



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital
Workers v Board of Management Namasoli Health Center (Cause
19 of 2023) [2024] KEELRC 607 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE 19 OF 2023
JW KELI, J
MARCH 14, 2024**

**BETWEEN
KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT
AND
BOARD OF MANAGEMENT NAMASOLI HEALTH CENTER ... RESPONDENT**

JUDGMENT

Representation:

For Claimant - Justin Kamuye - Industrial Relations Officer

For Respondent - Eshichi & Associates Advocates

1. The Claimant is a registered trade union that represents workers in the domestic, hotel, education, and hospital sectors. The Claimant brought a case for 4 of its members(grievants) following dismissal from service by the Respondent. The four grievants were Martha Shitindo, Philip Abuti, Phanice Musabi, and Maurice Namayi. Unfortunately, Philip Abuti passed on during the pendency of the suit and no administrator of the estate came on record.
2. The Claimant filed a claim which was amended on the 11th of October 2023 and received in Court on the 23rd of October 2023. The Claimant pleaded that before filing the suit the parties had been before the Conciliator and had separately come up with an agreement on payment terms for unfair dismissal which was not fully honored by the Respondent. The agreement was produced at the hearing(c-exhibit 6). The Claimant seeks for the Court to adopt the agreement as Order of the Court and award it costs in the claim.



3. The Claimant filed witness statements, the claimant's list of documents dated 13th December 2023, and the bundle of documents.
4. The Respondent entered appearance through the law firm of Eshuchi & Associates and in response the Respondent filed a Replying affidavit of Moses Khatete sworn on the 20th February 2022 and received in Court on the 23rd March 2023 with annexures, witness statement of Moses Khatete dated 2nd March 2023 and received in Court on the 23rd March 2023 and annexed supporting documents.
5. The Claimant filed a response to the Respondent's statement of defence.

Hearing

6. The Claimant's case was heard on the 20th September 2023, with CW1(Maurice Namayi) testifying on oath but was stood down. On 9th November 2023 CW1 (Maurice Namayi Etabale) , CW2(Phanice Musabi) and CW3 (Martha Shitindo) all testified on oath, adopted filed written statements as their evidence in chief and were cross-examined by counsel for the Respondent, Mr. Mukuna and the Claimant's case was marked as closed after re-examination of CW3.
7. The Respondent's case was heard on the 7th December 2023 with one witness Moses Khatete (DW) who testified on oath, adopted his filed witness statement and their filed replying affidavit as the Respondent's evidence in chief. The witness was cross-examined by the Claimant's Industrial Relations Officer Mr. Kamuye and the defence case was marked as closed after re-examination.

Written Submissions.

8. After the hearing the Court gave directions on the filing of written submissions. The parties complied.
9. The Claimant's written submissions drawn by Justin Wanungu Kamuye were dated 1st February 2024 and received in Court on the 6th February 2024.
10. The Respondent's written submissions drawn by Eshuchi & Associates were dated 10th February 2024 and received in Court on the 22nd February 2024.

The claimant's case in summar

11. The Claimants state that on the 6th of July 2021 the parties voluntarily signed an agreement for settlement of terminal dues for the grievants. That there was a case of unfair termination and the grievants sought the Claimant's intervention. The Claimant reported the case as a trade dispute and there was a conciliation meeting at Kakamega labour office. That in the conciliation meeting the Respondent requested for negotiations with the claimant. The negotiations resulted to an agreement dated 6th July 2021.
12. That the Respondent delayed payments contrary to the agreement and paid some monies as indicated in the amended claim. The Respondent stopped payment of instalments resulting to the case in court. That upon filing the case the Respondent drafted and backdated letter dated 20th December 2022 purporting to have informed the Claimant of intention to renegotiate the agreement. The case was filed in Court on 23rd December 2022.
13. The Claimant states that it has incurred costs in pursuit of the case.



The Respondent's case

14. The Respondent admits that the grievants are its former employees separately dismissed for various but pertinent reasons. That employees reported to the Claimant union, discussions ensued and a settlement was reached which stipulated the payment terms and reduced to an agreement dated 6th July 2021.
15. The Respondent states that it endeavored to settle the agreed amounts but ran into unexpected financial trouble and even wrote to the Claimant requesting for renegotiation of terms vide a letter dated 20th December 2022.

Undisputed facts.

16. The Court finds that it was an undisputed fact that the parties entered into an agreement dated 6th July 2021 for compensation of the grievants whose services had been terminated by the Respondents. The terms were not in dispute.
17. There was partial compliance with the agreement by the Respondent.

Disputed fact

18. The request for renegotiation of the agreement.

Determination.

19. The Claimant seeks for the adoption of the agreement between the parties as Order of the Court with costs.
20. The Respondent admits the existence of the agreement and fashioned issues for determination as:-
 - a. Whether the Respondent should pay Martha Shitindo, Phanice Musabi and Maurice Namayi their terminal dues as per the mutually signed agreement between the Claimant and the Respondent.
 - b. Whether the Respondent should pay the costs of the suit.
21. The Court finds that the issue for determination from the amended claim is whether to adopt the agreement between the parties as an order of the Court and costs. The issue of the terms of the agreement can only be amended by the parties and not the court. It is a trite law that the Court cannot rewrite the contract between the parties.

Issue: Whether to adopt the agreement between the parties as an order of the court.

22. As per the facts outlined above the parties are in agreement that they entered into a settlement of the claim for unfair termination of the grievants as per the trade dispute lodged before the Conciliator by the Claimant union. The agreement was produced by CW1 as document no. 6 of the Claimant's exhibits. The terms of the Agreement were not in dispute.
23. The agreement dated 6th July 2021 was titled:-

"Trade Dispute Agreement Between Management Namasoli Health Center And Kenya Union of Domestic Hotels Education Institutions And Hospital Workers (kudheih) Made At Namasoli Ack Church Vicarage On 6/7/2021."



It Read:-

“ In Matters Payment of Terminal Dues For Four Former Employees of Namasoli Health Center Namely Martha Shitindo, Philip Abuti , Maurice Namayi And Phanice Emitungu Musabi.

Parties negotiated and agreed to pay terminal dues for gratuity, salary arrears and house allowance as per the Collective Bargaining Agreement between KUDHEIHA and Churches and church related institutions where Namasoli Health Centre was listed. The CBA was signed on 14th October 2013.

Parties agreed to make payments as follows:-

SN	TOTAL AMOUNT	1 ST PAYMENT BY DEC 2021(5 MONTHS)	MONTHLY PAYMENT	2 ND PAYMENT SPREAD OVER BETWEEN JAN 2022 AND JULY 2023
1	Phanice Musabi 460,224	95,880	19,176	364,344
2	Marther Shitindo 619,332	129,028	25,805	490,304
3	Maurice Namayi 441,780	92,038	18,407	349,742
4	Philip Abuti 585,660	122,013	24,403	463,647

Parties agreed that the first lumpsum payment to each individual for 5 months will be paid end Dec 2021. Each employee will receive his 5 months payment. The balance for each employee will be spread over a period running between January 2020 to July 2023. The four grievants will therefore receive their monthly payments in the second tranche with effect from January 2022 to July 2023.

This agreement is hereby made in the presence of ... sign date

1. Douglas Nandwa – Chairman Board of Management Namasoli Health Centre.....signed



2. Moses Khatete..BoM member...signed
3. Owen Shikuku –BoM member... signed
4. Robert Matati – Sponsors Representative. signed
5. Justine Waingu Kamuye- Kudheihakakamega- Industrial Relations Officer-signed
6. Antonio Shiraku – Kudheihakakamega Organising Secretary -signed
7. Morris Namayi – Workers Representative. signed”

24. The Claimant seeks to have the foregoing agreement adopted as an Order of the Court. To support the claim, the Claimant called the 3 of the workers, Philip having passed on and further produced the agreement and evidence was led on non-compliance by the Respondent.
25. The Respondent through Moses Khatete filed a Replying Affidavit dated 20th February 2022 admitting the settlement between the parties vide the agreement. The Respondent produced its Advocate’s letter dated 20th December 2023 attaching proof of some payments and proposing a payment plan.
26. The Court finds that it was an undisputed fact that there exists an agreement between the parties which is yet to be completed. The agreement was dated 6th July 2021. It was produced before Court and admitted without any dispute. The agreement was also admitted in response to the claim.
27. The Court then finds that the parties freely negotiated the agreement and there is no reason why the Court should not adopt it. The Court cannot re-write the contract /agreement between the parties.
28. Consequently, the claim is allowed and the agreement dated 6th July 2021, between the parties is hereby adopted as Judgment of the court. The issue of the deceased worker to be dealt with according to the relevant laws.
29. The Parties have submitted on costs. Costs follow the event. The Claimant is a union and allowed to represent its members in trade disputes. Costs are also a matter of discretion of the Court. Judicial discretion ought to be exercised lawfully. I have considered the pleadings by the parties and on costs I award the Claimant Kshs. 50,000/- as a reasonable amount to cover Court filing fees, transport to Court and related costs.
30. In Conclusion, the Claim as amended on 11th October 2023 is allowed. The Agreement between the parties dated 6th July 2021 is adopted as an Order of the court.
31. The Claimant is awarded costs of Kshs. 50,000/-.
32. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 14TH MARCH 2024 IN OPEN COURT AT KAKAMEGA

J.W. KELI

JUDGE

In the presence of :-

C/A Lucy Macheso

For Claimant union- Justin Kamuye



For Respondent- Absent

