REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 76 OF 2020

IN THE MATTER OF ARTICLE 22(1) & (2)(D) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 30, 41(1) & (2)(A) & (B) AND 47(1) & (2) OF THE CONSTITUTION OF KENYA

BETWEEN

KENYA MEDICAL PRACTITIONERS, PHARMACISTS

AND DENTISTS UNION.. PETITIONER

V

KENYA HOSPITAL ASSOCIATION

T/A THE NAIROBI HOSPITAL...RESPONDENT

JUDGMENT

1. On or around 4 March 2020, the Chief Executive Officer of the Kenya Hospital Association t/a the Nairobi Hospital (the Hospital) issued a Memorandum to all staff in the following terms

> Due to the nature of the Hospital operations as a 24-hour essential services provider, all employees are required to work 45 hours a week, 180 hours per month and be flexible depending on the required work arrangement and business exigencies.
>
> In this regard, and for mutual benefit of our patients, the Hospital, staff and all stakeholders, all employees who signed a contract of employment to work 40 hours a week will be required to sign an addendum to the employment contract to this effect.
>
> This is aimed at ensuring a fair application in the policy to all employees and to ensure the quality of our services is not compromised at any one time.
>
> The Divisional Heads for all affected departments in liaison with the Human Resources will provide further details of this exercise in the course of the week.

2. The Memorandum was followed with individual letters dated 14 March 2020 to the affected staff stating, to wit

> This
>
> **WHEREAS**
>
> Both parties herein agree to amend the **Hours of Work** as described in the Employment Contract as follows
>
> **Hours of Work**
>
> **You shall be required to work 180 hours in a month. Due to the nature of the Hospitals operations, you will be expected to be flexible depending on the required work arrangement and business exigencies.**

This addendum revokes and supersedes the section of working hours detailed in your employment contract. All other terms and conditions of your employment remain as set forth in the Employment Contract.

3. The letters required the staff to sign and return the *Addendum to the Employment Contracts* to the Hospital.

4. The Kenya Medical Practitioners, Pharmacists and Dentists Union (the Union) got wind of the happenings and on 19 March 2020, it wrote to the Hospital decrying the failure to consult the employees as required by Articles 41 and 47 of the Constitution as read with sections 9, 10 and 11 of the Employment Act. The Union demanded the withdrawal of the addendum and the letters.

5. On 15 April 2020, the Hospital sent an email to the staff reminding them to submit the signed letters.

6. On the same day, one of the staff, stated to be a member of the Union sent an email to the Hospital seeking to know the effective date of the revised working hours and clarification on what would happen to those who did not accept the revised terms.

7. On or around 17 April 2020, the Hospital issued a *duty rota* implementing the revised work hours from 16 April 2020 to 15 May 2020.

8. The *duty rota* was followed by a purported WhatsApp message from the Hospital giving the staff who had not signed the letters up to 3.00 pm to submit signed copies.

9. When the Union was informed of the situation by one of its members, it sent an email to the Hospital on 23 April 2020 seeking information on the modalities of compensating for the extra hours of work (according to the Union the revised hours meant that those on day shift would work 10 hours while those on night shift would work 12 hours).

10. There was no response to the letter but the Hospital held a meeting with the staff to attempt to resolve the change in working hours on 30 April 2020. No agreement was reached.

11. Seeing no resolution in sight, the Union filed a Petition with the Court against the Hospital on 7 May 2020 alleging that the revision of the working hours being unilateral violated its members right(s) not to be held in slavery, servitude or to perform forced labour (article 30); to fair labour practices (article 41(1) & (2) in respect of fair remuneration, reasonable working conditions and unilateral amendment of contract) and fair administrative action (article 47).

12. Filed together with the Petition was a motion under a certificate of urgency seeking various interim reliefs.

13. When the application was placed before the Court on 13 May 2020, it was certified urgent and the Court also suspended the implementation of the revised work hours and the *duty rota*. The Court ordered the Hospital not to victimise any member of the Union who had not signed the addendum to the employment contract(s).

14. The Court at the same session issued directions as to the filing and exchange of pleadings.

15. When served, the Hospital filed an application on 21 May 2020 seeking orders setting aside and vacating the orders of 13 May 2020.

16. On 5 June 2020, upon hearing from the parties, the Court directed that the applications on file and the Petition be canvased together to save on judicial time. The interim orders on record were thus extended.

17. Pursuant to the Court directives, the Hospital filed a replying affidavit sworn on 16 June 2020 (should have been filed on or before 12 June 2020), the Union filed further affidavit and submissions on 24 June 2020 and the Hospital filed its submissions electronically on 30 June 2020 (should have been filed on or before 26 June 2020) ahead of judgment today.

18. The Union identified 3 Issues for determination in its submissions being

(a) Whether the present Petition fails for reason that the Petitioner is not a recognized Trade Union by the Respondent and that there is no signed and registered Recognition Agreement between the Petitioner and the Respondent.

(b) Whether there were consultation meetings between the Respondent and all affected staff on 17th July 2019 and 17th February 2020, on harmonization of the hour of work from 40 hours a week to 45 hours a week.

(c) Whether the Respondent's Policy on Hours of Work Regulations, which contractually bound all staff to flexible work adjustments made by the Respondent, within the law and that the communication of 4th March 2020 are sufficient to defend this Petition.

19. The Hospital identified the Issues arising for determination as

(a) Whether the Petitioner has the *locus standi* to originate and sustain the present Petition.

(b) Whether there is a valid constitutional question before the Court, or merely a dispute under the Employment Act, 2007 and the Labour Relations Act, 2007.

(c) Whether the Respondent contravened provisions of section 10(5) of the Employment Act in publishing the Memorandum of adjustment of work hours.

20. The Court has considered the facts, law and submissions.

Recognition of trade union as a precondition for *locus standi*

21. It is within the knowledge of practitioners in this Court that judges of the Court have taken different jurisprudential positions on the question of the competence of a trade union to institute legal proceedings and/or agitate on behalf of its members where there is no recognition agreement with an employer (see *Kenya Union of Employees of Voluntary & Charitable Organisations v Board of Governors, Maina Wanjigi Secondary School* (2015) eKLR; *Kenya Private University Workers Union v Kenya Methodist University* (2017) eKLR and *Kenya Shipping, Clearing & Warehouses Workers Union v Africair Management & Logistics Ltd* (2016) eKLR.

22. However, at least for now the Court of Appeal in Mombasa Civil Appeal No. 37 of 2019, *Modern Soap Factory v Kenya Shoe and Leather Workers Union* (unreported) has laid to rest the question.

23. In the aforesaid authority, the Court of Appeal identified the only appeal Issue at paragraph 10 of its Judgment as Whether a trade union has locus standi to represent its members in court in a dispute between an employee (who is member of the union) and an employer in the absence of a recognition agreement between the union and the employer.

24. In answering the question, the Court of Appeal reasoned thus Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention. In the same spirit, Section 22 of the Employment and Labour Relations Act provides that:

> In any proceedings before the Court or a subordinate Employment and Labour Relations Court, a party to the proceedings may act in person or be represented by an advocate, an office-bearer or official of the party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee specially authorised for that purpose.
>
> ……….
>
> A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.

25. The Court of Appeal, therefore, distinguished a Union's right to represent its members, and the right to collective bargaining which is anchored on a recognition agreement and held that lack of a recognition agreement would not serve as a legal handicap to the competency or *locus standi* of a Union to institute legal proceedings on behalf of its members.

26. The Court notes that the Union produced copies of *Form S'* indicating those employees of the Hospital which had joined it, without any rebuttal from the Hospital.

27. The Court in the circumstances finds no merit on the objection based on the lack of a recognition agreement between the Union and the Hospital.

Breach of contract/statute

28. Section 9 of the Employment Act, 2007 sets out the circumstances under which an employer must issue a written contract of service while section 10(1) & (2) of the Act outlines certain employment particulars which must be provided for in the written contract. Some of the particulars include remuneration, place of work and hours of work.

29. In terms of section 10(5) of the Employment Act, 2007, an employer is under a statutory obligation to consult with the employee when it changes or revises the particulars of employment (including the hours of work).

30. The Hospital contended that before altering the hours of work through a Memorandum on 4 March 2020, it followed due process and made *ad hoc* consultations with the employees on 17 February 2019 and 17 July 2019 and despite the employees having allegedly *ceded the right to be consulted.*

31. In asserting that the employees had *ceded the right to be consulted*, the Hospital cited a passage in the Staff Regulations providing that

You are required to make yourself familiar with and abide by such regulations as shall from time to time be issued by the Association.

32. Acting under such mandate, the Hospital submitted, it made the *Policy on Hours of Work Regulations July 2019.*

33. On what prompted the change of working hours, the Hospital explained that it was meant to achieve equitable working hours for all employees as previously some worked 40 hours and others 45 hours. It was to harmonise and avoid discriminatory working hours.

34. The Union, however, maintained that no consultations were held on 17 February 2019 and 17 July 2019 and that if any consultations were held, the Hospital had failed to discharge the burden of proving such consultations were conducted because no minutes or notes of any such consultations were placed before the Court.

35. The Hospital did not produce before the Court any records or notes to suggest that consultations were held with individual employees affected by the change in hours of work. Even no records to demonstrate group consultations were filed.

36. The Court, therefore, has no hesitation in finding that despite its intentions, the Hospital did not comply with the requirements of section 10(5) of the Employment Act 2007 as it did not even respond to queries for clarification by one of the employees through email.

37. Despite the finding, the Hospital also urged that the employees had *ceded the right to consultations* and by dint thereof, it could lawfully change and/or alter certain employment particulars such as on working hours.

38. The Court finds such a proposition unattractive.

39. Unattractive because there must have been a public policy consideration behind the statutory requirement to consult with the employee before revising the prescribed employment particulars.

40. One of the public policy considerations must have been the need to obviate unilateral and arbitrary alterations of the basic terms and conditions of employment, at the behest of an employer who always is the stronger party in an employment relationship.

41. Another consideration would go to the very heart of the constitutional norm of fair labour practices as recognised in Article 41 of the Constitution. In this respect, the Addendum did not make any reference to change in remuneration in light of the increased work hours.

42. An employer purporting to reserve to itself the mandate to change the prescribed employment particulars, in the view of the Court, would acting contrary to both the text and spirit of the need for consultations in the first place.

43. Such a practice could have found favour in the mediaeval times when a contract of service was characterised as that of a master and servant. The employment relationship in modern times is not that of a master and servant.

44. In these contemporary times, the promotion of social justice in the workplace has been recognised by the International Labour Organisation (see ILO Declaration on Social Justice for a Fair Globalisation). Such social justice in the workplace cannot be realised without dialogue between the tripartite partners and where labour is not organised, directly with the workers.

45. Employers should not attempt to avoid consultations, even during the COVID19 pandemic, for consultations need not result in consensus or agreement.

Petition not raising constitutional questions

46. The Courts have in the recent past seen an avalanche of disputes clothed as Petitions purporting to raise allegations of violations and or threatened violations of the Bill of Rights and/or other Constitutional provisions.

47. In most of those cases, Respondents have raised objections urging the Courts to decline jurisdiction and/or strike out the Petitions.

48. The Respondent in this particular litigation contended that there was no valid constitutional question placed before the Court despite invoking the Constitutional Petition route.

49. According to the Respondent, the real question presented by the Union was whether there was a violation of section 10(5) of the Employment Act, 2007 which requires consultations with the employee before certain employment particulars are changed.

50. Further, the Respondents urged that the Petitioner had failed to identify and demonstrate to the required standard alleged constitutional violations.

51. The Court agrees with the Respondent that the issues raised in the Petition could have been resolved without invoking the Constitutional route.

52. As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

53. The Rule envisages a party raising disputes regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a *Statement of Claim*.

54. Decades ago in *Harrikisson v Attorney General of Trinidad & Tobago* (1980) AC 265, the Privy Council had stated

The right to apply to the High Court under …..of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under …. the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

55. The legal proposition was given an endorsement by our Court of Appeal in *Gabriel Mutava & 2 Ors v Managing Director, Kenya Ports Authority & Ar* (2016) eKLR.

56. However, on what should be the legal implication of needlessly invoking the constitutional petition route, the Court is of the view that a denial of costs and/or an order directing that the Petition be converted in a Statement of Claim would be sufficient to deter this practice which is spreading at an alarming rate and that striking out should be the last resort.

Conclusion and Orders

57. The Union sought 3 substantive orders in the Petition but in light of the foregoing, the Court is of the view that a declaration in an amended format would be appropriate.

58. The Court orders

> (a) THAT a declaration be and is hereby issued that the Respondent's Policy as per the inter – office Memorandum dated 4th March 2020 titled '' ADDENDUM TO THE EMPLOYMENT CONTRACT'' and duty rota published on the 17th of April 2020 requiring its employees who are members of the Petitioner herein who signed contracts of employment for 40 hours a week and have not subsequently executed addendums to their contracts of employment, to work 45 hours a week without a commensurate increase in pay is contrary to Article 41(1) & (2)(a) & (b) as read with section 10(5) of the Employment Act, 2007.

59. In light of the anticipated social partnership in good faith between the parties and the views stated under the third Issue, the Court orders each party to bear their own costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 3rd July 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Washika instructed by Wafula, Washika & Associates Advocates

For Respondent Mr. Bwire instructed by Echessa & Bwire Advocates LLP

Court Assistant Judy Maina