



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 136 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD AND

ALLIED WORKERS.....CLAIMANT

-Versus-

SHIVLING SUPERMARKET LTD.....RESPONDENT

JUDGMENT

The Claimant is a trade union registered in Kenya. It has a recognition agreement with the Respondent, a limited liability company in the operating supermarkets in several towns of what was previously Nyanza Province. The parties were in the process of negotiating their first collective bargaining agreement when the present dispute arose. The issue in dispute is refusal of the Respondent to sign the Collective Bargaining Agreement.

By its Memorandum of Claim dated 17th April 2015 and filed on 28th April 2015 the Claimant avers that it signed a recognition agreement with the Respondent on 31st October 2012 and thereafter sent proposals for negotiation of the first Collective Bargaining Agreement on 19th December 2012. It at the same time requested for a meeting to discuss the Agreement on 21st January 2013.

The Claimant states that the Respondent did not consider it necessary to send its counter proposals but nevertheless the parties negotiated the new terms and conditions of service and reached agreement on all clauses. The Respondent thereafter refused to sign the Agreement compelling the Claimant to report a dispute to the Minister for Labour. The Minister accepted the dispute and appointed Mr. M. Wanyange of Homabay Labour Office as conciliator. The Respondent refused to attend conciliation meetings called by the Conciliator on 13th and 27th February 2014. The Conciliator however refused to issue a Certificate of Disagreement as provided under section 69 affidavit of the Labour Relations. The Claimant filed an Affidavit pursuant to Rule 6 of the Employment and Labour Relations Court (Procedure) Rules, 2010, which provides that for the same where there is no certificate of disagreement under section 69.

The Respondent filed a Reply to memorandum of Claim of 15th June 2015 but the same was expunged from the record by the Court of 1st November 2016 as it did not meet the requirements of the Rules and the defence filed on 1st November was adopted. In the Defence the Respondent admits that the parties have a valid recognition agreement signed on 31st October 2012 and that it received proposals for negotiation of a collective Bargaining Agreement from the Claimant on 21st January 2013. The Respondent admits that there were negotiations but denies that what was produced for signature by the Claimant reflected what had been agreed upon during negotiations.

The Claimant's case was heard on 1st November 2016, the date when the Respondent filed its substituted Defence. After hearing the Claimant's first witness and considering the substitute defence filed on that date by the Respondent the court directed the parties to each file written submissions setting out the issues that were agreed upon during their negotiations and those that were not agreed upon at the same time stating the position of each party on the issues that were not agreed upon.

I have considered the submissions filed by the Respondent and the CBA filed by the Claimant at appendix 3 and it is apparent that the following clauses were agreed upon:

1. Preamble
2. Probationary Period
3. Working hours
4. Protective Clothing
5. Suspension
6. Pay Slips
7. Maternity/Paternity Leave
8. Salary Advance
9. Safari/Subsistence Allowance
10. Long Service Increment

The clauses that are contested are the following:

1. Annual paid leave
2. Gazetted Public Holidays
3. Leave travelling Allowance
4. Termination of employment
5. Sick Leave
6. Retirement
7. Medical Treatment
8. Warning Procedure
9. Redundancy
10. Summary Dismissal
11. Transfers
12. Funeral Expenses
13. Certificate of Service

14. Housing Allowance

15. Grades and Basic Minimum Wages

16. General Wage Increase

The Court will therefore consider and make a determination only on clauses that are contested as follows:

1. Annual Leave

Annual Paid Leave is provided for in section 28 of the Employment Act as follows:

28. Annual leave

(1) An employee shall be entitled—

(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

(2) An employer may, with the consent of the employee divide the minimum

annual leave entitlement under subsection (1)(a) into different parts to be taken at different intervals.

(3) Unless otherwise provided in an agreement between an employee and an

employer or in a collective agreement, and on condition that the length of service of an employee during any leave-earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.

(4) The uninterrupted part of the annual leave with pay referred to in

subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.

(5) Where in a contract of service an employee is entitled to leave days in

excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days.

According to the Claimant parties agreed on 30 days per annum. The Respondent proposed 21 days. Considering that this is a first CBA between the parties the court awards 22 days per annum.

2. Gazetted Public Holidays

The Regulation of Wages (Wholesale and Retail Distributive Trades) Order as well as the

Regulation of Wages (General) Order provide that an employee who works on a gazetted public holiday or rest day will be deemed to be working overtime the whole of the time the employee is at work and be paid at double the normal hourly rate of pay in addition to the normal rate of pay. It is the court's view that what is provided for in the CBA filed by the Claimant is therefore a reflection of what is provided for by law.

The court awards that parties apply what is provided for by law as proposed in the BA filed by the union.

3. Leave travelling Allowance

The CBA filed by the Claimant provides for leave Travelling allowance at Kshs. 1000 for both years of the agreement. The Regulation of Wages (Wholesale and Retail Distributive Trades) Order provides for leave travelling allowance at Kshs. 35 per annum as at 1989. Considering the inflation since then which is above 100% it is the court's view that this is reasonable.

The court awards Kshs. 1000 each year for the duration of the CBA.

4. Termination of employment

The CBA filed in Court by the Claimant provides for termination notice as follows:

After the completion of the probationary period, employment may be terminated by either party as follows: -

1 – 3 years – 2 months' notice or pay in lieu

Over 5 years – 3 months' notice or pay in lieu

Above 10 years – 4 months' notice or pay in lieu

An employee whose services are terminated shall be entitled to 30 days service pay for each completed year worked.

The Respondent's proposal to adopt the law is reasonable for a first CBA. The parties can improve on the Clause in future negotiations. The portion on gratuity is supposed to be under the gratuity clause.

I therefore award that the CBA provides for one months' notice or one months' pay in lieu of notice.

5. Sick Leave

The Regulation of Wages (Wholesale and Retail Distributive Trades) Order provides for 21 days on full pay followed by 21 days on half pay while the Regulation of Wages (General) Order provides for 30 days on full pay followed by 15 days on half pay. Section 30 of the Employment Act however provides for sick leave of not less than 7 days on full pay and thereafter 7 days on half pay.

Relying on section 26 of the Employment Act and section 48 of the Labour Institutions Act both of which provide that no employee may be employed on terms that are less favourable than those prescribed by any written law or regulations, I award that the parties adopt the provisions of the Regulation of Wages (General) Order which provides for 30 days on full pay and thereafter 15 days on half pay.

6. Retirement

The Union proposed a retirement age of 60 years. The Respondent did not make any proposal only pointing out that 60 years is for the public sector and that employees should retire while still energetic.

As observed by the Respondent retirement age is not provided for by law and therefore parties must provide for it in terms and conditions of service or else the issue would create disputes at the time that an employee has to be released from work on grounds of age. The retirement age in the public sector is 60 years while National Social Security Fund (NSSF) Act and Retirement Benefits Act (RBA) both allow members to draw their benefits after attaining the age of 50 years.

Since NSSF is compulsory for all employees I award that parties adopt a retirement age of 55 years to be reviewed at a later date.

7. Medical Treatment

The Respondent submits that there were no discussions on this clause while the Claimant union has proposed Kshs. 30,000 per employee per year.

It would appear that parties did not discuss the clause. I therefore award that the parties adopt provisions of section 34 of Employment Act which provides for medical attention. The parties are advised to improve on the clause in future negotiations.

8. Warning Procedure

The Respondent appears not to have made any proposals on this clause. Since in the view of the court rule 16 of the Regulation of Wages (General) Order has reasonable provisions on warning system, I award that parties adopt the same. Rule 16 provides as follows-

16. An employee whose work or conduct is unsatisfactory or who otherwise commits a misconduct which, in the opinion of the employer, does not warrant instant dismissal shall be warned in writing and the following procedure shall apply –

(a) the first and second warnings shall be entered in the employee's employment record and the shop steward of his union shall be informed accordingly:

(b) the second warning shall be copied to the branch secretary of his union:

(c) if an employee who has already received two warnings commits a third misconduct, he shall be liable to summary dismissal.

Provided that where an employee completes two hundred and ninety-two working days from the date of the second warning without further misconduct any warning entered in the employment record shall be cancelled.

9. Redundancy

The Respondent did not make any proposals on this clause. The union has proposed severance pay of 30 days pay per year worked. In view of the fact that the clause was apparently not discussed and parties have the opportunity to improve on the same in future negotiations, I award that parties adopt section 40(1) of Employment Act which provides as follows-

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of

redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

10. Summary Dismissal

The Claimant union has adopted grounds for summary dismissal as provided in section 44(4) of Employment Act. The Respondent did not make any proposals on the clause. I award that the parties adopt section 44 read together with section 41 and 43 of Employment Act to cover both the grounds for summary dismissal and the procedure to be followed before dismissal.

11. Transfers

The Respondent did not make any proposals on this clause. I find the proposal in the CBA filed by the

union to be reasonable and award that parties adopt the same as follows:

12. Funeral Expenses

The Claimant union proposed that the employer provides for transport, coffin, mortuary bill and other funeral expenses and in addition bear the cost of 5 employees to attend the funeral. The Respondent objected to the proposal but did not make any offer.

I award that the Respondent pays for the cost of a coffin and at least 2 members of staff to attend the funeral.

13. Certificate of Service

The proposal by the Claimant union is an adoption of the provisions of Section 51 of the Employment Act. I award that parties adopt section 51 of Employment Act as follows -

51. Certificate of service

(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

(2) A certificate of service issued under subsection (1) shall contain—

(a) the name of the employer and his postal address;

(b) the name of the employee;

(c) the date when employment of the employee commenced;

(d) the nature and usual place of employment of the employee;

(e) the date when the employment of the employee ceased; and

(f) such other particulars as may be prescribed.

(3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

(4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

14. Housing Allowance

The Claimant union proposed a house allowance of 15% of basic salary. This is what is provided by law and I award that parties adopt House Allowance of 15% or 1000 whichever is higher.

15. Grades and Basic Minimum Wages

Parties were unable to agree on the clause. I award that they adopt Kshs.100 above statutory minimum wages as proposed by Claimant.

16. General Wage Increase

The Claimant proposed 10% for the first year and a further 7% for the 2nd year while Respondent

proposed 2% each year.

Taking into account cost of living indices and the fact that this is a first CBA I award a general wage increase of 5% each year.

Effective Date and Duration

Parties did not make any proposals on this clause. Since it is a first CBA and taking into account that the original date was 1st May 2013, I award that the new terms take effect from 1st July 2017.

Conclusion

The awards made herein have taken into account that this is a first CBA that stalled when it was expected to be signed in 2013. It is expected that parties will be able to build upon this in future negotiations.

Dated and signed and delivered this 20th Day of July, 2017

MAUREEN ONYANGO

JUDGE