REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1539 of 2010

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL,

INSTITUTIONS, HOSPITALS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

RULING

The Respondent has applied for review of this court's Judgment delivered on 17.9.2012. The application for review is brought under section 16 of the Industrial Court Act and rule 5(i), 27 and 32 Industrial Court Rules 2010 and it is supported by a memorandum dated 17.10.2012 which sets out the following grounds for review :

1. The Judgment is in breach of the law.
2. The Applicant is unable to and incapable of honouring the Judgment.
3. The award will adversely affect the public sector reform programme aimed at harmonization of renumeration and benefits of public servants in terms of article 230 of the constitution 2010.

The Claimant has opposed the application vide her replying affidavit filed in

Court on 23.10.2012.

The application was argued inter parties on 7.2.2013 by Mr. Okeche and Mr. Enonda learned counsel for the Applicant and Claimant respectively.

Mr. Okeche argued that the Court acted in breach of section 15(5) of the Industrial Court Act by not acting within the guidelines provided by the Minister of Finance. The guidelines in point were issued on 23.11.2005 annexed to the application as appendix 2. That the guidelines were addressed to the Court and the Court did not give the weight in the award.

That although the Court on page 18 of the Judgment blamed the Respondent for failure to prepare budget and negotiate with the Claimant, the Respondent had in fact all along negotiated and engaged with the Treasury for budgetary provision as per annexture 3 and 4 to the application.

As regards the EPD report relied upon by the Court in making the decision, Mr. Okeche argued that the EPD was erroneous because it used Kenya Consumer Price Indexes (CPI) instead Nairobi Low Income Group (NLIG) or Nairobi Medium Income Group (NMIG) to calculate the increase in cost of living. According to him the EPD report of 10.4.2010 gave the correct figure of 19.75 by using the NLIG

and NMIG except for the period erroneous I used of 2009 – 2011 instead of 2007 – 2009. He did not however indicate whether the court was to apply erroneous EPD Report or what.

On the issue of productivity award of 5.7 %, per year, the Court ought to have sought for a report from the Productivity Centre of Kenya (PCK). He was however quick to observe that the centre has to date not produced a single report for any sector.

He however insisted that the award of the productivity was an error on the face of the record for lack of evidence to support it except an induction meeting attendance sheet and verbal allegations that during the meeting the issue of productivity was addressed.

He relied on **Kanyabwera vs Tumbweza (2005) 2 EA**page 87 in which the Supreme Court of Uganda held that an error appeared on record is one which does not require extraneous matter to show its correctness.

As regards the issue of inability to pay, Mr. Okeche submitted that the Kshs. 2.5 billion required to implement the award is not available. That in addition to the foregoing, he submitted without any fresh evidence that the Respondent still had huge deficit in existence. He relied on **Kenya Tea Development Agency vs Kenya Plantation and Agricultural Workers Union,** where the former Industrial Court held that it was bound by the guidelines and proceeded to review its award.

He concluded by arguing that the award would cause disharmony in the public sector by creating disparities in the terms and conditions of service compared with the colleagues of same job groups in the public service. He referred to the Appendix 6 to the application which outlines salary scales and submitted that the Respondent had already effected a 17% pay increase to bring the grievants at par with their counter parts in the public service.

In addition he argued that the award would cause internal disharmony because some of the grievants would earn more than the lowest in the management. In his view the issue of harmonization is a new and important matter for review. The upshot of the Applicant's case was to urge the Court to review the argument to place it within the confines of minister's guidelines.

Mr. Enonda strongly opposed the application and urged me to dismiss it with costs. He supported the Judgment and submitted that no specific law has been shown to have been breeched. Accordingly to him the issue is not whether the Court followed the guidelines but whether the Court did consider them at all.

On the issue of budgetary provision, he submitted that the applicant did not exhibit her budget or that of the nation to show that it did not provide for the salary increment. He contended that the duty to prepare budget lies with the Respondent and her default should never be visited on the grievants.

On harmonization, he contended that, the Annexture 2 was dealing with an earlier CBA and it had no basis in the present dispute which deals with salary increment. According to him, the said harmonization was a condition for stay given by this Court.

As regards the EPD report dated 18.4.2010, Mr. Enonda contented that it had the correct CPI for the correct period because CPI was a geometric Index as opposed to Arithmetic Index for assessing increase in the cost of living.

On the issue of productivity, Mr. Enonda agreed with the Applicant that the PCK has not yet prepared any productivity Index. He however explained that the productivity period for the Respondent in the period under review was 13% using the formula of Output in money divided by Input in total number of staff members multiplied by 100.

According to him, the productivity Index was pleaded and supported by evidence in form of Appendix 10 and as such the issue is not good for review but for an appeal. In any event the application is an afterthought because the Applicant was ready to comply with the Judgment where it not for the

Ministry which declined the applicant's request for funds.

He denied that there was salary disparity within the Respondent or the public service in general as the Respondent was a State Corporation which legally should pay higher salaries than the general public service.

Regarding the decision in the **Kenya Tea Developing Agency case**, Mr. Enonda submitted that the Court did not review the figures made but only the period for the arrears.

In his view, there were no new issues or evidence which was not within the knowledge of the Applicant. That the Applicant has failed to demonstrate any mistake or error apparent on the face of the record or any breach of law or guidelines. According to him, the submissions by the applicant are about how the court applied its mind in arriving in the Judgment.

I have carefully considered the application, the replying affidavit and the submissions made by the two learned counsel. The following are the issues for determination:

a) Whether the application has met the threshold for granting the order of review.

b) Whether the orders sought ought to be granted.

Under rule 32(I) of the Industrial Court procedures rules, a party applying for review of an Award/ Judgment of the Court is obligated to prove the following grounds:

(a) Discovery of a new and important matter or evidence which was not within the knowledge of the Applicant after exercise of due diligence or could not be produced by that person at the time when the Judgment was passed.

(b) On account of some mistake or error apparent on the face of the record.

(c) On account of the ruling or Judgment being in breach of any written law.

(d) If the Judgment requires clarification.

(e) Any other sufficient reason.

In the present case, the Applicant has paragraph 9 of the memorandum raised three grounds on which the application for review is grounded as outlined earlier in this ruling. Discovery of a new and important matter or evidence, and mistake or error apparent on the face of the record are not among the three grounds. I will there not consider any submissions by the parties on the foregoing two grounds cited as the basis for seeking review. I am instead proceeding on the presumption that the applicant had in her possession and disposal all the relevant matters and evidence concerning the dispute which culminated into the Judgment under review and that the Court did not make any mistake and there is no error apparent on the record.

The Applicant has submitted that the Judgment under review is in breach of a written law, that is section 15(5) of the Industrial Court Act read together with guideline No. 6, 2(a), 2(b) and 5 of the revised guidelines for determination of wages awards dated 23.11.2005 by the Finance Minister.

I agree that, my mandate is to be guided by the provisions of the said guidelines. I however do not agree that the Court is bound to act within the decisions of the Executive arm of the Government. In my view the guidelines are just guidelines and the Court has constitutional mandate to do justice independent of any influence from the Executive arm of the government. It follows therefore that, if the Executive does not do justice in its guidelines or it does not provide any guidelines at all the Court will always act fairly.

Just like the Court observed in the **Kenya Tea Development case**, the submissions on the guidelines and disharmony were not made during the hearing. The counsel for the Respondent did not even call any witnesses to address such evidence. He in fact relied on the EPD report dated 18.4.2010 to justify Respondent's resolve to award zero salary increment.

This time round, however, she is saying that the EPD report of 10.4.2010 was the proper one for proposing a CPI of 9.5% per year. I do not take kindly the said submission especially when it is on record that even after persistently offering zero salary increase, the applicant was able to give a 17% backdated salary increase as a condition for stay without much effort. I perceive bad faith on the part of the Respondent and especially noting that the Court had as early as February 2012, observed that the Respondent was deliberately delaying settlement of the dispute.

In my view, the Court did not breach the law in passing the Judgment under review. The Court considered all the evidence on record, and more so the EPD report dated 18.4.2010 which the parties consented to and relied upon in making their submissions. The Applicant did not raise any issue with CPI as she is doing now and I wonder how on earth the court could have strayed away from the submissions and consent of the parties regarding the aforesaid EPD report

As regards the EPD report dated 10.4.2010, it is obvious that it referred to a different period than 2007 – 2009. The said report was replaced by the better one dated 18.4.2010 and as such, the Applicant who did not object to the new report during the trial should should be estopped from objecting to it now. Consequently the ground of breach of law fails.

The other two grounds relied upon by the applicant can be collapsed into one ground of any other sufficient reasons under rule 32(e) aforesaid.

On the issue of inability to honour the Judgment, I wish not to revisit my reasoning in the Judgment because that would amount to sitting on appeal of my own judgment. The failure to make the prior budget proposal is not to be blamed on the workers. The Respondent knew that the CBA was due for renewal from 1.7.2009 and she should have put in place machinery for review of terms of employment for the grievants. That should have helped her get the necessary approvals,if any, from Treasury to help in negotiating amicable salary review with the Claimant . She failed to justify the said lack of any increment.

This Court will not treat the failure by the employer to act or the government for that matter, as enough excuse not to grant a justified and livable salary to workers especially when EPD Report and the employer in her own words admits that the employees are overworked and working under overstretched hospital facilities.

As regards the issue of harmonization, this Court welcomes the move with both hands. However the matter must be approached cautiously. The matter before me concerns a CBA dispute older than the constitution. The whole issue of salary review is to compensate workers so as to enable them afford a living and housing worth human dignity. It is also a dispute for the terms of employment for workers of state Corporation which should slightly be different from the general public service The Respondent is also behind schedule in concluding the current CBA for 2011 – 2013 leave alone the one in dispute of 2009 – 2011. As earlier observed, the Applicant has been able to grant a salary increase with effect from 1.7.2012 without any problem even after feigning inability to grant any salary increment and as such the Applicant was not sincere when she submitted for zero increment during the hearing. She did not during the hearing, disclose that she had a prior budget allocation to increase salary from 1.7.2012 during the hearing and only did so after the court ordered so as a condition for stay order.

In the upshot I have not been satisfied that the applicant has any sufficient reason to warrant reviews of the Judgment.

As regards the second issue of the orders to be made, I obviously will dismiss the application except for review of effective date which is now going to be the 1.7.2011. This increment will take into consideration the 17% increment effected on 1.7.2012. I believe this change of the effective date

mitigates the respondents' financial deficit if any still subsists to date.

Consequently, I direct the parties to sign the CBA within 30 days incorporating the said salary increment as ordered in the Judgment under review. The Claimant will have the costs of the application.

Signed, dated and delivered on 15th day of March 2013.

Onesmus N. Makau
JUDGE