

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE IN IN
IN THE DISTRICT REGISTRY OF ARUSHA**

AT ARUSHA

COMPLAINT NO. 02 OF 2021

MOHAMED NURU.....APPLICANT

VERSUS

AND BEYOND TANZANIA LIMITED.....RESPONDENT

JUDGMENT

24/10/2022 & 12/12/2022

GWAE, J

The complaint, **Mohamed Nuru** who uncontentiously worked with the respondent, **AndBeyond Tanzania Limited** from 1998 to 2020 as a ranger had knocked the doors of the court by filing this complaint. He has complained that, the respondent has breached the Collective Bargaining Agreement entered in a tripartite manner that is, by the respondent as employer, Workers union, CHODAWU and employees' representatives. Therefore, he is praying for the following reliefs;

1. Payment of gratuity four months' salary for each year served., from 1998 to 20020 as per the Collective Bargaining Agreement (CBA)

months' salary of Tshs. 1,495,000/=time four time 21 years served
amounting Tshs. 125, 580,000/=

2. Any other relief as per court's grant

Through the statement of complaint, the respondent employed the complainant under permanent employment contract. He served for his employer for 21 years that is from 1999 to 31st October 2020. Among the benefits enjoyable by the complainant and other respondent's employees upon compulsory retirement is payment of gratuity under Clause 18:3:1 of CBA, 2008, 2011 which provides;

"18: 3:1 "That, if an employee reaches the age of 60 years, he /she shall retire and the gratuity shall be as follows;

a) A gratuity of 4 months' salary for every year worked will be paid to the employee (Service prior to 1988 is not considered)

b) Not relevant

However, in the year 2014, there was renegotiation of CBA of 2011 and its successor, CBA 2014 including the retirement's benefits of 4th months' salary for every year served. According to the complainant since the parties did not mutually reach agreement, he was therefore entitled to the 4th months' salary in each year he served.

On the other hand, the respondent filed his reply to the statement of complaint. In his reply he strongly refuted the complainant's claims on the ground that, the said Clause 18:3:1 of CBA which would entitle him was deleted through the agreement reached by the respondent and CHODAWU 19th June 2019 which is upon the employees and the respondent until a formal Collective Bargaining Agreement to replace the same is signed by the parties.

Before commencement of the hearing of the labour dispute, the following issues were framed by the court with consultation with the parties' advocates;

1. Whether the complainant is entitled to retirement gratuity rights as per CBA of 2011 to 2020 when he compulsorily retired
2. What reliefs the parties are entitled

The matter was heard on 3rd day of October 2022 and the complainant appeared as a sole witness in support of his complaints against the respondent. Under the lead of his advocate, Mr. Allen Godian practicing as Hakika Law Partners, he testified that, the respondent employed him since 2nd May 1999 till 30th October 2020 when he attained the age of a compulsory

retirement. He went on testifying that, the respondent and employees' representatives entered into a contract of employment and Employment Endowment "Hali bora Kazi" or Collective Bargaining Agreement of 2008 initially renewable in every lapse of three years and later on CBA ended in every four years.

The complaint's evidence is also to the effect that, he was not paid his gratuity as per the Clause 18:3:1 and that when he made follow ups he was told that he had already been paid. He further stated that there was no deletion of the clause 18: 3:1 entitling him and other employees payment of gratuity since there was no mutual agreement that was reached.

The complainant also produced a total of six documents and the same were received by the court, these were; Respondent's Notice of termination of employment dated 1st October 2020 (PE1), two salary slips as of 30th June 2020 (PE2), CBA of 2008 (PE3), CBA of 2011 (PE4), CBA of 2014 (PE5) and CBA of 2018 PE6.

When the respondent's counsel was given an opportunity to probe the veracity of the evidence by the complainant through cross-examination on his knowledge on the CBA of 2014 and 2018. The complainant replied that,

those who signed the agreements of 2014 and 2018 were person in authority but they have caused negative impacts to the respondent's employees and he recognized CHODAWU being a trade union which is established for the employees' rights. The complainant further admitted to have received some money in 2014 -2015 though he had not reached the age of retirement. He added that he received the money and spent.

The respondent via her sole witness one Scot Tineja (DW1) led Mr. Francis Kamzola assisted by Erick Kimaro, both the learned advocates gave the following defence, that, coming into operation of CBA of 2011 ceased the CBA of 2008 likewise the CBA dated 30th June 2014 caused the CBA of 2011 to cease. He added that, the validity of the 2011's CBA was to come to an end on 30th day of June 2014 followed by CBA duly signed on 19th September 2014 mutually reached by the employees through their trade union and respondent where they sat and discussed in Arusha at Makeliz Hotel after issuance of requisite notice which was replied thereto. DWI substantiated the respondent's contention that, there was meeting by attendance register as well as an agreement mutually reached between the respondent and CHODAWU. He went on stating that, following the meeting,

the payment of gratuity was mutually made to its end until mutually agreed otherwise by the parties or rather the same was suspended.

Another piece of evidence by the respondent is that the respondent and other employees who were entitled to gratuity accruing by 2014 as per the CBA of 2014 were paid in two instalments. He testified that the respondent was paid Tshs. 12,000,000/= on 30/6/2014 as first instalment and another on 12 /7/2015 Tshs. 12,000,000/=.

Substantiating his oral testimony, the respondent also tendered six documents. The documents tendered were as follows; a letter/notice for negotiation dated 11th December 2013 (DE1), CHODAWU's reply letter dated 15th January 2014 (DE2) and the attendance register for those who attended the negotiation meeting (DE3). There was also agreement mutually arrived at, by the parties on 19th June 2014 (DE4), complainant's two Pay slips of 2014 (DE5) as well as respondent's bank statement relating to the payment in respect of the complainant and other employees (DE6).

After close of the parties' cases, the counsel for the parties sought and obtained leave to file their written closing submissions, which I shall considerably take into account when determining the framed issues by the

court. It suffices as of now to heartedly thank you them as hereby do, for their industrious efforts in guiding the courts towards making of this judgment.

Regarding the first issue, *whether the complainant is entitled to retirement gratuity rights as per CBA of 2011 to 2020 when he compusorily retired.*

As revealed by the parties' evidence followed by the parties' closing submission, it is clear that since Nov. 2008 to June 2014, the respondent entered into CBA with the CHODAWU and employees representatives from each CHODAWU branch. Among other things in the CBA, 2014 is payment of gratuity of four (4) months' salary for ever year served upon a compulsory retirement, upon attainment of the age of sixty (60) years as per Clause 18:3: 1 quoted above.

It is further undisputable fact that, there was re-negotiations between the respondent and CHODAWU as revealed by the parties' letter (DE1, DE2) and paragraph 3 (f) of the statement of the complaint. The complainant is bound by his pleadings especially paragraph 3 (f). He cannot therefore, deny that, there was re-negotiations between the respondent and CHODAWU (See

Simion Kichele vs. Aveline Kilawe, Civil Appeal No. 160 of 2018 (unreported-CAT).

Under Article 2 of the ILO ***Collective Bargaining Convention 154 of 1981***, the term CB is defined as negotiations, which take place between an employer or a group of employers or one or more employers organization on one hand, and one or more **workers organizations**, on the other hand. A Collective Bargaining Agreement known by its acronym “CBA”) is the labour contract between a union representing employees and the employer (management). A CBA sets the terms and conditions of employment, such as wages, working hours and conditions, employees’ incentives, grievances , validity period and amendment of agreement and arbitration procedures, union's and Management’s rights and responsibilities.

However, it is known principle that, parties' rights and obligations do not end on the expiration of a CBA as a successor CBA not been concluded by the time the former CBA expires. In **Dunkley and other vs. Kostal Ltd** (2019) EWCA, Civil 1009 where it was stated that, a former agreement remains enforceable until change is negotiated, agreed or imposed. In view of the underlying principle that if a CBA expires before the next CBA is in

place, almost all the terms of the expired contract continue while the parties are bargaining.

It follows therefore, when new CBA comes into force, the predecessor CBA ceases unless the later or successor is yet to be signed by the parties. Applicable provisions of the law regarding Collective Bargaining Agreement is section 71 (2) (3) (4) and (5) of the Employment and Labour Relations Act, Cap 366, Revised Edition, 2019 (ALRA) which read and I quote;

“(2) A collective agreement shall be binding on the last signature unless the agreement states otherwise.

(3) A collective agreement shall be binding on –

(a) the parties to the agreement;

(b) any members of the parties to the agreement;

(c) any employees who are not members of a trade union party to the agreement if the trade union is recognised as the exclusive bargaining agent of those employees under section 67.

(4) A collective agreement shall continue to be binding on employers or employees who were party to the agreement at the time of its commencement and includes resigned members from that trade union or employer association.

(5) A collective agreement becomes binding on employers and employees who become members of the parties to the agreement after its commencement”.

In our instant dispute, the complainant is found lamenting that, there no mutual agreement that was so far reached in relation to the payment of retirement gratuity. On the other hand, the respondent is seriously asserting that the parties reached mutual agreement as to the payment of those who were still in office and they were paid in accordance with their agreement dated 19th June 2014 (DE4). In my view, the complainant's complaints are not meritorious for obvious reasons that, there are not only signature and names of the Management, including that of DW1, CHODAWU's and Regional Secretary but also members from Field branch who attended the meeting held on 20th January 2014 and who duly signed the attendance register (DE3). Similarly, the complainant admitted that, CHODAWU and employees' representative were representing him.

Moreover, it is evident through, the respondent's letter dated 11th December 2013 (DE1) and CHODAWU's letter dated 15th January 2014 (DE2) that there was re-negotiations prior to the lapse of the CBA of 2011 on 30th June 2014. I have carefully gone through the conditions set by both CBA,

2011 (PE4) and CBA of 2014 (PE5) with effect that, no amendment of provision of CBA shall become operational without mutual agreement by the parties under Clause 22:2 which reads;

"Clause 22:2: Should the employer or employee wish to amend any the above clauses, the employer or employee should give one month written notice of their intention to amend the whole or any part of the agreement. The amendment shall become operational upon agreement by both parties with no retroactive effect. Provided that, there is no agreement reached the clause or part of the agreement intended or amended shall remain suspended until both parties mutually reach an agreement."

Basing on the above quoted article, it is clear that, either employer or employee who wishes to amend should give one-month written notice of the intention to amend which the case on the part of the respondent via DE1 followed by the employees' proposal. As CHODAWU and representatives of employees represented the complainant from each CHODAWU field branch, who discussed or renegotiated as to the payment of gratuity and eventually the same was removed as appearing in CBA, 2014 effective from 1st July 2014 under Clause No. 18:3: 1 which reads;

"Clause: 18: 3.1. This article shall be discussed at the next renewal of this agreement."

The complaints by the complainant that, there was no mutual agreement in respect of the payment of the retirement gratuity would be quite workable and meaningful if, CHODAWU was not representing him or if, he was duly represented but there was no mutual agreement satisfactorily established by the respondent. The agreement dated 9th June 2014 is therefore binding upon the complainant by virtue of section 71 (5) ALRA quoted above.

As to the complaint that, there was no conclusiveness on the issue of payment of retirement gratuity. this complaint, in my considered view, is devoid of merit since insertion of words in "Article 18:3:1 *"This is article shall be discussed at the next renewal of this agreement"* in lieu of the former words meant that, such payment has been deferred until a formal Collective Bargaining Agreement replacing the CBA, 2014 is signed by the parties.

The CBA, 2014 deleting payment on gratuity but discussable in the future since CBA, 2014 was conclusive and the same was duly signed by the parties on the 19th day of June 2014. Hence, compliance with CBA of 2011

under Clause 22:2 as the parties mutually reached agreement regarding deletion of payment on retirement gratuity and payment thereof.

Moreover, the complaint that, the payment of gratuity at the rate of Tshs. 32, 000,000/= taxable in favour of the complainant as per the CBA, 2014 was not in conformity with the law. This assertion would also be justifiable if there was no agreement or the complainant was not represented by CHODAWU and employees' representatives from CHODAWU branches. That being the position without any evidence to the contrary, the complainant is legally bound by the agreement voluntarily entered between the respondent and Trade Union (CHODAWU) representing employees including the complainant from denying the fact that, there was mutual agreement relating to retirement gratuity. This position of the law was articulately stressed in the case of **Abually Alibhai Azizi vs. Bhatia Brother Ltd** (2000) TLR 288 at page 289 thus;

"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."

In our dispute, if the complainant truly that, the agreement on the payment of gratuity to the employees who attained compulsory retirement age was not concluded or the agreements in exhibits D4 and D3 were fraudulently obtained, there ought to be sufficient evidence to that effect instead of mere assertion. The first issue is therefore determined not in favour of the complainant.

Having determined the 1st issue not affirmative, finding in the 2nd issue is like a day inevitably follows a night. The complainant's relief is no more than an order dismissing.

Consequently, the complaint is hereby dismissed. No order as to costs is made for an obvious reason that this case is labour dispute.

It is so ordered.

DELIVERED and **DATED** at **ARUSHA** this day of 12th December, 2022


M. R. GWAE
JUDGE

Court: Right of appeal to the Court of Appeal fully explained




M. R. GWAE
JUDGE
12/12/2022