



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 24 OF 2019

KENYA UNION OF COMMERCIAL,

FOOD & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KAHUTI WATER & SANITATION CO. LTD.....RESPONDENT

JUDGMENT

1. This suit was precipitated by a collective bargaining agreement that failed to result in a registered CBA. The Claimant is a trade union and from the record before the Court negotiated the various clauses with the Respondent and disagreed on clauses relating to protective clothing; probation period; discipline and warning; suspension; appeal procedure; redundancy; transfer and disturbance allowance; leave days and leave allowance; house allowance; commuter allowance; medical treatment (medical cover); minimum wages and basic pay; and, effective date and duration of the agreement. As a result, the matter was reported as a trade dispute before the Minister for Labour who in compliance with his mandate appointed a Conciliator. Despite the efforts at conciliation the parties failed to agree and the dispute was referred to the Court. In the memorandum of claim, the Claimant succinctly articulated its position on the items the parties had disagreed on. The Claimant urged the adoption of the proposals made in the claim and that the Court do order the adoption of the proposals and a signing of the CBA within 30 days as well as costs of the suit.

2. The Respondent filed a memorandum of defence in which it was averred that as a semi-autonomous not for profit company, it is contracted by the Tana Water Services Board (TWSB) as a service provider within Kangema and Kahuro covering the areas of Murarandia, Kahatia, Mirichu, Githambo, Kanyenya-ini among others within Murang'a County. The Respondent asserts it is managed in accordance with the Companies Act, the water sector guidelines as provided by the Water Services Regulatory Board (WASREB). It averred that Article 4 of ILO Convention No. 98 encourages voluntary negotiation of collective bargaining agreements and does not envision compulsory or mandatory award of salary/benefits and other terms in the course of the negotiations. The Respondent averred that asking the Court to adopt the proposals on the contentious matters, the Claimant is in effect asking the Court to compel the Respondent to implement the Claimant's terms and this goes against the principle of voluntary negotiations. The Respondent averred that the financial aspects of the general wage increase for the duration of the CBA is not in dispute as the Respondent's counter-proposal was subject to achieving a monthly turnover of Kshs. 11 million. In respect to the specific contentious issues in the CBA, the Respondent asserts that the Employment Act has clear provisions regarding probation, discipline, redundancy, leave, house allowance, and lastly, medical treatment. The Respondent asserts that the Occupational Safety and Health Act (OSHA) has provisions on health and safety at the workplace and urged the Court to adopt the statutory provisions. The Respondent also asserts that the Regulation of Wages (General Order) provides for minimum wage and basic pay and that the Court should adopt the regulatory provisions. In regard to the effective date and duration, it was asserted that it was trite law that unless otherwise stated the effective date is the date when the CBA is registered in Court. The Respondent averred that it had made reasonable proposals in respect to the remaining issues on suspension, appeal procedure, transfer and disturbance allowance, leave allowance, commuter allowance and medical allowance. The Respondent averred that the Claimant had not demonstrated why the figures or terms proposed by the Claimant ought to be adopted by the Court. It was averred that there was no economic rationale why severance pay should be 45 days for each completed year of service and why leave allowance should be equivalent to one month basic pay, why house allowance should be 30% of basic pay and why they propose higher minimum wages and basic pay terms that are above the general order. The Respondent averred that the Claimant was oblivious to the fact that these terms considered to be in dispute have no statutory underpinnings and are additional benefits given by the employer and do not constitute rights but are privileges given by an employer with no legal obligation to give them. The Respondent urged the Court to adopt its counter proposals as binding terms of the CBA and accordingly dismiss the suit with costs to the Respondent.

3. Granted that this was an economic dispute, the Court directed the Ministry of Labour & Social Protection's Central Planning & Monitoring Unit (CPMU) to prepare a report on the economic dispute. The CPMU in a report dated 22nd June 2020 duly signed by Mr. Benson Okwayo an Economist at the Ministry, it was observed that the indicators relied on by the Respondent showed the turnover anticipated fell short of the Kshs. 11 million target by a whopping Kshs. 6.11 million. The CPMU hoped the report would assist the Court in reaching a determination of the dispute. Only the Claimant filed submissions in which it reiterated its demands and cited the case of **Kenya Union of Commercial Food and Allied Workers v Bounty Limited [2020] eKLR**. The Claimant urged the grant of the prayers in the

memorandum of claim with costs.

4. The parties herein have not disputed that their areas of disagreement are confined to specific clauses in the proposed CBA. These relate to probation, discipline, redundancy, leave, house allowance, and lastly, medical treatment, occupational health and safety, minimum wage and basic pay, suspension, appeal procedure, transfer and disturbance allowance, leave allowance, commuter allowance and medical allowance. The Court notes the provisions of ILO Convention No. 98 and in particular that Article 4 thereof provides:

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.

The primary law as I understand in respect of disputes of this nature is primarily Article 41 of the Constitution of Kenya and the Labour Relations Act as well as the rules of this Court. In the memorandum of defence, the Respondent seemed to suggest that the Court would not have a role in this case as the ILO Convention provides for a voluntary negotiation. If this position was so, there would be far fewer provisions of the Labour Relations Act and Part VII of the Act would be non-existent. As the parties have been unable to agree even with the assistance of the Conciliator, the dispute falls for determination of this Court which is imbued with the power to make a determination with the assistance of the CPMU where need arise. Under Section 73 of the Labour Relation Act, there is authority to refer disputes to this Court where the matter concerns an issue in which a party may call for a protected strike or lockout. Matters such as the ones articulated in this claim can lead to a protected strike or lockout and therefore fall within the mandate of this Court. Now to the issues at hand. The parties have made extensive argument on their positions and what now remains is the determination of the Court.

5. The Court is not convinced that there is a proper reason to deviate from the provisions of the Occupational Safety and Health Act in respect of the safety and health of workers at the workplace. There need not be any elaborate provision in the CBA in this regard. Parties should adopt a clause that states that the safety and health of all workers in the Respondent's employ shall be in accordance with the provisions of OSHA. The law provides for a basic minimum wage and given the fact that the Respondent has not been shown to be paying less than the Regulation of Wages (General Order) Guidelines. On the remaining clauses, the determination is as follows:

- a. probation, go by the provisions in the Employment Act
- b. discipline, go by the provisions in the Employment Act
- c. redundancy, go by the provisions in the Employment Act
- d. leave allowance go by proposals of the employer
- e. house allowance, go by the provisions in the Employment Act with room for improved allowances once the Respondent's financial position improves significantly or perhaps at the next CBA cycle.
- f. medical treatment, go by proposals of the employer.
- g. suspension, go by proposals of the employer.
- h. appeal procedure, go by proposals of the employer
- i. transfer and disturbance allowance, go by proposals of the employer
- j. leave allowance, go by proposals of the employer
- k. commuter allowance, go by proposals of the employer.
- l. medical allowance go by proposals of the employer.

6. As the parties are still social partners and engaged from time to time in seeking solutions for their clients, each party shall each bear its own costs.

It is so ordered.

Dated and delivered at Nyeri this 21st day of September 2020

Nzioki wa Makau

JUDGE