



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 27 OF 2020

UNION OF NATIONAL RESEARCH INSTITUTES STAFF OF KENYA (UNRISK)....CLAIMANT

- VERSUS -

KENYA MARINE AND FISHERIES RESEARCH INSTITUTE (KMFRI).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the statement of claim on 15.06.2020 through its Secretary General Zachariah Achacha and who appointed Odin Boaz Otieno (Janitor) to appear and represent the union in the suit.

The respondent filed the response to the statement of claim on 21.07.2021 through Kadima & Company Advocates. The respondent prayed that the suit be dismissed or struck out with costs. The claimant filed **“The claimant’s affidavit of rejoinder to the respondent’s reply to statement of claim dated 21.07.2021.”**

By their pleadings, the parties agree upon the following matters:

- a. The issue in dispute is wrongful withdrawal of daily subsistence allowance for seagoing research employees by the respondent’s management.
- b. The suit is a trade dispute as defined in section 2 of the Labour Relations Act, 2007 to be determined by the Court under section 12(1) (b) of the Employment and Labour Relations Court Act Cap 234B and pursuant to Article 41(1) of the Constitution of Kenya, 2010 and section 5(1) (a), (2) and (7) (c) of the Employment Act, 2007.
- c. The parties have a valid collective bargaining agreement (CBA) registered by the Court under entry No. RCA No. 2 of 2013.
- d. Clause 5.2(1) (a) of the annexed CBA entitles the all respondent’s employees to daily subsistence allowance (night out) for job groups R.I 1 to R.I 6 without discrimination of any job occupation as set out in schedule on daily subsistence allowance (night out).
- e. The Cabinet Secretary for Labour and Social Protection appointed a conciliator with respect to the dispute herein and the conciliator issued a certificate of unresolved dispute dated 18.04.2019 duly exhibited by the claimant. The certificate shows that the respondent participated in the unsuccessful conciliation.
- f. The issues for determination are:
 - i. The validity of daily subsistence allowance in clause 5.2(1) of the parties’ CBA RCA No. 2 of 2013.
 - ii. Whether the respondent’s unilateral decision to discontinue payment of daily subsistence allowance at the daily rate for all job groups of seagoing staff as advised by the Salaries and Remuneration Commission (SRC) and authorised by the National Treasury was or is unlawful.’
 - iii. Whether the respondent’s unilateral decision to pay a uniform subsistence allowance of Kshs.3, 660.00 per month to all job groups of her seagoing staff without a review of the parties’ CBA was lawful or unlawful.

The claimant’s case is that the respondent effected and complied with the agreed terms in the CBA on daily subsistence allowance and paid

the employees up to January 2015 and effective with wages for February 2015, the respondent adopted the more favourable daily subsistence allowance in the SRC circular on review of allowances in the public service Ref. No. SRC/ADM/CIR/1/13VOL.III (126) dated 10.12.2014 as instructed by the National Treasury in the circular Ref. No. ZZ 44/122/05(10) to all accounting officers dated 12.02.2015 both exhibited for the claimant. The respondent continued paying the more favourable SRC's daily subsistence allowance rates for all job groups of her seagoing staff until her parent Ministry of Agriculture, Livestock and fisheries issued the letter Ref. MOALF/SDG/FIN/6A (15) dated 23.01.2018 as exhibited – addressed to the respondent's director by the Ministry's Principal Secretary thus,

“Dear Professor Njiru,

RE: PAYMENT OF SEA GOING ALLOWANCE

Reference is made to your letter Ref. No. KMF/AD/53 VOLXXVI/68 of 5th January, 2018 on the above subject.

It is noted that the Institute has been paying Daily Subsistence Allowances (Per Diems) to the crew and staff when RV Mtafiti goes to the sea for research purposes. It is further noted that the allowances paid were not in line with the prevailing situation in the sector.

The State Department has deliberated on this issue in its Ministerial Human Resource Management Advisory Committee and also benchmarked with the Ministry of Defence and therefore, recommends that all sea going personnel during the sail of RV Mtafiti and PV Doria should be paid at the rate of Kshs.3, 660.00 (Three thousand, six hundred and sixty) per month.

This will remain a temporary arrangement as we seek authority from the Salaries and Remuneration Commission on the actual rates to be paid.”

The claimant's case is that the daily subsistence allowance payable to respondent's employees in job group RI.1 up to and including RI.6 of the respondent's employees including all her seagoing employees as provided in the CBA is valid and lawful because subsection 59(1) of the Labour Relations Act, 2007 provides that a CBA binds for the period of the agreement as against the parties (union and the respondent), and, all unionisable employees. Further subsection 59(2) of the Act provides that a CBA 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 the trade union or employer association. Further subsection 59(5) provides that a CBA becomes enforceable and shall be effective from the date agreed upon by the parties. For three years from February 2015 to January 2018 the respondent's sea going employees were paid the daily subsistence allowance as stipulated in the SRC circular of 10.12.2014 which was more favourable and in view that the parties' CBA was and is still under review. It is the claimant's case that the respondent's unilateral decision to discontinue paying her seagoing employees daily subsistence allowance at the daily rates advised by the SRC awaiting registration by the Court the parties' reviewed CBA was unlawful and improper. Further the decision to pay the uniform subsistence allowance of Kshs. 3, 666.00 per month without the advisory by SRC or the parties' reviewed CBA was without consent of the claimant and against the maxim *pacta sunt servanda* – agreements must be kept.

The claimant's case is that the respondent has breached clause 1.3 (f) (ii) of the CBA which states that during the validity period, either party to the CBA may give the other notice in writing expressing its wish to change the agreement between them and where new salary and allowances incremental percentages may be agreed. Further clause 1,3 (f) (iii) provides that during the life of the agreement either party may give the other notice that it wishes to negotiate a change in the basic salary rates and any other clause herein, but, during the negotiation, the agreement shall remain in force until when a new implementation of the fresh agreement is effected as above (the CBA being for 2 years effective 01.07.2012). The claimant's further case is that the respondent has violated Article 41(2) (a) on the right to fair remuneration and further breached section 5(2) and (7) (c) of the Employment Act, 2007 that an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice; and, employment policy or practice includes any policy or practice relating to, inter alia, job classification and grading, remuneration, employment benefits and terms and conditions of employment. It is urged that it was discriminatory for the respondent to pay her sea going staff a uniform Kshs. 3, 660.00 per month on account of subsistence allowance and not per day at the agreed or the SRC advised daily rate, so to be paid for the number of days on official duty away from the employee's work station. The claimant therefore claims for reinstatement of the daily subsistence allowance at the advised daily rates in the SRC's circular Ref. SRC/ADM/CIR/1/13 VOL.III (126) dated 10.12.2014 until review of the parties CBA is concluded and registered.

The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's unilateral decision to discontinue paying her seagoing staff daily rates of subsistence allowance was an act of discrimination, was unfair, unjustified and unlawful.
- b. A declaration that the respondent's unilateral decision to pay her seagoing staff a uniform Kshs. 3, 660.00 per month on account of subsistence allowance breached clause 1.3(f) (ii) and (iii) of the parties' CBA, was against the advice of SRC on record, contravened Article 41 (2) (a) of the Constitution of Kenya 2010 and section 5(2), (4) and (7) (c) of the Employment Act and it was unconstitutional and unlawful.
- c. The respondent to reinstate *ante bellum* her seagoing staff daily rates of subsistence allowance as advised by the Salaries and Remuneration Commission (SR) until review of parties' CBA is concluded.
- d. Consequential to reinstatement of the seagoing staff daily rates of subsistence allowance, the respondent to compute and file on record the amount of her seagoing (in service and retired) staff's daily rates of subsistence allowance as was advised by SRC and less 3, 660.00 paid per month for the Court to consider a final judgment.
- e. The respondent to pay the quantum of the final judgment with interest at the rate of 14% from the date of report of the dispute to the Cabinet Secretary and until settlement in full.

f. The respondent to pay reasonable costs of the suit.

g. Any other relief the Court deems fair and justified to award the claimant.

By consent order at the directions stage, the parties agreed that the suit to be determined on the basis of pleadings, documents and final submissions and which were filed for the parties respectively. The Court has considered all the material on record and returns as follows.

First, the respondent admitted the matters as earlier stated in this judgment not to be in dispute. The respondent in the response to the statement of claim made general denials and no documents were filed for the respondent. The Court finds that the facts of the case are as per the claimant's statement of claim and as verified by the documents exhibited for the claimant. Those facts of the case are found not to be in dispute at all.

Second, the evidence is that the parties agreed upon daily subsistence allowance (night out) as per clause 5.2(1) (a) of the CBA for job groups R.I 1 to R.I 6 of its employees and there is no reason to doubt that the same was implemented until January 2015. Further the material on record show that SRC circular of 10.12.2014 instituted the rates of daily subsistence allowance (local travel) and as adopted and directed to all accounting officers to implement per National Treasury circular letter of 12.02.2015. The Court finds that there is no reason to doubt that the respondent, and correctly so, implemented the SRC and National Treasury rates of daily subsistence allowance effective end of February 2015 wages.

Third, the Court finds that the respondent stopped paying the SRC rates to its employees when the respondent's parent Ministry of Agriculture, Livestock and Fisheries issued the letter dated 23.01.2018. The parties are in agreement that under Article 230 (4) of the Constitution of Kenya, 2007, the SRC sets and regularly reviews the remuneration and benefits of all state officers; and advises the national and county governments on the remuneration of all other public officers. The Court finds that the letter by the Ministry of Agriculture, Livestock and Fisheries dated 23.01.2018 does not state that it was made pursuant to an advisory by the SRC and the Court finds that the decision therein was unconstitutional because it was made in clear contravention of the constitutional mandate of SRC. In particular, the Court finds that Sub-Article 259 (11) of the Constitution states, "**11) if a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with approval or consent of , or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.**" The Court finds that the letter dated 23.01.2018 by the Ministry of Agriculture, Livestock and Fisheries purporting to impose and fix Kshs. 3, 660.00 monthly subsistence allowance for all respondent's staff was unconstitutional for want of SRC advisory prior to its issuance and further it impliedly amounted to unjustified slating and smearing of the earlier SRC circular of 10.12.2014 as implemented by the National Treasury Circular of 12.02.2015.

Fourth, the SRC rates were more favourable than the rates in the CBA and the Court finds that the respondent was entitled to implement the more favourable SRC rates in favour of its employees and in place of the CBA negotiated but less favourable rates. In making that finding the Court has referred to the CBA clause 1.2 (b) (iii) and (iv) on responsibilities of the parties to the agreement and which provides:

"(iii) It is agreed and understood that the Institute Management will discuss and consult in good faith with The Union before making changes of prior benefits, practice and understanding to the employees, which can be mutually acceptable to the Union but are not specifically covered by this agreement. Notwithstanding this provision, the Institute Management shall make changes in salaries and allowances provided they seek to improve the existing levels and inform the union as soon as the changes are due to be made.

(iv) It is recognized that if, during the life of this agreement, there are changes in law, regulations, personnel, policies, practices or other matters affecting working conditions and if the changes leave the Institute Management with no discretion in the matter the Union will be informed of the changes. However, when the laws or regulations leave administrative discretion of the required changes, the parties will engage in negotiations in good faith to fulfil the changes."

The Court finds that the SRC circular of 10.12.2014 left the respondent with no discretion on payment of the daily subsistence allowance (local travel) when the circular stated thus, "**The Commission noted from the results of study that there were different circulars in the Public Service providing different rates for subsistence allowance. Subsequently, for purposes of standardization and regulation of the application of this facilitative allowance in the Public Service, the Commission has decided that all the allowances in the Public Service that are paid to facilitate officers to attend to official assignments away from their duty stations within the country be renamed Daily Subsistence Allowance (Local travel) and to be paid at the rates shown in Table 3.**" The Court finds that the SRC rates of daily subsistence allowance (local travel) were introducing harmonised rates across the public service including in the respondent's establishment and therefore had an effect of abolishing the rates in clause 5.2 (i) of the CBA and substituting thereof the SRC harmonised rates and which the respondent was bound to implement especially in view of sub-Article 259 (11) of the Constitution already referred to earlier in this judgment.

Further, the Court finds that indeed the respondent had to implement the SRC rates of daily subsistence allowance (local travel) as per the National Treasury circular letter of 12.02.2015 referred to the SRC circular of 10.12.2014 and which proceeded to state imperatively, "**i) Domestic and Foreign Subsistence Allowances: this being a facilitative allowance and an operations and maintenance related expenditure, it should be implemented immediately as proposed. It is however emphasised, that this should not warrant for requests for additional funding from exchequer. All planned activities should be rationalised and fitted within the existing approved budget.**"

Fifth, the Court finds that in view of the findings, the claimant has established the contractual, statutory, and constitutional breaches and violations as claimed. The prayers will therefore issue as prayed for. While making that finding the Court adds that it amounted to discrimination and unfair labour practice when the respondent imposed a monthly subsistence allowance over its affected employees whereas in the rest of the public service, the SRC prescribed rates had been implemented. As the claimant and the respondent are in continuing industrial relationship and towards fostering their continued amicable encounter, the respondent will pay only 50 % of the costs of the suit to be agreed upon between the parties or to be determined by the taxing master in the usual manner.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the respondent's unilateral decision to discontinue paying her seagoing staff daily rates of subsistence allowance was an act of discrimination, was unfair, unjustified and unlawful.
2. The declaration that the respondent's unilateral decision to pay her seagoing staff a uniform Kshs. 3, 660.00 per month on account of subsistence allowance breached clause 1.3(f) (ii) and (iii) of the parties' CBA, was against the advice of SRC on record, contravened Article 41 (2) (a) of the Constitution of Kenya 2010 and section 5(2), (4) and (7) (c) of the Employment Act and it was unconstitutional and unlawful.
3. The respondent to reinstate *ante bellum* her seagoing staff daily rates of subsistence allowance as advised by the Salaries and Remuneration Commission (SRC) until review of parties' CBA is concluded.
4. Consequential to reinstatement of the seagoing staff daily rates of subsistence allowance, the respondent to compute and file on record the amount of her seagoing (in service and retired) staff's daily rates of subsistence allowance as was advised by SRC and less 3, 660.00 paid per month; and to file within 30 days from the date of this judgment and parties to agree on quantum failing the Court to determine the quantum and the amount to be part of the final decree herein.
5. The respondent to pay the quantum of the final judgment by 01.03.2022 failing, to pay thereon interest at the rate of 14% from the date of this judgment until settlement in full.
6. The respondent to pay the claimant 50% of the costs of the suit to be agreed upon between the parties or taxed in the usual manner.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021

BYRAM ONGAYA

JUDGE