



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 334 OF 2013**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS**

**HOSPITAL AND ALLIED WORKERS.....CLAIMANT**

**VS**

**AGA KHAN EDUCATIONAL SERVICES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This claim is brought by Kenya Union of Domestic, Hotels, Education Institutions, Hospital and Allied Workers on behalf of Justus Arita, the Grievant herein. The Respondent filed a Response on 19<sup>th</sup> April 2013 and an amended Response on 15<sup>th</sup> February 2017.

2. The matter came up for hearing before me on 22<sup>nd</sup> November 2018 during the Nairobi Station Service Week. The Grievant testified on his own behalf and the Respondent called its Human Resource Manager, Getrude Mutta.

**The Claimant's Case**

3. The Grievant, Justus Arita was employed by the Respondent on 28<sup>th</sup> February 2001 in the position of Librarian. He worked until 3<sup>rd</sup> May 2011 when he resigned.

4. At the time of leaving employment the Grievant earned a monthly salary of Kshs. 30,000. His claim is for unpaid allowances.

5. The Union reported a dispute to the Minister for Labour who appointed a conciliator. The parties failed to agree prompting the conciliator to issue a certificate of disagreement dated 20<sup>th</sup> December 2012.

6. The Claimant seeks the following reliefs on behalf of the Grievant:

a) House allowance for 12 years.....Kshs. 615,000

b) Travelling allowance for 5 years @ Kshs. 6,000.....30,000

c) Acting allowance in the books store for 105 months.....735,000

**The Respondent's Case**

7. In its Response as amended on 15<sup>th</sup> February 2017, the Respondent states that the Grievant was employed in the position of Librarian at a monthly salary of Kshs. 14,000 effective 28<sup>th</sup> February 2001. The Grievant's salary was increased progressively up to Kshs. 30,000 as at the time he left the Respondent's employment in May 2012.

8. The Respondent admits that conciliation proceedings did not bear fruit.

9. The Respondent states that the Grievant was not unionisable but was in management as evidenced by the fact that:

a) Librarians are not listed as one of the categories of workers that are covered under the CBA (Clause 22); and

b) Unionisable workers who have worked for over 10 years are required to give 6 months' notice of termination which the Grievant would have had to give if he was unionisable under Clause 11.

10. The Respondent further states that the Grievant was receiving a gross salary which included all the allowances, as he was in management and was therefore getting benefits applicable to management category of employees.

11. The Respondent adds that the claims for travelling allowance and acting allowance have no contractual or legal basis. Moreover, all claims allegedly due prior to March 2010 are time barred under Section 90 of the Employment Act, 2007.

### **Findings and Determination**

12. From the pleadings and evidence on record, the first issue that emerges for determination by the Court is whether the Grievant was a unionisable employee. This point strikes at the centre of the claim as it questions the capacity of the Claimant Union to sue in its own name on behalf of the Grievant. Secondly, all the Grievant's claims are based on a Collective Bargaining Agreement (CBA) negotiated between the Union and the Respondent.

13. The Respondent's Human Resource Manager, Gertrude Mutta told the Court that unionisable employees are paid a service gratuity as provided in Clause 20 of the CBA, whereas management staff are members of a pension scheme.

14. In response to the claim for house allowance, the Respondent states that as at the time of resignation, the Grievant earned a consolidated monthly salary of Kshs. 30,000. According to the Respondent this was the practice for management employees. In similar vein, travelling allowance was not paid to employees in management category.

15. As held by this Court in *Kenya National Private Security Workers Union v Lavington Security Limited [2013] eKLR* trade unions enjoy a special standing under the Labour Relations Act within which they can sue in their own names on behalf of their members. For a trade union to exercise this right however, it must demonstrate that the Grievant they seek to act for was their member at the material time.

16. In the instant case, it would appear that the Grievant was initially a member of the Union but resigned sometime in the year 2006. He told the Court that he was coerced to resign by his employer but this is not what is in issue here. The Grievant claims to have rejoined the Union as a private member and produced his membership card showing intermittent payment of union dues up to April 2011.

17. There was no evidence that the Grievant paid any union dues to the Claimant Union after April 2011. It seems to me therefore that by the time this claim was filed, the Grievant's membership with the Claimant had lapsed. The Claimant Union therefore had no capacity to bring this claim in its own name.

18. Additionally, under Clause 22 of the CBA upon which the Grievant's claim is premised the position of Librarian which the Grievant held is not listed. The conclusion is that this position was not among the unionized positions as evidenced by the CBA negotiated by the parties.

19. Ultimately, the Court finds the Claimant's claim to be without basis and proceeds to dismiss it.

20. Each party will bear its own costs.

21. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 17<sup>TH</sup> DAY OF DECEMBER 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Tonge Yoya (Union Representative) for the Claimant

Miss Kagai for the Respondent