



**Kenya Union of Domestic, Hotels, Education Hospitals and Allied Workers v Nanyuki Cottage Hospital (Cause E039 of 2022) [2023] KEELRC 1068 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1068 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**CAUSE E039 OF 2022**  
**ON MAKAU, J**  
**APRIL 27, 2023**

**BETWEEN**  
**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION HOSPITALS AND ALLIED WORKERS ..... CLAIMANT**  
**AND**  
**NANYUKI COTTEGE HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a registered trade union while the respondent is charitable trust whose core business is provision of a medical services as a medical institution at Nanyuki. The two parties have a recognition agreement and together they concluded 11 Collective Bargaining Agreements (CBAs) and they were in the process of negotiating the 12<sup>th</sup> CBA when they disagreed on four clauses namely:-
  - a. Clause 3: wages and increment where the claimant demanded 70% increment in two years while the respondent is agreeable to 7% only.
  - b. Clause 7: leave travelling allowance where claimant demands additional 500 to raise it Kshs 8500 but the respondent wants the figure of Kshs 8000.00 retained.
  - c. Clause 18: house allowance where the claimant demands an increase of Kshs 500 in the first year and a further Kshs 500 in the second year but the respondents wants the figure of Kshs 7500 retained.
  - d. Clause 28: effective and duration of the CBA where the claimant demands a duration of 2 years effective May 1, 2021 but the respondents wants the duration extended to 3 years.
2. The dispute was referred to the labour officer for conciliation but the said issues were never resolved hence this suit. After close of pleadings, the matter was referred to the Central Planning and Monitoring Unit (CPMU) in the Ministry of Labour for preparation of an economic report. The



report was prepared by Mr Bob Ngache on behalf of the Director of the CPMU on November 29, 2022. Each party was served and filed written submissions to argue their respective cases.

### **Claimants' Submission**

3. On the wage increase the claimant submitted that the offer by the respondent of 2% in the first year and 3% in the second year does not take into account the meagre salaries the union members are earning currently. Further the offer does not take into account the cost of living plus the high inflation rate which has affected the purchasing power of its members. It was submitted that the union members can hardly put food on the table and are struggling to take their children to school. They are also unable to meet other essential needs to their dependants due inability to afford. In the claimants' view, its members are being treated like slaves to make them think that the union is not helping them and therefore withdraw membership.
4. As regards house allowance, it was submitted that the respondent is violating section 31 of the *Employment Act* which requires that the employer provides its employees with reasonable housing accommodation at all times or pay sufficient sum in addition to the wages or salary to enable them pay rent for reasonable accommodation. The claimant considered its proposed increment of Kshs 500 in the first year and Kshs 500 in the second year to be sufficient to enable its members afford reasonable accommodation.
5. Likewise the claimant submits that an increment of Kshs 500 to raise leave travelling allowance to Kshs 8500 was justified because some staff travel for leave with their family to as far as western Kenya hence they are forced to dig deep into their pockets to compensate for the deposit. Further an employee is forced to borrow money to cater for transport. Therefore it was submitted that the respondent has not given a valid reason for insisting to retain the sum of Kshs 8000.00. Further that the said amount is not in tune with the current market trends.
6. As regards the effective date of the CBA, it was observed that the respondent has agreed to the May 1, 2021 but demanded that the CBA runs for 3 years. The claimant submitted that a 2 years' CBA is in line with the wage guidelines of 1973 and faulted the respondent for insisting on 3 years period without any offer of salary increment. The said demand was deemed to be a bad labour practice and a scheme for exploiting workers.
7. The claimant denied that the demands for increment of consideration is grossly exaggerated and made in bad faith. Further the respondent has failed to table its audited financial statement to prove its inability to meet the proposed increments. Besides the citing of covid-19 pandemic as a ground for rejecting the proposed increment, is not valid because the respondent's business increased during the pandemic due to increase in referral cases.
8. Further, the claimants submitted that its members were discriminated contrary to section 5 of the *Employment Act* when the staff who are not its members were given salary increments of 5% to 15%. It was submitted that the respondent's business is doing very well with its Gundua Hospital alone getting an income of Kshs 74,581,158.00 between August, 2020 and February, 2021.
9. With respect to the CPMU report, it was submitted that there is significant reduction of the unionisable staff while the casual staff increased. Further, the claimant did not like the proposed increment based on rise in the cost of living (inflation) of 10.95% and contended that the analysis by the CPMU was not independent. It was argued that the CPMU did not consider the fact that much of the alleged huge wage bill goes to the management and casual staff.



10. The claimant insisted on the claim for salary increment of 40% and 30% in the first and second year respectively, contending that inflation according to the Kenya Bureau of Statistics was 7.9% by June 30, 2022. Further the claimant contended that the Wage difference between respondents management staff and the claimant's members was very wide exceeding 50% contrary to wages policy guidelines from the Ministry of Labour. The claimant prayed for the reliefs sought in the suit plus costs.

### **Respondents' Submissions**

11. It was submitted from the onset that the suit herein is an invitation to the court to dictate the terms to be incorporated into the CBA, which according to the respondent is untenable as the work of the court is merely to interpret and enforce a contract as opposed to dictating the terms of such contract. For emphasis, reliance was placed on the case of *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* (2018) eKLR and *Kenya Game Hunting & Safari Workers Union v Micato Safaris* (2016) eKLR.
12. As regards the issue of wages and increments, it was submitted that the factors to consider are productivity, cost of living and the ability by the employer to pay (see *Kenya Tea Growers case*, supra). The court was told that there was wage increment of 7% in June 2018 and 6% on May 31, 2020 and therefore the shift from its offer of salary increment of 3% and 4% to 40% and 30% herein is unreasonable, overly exaggerated and unsustainable.
13. It was further submitted by the respondent that the huge increment proposed has not been justified by any reasons. Further the allegation that the claimants' members cannot place food on the table is unsupported by evidence. Reliance was placed on the case of *Tailors & Textile Workers Union v African Cotton Industries Ltd* (2017) eKLR where the court held that increase in wages depends on the cost of living and the financial capacity by the employer.
14. As regards the increase on leave travelling allowance, the respondent maintained that the existing Kshs 8000 was sufficient and ought to be retained. The reason given was that most employees come from Laikipia, Nyeri, Meru and the furthest Kakamega and therefore Kshs 8000 was fair. It was clarified that the travelling allowance was not an extra income but an allowance to facilitate travelling when going for leave.
15. Likewise, the respondent insisted on retention of the house allowance of Kshs 7500 contending that there is no evidence that the union members live in slums due to low house allowance. It was submitted that the economy is recovering from effects of covid-19 and once the economic situation improves the respondent will review the house allowance.
16. As regards the duration of 2 years for a CBA it was submitted that there is misconstruction of the wage guidelines published by the Ministry of Finance and National Treasury. Further the trend keeps the parties continuously negotiating because by the conclude the CBA, the attendant CBA duration is always half way gone. Therefore the court was asked to find that 3-4 years duration for a CBA is reasonable.
17. In conclusion, the respondent urged the court to reject the demands made by the claimant because they are excessive and beyond its ability to pay and adopt its proposals. Further the court was asked to order each party to bear its own costs.



## **CPMU Report**

18. The CPMU report indicate that from 2018, the respondent's revenue had taken an upward transitory just like the labour costs. Further the report shows that despite a deficit in 2018 and 2019, the respondent managed surplus in 2020 and 2021.
19. As regards the compensable factors, the CPMU indicated that there was increase in cost of living (inflation) during the existing CBA period being June 1, 2018 to May 31, 2020. It was indicated that in Nanyuki the Consumer Price Index (CPI) was 10.95% or 5.5% compensation each year made up of 1.020% in the first year and 9.93% in the second year. The increase of 5.5% each year would lead to a total of Kshs 1.99 million during the period under review.
20. As regards the issue of productivity, the CPMU found that there was no huge profit margins considering the data in table 3 in the CPMU report.
21. The CPMU further found that there is no wage disparity within the organization after considering the difference between the average pay for the three highest paid unionisable employees and that of three lowest paid management staff. The former gave an average of Kshs 30,516 while the latter was Kshs 29,736.00.
22. The CPMU further noted that the respondent was facing competition from other health care providers in the region and also liquidity challenges leading to struggles in fulfilling obligation to creditors and suppliers. The last challenge identified was the effects of covid-19 pandemic. In the end the CPMU was of the opinion that compensation in respect to inflation for the period under review is 11%.

## **Analysis and Determination**

23. Having considered the pleadings, evidence, submissions and the report by the CPMU, the following issues arise for determination:-
  - a. Whether the claimant has proved a case for increment of wages, house allowance and leave travelling allowance.
  - b. Whether the employer has the financial capacity to pay the proposed increments.
  - c. Whether the CBA duration should be extended to 3 or 4 years.
  - d. Whether the claimant is entitled to any relief.

## **Wage increment**

24. The claimant contends that a wage increment of 40% and 30% in the first and second year of the CBA respectively is warranted because its members' purchase power has been eroded by inflation. It further contends that its members have been discriminated by the employer who has already increased salary for the other staff by 5% to 15%. On the other hand the respondent contends that the proposed increment by the claimant is grossly exaggerated and it cannot afford it considering the hard economic situation and the effects of covid-19 pandemic. Therefore it proposes an increment of 3% and 4% in the first and second year of the CBA respectively.



25. It is now well settled jurisprudence that wage increment is depended on productivity, cost of living (inflation) and the employer's ability to pay. In the case of *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* (2018) eKLR, the Court of Appeal held that:-
- “consequently, a court faced with a question of wage increment ought to take into account productivity, cost of living and the ability to pay by the employer.”
26. The CPMU filed the aforesaid economic report to guide the court in determining the correct wage increment. On the issue of productivity, the report indicated under table 3 that in 2018 and 2019 the respondent got a deficit in its annual financial statement but in 2020 and 2021 it got a minimal surplus of Kshs 3,334,510.00 and 2,914,614.00 respectively.
27. The next factor to consider was wage differential of which it found that there was no disparity within the organization. The highest paid top three levels of unionisable employee earned Kshs 27,736, 29,958 and 33,919 being an average of Kshs 30,576.00 while the lowest three levels in the management cadre earned Kshs 26,107.00, 30,000.00 and Kshs 33,100 being an average of Kshs 29,736.00.
28. Finally the CPMU report considered the cost of living and found that in first year of the existing CBA, the Consumer Price Index (CPI) increased from 195.88 to 197.87 giving an inflation rate of 1.02%. During the second year of the CBA, the CPI rose from 100.00 to 109.93 giving an inflation rate of 9.93%. The total increase on the cost of living (inflation) was therefore 10.95%.
29. Having put all the above factors into consideration, the CPMU made the opinion that the correct rate of compensation due to inflation is 11%. I am persuaded by the said opinion first because there is no contrary evidence from the claimant and the respondent upon which the court can make a different conclusion. Secondly, the assessment by the CPMU is objectively done considering that salary increments are not meant to unjustly enrich the employees but to cushion them from loss of purchasing power occasioned by inflation, and also to give them a share of the employer's profits.
30. Paragraph e 1(i) of the report by the CPMU indicates that in 2020 the annual wage for unionisable staff was Kshs 17.6 million of which an increase by 5.5% per year in the new CBA would translate to Kshs 0.97 million in the first year and Kshs 1.02 million for the second year. The total increase in the annual wage for the unionisable staff would be Kshs 1.99 million.

### **House Allowance**

31. The claimant demands an increment of Kshs 500 per month in the first year and a further Kshs 500 in the second year because its members are living in unsecure slums. The respondents insists that the figure of Kshs 7500 should be retained due to hard economic situation and effects of covid-19 pandemic. The CPMU on the other hand referred to the wage guideline No 2 which provides that a half (1/2) of the permissible compensation in respect of inflation be allowed for housing. Consequently, it opined that a rate of 5.5% is the correct rate of increment for house allowance translating to an increment of Kshs 413 per month or Kshs 4,956.00 per annum. For the 54 unionisable staff, the added financial burden in this regard would be Kshs 4,956 x 54 equaling to Kshs 267,624.00

### **Leave Travelling Allowance**

32. The claimant sought for an increase of Kshs 500 from Kshs 8000 but the respondent insists on retaining the Kshs 8000. The said Kshs 8000 was agreed in 2018. The said pay is not an extra income but a facilitative pay to assist the employees travel home or go for holiday during the annual leave. It is paid once per year. There is no dispute that the cost of travelling in the county increased tremendously



over the 2 years of the existing CBA. An increase of Kshs 500 x 54 unionisable staff adds up to Kshs 27,000.00 per year translating to Kshs 54,000.00 in two years.

### **Respondent's Ability To Pay**

33. The respondent contends that any increment of wage beyond 7% for the 2 years plus the increment of house allowance and leave travelling allowance from the existing figures will be unsustainable. I have already referred to the analysis by the CPMU in its report and this court herein above. In the first year, the wage increase will be Kshs 970,000.00, housing Kshs 267,624 and leave travelling allowance Kshs 27,000 equaling to Kshs 1,264,624.00. In the second year the figure will be wage increase Kshs 1,020,000, housing Kshs 267,624 and leave travelling allowance of Kshs 27,000 equaling to Kshs 1,314,624. In the two years the added financial burden from the said 3 items will be Kshs 1,314,624 plus Kshs 1,246,624.00 equaling to Kshs 2,579,248.00
34. Table 3 in the report by the CPMU indicates that in 2020, the respondent made a net profit of Kshs 3,334,570 while in 2021 it reduced to Kshs 2,914,614.00. The CPMU then made observation that there was a positive trend in the respondents' financial position as a profit making entity. There is no evidence adduced by the respondent to prove the contrary. Consequently, I find and hold that the respondent will be able to afford the wage increment at the rate of 5.5% per year for the two years, Kshs 413 for housing and Kshs 500 for leave travelling allowance.

### **Duration of the CBA**

35. The claimant insists that the CBA duration should remain 2 years as per the wage guidelines of 1973. The respondent however fears that the duration of 2 years is keeping the parties in continuous negotiation considering that by the time a CBA is concluded half of its term is already gone. The court cannot agree more with the respondent. However the circumstances of this case dictates that I only limit myself to the duration of the 2 years covered by the CPMU report and direct the parties to consider negotiating their future CBAs on 3 or 4 years cycle as adopted by the civil service.

### **Final Orders**

36. Based on the foregoing analysis, I enter judgment in favour of the claimant in the following terms:-
- a. On clause No 3 of the proposed CBA, the claimant is awarded wage increment of 5.5% in the first year, effective May 1, 2021 and 5.5% in the second year effective May 1, 2022.
  - b. On clause No 7 of the proposed CBA, the claimant is awarded increment on the leave travelling allowance from Kshs 8,000.00 to Kshs 8,500.00 per annum.
  - c. On clause No 18, the claimant is awarded an increase of Kshs 413 per month on house allowance raising the monthly house allowance to Kshs 7,913.00 in the first year and Kshs 8,326.00 in the second year of the CBA.
  - d. On clause 28 of the proposed CBA, the duration of the CBA shall be 2 years effective May 1, 2021.
  - e. In order to encourage good relationship between the two social partners, I direct that each party meets its own costs of the suit.
  - f. The parties are directed to conclude the CBA forthwith.
  - g. Finally the court thanks the director of the CPMU, and Mr Ngache specifically for the economic report, which has assisted the court to resolve this dispute effectively.



**DATED, SIGNED AND DELIVERED AT NYERI THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

