



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 114 OF 2014

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS & HOSPITAL
WORKERS CLAIMANT**

v

YOUNG WOMEN CHRISTIAN ASSOCIATION

RESPONDENT

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (Union) entered into a Memorandum of Agreement with Specified Churches and/or Institutions in a list annexed to the Memorandum of Agreement in respect to terms and conditions of service for unionisable employees employed by the churches and or Institutions (Collective Bargaining Agreement) to run from 1 January 2010 for two years. When the Collective Bargaining Agreement expired, a new one was signed effective 1 January 2012.
2. Among the institutions named were the Young Women Christian Association (Respondent) and its branches.
3. The Respondent, at some point had difficulties fulfilling its contractual obligations to its employees (Grievants) who were members of the Union. On 12 April 2011, the Union wrote to the Respondent raising concerns about salary arrears for three months. A similar concern was raised through letter dated 23 March 2012.
4. It seems the non fulfillment of contractual obligations by the Respondent persisted because on 29 January 2013, the Union wrote to the Respondent's Branch Secretary, Mombasa seeking a meeting to deliberate on salary arrears for 2010/2011, non-issuance of pay slips and delayed salaries for November and December 2012. The meeting was held on 13 February 2013.
5. On 27 March 2013, the Grievants wrote to the Union to report persistent delays in salary payments and non fulfillment of other contractual obligations by the Respondent. As a result, the Union again wrote to the Respondent on 28 March 2013 seeking a meeting on 19 April 2013.
6. A meeting was held but the non fulfillment of contractual obligations persisted and so on 28 June 2013, the Union wrote again to the Respondent seeking a meeting on 12 July 2013.
7. There was further correspondence but no solution was forthcoming. On 26 September 2013, the Union's Mombasa Industrial Relations Officer cascaded the dispute to the Union's National Secretary General asking that a formal trade dispute be reported to the Cabinet Secretary for Labour. Consequently, a trade dispute was formally reported by the Union to the Cabinet Secretary.
8. The Cabinet Secretary accepted the dispute and appointed a conciliator. The Conciliator called for submissions from the parties through a letter dated 5 February 2014 and the parties furnished him with written submissions. But the dispute was not resolved at conciliation and therefore on 26 March 2014, the Union filed a Memorandum of Claim against the Respondent.

9. In the Memorandum of Claim, the Union stated some 7 issues in dispute and they substantively related to non fulfillment of contractual obligations by the Respondent (*refusal to pay wages, annual leave, salary arrears, non provision of uniforms, failure to issue pay slips, non-payment of overtime and failure to effect long service awards-see Unions appendix SC-1*).
10. Together with the Memorandum of Claim, the Union filed a motion under urgency. The Court certified the motion urgent and directed that it be served for *inter partes* hearing. The Respondent was served and it filed its response to the motion.
11. On 14 May 2014, when the motion came up for *inter partes* hearing, the Court ordered that the main Cause be set down for hearing on the merits because the orders sought in the motion were likely to lead to final orders/dispose of the main issues in contention. In this regard, the Respondent filed its Response on 22 May 2014.
12. When the Cause came up for hearing on 22 May 2014, the Respondent indicated that it had a Preliminary Objection to raise. After hearing the parties, the Court dismissed the Preliminary Objection *ex tempore*, with reasons to be given later and directed that the hearing proceed as earlier scheduled.
13. The Cause was heard on 22 May 2014, 26 June 2014 and 4 July 2014. At the end of the hearing, the Court became convinced that extensive calculations needed to be done to determine exactly the amounts of salary arrears and other payments owed to the Grievants. The Court therefore directed the parties to furnish the County Labour Officer/conciliator with submissions to enable him compute the sums claimed.
14. The direction by the Court was grounded on the fact that in both the Response filed in Court and the evidence produced by both parties, the real dispute between the parties was on the computation of salary arrears from 2010, unpaid wages, long service awards and uniforms or allowances in lieu thereof. It was more to do with arithmetic. The Respondent had admitted that it had been having financial problems and thus unable to pay wages on time and was advancing the Grievants small amounts of monies in lieu of wages.
15. The County Labour Officer received submissions and computations from the parties and on 5 August 2014 he filed his report in Court.
16. The Court will therefore in very brief terms outline each party's respective case.

Union's case

17. The Union commenced the Cause on behalf of some 10 employees (Grievants) of the Respondent. These were

Patrick Ngwekwe

Cecilia Kanyaru

Samuel Kenga

Chiwai Mwakudza

Thomas Mwakilila

Oliver Mwangoma

Japheth Hanga

Simon Okelo

Kahindi Karisa K and

John Kea (Union's appendix SC-1). It called two witnesses.

18. According to the Union, the Respondent had failed to honour its contractual obligations by not

paying wages as they fell due (section 18 of Employment Act, 2007); had not implemented agreed wage increments/rates as set out in various Collective Bargaining Agreements (exhibited); was not issuing pay slips as required by law (sections 20 and 21 of Employment Act, 2007); not granting or paying for annual leave (section 28 of Employment Act, 2007); had not provided uniforms to those entitled to the same (clause 21 of Collective Bargaining Agreement) and not paying overtime (clause 2 of Collective Bargaining Agreement).

19. Further, the Union contended the dispute related to workers fundamental and constitutional rights (non-payment of wages among others) and that attempts at conciliation had failed.

Respondent's case

20. The Respondent pleaded that wages for November, December 2013 and January to March 2014 had been paid or partly paid through advances and that it had agreed with the Grievants to be paying them whenever funds were available and that it had prepared vouchers to pay outstanding arrears.

21. On pay slips, the Respondent contended that the Grievants had refused to collect the same until all wages and arrears were fully paid.

22. Regarding the salary arrears from 2010/2011 and 2012/2013, the Respondent contended that the same totaled Kshs 543,759/- and not as computed by the Union and that the individual contracts superseded the Collective Bargaining Agreements.

23. Finally, the Respondent pleaded that it had failed to meet its contractual obligations to the Grievants because of low business volumes, but otherwise was ready and willing to pay based on the letters of appointment and the rates in the Collective Bargaining Agreement.

24. The Respondent called its Mombasa Branch Manager, Phidilia Walegwa as its first witness. She stated that the Grievants were last paid salaries in October/November 2013 and that the Respondent had not refused to pay the salaries but had financial problems from 2008. She further stated that the situation did not allow the Respondent to provide the Grievants with uniforms.

25. The witness further stated that long service awards had been erroneously omitted from payment, though the Respondent had tabulated the same.

26. On the applicable wages, the witness stated that the Respondent was paying wages and allowances based on the qualifications of the Grievants and not worked perform/duties assigned and she referred to the case of a cook.

27. The witness also stated that the little income received has been used to offset bank loans taken by the Respondent.

28. The Respondent's second witness, Gilbert Mwangemi confirmed that wages were last paid in October 2013 and that there was no dispute on outstanding salary arrears and that the Respondent has consistently made losses and he produced accounts for 2011 and 2013.

29. The witness further stated that he had computed the outstanding wages based on the payroll and not the rates set out in the respective Collective Bargaining Agreements and hence the differences in computations by Claimant Union and Respondent.

Reasons for dismissing the preliminary objection

30. It is in order for the Court to give the reasons for dismissing the objection which was raised by the Respondent.

31. The objection filed on 22 May 2014 was to the effect that the Memorandum of Claim was fatally defective, offended Order 4 rule 2 of the Civil Procedure Rules, there was no cause of action and the Claim was an abuse of the Court process.

32. In submissions, Ms. Chesaro urged that the Memorandum of Claim did not set out the exact sums claimed despite being a pecuniary claim.

33. She further urged that the verifying affidavit did not disclose that the deponent had the authority of the other Grievants contrary to the provisions of Order 4 rule 2 of the Civil Procedure Rules.

34. Mr. Thuita, in a brief response submitted that schedule 1 to the Memorandum of Claim had indicated the figures claimed and that the Claimant had filed a tabulation of the salary arrears sought on 14 April 2014 after getting leave of Court.

35. He further submitted that the Claim was filed by the Union on behalf of the Grievants and so the

- dispute was between the Union and employer. The objection, he added was meant to delay the determination of the dispute.
36. Order 4 rule 2 of the Civil Procedure Rules is inapplicable in the instant case. The Industrial Court (Procedure) Rules, 2010 has prescribed the nature and content of Claims commenced before the Court. It was not suggested there was a lacuna in the Industrial Court (Procedure) Rules, 2010. Because the parties did not address the Court on whether the Rules were complied with, it will not discuss the same here.
 37. Again, the Union had annexed a schedule indicating the amounts sought and the Respondent was clearly aware of the sums being claimed initially. Further computations were filed after leave was granted by the Court.
 38. It is for the above reasons that the objection was dismissed.

Evaluation

39. The dispute between the parties revolves on unpaid salaries from October/ November 2013, salary arrears from 2010 based on the rates agreed in various Collective Bargaining Agreements, Long service awards and uniforms or allowances in lieu of uniforms.
40. Each party had filed its own different computations of what was outstanding and it is because of this that the Court directed the parties to furnish the County Labour Officer with submissions/records to enable him do the arithmetic.

Pay slips

41. An employer is under a statutory obligation to issue an employee with a pay slip. In ordinary practice, pay slips inform the employee of earnings and deductions for the month.
42. The Grievants should be able to differentiate between the pay slip and actual payment of wages. Accepting pay slips by itself is not an indication that wages have been paid.
43. The Respondent should issue and the Grievants should collect their pay slips from October 2013.

Unpaid salaries

44. The payment of wages is of the essentiala of an employment contract. Section 18 of the Employment Act, 2007 requires employers to pay wages when they fall due or as agreed. The Grievants were to be paid by the month. By failing to pay wages when due, the Respondent was in breach of a fundamental or essential term of the contract between it and the Grievants.
45. The Respondent's two witnesses agreed salaries were last paid in October/November 2013 and that from that time the Respondent has been giving the Grievants salary advances.
46. The County Labour Officer in his report calculated the wages each Grievant should have earned from October 2013 to 31 July 2014.
47. Based on the tabulations by the Labour Officer and the admission by the Respondent, the Court would find in favour of the Grievants in the amounts as shown in page 5 of the Labour Officer's report less any advances paid.

Salary arrears from 2010

48. The Grievants based the claim on salary arrears on the rates agreed in the Collective Bargaining Agreements from 2010. The Respondent resisted the claim on the basis that some of the Grievants did not have the qualifications for the positions or jobs they were carrying out.
49. In my view, the position taken by the Respondent does not have merit. If it allowed any of the Grievants to perform duties/functions they were not qualified for, it should not turn back and argue that they should not be paid wages for those designations/functions. It was aware it was assigning duties to persons who were not qualified and it has not suggested that they did not satisfactorily perform those functions. It cannot blow hot and cold.
50. The Court would therefore adopt the computations by the County Labour Officer at page 3 of his report, which computations have factored in what was actually paid to arrive at the arrears.

Long service awards

51.This issue was not disputed by the Respondent and the Court accepts the computations by the County Labour Officer at page 6 of his report

Uniform allowance

52.The Respondent was not providing uniform to the Grievants as required by the Collective Bargaining Agreement. The County Labour Officer also computed what was owed and the Court would adopt his report at page 8.

Conduct of Respondent

53.The conduct of the Respondent at various stages of the proceedings was antithetical to the principal objective of the Industrial Court Act to enable the Court facilitate the just, expeditious and proportionate resolution of the dispute. The objection was raised on day of hearing the application, failing to negotiate in good faith and coming to Court late.

Conclusion and Orders

54.From the foregoing, the Court finds and holds that the Respondent owes the Grievants salary arrears, unpaid salaries up to July 2014, long service wards and uniform allowance and orders the Respondent to pay them as follows

Patrick Ngwekwe

Salary arrears	Kshs 272,625/-
Unpaid salaries	Kshs 377,652/-
Long Service awards	Kshs 13,320/-
Uniform	Kshs 29,250/
TOTAL	Kshs 694,837/-

Cecilia Kanyaru

Salary arrears	Kshs 124,479/-
Unpaid salaries	Kshs 86,058/-
Long Service awards	Kshs 11,544/-
Uniform	Kshs 29,250/
TOTAL	Kshs 251,331/-

Samuel Kenga

Salary arrears	Kshs 124,479/-
Unpaid salaries	Kshs 52,953/-
Long Service awards	Kshs 12,264/-

Uniform	Kshs 29,250/-
TOTAL	Kshs 218,946/-

Chiwai Mwakudza

Salary arrears	Kshs 228,454/-
Unpaid salaries	Kshs 372,735/-
Long Service awards	Kshs 11,544/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 641,983/-

Thomas Mwakilia

Salary arrears	Kshs 171,936/-
Unpaid salaries	Kshs 321,756/-
Long Service awards	Kshs 9,840/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 532,782/-

Oliver Mwangoma

Salary arrears	Kshs 185,870/-
Unpaid salaries	Kshs 156,972/-
Long Service awards	Kshs 12,480/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 384,572/-

Japheth Hanga

Salary arrears	Kshs 242,060/-
Unpaid salaries	Kshs 579,744/-
Long Service awards	Kshs 11,760/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 802,814/-

Simon Okelo

Salary arrears	Kshs 259,060/-
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Unpaid salaries	Kshs 294,135/-
Long Service awards	Kshs 14,160/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 596,605/-

Kahindi Karisa K

Salary arrears	Kshs 106,729/-
Unpaid salaries	Kshs 43,194/-
Long Service awards	Kshs 11,544/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 190,717/-

John Kea

Salary arrears	Kshs 105,529/-
Unpaid salaries	Kshs 84,459/-
Long Service awards	Kshs 9,840/-
Uniform	Kshs 29,250/-
TOTAL	Kshs 229,078/-

55. Salary advances paid to the Grievants and acknowledged after commencement of Claim and which are not factored in the awards should be deducted.

56. The Respondent should issue pay slips to the Grievants as required by law from October 2013.

57. In case of any arithmetical errors in the figures hereinabove the parties are at liberty to apply.

58. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 12th day of September 2014.

Radido Stephen

Judge

Appearances

For Union/Grievants
Mr. Alex Thuita, Industrial Relations Officer, instructed by KUDHEIHA

For Respondent
Ms. Chesaro/Ms. Bii instructed by Chesaro & Co. Advocates

