



Kenya Union Of Commercial Food & Allied Workers (KUCFAW) v Kenya National Library Service (Cause 1438 of 2018) [2023] KEELRC 3434 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3434 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1438 OF 2018
NZIOKI WA MAKAU, J
NOVEMBER 22, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS
(KUCFAW) CLAIMANT**

AND

KENYA NATIONAL LIBRARY SERVICE RESPONDENT

JUDGMENT

1. The Claimant Union instituted this suit against the Respondent through the Memorandum of Claim dated October 12, 2018 asserting the Respondent’s refusal to implement the Collective Bargaining Agreement’s (CBA) clause 4(ii)(c) on Hardship Allowance from July 1, 2010; to adjust wages to be in conformity with statutory minimum wages from May 1, 2017; and to implement clause 5(a) of the CBA on Outpatient Medical Allowance with effect from August 1, 2018. The Claimant thus prayed that this Court does declare that the Respondent’s failure to adjust employees’ wages to be in conformity with the *Regulation of Wages (General)(Amendment) Order 2017* is illegal. Secondly, that the Court ought to declare the Respondent’s failure to pay hardship and medical allowances as detailed in the parties’ CBA unlawful. Thirdly, the Court should order the Respondent to adjust the employees’ basic wages to be in conformity with the *Regulation of Wages (General)(Amendment) Order 2017* and pay the resultant arrears from May 1, 2017. Moreover, that the Court should order the Respondent to honour the said clauses of the CBA and pay the said allowances together with the resultant arrears and until a new staff insurance medical cover is rolled out and implemented. It was the Claimant’s further prayer that the aforementioned payments by the Respondent be made within 14 days of the date of the Judgment and that costs of the claim be paid by the Respondent. The Claimant’s case was that the parties had concluded several CBAs, the last of which came into effect on July 1, 2010 and was still in force. That employees in hardship/remote areas had complained of not being paid hardship allowances causing the Union to address the Respondent on the same on March 28, 2018. It further averred that it also wrote to the Respondent on April 27, 2018 asking them to adjust staff wages that were below the



statutory wages order, to conform with the said Order that had come into effect on May 1, 2017. That thereafter, in its letter dated May 16, 2018, the Respondent admitted the underpayment of wages and promised to adjust the same from July 2018. That the Respondent also disclosed in their said letter the existence of a Circular by the Salaries and Remuneration Commission (SRC) on the results of Job Evaluation and a 2013 SRC Circular on basic salary, house and commuter allowance.

2. In addition, the Claimant averred that the Respondent ignored the Union's letter dated September 1, 2018 addressing them on the workers' grievances touching on statutory wages and medical. It noted that the Respondent had on August 9, 2018, through a circular, required employees to forfeit their outpatient medical allowance to enable the Respondent roll out a comprehensive staff insurance medical cover. That it subsequently addressed the Respondent on the proposed comprehensive staff insurance medical cover in a letter dated August 20, 2018 but the Respondent insisted on continuing with the said as communicated in their letter dated September 26, 2018. It was the Claimant's averment that in September 2018, it reported the grievances to the Ministry of Labour for conciliation.

3. Respondent's Case

- . In reply, the Respondent filed a Statement of Defence dated November 19, 2018 averring that they indeed had a CBA with the Claimant Union until late 2018 when the Union purported to raise issues spanning more than three years ago, on implementation of some clauses in the CBA. On implementation of the Hardship Allowance that was to be paid to employees in remote areas at the rate of 40% of the basic or Kshs. 5,000/- whichever is more, the Respondent admitted having paid employees a maximum of Kshs. 5,000/-. Its explanation was that it being a State Corporation, it was constrained of funds from the exchequer and that any changes to the adjustments in payments would be done when Treasury avails the funds.
4. Regarding the issue of adjusting wages to be in conformity with the statutory minimum wages from May 1, 2017, the Respondent averred that the same would be effected and backdated to July 2017 based on the job evaluation and also in line with the SRC approved structure and the statutory minimum wages. In addition, that the Board had requested the National Treasury to avail funds to implement the job evaluation results through letters dated June 20, 2018 and that in yet another letter, the Executive Office of the Respondent analysed the Gazette Notices for 2015 and 2017 and highlighted the financial implication of adjusting the wages. The Respondent's stance was that its CEO has always requested the Treasury for money to implement the CBA fully as a sign of their commitment to sound labour relations and employee welfare and motivation. Further, that the parent Ministry of Sports, Culture and Heritage through the Principal Secretary, had also requisitioned Treasury to release funds as per the SRC Advisory, for purposes of implementing the Minimum Wage.
5. As regards implementation of the Medical Allowance at clause 5 of the CBA, the Respondent averred that its Board in consultation with Treasury had agreed to have the medical scheme for the unionisable staff equivalent to the other non-unionisable staff and that Treasury had agreed to provide the funds on condition that the staff forfeit their medical allowances. That the said information was relayed to the employees through a Circular dated August 9, 2018 on implementation of the comprehensive medical insurance cover for the 2018/2019 financial year. That 95% of the employees had subsequently complied with the requirement to provide additional information for the same.
6. Parties agreed to have the matter determined through evidence on record.

7. Claimant's Submissions

- . The Claimant submitted that from Exhibit 14 in the Claimant's Further List of Documents, 40% of employees' basic wages was less favourable compared to Kshs. 5,000/-. That the Respondent declined



to adjust such hardship allowances to Kshs. 5,000/- as required under clause 4(ii)(c) of the CBA for the period from July 1, 2010. In sum, the Claimant submitted that the total arrears for the unpaid hardship allowances for 43 employees of the Respondent from July 1, 2010 to June 30, 2023 was Kshs. 4,332,993.60. Regarding outstanding arrears from minimum wages, the Claimant submitted that no employer in Kenya is authorised to pay wages below the Regulation of Wages Order as issued from time to time by the CS for Labour. That the Regulation of Wages (General)(Amendment) Order derive its force from the Labour Institutions Act, 2007 and that once the same is gazetted, it has force of law and an employer is bound to observe it. It was the Claimant's submission that the Respondent had pegged the said arrears of the minimum wages at Kshs. 23,558,860.12 which figure it countenanced considering the Respondent's letter to the Treasury on August 30, 2018 seeking funds of a similar amount to adjust salaries that had fallen below the statutory minimum wages order. That it therefore followed that there was agreement on the claim on underpayments and what remained was payment of the same.

8. On the Outpatient Medical Allowance, the Claimant submitted that whereas the Respondent stopped implementation of clause 5(a) of the CBA from August 1, 2018 and finally operationalised the comprehensive Staff Medical Cover with effect from September 1, 2019, there was a 13 months' period of unpaid outpatient medical allowance in between. While disagreeing with the Respondent's assertion that the National Treasury provided them with funds to implement the said comprehensive Medical Cover on condition that staff forfeit the Outpatient Medical Allowance, the Respondent asserted that the CBA did not provide for forfeiture of any benefits contained therein. That all the 223 unionisable employees of the Respondent did not thus earn their medical allowances for 13 months as spelt out under clause 5(a) of the CBA and the same in arrears totalled Kshs. 3,246,880/-. It was the Claimant's submission that this Court ought to grant the prayers sought in the claim and order the Respondent to pay the sum of Kshs. 31,138,733.72 within 14 days of the date of Judgment. In addition, that costs of the suit be awarded to the Claimant in quantified amount as the Claimant does not benefit from the Advocates Remuneration Order.

9. Respondent's Submissions

- . The Respondent relied on the Statement of Response, the documents attached thereto and the Statement by Mr. Richard Atuti filed on November 20, 2018. It submitted that the issues raised by the Union in the Claim were issues that do not require to be brought to court before going through a conciliation process. That the dialogue mechanism allowed between the employer and employee had not been fully exhausted and that it has always been open in the implementation of the CBA. It was the Respondent's submission that the Claimant Union was aware that the parent Ministry had requested the National Treasury to release funds to implement the underpayment of wages as communicated to the Claimant in the letter dated October 16, 2018. Regarding the claim for medical allowance, it submitted that section 26 of the Employment Act provides for minimum terms and in case other better terms are applicable, then the employer ought to use the better terms while managing the employment contract of its employees. That the previous staff medical allowance of Kshs. 1,120/- was too small an amount to cover an employee and their family and it was thus advantageous for all employees to have the Comprehensive Medical Cover. The Respondent also maintained that the records provided show that it had always implemented the Hardship Allowance and that the Claimant members are receiving the amount.
10. The Respondent further submitted that the Claim herein was in respect to clauses negotiated prior to 2018 when the suit was filed. That the resultant effect was that the parameters used in 2018, which is 5 years ago, cannot be used now and the Respondent being a state corporation, it must be guided by the provisions of the SRC. That in the absence of guidelines from the SRC or at any rate any guidelines from the National Treasury, this Claim must fail. The Respondent thus prayed for the Court to direct



that the matter herein be subjected to the provisions of the *Salaries and Remuneration Commission Act, 2011* and that parties go back to the negotiating table along the lines guided by the said Commission. It further prayed that this Court, in the meantime, have the case dismissed with costs to the Respondent.

11. This case highlights the sad case of employees in the Respondent. In this particular case, the Respondent is accused of underpayment of wages below the statutory minima which are ironically set by the Government, the paymaster of the Respondent. This surely cannot be allowed to continue. The mandate of the Salaries and Remuneration Commission is *inter alia* to set and regularly review the remuneration and benefits of all State officers; and as it executes its functions take into account the principles such as the need to ensure that the public services are able to attract and retain the skills required to execute their functions.
12. When the Respondent is unable to pay statutory minima as set in the *Regulation of Wages (General) (Amendment) Order* there is nothing a court can do other than declare such failure as illegal and unlawful. The Court finds the failure to pay staff of the Respondent wages in line with the *Regulation of Wages (General)(Amendment) Order, 2017* was not only illegal, but something the Respondent must correct with dispatch by ensuring the underpayments are promptly resolved with the relevant Ministry and Treasury. With that in mind, the Court directs the parties to resume negotiations in respect of the collective bargaining agreement due. The negotiations must be commenced in earnest noting that the responsibility of SRC is not to cap salaries but to ensure the salaries paid are lawful and not illegal as has been the case in the Respondent. SRC guidelines cannot supersede the law contained in various *Regulation of Wages (General)(Amendment) Orders* which the Respondent seems to imagine is the role of SRC. As the Respondent was the cause of this suit, the Claimant will be entitled to costs of this suit.
13. The final result is that on the strength of the law on minimum wages guidelines as enumerated in Government directives in the *Regulation of Wages (General) (Amendment) Orders*, the parties CBA;
 - a. This Court declares that the Respondent's failure to adjust its employees' wages to be in conformity with the *Regulation of Wages (General)(Amendment) Order 2017* illegal.
 - b. The Court declares the Respondent's failure to pay hardship and medical allowances as detailed in the parties' CBA unlawful.
 - c. The Court orders the Respondent to adjust the employees' basic wages to be in conformity with the *Regulation of Wages (General)(Amendment) Order 2017* and pay the resultant arrears from May 1, 2017.
 - d. The Claimant be paid costs of the suit by the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

