



**Union of National Research and Allied Institutes and Allied Staff of Kenya
(UNRISK) v Bukura Agricultural College (Employment and Labour Relations
Cause 19 of 2021) [2023] KEELRC 1346 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 19 OF 2021**

JW KELI, J

MAY 26, 2023

BETWEEN

**UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES AND ALLIED
STAFF OF KENYA (UNRISK CLAIMANT**

AND

BUKURA AGRICULTURAL COLLEGE RESPONDENT

JUDGMENT

1. The claimant union, holding a recognition agreement with the respondent and the parties having failed to agree on terms of renewal of Collective Bargaining Agreement brought the instant claim dated June 14, 2021 and received in court on the June 15, 2021 for the court to determine the following issues:-
 - i. Validity period
 - ii. Bicycle allowance
 - iii. Commuter allowance
 - iv. Provision of airtime
 - v. Sanitation allowance
 - vi. Uniform, safety gear /clothing
 - vii. General wage increase
 - viii. Effective date.
2. The claimant then sought order for the parties to conclude and sign the Collective Bargaining Agreement within 30 days of the judgment and for costs.



3. The Claimant had in the statement of claim made proposals on all issues.
4. The respondent delayed to file response and on the February 24, 2022 through their counsel informed the court negotiations were ongoing on the issues. The court gave adequate time for the parties to conclude negotiations. On the May 17, 2022 the parties informed the court they had deadlocked on two issues being Basic wage increase and commuter allowance. The parties requested to submit on the two issues and have the Central Planning and Monitoring Unit of the Ministry of Labour make a report to assist the court. The respondent was granted leave to file defence to the claim.
5. The respondent filed memorandum of response thorough the Federation of Kenya employers dated June 10, 2022. The respondent annexed as its evidence appendix A which was SRC letter dated December 1, 2021 where it had issued guidelines to pave way for engagement with the claimant union which the respondents stated it followed with minimal adjustments. Appendix B was letter by the respondent dated December 9, 2021 informing the claimant union of having received the guidelines by Salaries and Remuneration Commission (SRC) and was ready to engage in the negotiations with a view of concluding the CBA within the sanctioned parameters. Appendix C was minutes of the meeting between the parties indicating the parties were unable to agree on the two issues of general wage increment and commuter allowance. The respondent stated it had no mandate to negotiate outside the SRC guidelines which include:-
 - a. Labour market efficiency
 - b. Legal social economic and environmental issues
 - c. Prevailing market rates from the result of a comparative market survey
 - d. Existing CBA
 - e. Cost of employment vis a vis resource capacity of the respondent
 - f. Affordability and sustainability of compensation and available budgetary provision.
6. The Central Planning and Monitoring Unit of the Ministry of Labour considered the positions of the parties on the two outstanding issues of basic wage increment and commuter allowance and presented to the court and the parties report dated November 17, 2022 through one Hudson Kamau. The parties requested to make their final submissions on the two issues in determination of the claim.
7. The report of the Central Planning and Monitoring Unit (CPMU) was an expert report to guide the court. The claimant submits that like other expert reports it is not binding and the court can take a different position.
8. The expert report dated November 17, 2022 indicated that the CPMU staff consulted the parties and made reference to their submissions, consulted with wage guidelines issued on the August 24, 1973 and subsequently amended especially the latest of November 23, 2005, the consumer price indices(CPI) and CBA's of organisations in the same sector.
9. The CPMU report indicated that the parties have a valid recognition agreement and had earlier concluded a CBA for July 1, 2016 to June 30, 2018. The parties failed to agree in the renewal of the CBA for 4 years which was to cover July 1, 2018 to June 30, 2022 at their level and at conciliation process.
10. On financial status of the respondent the CPMU report stated that the major revenue sources was government funding and fees collection from students. That the respondent posted a deficit of Kshs 24 million in 2019 and Kshs 41 million in 2021. That for the year 2020 the respondent posted a surplus



of Kshs 996,000/-. The claimant's position was that the number of students had increased and hence increased workload without resultant compensation. The CPMU report indicated that based on the claimant's demands the resultant additional wage would be Kshs 196,701,937.54 for the whole period of the proposed CBA. That in the first year the additional wage bill would be Kshs 36,5643,430.99./ =and increased gradually.

11. CPMU stated in the report that the respondent did not make counter offer on the wage increment proposal and adduced this in line with the SRC recommendations in letter dated December 1, 2021.
12. The CPMU report stated that based on consumer price indices of 13.15% for the CBA period the total additional bill would be Kshs 25,307,397.65 for the whole period of the proposed CBA. According to the report the Consumer Price Indices factor endeavours to restore the purchasing power of basic consumer goods and service which would have been eroded by inflation over the lifespan of the outgoing CBA. According to the report the year CPI would be 3.29% which would compensate the erosion of purchasing power of the claimant's members.
13. The SRC letter of December 1, 2021 advised for retention of current rates on basic salary and wages and commuter allowance. (D-appendix a).The claimant was of the view that the respondent had sufficient revenue generating activities to cover the increment, that the number of students was on upward trajectory increasing work load for its members hence the increment was justified. In the report the CPMU observed that the respondent relies on the exchequer to fund its operations and the current figure was at Kshs 180 Million annually. That the revenue generating activities being student fees and agriculture extension activities were sometimes hampered by delay on the exchequer release and challenge in collecting fees, that the outgoing CBA was not fully implemented largely due to delay in exchequer release. That the respondent had pending bills of Kshs 24.1 million as at June 30, 2022 and that there were government directives to cut public spending.

Determination

The legal framework.

14. 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.’
15. Nationally, the legal framework for collective bargaining agreement is set out under the [Labour Relations Act](#) (LRA) under section 57. Section 57(1) requires in mandatory terms, among other things, that an employer that has recognised a trade union should conclude a collective agreement with the recognised union setting out the terms and conditions of service for all unionisable employees covered by the recognition agreement. ‘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. (2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information’



16. As provided in section 59 of LRA such collective agreement binds all parties to the agreement; should be incorporated in the contract of employment of every individual employee covered by it and is enforceable and should be implemented upon registration by the Court. Section 59 reads:- ‘59. Effect of collective agreements (1) A collective agreement binds for the period of the agreement— (a) the parties to the agreement; (b) all unionisable employees employed by the employer, group of employers or members of the employers’ organisation party to the agreement; or (c) the employers who are or become members of an employers’ organisation party to the agreement, to the extent that the agreement relates to their employees. (2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers’ association. (3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement. (4) A collective agreement shall be in writing and shall be signed by— (a) the chief executive officer of any employer, the chief executive or national secretary of an employers’ organisation that is a party to the agreement or a representative designated by that person; and (b) the general secretary of any trade union that is a party to the agreement or a representative designated by the general secretary. (5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.’
17. By section 60 of the LRA, the collective agreement should be submitted to the Court. The court has a discretion to register but section 60(6) prohibits the court from registering the collective agreement if it conflicts with the LRA, or any other law or if it does not comply with any directives or guidelines concerning wages, salary levels and other conditions of employment issued by the Minister responsible for labour matters.
18. Collective agreement is defined in LRA as ‘a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers;’
19. The LRA provides in sections 62-73 for dispute resolution mechanism. The mechanism requires that the dispute be reported to the Minister first, who then appoints the conciliator and if the dispute is not resolved, reference to the Court should be resorted to.
20. Article 41(2) (a) of the [Constitution](#) provides that every worker has a right to fair remuneration and Article 41(5) provides that every trade union, employers’ organisation and employer has the right to engage in collective bargaining.

Claimant’s submissions

21. The claimant in final submissions reiterated its claim on basic wage increment by 20% per year to cushion its members from economic hardship and make them more productive. On commuter allowance the claimant reiterated its proposal of increase by Kshs. 2000 (Kenya shillings two thousand) stating that due to inflation prices of transport had increased. The claimant submitted that the CPMU report did not pronounce itself on the issue of commuter allowance. The claimant submitted that the CPMU report like expert reports was not binding on the court.

Respondent’s submissions

22. The respondent relied on the SRC advisory on retention of status quo on basic salary and commuter allowance and submits that the CPMU did not address itself on the sustainability of its recommendation. The court noted that the CPMU had suggested CPI increment of wages at 13.5 % to



cater for purchasing power during the CBA period. The Respondent submits that the financial status of the respondent was painted as gloomy by the CPMU.

23. The respondent asked the court to take judicial notice of the fact that the national economic performance was at all time low, that the respondent struggled to implement the outgoing CBA as observed in the CPMU report so any increment may not be implemented and may not be sustainable. The respondent submit that the role of SRC is to ensure sustainability of the institution through scientific and comparative analysis on both sectoral and national projections. That parties cannot be forced into negotiations when they have been willing to do so within constitutional and statutory parameters. The respondent to buttress the forgoing submissions relied on the decisions of the court in Nairobi *ELRC NO 2019 OF 2015 BIFU V Post Bank Limited* and *Nakuru ELRC NO 7 OF 2020 Kenya Chemical Workers Union v Pyrethrum Processing Company of Kenya Limited* where the court expressed the role of SRC in negotiations of CBA with specific reference to monetary clauses.

Decision

24. The Court proceeds to make decision guided by the principle of the right of the parties to engage in voluntary negotiations of collective bargaining agreements pursuant to ILO convention 98 of 1949, Article 4, which 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.’

25. The CPMU report was a scientific expert report requested by the parties to assist the court in determination of the two issues of basic wage increment and commuter allowance. The report indicated that the respondent was largely funded by government and the claimant so stated in its claim that, ‘the respondent depended on the government funding for its recurrent expenditure and had income generating programs from farm production. The CPMU report indicted that the said income generating programs were dependent on the exchequer. The SRC vide its letter of 1st December, 2021 advised against increment of basic wages and commuter allowance and guided for retention of status quo. The court finds that the funding of the respondent by exchequer on its recurrent budget and general operations and the said revenue programs being depended on the exchequer places the role of the SRC at higher ground as it has the constitutional mandate to ensure financial fiscal sustainability of the respondent and total public compensation under Article 230(5) of the *Constitution* which states that in performing its functions the commission shall take the following principles into account:-

‘ (a) The need to ensure that the total public compensation bill is fiscally sustainable;’

26. Article 230(1) of the *Constitution* established SRC as an independent commission with power and functions set out in Article 230(4) which are:

‘ (a) To set and regularly review the remuneration and benefits of all state officers; and
(b) To advise the national and county governments on the remuneration and benefits of all public officers.’



27. Article 230(5) states that in performing its functions the commission shall take the following principles into account:

- ' (a) The need to ensure that the total public compensation bill is fiscally sustainable;
- (b) The need to ensure that the public services are able to attract and retain the skills required to execute their functions;
- (c) The need to recognise productivity and performance; and
- (d) Transparency and fairness.'

28. In 2011, SRC made regulations titled:- 'The Salaries and Remuneration Commission (Remuneration And Benefits Of State And Public Officers) Regulations No 10 of 2011.

Regulation 18 provides:-

'18. Negotiations with Trade Unions

- (1) The Commission shall not negotiate with a trade union when determining, reviewing or advising on remuneration and benefits of State or public officers.
- (2) The management of a public service organization with unionisable employees shall seek the advice of the Commission before the commencement of any collective bargaining process with the respective union on the sustainability of the proposal of the union.
- (3) Where the collective bargaining process referred to in paragraph (2) is successful, the management shall, before the signing of the agreement, confirm the fiscal sustainability of the negotiated package with the Commission.'

29. Justice Otieno- Odek in the Court of Appeal *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR* decision held that the advisory by SRC was binding. The Judge stated:- '228. *In the Matter of Advisory Opinion of the Court, Constitutional Application No 2 of 2011* at paragraph 93, the Supreme Court in the context of the binding nature of an advisory opinion expressed itself thus:

' On this account, it is inappropriate that the Supreme Court's Advisory Opinion should be sought as mere advice. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would abide by that Opinion; the Opinion is sought to clarify a doubt, and to enable it to act in accordance with the law. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the *Constitution* to an 'idle provision', of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the *Constitution*, particularly the rule of law.'

229. It is my considered view that if a constitutional advisory opinion is binding, then a constitutional advice is more binding. In *Kenya National Commission on Human Rights - v- AG & Another, Petition No 132 of 2013; 2015 eKLR*, the High Court in a persuasive authority considered the legal consequences of failure to seek advice from SRC. In this case,



Parliament had enacted the Presidential Retirement Benefits (Amendment) Act providing for pension and benefits for retired Presidents Hon. Mwai Kibaki and Hon DT arap Moi. The High Court (Lenaola, J) stated that the law mandates that the input of SRC is to be sought as it is the body mandated to review salaries and remuneration; that SRC's advice ought to have been obtained BEFORE Parliament embarked on its legislative mandate; that by failing to seek recommendation from SRC prior to legislation, Parliament violated the Constitutional Provisions of Articles 10 and Article 230 (4) (a) and (b) and by so doing Parliament usurped the role of SRC; that Section 11 of the SRC Act was violated and the fact that SRC was not consulted was unconstitutional. In declaring the Presidential Retirement Benefits (Amendment) Act unconstitutional.

230. Guided by the Supreme Court decision In the Matter of Advisory Opinion of the Court, Constitutional Application No 2 of 2011 at paragraph 93 and persuaded conclusions by the learned Justice Lenaola in Kenya National Commission on Human Rights -v- AG & Another, Petition No 132 of 2013; 2015 eKLR, I hereby come to the conclusion and finding that the advice given by SRC is binding. The advice is binding because to hold otherwise would render the functions of SRC under Article 230 (5) idle; it would render SRC ineffective and irrelevant; it will introduce a discretionary concept of pick and choose in Kenya's governance structure. An interpretation that renders a constitutional Article idle and an Independent Commission ineffective does not pass the threshold of constitutionality. SRC is a constitutional organ and the trial judge erred in interpreting the Constitution in a manner that renders SRC's singular and exclusive mandate in Article 230 (5) (a) idle and ineffective. The trial court misapprehended the doctrine of separation of functions which is keystone in Kenya's governance structure. In holding that SRC has a non-binding advisory role in the determination remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per Article 230 (5) (a) of the Constitution.'
30. The foregoing decision of the Court of Appeal in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR is binding on the court. The court upholds said decision of Otieno- Odek JA and proceeds to hold that the advice given by SRC on the parameters of negotiations of the CBA by the respondent with the claimant vide letter dated December 1, 2021 is binding. The respondent is bound to negotiate the CBA under the parameters stated by SRC under its letter dated December 1, 2021 to which there would be retention of status quo on basic salaries/ wages and commuter allowance. Consequently the court dismisses claim dated June 14, 2021 with respect to the two issues of general wage increase and commuter allowance identified by the parties as outstanding in the claim.
31. On costs of the suit the court considered that the parties were cooperative in the negotiations and proceeded in good faith. I exercise my discretion and order each party to bear its costs on the suit. The court advises the parties to proceed and conclude the CBA as guided by SRC.
31. It is so ordered.
- The court wishes to appreciate the parties for their amicable conduct in the case. The court wishes to further appreciate the CPMU of the Ministry of Labour and Social Protection for their assistance in the suit by preparation and filing report on the economic dispute in a timely manner.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT THIS 26TH MAY , 2023.

JEMIMAH KELI,

JUDGE.



IN THE PRESENCE OF :-

Court Assistant: Lucy

Claimant:- Mokaya

Respondent:-Dickens Ouma

