Kenya Petroleum Oil Workers Union v Kenya Pipeline Company Limited & another (Cause E954 of 2022) [2024] KEELRC 1511 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1511 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E954 OF 2022

J RIKA, J

JUNE 14, 2024

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION ..... CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED ..... 1ST RESPONDENT

SALARIES AND REMUNERATION COMMISSION ..... 2ND RESPONDENT

JUDGMENT

1. The Claimant is a registered Trade Union, representing Workers in the petroleum, oil and gas industries.

2. The 1st Respondent is a State Corporation, dealing in transportation and storage of petroleum products.

3. The 2nd Respondent is a Constitutional Commission, mandated to set and regularly review, the remuneration and benefits of all State Officers and to advise the National and County Governments on the remuneration and benefits of all other Public Servants.

4. The dispute relates to the failure by the 2nd Respondent, to give its approval to a CBA executed between the Claimant and the 1st Respondent, dated 16th September 2022.

5. Refusal necessitated the filing of the Statement of Claim by the Claimant, amended on 2nd March 2023, seeking orders inter alia: -

    a. Declaration that the 2nd Respondent does not have the mandate to take away the Claimant's and the 1st Respondent's right to collectively bargain.

b. Declaration that the 2nd Respondent's position that its advice is binding on the 1st Respondent, is counter to the principle of collective bargaining under Article 41 [5] of the *Constitution* and *ILO Convention on the Right to Organize and Collective Bargaining, 1949 [No. 98]*.

c. Declaration that the 2nd Respondent's circular dated 14th October 2019, purporting to regulate collective bargaining is devoid of legal effect.

d. The CBA executed by the Claimant and the 1st Respondent be registered.

e. An order to compel the Respondents to allow all Employees in service at the time of execution of the CBA, to benefit from the CBA.

6. The 1st Respondent filed a Statement of Response dated 26th April 2023. Its position is that it has executed a Recognition Agreement with the Claimant, and entered into various CBAs. The 1st Respondent received CBA from the Claimant and sought the advice of the 2nd Respondent as required by the law. It received advice through a letter dated 12th October 2022, which was that the proposed salary increments were not sustainable.

7. The Claimant referred the dispute to the Ministry of Labour for conciliation. The Conciliator found that the Claimant and the 1st Respondent were willing to collectively bargain and conclude the CBA, but that they could not do so, without the involvement of the 2nd Respondent. The Conciliator recommended that in light of the 2nd Respondent's decision to withhold its approval, the Parties should resort to Court.

8. The 1st Respondent submits that the orders sought by the Claimant, would result in the Court assuming the mandate of the 2nd Respondent.

9. The 2nd Respondent filed a Statement of Response, dated 4th May 2023. It concedes that it wrote to the 1st Respondent on 15th December 2021, advising that the proposed basic salary review at 10% p.a. was not sustainable; and that the rates of transfer and disturbance allowances were similarly, unsustainable. The Claimant and the 1st Respondent executed the CBA, in disregard of the 2nd Respondent's advice.

10. It was agreed by the Parties that the Claim is considered and determined under Rule 21 of the Employment and Labour Relations Court [Procedure] Rules, 2016. The Claim was last mentioned before the Court on 21st November 2023, when the Parties confirmed the filing and exchange of Submissions.

The Court Finds: -

11. What the Claimant Union is asking this Court to grant, is contrary to the law, on the mandate of the 2nd Respondent, as pronounced by the Court of Appeal, in a catena of recent decisions.

12. These decisions have continued to restate the earlier Court of Appeal position, in *Teachers Service Commission [TSC] v. Kenya National Union of Teachers [KNUT] & 3 Others* [2015] e-KLR.

13. The position is that, the advice given by the 2nd Respondent, is mandatory and binding. A Constitution, the Court of Appeal states, cannot contain mere advice, incapable of enforcement. The advice is binding and not merely an opinion.

14. This Court cannot assist the Claimant, by sidestepping the 2nd Respondent, and granting the orders for registration of the CBA executed between the Claimant and the 1st Respondent. It is not in the position of the Court in the judicial hierarchy, to rule on the validity of the collective bargaining guidelines,

contained in the circular issued by the 2nd Respondent, in light of the decisions of the Court of Appeal, upholding the role of the 2nd Respondent, in public service collective bargaining.

15. This notwithstanding, there is a lot of weight in the submissions made by the Claimant. The 2nd Respondent is essentially a constitutionally created mechanism, substituting the institution of collective bargaining in the public service.

16. What the 2nd Respondent says are the terms and conditions of service in the public service, regardless of what the Union and the respective Employers negotiate and agree upon, become the valid terms and conditions of service.

17. The submissions by the Claimant, relating to Article 41 [5] of the *Constitution* and *ILO Convention of the Right to Organize and Collective Bargaining, 1949 [No. 98]*, have considerable weight.

18. Article 230 of the *Constitution* whatever its noble intention was, has resulted in the death of the right of collective bargaining in the public service, as known to Article 41 [5] of the *Constitution* and ILO Convention 98. It is not an overstatement, to say that this right, is as dead as a dodo, in public service collective bargaining.

19. In fact, there is currently no need to have Trade Unions in the public service. They have become moot, spending most of their time in strikes, over CBAs they can no longer freely negotiate. The Public Service Employers on the other hand, spend most of their time trashing concluded and pending CBAs, because they no longer hold CBAs inviolable. How and when the CBAs are negotiated, and the contents of those CBAs, is left to the mandate of the 2nd Respondent. Collective bargaining power has become an illusion to these Trade Unions. The collective bargaining process is completely directed by a 3rd Party, rather than the Parties to the CBA. What is the role of the Trade Union and the Employer who has granted recognition to the Trade Union, as the sole collective bargaining agency? Should Trade Unions and Public Service Employers waste resources collectively bargaining, while the 2nd Respondent could legally generate the CBA, without involving the Trade Union and the Employer, and forward it to the Court, in the name of the Parties for registration?

20. As the law currently stands, there is no distinction between the 2nd Respondent's mandate, under Article 230 [4] [a] and 230 [4] [b]. The 2nd Respondent is not confined to advising National and County Governments on remuneration of their Public Servants; its advice is mandatory and binding to all, which reverts the advisory role, to the mandate under Article 230 [4] [a] – setting and regularly reviewing the remuneration and benefits of all State Officers, as well all other Public Officers. If one is mandated to give mandatory and binding advice, one is placed in the role of the decision-maker. What is the place of collective bargaining? Why did the framers of the *Constitution* create different mandates for the 2nd Respondent under Article 230 [4], if it was intended that the 2nd Respondent's advice is mandatory and binding in either case? Why did not the *Constitution* simply confer on the 2nd Respondent a unified mandate –to set and regularly review, the remuneration and benefits of all State Officers, and all other Public Officers?

21. The Court does not see what in the long term, is the need for Trade Unions and the institution of collective bargaining, in the Public Service, in light of the broadly interpreted and applied constitutional mandate, of the 2nd Respondent by Superior Courts. The Trade Unions and the institution of collective bargaining, cannot co-exist with the 2nd Respondent. The 2nd Respondent is the antithesis of the right to collectively bargain, as envisaged under Article 41[5] of the *Constitution* and *ILO Convention No. 98*.

22. These are weighty constitutional issues, which need to be articulated and settled with finality, at the highest levels of judicial hierarchy. It is not sufficient for the Courts to simply tell the social partners, that the advice of the 2nd Respondent is mandatory and binding, and not a mere opinion. These judicial pronouncements, can only result in trade union militancy, with an upsurge in industrial strife, because the Trade Unions and the Workers they represent, will feel stifled and helpless in determining their terms and conditions of service. They will increasingly express their frustrations by way of strikes. Courts must rule on the right of the Trade Unions and Employers in the public service, to collectively bargain as contemplated under Article 41 of the *Constitution* and *ILO Convention No. 98*.

23. In light of the decisions of the Court of Appeal on the subject matter, the Court is not able to accede to the prayers sought by the Claimant.

It Is Ordered: -

24. ...

    a. The Claim is declined.

    b. No order on the costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE