



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 110 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

UNION OF NATIONAL RESEARCH INSTITUTES

STAFF OF KENYA.....CLAIMANT

-Versus-

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANISATION (KALRO).....RESPONDENT

JUDGMENT

Issue in Dispute

Failure by management of KALRO to award general wage increase to two of their employees namely:

1. Mr. Edwin Shikanda, and,
2. Mr. Aloysius M Nyangau

INTRODUCTION

The Claimant is a trade union registered in Kenya to represent employees of research institutions in Kenya. The Respondent is a research institution established under the Kenya Agricultural and Livestock Research Act, 2013. The Respondent previously operated as Kenya Sugar Research Foundation (KESREF) which was merged with other research institutions and renamed KALRO under the Kenya Agricultural and Livestock Research Act, 2013.

The parties have a recognition agreement signed on 19th March 2004, giving the Claimant a right to negotiate terms and conditions of service for the Respondent's unionisable employees. The parties commenced negotiations of their first collective bargaining agreement (CBA) in 2005 but were unable to reach agreement on all issues. A dispute was reported by the Claimant over several clauses of the CBA that the parties were unable to agree on and the court eventually resolved the dispute through the court award in **Industrial Court Cause No. 472(N) of 2009** which was delivered on 28th June 2011. Among the issues in dispute were the clauses relating to general wages and effective date clause. The court awarded general wages of 5% each year and set the effective date of 1st July 2010. The parties thereafter signed the CBA on 24th March 2014.

Upon implementation of the CBA the Respondent failed to adjust the terms and conditions of service for

Mr. Edwin Shikanda and Mr. Aloysius M Nyangau, the Grievants, in accordance with the CBA on grounds that they were in management and were therefore not covered by the CBA. The Claimant was aggrieved by the non-implementation of the CBA in respect of the Grievants who were their members and reported a dispute to the Minister for Labour who appointed a conciliator. The parties failed to agree during conciliation and the Conciliator issued a certificate to refer the dispute to this court for determination.

In the Amended Statement of Claim filed by the Claimant it avers that the Grievants are bona fide members of the union and that they joined the union membership voluntarily as provided under section 4(1)(b) of the Labour Relations Act and Article 41(2)(a), (b) and (c) of the Constitution. The Claimant avers that by virtue of the recognition agreement it is the sole labour organisation mandated to represent the interests of workers of the Respondent. The Claimant avers that the recognition agreement recognises the principle of industrial trade unionism. The Claimant avers that the Respondent has continued to deny the Grievants their rightful and lawful dues for no good reason. The Claimant prays for the following remedies-

- (1) General wage increase of 5% effective 1st July, 2010 to 30th June 2011 and a further 5% effective 1st July, 2011 to 30th June, 2012 totalling to 10% for the two (2) years.
- (2) 5% House Allowance increase.
- (3) Additional Kshs.500/= (five hundred only) Leave Travelling Allowance.
- (4) All the three items to be effective from 1st July 2010 upto and including 30th June, 2012.
- (5) The accrued arrears covering the two years, is July 2010 to June 2012 be paid to the two grievants within one month from the date of the Award.
- (6) The 2nd Respondent to pay costs of this dispute.

In the Amended Memorandum of Defence of the Respondent filed on 14th December 2016 the Respondent avers that only its employees in Job Grades RF1-RF9 are covered by the terms and conditions of service in the CBA while employees in Grades RF10-RF15 are management staff whose terms and conditions of service are handled by the Respondent's Board of Directors. They state that both Grievants are in Job Grade RF10 and that they are supervisors of Research Assistants and Research Technicians.

The Respondent has further referred to the Central Planning Unit Report made to the Court in **Cause No. 472(N) of 2009** which relates to grades RF1-RF9. The Respondent avers that the Court Award was limited to grades RF1-RF9 and that the words "across the board" as used in the award relates to the said grades RF1-RF9. The Respondent further avers that the CBA signed on 24th March 2014 demonstrates that the CBA covers grades RF1-RF8 and refers specifically to clauses on house allowance, meal claim, night out allowance and salary structure.

The Respondent avers that the recognition agreement clearly states that "... Employees who are in the Employment of KASREF KALRO as defined from time to time by the Government, the Federation of Kenya Employers and the Central organisation of Trade Unions(K)..." while the Industrial Relations Charter provides that-

- a) Persons who are formulating, administering, co-ordinating, and/or controlling any aspects of the organisation's policy.
- b) Staff who perform work of a confidential nature as shall be defined by a Tripartite Committee.
- c) Any other category of staff they may in the case of any particular undertaking be excluded from

Union representation by mutual agreement.

The Respondent avers that although Article 41 of the Constitution provides for the right to join and participate in the activities and programs of a trade union the right does not extend to managerial employees. It is the Respondent's averment that both sections 54(1) and 57(1) of the Labour Relations Act refer to recognition for purposes of collective bargaining for unionisable employees covered by the CBA. The Respondent avers that should the CBA be applied to the two Grievants it will have a ripple effect up to grade 14 and destabilise the Respondent's existing salary structure which has neither been planned nor budgeted for. The Respondent avers that it erroneously made deductions of union dues from the salaries of the two Grievants but this does not change the fact that they are not unionisable and cannot benefit from the CBA.

The case came up for hearing on 10th November 2016 when the parties informed the court that they both wished to rely entirely on their pleadings and documents filed therewith and requested the court to proceed and write judgment on the basis of the same.

Determination

Article 41(2) provides that -

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

Section 4(1) of the Labour Relations Act echoes the said provisions as follows-

4. Employee's right to freedom of association

(1) Every employee has the right to—

(a) participate in forming a trade union or federation of trade unions;

(b) join a trade union; or

(c) leave a trade union.

The Industrial Relations Charter sets out the level of Union Representation as follows-

11. The following will be excluded from Union representation:

(a) Persons who are formulating, administering, co-ordinating, and/or controlling any aspects of the organisation's policy.

(b) Staff who perform work of a confidential nature as shall be defined by a Tripartite Committee.

(c) Any other category of staff who may in the case of any particular undertaking, be excluded from Union representation by mutual agreement.

Also refer to appendix "C" 1. (iii)

Appendix "C" further breaks down the level of employees excluded from union representation as follows-

1. (i) *Executive Chairman; Managing Director; General Manager (and his Deputy) and Functional Heads – that is – Departmental Heads (and their Deputies).*

(ii) *Branch Manager (and his Deputy)*

(iii) *Persons in-charge of operation in an area (and their Deputies)*

(iv) *Persons having authority in their organisations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Relations Charter Clause No. 11 - 1*

(v) *Persons training for above positions (including understudies).*

2. (i) *Personal Secretaries to persons under 1 above.*

(ii) *Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties.*

3. *Any other category of staff who may, in the case of any particular undertaking, be excluded from union representation by mutual agreement.*

Parties are expected to discuss and agree on level of union representation and to set out the same in either or both the recognition agreement and the CBA. Where parties do not agree on the level of union representation either of them may report a dispute so that the issue is resolved at conciliation or by the court.

In the present case there is no clause either in the recognition agreement or the CBA setting out the level of union representation. The Respondent did not attach any document to show the minutes of the meeting where the grading structure was discussed or agreed on or where parties agreed on cut off for union membership at grade 8 or 9 or 10. Indeed the CBA causes even more confusion. In Article A1 thereof it is stated inter alia that it "*... provides for terms and conditions of employment which shall apply to **all unionisable staff of KASREF** for whom the union (UNRISK) have been recognised to negotiate.*"

At Article 12(1) states that-

There shall be such salary scale and grading as the Foundation in consultation with the union may determine from time to time.

There is however no document in the bundles filed by the parties referring to salary scales or grading that has been agreed on.

Articles K1 (housing Allowance), T2(Meal Claim) and T3(night out allowance), cover employees up to grade RF8

Articles T10 (Special/extraneous allowance) covers up to grade RF10

Articles T1(Leave allowance) covers up to grade RF14

Article T4(Commuter Allowance) covers up to grade RF15

Basic salary levels as per award are given up to grade RF14.

There is therefore no uniformity or clear cut off level in the CBA as alleged in the Memorandum of Defence.

The Respondent referred to Performance Appraisal Reports for the Grievants to show that they were supervising research assistants and research technicians and therefore are excluded from union representation by Clause 11 of the Industrial Relations Charter and Appendix "C" thereof. The Charter does not provide that supervision of other staff would exclude an employee from union representation. A letter from the Respondent advising the Grievants that they do not fall under unionisable employee level, or refusal to deduct union dues from them or an agreement with the union on level of union representation, would have sufficed to prove that the Grievants are not unionisable, Also or a copy of Terms and Conditions of Employment of management staff showing that the positions held by the Grievants or their job grades are covered under the management terms of employment would be acceptable to prove that the Grievants are not unionisable. None of these has been produced by the Respondent.

The Respondent admitted deducting union dues from the Grievants' salaries and remitting to the union. In the absence of any proof to the contrary, this is proof that the Grievants were accepted by the Respondent as union members. Their positions are not excluded from union representation under the Industrial Relations Charter or the recognition agreement or CBA. By deducting and remitting their union dues during the period when the parties were negotiating the CBA, the Grievants had a reasonable and legitimate expectation to benefit from the terms of the CBA once implemented. Having failed to prove why the Grievants should not be considered as union members or benefit from the CBA, I find no reason to deny the Grievants the benefit of the same.

Conclusion

From the foregoing I find that the Claimant has proved that the Grievants **Edwin Shikanda** and **Aloysius M Nyangau** are bona fide members of the Claimant union and declare that they are entitled to benefit from the CBA covering the period July 2010 to June 2012. I therefore award each of them the following-

- (1) General wage increase of 5% effective 1st July 2010 to 30th June 2011 and a further 5% effective 1st July 2011 to 30th June 2012 totalling to 10% for the 2 years.
- (2) 5% House allowance increase.
- (3) Additional Kshs.500/- (five hundred only) leave Travelling Allowance.
- (4) All the three items to be effective from 1st July 2010 upto and including 30th June 2012.
- (5) The accrued arrears covering the two years, is July 2010 to June 2012 be paid to the two grievants within one month from the date of the Award.

.There shall be no orders for costs.

Dated, Signed and Delivered this 22nd day of September , 2017

MAUREEN ONYANGO

JUDGE