



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 31 OF 2013**

**(Formerly Cause No.61 of 2012 at Nairobi)**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS  
AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**LESHAU BOYS' HIGH SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> November, 2013)

**JUDGMENT**

The Claimant is the **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers**. It filed the memorandum of claim on 20.01.2012 on behalf of its members Mary Njeri Kabiru and Susan Njoki Ngigi, the 1<sup>st</sup> and 2<sup>nd</sup> grievants respectively. The claimant has prayed for judgment against the respondent to pay the grievants' service gratuity and unpaid leave.

The respondent is **Leshau Boys High School** and it filed the response to the memorandum of claim dated 5.11.2012 through the Honourable Attorney General. The respondent prayed that the suit be dismissed with costs.

The case was heard on 3.10.2013. The claimant through Mr. Hezron Onwong'a opted to rely on the pleadings and documents filed in court. Mr. E.N. Njuguna, Senior Litigation Counsel represented the respondent and called one witness, Stephen Muchiri Gichengo, the respondent's Principal (**RW**).

RW testified that there was no dispute between the respondent and its workers. In 2010, some workers including the 1<sup>st</sup> and 2<sup>nd</sup> grievants requested to retire voluntarily and the respondent's Board of Governors granted the request. The 1<sup>st</sup> grievant was paid Kshs.115,338.00 and the 2<sup>nd</sup> grievant Kshs.63,658.00 for gratuity. The grievants were also members of the National Social Insurance Fund and they were advised to follow up for their benefits as contributed to the Fund.

In June 2010, RW testified that the grievants were not at work because they were allowed to take their respective annual and terminal leave and they were paid their monthly pay during the leave period. Thus, RW testified that the separation was amicable and by agreement between the respondent and the two grievants. Accordingly, the present suit was unjustified. It was RW's evidence that there was no recognition and collective agreements between the parties. RW testified that the first time he learnt about the dispute is when the suit was filed and summons served upon the school.

The issues for determination in this suit are:

1. **whether the parties were bound by the collective agreement filed in court; and**
2. **whether the claimant is entitled to the remedies as prayed for.**

The collective agreement filed in court on 1.07.2013 is between the claimant and the Ministry of Education, Science and Technology. It is dated 18.03.1986. Clause 30 of the agreement prescribes the normal retirement age of 50 years and the payable gratuity upon retirement as per clause 31 is at the rate of one twelfth of each completed year of service. The 1<sup>st</sup> grievant was employed in 1982 and the 2<sup>nd</sup> grievant in 1991 and both retired with effect from 1.06.2010. The 1<sup>st</sup> grievant had served for 28 and the 2<sup>nd</sup> for 19 complete years.

The respondent has submitted that the collective agreement is not binding in view of Legal Notice No. 283 of 1993 under which the Ministry of Education gave institutions the guidelines on non-teaching staff requiring tailor-made budgets. The Legal Notice provides for Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993. They apply to appointment of staff by the Board of Governors of public schools such as the respondent in this case. Regulation 9 on determination of issues states thus, **“9. Any issue arising as to the construction of these Regulations or any act done or about to be undertaken under them shall be determined conclusively by the Minister.”**

As at the time the Legal Notice was published in 1993, the collective agreement was subsisting. The court has not been shown the Minister’s determination on the effect of the Regulations on the subsisting collective agreement that affected staff in the employment of the Board of Governors. Regulation 6 provides that the Employment Act will apply to claims and grievances between the Board and its staff. The court holds that the subsisting terms and conditions of service in the collective agreement could not be varied unilaterally by the respondent as envisaged in **section 10(5) of Employment Act** because under the section, consultations were necessary. There is no evidence that the respondent and the grievants agreed to vary the terms and conditions of service as contained in the collective agreement. The material on record shows that the terms in the collective agreement were never varied. Accordingly, the court finds that the collective agreement applied to the grievants’ retirement.

The second issue for determination is whether the claimant is entitled to the remedies as prayed for.

The first claim is for service gratuity under clause 30 and 31 of the collective agreement. The court finds that there is no dispute that the grievants retired upon attaining the age of 50 years. They are therefore entitled as prayed for less the amount of gratuity already paid to them by the respondent. The 1<sup>st</sup> grievant is entitled to **Kshs.88,582.00** and the 2<sup>nd</sup> grievant **Kshs.52,812.00**.

The second prayer is for annual leave. For the respondent, it was submitted that the grievants were advised to proceed on their leave for the year 2010. They retired on 1.6.2010 and 31.5.2010 respectively and were paid their June, 2010 salary. The court finds that the grievants could not have taken leave after their respective termination by way of retirement. The payment for June was reasonably a pay in lieu of the retirement or termination notice and the court finds that the 1<sup>st</sup> grievant is entitled to **Kshs.7,140.00** and the 2<sup>nd</sup> grievant **Kshs.6,130** as prayed for.

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

1. **the respondent to pay the grievants Kshs.154,664.00 as found due in this judgment;**
2. **the payment in 1 to be by 1.1.2014, in default interest to be payable at court rates from the date of the judgment till full payment; and**
3. **the respondent to pay costs of the suit.**

**Signed, dated and delivered in court at Nakuru this Friday, 29<sup>th</sup> November, 2013.**

**BYRAM ONGAYA**

**JUDGE**