



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 69 OF 2016

KUDHEIHA WORKERS UNION.....CLAIMANT

VERSUS

THE ADMINISTRATOR, MARY

HELP OF THE SICK MISSION HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 29th September, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 12.04.2016 for orders against the respondent for:

- a. The respondent to implement the CBAs attached on the memorandum of claim.
- b. The respondent to pay all accrued arrears.
- c. The respondent to adjust the salaries, house allowance and risk allowance in conformity with the CBAs.
- d. The parties to meet and compute all arrears for payment.

A recognition agreement was signed between the claimant union and the churches and institutions associated with the National Council of Churches of Kenya, Mater M. Hospital, C.H.A.K, Y.W.C.A, Y.M.C.A, and the Kenya Catholic Secretariat. The recognition agreement was signed on 07.06.1990. The parties to the recognition agreement subsequently, and over the years, concluded relevant collective bargaining agreements (CBAs). Such CBAs as attached on the claimant's bundle of documents include exhibit 6(a) signed on 01.01.2015 effective 01.01.2014 for two years and thereafter until a new CBA is negotiated; exhibit 6(b) signed on 14.10.2013 effective 01.01.2012 for two years and thereafter until a new CBA is negotiated; exhibit 6(c) signed on 21.03.2011 effective 01.01.2010 for two years and thereafter until a new CBA is negotiated; and exhibit 6(d) signed on 14.08.2009 effective from 01.01.2008 for two years and thereafter until a new CBA is negotiated.

The claimant's case is that the respondent has failed to implement the CBAs as concluded and binding upon the parties. Conciliation proceedings were initiated by the claimant's letter dated 15.01.2015 under section 62 of the Labour Relations Act, 2016 but did not yield an amicable resolution. Hence, the present suit by way of a reference to the court was filed. The conciliator's certificate of a trade dispute between the parties is dated 03.09.2015.

The respondent filed the memorandum of response on 28.09.2016 through the Federation of Kenya

Employers. The respondent prays that the claimant's suit be dismissed with costs.

The respondent's case is that it is a stranger to the recognition agreement and the CBAs. The respondent's further case is that the respondent is not a proper party to the suit because the respondent never signed the recognition agreement and the CBAs.

The **1st issue** for determination is whether the recognition agreement and the CBAs are binding upon the respondent. The respondent's witness No. 1 (RW1) was one Sister Teresia Muthoni working as the legal officer at the Catholic Archdiocese of Nairobi, Kenya. Her testimony was that the Catholic Archdiocese of Nairobi being a corporate entity was initially known as the Holy Ghost Mission and in 1932 the name changed to the Archdiocese of Nairobi Kenya Registered Trustees. The Archdiocese comprises of Catholic Church parishes within the Nairobi and Kiambu Counties as well church sponsored Catholic schools and Catholic Mission Hospitals within the two Counties. The respondent's land, and therefore the hospital, is owned by the Archdiocese and the Archbishop of the Catholic Archdiocese of Nairobi has requested the the Salesian Missionaries of Mary Immaculate to run the respondent's hospital per the management agreement of 25.03.2011. The agreement is clear that the owner of the hospital is the Archdiocese of Nairobi Kenya Registered Trustees. The agreement declares the manager as the Salesian Missionaries of Mary Immaculate whose address is care of SMMI Provincialate, Pudukottai Road, Thanjavur DT, Tamil Nadu, Pin Code 613007, South India. The agreement provides that the manager has the necessary specialists, personnel and facilities for running the hospital. The purpose of the agreement was therefore to turn over to the manager the operation, management and supervision of the hospital subject to the terms and provisions of the management agreement so that the manager can assume the responsibility of the operation, management and supervision of the hospital. The agreement is effective 25.03.2011 and initially for 7 years. As relates to employment of staff, the agreement provides thus, **"Section 6.3 – Employees The Manager shall employ such persons that it deems fit for the fulfilment of its obligations contained in this Agreement. Such employees shall not in any way be employees of the Owner and the Owner shall not incur any liability in relation to the employment contract entered into between the Manager and any of its employees. The Manager shall at all times ensure that due compliance with the Employment Act and any other relevant legislation of the Republic of Kenya is adhered to."**

The recognition agreement was signed by the Kenya Catholic Secretariat. The CBA of 01.10.2015 was not signed by the Archbishop, Catholic Diocese of Nairobi. The Archbishop signed the CBA of 14.10.2013, the one of 21.03.2011, and the one of 14.08.2009.

The court has considered the material on record. The court returns that the recognition agreement binds the Archdiocese of Nairobi Kenya Registered Trustees and on whose basis the Archbishop of Nairobi signed the CBAs. There is no material before the court to suggest that the Archdiocese of Nairobi does not recognise the recognition agreement; but the evidence is that it does and whose basis the Archbishop has signed the collective agreements. The court further returns that respondent runs an institution which is clearly an institution of the Archdiocese of Nairobi Kenya Registered Trustees and the respondent is clearly bound by the recognition agreement as well as the CBAs duly signed by the Archbishop of Nairobi. The court has considered the Management Agreement and returns that it does not vitiate the binding recognition and collective agreements as it is clear that the Employment Act and relevant legislation (including the Labour Relations Act, 2007 under which the recognition and collective agreements were concluded) must be adhered to by the manager. Thus the court returns that the recognition agreement in issue and the collective agreements signed on 14.10.2013, 21.03.2011 and 14.08.2009 respectively are binding upon the parties but the scope of implementation of the CBAs will be revisited when the court considers the issue of available remedies. The court has also found that it is not disputed between the parties that the respondent's hospital is one of the institutions mentioned or listed in the schedule to the CBAs as being bound by the CBAs.

The **2nd issue** for determination is whether the respondent was the proper party as a respondent. Section 6.3 of the management agreement is clear that the manager employs staff subject to the applicable law. Respondent's witness No. 2 (RW2) was one Francis Kioko Kitetu, the Hospital's Human Resource Manager. He confirmed the Hospital was under the Archdiocese of Nairobi. He confirmed that he came to

know about the union in 2013 during a meeting about recruitment of union members at the hospital and check-off forms were served upon the hospital on 26.09.2013. The deduction and remission of union dues commenced thereafter. He confirmed that the respondent was the final authority as far as the hospital human resource matters were concerned. The court has considered that evidence together with the management agreement and returns that the respondent was the proper party to the suit as the ultimate person or authority vested with human resource powers over the hospital staff and therefore responsible for implementing the recognition agreement and the binding CBAs as in place from time to time. The court returns that the respondent was the proper party as a respondent in the suit.

The **3rd issue** is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The first prayer is for the respondent to implement the CBAs attached on the memorandum of claim. The evidence is that the last CBA signed by the Archbishop was the one signed on 14.10.2013 being effective 01.01.2012 and to be in force for 2 years from 01.01.2012 and thereafter until amended by mutual agreement. The further evidence is that the claimant recruited and served a list of respondent's employees being the claimant's members on or about 26.09.2013 – and the court finds that prior to such recruitment and service of the list of members, terms of the collective agreements would not apply to the employees. Thus, the court returns that the claimant is entitled to a declaration that the respondent to implement the CBA signed on 14.10.2013 and such subsequent and duly signed CBA binding the parties and only with respect to respondent's employees being the claimant's members and effective 30 days from the date each of such employees joined the trade union.
- b. The claimant is entitled to the order that the respondent to pay all accrued arrears in line with the findings of the court about the dues flowing from the applicable CBAs.
- c. The claimant is entitled to the order that the respondent to adjust the salaries, house allowance and risk allowance in conformity with the CBAs found to apply.
- d. The claimant is entitled to an order that the parties to meet and compute all arrears for payment.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the respondent to implement the CBA signed on 14.10.2013 and such subsequent and duly signed CBAs binding the parties and only with respect to respondent's employees being the claimant's members and effective 30 days from the date each of the concerned employees joined the trade union.
2. The respondent to pay all accrued arrears in line with the findings of the court about the dues flowing from the applicable CBAs in line with order (1) above.
3. The respondent to adjust the salaries, house allowance and risk allowance in conformity with the CBAs found to apply in line with order (1) above.
4. The parties to meet within 30 days from the date of this judgment and compute all arrears for payment by 01.03.2018 failing interest at court rates to be payable thereon from 01.03.2018 till full payment.
5. The computation in order (4) above to be filed and served by 15.11.2015 for mention on a convenient date for recording the same in court.
6. Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 29th September, 2017.**

BYRAM ONGAYA

JUDGE