



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 304 OF 2011

(Before D.K.N. Marete)

KUDHEIHA.....CLAIMANT

Versus

ASSOCIATION OF PHYSICALLY DISABLED OF KENYA.....RESPONDENT

JUDGEMENT

This suit was brought to court vide a Memorandum of Claim dated 1st March, 2011. The issue in dispute is cited as;

**‘Refusal by the management to negotiate Thirty Two (32) clauses of the Collective Bargaining Agreement’**

The respondent submits that it is not able to afford an offer of the claimant’s demands due to its unique financial circumstances as pleaded.

The claimant’s case is that the respondent is an Association of physically disabled person registered to assist and improve the living standards of the disabled. It has registered branches in Machakos, Kisumu, Embu, Eldoret, Kisii, Busia and Nakuru.

The claimant further submits that the Collective Bargaining Agreement signed by the parties on 14th April, 2008 commenced on 1st August, 2004 and expired on 31st July, 2007. Further, the union’s proposal to review the Collective Bargaining Agreement for 1st August, 2006 to 31st July, 2010 was dispatched to the respondent in December, 2009 but negotiations would not commence as the respondents Director was on leave. The matter was reported to the Minister for Labour as a trade dispute on insistence by the respondent that they would only adjust salaries as per the Regulations on General Wages (Amendment) Order currently in force and retain all the other clauses of the Collective Bargaining Agreement – See Appendix 6a and 6b. On this note, the respondents initiated negotiations through the Federation of Kenya Employers wherein two meetings were called and some clauses agreed on and a disagreement arrived at 11 clauses. On reference of the matter back to the appointed conciliator, the clause on effective date and duration of the Collective Bargaining Agreement was agreed on leaving 10 items of disagreement. The dispute therefore is on 10 clauses of the Collective Bargaining Agreement where the parties were not agreed. He prays as follows;

1. Wages - 25%
2. House allowance -
  - 1st year - Kshs.3,000/=
  - 2<sup>nd</sup> year - Kshs.4,000/=
  - 3<sup>rd</sup> year - Kshs.5,000/=
  - 4<sup>th</sup> year - Kshs.6,000/=
3. Redundancy - 20 days as Severance pay
4. Annual Leave - 35 days

5. Retirement - Kshs.19,000/= Plus 5 months, then 16 days pay for each completed year in service.
6. Protection of employees - As submitted in the memorandum
7. Meals/water
- Tea at 10.00 am
- Lunch at 1.00 pm
- Tea at 4.00 pm
- 2 packets of milk in dust and chemical areas
8. Daily transport - Kshs.3,000/=
9. Long Service increment –
- 3 years but less than 8 years - Kshs.300/=
- 8 years but less than 13 years - Kshs.500/=
- 13 years but less than 18 years - Kshs.600/=
- 18 years but less than 23 years - Kshs.800/=
- 23 years and above - Kshs.1,000/=
10. Safari allowance - Kshs.1,500/=

The respondent in response submits that it is registered under the NGO Act and operates under the Ministry of Gender, Children and Social/Development. Its mission is to enable persons with disability to overcome their physical limitations and empower them socially and economically so as to become self reliant and fully integrated members of their communities. It operates in high population areas with headquarters at Nairobi and branches at Mombasa, Kisumu, Kisii, Nakuru, Eldoret, Busia, Embu and Machakos. The Respondent's operations are mainly concentrated in Nairobi and Mombasa and the report has mainly relied on these regions. Its headquarters is located at APDK House, Waiyaki Way and whose address is P.O. BOX 46747-00100, Nairobi.

The respondent further submits that its source of income for the rehabilitation programme is specified donations and this is supplemented by sale of rehabilitate equipment like orthopedic appliances and supplies, mobility aids, etc, brought by development organization who provide them freely to needy disabled persons. Donors do not provide funding for recurrent expenditure.

The respondents cite adverse economic return from their operations and loss making this leading to a disability in being able to meet the terms of this Collective Bargaining Agreement as set out.

*It was in the background of these severe financial circumstances that the Respondent wrote the letter dated 4<sup>th</sup> January, 2010, to the Secretary General of the Claimant, calling for the Claimant's understanding of the extenuating circumstances, but which the claimant interpreted to mean refusal to negotiate the 32 clauses of the harmonized memorandum and thus declared a dispute and reported to the minister for Labour.*

This claim was brought to court vide a memorandum of claim dated 16th February, 2011 and filed on 2nd March, instant. It does not disclose the issue in dispute on its face.

The respondents therefore urges and pray that this court indulges them and construes their plight in the determination of the issues in dispute.

The matter variously came for hearing until the 3rd July, 2013 when the parties agreed to dispose of the matter by way of written submissions.

In their written submissions, the parties more or less reiterate their positions and pleaded and urged the court to honour their respective positions.

This court appreciates the respective position of the parties and recognizes their respective position as earnest industrial relations exercises and positions that should be respected. The court would therefore recommend a further scrutiny into these matters and an analysis of the respective positions by the Secretary for Labour with a view to coming up with an agreed and acceptable position on the issues in dispute *inter parties*. I therefore order as follows;

1. **THAT** this matter be and is hereby referred to the Commissioner for Labour who by himself or through his appointed Labour Officer shall hear and determine the contentious issues in dispute by the parties.
2. **THAT** Commissioner or his appointed agency and official shall hear oral evidence, and address memoranda, documentation and other data presented by the parties in facilitating such determination of the issues in dispute.
3. **THAT** the Commissioner is directed to furnish this court with a report and the subject within sixty days of these orders of court.
4. **THAT** mention on 2nd July, 2014 at 900 hours to enable receipt of a report on determination by the Commissioner for Labour.
5. **THAT** each party shall bear its costs of this claim.

Delivered, dated and signed the 24th day of April, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Samson Kioko for the claimant.
2. Mr. Abenge instructed Federation of Kenya Employers for the respondent.