



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.42 OF 2015

KUDHEIHA

WORKERSCLAIMANT

VERSUS

**THE BOARD OF MANAGEMENT, NG'ARARIA GIRLS SECONDARY
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20th November, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 12.03.2015 alleging refusal by the respondent to pay Julius Kagiri Kang'ethe (the grievant) being the claimant's member the retirement benefits contrary to clause 31 of the collective agreement binding upon the parties to the suit.

The respondent filed the memorandum of response on 16.04.2015 through F.O. Makori, Litigation Counsel, for Attorney General. The respondent prayed that the suit be dismissed with costs.

The parties negotiated with a view of compromising the suit and they agreed that the grievant was entitled to special terminal leave pay of one month gross pay and that for the purpose of assessing the service gratuity the grievant's completed years of service shall be 21 years.

At the hearing on 14.10.2015, by consent of the parties the court recorded the two issues for determination as follows:

- a. Whether the grievant was underpaid.
- b. Whether the grievant is entitled to gratuity under the provisions of the collective.

The grievant served the respondent as a cook for 21 years. The grievant testified that he served on two shifts one from 4.00am to 5.00pm and the other shift was 8.00am to 8.00pm. By the letter dated 16.03.2010 the grievant together with other staff demanded house allowance arrears. They also demanded to be paid per the circulars issued by the Directorate of Personnel Management. Upon retirement the grievant was entitled to pay from NSSF being Kshs.97, 633.00. The grievant admitted that he was paid Kshs. 8, 259.00 on 31.10.2013 and again Kshs. 86, 130.00 being gratuity on 24.01.2014 but he was not given an explanation about the basis the payment had been computed. The grievant testified that he expected further and higher pay in view of his 21 years' service. The grievant testified that he claimed house allowance for 1.07.2001 to 30.06.2008 as per the circular being Kshs.78, 120.00. The grievant admitted that his letter of appointment did not state the job group he was emplaced as a cook but that the respondent's bursar had told him that he was on job group C then he was demoted to job group B. It was his case that the circular applied to his wage and house allowance. He had left employment in December

2012 upon retirement at pay of Kshs. 8, 259.00 per month.

The respondent's witness (RW) testified that the respondent paid the grievant Kshs. 8, 259.00 and then Kshs. 86, 130.00 being gratuity and Kshs. 17, 268.00 was remitted to Kenya Revenue Authority as tax on the gratuity but the tax was not deducted from the claimant's final dues. The gratuity was paid before the claimant had disclosed the entitlement to NSSF dues. The gratuity as paid was out of the respondent's savings. RW testified that the grievant was an employee of the respondent and the circular did not apply. RW admitted that retirement letter had stated that the retirement was in accordance with the collective agreement. The gratuity under the collective agreement was to be one month for each year served.

The **1st issue** for determination is whether the grievant was underpaid. The court finds that the collective agreement applied to the grievant's employment. The grievant has not established how the circular could have come to apply to his service. In the circumstances, the court finds that the claims for underpayment as based on the circular will fail.

The **2nd issue** is whether the grievant is entitled to gratuity under the collective agreement. Clause 29 of the collective agreement provides that all staff be registered for NSSF as a matter of legislative requirement and it was mandatory to deduct and remit the NSSF contributions. Clause 31 provides that for an employee who retires, gratuity shall be paid at the rate of one twelfth of each completed months of service based on the employee's current salary. Under the clause the grievant was entitled to 8, 259.00 per month times 21 years served making Kshs.173, 439.00 less Kshs. 86, 130.00 and Kshs. 8, 259.00 being gratuity already paid making **Kshs.79, 050.00** as gratuity unpaid as per the provisions of the collective agreement.

While making that finding the court holds that the provisions of section 35(5) entitled the parties to agree as was done in the collective agreement to fix the gratuity or service pay as was done in clause 31. Further the court holds that section 35(6) that provides that provisions of section 35 will not apply where employees are members of NSSF or registered pension or provident fund scheme or gratuity under collective agreement or favourable terms in place simply shows that the parties were entitled to agree as was done in the said clause 31; the clause was such gratuity envisaged in section 35(6) (b) of the Act and it was an agreement over and above the grievant's entitlement to NSSF which was expressly provided for in clause 29 of the collective agreement. The court further holds that the provisions of the Act are not a ceiling but are a floor and the parties are entitled to agree upon more favourable terms and conditions of service including service pay or gratuity or pension or such other retirement or otherwise separation benefits that may be paid to an employee. The court upholds the holding in the ruling of 21.02.2014 in **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers-Versus-Leshau Boys' High School [2014]eKLR** that section 35(6) of the Employment Act, 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the grievant **Kshs.79, 050.00** by 31.12.2015 and in default interest at court rates to be payable thereon from the date of retirement on 31.12.2012 till full payment.
2. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 20th November, 2015.**

BYRAM ONGAYA

JUDGE