



**IN THE REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC. CAUSE NO. 1451 OF 2018**

**KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA.....RESPONDENT**

**JUDGMENT**

1. The Claimant is a Trade Union registered to represent workers in the Petroleum Oil and Gas Industry, Petrol and Service Stations and Allied Companies. The Respondent is a State Corporation involved in all aspects of petroleum supply chain concerning the upstream oil and gas exploration, midstream infrastructure development, and downstream marketing of petroleum products where it operates over 99 service stations country wide.

2. The Claimant and the Respondent have signed a Recognition Agreement and concluded several Collective Bargaining Agreements (CBA) the last one being 2014-2016 CBA which expired on 30.6.2016. Thereafter, the two parties commenced negotiation for the 2016-2018 CBA but differed especially on the increase of the salary with the Claimant proposing a total of 40% salary increment of 20% per year while the Respondent maintained a nil salary increment citing unhealthy financial status.

3. On 24.5.2017 the Claimant reported a trade dispute to the Ministry of Labour and a conciliator Mr. J.N. Makaa was appointed to help resolve the dispute. After several attempts, the conciliation failed to resolve the dispute and the Claimant brought the instant suit on 22.20.2018 seeking the following reliefs:

**(a) The Claimant Union prays that this Honourable Court gives an order that directs the Respondent company to give a monetary basis wage increment of 40% spread over 2 years as 20% for the 1<sup>st</sup> year and 20% for the second year to the union members as proposed by the Claimant union in its CBA proposals effective from 1<sup>st</sup> July, 2016 within 7 days from the date of award.**

**(b) The Claimant union prays that this Honourable Court do issue an order that directs the Respondent company to also give monetary increments on other monetary clauses to the union members as proposed by the Claimant union in its CBA proposals effective from 1<sup>st</sup> July, 2016 within 7 days from the date of award.**

**(c) That there be an order compelling the Respondent to allow staff from Nock-5 to become unionisable as per Claimant's revised proposal.**

**(d) That the Honourable Court do issue an order that direct the Respondent to commence another cycle of CBA 2018/2020 within the next 90 days.**

**(e) The claimant union prays that the Respondent be directed to pay costs of the case.**

4. On 7.11.2018, with the consent of the parties, the matter was referred to Court Annexed Conciliation before Mr. Jeremiah Katana, a Labour Officer Nairobi. Again, with parties consent, the court requested for a report from the Central Planning and Monitoring Unit (CPMU) on the Respondent's financial position, in order to assist the conciliator to resolve the dispute.

5. The CPMU did its report which was forwarded to the court and the conciliator. The conciliator prepared his opinion on 11.7.2019 advising that the 2016-2018 CBA be suspended indefinitely until the respondent's financial position becomes healthy since any salary increase will an effort in futility.

6. The claimant was not persuaded by the conciliators opinion and the parties agreed to file written submissions on the matter for the court to

resolve the dispute. In the meanwhile the court invited the SRC to file a report on the dispute pursuant to Rule 37(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

### **CLAIMANT'S SUBMISSIONS**

7. The Claimant submitted that the CBA under review for 2016-2018 is now overdue. It further submitted that during the period of negotiations, the Respondent never raised the issue of 4 year CBA cycle and it is the Claimant's view that the requirement of 4 year CBA cycle is a new issue which should not be used to defeat the CBA.

8. The Claimant also submitted that the report by the Salaries and Remunerations Commission dated 21.8.2020 is an advice and must not be relied upon by the court to delay the case. In its view, the SRC should have noted that the 2018-2020 CBA is already in arrears and recommended the 2016-2018 and 2018 – 2020 CBAs to be collapsed into one to cover the 4 years cycle.

9. As regards the proposed salary review, the Claimant reduced the demand from 40% to 20% equalling to 10% for 1<sup>st</sup> year and 10% second year). It based the said new proposal on the steady increase in revenue over the 4 preceding years as shown in part E of the CPMU report. It further contended that part C of the CPMU report indicates that the 168 Management Staff consumed the elephant share of the Respondent's revenue compared to the 32 unionisable staff. It contended that the loss shown in Part E of the report was due to the huge Managerial Wage Bill and Managerial Investment Policies done without involving the union members.

10. The Claimant referred to Part F of the CPMU report to submit that the real challenges facing the Respondent is poor management and inefficiency as opposed to issues indicated by the report. In its view, the CPMU report did not show the correlations between the challenges and the increased expenditure by the Respondent.

11. The Claimant submitted that the rise in CP1 of 12.72% indicated in Part G (1) of the CPMU report ought to be awarded to cushion the union members for a period under review. It submitted that Kshs. 3,606,110 additional wage bill over the 2 years based on the said CPI is not much compared to the Managerial Wage Bill in place. As a show of good will and in consideration of the Respondent's financial status, the Claimant abandoned all other stand-alone monetary clauses in the 2016-2018 CBA.

12. On the other hand, the Claimant submitted that employees in Job Grade NOC5-10 be declared unionisable pursuant to Article 41 of the Constitution of Kenya and the Industrial Relations Charter (IRC) of 1984, because they are not policy makers, in the Corporations and they do not have capacity to hire, reward, promote, demote, punish, appraise, suspend and or keep confidential information on Respondent's operations. It contended that currently, only Job Grade NOC 7-10 are unionisable representing 16% of the total staff while management takes the remaining 84% according to the CPMU report. It argued that the Management system globally agree that management staff should be 25% to supervise and manage 75% unionisable staff.

13. In view of the matters submitted above the Claimant urged the court to award the unionisable staff a basic salary increase of 10% for the 1<sup>st</sup> year and 10% in the 2<sup>nd</sup> year. It further prayed for an order to compel the Respondent to classify employees in job Grade NOC 5-10 as unionisable staff. Finally it prayed for an order compelling the parties to sign and register the 2016-2018 CBA within 30 days to allow the subsequent 4 year CBA cycle for 2018-2022 to commence as per the SRC guideline. It also prayed for costs.

### **RESPONDENT'S SUBMISSIONS**

14. The Respondent submitted that the report by the CPMU is clear that the Respondent's financial performance over the period had not been healthy. According to the Respondent, the CPMU report supports her case that it does not have the ability to increase benefits of her unionisable staff. It contended that according to the orders of the court, the CPMU was directed to assess the Respondent's ability to increase benefits of its unionisable staff and it has returned a verdict in the negative and therefore the court should adopt the CPMU report fully.

15. In addition, the Respondent submitted that the SRC filed its report dated 16.11.2020 which is unequivocal that the proposals made by the Claimant are fiscally unaffordable and unsustainable, given the fiscal position of the Respondent. It further contended that the report by SRC is that even the retention of the allowance ad benefits as proposed by the management is also not affordable nor sustainable until the Respondent turns and sustains its financial trajectory toward recovery, growth and profitability.

16. In the end the Respondent urged the court to adopt the reports by the CPMU and the SRC and proceed to dismiss the suit with costs.

### **ISSUES FOR DETERMINATION**

17. I have carefully considered the materials presented to the court by the parties and also the reports by the CPMU and the SRC. The issues for determination are:

(a) *Whether the court should award an increase of basic salary to Respondent's unionisable staff and if so what percentage.*

(b) *Whether the court should order the Respondent to classify Job Grade NOC 5-10 as unionisable cadre.*

(c) *Whether the court should order the partes to sign the 2016-2018 CBA and thereafter negotiate 4 year cycle CBA for 2018-2022.*

### **SALARY INCREASE**

18. The Claimant proposed a 40% increment being 20% in the first year and 20% in the second year, among other items. However, in its

submissions, it dropped all other monetary proposals and reduced the basic salary increment to 20% being 10% in the first year and 10% in the second year. On the other hand, the respondent maintained that there should be no salary increment and that all the terms under the expired CBA should be retained owing to the its financial constrains as indicated in the CPMU and SRC reports.

19. I have considered the SRC's report dated 16.11.2020 which I appreciate that it remains an advice and as such not binding on the Court in discharging adjudication duty. The report advised that the proposal by the Claimant to increase the salary by 40% and the proposal by the Respondent to retain the status quo are fiscally unaffordable and unsustainable given the Respondent's financial position until the Corporation turns and sustains its financial trajectory towards recovery, growth and profitability.

20. The foregoing notwithstanding, the SRC acknowledged the salary increment of 5% was given by the respondent in January 2018 to cushion the employees against the cost of living adjustments. According to the SRC, the said increment was within the cycle of the disputed CBA. The basis of the said 5% salary increment has not been shown and as such one cannot say whether any of the factors for determining wages was considered.

21. I have also considered, the CPMU's report dated 10.5.2019 which also observed that the Respondent's financial performance over the period under review has not been healthy noting that the Respondent made losses between 2014 and 2017. However, CPMU noted that during the period under review, the costs of living went up from 173.78 consumer price index (CPI) in 2016 to 195.85 in 2018 representing an increment of 22.2 equalling 12.72% rise for 2 years or 6.36% each year.

22. Based on the foregoing, the CPMU opined that the Claimant's members' purchasing power of basic consumer goods and services was eroded by inflation during the period of the disputed CBA by the said percentage. According to the CPMU report, a grant of salary increment based on the CPI of 6.36% each year will add the Wage Bill by Kshs. 1,747,485 in the first year and Kshs. 1,858,625 in the second year totalling to Kshs. 3,606,110 for the 2 years.

23. The CPMU further noted that labour productivity is an additional factor to consider when dealing with wage compensation and reiterated that in this case, the Respondent's financial performance during the period of the disputed CBA was unhealthy.

24. The factors to be considered in determining wages were set out in the Wage Guidelines which came into force on 1.11.2005 and were summarised by the Court of Appeal in **Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR** as follows:

*“Under the guidelines, the prime elements of determining wages are listed as realized productivity gains, the ability of the economy and employers to sustain increased labour costs and the costs of living. ...*

*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.”*

25. The CPMU and SRC reports have all painted a dull picture of the Respondent's financial position. The respondent has however not responded to the claimants allegations that its financial woes have been occasioned by mismanagement and bloated management workforce contrary to the trend in globally recognized management system which prefers a lean management staff supervising a bigger unionisable workforce.

26. The said contention is founded on the report by CPMU which shows that the management staff increased from 157 to 168 between 2014 and 2017 while the unionisable staff reduced from 35 to 32 in the same period. The wage bill for management increased from Kshs. 347,903,314.96 to Kshs. 365,437,981 while the unionisable wage bill increased from 23,373,793.39 to Kshs.27, 392,586. The court is, however not in a position to dictate to the employers on the composition or operational management and policy matters. May be the claimant should raise that matter with the employer during future negotiations or with any other relevant agencies if any.

27. In addition, the claimant has not produced any documentary evidence to prove the alleged mismanagement like books of account, report from the Auditor General, Police record, Court records or the Anti-corruption Agency records. Suffice it to say that the report by CPMU and the advice given by the SRC herein who had access to the respondent's financial records, indicate clearly that the respondent is financially unable to afford any salary increment due to its financial constraints.

28. It follows that the court must now balance between the respondent's financial difficulties and the need to cushion the claimant's members from the hard economic circumstances occasioned by the erosion into their purchasing power.

29. The Respondent gave the Claimant's members 5% increment in 2018 without considering the actual erosion of the employee's purchasing power. The CPI has now been established by the CPMU experts as 6.36% per year and 12.72% for the two years. Going by the said CPI, then an award of salary increment is justified. However, that is subject to the employer's ability to pay and sustain the additional wage bill.

30. In **Kenya Ferry services limited v Dock Workers union (Ferry Branch) [2015] eKLR** , Rika J held that:

*“The CPI for the period 2011 to 2013 shows an average annual inflation of 5%. Whereas the employees should be compensated for the loss of money value, it is important such compensation does not result in an unsustainable wage bill”*

31. Again in **Kenya Game Hunting & Safari Workers Union v Micato Safaris [2016] eKLR**, Abuodha J held that:

*“The purpose of wage increase is to cushion the worker from inflation by enhancing purchasing power however this can only be effectively achieved against a background of improved performance and sustainability of the wage bill. A wage increment whose effect would be to trigger the journey to collapse of an organization is harmful to the self-same worker it was intended to benefit.”*

32. In this case, the respondent’s financial position is unhealthy as the company made losses throughout the period of the disputed CBA and according to the SRC, any salary increment will not be sustainable until the company turns and sustains its financial trajectory towards recovery, growth and profitability. The Court is not in position to contradict the SRC on the matter because unlike the SRC, it has not seen the respondent’s financial reports or records. The court has also not been shown how low the claimant’s members are earning compared to their peers in the industry or the difference between the highest paid unionisable staff and the lowest paid management staff.

33. Having considered the report by the CPMU and the advice by the SRC, and in view of the foregoing observations, I decline to award any salary increment to the claimant as prayed or at all. The risk of granting a salary increase in the circumstances of this case is worse than declining because it may lead to the collapse of the company or result in redundancy of the same workers who get the wage increment.

34. In the end I direct the parties to sign the CBA for the 2016-2018 without the intended salary increment, and immediately thereafter commence negotiations for the 2018-2022 CBA so as to regularise their CBA cycle to the 4 years given under the SRC’s Guidelines.

#### **CLASSIFICATION OF JOB GRADE NOC 5-10 AS UNION STAFF**

35. The Claimant contended that the employees in Job Grade NOC 5-10 ought to be classified as unionisable staff and allowed union representation. According to the Claimant the said cadre of staff do not have capacity to hire, reward, promote, demote, punish, apprise, suspend and or keep confidential information in the Respondent’s operations. It also contended that the classification of 84% of the workforce as management cadre and only 16% as unionisable was contrary to the trend of Management System globally.

36. The court has considered the contentions by the claimant but regrets to notes that the material provided by the Claimant is not sufficient to support the order sought. I therefore, decline to grant the order for reclassification of the Job Grade NOC 5 and 6 as unionisable staff and leave that matter to the Claimant to engage the Respondent during the future negotiations and if no compromise is reached, to use the relevant legal channels to resolve the matter.

#### **SIGNING OF CBA FOR 2016-2018**

37. In view of the matters aforesaid, I direct the parties to sign and register the CBA for 2016-2018 by retaining all the terms in previous CBA within 45 days of this judgment. Thereafter, the parties will engage in 4 years CBA cycle as per the SRC guidelines. Since the parties are still engaging in social partnership, each party will bear its own costs of the suit.

**Dated, signed and delivered in Nairobi this 3<sup>rd</sup> day of June, 2021.**

**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.**

**ONESMUS N. MAKAU**

**JUDGE**