



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2001 OF 2013

(Before D. K. N. Marete)

JAYNE NYAGOHA EMISEMBE.....CLAIMANT

VERSUS

NAIROBI COUNTY BRANCH OF KUPPET.....RESPONDENT

JUDGEMENT

This matter was originated by an Amended Memorandum of Claim dated 18th January, 2017. The issue in dispute is therein cited as;

Non-payment of allowances by the respondent to the claimant during her tenure in office as the branch treasurer – between July 2013 – May 2015)

The respondent in a Statement of Defence dated 15th November, 2016 denies the claim and prays that this be dismissed with costs.

The claimant’s case is that he was selected Treasurer, Nairobi County Branch – KUPPET on 18th June, 2011 and subsequently registered with the Registrar of Trade Unions.

Her further case is as follows;

On 18th January, 2018, the Branch held the Branch Governing Council (B.C.G) meeting and purported to suspend the Claimant from office for a period of 1 year without according her due process and or hearing her.

6. *Despite this reinstatement, the Respondent purported to have expelled the Claimant from the branch on 13/9/2014 and also moved to Court through a notice of motion application dated 26/9/2014 to review the reinstatement Orders of 4/7/2016, which application was dismissed with costs on 17/11/2014 and consequently the said purported expulsion was nullified and she was continued to serve in her position of branch Treasurer, but with a lot of frustrations from branch Executive Secretary.*

7. *During her time in office the Claimant was supposed to be the custodian of the branch books of accounts and also a signatory of the branch bank account, account number xxxxxxxxxxxx held at Equity Bank, Four Ways branch.*

8. *She was part time official due payments in the form of monthly allowances for meetings, recruitments and other operational duties, which payments are as per the Union constitution, a directive from the Head Office and the law.*

9. *After making payments of all the office expenses, the Claimant was to be paid 12.68% of the branch income and or allocation from the head office.*

10. *The Respondent paid the Claimant her dues and or monthly allowances from June 2011 to June 2013 but from July 2013 to May 2015, she was paid only Kshs.30,000 in November 2013, Kshs 50,000 in October 2014 and Kshs.50,000 in November 2014 and only after the said suspension was lifted by the Court, but was not paid her full dues in 2013, 2014 and 2015, during which time she was still registered as the branch treasurer and during which time she was discharging and or ready, willing and able to discharge her duties as the branch treasurer.*

She claims as follows;

a) *Dues of July – December 2013.....Kshs.235,864.85*

b) Dues for January – December 2014.....Kshs.647,828.65

c) Dues for January – May 2015.....Kshs.293,428.20

d) Agency fee for 2015.....Kshs.88,171.00

Total.....Kshs.1,265,293.30

She prays as follows;

- a) A declaration that the Claimant served the Respondent as an elected and registered branch treasurer from 18/6/2011 to 5/3/2015
- b) An order compelling the Respondent to pay the Claimant her outstanding allowances and or dues pending between July 2013 and March 2015 totaling Kshs.1,265,293.30/=
- c) Costs of the Claim.

The respondent's case comes out as follows;

The claimant and others formed the Branch Executive Council were illegally and irregularly elected into office on 18th June, 2011 alongside the claimant.

She was never the legitimate Branch Treasurer at any given time.

Branch elections were held on 5th March, 2011 where officials were elected for a term of five years and the claimant was not amongst them.

The Registrar of Trade Unions effected these changes and registered the official elected on 5th March, 2011

The matter came to court variously until 15th October, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the claimant served the respondent as an elected and registered branch treasurer from 18th June, 2011 to 5th March, 2015.
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant served the respondent as an elected and registered branch treasurer from 18th June, 2011 to 5th March, 2015. The claimant in her written submissions dated 19th October, 2018 reiterates and submits her case. This is as follows;

That the Claimant has been able to demonstrate from the payments about that she used to be given allowances that amounted to 12.68% of the income of the monies disbursed to the branch from the national office. (See calculations on page 56 of the Claimant's bundle of documents). The Claimant has also demonstrated the income that the branches in 2013 and 2014 pages 23 & 24 in the Claimant's bundle and the budget for 2015 on page 25 to 28, branch statements indicating income and remittances on pages 29 to 34 of the Claimant's bundle of documents).

From the above documents the Claimant has ably demonstrated the computation of the allowances she was entitled to at the material time from the Respondent as an official. (See pages 56 & 59 of the Claimant's bundle of documents). These figures have not been disputed by the Respondent. The Respondent has only vaguely indicated that she was paid (without proof) or alternatively indicated she was not entitled to payment having been suspended/expelled and also alternatively alleged that she paid herself illegally with other officials at the material time (also without proof of this allegation. It should be noted that other officials subsequently paid themselves by opening and operating illegal accounts or removing the Claimant as a signatory to the branch account. This has not been denied by the Respondent.

The claimant in support of her case sought to rely on the authority of **Athumani LaLi v Kenya Union of Domestic, Hotels, Educational, Hospital & Allied Workers [20105] eKLR** where the court observed as follows;

“No evidence was adduced by the Claimant to prove that he was entitled to any regular monthly allowances of Kshs.10000 and Kshs.5000 from the HQ and Branch office respectively. Whereas section 39 of the Labour Relations Act (LRA) allows trade unions to use their funds to pay salaries and allowances to their officials, it leaves it open to the respective unions to decide which of its officials have to earn a salary or allowances and to what extent. The claim herein being one not based on employment contract, the Respondent had no

obligation of producing employment records to disprove the claimant's verbal allegations about the claimed monthly allowances. The court therefore takes judicial notice of the fact that unless otherwise prove, trade unions elected officials like CW1 are by law honorary and not executive. Consequently, unless contrary is proved, an honorary official like CW1 is only entitled to sitting, travelling and subsistence allowances while on official duties for the union and not regular unspecified allowances. It follows therefore that without any formal resolution by the General Membership of the union or express provision of the constitution of the Union, the honorary officials cannot draw any regular and unspecified monthly allowances as alleged by the Claimant."

Again, she sought to rely on the authority of **Peter Mwaura Kamau v Kenya Union of Post Primary Education Teachers (KUPPET) & 3 Others [2012] eKLR** where the court observed thus;

In a ruling for payment of union salaries and allowances Justice Wasilwa castigated the Respondent for failing to do so even when there was a dispute on whether the Claimant was an official or otherwise. The court ordered the Respondent to pay the salaries and allowances arrears due to an official calculated at 1,656,400/= and to continue paying the salaries and allowances pending the hearing and determination of the case. In this instance, what is due the Claimant is Kshs.1,265,293.30 which is the balance of the approved but unpaid allowances due to the Claimant which the Respondent ought to pay.

It is the claimant's penultimate submission that the respondent failed to recognize and compensate the work done by the claimant in her refusal to pay her legitimate allowances. This was occasioned by ulterior motives most likely arising out of the union politics of the day. This should not be allowed to stand.

Payment of allowances to union officials is not whimsical but a legal necessity provided for in law and trade union processes and practice.

The respondent did not file any written submissions on her case.

Where does this leave us? The claimant's case takes sway in the circumstances. She has demonstrated an outright case of denial of her legitimate earnings as a branch official for the respondent through neglect and outright deprivation. I therefore find that the claimant was a legitimate union official who served the respondent at the material times of these disputes.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. The claimant was a legitimate official of the respondent as Branch Treasurer. She served the respondent during the currency of her office. She is therefore entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follow;

- i. A declaration be and is hereby issued that the claimant served the respondent as an elected and registered branch treasurer from 18th June, 2011 to 5th March, 2015.
- ii. The respondent be and is hereby ordered to pay the claimant her outstanding allowances and or dues pending between July 2013 and March 2015 totaling Kshs.1,265,293.30.
- iii. The cost of the Claim shall be borne by the respondent.

Dated and signed this 20th day of December 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 20th day of December, 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Okoth Instructed by Ataki Kimori & Okoth Advocate for the claimant.
2. Mr. Chege Instructed by Muchoki, Kang'ata, Njenga & Company Advocates for the respondent.