



Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Board of Management Bishop Sulumeti Girls High School (Employment and Labour Relations Cause E003 of 2023) [2023] KEELRC 2200 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2200 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2023**

**JW KELL, J
SEPTEMBER 21, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT**

AND

**BOARD OF MANAGEMENT BISHOP SULUMETI GIRLS HIGH
SCHOOL RESPONDENT**

JUDGMENT

1. The claimant is a registered union operating within the Republic of Kenya and holding a valid recognition agreement with the respondent. The claimant following failed attempts to negotiate the collective bargaining agreement filed in court statement of claim dated May 30, 2023 and seeking the following reliefs:-
 - a. A declaration that the respondent action was unfair, unlawful and/or illegal
 - b. The respondent be encouraged /advised to negotiate the CBA
 - c. The costs of this suit be paid by the Respondent.
2. The claimant together with the statement of claim filed verifying affidavit by Thomas Mboya the Branch secretary and list of documents dated May 30, 2023 and the bundle.
3. The claim was opposed by the respondent who entered appearance through the law firm of Wamalwa & Echesa Company advocates and filed response dated June 20, 2023 together with respondent’s list of documents of even date and the bundle.



Written Submissions

4. The court in consultation with the parties directed that the claim be canvassed by way of written submissions. The claimant's written submissions dated July 22, 2023 were drawn by Antonio Shiraku, industrial Relations officer of the claimant, and filed in court on the July 24, 2023. The respondent's submissions dated July 19, 2023 were drawn by Wamalwa & Echesa Company Advocates and received in court on the July 20, 2023.

Claimant's case in summary

5. The claimant is a trade union which has a valid recognition agreement with the respondents. The parties have previously negotiated collective bargaining agreements with the last being signed on March 14, 2018 with expiry date of June 30, 2019. That efforts to negotiate a subsequent Collective Bargaining Agreement have failed and they blame the respondent for failing to sit and negotiate.
6. The claimant then reported a trade dispute through the Secretary General to the Cabinet Secretary, Ministry of Labour and a conciliator was appointed. That the management ignored invitation by the conciliator who then issued certificate of unresolved dispute.

Respondent's case

7. The respondent's position was that under section 45 of the CBA signed between the parties on 14th March 2018 the agreement was to remain in force until amendments are made. That the respondent received a draft CBA proposal on 18th June 2019 and on the 11th December 2019 the management held a consultative meeting with the claimant and resolution NO. 10 OF Min 2 /12/2029(CBA revision negotiations) the parties agreed as follows:- i. the school attains the minimum wage as provided for in the law. ii. The 12.5% increment be paid in 2020. (ii). New CBA be discussed in September 2020 and be implemented in 2021. The respondent states that the first 2 proposals have been implemented and that the new CBA is yet to be implemented due to failure by claimant to honour invitations to the board management. The respondent stated that they responded to the conciliator on receipt of his communication vide letter dated March 9, 2023 notifying the conciliator that there was no dispute as the claimant had refused to agree on date convenient to both parties. The respondent stated they are committed to negotiating and concluding the CBA under review.

Determination

Issues for Determination

8. The parties addressed the merits of the claim in general and reliefs sought. The issues to be determined are thus:-
 - i. Whether the claim is merited.

Issue. Whether the claimant was merited

Claimant's submissions

9. The claimant reiterates the facts in the claim which I summarised above on the efforts made towards negotiation of new CBA and frustration faced which they blame the respondent for lacking intention to negotiate new CBA. The claimant submits that under the Constitution article 41 subsection 5, 'every trade union, employer's organisation and employer has the right to engage in collective bargaining.' That the Labour Relations Act section 57 (1) states:- '(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." The ILO Convention No. 98 provides for right to organise and collective bargaining which Kenya ratified on June 13, 1964.

10. The claimant further submits that considering the voluntary nature of collective bargaining process and the law governing the same it was prudent for the management to honor the several letters emanating from the conciliator calling for joint meetings and having failed to do so meant the management had no intention of having the CBA negotiated. That the respondent be advised to negotiate the CBA to cushion the members against the current high cost of living.

Respondent's submissions

11. The respondent reiterated that it was committed to negotiations of the CBA stating the delay was caused by the claimant's desire to negotiate on own terms. That the claimant be compelled to attend a meeting with the respondent with a view of agreeing on convenient date and time to negotiate the CBA. That the court be guided by article 159(2)(c) to compel the parties to schedule meetings on convenient dates to negotiate a new CBA. That article 41 of the Constitution rubberstamps the essence of CBA that the terms and conditions ought to be voluntary as stated in Teachers Service Commission v Kenya Union of Teachers & 3 others 2015 e KLR '159. It is my considered view that collective bargaining is neither compulsory nor automatic. It is the source of voluntarily negotiated terms and conditions of service for employees. Collective bargaining is a platform upon which trade unions can build to provide more advantageous terms and conditions of service to their members. The Constitution in article 41 (5) recognizes the right to engage in collective bargaining. The right is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining."
12. The respondent further submits that the court should allow the parties to negotiate the CBA as held in Union of National Research and Allied Institutes Staff of Kenya (UNRISK) v Kenya Research and Development Institute (KIRDI) (2016) e KLR where justice Nzioki wa Makau observed: "The steps that have to be taken by the parties before me are to sit and negotiate a Collective Bargaining Agreement. It has never been nor can it be the responsibility of the court to set the terms of the Collective Bargaining Agreement. The Collective Bargaining Agreement for 2012 ought to have been concluded ages ago. It is notable that the parties have been engaged in litigation since 2012 and have expended large sums of money to undertake this as well as energy and focus. This is misguided. I will order as follows to save them from further litigation. Parties should present within 30 days a validly negotiated Collective Bargaining Agreement to cover the period 2012-2014. The law is clear as to who the Collective Bargaining Agreement covers. Should parties fail to agree on any term or issue they should approach the relevant Ministry and obtain conciliation before coming to Court. In industrial relations, the Court is the final arbiter yet parties seem to revel in Court battles that do not resolve the issues they need resolved....."

Decision

13. The facts and the applicable law are as stated above and it was the opinion of the court that the failure to negotiate a new CBA was caused by failure to agree on mutual dates for meeting as found by the conciliator at page 66 of the claim that, 'the parties started corresponding with one another on the signing of another CBA upon the expiry of the existing. That the union although skipped one or two meetings scheduled..' The conciliator opined the respondent had no intention to conclude the CBA yet also found the respondent had failed to attend one or two scheduled meetings.



14. The respondent filed in court its letter dated March 9, 2023 which was received at the county labour office Kakamega county on the March 10, 2023 addressed to the Conciliator Mwinami on the alleged trade dispute in which it explained the why the CBA had not been concluded and stated there was no dispute and hence non-attendance to the meeting of the conciliator.
15. The court on considering the conciliator report and the correspondence by the parties finds that the delay to negotiate the CBA was caused by both parties and hence the conclusion by the conciliator that the respondent had no intention to conclude the CBA was not consistent with his notes.
16. The process for collective bargaining agreement conclusion and registration is provided for under section 57 of the *Labour Relations Act* to wit:- ‘(57)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 that will allow the trade union to effectively negotiate on behalf of employees. (3) All the information disclosed by an employer as specified in subsection (2) is confidential and shall not be disclosed by any person to a person who is not engaged in the negotiations. (4) An employer is not required to disclose information that— (a) is legally privileged; (b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or an order of any court; (c) if disclosed, may cause substantial harm to the employer or employee; or (d) is private personal information relating to an employee, unless an employee consents to the disclosure of that information. (5) If there is a dispute about what information is required to be disclosed in accordance with the provisions of this section, any party to the dispute may, in writing, refer the dispute to the Minister for conciliation. (6) If a dispute remains unresolved, after it has been referred to the Minister under subsection (5), any party to the dispute may refer the dispute to the Industrial Court under a certificate of urgency. (7) In any dispute about an alleged breach of confidentiality, the Industrial Court may order that the right to disclosure of information be withdrawn for a period specified by the court. (8) No person shall disclose any confidential information disclosed under this section to a person who is not a party to those negotiations.’
17. The status of the claimant was not in dispute. It was also not in dispute there was a valid recognition agreement between the parties. It was also not in dispute that a new CBA had not been concluded. The claimant stated the last CBA was signed on the March 14, 2018 expired on the June 30, 2019. The respondent disputed the expiry of the CBA and relied on clause 45. Clause 45 of the CBA states:- ‘This agreement shall come into force with effect from July 1, 2017 to June 30, 2019 thereafter the agreement shall remain in force until amendments are made’. The court opinion was that the CBA despite the end date remained in force until a new CBA is concluded.
18. The Claimant made a case that a new CBA was necessary to cushion its members from rising his cost of living. The negotiations of collective bargaining agreements 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)



19. The court opines that both parties are willing to negotiate and conclude a new collective bargaining agreement to replace the 2018-2019 one which had long come to an end though still in force pursuant to clause 45. I do uphold the decision in *Teachers Service Commission v Kenya Union of Teachers & 3 others* 2015 e KLR to the effect that the right to collective bargaining by the employer(or its union/ federation of employers) and the employees’ union is founded on the concept of social dialogue, freedom of contract and autonomy of parties in collective bargaining. Having held both parties are responsible for the failure to negotiate a new CBA and finding that they are both willing to negotiate voluntarily and further being in agreement with the decision of Justice Nzioki wa Makau in *Union of National Research and Allied Institutes Staff of Kenya (UNRISK) v Kenya Research and Development Institute* (KIRDI) (2016) e KLR, I hereby order the parties to proceed and negotiate and conclude a new validly negotiated CBA and present the same to the relevant court for registration within 45 days of this order. Should the parties fail to agree on any term or issue they should approach the relevant Ministry and obtain conciliation before coming to court.
20. No order as to costs
21. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST SEPTEMBER 2023.

JEMIMAH KELI

JUDGE

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : Shiraku

For Respondent: Echesa

