



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 291 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE AND**

**ALLIED INDUSTRIES UNION.....CLAIMANT**

*VERSUS*

**JUBILEE JUMBO HARDWARE LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant is a duly registered Trade Union under the (now repealed) Trade Unions Act Cap 233 Laws of Kenya with mandate to represent the interest of the unionisable employees of the Respondent. The Respondent is a limited liability company incorporated in Kenya with its headquarters in Kisumu. The respondent's major activities are sale of hardware, building and construction materials both in wholesale and retail markets, and transportation of the goods from one destination to another.

Pursuant to its mandate the Claimant negotiated a Collective Bargaining Agreement (CBA) with the Respondent for the benefit of the Respondent's unionisable employees after the parties had signed a Recognition Agreement. The CBA was signed in 2008 to remain in force for a duration of 2 years and thereafter remain in force until reviewed by a subsequent CBA.

Upon expiry of the CBA, the claimant reached out to the Respondent with proposals for amendment of the CBA. According to the claimants, the parties agreed on the new CBA but the Respondent withdrew good will and failed to sign the CBA.

Following the disagreement, the same was reported to the Minister for Labour and a Conciliator was appointed but according to the claimants the Respondent stood its ground and refused to sign the revised CBA prompting the signing of certificate of disagreement. The Claimant filed this claiming seeking the Court's intervention for settlement of the dispute.

The Respondent filed a reply to the Memorandum of Claim wherein it denies the contents of the Claim and states that after the existing CBA expired on 31<sup>st</sup> May 2010, no party was bound to accept the amendment proposals. It denies that there were deliberations by the parties before the Federation of Kenya Employers where the parties resolved the proposed amendments and agreed on subjects of the revised collective bargaining agreement.

The Respondent contends that there is no obligation under the Labour Relations Act or any other law to sign or honour the CBA with the Claimant since its employees are not members of the Trade Union.

Further that there is no law that either under section 57(1) of the Labour Relations Act and Articles 36 and 41 of the Constitution of Kenya 2010 or any other law that requires the Respondent to sign the collective bargaining agreement. That in any event the respondent offers far much better terms and conditions of work to its employees than what is proposed in the amended collective bargaining agreement and as such they are not obligated to sign terms of employment that are inferior. The respondent prays for the cause to be dismissed with costs.

On 26<sup>th</sup> October 2016, the Court referred the matter to the Economic Planning Department (EPD) to prepare an expert opinion and file the same in court within 60 days. The EPD prepared a report and filed in Court on 16<sup>th</sup> February 2017, with the following findings and recommendations:-

**The respondent's employment and labour cost trends**

They relied on the Respondent's records and the following was observed:

- i. Since its inception up to year 2013, the Respondent had sites only at the Kisumu County and its environs. In 2014, the Respondent opened a site at Nairobi County and from year 2015, it opened a further site at Mombasa County. It therefore implies that, at the time of filing this dispute, only the Kisumu County and its environs sites were in existence.
- ii. The level of unionisable staff assumed an upward trend during the period under review. It stood at 130 staff in year 2012, rose by 16 staff or 12.3% to stand at 146 in year 2013, further rose by 62 staff or 42.5% to stand at 208 staff in year 2014, further rose by 38 staff or 18.3% to stand at 246 staff in year 2015 and 245 staff in year 2016.
- iii. Similarly the level of management staff assumed an upward trend during the period under review. It stood at 24 staff in year 2012, rose by 4 staff or 16.7% to stand at 28 in year 2013, further rose by 3 staff or 10.7% to stand at 31 staff in year 2014, further rose by 9 staff or 29% to stand at 40 staff in year 2015 and finally further rose by 3 staff or 7.5% to stand at 43 staff in year 2016.
- iv. Correspondingly, the total consolidated annual labour costs for both unionisable and management workforce also assumed an upward trend mainly because of increased manpower each during the period under review. The figure stood at Kshs.33 million in year 2012, rose by or 15.5% to stand at Kshs.38.1 million in year 2013, further rose by Kshs.32 million or 84 stand at Kshs.73.3 million in year 2015.
- v. At the time of compiling this report, the figures for year 2016 were still being audited. However, noting that the level of unionisable staff had dropped by one (1) staff from 246 to 245 staff in year 2016, the management workforce had gone up by three (3) staff from 40 to 43 staff. Its therefore justifiably safe to expect the consolidated labour costs for year 2016 being higher than the Kshs.73.3 million recorded in year 2015. At the time of compiling this report, the figures for year 2016 were still being audited. However, noting that although the level of unionisable staff had dropped by one (1) staff from 246 to 245 staff in year 2016, the management workforce had gone up by three(3) staff from 40 to 43 staff. It is therefore justifiably safe to expect the consolidated labour costs for year 2016 being higher than the Kshs.73.3 million recorded in year 2015.

### **The respondent's financial position**

- i. The Revenue is derived from the sale of goods and transportation

income. Expenditures include staff, finance and administrative costs.

- ii. The Respondent's revenue from its two (2) core activities of sale of goods and transportation has been on an upward trend during the period 2011 to 2015. The revenue rose by 4% from the year 2011 to 2012 and by 16.5% between 2012 and 2013. In the year 2013, the revenue rose by 20.5% and in the year 2014 to 2015 by 32.6%.
- iii. The cost-of-sales also assumed an upward trend rising by 6.4% in 2011, 16.4% in 2012, 30.4% in 2013 and 32.6% between 2014 and 2015.
- iv. Gross profits and other operating incomes also generally assumed an upward trend except in year 2012, when it fell by 19.7%. between 2012 and 2013 the gross profits rose by 14.6% and further by 72.3% between 2013 and 2014. Between 2014 and 2015 it rose by 7.6%.
- v. Except in year 2013 when the Respondent experienced a loss before taxation of Kshs.10.4 million, all the other years have been recording profits during the period under review.
- vi. In summary, the foregoing shows that the Respondent has been doing fairly well over the years and is poised for better performance in the years ahead. Indeed, the Respondent is ranked among the top 100 middle sized companies in Kenya.

### **Compensable Factors**

#### **1. Rise in the Cost of Living (Inflation)**

- i. The Collective Bargaining Agreements (CBAs) that have been pending since the expiry of the registered CBA are four (4). They are for the periods June 2009 to May 2011; June 2011 to May 2013; June 2013 to May 2015 and June 2015 to May 2017. The CPMU recommends that the parties include the CBA for the period June 2017 to May 2019 because, as at the date of making this report, the parties would have to embark on renegotiation of the fifth CBA in two (2) months' time.
- ii. The applicable compensatory period for the rise in the cost of living over the years is the period June, 2009 to May, 2015; a total of six(6) years. For the New Nairobi Lower Income Group, the rise in consumer price indices during the six (6) year period stands at 58.5% which translates to a general wage increase of approximately 10% each year.
- iii. The Respondent avers in its memorandum that it has been setting basic minimum wages at 5% above the General Wages (Amendment) Orders. This percent rise is also effected on the existing workforce's wages on annual basis. Consequently, to compensate for inflation of 10% each year, a further 5% each year is recommended commencing from June 2009. However, in the CBA for the period June 2017 to May, 2019; the general wage increase should be 10% each year or a total of 20% during the 2 year period. The same need apply for the basic minimum wages (new entrants).

## **2. Productivity**

Further compensation would arise from improved levels of productivity of the unionisable workforce. However, during consultations, the Respondent reported to CPMU that the productivity levels of the unionisable workforce is average. For purposes of the expected renewed healthy labour relations between the parties, the CPMU recommends no further compensation in respect of this factor.

### **Analysis of the issues in dispute**

#### **1. Effective Date and Duration**

As established under paragraph E1(i) herein this report, the effective dates

for the new CBAs shall be 1<sup>st</sup> June 2009 to 31<sup>st</sup> May 2011; 1<sup>st</sup> June 2011 to 31<sup>st</sup> May 2013; 1<sup>st</sup> June 2013 to 31<sup>st</sup> May, 2015; 1<sup>st</sup> June 2015 to 31<sup>st</sup> May 2017 and 1<sup>st</sup> June 2017 to 31<sup>st</sup> May 2019; a total of five (5) CBAs each with a duration of 2 years. When drawn and signed by the parties all the 5 CBAs will then be registered by the Honourable Court at the same. The expired ones will be for formality and record purposes.

#### **2. Basic Minimum Wages**

- i. As already stated herein this report under paragraph the applicable compensation in respect of inflation is 10% each year. The Respondent's practice has over the years been to peg the wage rates at 5% above what the various Regulation of Wages (Amendments) Orders provide. The applicable Wages Orders are those of May 2009, 2010, 2011, 2012, 2013, 2014 and 2015.
- ii. Since the applicable compensation is 10% each year and the Respondent has been providing 5% above the statutory rates as provided for by the various Wages Orders, CPMU recommends that the Respondent tops up the balance of 5% each year for the CBAs commencing from 1<sup>st</sup> June 2009 to 31<sup>st</sup> May 2015. However, the CBA for the period 1<sup>st</sup> June 2017 to 31<sup>st</sup> May 2019 be set at 10% above the statutory rates each year.
- iii. The existing provision in the last registered CBA (1<sup>st</sup> June 2007 to 31<sup>st</sup> May 2009) is 10% each year or a total of 20% during the two year period of the CBA. The principle in CBAs has always been either retain the clause as it were or improve it but not offer inferior terms and conditions of service. In this instance, the Respondent is offering 5% less than what not only the existing provision states but also our recommendation arising from the Wages Guidelines.

#### **3. General Wage Increase.**

The arguments as set out under paragraphs F2(i), (ii) and (iii) above do apply also in this case for the existing workforce over the various lifespans of the expired CBAs. The recommendations do also apply.

#### **4. House Allowance**

- i. The existing provision in the last registered CBA is 20% of the Basic Wage subject to a minimum of Kshs. 1500.
- ii. The Wages Guidelines No. 2 (ii) provide that a half (1/2) of the permissible compensation in respect of inflation be allowed for housing. As explained under paragraph F2(ii), the applicable compensation in respect in housing is 5% each year each.
- iii. During consultations with CPMU, the Respondent stated that house rent averages for its unionisable workforce is captured within the 15% as provided in the General Wages (Amendments) Orders. This is at variance with what is existing as per (i) above by 5%. However, the applicable compensation of 5% {(ii) above} and 15% as stated by the Respondent add up to 20% as per (i) above.
- iv. From (iii) above, the 20% of Basic Wage need to be retained. Taking the lowest paid staff provision as per the various Wages Orders and only applying the Respondent's setting of wages at 5% above these provisions and the adhoc going rent rates at the various periods of the 5 CBAs, the CPMU recommends the following:-
  - a) 1<sup>st</sup> June, 2009 to 31<sup>st</sup> May 2011:- 20% of Basic Wage subject to a minimum of Kshs.1,800
  - b) 1<sup>st</sup> June, 2011 to 31<sup>st</sup> May 2013:- 20% of Basic Wage subject to a minimum of Kshs. 2,300
  - c) 1<sup>st</sup> June 2013 to 31<sup>st</sup> May 2015:- 20% of Basic Wage subject to a minimum of Kshs. 2,500
  - d) 1<sup>st</sup> June 2015 to 31<sup>st</sup> May, 2017:- 20% of Basic Wage subject to a minimum of Kshs. 2,800 ; and
  - e) 1<sup>st</sup> June 2017 to 31<sup>st</sup> May 2019:- 20% of Basic Wage subject to a minimum of Kshs.3,200.

#### **5. Hours of Work**

Sub clause (d) be retained as it were that is 800/= per month be paid to watchmen over and above their normal monthly wages. The principle here is that a term of service can only be retained as it were or be improved upwards.

#### **6. Leave Travelling Allowance**

Respondent's workforce comes from every part of the country. The going return tickets by fairly safe road means ranges between Kshs.800 to Kshs.2,800. The CPMU recommends Kshs. 2,500 commencing from the year 2017 and only for those who shall not have proceeded for their leave as at the time the applicable CBA is registered by the Honourable Court.

#### **7. Safari Allowance**

The going accommodation rates in the three cities range from Kshs.800 and subsistence (breakfast, lunch and supper) from Kshs. 350. The CPMU therefore recommends a safari allowance of Kshs.1,200 (subsistence and accommodation) for all categories of workers commencing from year 2017 and only for those who will go on safari as at the time the applicable CBA is registered by the Honourable Court.

#### **8. Death of an Employee**

The CPMU notes that indeed, nobody would wish to die so that their next of kin benefit from the provisions of this clause. The parties' existing CBA sub clause (e) provide for a coffin and Kshs. 25,000. The CPMU recommends that the figure be raised to Kshs. 30,000.

#### **9. Tools Allowance**

The parties existing CBA provides for Kshs. 300. The CPMU recommends Kshs. 500 and only commencing from year 2017.

#### **10. All Other Terms and Conditions of Service**

The CPMU recommends that all other terms and conditions of service be retained as provided for in the existing CBA which was for the period June, 2007 to May, 2009.

After analysis of the respondent's financial situation, and the financial provisions of the CBA, the CPMU concluded that the recommendations are sustainable and within the ability of the respondent to meet.

#### **Submissions**

The Claimant filed submissions in which they adopted the report by the Economic Planning Unit of the Ministry of East African Community, Labour and Social Protection State Department of Labour. The Respondent on the other hand did not file any submissions.

#### **Determination**

The issues for determination are whether the respondent is under obligation to sign the CBA and if so, the court's determination on the clauses of the CBA, Section 54 of the Labour Relations Act, provides as follows –

#### **54. Recognition of trade union by employer.**

**(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.**

**(2) A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.**

**(3) An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.**

**(4) The Minister may, after consultation with the Board, publish a model recognition agreement.**

**(5) An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.**

**(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.**

**(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.**

**(8) When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.**

Under Section 54(3) an employer who has signed a recognition agreement with a union is under obligation to sign a collective agreement with the union. The respondent does not deny signing a recognition agreement with the claimant. It however alleges that the claimant no longer has members among its employees. The claimant on the other hand argues, as stated in the CPMU report, that the respondent coerced its members to resign from its membership. The claimant submits that the recognition agreement is still valid as it has never been revoked.

Section 54(5) provides for termination of recognition agreement by an employer or group of employers. The parties did not submit a copy of the recognition agreement to enable the court determine if it provides for the mode of termination thereof. The court can therefore only rely on the provisions of Section 54(5) of the Act in determining the issue of termination of the same.

In the present case the respondent has not taken any steps to terminate the recognition agreement. It still has unionisable employees within its employment who have a constitutional right under Article 41 of the Constitution to join and participate in activities of a trade union.

Further, although the respondent avers that the employees have resigned from membership of the union, it did not produce any evidence of resignation of employees from membership of the union. It is not enough for the respondent to take no action to either prove resignation of its employees from membership of the union or refuse to negotiate a CBA on grounds of such resignation. The respondent can only disengage itself from the obligation to negotiate a CBA if it takes steps and terminates the recognition agreement. For as long as the recognition agreement is in place, the respondent is under obligation to negotiate a CBA with the union as provided under Section 54(1) and (2) of the Labour Relations Act.

For the foregoing reasons, I find that the respondent is statutorily and constitutionally bound to negotiate terms and conditions of the collective agreement with the union in respect of its unionisable employees.

**CBA**

According to the claimant, the parties agreed on the following clause of the CBA –

1. Hours of work
2. Overtime rates
3. Annual leave
4. Public Holidays
5. Maternity leave
6. Probationary period
7. Sick leave
8. Injury by accident
9. Payment of wages
10. Redundancy
11. Safari Allowance
12. Provision of protective clothing, uniform and other equipment.
13. Retirement of Employee
14. Night shift
15. National Social Security Fund
16. Certificate of service
17. Letters of appointment
18. Supply of milk
19. Termination of employment

20. Funeral burial expenses
21. Warning system
22. Definition of trainee
23. Absence from duty
24. Lateness
25. Compassionate leave
26. Leave of absence
27. Waterproof notice board
28. Records of employees
29. Disputes
30. Tools allowance
31. Safety and health
32. Effective date and duration

In the respondent's proposals dated 11<sup>th</sup> October 2016 and filed on 17<sup>th</sup> October 2016, it confirms that there is no dispute on the following clauses–

1. Public Holiday
2. Maternity leave
3. Probation period
4. Sick leave
5. Injury by accident
6. Payment of wages
7. Redundancy
8. Overtime
9. Provision of protective clothing
10. Night shift allowance
11. NSSF
12. Certificate of service
13. Funeral/burial assistance (death in service)
14. Letter of appointment
15. Supply of milk
16. Termination of employment
17. Warning system
18. Definition of trainee

19. Absence from duty
20. Lateness
21. Compassionate leave
22. Leave of absence
23. Records of employees
24. Safety and health
25. Medical treatment
26. Work injury

From the foregoing, the only clauses not agreed upon are the following –

1. Wages, rates of pay
2. Effective date
3. Leave travelling allowance
4. Safari allowance
5. Annual leave
6. Hours of work
7. Retirement
8. Tools allowance

The claimant adopted the CPMU report. The respondent did not file any submissions in respect of the report. The court has considered the positions of the parties and makes determination on the issues not agreed upon as follows –

### **1. Effective Date**

The effective date is always the anniversary of the last agreement between the parties to ensure that employees are covered even during periods when parties have not concluded the CBA. That is why the effective date clause states that the agreement remains in force until replaced.

In the present case, the last CBA expired on 31<sup>st</sup> May 2009. The effective date for the present agreement is therefore 1<sup>st</sup> June 2009.

The CPMU proposed as follows –

#### **“1. Effective Date and Duration**

*As established under paragraph E1(i) here-in this report, the effective dates for the new CBAs shall be 1<sup>st</sup> June 2009 to 31<sup>st</sup> May 2011; 1<sup>st</sup> June, 2011 to 31<sup>st</sup> May 2013; 1<sup>st</sup> June 2013 to 31<sup>st</sup> May 2015; 1<sup>st</sup> June 2015 to 31<sup>st</sup> May 2017 and 1<sup>st</sup> June 2017 to 31<sup>st</sup> May 2019; a total of five(5) CBAs each with a duration of 2 years. When drawn and signed by the parties all the 5 CBAs will then be registered by the Honourable Court at the same. The expired ones will be for formality and record purposes.”*

The parties have however not made any proposals on subsequent CBAs and I will therefore not make any finding on the same.

The effective date for the CBA is dispute is therefore 1<sup>st</sup> June 2009.

### **2. Annual leave**

According to the outgoing CBA, annual leave was 26 days. The claimant proposed 32 days while the respondent proposed to retain.

In view of the fact that the law provides for 21 days, the 26 days in the CBA is reasonable and the court awards that the same be retained.

### **3. Safari allowance**

The outgoing CBA provides for safari allowance as follows –

An employee who is required to work away from his principal area of employment (i.e. outside municipal boundary) shall be paid subsistence and accommodation allowance as follows:-

- a) *Drivers Kshs.300.00*
- b) *Turn boy Kshs. `120.00*
- c) *Artisans Kshs.200.00*
- d) *Others Kshs.200.00*

*A flat rate of Kshs.5,000.00 shall be given to drivers to cater for any unexpected costs.*

The claimant proposed Kshs.500 across the board which it states was agreed upon. The respondent proposes that the clause be retained as in the outgoing CBA.

The court agrees with the union's proposal of Kshs.500 across the board taking into account inflation and the raise in the cost of living over the years.

### **4. Hours of work**

The outgoing CBA provides for 45 hours per week for all regular workers, 48 hours for day watchman and 52 hours for night watchmen.

The claimant proposes that the clause be retained as is except the flat rate for overtime pay for watchmen which it proposes to be increased from Kshs.800 to Kshs.900.

In view of the fact that the parties are not in agreement, the court awards that overtime be calculated as provided by law being 1.5 times normal hourly rate for regular overtime and double the hourly rate for overtime during public holidays and rest days.

### **5. Tools allowance**

The claimant proposes that the figure of Kshs.300 per month for employees who use their own tools be increased to Kshs.500/= per month while the respondent' proposal appears to be based on a misunderstanding of the clause as the proposals considers this to be a deduction for wages.

I award that the clause be retained as in the outgoing CBA.

### **6. Rate of Pay**

The union proposed an adjustment of all figures by 40% for the first year and a similar increase of 40% for the second year of the CBA on wages, and an adjustment of Kshs.3,500 for house allowance.

The respondent proposed an increment of 5% above the statutory minimum rates of pay.

This court is bound by the wages guidelines which is the basis upon which CPMU prepared its economic report. According to the CPMU report the employees of the respondent are entitled to a wage increase of 10% according to the wages guidelines (Section 15(5) of the Employment and Labour Relations Court Act.) I therefore award a wage increase of 10% for the first year and a further 10% for the second year.

On house allowance, the CBA provides for the same to be pegged at 20% of the basic pay of the employee. I find the same to be reasonable and award that house allowance be retained at 20% of basic wage.

On the minimum rates of pay, the claimant proposes an increase of 40% while the respondent proposes 5% above the Gazetted statutory wages.

I consider the respondent's proposal fair and award that the minimum rates of pay be pegged at 5% of gazetted statutory minimum rates of pay.

For the avoidance of doubt Part 1(a) of the CBA is what will be pegged at 5% above statutory minimum rates of pay while general wage increase will be at 10% for the first year and a further 10% for the second year.

### **Costs of this Suit**

Each party shall bear its costs. Orders accordingly.

**DATED AND SIGNED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**