 days. I find no submission to support the same. Only 20 days worked are thus due.

25. Kiilu resigned from his employment voluntarily. On the finding that there was no notice issued, the sanction here is for him to lose any pay in that regard whatever the justification for his resignation. Notice was a requirement under his terms and condition of employment. However to deny Kiilu his gratuity pay under the circumstances or on the grounds that he had resigned without notice would be double punishment. That is not the intention of fair labour relations. The conditions outlined in the CBA for the grant of such service or gratuity pay had been met and I find no justification for denial of the same. This shall be awarded.

26. The CBA under which Kiilu was covered, the last running from 1st April to 31st March 2011 protect him while in the employment of the respondent. Kiilu resigned on 20th July 2009. Any benefit that flow from such a CBA after his leaving the Respondent employment and after the CBA period ending 31st March 2011 cannot be claimed as arrears.

27. The case for Litunya is that he was issued with a show cause letter upon gross misconduct and before this could be addressed he resigned. This is a scenario contemplated under the CBA at clause 19. Where an employee terminates employment to escape disciplinary action, whether that process would result in a termination or not, such an employee is supposed to subject himself to the same but to resign to avoid such a process is an act in bad faith. Such an employee under the CBA, whatever number of years served is not entitled to gratuity. This thus addresses the issue of the number of years Litunya had served noting that the moment he resigned under the circumstances that had placed him a point of awaiting

disciplinary action, he broke a cardinal rule in the collective agreement. Had he been patient enough to await the outcome of his disciplinary case, such patience would have resulted in an otherwise different position. That cannot now be speculated as Litunya opted to resign so as to to be subjected to a disciplinary process. The right to resign was an option the grievant enjoyed and should not be faulted. However his losses any claim for gratuity pay. The sanction for payment of costs incurred after the personal use of Respondent property cannot justify a resignation without notice and while there was a disciplinary case ongoing. To benefit from such a process is to allow misconduct and then celebrate it with an award for gratuity. That is not part of fair labour relations jurisprudence. An employee who seeks in equity must be ready to bear the hardship of undertaking his part at equity.

28. Claim for days worked is an entitlement owed to the grievant. However the claim for leave is not outlined to state what period or duration the same covered.

29. In a case where there is resignation and no claim for constructive dismissal, the award for compensation does not arise. Where an employee voluntarily tenders their resignation, this should be taken as such. In the absence of any evidence that the claimants were placed at a position so as to be forced to resign, I make no finding with regard to compensation.

Remedies

30. With regard to Dominic Kiilu, his gratuity for the 16 years served is due at kshs.154, 169.25. He is also entitled to 20 days worked in July 2009. Such payment should be less 3 months' notice pay that he ought to have given before his resignation took effect.

31. With regard to Alfred litunya his 29 days day salary for work in September 2007 is due at Kshs.8, 900.00. Such payment will be less one month's notice that he should have given before resignation took effect.

32. I find no merit in the other claims for leave, wage arrears or compensation as this is not a case of unfair termination.

In conclusion, save for what is outlined above at paragraphs 30 and 31, other claims are hereby dismissed. Each party shall bear their own costs.

Dated, delivered in open court at Nairobi this 13th day of August 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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Resigned without notice

- Want to forfeit notice pay
- Litunya already sactioned and 7000.00 deducted from his salary – a new saction would be double punishment