



Morusoi & 34 others v Kenya Literature Bureau; Kenya Union of Printing, Publishing and Allied Workers (KUPRIPUPA) (Interested Party) (Petition E064 of 2024) [2024] KEELRC 1938 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1938 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E064 OF 2024

B ONGAYA, J

JULY 26, 2024

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 22, 23, 34, 35, 46, 48, 73, 75, 156, 159, 161, 162, 201, 232, 234, 235, AND 258 OF CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: KENYA LITERATURE BUREAU ACT

AND

IN THE MATTER OF: THE STATE CORPORATIONS ACT

AND

IN THE MATTER OF: MWONGOZO, THE CODE OF GOVERNANCE FOR STATE CORPORATIONS, JANUARY 2015.

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATIONS

AND

IN THE MATTER OF: THE FAIR AND ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

BETWEEN

FREDRICK KOECH MORUSOI & 34 OTHERS & 34 OTHERS & 34 OTHERS & 34 OTHERS & 34 OTHERS PETITIONER

AND

KENYA LITERATURE BUREAU RESPONDENT



AND

**KENYA UNION OF PRINTING, PUBLISHING AND ALLIED WORKERS
(KUPRIPUPA) INTERESTED PARTY**

JUDGMENT

1. The petitioners filed the petition dated 23.04.2024 through Kurauka Advocates seeking the following orders:
 - a. That a declaration that the respondent has infringed the petitioners' rights under Article 27 of the Constitution , which guarantees the petitioners the right of equality and freedom from discrimination by discriminating against the petitioners.
 - b. That a declaration that the respondent has infringed the petitioners' rights under Article 41 of the Constitution which provides that every employee has a right to fair labour practices and to fair remuneration and a right to form, join or participate in the activities and programmes of a trade union.
 - c. That an order be and is hereby issued compelling the respondent to pay the petitioners a sum of Kshs.16,938,100.71 being 21 months' increment for a period between 1st July, 2022 to 31st March, 2024 that is due and owing to the petitioners as per the attached schedule dated 31st March, 2023 and to continue making such payment therefore.
 - d. That an injunction be and is hereby issued to prevent the respondent from discriminating against all the petitioners in respect of: their employment contracts; audience and participation; pension scheme; fair arbitration and dispute resolution mechanisms; training and development opportunities; annual increments; working conditions; promotions; salary scale; overtime allowances (at the rate of 1.5 times the regular hourly pay); participation; fringe benefits and other fair labour practices as enshrined in the Constitution , labour laws and the respondent's prevailing human resource manual.
 - e. That an injunction do issue to prevent the respondent from implementing its new human resources tools until the same are subjected to public participation and consultation prior to implementation thereof.
 - f. That and other or further orders that this Honourable Court may deem fit to grant hereof.
 - g. That and other or further orders that this Honourable Court may deem fit to grant hereof.
 - h. That the respondent in favour of the petitioners pay the costs of this petition.
2. The petition was based upon the supporting affidavit of the 1st petitioner Fredrick Koech Morusoi and annexures thereto filed together with the petition and sworn on 23.04.2024. The petitioners' case is as follows:
 - a. That the respondent has gravely offended Article 27 of the Constitution , which guarantees the petitioners the right of equality and freedom from discrimination.
 - b. That the respondent has unjustly operated two sets of payrolls, one for the petitioners who are the interested party's members and those coerced by the respondent to withdraw from the interested party for the past four (4) years.



- c. That the respondent has discriminated upon the petitioners by failing to promote them for the past five (5) years yet they have done so for non-union members.
 - d. That the respondent has failed to pay the petitioner a sum of Kshs.16,938,100.71 being 21 months' increment for a period between 01.07.22 and 31.03.2024 as per a schedule they attached.
 - e. That the respondent's human resources tools have not been subjected to public participation and consultation prior to intended implementation. Lack of public participation is likely to infringe the rights of the petitioners contrary to Article 10 of the Constitution .
 - f. That the respondent has caused the collective bargaining agreement (CBA) with the interested party to stall. Since the old CBA has not been concluded, the petitioners have been greatly disadvantaged because the new CBA is already overdue. The respondent and the interested party are engaged in a CBA matter No. ELRC E805 of 2021 (Milimani) which related to only recognition of the CBA and has been pending in court since 2021.
 - g. That the respondent is unwilling to execute the said CBA causing delays thereof because all efforts to prevail the respondent to do so including correspondence and proceedings before the Labour Commissioner have been futile thereof.
3. The respondent filed their replying affidavit through their advocate, Yoon Nashali Musa. The Chief Executive Officer of the respondent's organization, Victor K. Lomaria swore the affidavit on the 16.05.2024 opposing the petition. The respondent's case is as follows:
- a. The conservatory orders being sought by the petitioners in terms of prayer (c) and (d) of the petition amounts to forum shopping and is sub judice since the respondent and the interested party are engaged in ELRC cause no. E805 of 2021, which is seeking to unlock CBA, related issues.
 - b. That the respondent and the interested party have had a good standing in representation of their members (the petitioners) since 1991 until 2019 when the respondent gave a counter proposal as guided by the Salaries and Remuneration Commission (SRC) and its membership fell below the legal threshold for recognition paving way for the matter pending judgement, ELRC cause no. E805 of 2021.
 - c. That from the time parties signed a recognition agreement, they have negotiated many CBA's terminating with the one for 2015-2019 and that the respondent has allowed members to belong to the said trade union and participate in its activities without any limitation.
 - d. That the allegations of the respondents stalling the CBA negotiation process is not true and same was occasioned by the interested party who went to court and the respondent has no control over the court process.
 - e. That it is not the duty of the respondent to recruit members of a trade union but the duty of the union leadership and cannot coerce or force a member to stay in the union.
 - f. That the terms of services, salary and remuneration of the petitioners is pegged on a CBA and the one for 2019-2023 was not concluded having been referred to court by the interested party and the newly negotiated CBA is disputed before the Honourable Court and hence cannot be effected until the court's decision is made.



- g. That the petitioners' prayer (e) of the petition is premature, ill-conceived and in bad faith considering that the respondent's human resource's instruments have been in place since 2018 following an elaborate review process before approval and implementation.
 - h. That the allegations of the respondent discriminating the petitioners is false since even two of the petitioners serve in the respondent's staff retirement benefits schemes.
 - i. That the respondent does not have any provisions for the so-called 'emergency loans' in its policy and has never administered such funds currently or in the past.
 - j. That the training of the respondent's employees and their promotion is dependent on opportunities, needs and funds being that it's a government entity and hence there is no discrimination on those basis as alleged by the petitioners. In addition, such matters are administrative and should be handled internally hence outside the purview of the Honourable Court.
 - k. That payment of overtime is as and when employees on specified job levels are required to work for longer and the same to be in compliance with specific HR policies which were communicated to the staff. A circular to that effect was exhibited.
 - l. That all the petitioners herein are on a permanent and pensionable basis hence the allegation of being denied is null and void.
 - m. The respondent who put them to strict proof denied all other allegations made by the petitioners.
4. The petitioners filed a further affidavit dated 27.05.2024 in response to the respondent's replying affidavit.
5. In the further affidavit, the petitioners reiterated the facts as in the petitioners' supporting affidavit and rebutted the issues as raised in the respondent's case. It was further urged as follows:
- a. That the matter pending for judgement and the matter herein are different and independent cases and the substratum and reliefs thereof are dissimilar and that the petitioners were not enjoined in the said matter to raise their issues thereof.
 - b. That the National Labour Board Sub-committee on Revocation of Recognition Agreements in its 26th meeting held on 13th and 14th October 2021 declined to revoke the recognition agreement by management of the respondent after receiving written and oral submissions from the parties on 16.12.2021.
 - c. That the interested party tried to pursue for a meeting with the respondent vide a letter dated 16.06.2022 and said letter was not responded to.
 - d. That the respondent has never given the criteria used to give and pay salary increments to other staff and discriminate the petitioners and that the respondent stuck to the advisory from SRC and refused to provide a counter proposal as required by law and also that the respondent confirmed in clause 12 of his affidavit that that was indeed an advisory and not a counter proposal.
 - e. That the respondent wrote to the National Labour Board intending to revoke the existing recognition agreement with the interested party dated 20.07.2020 which was declined by the Labour Board Subcommittee.



- f. The petitioners once again urged that the respondent's response herein be dismissed and that the court grants the reliefs sought in the petition.
6. The parties filed final submissions. The Court has considered all the material on record. The Court returns as follows:
- a. The material on record shows that the impugned human resource instruments came into effect in February 2018. The petitioners urge that the same were prepared without due public participation as required in Article 10 of the Constitution . There is no dispute that the instruments came into force in February 2018. The Court considers that the failure to hold participation was a continuing injury, which lapsed in February 2018. Section 90 of the Employment Act, 2007 provides that for a continuing injury, the time of limitation is 12-months from the date of the cessation of the continuing injury. The entitlement to participate having lapsed in February 2018, the legal action ought to have been filed by February 2019. It appears to the Court that as urged for the respondent, it would not be just to stay implementation of the human resource instruments after lapsing of about 7 years of their continuous implementation. The cause of action in that respect appears time barred and inordinately belated. In any event, the petitioners have not rebutted the respondent's case that the Public Service Commission per Article 232 and 234 of the Constitution had approved the impugned instruments.
 - b. As urged for the petitioners there appears to be pending disputes before the Court about conclusion of the CBA between the respondent and the interested party. The Court considers that such are matters best determined in the pending legal proceedings and in accordance with the provisions of the Labour Relations Act on resolution of disputes between trade unions and employers. The petitioners in the instant case and being members of the trade union appear to seek to enforce their fundamental rights and freedoms, which they say, have been violated, despite the pending dispute on the next collective agreement. The Court considers that the claims herein do not amount to a by-pass of the statutory and contractual provisions on the resolution of particularly, collective grievances, such as the ones purportedly raised in the pending CBA case. The Pending CBA dispute is merely about conclusion of the disputed CBA. It is a different cause of action from the instant case whereby the petitioners allege violations of rights arising from majorly, their being members of the trade union and, partly due to the failure of prompt conclusion of the next CBA. In that respect, the petitioners have exhibited the certificate of unresolved dispute dated 21.09.2021 by the Conciliator, Hellen Maneno. The unresolved issue is stated thus, "Refusal by the employer to provide the union with counter proposal of negotiations as required by section 57 (1) and (2) of the Labour Relations Act, 2007" . The Court considers that the issue of conclusion of a CBA in the pending case flowing from unresolved disputes under the statutory conciliation process is clearly different from the instant petition alleging violation of rights. The statutory conciliation process is not being avoided through the instant petition. It should be that CBA E805 of 2021 should be expedited so that it is heard and determined on priority basis but, it is obviously addressing different issues distinct from the cause of action and reliefs sought in the instant petition.
 - c. The petitioners allege unfair discrimination in payment of salary, promotion, payment of overtime and other entitlements at work. Such matters require pleading of particulars for each of the petitioners and computation of the specific amounts claimed in that respect. The respondent urges that some of the claims made in that respect are subject of the pending legal proceedings. The respondent further states that the evidence for the alleged discrimination



is not provided. The Court finds that the respondent has conceded that in view of the CBA which has not been concluded, it has not awarded the members of the union in its employment the due pay rise. By that assertion, the Court finds that the respondent has admitted that it has continued to pay unionisable employees differently because of those who are members and not members of the union. Indeed, it is discriminatory for the respondent to advantageously pay or otherwise confer employment benefits or opportunities to unionisable employees not being union members than those being members of the union – simply on account that the CBA has not been concluded or the disadvantaged employees are members of the union. The petitioners have not given evidence on record to establish the particulars of discrimination and the extent of the monetary disadvantage to enable the Court award the amounts claimed. The respondent appears to admit disparity of treatment between members of the union and unionisable staff not having joined the union. The Court returns established discrimination at work contrary to Articles 27 and 41 of the [Constitution](#) as read with section 5 of the [Employment Act](#). However, the amounts claimed would not be awarded for want of specific breakdown and due evidence. Parties should be able to reconcile in that regard. While making that finding the Court observes that the [ILO declarations on fundamental principles and rights at work](#) adopted in 1998 and amended in 2022, constitute an expression of commitment by governments, employers and workers organization to uphold basic human values vital to our social and economic well-being. The principles and values include, inter alia, freedom of association and the effective recognition of the right to collective bargaining, and, the elimination of discrimination in respect of employment and occupation. Further, [ILO C100 - Equal Remuneration Convention, 1951](#) (No. 100) Article 1 provides thus, “For the purpose of this Convention : (a) the term remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment; and (b) the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.” Thus, the respondent cannot be allowed to implement differential remuneration for its employees based upon the unionisable employee being or not being a member of the trade union. The respondent is bound to implement fair labour practices and remuneration as envisaged in Article 41 of the [Constitution](#) of Kenya.

- d. The Court has noted the interested party’s submission filed through Teresa N. Kagwa, thus, “ That the respondent has clearly offended Article 27 of the [Constitution](#) which guarantees right of equality and freedom from discrimination, by awarding those who he coerced to withdraw union membership with the benefits by awarding them with 15% wage increase spread from 2019 to 2023 and which was disputed by the interested party and the same matter pending in Court for the last four years awaiting determination before Judge Jacob Gakeri. That the Respondent have further given unequal treatment on overtime payment, promotion, employees training and workshops and threats to early retirement.” The Court considers that the respondent cannot be allowed to invoke such unfair tactics to defeat the workers’ rights to fair remuneration, to join and participate in union activities, to collectively bargain, or undermine the workers right to associate. It is that once the union negotiates terms and conditions of service, unionisable staff, irrespective of their union membership status, must enjoy the same. The converse is that the respondent cannot confer the unionisable employees not being members of the union better terms on account that they are not union members. Employers cannot be permitted to run different terms and conditions of service for unionisable staff solely on account of whether the employee is a member or not member of the union. Such



differential treatment would amount to a classical unfair discrimination at work undermining the right to associate and to collectively bargain.

e. The petitioners have succeeded and the respondent to pay costs of the petition.

In conclusion, the petition is hereby determined with orders:

1. The declaration that the respondent has infringed the petitioners' rights under Article 27 of the Constitution, which guarantees the petitioners the right of equality and freedom from discrimination by discriminating against the petitioners.
2. The declaration that the respondent has infringed the petitioners' rights under Article 41 of the Constitution which provides that every employee has a right to fair labour practices at to fair remuneration and a right to form, join or participate in the activities and programmes of a trade union.
3. The declaration that the respondent's unionisable employees holding same position, grade or roles at work shall not be treated differently in terms of remuneration or salary, allowances, overtime payment, promotions, and other terms, conditions or opportunities at work on account of being members or not members of the trade union and the respondent to take prompt steps to remove any such prevailing discrepancies in fully upholding Article 41 of the Constitution and any amounts due be computed by the parties and paid by 01.10.2024 failing, the same be payable with interest at Court rates from today until full payment – the amount being incorporated in the final decree herein.
4. For purposes of order (1) the parties to compromise or reconcile their positions accordingly.
5. The injunction hereby issued to prevent the respondent from discriminating against all the petitioners in respect of: their employment contracts; audience and participation; pension scheme; fair arbitration and dispute resolution mechanisms; training and development opportunities; annual increments; working conditions; promotions; salary scale; overtime allowances (at the rate of 1.5 times the regular hourly pay); participation; fringe benefits and other fair labour practices as enshrined in the Constitution, labour laws and the respondent's prevailing human resource manual.
6. The respondent to pay the petitioners' costs of the petition and the interested party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26TH JULY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

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