



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 185 OF 2019

IN THE MATTER OF ARTICLES 22, 23, 27, 41(1), (2) (a & b), (5), 43, 47, 159 AND 162 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ALLEGED VIOLATION OF THE PETITIONER'S MEMBERS' RIGHTS TO FAIR LABOUR PRACTICE AND FREEDOM FROM DISCRIMINATION

IN THE MATTER OF RULE 4 AND 10 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF SECTION 3 & 4 OF FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF SECTIONS 5, 18 AND 25 OF THE EMPLOYMENT ACT, 2007

IN THE MATTER OF EMPLOYMENT INSTITUTIONS ACT, 2007

-BETWEEN-

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS & HOSPITAL WORKERS..... PETITIONER**

- VERSUS -

BOARD OF MANAGEMENT

SPORTS KENYA.....ST RESPONDENT

PIUS METTO.....^{2ND} RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

JUDGMENT

The petitioner filed the petition on 09.10.2019 in person and its legal officer Mr. Tonge Yoya represented the petitioner. The petition prays for judgment against the respondent for declaration and orders:

- a) The action of respondents violates petitioner and her member's fundamental rights under Article 27, 41, and 43 of the Constitution of Kenya 2010.
- b) The respondents pay all monies so deducted from the basic salary from the month of July 2019 to all affected grievants.
- c) The respondents reinstate the basic salaries as at the month of June 2019 and be permanently restrained from revising the salaries downward.
- d) The costs of the petition be borne by the respondents jointly and severally.

e) Such other order or relief as the Honourable Court may consider fit and proper in the circumstances.

The respondents opposed the petition by filing the replying affidavit of the 2nd respondent Pius Metto through the Honourable Attorney General and learned Senior Litigation Counsel Mercy G. Kinyua appeared in that regard.

The facts are rather not in dispute and are elaborated in the replying affidavit. The 1st respondent is the successor of Sports Stadia Management Board through as established under section 3 of the Sports Act, 2013. The 2nd respondent is the Chief Executive Officer of the 1st respondent. The petitioner is a duly registered trade union and has concluded recognition and collective bargaining agreements with the 1st respondent.

Since 2013 when Sports Kenya succeeded Sports Stadia Management Board, Sports Kenya has never undergone review by the Salaries and Remuneration Commission (SRC) and the State Corporations Advisory Committee (SCAC). However, the Collective Bargaining Agreement (CBA) for the years 2015 up to the year 2017 provided in Clause 26 thus, “**All unionisable employees shall be awarded a general salary increase of 7% effective date 1st July, 2015 to 30th June 2016 and 7% effective date 1st July, 2016 to 30th June, 2017**”. The 1st respondent and the petitioner signed the CBA on 10.08.2015. The CBA was implemented from 2013 to 2018 but by then, the salary structure for Sports Kenya had not been approved. The unionisable staff enjoyed the salary increments as agreed in the CBA.

On 12.07.2018 Sports Kenya Board’s Ad hoc Committee on Human Resource Management reviewed the basic salaries of members of staff and found that there were 21 members of staff whose basic salary had exceeded their basic salary bands from year 2013 to 2018 as per exhibit PM-3 of the replying affidavit. The Committee recommended immediate stoppage and reversal of the excess payments effective 01.07.2018 and the decision was conveyed to the 21 officers but they never responded and the action was not implemented. The Ad hoc Committee was replaced with the Corporate Services Committee which presented a report on the matter to the full Board on 14.05.2019 and with respect to members who had surpassed their basic salary bands, the Board directed the management of Sports Kenya to seek further guidance from the SRC and the issue to be referred back to the Board once the guidance by SRC was obtained. The Board further decided that if by end of May 2019 the SRC guidance would not have been obtained, the management to revert to affected employees’ highest scale without recoveries.

On 16.05.2019, SRC officers and Sports Kenya management held a meeting to discuss job evaluation, human resource manuals, organisational structure and other human resource matters. The Sports Kenya management sought advice on the best way to regularise salaries for staff who had exceeded the band. At that meeting the SRC officers advised that the best way to regularise the salaries was to stop further payments of the erroneous salary payments to the 21 officers and revert to the highest level within the band. On 10.07.2019 SRC officers met Sports Kenya management about the salary structure and for employees who had exceeded the pay band, it was again recommended to stop further payments of the erroneous salary payments to the 21 officers and revert to the highest level within the band. The decision was communicated to the affected 21 unionisable employees by respective letters dated 25.07.2019. The officers did not write back.

The approved pay structure for Sports Kenya dated August 2019 is exhibited as PM11(b) on the replying affidavit. It states that the SRC undertook compliance checks at Sports Kenya on 10.07.2019. At 3.0 it is stated that the salary structure for Sports Kenya as approved by Sports Stadia Management Board in July 2012 was as per table 1 therein. It also notes that some 22 employees in table 2 had been paid beyond the approved maximum notch payable in some grade to some staff. At 4.0 (a) it was concluded that Sports Kenya should revert to the basic salary structure approved by the Board in respect to the 22 employees paid beyond the approved maximum notch payable.

Parties filed their respective submissions. The Court has considered all material on record and makes findings as follows.

The **main issue** for determination is whether the petitioner’s and affected petitioner’s members’ rights have been violated as alleged. It is not in dispute that on 25.07.2019 the respondent issued 11 members of the petitioner with letters advising that their basic salaries will be revised downward with immediate effect based on advice from SRC and subject to a similar letter issued on 18.07.2018 but which was not implemented. The names of the affected members are listed in the pleadings as well as paragraph 4 of the submissions. It is also not in dispute that the payment was effected and made as per clause 26 of the CBA for the years 2015 up to the year 2017 signed on 10.08.2015. There is no dispute that the CBA was entered into and registered in accordance with the applicable provisions of section 60 of the Labour Relations Act, 2007 and it is not in dispute that the CBA was negotiated in accordance with section 57 of the Act. Section 59 of the Act provides that a CBA binds the parties thereto and the terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement. The Court upholds the petitioner’s pleading and submission that under section 17(1) of the Employment Act, 2007 an employer shall pay the entire amount of wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly in the currency of Kenya and the affected petitioner’s members are entitled to the payment as agreed in the CBA.

It was submitted for the respondents that section 19(1) (e) of the Employment Act, 2007 provides that an employer may deduct from the wages of his employee any amount paid to the employee in error as wages in excess of the amount of wages due to him. However, as submitted for the petitioner, the amount as paid to the affected officers was in accordance with the CBA the 1st respondent as an employer had signed with the petitioner and the erroneous payment as submitted for the respondent has not been established. Further, the pay change advised conveyed in the respective letters dated 18.07.2018 conveyed the stoppage and reversal of the payment effective July, 2018 and the Court finds that the decision was not about deduction of salary but reduction of the salary as due under the CBA to the pay band said to have been in place in 2012.

It is further submitted for the respondents that section 10(5) of the Employment Act, 2007 provides that where any matter stipulated in subsection (1) changes (being particulars of the terms and conditions of the contract of service such as salary in the instant case), the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change. The Court finds that there were no consultations with the union, the contract of service for each of the affected was as per the terms and conditions in the CBA, the CBA has never been changed or been renegotiated, and the Court returns that the section as relied upon by the respondents does not aid their defence. The evidence is that the 1st respondent made decisions which were conveyed to the affected employees and such

communication was not an invitation to make representations in that regard.

The Court has carefully revisited the evidence. At paragraph 4 of the replying affidavit, the 2nd respondent states that since the succession in 2013, Sports Kenya has never had its salary structure reviewed and the same was undergoing review by SRC. The decision of approval of the salary bands said to have been approved in 2012 and now said to have been exceeded by the affected employees has not been exhibited. Further the respondents say the pay structure for the Spots Kenya is currently under review. There is no decision by SRC exhibited before the Court and further the Court finds that the deliberative meeting between SRC officers and 1st respondent's management on 16.05.2019 did not involve the SRC (Article 230 of the Constitution having established the SRC to consist of a chairperson and other members as provided in the Article).

While making the findings, the Court considers that under Article 250 (2) (a) the SRC as an independent constitutional commission is subject to the Constitution and the law. Accordingly, in making recommendations about salaries and pay structure for public officers, it cannot act to make decisions which are inconsistent with clear statutory provisions. In the instant case, the terms and conditions in the unchallenged and undisputed CBA applied and the CBA was protected as per the provisions of the Labour Relations Act, 2007 already referred to earlier in this judgment. Thus, once the CBA was in place and lawfully so, the SRC was accordingly bound. That is more so because the alleged approved salary bands of 2012 have not been exhibited at all and the replying affidavit clearly states that there was no such approved salary structure and the same was being developed. The Court considers that the SRC and the respondents would as well be bound by the national values and principles of governance in Article 10 of the Constitution which include good governance, integrity, transparency, accountability and sustainable development. It is the Court's considered opinion that reduction of employees' or public officers' basic salary and other remuneration and benefits in breach of a lawful CBA and upon a salary pay structure or pay band that has not been established to exist or existed prior to signing the lawful CBA, or upon unjustified ground, amounts to bad governance and is inconsistent with the national values and principles of good governance and sustainable development. The Court holds that deteriorating living standards as may be manifested in pay cut and more so unjustified pay reductions, is a clear symptom of bad governance which is a violation of national values and principles in Article 10 of the Constitution.

The petitioner pleaded and prayed that the respondents violated petitioner's rights under Article 27, 41, and 43 of the Constitution. The Court finds that in view of the disregard of the cited statutory provisions and in particular disregarding the salary under the CBA and the statutory protection of the CBA, the respondents violated Article 27 - the petitioner's and its affected member's right of equality before the law and the right to equal protection and equal benefit of the law. The disregard of the CBA and its provisions on the agreed salaries violated Article 41 on the right to fair labour practice, fair remuneration, reasonable working conditions as well as the right to form, join or participate in the activities and programmes of a trade union. The Court considers that once the respondents disregarded the terms of the unchallenged and undisputed CBA, the petitioner's right to collectively bargain for its affected members was thereby undermined and Article 41 was violated in that regard. The reversal of the salary increment meant that the economic and social rights of the affected petitioner's members were necessarily adversely affected and violated contrary to Article 43 of the Constitution. The Court therefore returns that the petitioner has established that the constitutional rights and fundamental freedoms were violated as was alleged in the petition. The petitioners have established their claims and prayers and they will be granted.

As the petitioner has succeeded, the 1st respondent will pay costs of the petition as the employer in the instant case.

In conclusion judgment is hereby entered for the petitioner against the respondents for:

- a) The declaration that the action of respondents violates the petitioner's and her members' fundamental rights under Articles 27, 41, and 43 of the Constitution of Kenya 2010.
- b) The 1st respondent to pay all monies so deducted (essentially withheld) from the basic salary from the month of July 2019 to all affected grievants and to pay by 01.12.2020 failing interest at Court rate to accrue on the principal sum as at the date of this judgment until full payment.
- c) The 1st respondent to reinstate the basic salaries as at the month of June 2019 and is hereby permanently restrained from revising the salaries downwards on account of the matters raised in the present petition or howsoever in breach of the CBA.
- d) The costs of the petition be borne by the 1st respondent.

Signed, dated and delivered by the court at **Nairobi** by video-link this **Friday 16th October, 2020**.

BYRAM ONGAYA

JUDGE