REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1788 OF 2011

KENYA POWER & LIGHTING COMPANY LIMITED.....CLAIMANT

VERSUS

KENYA ELECTRICAL TRADES AND

ALLIED WORKERS UNION.....RESPONDENT

JUDGEMENT

Issues in dispute –

a) Non conclusion of the CBA for the period 2011/2012;

b) Permanent employment of employees already on 3 months, 1 year and 3 years terms of service;

c) Refusal to accord recognition to the union to represent employees on (2) months contract and temporary (non-regular) one (1) year day casuals;

d) Unilateral conversion of temporary one day casuals into two (2) months contract with resultant decrease on their hourly rate, denial to pay extra hour worked and refusal to pay day allowance whenever necessary;

e) Discrimination in awarding longer contracts terms i.e. six months, one year and thee years;

f) Full implementation of the Memorandum of Agreement dated 18th September 2010 as regards representation of day casuals, promotions and operationalization of joint oversight committees on job contracting; and

g) Unconditional lifting of suspension letters issued to a union official and members of Nairobi region.

Claim

1. The parties herein have a Recognition Agreement and CBA negotiated from time to time. The dispute arose while parties were negotiating the CBA for the period of 2011/2012 which commenced on 4th January, 2011 where 28 items out of the 40 items were concluded.

2. On 17th June, 2011 the Respondent wrote to the Minister reporting a dispute on items not agreed. A conciliator was appointed. On 27th September, 2011 the Respondent reported another dispute with the Minister on the matters of negotiations and also issued a strike notice of 24th October, 2011.

4. On 6th October, 2011 both parties were invited for negotiations but the Respondent refused to attend. The Minister appointed a new conciliator and directed the Respondent to withdraw strike notice unconditionally to give dialogue a chance but the Respondent refused. The conciliation meeting on 17th and 18th October, 2011 did not bear fruits and a Certificate of Disagreement was issued.

5. The Claimant thus moved the court to stop the industrial action. Interim orders were granted.

6. On the matters in dispute, on the matters of employees on 3 months contracts; 6 months, 1 year and 3 years, the claim is that the employees on 3 year and 3 months contracts are represented by the Respondent union and the terms and conditions of employment are being negotiated. Employees on 6 months contract are not represented by the union as their confirmation to permanent employment is dependent on availability of appropriate vacancies in the Claimant company.

7. The Respondent has included in the CBA under negotiations terms that apply to 2 months and temporary (non-Regular) one day causal employees and made unreasonable offer/proposal. These category or employees are not represented by the union and should not be made part of the subject CBA. Employees with fixed-terms contracts for 2 months have not been represented by the union.

8. There is no discrimination against any set of employees that has been brought to the attention of the claimant. There is no specific case of discrimination against any specified employee in recruitment.

9. On the implementation of the Memorandum of Agreement of 18th September, 2010 the claim is that the Claimant has fully implemented the MOA where day casuals promotion is addressed under clause 24 of the CBA to be done at the prerogative of the Claimant company on deserving staff and based on available vacancies in the establishment, qualifications and performance. The Claimant has established the Joint Oversight Management Committee in all regions to oversee allocation of construction jobs to contractors.

10. On the demand to lifting suspension letters issued to union official and members of Nairobi region, the claim is that the union claim is misplaced as suspensions were effected as a result of fighting in the work place against the Claimant rules and regulations.

11. The Claimant is seeking for an order that the Respondent union should attend the conciliation meetings in good faith and to comply with section 30 of the CBA and in the alternative, the court to award in terms of reasonable offer made by the claimant.

Defence

12. The Respondent filed response on 4th November, 2011 and amended the same on 7th March, 2014 with a counter-claim.

13. By letter of 19th October, 2011 the union reported a dispute with the minister in terms of article 41 of the constitution. The directive to withdraw the strike notice was unlawful and contrary to the law.

14. The Claimant forwarded proposals to the union on the revision of CBA on 1st November, 2010 and negotiations started on 4th January, 2011 and by 27th July, 2011 only 28 non-monetary issues had been finalised and leaving 12 monetary issues to be negotiated. By 21st September, 2011 when the Respondent issued strike notice there were no negotiations pending. The claimant's delay in negotiations was meant to frustrate the union to accept unfavourable proposals.

15. The defence is also that the Claimant never gave the union a written offer not express offers at the conciliation meetings but concentrated on procedural elements of the dispute to buy time and frustrate the union and its members. By its conduct the Claimant was not acting in good faith to finalise the CBA and hence the deadlock and subsequent issuance of the strike notice by the Respondent union. This was inevitable as the Claimant moved to court in Cause No.29 of 2007 an economic dispute that lasted for 5 years and left the union and its members greatly disappointed with very little economic gains. There is intention is to circumvent the respondent's right to conclude a CBA within reasonable time in order to cushion the members' purchasing power.

16. The defence is also that on the question of permanent employment of employees already on 3 months, 6 month, on year and 3 year contract is that the Claimant has over 8000 employees on such terms against a workforce of 5900 permanent employees in breach of the employment Act. The union in the Recognition Agreement with the Claimant are allowed to represent all workers in the claimant's establishment but the Claimant has persistently violated the agreement by frustrating the union's efforts to represent the contract employees.

17. Union membership is not classified according to the duration of employment and hence the Claimant should be directed by the court to respect and implement the terms of the Recognition agreement.

18. On the refusal by the Claimant to accord recognition to the union to represent employees on 2 months contract and temporary (non-regular) one day casuals, the defence is that the union is within its mandate to represent all employees within the Claimant establishment.

19. There is unilateral conversion of temporary one day casual into two months contract with resultant decrease on the hourly payment rate, denial to pay of extra hour worked and refusal to pay day allowance whenever necessary. The defence is that the casuals in the Claimant establishment work alongside the permanent employees doing the same type of jobs for which their payment is fixed on hourly rate but the claimants have unilaterally and without the union input converted the casuals to contract employees with less favourable terms of pay. This action has resulted in the Claimant paying these employees less wages in comparison with what the parties have agreed.

20. The defence is also that there is discrimination by the Claimant in the process of awarding longer contracts to terms longer at 6 months, 1 to 3 years contracts. Where there are vacancies the Claimant make internal advertisement which are carried out periodically in a discriminatory manner against employees on temporary 1 day casuals and those currently on converted terms of 2 months contracts. This is an unfair labour practice and unconstitutional and exposes the casuals to exploitation and degradation which the court should guard against.

21. Full implementation of the MOA dated 18th September, 2010 as regards representation of casuals, promotions and operationalisation of joint oversight committee on job contracting, the Claimant should not be allowed to use the court process to renege on an agreement mutually entered into by parties herein.

22. The suspended officials of the union are a matter that has since been compromised and should not be made an issue herein.

Counter-claim

23. In counter-claim, the respondent's case is that before the suit was filed, parties herein had unresolved issues and which formed the basis of the strike notice called by the respondent.

(a) Definition – that in the **2009/2010 CBA** definition part should be amended to cover and include STIMA CUB.

(b) Medical benefits – the Respondent proposes to have Kitui and Mwingi stations in the areas covered by medical benefits under the referral scheme. In the inpatient and outpatient balances, the Respondent proposes that unionisable employees should enjoy medical benefits throughout the 2

year period of the CBA without restrictions on the expenditure/ceiling per year

(c) General wages/salary increase – the Respondent proposal is to have a general wage increase of 20% for each year or a total of 40% for the 2 years period taking into account the interim increases already given by the claimant;

i. Basic wage, Grade "A" – basic minimum wage at Kshs.17,500.00;

ii. Salary Conversion table – a table be done to avoid salary overlaps

iii. Entry point for all employees – a clause with a set salary for all unionisable employees at the entry point

(d) Hardship allowance – there be a hardship allowance for employees in Mwingi and Kitui Towns –

Salary scale	allowance
A-B	Kshs.4, 000.00
C-D	Kshs.4, 200.00
E-F	Kshs.4, 400.00
G-H	Kshs.4, 600.00
J-K	Kshs.4, 800.00
L-M	Kshs.5, 000.00

That clause 12 of the CBA is amended.

(e) Mileage rates – the respondent's proposal is to have the rate of Kshs.18.00 per kilometre. changed to Kshs.25.00 per kilometre.

(f) Electricity allowance/concession – the Respondent proposal is to have an increment from Kshs.2, 000.00 to Kshs.3, 000.00.

(g) Suspension from duty – Respondent proposal is an amendment to have employees charged in court over a matter involving the claimant's interest be suspended on half pay until the case is heard and determined.

(h) Effective date and validity and payment of arrears – the proposal is to have at 1st January every year.

(i) Commuter allowance – proposed as a new clause for a provision of Kshs.5, 000.00 for Nairobi, Mombasa and Kisumu and other stations at Kshs.3, 000.00.

(j) Contract employees – a new clause to cover all employees with terms that employment should be in accordance with the provisions of the Employment Act. All employees be represented by the union.

(k) Job classification – a clause making provision for non-discrimination.

(l) Gratuity – have a clause making provision that upon the completion of each contract term, employees on 2 months, 3 months, 6 months, and 1 year and above with an aggregate service of 12

months to be paid gratuity of 31% of the basic pay calculated on prorate basis.

(m) Day and variable allowance – amendment to clause 4.0 to provide for day and variable allowances and there be payment to casual, temporary and contract employees. Where an employee is required to work and live temporarily away from the normal place of work to be entitled to claim such allowance.

(n) Transfer and special accommodation for contract and temporary employees – proposed amendment to clause 9.0 to provide for a 3 year contract employee to be transferred from one company operational depot to another where disturbance to housing arrangement will occur to be paid a transfer allowance –

Not house -	housed
2 months basic wage	1 month basic wage

Disturbance allowance

Not housed -	housed
3 months basic pay	2 months basic pay

And costs of transporting personal and household good and the movement of employee together with spouse and children be borne by the employer.

(o) Medical benefits – proposed amendment to clause 7 to have all employees on various contract entitled to a limited outpatient and inpatient medical cover on prorate basis-

Out-patient

Employees spouse and children under 24 years to have kshs.50, 000.00 per year.

In-patient

Employee, spouse and children under 24 years to have 100% of hospital bill upon NHIF rebate covered subject to a minimum of Kshs.300,000.00 per year.

(p) Leave entitlement – proposed amendment to clause 8 –

i. Maternity – all female employees without distinction to resume duty after maternity leave at the same level

ii. Leave allowance – all employees without distinction and with an aggregate of 12 months to be paid a leave travel allowance of kshs.25, 000.00.

iii. Paternity leave – all employees to be granted paternity leave with pay.

iv. Compassionate leave – all employees on contract terms to be granted reasonable leave without loss of pay

23. The Respondent is thus seeking for orders that the claim by the Claimant be dismissed with costs; the counter-claim be allowed and costs of the suit be paid to the respondent.

Submissions

24. Both parties filed their written submissions.

25. The Claimant submits that the cause of action arose following the Respondent union calling for a strike vide notice of 27th September, 2011 and 19th October, 2011 while CBA negotiations were on-going. The first notice was issued while the parties had agreed to convene and negotiate but the meeting was deferred following the chairperson being indisposed and which information was brought to the attention of the respondent. The strike notice was thus premature and there was no deadlock to negotiations and conciliation had not been sought.

26. The Claimant also submits that the issues set out in the counter-claim of 7th march, 2014 is after 3 years and matters set out in the same are not with regard to the subject CBA of 2011/2012 and cannot form part of the dispute herein.

27. On the issues registered as being in dispute, the non-conclusion of the CBA 2011/2012 was by the conduct of the Respondent frustrated by the notice to go on strike before the negotiations were concluded. There was no inaction of lack of co-operation from the claimant. The dispute reported to the minister was before the parties could explore the social dialogue.

28. On the nature of contracts entered into between the Claimant and its employees, part III of the Employment Act allow the Claimant to enter into various forms of employment contracts with its employees. The contracts of service are determined by the nature of services required by the Claimant and based on organisational requirements, availability of work, affordability, sustainability and profitability of the business. The decision to issue any contract has financial implications which must be well advised to ensure sustainability and affordability of the same.

29. On the refusal to accord recognition to the union to represent employees on 2 months contract and casuals, the Claimant submit that this will have the effect of these employees due wages being subject of negotiations under the collective bargaining process. Such employee's employment is subject to availability of work and thus not employees of the Claimant and cannot form part of the cadre in the CBA and such proposal must be declined.

30. Other submissions relate to the respondent's counter-claim to which the Claimant had no defence filed. The Claimant has also relied on the following cases in support of their submissions –

31. Teachers Service Commission versus KNUT, KUPPET, SRC & AG, Civil Appeal No.196 of 2015; Kenya Plantation & Agricultural Workers Union versus unilever Tea (K) Limited, Cause No.32 of 2014; and Kenya Plantation & Agricultural Workers union versus Kenya Tea Growers Association, Cause No.1997 of 2014 and Cause No.15 of 2015(Kericho) [consolidated].

32. The Respondent submits that before the Claimant filed suit, the Respondent had reported the dispute with the minister and the parties being unable to arrive at an amicable solution, the union issued a strike notice which was stopped by the Claimant filing this suit. The Respondent filed defence and counter-claim seeking to have claim dismissed and the strike notice to proceed and in the alternative the counter-claim be allowed as prayed with costs. There is no challenge to the counter-claim by the claimant.

33. The Respondent also submits that on the unresolved issues in the CBA of 2011/2012 such should be concluded by the court by having all employees on the Claimant being put on permanent terms of employment and be allowed unionisation; all monthly contract employees to be unionised as well as causal employees; the Claimant to stop discrimination against contract employees with all employees being treated equally; the CBA be implemented as soon as it is concluded; and that the union officials placed on suspension, such be lifted.

34. There being no defence to counter-claim, the same be allowed as prayed. Costs be awarded to the respondent.

Determination

The both CBA subject of litigation herein – the CBA covering 2011/2012 and CBA covering 2009/2010,

the issues can be set out as follows;

Whether employees on 3 and 6 months contract, employees on 1 and 3 years contract should be made permanent;

Whether there should be unilateral conversation o temporary one day causals into two months contract with fewer benefits;

Whether there is discrimination in awarding longer contracts term – 6 months, 1 year and 3 years;

Whether the counter-claim has merits and if so whether it should be allowed and if not whether it should be dismissed;

35. Before delving into the issues set out above, it is trite that a counter-claim is a new suit and once filed; served upon the other party; there ought to be a reply to it challenging the new claims made or confirming the same. The Respondent filed the Amended Response and Counter-Claim on 7th March, 2014; served the Claimant and up and until the close of pleadings and filing of written submissions, there was no reply to controvert the counter-claim. The counter-claim is only revisited by the Respondent at the written submissions stage. However, such a revisit is not a defence or response as contemplated under the Rules of procedure and or practice. A defence/response to a claim is well articulated under the rule as a reply to any averments made by a party to a claim.

36. In Halsbury's Laws of England, Volume 42, 4th Edition also states:-

> *For the purpose of default in pleading, a counterclaim is treated as a claim. Therefore, if the Plaintiff or other person against whom a counterclaim is made fails to serve a defence to counterclaim within the prescribed time, the counterclaiming defendant may enter final judgment according to the nature of the counterclaim.*

37. The Court of Appeal in **Kiprotich versus Gathua and Others, C.A. Civil Appeal No.19 of 1976**, KLR the court held that the court has jurisdiction to enter judgment due to failure to file a reply or defence to a counterclaim.

38. In this regard, I therefore find no challenge to the respondent's counter-claim. Making submissions to a matter that once has failed to give a defence to does not negate its averments and the veracity of the import of the claims made.

39. The counter-claim relates to contested and proposed amendments to the CBA of 2009/2010. The counter-claim is filed with the amended defence on 7th April, 2014.

40. Both parties admit there is recognition between them. Within such, several collective agreements have been concluded. The subject CBA with regard to the counter-claim covering the period of 2009/2010 putting into account the provisions of section 59(2) of the Labour Relations Court Act;

> *(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association*

41. The on-going CBA remains in force in its terms and conditions until the parties are able to register a new CBA giving effect to new terms and conditions. There is therefore no vacuum in between CBAs. Therefore, where the CBA covering the period of 2009/2011 was not concluded or is contested in its terms and there is no other binding CBA negating its terms and conditions, the same remains running and can be addressed by either party to it before the court.

42. Without filing any defence to the counter-claims, the same must be looked at their own merits, the lawfulness of the same and award accordingly.

43. On the issues not agreed by the parties in the CBA of 2011/2012 I will address each on its merits.

44. On the issue of the non-conclusion of the CBA negotiations and the Respondent call for a strike by the Respondent vide notice of 19th October, 2011 – the same was proceeded by invitation by the Respondent for negotiations over the subject CBA for the period 2011/2012 commencing January, 2011. By September, 2011 there were several unresolved issues. The Respondent reported a dispute to the minister which was followed by the strike notice and before such court be put into effect, the Claimant filed the current suit and an order was issued stropping the Respondent from proceeding with the strike notice. Such order has been respected to this date.

45. The Respondent had thus complied with the provisions of section 62 of the Labour Relations Act by reporting the dispute as required. Before the motions of section 76(1) (c) of the LRA could take effect, the Claimant had moved to court and the potential strike stopped. By abiding the court orders issued, the respondent's call for a strike thus was addressed. Such was to allow the issues in dispute be resolved. The claim to thus have the strike notice withdrawn and in the alternative have the claimant's reasonable proposal to the contested items be accepted is thus deals the first issue.

46. On the issue of nature of employment terms and conditions – causal, contract or permanent - The law allow an employer and employee to agree on terms of employment which can be on casual terms, fixed term contract, seasonal contract or as the case may be. Section 10 of the Employment Act allows and employer to enter into an employment relationship with an employee based on the agreed terms and conditions and for the specific work required by the employer. Section 10(3) (c) provides that;

> *(c) Where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

47. Upon such employment, whether on casual terms, fixed term contract seasonal or on full time basis, *all employees* without a distinction of whatever nature are covered and protected under article 41(2) of the constitution with regard to enjoying the right to unionise. Such a right canto be negated by the nature of employment even if such employment is to end at the end of each day. Article 41 of the constitution covers *all workers;*

> ***41. (1) …***
>
> ***(2) Every worker has the right—***
>
> > ***(a)…***
> >
> > ***(c) To form, join or participate in the activities and programmes of a trade union;***

48. Upon exercising the right to form or join or participate in the activities of a trade union, the union representing the employee/worker has a constitutional mandate under article 41(5) of the constitution to;

> ***(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining***

49. the rights under article 41(2) on the right of an employee to unionise; the right under article 41(5) on the right of an employer and trade union to engage in collective bargaining are not competing. Upon the employment of each employee under the terms and conditions agreed between the Respondent and each employee, once such an employee has joined the Respondent union, and the union has Recognition by the employer and Claimant herein, Such Recognition is thus achieved upon set principles. The employee who joins and become a member of the union enjoy the terms and conditions that govern their employment with their union based on the Recognition. Such cannot be negated unilaterally by the Claimant on the basis of the initial entry into the work force as upon the recognition of the union, its members enjoy the terms that have been negotiated with the Claimant as the employer.

50. Such recognition and application of the recognition of the union does not infringe on the claimant's right as the employer in addressing the employment terms of its respective employees whether casuals, two months contract, 1 or 3 year contracts. With the employees exercising their constitutional right to join the trade union of their choice and in this case the Respondent union, and such union enjoying recognition by the Claimant as the employer, such recognition having met the set threshold, then the Claimant is bound by the terms of such recognition.

51. It is therefore not a question of the duration of employment; rather it is the question of *employment* and the constitutional right to *unionise.* Once an employee by whichever name, form or period of *employment* is engaged by the respondent, such an employee has an unrestricted right to *unionise.*

52. The question then of whether there is unilateral conversion of temporary one day casuals into 2 months contract and thus with reduced pay must be addressed in the context of the nature of employment; the need for which such employment is sourced by the Claimant and the terms and conditions upon which the employee is sourced for. To make a blanket provision that all employees taken up by the Claimant should be put into permanent employment would negate the purpose and context for which the law allow an employer to source for employees for casual work, fixed terms contracts or on permanent basis.

53. The rationale of taking in new employees, retaining such employees must be addressed by the employer. Such does not negate the right of each employee to unionise in the context of the nature of employment each individual employee has. Such is to address the business need and allowing the Respondent union to have a free hand to recruit new members without interfering with each party's mandate.

54. The nature of work for which an employee is source for, the duration and nature of engagement shall therefore be left to the Claimant as the employer to determine. Such should however be done within the law. The Respondent union should also not be restricted in their recruitment of new members within the Claimant employees.

55. Discriminatory work practices are specifically prohibited under section 5 of the Employment Act and read together with article 27 of the constitution. The context here is that the Claimant has issued different employment terms and conditions of employment to different employees thus affecting the right to equality. However, with the above findings, with the Claimant as the employer right to recruit employees based on its business need and place them as causals, contract of permanent employees secured, such cannot thus be a basis to claim the same as being a discriminatory practice.

56. In any event, discrimination against any employee cannot apply in a blanket manner. Where a causal employee has specifically been singled out in the Claimant recruiting thought internal advertisement or external sourcing for a position such an employee is dully qualified for but was left out in a manner that is discriminatory, the Respondent can address such in a new and separate suit. To address such a practice here based on the facts set out, the different and separate treatment that if unlawful and lacking in justification is not clarified for the court to make a finding that indeed the Claimant is engaged in discriminatory practices.

57. The above addresses the contested issues numbers (d), (e), and (f) save that in the implementation of the MOA of 18th September, 2010 parties are at liberty to engage and include the same in their subsequent CBAs negotiations to make the same enforceable.

58. The last issue has marked as settled/resolved by the parties. However it is relevant to add here that Individual misconduct of an employee, whether unionised, union member or official should be addressed by the employer in accordance with work place rules and regulations and the applicable law. Such is not a matter that can be addressed down in a CBA unless the same relates to terms under which is to be comprehensively addressed. Work place misconduct by any employee cannot receive the sanction of the court. Where the alleged misconduct relates to fighting while at the work place and such requires other agencies to enter effectively address, where the Claimant as the employer wishes to do so, such is open and applicable. In any case, section 44(4) of the Employment Act prohibits such gross misconduct.

Counter-claim

59. On the counter-claim, the issue of the definition clause in the CBA is a proposal to have STIMA CLUB added to the clause. There is a draft clause with the addition of STIMA CLUB. There is appendices "C" but "A" is not attached. The entity STIMA CLUB and its inclusion in the clause is not clear or clarified in the submission. The attached appendices "C" relates to *Agreement relating to terms and conditions of service of temporary/contract employees.* Without building a case for STIMA CLUB and the rationale as to why such a party should form part of the CBA between the parties herein, such shall not be put into account.

60. Medical benefits – the proposed changes relate to Kitui and Mwingi stations and despite no defence, the setting apart of these two stations is not set out. There is no justification for the proposal of a *without restrictions on expenditure/ceiling per year*. The rationale for the proposal for the cited stations is not made. This being a CBA covering the entire membership of the respondent, the unique circumstances of these two areas is relevant. In find no justification. This would be a matter for further negotiations in future CBA.

61. General wages/salary increase – as noted above, there is no defence to the counter-claim. The submissions made challenging the proposals on a wage increase cannot form such a missing defence or response to the counter-claim items. In **Teacher's Service Commission versus KNUT & Others [2015] eKLR** at paragraph 154 the Court of Appeal recognised that the under article 41(5) of the constitution parties have a right to collectively bargain their terms and conditions of employment. Such negotiations should be voluntary. However, such negotiations may not achieve the desired results of an agreement. The LRA then steps in to allow either party to file the matter with the Minister for conciliation or with the court. The dispute has since been filed with the Minister and who only addressed the immediate and pending industrial action of the strike. The substantive questions in dispute and leading to the strike notice were not addressed. Should the Respondent then be without recourse? Without any defence to challenge the proposal for the award of a pay increase of 20% for each year and covering 2009/2010, I find the rate of 10% for each year being a reasonable and fair award in this case. The basic minimum wage for each cadre shall remain as in subsisting at Kshs.13, 000.00 until renegotiation. The proposal for a conversion table is fair and reasonable and allowed.

62. Hardship allowance – as set out above, the rationale for setting out the stations at Kitui and Mwingi though over a different item is not set out. Would this commence a discriminatory practice that is justified and legitimate? A good case in support of this proposal has not been made. Such is declined.

63. Mileage rates – the proposal is to have a revision from Kshs.18.00 to Kshs.25.00 per kilometre. Such I find to be a fair and reasonable proposal and is hereby allowed.

64. Electricity allowance – the proposal is to have an increase from Kshs.2, 000.00 to Kshs.3, 000.00 which I find to be fair and reasonable and is hereby allowed.

65. Suspension from duty – the proposal is to have an employee charged with an offence involving company interest be suspended on half pay until the matter is heard and determined. Such is a matter that will require parties to agree and make reference to the internal regulation of work place rules and regulations as any misconduct of an employee that warrant a suspension is a matter for the employer to deal. Where appropriate, further negotiations may put this proposal into account.

66. Effective date validity and payment of arrears – the proposed new clause is to have the effective date on 1st of January every year. This I find to be a fair and reasonable proposal for inclusion in the subject CBA and is hereby allowed.

67. Commuter allowance – the proposal to have a commuter allowance of Kshs.5,000.00 for Nairobi, Mombasa and Kisumu with other stations being at Kshs.3,000.00 to cushion employees on the increasing high consumer challenges, with the above increase on the wage/salary increase, such is thus taken into account. This can be reviewed in subsequent CBA.

68. Contract employees - on the finding above with regard to the Claimant having the right to source and engage various categories of employees as casuals, contract or on permanent basis and to pay and remunerate them in accordance with the law, the new proposed clause by the Respondent I find to be a fair and reasonable clause for inclusion into the CBA. The proposal is hereby approved as set out in the counter-claim. The right to unionise for each employee is also addressed above as such is a constitutional right available to all employees without distinction.

69. Job classification – the proposal by the Respondent is to have a non-discriminatory provision in the CBA. Such a proposal gives meaning to the provisions of section 5 of the Employment Act read together with article 27 of the constitution. By the CBA expounding on the same and making a requirement that the Respondent should have a non-discriminatory clause, such is to give emphasis and practical reality to the legal and constitutional provisions. Section 5(2) of the Employment Act provides that;

> *(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

70. Section 5(8) (c) further stipulates that;

> *(c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures.*

71. Such a provision for non-discrimination is therefore lawful, legitimate and overall constitutional requirement. In any event by the Claimant ensuring that there exists a non-discriminatory clause in the CBA such is just a basic minimum. Ordinarily there ought to be a separate and standalone policy on the subject as a good practice for the business and for the benefit of both parties to the CBA. With such a policy, it would also be relevant to note the provisions of section 6 of the Employment Act and the provisions therein which requires an employer with more than 20 employees to also have a sexual harassment policy, which is a matter that can be put into account in future negotiations.

72. Gratuity – the proposal is to have gratuity paid upon successful completion of each contract term and for employees on 2 months, 3 months, 6 months, one year and above contracts with aggregate service of 12 months to be paid gratuity of 31% of the basic salary calculated on prorate basis. Such are proposals that are reasonable; however this is a matter that can well be addressed in future negotiations and without negating the current practice between the parties.

73. Day and variable allowance – the proposal is to have all employees, in addition, where the employee is required to temporarily live away from their normal place of work on company business to claim such an allowance. Such provision for day and variable allowance should be left to the clamant as the employer to deal as to require casual employees or contract employees claim outside the allocated work timelines or contractual terms without putting into account the terms and conditions agreed between the parties would negate the very essence of having such employees in the first instance. Where permanent employees are allocated such work that requires being placed outside their work stations, such can be addressed separately.

74. Transfer and special accommodation for contract and temporary employees – the above clause for day and variable allowances thus addressed, to adopt the proposal herein would fundamentally change clause 9 of the CBA and place 3 year contract employees on different status with other employees. Such are terms and conditions which the parties can well address in their subsequent negotiations.

75. Medical benefits – on the proposal to have contract employees on an out-patient medical cover that is unlimited this will directly contradict the essence of having contract employees in the first instance. As set out above, the employer has the prerogative to determinate what the business needs are, who to engage

on what terms and conditions as agreed between the employer and employee. Once such an employee has accepted the terms and conditions of such employment, the term of such contract being for 3 years, the assigned work being set out, to require that such an employee remain on an unlimited medical cover would be to remove the employer from the negotiations table and the role of addressing the business need. Were the union as the representative of the unionisable employee is seized of such membership, the applicable terms with regard to medical provisions for such unionisable employees apply. Such cannot be made distinct and separate for only 3 year contract employees outside the entire workforce of other unionisable employees of the claimant.

76. Leave entitlement – the proposal for leave with regard to **maternity and paternity**, the Claimant is bound by the statutory minimum. With regard to casual or temporary employees, the Employment Act provisions shall form the basis of how the Claimant is to deal.

77. Leave taking is protected under section 28 of the Employment Act with full pay. Such shall apply. The proposal to have an allowance of travelling allowance at Kshs.25, 000.00 within each 12 months of taking leave such can be addressed in future negotiations.

78. Compassionate leave – the proposal to have compassionate leave for contract and term employees without loss of pay is fair and reasonable. However, such must be with rules and guidelines to ensure the employer is able to allocate within reasonable notice, timelines and available resources within any given financial year. The proposal is approved subject to the Claimant making provision for guidelines in the next 6 months.

Judgement is hereby entered with regard to the CBA for 2011/2012 as set out above and in the following terms;

a) The Claimant is at liberty to enter into employment contract on terms and conditions agreed with each employee;

b) Conversion of employment contract is at the option of the Claimant subject to terms agreed with the Respondent with regard to unionised employees; and

c) Employees have a right to be unionised without distinction.

On the counter-claim, judgement is hereby entered for the Respondent with regard to the CBA 2009/2010 as set out above and in the following terms;

a) general wage/salary is hereby awarded at 10% for each year;

b) Mileage rate awarded at Kshs.25.00 per kilometre;

c) Electricity allowance awarded Kshs.3,000.00;

d) Effective date validity payment of arrears by 1st January;

e) New clause to the CBA with a non-discrimination provision in terms of article 27 of the constitution and section 5(2) of the Employment Act;

f) Leave entitlement in terms of section 28 of the Employment Act and subject to payment of due wage/salary when such is taken;

g) Maternity and paternity leave taken without loss of wage/salary and due entitlements;

h) Compassionate leave shall be taken upon reasonable notice and the Claimant to put guidelines within 6 months;

i) As parties are enjoying peaceful industrial relations, each shall bear own costs.

Dated, signed and read in open court at Nairobi this 20th day of April, 2017.

M. MBARU

JUDGE

In the presence of:

……....

……