



**Kenya Union of Commercial, Food and Allied Workers v Vihiga Teachers Benevolent Fund (Employment and Labour Relations Cause E020 of 2024) [2024] KEELRC 2640 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2640 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2024**

**JW KELI, J  
OCTOBER 24, 2024**

**BETWEEN**  
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... CLAIMANT**  
**AND**  
**VIHIGA TEACHERS BENEVOLENT FUND ..... RESPONDENT**

**JUDGMENT**

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent commercial and food industry workers.
2. The Claimant on 6<sup>th</sup> June 2024 filed the Memorandum of Claim dated 30<sup>th</sup> May 2024 supported by the Verifying affidavit sworn on even date by the Claimant’s General Secretary, Mr. Boniface M. Kavuvi.
3. The suit had been triggered by the alleged refusal by the Respondent’s to sign a Collective Bargaining Agreement (CBA). Vide the Memorandum of Claim, the Claimant has prayed for the following reliefs:-
  - a. Declare the action by the Respondent to refuse to allow for signing of the negotiated CBA as unlawful and unfair.
  - b. Order the respondent to sign the negotiated CBA within 30 days of the judgment of this Honourable court to pave way for registration.
  - c. Revoke the performance contracts and render it null and void.
  - d. Order the Respondent to refund back any unlawful deductions made on the unionizable employees’ salaries prior to signing and registration of the Collective Bargaining Agreement.



- e. Any other relief this Honourable court may find fitting to grant.
- f. Cost of the suit to the Claimant.
4. Also filed together with the Memorandum of Claim was the Claimant's list of Documents dated 30<sup>th</sup> May 2024 and its Bundle of Documents.
5. The Claimant on 12<sup>th</sup> September 2024 filed a further list of documents dated on an even date and additional documents.
6. The Respondent filed what it called background to Vihiga Teachers Benevolent Fund.

### **The Claimant's Case**

7. It was the claimant's case that it recruited five employees of the respondent, who are the total unionisable members (Exhibit 1), and thereafter the parties signed a recognition agreement dated 11<sup>th</sup> April 2023(Exhibit 2).
8. The Claimant contended that they negotiated their first Collective Bargaining Agreement (CBA) (Exhibit 3) with the Respondent which is pending signing, being the issue before court.
9. It was the claimant's case that vide a letter of 23<sup>rd</sup> November 2023, the Claimant reported a dispute citing the negotiations of the CBA for the Year 2023-2026, upon which the conciliator filed his findings and recommendations, urging the union to sign the CBA with the terms proposed by the Respondent (Exhibit 4).
10. It was the claimant's case that after the issuance of the Report of the Conciliator, the claimant wrote to the respondent accepting the report and proposed a meeting for signing of the CBA (Exhibit 5).
11. The claimant states that upon receiving the Conciliator's report, the Respondent introduced performance contracts in place of the negotiated CBA (Exhibit 6). The claimant alleged that the Respondent went ahead to deduct the employee's salaries (Exhibit referred as 7 was not annexed).
12. It was the claimant's case that the Respondent's refusal to sign the CBA has exposed its members to threats and intimidation.
13. The Claimant's case is that the Respondent had not stated the reason of its failure to sign the CBA, which was in bad faith, and which act violates the right under Article 36 (1) of *the Constitution* entitling every person to freedom of association, right to form, join and participate in the activities of any association.
14. The claimant asserts that having negotiated the CBA and the respondent's sudden turnaround is a threat to the wellbeing and livelihood of its members and the respondent's conduct is meant to taint the claimant in a bad light in the eyes of its members.
15. The claimant states that the Respondent's refusal to sign the negotiated CBA is tantamount to denying its members an opportunity to enjoy the benefits of the CBA and which is unfair labour practice.

### **Response**

16. The Respondent filed its submissions on the issues in dispute dated 10<sup>th</sup> September 2024 which the court treated as the response to the claim.



## **Directions**

17. By an order dated 18<sup>th</sup> July 2024, the court referred the parties to out of court negotiations before the Conciliator on contested issues in the CBA, being clause 25, clause 19, and clauses 22 on salary advance and clause 9 on gratuity.
18. The Conciliation report was filed by the conciliator dated 26<sup>th</sup> July 2024 whereupon parties agreed and disagreed upon some issues.

## **Written Submissions**

19. The court with consent of the parties directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 12<sup>th</sup> September 2024 were filed by Boniface M. Kavuvi, the Claimant's General Secretary on an even date. The Respondent filed its submissions on the issues in dispute dated 10<sup>th</sup> September 2024 which the court treated as the response to the claim.

## **Determination**

### **Issues for determination**

20. The claimant submitted globally on the respondent's failure to file any defence or evidence before the court regarding its refusal to sign a CBA and asks the court to allow its claim requiring the respondent to sign the CBA. The Respondent submitted on the 4 outstanding issues under the CBA.
21. The court on the 18<sup>th</sup> July 2024 having heard the parties oral submissions referred the following contested clauses of the CBA to conciliation process:-
  - a. Clause 9 Gratuity
  - b. Clause 19 medical allowance
  - c. Clause 22 Salary and salary advance
  - d. Clause 25 General Wage Increase
22. The parties made submissions before the conciliator, Ms. Dorcas Ouma who filed her report dated 26<sup>th</sup> July 2024 in court.
23. The court having read the Conciliator's report and the submissions of the claimant finds the issues for determination in the Judgment to be :-
  - i. Whether the Respondent failed to unfairly sign the CBA with the Claimant.
  - ii. Whether the parties have agreed on the CBA outstanding issues and the findings of the court
  - iii. Whether the Court should Order the respondent to sign the negotiated CBA within 30 days of the judgment of this Honourable court to pave way for registration.
  - iv. Whether to Revoke the performance contracts and render it null and void.
  - v. Whether to Order the Respondent to refund back any unlawful deductions made on the unionizable employees' salaries before signing and registration of the Collective Bargaining Agreement.



### **Whether the Respondent failed to unfairly sign the CBA with the Claimant.**

24. The claimant submits that having signed a recognition agreement and negotiated a CBA the Respondent had refused to sign the same. The Respondent had not disclosed the reasons for the refusal despite the parties having gone through a conciliation process. The claimant submits that this was holding their 5 members at ransom and violating their constitutional rights under Articles 36 and 41 of *the Constitution*. Instead, the respondent had issued its members with performance contracts to defeat the CBA terms.
25. The Respondent did not file response but appeared through its chairman in court and informed the court that the claimant had failed to honour their invitation for a meeting on the CBA. They had not agreed on gratuity, the agreement on increment was 4.5% in 3 years thus 1.5% per annum. The draft CBA by the claimant stated 4.5% across board which the Chairman of the Respondent did not understand.
26. The court having heard the parties' representatives referred the outstanding issues under the CBA to the conciliator vide Court Order of 18<sup>th</sup> July 2024 having heard the parties referred the following contested clauses of the CBA to conciliation process:-
- a. Clause 9 Gratuity.
  - b. Clause 19 medical allowance.
  - c. Clause 22 salary and salary advance.
  - d. Clause 25 General Wage Increase.
27. The court states that the negotiations by employers with unions representing employees of collective bargaining agreement is voluntary. The International Labour Organization Convention 98 on Right to Organise and Collective Bargaining Convention, 1949, Article 4 provides for voluntary negotiation of collective bargaining agreements as follows:-
- ‘Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.’ (Emphasis given)
28. The right to collective bargaining is recognized under Article 41 of *the Constitution* thus-” (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.”
29. The parties herein having entered into recognition agreement, the next stage was the negotiation of the CBA as per section 57 of the LRA to wit:- ‘57. Collective agreements
1. An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.”
30. The court was not persuaded that the Respondent had refused to sign the CBA without reasons as alleged by the Claimant taking into account the proceedings of the conciliation process filed in court where the Respondent appeared to have participated and made submissions.



31. Following the Court Order of 18<sup>th</sup> July 2024 the parties appeared before the appointed Conciliator Dorcas Ouma, who filed her report dated 26<sup>th</sup> July 2024. The report was uncontested and the Court proceeded to adopt the recommendations by the conciliator, which the Court found were consistent with the submissions of the parties during the conciliation meeting, to determine the outstanding issues in the draft CBA as follows:-

#### **Clause 9 -Gratuity**

32. The conciliator found that the Respondent was paying NSSF statutory deductions and that section 35(5) of the *Employment Act* as read together with subsection 6(1-d) read :- ‘(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. (6) This section shall not apply where an employee is a member of—
- a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
  - (b) a gratuity or service pay scheme established under a collective agreement;
  - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
  - (d) the National Social Security Fund.”
33. Section 26 of the *Employment Act* provides for basic terms of employment but parties vide CBA can negotiate more favourable terms. It reads:- ‘26. Basic minimum conditions of employment
1. The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.
  - (2) 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.”
34. In pursuit of more favorable terms the claimant union sought payment of gratuity for its members under the CBA notwithstanding the provisions of section 35(5) of the *Employment Act* as read together with subsection 6. The proposed rate of payment of gratuity by the employer at 15 days for every completed year is the prevailing rate for service pay payable under section 35(5) of the *Employment Act*. Since gratuity is a discretionary employee benefit, the court adopts the proposal by the employer under this clause to pay the unionisable employee upon termination of contract 15 days for every completed year of service computed based on last salary and all liabilities shall be deducted.

#### **Clause 19 -medical allowance**

35. The proposal by the claimant was for the unionisable employees to be paid 5% of the basic salary medical allowance. The recommendation by the conciliator having heard the Respondent was paying NHIF statutory deductions but was willing to supplement with 2% of the unionisable employee basic salary accepted that as the recommendation. The recommendation is adopted by the court to resolve the issue under clause 19.



### **Clause 22- salary and salary advance**

36. The union sought for the management to be specific as the date when salary was due because some of the unionisable members were servicing loans with banks that had to be paid on specific dates. The report indicates that the respondent informed the conciliator that it had no money to pay salary advance. The Respondent said it will remit their salary on or before the 25<sup>th</sup> day of every month unless something happened.
37. The conciliator recommended that salaries be remitted by 25<sup>th</sup> of every month . The court adopts the position that salary advance is not a legal requirement. The Court adopts the recommendation by the Conciliator that salary is due on 25<sup>th</sup> day of every month.

### **Clause 25 -General Wage Increase**

38. The respondent took issue with the way the clause was drafted namely:- ‘the general wage increase shall be 4.5 % annually across the board after all employees meet the standard minimum wage.’”
39. Before the conciliator the claimant took the position that some employees were earning above the Minimum Wage Order of 2022 and they were not considered in wage increase. They proposed an increment for all employees without discrimination at 4.5% across board , being 1.5% per annum for all unionisable employees. The respondent stated they were willing to increase their employees wage at 1.5% per annum and this includes all employees above the Minimum Wage Order.
40. The Conciliator recommended the management should give their employees a salary increment of 4.5% across board being 1.5% per annum for all employees.
41. The adopts the position of the parties and frames the clause to read that the employer will give all the unionisable employees salary increment of 1.5% per annum total 4.5% for the entire CBA period.
42. In the upshot the court returns that the respondent had valid reasons not to sign the CBA and adopts the recommendations of the conciliator as above to solve the stalemate.

### **Whether the Court should Order the respondent to sign the negotiated CBA within 30 days of the judgment of this Honourable court to pave way for registration.**

43. Once clauses 9,19,22 and 25 of the CBA are amended as ordered by Court(supra), the parties should sign the CBA in 30 days of this judgment.

### **Whether to Revoke the performance contract and render it null and void.**

44. The court perused the draft performance contract annexed by the respondent. The said document was a mere draft with no legal consequences. The court holds that an employer has right to define its relationship with employees including regulating performance vide contracts. Once the CBA is signed the employer must comply with the terms of the CBA as they become part of the contract terms of employment pursuant to the provision of section 26 of the [Employment Act](#) (supra). The court finds it is premature to pronounce itself on the said draft document titled performance contract for Vihiga Teachers Benevolent Fund. The prayer is disallowed.

### **Whether to Order the Respondent to refund back any unlawful deductions made on the unionizable employees’ salaries prior to signing and registration of the Collective Bargaining Agreement.**

45. There was no evidence placed before the court to support the prayer. The same is disallowed.



## **Conclusion and disposition**

46. The Claim is allowed. The parties are ordered to sign the CBA upon amendment of the following clauses :-

Clause 9 -Gratuity- be amended to provide for the employer to pay the unionisable employees, upon the termination of a contract, 15 days for every completed year of service computed based on the last salary, and all liabilities shall be deducted.

Clause 19 -Medical allowance- clause be amended to provide for the employer to pay 2% of the unionisable employee basic salary as medical allowance to supplement statutory NHIF/SHIF.

Clause 22 -Salary and salary advance. – clause be amended by deleting salary advance and to state salary is due on 25<sup>th</sup> day of every month and be remitted to the banks accordingly.

Clause 25- General wage increase –clause be amended to read the employer will give all the unionisable employees salary increment of 1.5% per annum total 4.5% for the CBA period.

47. All other prayers are dismissed.

48. No order as to costs.

49. It is so Ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> OCTOBER 2024.**

**JEMIMAH KELI,**

**JUDGE**

IN THE PRESENCE OF: -

Court Assistant: Caleb

For Claimant: Absent

For Respondent: -Absent

