Dock Workers Union – Kenya v Kenya Ports Authority (Cause E011 of 2023) [2024] KEELRC 2109 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2109 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E011 OF 2023

M MBARŨ, J

JULY 11, 2024

BETWEEN

DOCK WORKERS UNION – KENYA ..... CLAIMANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

JUDGMENT

1. The parties have a Recognition Agreement and have negotiated Collective Agreements (CBA) which have been incorporated into the contracts of every unionisable employee.

2. Article 43(1) of *the constitution* guarantees every person the right to the highest attainable standards of health including the right to health care services. Clause 27 of the CBA recognizes medical benefit as a term of service that is negotiable and which forms part of the employee's contract of employment.

3. The claim is that on 1st November 2022, the parties entered into a CBA on the review of the policy related to staff medical services which agreement was to be registered as an addendum to the 2020-2023 CBA before its implementation. Among the terms of the CBA was that the new medical scheme was to be implemented first on a trial basis and be reviewed within the first 6 months with another review scheduled to follow after a further 6 months. Parties agreed that before the implementation, staff civic education would be undertaken jointly by the parties to sensitize the employees to the new scheme.

4. The claim is that despite the agreement between the parties, the respondent issued a staff circular dated 15 November 2022 promulgating the new medical scheme effective 1st January 2021 before fulfilling the antecedent conditions agreed upon. In the circular, the respondent gave an undertaking that a detailed policy document containing the medical scheme's implementation guidelines would be issued to staff. There are no policy guidelines that have been issued to date.

5. The respondent acted in an arbitrary manner and without consultation or consent of the claimant by introducing a new medical scheme. For example, the respondent has issued instructions to all hospitals

that in-patient cover limits for employees be capped at Ksh.l, 250,000 instead of Ksh.2, 500,000 agreed with the claimant. That anyone exceeding the limit should have their treatment discontinued.

6. As a result of these impositions, 4 employees who were admitted to the hospital for treatment at the Aga Khan Hospital Mombasa had their treatment discontinued on 9 February 2023 on instructions by the respondent. The basis is that they had exhausted their medical cover limits. The claimant intervened by way of a binding agreement with the hospital on 10 February 2023 to stop the premature discharge of the 4 employees and to have their treatment reinstated. These employees were in the intensive care unit and the claimant pleaded with the hospital through a letter dated 15 February 2023, not to stop treatment.

7. The respondent ought to have allowed the employees to enjoy their medical cover and the ex-gratia facility first before directing the hospitals to deny them treatment. The scheme is currently on trial pending review in June 2023 after which parties will decide on what should be implemented by December 2023.

   The claimant is seeking the following orders;

   a. A declaration and an order that the respondent handling of the new medical scheme for unionisable employees is unlawful, null and void and amounts to a breach of the employee 's contract of service for want of compliance with the law.

   b. A declaration and order that the respondent's circular to staff dated 15 November 2022 communicating the implementation of the new staff medical scheme be and is hereby set aside and nullified.

   c. A declaration and an order that the respondent and the claimant negotiated afresh the policy governing the new medical scheme and met all the conditions necessary before implementing it including the registration with the court of the ensuing agreement as an addendum to the CBA under the requirements of Section 60(1) of the *Labour Relations Act*.

   d. An order that in the interim, the old staff medical scheme shall continue to apply per the provisions of Clause 27(k) of the parties' CBA pending negotiations, agreement and registration of a new scheme mutually agreeable to both parties.

   e. Costs of the suit.

8. In evidence, the claimant called Simon Kiprono Sang the general secretary who testified that parties negotiated a new medical cover that was to be implemented first on a trial basis and then reviewed in 6 monthly phases effective 1st January 2023. Before implementation of the new medical scheme, the parties agreed to undertake civic education to sensitize employees on the new medical scheme that provided that an employee would be entitled to an inpatient cover of Kshs. 2,500,000 and an out-patient cover of Kshs. 230,000 per family per year. Further, each employee was entitled to an ex-gratia facility of Ksh. l,500,000 upon exhausting their medical cover which was shared between the employer and the employee on a 75% and 25% basis.

9. Mr. Sang testified that despite the parties having the agreement, on 15 November 2022, the respondent issued staff with a circular that the new medical cover would take effect from 1st January 2023 without addressing the conditions thereof. At the time of filing suit, 4 employees and members of the claimant were in hospital and were on the verge of being discharged despite being at the intensive care unit. The claimant had to intervene with an undertaking for payment as the matter was addressed with the respondent. To discontinue treatment is inhumane and contrary to Article 43 of *the constitution* and

a failure to address the existing CBA and ongoing negotiations for a new medical cover by the parties. The orders sought should be issued.

10. Upon cross-examination, Mr. Sang testified that there is a CBA for the period of 2020 to 2023 and the new medical scheme was to be an addendum thereto. The new medical cover was to be implemented after sensitization and a policy to operationalize it was passed. It was on a trial basis and hence premature for the respondent to implement a CBA that had not been registered in court. Although the addendum was negotiated, it was not registered and was on a trial basis for 6 months before its registration. The two main conditions to be addressed before registration were agreed to be;

    a. Sensitization of employees; and

    b. A policy manual on how the new medical cover would be applied.

10. The joint council held a meeting over the matter to achieve these negotiations but before addressing the matters agreed upon, the respondent went ahead to implement the new medical scheme.

11. Mr. Sang testified that the respondent had taken the approach that it was not necessary to register the addendum before implementation. However, Section 60 of the LRA requires the same to be registered with the court before enforcement. On the former and current CBA, the claimant is disadvantaged due to the limitations of Kshs. 2.5 million without an indication of how the ex-gratia would be applied. A process was required under a policy document so that the claimant's members could understand the new change. The claimant has had to deal with an employee removed from Aga Khan ICU to the general ward and then died. This situation would have been alleviated if the respondent properly implemented the new medical scheme on a trial basis as negotiated. Another employee was changed from one hospital to another as the available medical cover was not sufficient. The claimant has had to commit to various providers to secure its members from being discharged from the hospital without full recovery.

12. Mr. Sang also testified that he signed the agreement between the parties concerning the new medical scheme on behalf of the claimant. Item 17 of the agreement addressed the need for civic education for employees before the implementation of the new medical scheme. The details thereof were captured in the minutes leading to the agreement.

13. Item 27 of the agreement was that parties would maintain the status quo — inpatient cover at Kshs. 2.5 million, outpatient Kshs. 230,000, and ex gratia Kshs. l.5 million. The new cover provides less than what was available before.

14. In response, the respondent's case is that it is a statutory corporation and has a CBA with the claimant. Clause 27 of the 2020/2023 CBA provides for medical benefits as a term of service that is negotiable and which forms part of the employee's contract of employment. To improve medical benefits, the respondent operates an in-house medical scheme available to all employees together with their sources and dependent children. The benefits accrue from the medical scheme based on best practices among similar organizations and within the medical insurance business and the aligned government policies prevailing from time to time.

15. During the 382nd board meeting held on 30 November 2020, the respondent was tasked to provide a report on medical services detailing cost mitigation measures and emerging medical health challenges. The report was subject to approval by the Cabinet Secretary National Treasury, the Public Service Commission and the State Corporation Advisory Committee (SCAC) and aimed at ensuring the respondent complied with the law but had a cost-effective medical policy for its employees.

16. On 11 May 2021, the Cabinet Secretary National Treasury approved the implementation of the SCAC Human Resources Instrument to the effect that the respondent should assess the cost benefit of running an in-house medical scheme versus procuring a comprehensive medical health insurance cover for all employees. Following its approval, the respondent embarked on a comparative analysis of how other state corporations had implemented their medical schemes. It emerged that the respondent medical scheme at the time covered a total of 28,795 beneficiaries composed of 6,499 employees, 17,781 children of employees and 4,525 spouses. Under the medical scheme, the employees were entitled to an out-patient and in-patient service plus Kshs. 12, 000 per year for each family.

17. In the years 2018 to 2020, the respondent incurred medical costs of Kshs. l,028,527, 124.43, 1,193,232,579.72 and 1,095,099,382.22 respectively. These medical costs constitute recurrent expenditure and are all too high.

18. The respondent offers free outpatient services to its employees through the existing network of outpatient clinics, 2 in Mombasa and 2 in Nairobi. In Lamu, Kisumu and Naivasha, the service is outsourced. The respondent has also engaged consultants to address employees' needs weekly including pediatricians, physicians and gynecologists. Additionally, there are pharmacy, laboratory and radiology services as outsourced.

19. The respondent also established that the greatest burden of expenditure was in non-communicable diseases attributed to the fact that 72% of its employees are aged above 41. To tame high costs, the respondent introduced various measures including having vital medicines supplied by NASCOP on the national programme. The respondent also contracted several private hospitals for in-patient services where it paid 100% for employees and 8-% for dependants.

20. While conducting the study, the respondent engaged the claimant to table its proposal and in the Joint Industrial Council (JIC) meeting held on 25 to 29 July 2022, the claimant tabled its proposal in respect of the review of the medical cover. The claimant's proposal was not correct as it was based on the perception that the respondent intended to reduce the number of dependants which would be discriminatory. The claimant also proposed that there be a provision for 10% on its annual budget or Kshs l.3 billion annually in a separate insurance premium of Kshs. 10 million per month to cater for extra costs incurred in medicine for non-communicable diseases. However, the claimant failed to address the rising costs of health care and the fact that the respondent could not afford the extremely preferential treatment scheme.

21. Upon negotiations, the parties reached an agreement on the structure of the new medical benefits scheme. On 1st November 2022 parties executed an agreement on the Medical Service Policy and Review Agreement based on the JIC meeting held on 31st October 2022. Both parties agreed that their medical scheme would cover outpatient, inpatient, optical, dental, and maternity and rehabilitation for different cadres of employees in executive, management and other employees. It was also agreed that;

22.

    a. The medical scheme be available to employees as principal members, spouses and dependents for up to 25 years since the previous scheme was capped at 22 years;

    b. The inpatient cover to include pre-existing and chronic illness;

    c. Perpetual dependants to be considered as dependants for the duration of the employment;

    d. Ex-gratia amount of a maximum of Kshs. l,500,000 on a shared basis to the employee who exhausts the inpatient limit.

e. The respondent to retain a hybrid system that incorporates NHIF for outpatient service including drugs (medicine);

f. The Medical Scheme Policy be implemented with effect from 1st January 2023 and a review to be done within 6 months and another 6 months.

23. The response is also that it was not a term of the agreement that the Medical Service Policy and Review Agreement be implemented on a trial basis and reviewed within 6 months as alleged by the claimant. The agreement at clause 6 provided that the MSP and Review Agreement be implemented with effect from 1st January 2023 with a review within 6 months. The agreement had no condition precedent/antecedent to be fulfilled by any party before implementation. The allegations that the respondent introduced new conditions to the medical scheme including cover limits whose effect denied 4 employees medical services is not correct. The allegations that the respondent caused the treatment of 4 employees at Aga Khan Hospital Mombasa to be discontinued are without proof. The respondent through a letter dated 28 February 2023 wrote to Aga Khan Hospital confirming that it would settle the hospital bill for the named employees. The response is also that the 4 noted employees were beneficiaries under their respective medical covers. For instance, Benson Okombo Oluoch's cumulative medical bill was Ksh.3, 969, 143.92 fully utilizing the maximum limit of Ksh.2, 500,000. Upon applying the ex-gratia amount, the respondent ought to have paid Kshs. l,125,000 total being Kshs. 3,625,000. The claim that there was premature discontinuation of the medical cover is hence not correct.

24. The claim that the MSP and Review Agreement dated 1st January 2023 is unlawful, null and void is not correct and does not breach the employees' contract. There is a CBA 2020/2023 registered with the court in CBA No. E001 of 2022 between the parties. Clause 46 of the CBA recognizes that parties did not include negotiations of the items on house allowance, transport, leave and medical policy. The CBA recognized that once parties agree on either of these items, the same would be registered as an addendum to the 2020/2023 CBA. Upon negotiations, the parties herein reached an agreement on a new medical benefits scheme and there is an agreement in MSP and Review Agreement dated 1st January 2023 resulting from a JIC meeting on 31st October 2022. The agreement remains valid and binding on the parties and the claim herein is without merit and should be dismissed.

25. In evidence, the respondent called Dr. Gome Lenga the manager of medical services for the last 16 years. He testified that there is a CBA between the parties herein for 2020/2023 and registered with the court. The medical scheme covers all staff and unionisable employees who are members of the claimant. His role is not to negotiate the CBA terms which is a function of management and he was only advised on what to do following the agreement on the medical scheme. The agreement between the parties was supposed to be registered as an addendum to the CBA pending which implementation was to commence on 1st January 2023 which he has applied as the manager of medical services.

26. Dr. Lenga testified that upon the implementation of the medical scheme from 1st January 2023, there were conditions to be addressed by the parties herein to which he is not privy. One condition was that civic education was to be undertaken among employees. His role was to implement the medical scheme as required by the respondent and was not aware that some employees and members of the claimant were required to pay medical bills or have treatment at medical facilities discontinued. The respondent paid all bills based on the employee cadre limits. The issue of movement of patients from one facility to the next due to inability to pay was not within his knowledge since the respondent paid to the agreed limits.

At the close of the hearing, both parties filed written submissions.

Determination

27. The claimant is seeking a declaration that the respondent's handling of the new medical scheme for unionisable employees be found unlawful, null and void as it is in breach of the employee's contract of service. The claimant is also seeking that an order be issued that the respondent's circular to staff dated 15 November 2022 communicating the implementation of the new staff medical scheme be set aside and nullified to commence fresh negotiations for a policy governing the medical scheme that meets all conditions necessary before implementation including registration as an addendum to the CBA as required under Section 60(1) of the *Labour Relations Act*. The claimant is also seeking an order for the old staff medical scheme to apply per clause 27(k) of the CBA.

    Parties herein are covered under a CBA for 2020/2023.

28. Under the CBA, parties recognize the need to negotiate and agree on terms and conditions of service regulating unionisable employees in the employment of the respondent. Indeed, under clause 46 of the subject CBA, several items were not agreed including the provision of a medical policy. Parties recognized that once the CBA had been registered, any of such items such as a medical policy, would be negotiated and registered as an addendum to the CBA.

29. To this end, on 31st October 2022 and 2 November 2022 parties in a JIC negotiated the medical scheme leading to the MSP and review agreement dated 1st November 2022.

30. The medical scheme was to be implemented with effect from 1st January 2023

31. Both parties recognize the fact that the CBA 2020/2023 is registered under ELRC CBA No. E001 of 2022.

32. Registration of a CBA is imperative to give it the legal force for enforceability in terms of Section 59(5) of the *Labour Relations Act* (LRA). A term of the CBA once negotiated only becomes enforceable and is to be implemented upon registration.

33. In this case, both parties attended the JIC on 31st October and 2 November 2022 where negotiations were held leading to the execution of the MSP and Review Agreement on 1st November 2022 to commence implementation on 1st January 2023. Clause 27(k) of the subject CBA required that before the implementation of any such agreement, the same be added to the subsisting CBA through registration of an addendum. Only then would it have the force of law in terms of Section 59(5) of the LRA read together with Section 10(5) of the *Employment Act* read together with Sections 13, 14 and 15 thereof. The rationale is that the employer is not allowed to implement a CBA term to the disadvantage of employees before registration with the court especially concerning negotiated terms thereof. Also, any changes to the CBA that affect any given terms and conditions to the employment contract of service that apply terms that are not to above minimum terms and conditions of employment are null and void. These cannot be applied outside the negotiated CBA.

34. A change of employment terms secured under a CIBA cannot be- unilaterally altered by the employer as held in Terry Muigai v SKF Kenya Limited [2021] eKLR that any change of employment terms must be with the written consent of the employees and in this case, upon the CBA between the parties, any change to the terms thereof, the minimum threshold is that of registration before enforcement.

35. In the case of Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR the Court of Appeal herein held that the court in considering the terms in the CBA should apply and take into consideration the minimum terms set under Section 26(1) of the *Employment Act*. Give regard to each sector under the employer.

Further, Section 26(2) of the *Employment Act* requires that;

> Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

36. The answer as to whether the new medical scheme applied by the respondent is more favourable to the members of the claimant is factual and mathematical in the sense that one needs to determine if the enhanced minimum benefits subject to a ceiling/limit are less or more favourable than the statutory minimum or current and existing terms. If the answer to this question is affirmative, the claimant would be unjustified in claiming stoppage of the implementation of the new medical scheme. On the other hand, whatever good is intended by the respondent as the employer in seeking to comply with other state corporations as noted in the report upon the benchmarking, these gains will be lost if the MSP and Review Agreement is not sanctioned through a registered addendum to the CBA 2020/2023. See Agnes Wachu Wamae & 104 Others v Barclays Bank of Kenya [2013] eKLR.

37. I take it, upon the execution of the MSP and Review Agreement on 1st November 2022 and pending implementation on 1st January 2023, there were 60 calendar days provided to allow for registration of the same as an addendum to the CBA 2020/2023. The motions of Section 60 of the LRA should have been invoked upon the agreement once executed on 1st November 2022.

38. Section 60(2) of the LRA places the legal duty upon the employer to cause the subject CBA to be placed in court for registration;

> (2) The employer or employer's organisation which is party to an agreement to be registered under this section shall submit the agreement to the Industrial Court [Employment and Labour Relations Court] for registration.

39. The position thus taken by the respondent that the parties agreed to the new medical scheme and hence commenced implementation is negated under the very CBA the respondent seeks to apply. Upon the CBA, any terms addressing a work benefit and related to a medical issue, once negotiated under clause 46 as being subject to further agreements, any consensus thereof should have taken the same motions as addressed under ELRC CBA No. E001 of 2022. Whatever conditions were to be gone into before the new medical scheme took effect on 1st January 2023, the parties should have obtained the legal mandate for its enforceability through registration.

40. Without the legal force, the MSP and Review Agreement dated 1st November 2022 became a working document. It has no force of law. It cannot form the basis of application on the shop floor.

41. The circular dated 15 November 2022 communicating the implementation of the new staff medical scheme for the unionisable employees of the respondent and members of the claimant is null and void for lapse of registration as an addendum to the CBA 2020/2023.

42. Without the agreement being registered under Section 59(5) of the LRA, parties retained the old terms and conditions for the medical cover and allowed further negotiations on the modes of implementation. Hence, both parties regulated under the CBA are at liberty to negotiate and agree on the nature and application of a new medical scheme under the provisions of Clause 27 of the CBA 2020/2023. Upon agreement, apply the motions of the law for registration to give the same legal force.

43. I take note that the respondent relied on the case of Said Ndege steel Makers Ltd 120141 eKLR and urged the court not to rely on technicalities but apply substantive justice taking note that being social partners, the parties should not lightly go back on explicit promises made to each other whether registered or not. However, where the law regulates a given matter/process such as the registration of a CBA for the same to gain the force of law, such is not a mere technicality that can be cured through the discretion of the court. The respondent is well aware that the parties herein are regulated under a CBA. Any information additions to the relation would only water down the terms and conditions thereof.

44. The fact that the respondent is a state corporation or regulation under SCAC cannot apply to negate existing CBA terms and conditions. Parties have the opportunity to negotiate future CBA taking into account current and existing changes in the shop floor. The respondent is also at liberty to apply before the National Labour Board as necessary. The application of the case of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another [20021 EA on the basis that the court cannot force parties to re-write an employment contract and hence cannot hold sway to the CBA between the parties herein. Indeed, clause 27(a) of the CBA provides that the Medical Benefits prevailing at the time of the registration would prevail until parties agree on a reviewed Medical Policy Review. Until the addendum is introduced and registered, such provisions remain alive.

45. Orders sought by the claimant are found with a good foundation and are justified. On costs, what stood out prominently during these proceedings, parties are keen to apply a better medical scheme for the benefit of unionisable employees. The only hurdle is to apply the same within the framework of the CBA 2020/2023. To ensure industrial peace and allow for future negotiations, no orders on costs.

46 Accordingly, the claim is with merit and judgment is hereby entered for the claimant against the respondent in the following terms;

a. A declaration that the respondent implementation of a medical scheme outside the 2020/2023 CBA for unionisable employees is unlawful;

b. A declaration and order is hereby issued that the respondent's circular 15 November 2022 on the implementation of staff medical scheme outside the 2020/2023 CBA is set aside;

c. Parties to revert to the exiting medical scheme applicable as of 1st November 2022 and apply Clause 27 of the parties' CBA for negotiations;

d. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11TH DAY OF JULY 2024.

M. MBARÜ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....