



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.163 OF 2015 CONSOLIDATED WITH CAUSE NO.164 OF 2015

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS..... CLAIMANT**

AND

JAMES GICHUCHE.....1ST CLAIMANT

JOHN KIMATA.....2ND CLAIMANT

ELIUD PAPOI.....3RD CLAIMANT

ANNE MUGO.....4TH CLAIMANT

SAMSON TEMBE.....5TH CLAIMANT

VERSUS

ALLIANCE ONE TOBACCO (KENYA) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday, 25th November, 2015)

JUDGMENT

The claimant trade union filed against the respondent the memorandum of claim in cause 163 of 2015 on 23.09.2015. The union prayed for judgment against the respondent for:

- a) The respondent to sign the agreed collective bargaining agreement and present it to the court for negotiations within 14 days.
- b) The respondent be directed to calculate accrued leave days based on gross and pay the difference of approximate Kshs.1.3 million within 30 days with interest.
- c) To pay to the contracted employees' gratuity of Kshs.8, 799,966.00 and house allowance Kshs.23, 281,851.00 as per annexure 15(b) containing the detailed calculation for each employee.
- d) To be ordered to pay the discriminated employees severance pay based on gross and including mileage allowance.
- e) To pay to the co-operative Sacco Kshs. 4.4 Million from their own account.

f) Any other order the honourable court may deem to meet to address the cause of justice.

g) Costs of the suit to the claimant.

The 1st to 4th claimants filed the memorandum of claim against the respondent in cause 164 of 2015 through Gladwell V. Mumia Advocate of Mumia & Njiru Advocates. The 4 claimants prayed for judgment against the respondent for:

a) An order declaring that the respondent's actions towards the claimants amounted to discrimination and unfair labour practices.

b) An order that the claimants' severance pay be recomputed to include mileage allowance and house allowance and the same be paid to them.

c) An order that the claimants be paid their housing allowance from the time they started working with the respondent till their last month when their services were terminated.

d) Costs of the suit.

e) Any other relief the court may deem fit to grant.

The respondent filed on 08.10.2015 separate statements of response to oppose the two respective suits. The statements were filed through Anjarwalla & Khanna Advocates and Wairoto Advocate from that firm urged the respondent's case throughout the proceedings.

The suits were consolidated and heard together on 26.10.2015.

The suit by the union was brought by the union on behalf of the unionisable employees of the respondent. The 4 other claimants brought the suit being managers formerly in the respondent's employment.

The respondent undertook a redundancy decision based on the redundancy and collective bargaining agreement signed on 18.06.2015 between the union and the respondent. The parties agreed as follows:

1) That the employer had indicated his intention to declare workers redundant and the union had no objection to that move.

2) On being declared redundant the employees were to be paid as follows:

i. Wages increase on their existing salary of 7%.

ii. Severance pay of 57 days per each completed year of service.

iii. House allowance of 15%.

iv. Leave traveling allowance of Kshs.7, 000.00.

v. Leave of 3 days as a token.

vi. Pension to be retained as in outgoing CBA.

vii. Relocation:

a) Western Kenya Kshs. 23, 000.00.

b) Nairobi Kshs.28, 000.00.

c) Outside Nairobi Kshs.16, 000.00.

d) Migori and its environs Kshs.16, 000.00.

On paying the above, it was agreed that the employer shall observe the CBA and other relevant employment laws particularly sections 5 of the Employment Act, 2007 Act No. 11 of 2007.

It was further agreed that the payment as set out above would be in full and final settlement of all claims made against the employer.

The respondent's witness was the regional human resources director one Paulette Anne Elizabeth Kankhwende (RW). She testified and confirmed to the court that the same agreement was applied to all staff whether the staff were union members or managers or, permanent or on term contract.

In the present suits, the claimant's claims and prayers are that the respondent did not fully and strictly implement the redundancy and collective bargaining agreement signed on 18.06.2015.

The only issues in dispute in the cases are whether the claimants are entitled to the remedies as prayed for. The court makes findings as follows in cause 163 of 2015:

a) The claimant prayed that the respondent is ordered to sign the agreed collective bargaining agreement and present it to the court for negotiations within 14 days. The union submitted that the parties had previously negotiated and registered several collective agreements the last one being for the period 01.04.2013 to 30.03.2015. The union further submitted that the agreement of 18.06.2015 was meant to improve on the prevailing terms of service as per lapsed collective agreement and to provide for the redundancy. It was the union's case that one member of the union had remained in the service of the respondent. It was the union's case that if the agreement of 18.06.2015 was not registered then one Mr. Nyoike who was the only member of the union retained in the respondent's employment would not be able to benefit from the same redundancy package and terms should he be declared redundant. For the respondent it was submitted that the separation agreement was not a collective agreement and the parties had not negotiated a subsequent collective agreement since the lapsing of the last agreement. The court has considered the submissions and finds that the redundancy and collective bargaining agreement signed on 18.06.2015 was indeed a collective agreement whose purpose was limited to the concluded redundancy process. To that extent that agreement can be registered in the court as a collective agreement but considering that it has already served its purpose, it would appear that such registration would not serve much practical purpose. As far as the parties are in a recognition agreement, the court finds that they are at liberty to negotiate and register the next collective agreement in view of the lapsed last collective agreement. The court further finds that since the parties are in a recognition agreement, in event of future redundancy, the future collective agreement or relevant agreement along the lines of that of 18.06.2015 will have to apply to the union members and the one remaining member of the union is not disadvantaged in any manner. As of now, the court finds that there is no negotiated and agreed collective agreement to be presented and registered by the court and the prayer as made will fail.

b) The union prayed that the respondent be directed to calculate accrued leave days based on gross and pay the difference of approximate Kshs.1.3 million within 30 days with interest. The union claimed pay for accrued leave days not paid at redundancy. The schedule of the leave days was not filed in court. There is no reason to doubt the respondent paid for the leave days as exhibited and submitted. In absence of clear particulars on the claim setting out the number of the disputed leave days for each employee, the court returns that on a balance of probabilities the union has failed to establish the claim and the prayer will fail.

c) The union prayed that the respondent is ordered to pay to the contracted employees' gratuity of Kshs.8, 799,966.00 and house allowance Kshs.23, 281,851.00 as per annexure 15(b) containing the detailed calculation for each employee. It is not disputed that the contracted staff were registered for NSSF and the court finds that in absence of an agreement enhancing their separation benefits,

section 35 (6) (d) of the Employment Act, 2007 will apply and it is sufficient that they were registered for NSSF as the claim for gratuity was baseless. The exhibited contracts for the contracted staff do not have a provision on gratuity. The respondent further paid the contracted staff 57 days for every year worked for severance which was more favourable than the 15 days under section 40 of the Act. The court finds that the failure to pay gratuity to contracted staff was not discriminatory because it was consistent with their contracts of service and the law. Thus, the court finds that the prayer for gratuity will fail. The court upholds **Geoffrey Makana Asanyo –Versus- Nakuru Water and Sanitation Services Company & 7 Others [2014]eKLR** that a person whose office is abolished is entitled to redundancy payments in accordance with the relevant statutory provisions and the provisions of the contract between the parties. Claimant witness No. 2 (CW2) Eliud Papoi Papa served as the respondent's leaf administration and human resources manager. He testified that 15 % house allowance applied to unionisable staff that were paid house allowance. He testified that for contracted staff, house allowance was included in the monthly consolidated pay package. He testified that it was unfair that upon implementation of the redundancy package, some contracted staff were not paid the 15 % house allowance. The court has revisited the agreement of 18.06.2015 and it is plain that 15% was payable. RW testified that the agreement applied across all categories of staff. Accordingly the court finds that all contracted staff that were not paid the **15% house allowance** are entitled and to be paid per computation to be filed and recorded in court.

d) The claimants in both cases claimed that the respondent be ordered to pay the discriminated employees severance pay based on gross and including mileage allowance. CW2 testified that mileage reimbursement was refunded for fuel used on private car while on official duty. Though pay slips stated mileage reimbursement, CW2 testified that it was different from the explained reimbursement as it was a monthly pay thus a mileage allowance to be included in the computation of final redundancy package as part of the gross pay. RW testified that the pay reflected as mileage reimbursement in the pay slips was essentially pay to enable the managers use their private cars while on official duty. It was submitted for the respondent that mileage reimbursement or allowance as was referred to, was actually an expense incurred by managers to perform their duty and not part of the pay so that it was correctly excluded from the gross pay in computing final redundancy package. The court finds that the mileage reimbursement or allowance was remunerative on monthly basis and was part of the managers' gross pay as it ought to have been included in the computation as prayed and as was agreed. The prayer will therefore succeed.

e) The union prayed that the respondent is ordered to pay to the co-operative Sacco Kshs. 4.4 Million from their own account. The union submitted that it had withdrawn that claim. Thus, the court finds that the claim will fail.

f) As the union has partly succeeded in its claims, the court finds that the respondent will pay 50% of the union's costs of the suit.

The court makes findings as follows in cause 164 of 2015:

a) The 4 claimants prayed for an order declaring that the respondent's actions towards the claimants amounted to discrimination and unfair labour practices. The court has found that the 4 claimants were entitled to redundancy computations including the mileage reimbursement as was agreed in the agreement of 18.06.2015. To the extent that they were treated differently by the respondent not applying the gross salary, the prayer for discrimination will succeed within section 40 1(d) of the Employment Act, 2007 – that not being members of the union, they were not to be treated differently from the union members as was agreed on 18.06.2015.

b) The 4 claimants prayed for an order that the claimants' severance pay be recomputed to include mileage allowance and house allowance and the same be paid to them. The court has already found that they are entitled as prayed with respect to mileage allowance and the prayer will succeed in that respect. However, with respect to house allowance, the court finds that the same was paid as included in the consolidated salary and the prayer will not succeed in that respect. The respondent submitted that in **Fredrick Ngari Muchina, Howard Kipkoeh Korir & 98 Others -Versus-**

Pyrethrum Board of Kenya [2014]eKLR the court held that the expenses facilitative of labour being proper expenses on the part of the employer do not constitute wage or salary even where the employer pays them out to the employee to achieve administrative efficiency and effectiveness; and further the only exception is where the contractual or statutory provision deems such otherwise expenses of the employer to be part of the wage or salary and where such exception has not been established severance pay shall be calculated on the basis of the basic pay. In the present case, there is no doubt that all allowances were to be included in computing the gross pay to be applied for final redundancy pay. Accordingly, the court finds that the exception in the cited case was satisfied.

c) They prayed for an order that the claimants be paid their housing allowance from the time they started working with the respondent till their last month when their services were terminated. Both RW and CW2 testified that the managers were paid consolidated salary inclusive of the element of house allowance or reasonable pay for housing. The court finds that the respondent complied with section 31(2) (a) of the Employment Act, 2007 by making a consolidated pay to the managers with a clear element intended to be used by the managers as rent and enable them to have reasonable housing accommodation. The prayer will therefore fail.

d) As the claimants have partially succeeded in their claims, the respondent will pay 50 % of their costs of the suit.

In the response filed on 08.10.2015, the respondent put forward a counterclaim and a set off against the 3rd claimant in cause No.164 of 2015. It was stated, and the 3rd claimant admitted, that he served as the respondent's human resources officer. Thus, if the respondent failed to pay house allowance to the employees, then the 3rd claimant had failed to advise the respondent and he should be held liable. Further if the court finds that housing allowance was not included as part of the gross pay in computing final redundancy package then the 3rd claimant was to blame and therefore liable for all the resultant claims. Thus, it was submitted that any award by the court to the 3rd claimant should be set off against his liability for failing to advise the respondent as was expected and was his duty to perform.

The court has considered the counter claim and the set off as pleaded. The court has already found that the respondent was entitled to pay consolidated salaries inclusive of provision for pay for reasonable housing accommodation. The material on record shows the respondent was alert and the element of pay for housing was included in the pay for managers and the contracted staff. The agreement on redundancy was that staffs are paid house allowance 15% as part of final redundancy pay. Nowhere was it agreed that the house allowance 15 % would then constitute part of the staff gross pay for purposes of the redundancy final computations. The respondent has failed to show that the 3rd claimant failed to discharge his duties as the human resources manager in that regard and as alleged so that the counterclaim and set off will fail with costs.

It was said that the union lacked standing to sue for the contracted staff. However the material on record show that the contracted staffs were members of the union and the union was entitled to sue on their behalf.

In conclusion judgment is entered for the claimants against the respondents for:

- 1) The declaration that all contracted staffs that were not paid the 15% house allowance as part of the final redundancy dues are entitled to the same and to be paid by the respondent per computation to be filed and recorded in court.
- 2) The declaration that for the 1st, 2nd, 3rd and 4th claimants, the respondent's actions of failing to include the remunerative car reimbursement in their gross salary in computing final redundancy pay for the claimants amounted to discrimination and unfair labour practices.
- 3) The declaration that the 1st, 2nd, 3rd and 4th claimants were entitled to redundancy computations including the remunerative mileage reimbursement in the gross pay as was agreed in the agreement

of 18.06.2015 and to be paid by the respondent per computation to be filed and recorded in court.

4) The respective claimants to file and serve the computation in orders (1) and (3) above by 4.12.2015 and the respondent to file and serve objection, if any, by 11.12.2015 with a view of recording the same in court on a convenient date.

5) The money payable by the respondent herein to be paid by 1.02.2016 failing interest to be payable thereon from the date of this judgment till full payment.

6) The respondent to pay 50% of the claimants' costs of the suit.

7) The counterclaim and set off against the 3rd claimant is hereby dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Wednesday, 25th November, 2015.**

BYRAM ONGAYA

JUDGE