



**Kenya Private Universities Workers Union v Africa International University (Employment and Labour Relations Cause 487 of 2019) [2024] KEELRC 1265 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1265 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 487 OF 2019**

**MA ONYANGO, J**

**MAY 3, 2024**

**BETWEEN**

**KENYA PRIVATE UNIVERSITIES WORKERS UNION ..... CLAIMANT**

**AND**

**AFRICA INTERNATIONAL UNIVERSITY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a trade union registered under the *Labour Relations Act* mandated to represent and promote the interests of those employees engaged and working in private universities and colleges.
2. The Respondent is a private university established under the *Universities Act* No. 42 of 2012 whose core mandate is to offer higher learning education.
3. By virtue of its constitution the Claimant is the right union to represent the employees of the Respondent in labour matters.
4. The Claim herein was filed by the Claimant on behalf of its members (hereinafter referred as Grievants) vide a Memorandum of Claim filed in court on 25<sup>th</sup> July 2019 in which the Claimant seeks the following orders which I reproduce verbatim: -
  - i. That the Honourable court deems fit and find, and an Order of Declaration to issue, and is hereby issued, and that the Respondent underpaid most of her employees and non-payment of house allowance
  - ii. That the Honourable Court do make a finding, and an Order of Declaration to issue, and is hereby issued, and that the Respondent's actions of underpayment constitutes bad labour practice and breach of section 25 and 31 of the *Employment Act*



- iii. That the Honourable Court to issue a permanent Order of injunction, and is hereby issued directing the Respondent to properly pay salaries/wages and payment of house allowances in line with the law and Government wages Guide/order
- iv. That the Honourable Court to issue Permanent Order of injunction, and is hereby issued, barring the Respondents, her agents, assigns, servants and representatives from underpaying salaries/wages to most of her employees payment of house allowance.
- v. Under this circumstances the Honorable court be pleased to make the following compensatory orders that the Respondent to pay: -

Grievant Arrears Years worked

Agneta Oyiela Eteye Kshs. 369,974 11

Paul Olukwa Kshs 298,445 11

Joseph Odundo Omollo Kshs 311, 192 11

Daniel A. Chanani Kshs 662,147.57 15

Kennedy Libese Kshs 295,796.05 11

Joseph Mukabi Kshs 281,785 11

Emily Salala Kshs 296,242 5

Munyao Musau Kshs 144,000 4

Irene Wanjiku Mwaura Kshs 271,542.26 4

Festus Ochieng Asiko Kshs 199,850 4

Mutsembi Elvis Kshs 177,000 5

Elphas Chanzu Kshs 198,499.26 3

Lucy Wanjiru Wairimu Kshs 306,371 4

Lucas Shihachi Milimu Kshs 126,680 3

Late Thomas Kunza Kshs 382,824 9

Joel Gadiye Isuvi Kshs 319,953 19

Wycliffe Rudeki Kshs 365,755 15

Florence K. Mange Kshs. 493,946.20 35

Plus other employees at court leave

- vi. That the Honourable Court to issue an Order, and is hereby issued, directing the Respondent to pay interests at the court rate and all items/underpayments and non-house allowances due and other items awarded in the above paragraph from the date of filing of this Claim until its settlement in full
- vii. That the Honourable Court to issue any other order, orders and other reliefs which this court may deem fit to grant(overtime) and for the ends of justice for the grievant to actualize
- viii. That the Honourable court be pleased to issue an Order and is hereby issued directing the Respondent to pay the Costs of this suit



5. The Claimant avers that the Grievants in this matter are current employees of the Respondent while some are former employees of the Respondent and are members and former members of the Claimant union.
6. The Claimant contends that the dispute herein revolves around underpayments of salaries and nonpayment of house allowance by the Respondents.
7. It is further averred that the Respondent has unlawfully reduced salaries of her employees, hence disrupting their daily financial life, contrary to the best labour and employment practice.
8. The dispute was referred to the Ministry of Labour vide a letter dated 3<sup>rd</sup> May 2019 and a Conciliator was thereafter appointed. Parties were engaged in conciliation meetings on several occasions but the dispute could not be resolved hence necessitating the filing of this suit.
9. The Respondent filed a Statement of Response dated 10<sup>th</sup> March 2021. It is contended that this matter is res judicata for reason that there was a similar case between the Claimant and the Respondent, ELRC No. 2102 of 2017 which was settled by a consent dated 2<sup>nd</sup> July 2018 recorded before Hon. Justice Ongaya which case according to the Respondent dealt with issues similar to those herein.
10. In addition, the Respondent states that the Claimant lacks the requisite locus standi to bring this suit as the employees of the Respondent recruited by the Claimant into its membership do not form a simple majority.
11. The Respondent denies underpaying its staff or paying them salaries and benefits below the minimum wage as alleged by the Claimant. It is the Respondent's case that it has been paying its employees' salaries way above those recommended by law and particularly in accordance with section 26(2) of the Employment Act.
12. The Respondent particularized the salaries of the Grievants vis-a-vis the statutory minimum wages orders over the years in disputing the allegations of underpayment and nonpayment of its employees' house allowance.
13. It is the Respondent's case that to grant the reliefs sought by the Claimant would amount to unjust enrichment and result in undue financial loss to the Respondent.
14. The court was urged to dismiss the claim with costs.
15. On 14<sup>th</sup> December 2020, the court directed parties to proceed by way of written submissions. The Claimant's submissions dated 18<sup>th</sup> March 2022 are on record and they basically reiterate the averments made by the Claimant in its Memorandum of Claim.
16. The Respondent's submissions are dated 17<sup>th</sup> July 2022. It is the submission of the Respondent that the Claimant filed new documents with its submissions without leave of the court. That such documents should be expunged from the record. The Respondent relied on the decision in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR.
17. It is further the submission of the Respondent that the Claimant has filed submissions and relied on documents in applications which were withdrawn. Relying on the decision in Bahati Shee Mwafundi v Elijah Wambua [2015] eKLR the Respondent submits that the documents and pleadings once withdrawn cannot be reinstated but the party is free to file fresh ones. It prays that the Claimant's documents in withdrawn applications be disregarded by the court.
18. On underpayments the Respondent submitted that the salaries it paid every year exceeded the statutory minimum rates and that it complied with both section 48 of the Labour Institutions Act and the General



- Wages Order. The Respondent submits that this is acknowledged by the Claimant who in each case of the Grievants stated that the salary exceeded the minimum wages with the exception of Lucy Wanjiru Wairimu and Thomas Kunza Konzolo whom the Claimant stated were underpaid.
19. The Respondent however submitted that there was no proof that either Lucy Wanjiru Wairimu or Thomas Kunza Konzolo were underpaid.
  20. On the Claimants allegation that the Respondent did not pay house allowance the Respondent submitted that its salaries were consolidated and that this was clearly provided in the contracts of the Grievants. The Respondent submitted that the fact that the pay slip does not reflect house allowance does not mean the same was not paid as the contract of employment is paramount. The Respondent relied on the decision in Daniel Mburu Muriu v Hygrotech East Africa Ltd [2021] eKLR where the court stated that the letter of appointment is the primary contract of employment.
  21. The Respondent further relied on the Court of Appeal decision in Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu [2019] eKLR where the court stated “We hold the primary document of contract here was the letter of appointment as the payslip does not constitute a contract”.
  22. The Respondent further relied on section 31 of the Employment Act which provides that the employer may pay a consolidated salary where the contract provides that the basic wage includes house allowance. The Respondent submitted that the contracts for the Grievants provided at clause 3 that “This salary constitutes 85% basic pay and 15% house allowance”.
  23. The Respondent further relied on the decisions in Nancy Omolo v Mercy Corps [2021] eKLR and Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR where the court made the same finding.
  24. the Respondent denied that it arbitrarily altered contract terms of its employees as averred by the Respondent. It prayed that the Claim be dismissed.

### **Analysis and Determination**

25. Upon considering the pleadings herein, I find the issues for determination to be:
  - i. Whether the Claimant has the locus to file suit on behalf of the Grievants,
  - ii. Whether the Claimant has established that the Grievants are entitled to compensation for underpayment and unpaid house allowances,
  - iii. Whether the reliefs sought are merited.
26. The Respondent has questioned the Claimant’s capacity to bring this claim on behalf of the Grievants contending that the Claimant lacks the locus standi. The Respondent has annexed in its bundle of documents dated 10<sup>th</sup> March 2021, a list showing that it has a total of 97 employees with only 20 employees being unionisable.
27. Membership of a trade union is distinct from recognition of the trade union. Recognition of a trade union is necessary for negotiation of terms and conditions of employment for its members. However, any employee who has joined the membership of a trade union is entitled to representation by the union.



28. This was the import of the decision in *Kenya Tertiary and Schools Workers Union (KETASWU) v University Council University of Nairobi; KUDHEIHA Workers (Interested Party)* [2021] eKLR where the court held:

“It is by virtue of membership that a trade union acquires the right to represent an employee on the rights of an employee. It does not require a simple majority of membership or a recognition agreement to do so. Section 48 of the *Labour Relations Act* provides the procedure for joinder by an employee to the membership of a trade union by signing of Form S in the Act, which is a check off form for deduction of union dues”

29. The Respondent having confirmed that the Claimant has members among the Respondent’s employees, the Claimant has locus to represent the said members. I therefore find that the Claimant has locus to institute this suit

30. With regard to the second issue on the claim for underpayments, it is the Claimant’s case that the Respondent underpaid its employees. For the Claimant to prove that there were underpayment of wages and house allowance it must demonstrate that the wages or salary paid by the employer was less than the consolidated statutory minimum wage, that is, the minimum basic pay plus 15% house allowance.

31. The Claimant acknowledged that all the Grievants were paid salary that was higher than the statutory minimum wage. The Claimant’s argument for nonpayment of house allowance is based on the fact that the pay slips for the Grievants only refer to basic pay and does not make any reference to house allowance.

32. In both the Statement of Response to the Claim and in its submissions the Respondent gave a breakdown of the salary it was paying each of the Grievants over the years from 2011 compared to the statutory minimum wage. The Respondent’s documents show that it has always paid wages above the consolidated statutory minimum rates.

33. Section 48 of the *Labour Institutions Act* provides:

“48. Wages Order to constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law—

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the



wages order shall be inserted in the contract in substitution for those terms.

- (2) An employer who fails to—
  - (a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or
  - (b) provide an employee with the conditions of employment prescribed in the order, commits an offence.
- (3) If an employer is found guilty of an offence under subsection (2), the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.
- (4) Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—
  - (a) if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and
  - (b) on proof of such contravention, the Court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:

Provided that evidence shall not be given under paragraph (a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.
- (5) The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:

Provided that no person shall be liable to pay twice in respect of the same cause of action.”

34. I have perused the contracts of the Grievants 167 to 238 of the Respondent’s bundle and confirm that the Respondent paid a consolidated salary with 85% thereof constituting basic salary and 15% constituting house allowance. This is expressly stated in the contracts.



35. Section 31 of the *Employment Act* provides for house allowance as follows:

31. Housing

- (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—
  - (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
  - (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

36. The section permits an employer to pay a consolidated wage to an employee that includes an element of house allowance. The Respondent was therefore not in violation of the Act by paying the Grievants a consolidated salary.

37. From the foregoing I find no proof of the Claimant's allegation that the Grievants were underpaid wages and house allowance. I further find no proof that the contracts of the Grievants were reviewed to their detriment without consultation contrary to section 13 of the *Employment Act*.

38. In the end I find no merit in the Claim herein and dismiss the same. There shall be no orders for costs.

39. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 3<sup>RD</sup> DAY OF MAY 2024**

**MAUREEN ONYANGO**

**JUDGE**

