



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 799 of 2010**

**BETWEEN**

**KENYA UNION OF JOURNALISTS AND ALLIED WORKERS  
.....CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED..... 1<sup>ST</sup>  
RESPONDENT**

**STANDARD GROUP LIMITED..... 2<sup>ND</sup>  
RESPONDENT**

*Rika J  
CC. Elizabeth Anyango*

*Hezron Onuong'a Industrial Relations Officer of the Claimant instructed by the Claimant*

*Mr. Nyaosi instructed by Mohammed and Muigai Company Advocates for the 1<sup>st</sup> Respondent*

*Mrs. Ochieng' instructed by Guram and Company Advocates for the 2<sup>nd</sup> Respondent*

**ISSUE IN DISPUTE: BREACH OF THE COLLECTIVE BARGAINING AGREEMENT**

**AWARD**

1. The Claimant is a registered Trade Union, representing the Media Industry. The two Respondents are Media Companies, with their Head Offices in Nairobi Kenya. The Union and the two Employers have a Recognition Agreement. They registered a Collective Bargaining Agreement at the Industrial Court to cover the period 2008-2010. This CBA has a wage adjustment clause. It is this clause that has resulted in this dispute.

2. The Statement of Claim was filed on 16<sup>th</sup> July 2010. The 1<sup>st</sup> Respondent, Nation Media Group Limited, filed its Statement of Reply on 27<sup>th</sup> September 2010. The 2<sup>nd</sup> Respondent, the Standard Group Limited filed its Statement of Reply on 5<sup>th</sup> August 2010. Preliminary issues of law have been raised and determined on various dates. The final hearing took place, and closed on 26<sup>th</sup> November 2012, with the parties' representatives proceeding by way of submissions.

3. The Claimant's position is that the 2008-2010 CBA Clause 1 and 2 state:

*“The revised salaries contained herein reflect a minimum increase of 11% in the first year, and 12% in the second year. Anniversary increases contained and stated herein continue and will be given accordingly to journalists' salary position.”*

Clause 2 regulates anniversaries, stating that employees would continue to earn an anniversary of Kshs. 360. All journalists except the 4 categories excluded by the Recognition Agreement would benefit from the CBA to the same extent, get salary increments as well as anniversary increments. On 6<sup>th</sup> July 2010, the Legal Officer of the 1<sup>st</sup> Respondent Mr. S. Owino, admitted that a number of eligible employees did not benefit from the CBA. Only 19 employees of the 1<sup>st</sup> Respondent and 9 of the 2<sup>nd</sup>, had their salaries and anniversaries raised. On 7<sup>th</sup> August 2007, the 1<sup>st</sup> Respondent issued a letter of appointment to an employee with the following clause:

*“Your employment shall be outside the scope of union representation and your terms and conditions shall not be subject to representation by or discussion with any trade union, and shall not engage actively in trade union affairs, except as representative of the Group.”*

4. The Claimant submits that the Respondents have flouted the CBA and prevented the Claimant from carrying out legitimate trade union activities at their respective workplaces. Employees are at the risk of losing their rightful salary and anniversary increments. The Respondents are bound by the CBA. They have acted contrary to the Constitution. Mr. Onuong'a asks the Court to rely on the two lists of employees of the Respondents, prepared by the Secretary-General of the Claimant, detailing the unpaid salary and anniversary increments. The Claimant submits that the question, as framed by the Court in its earlier ruling, is whether all the unionisable employees of the Respondents benefited from the CBA. The 2<sup>nd</sup> Respondent has conceded in its Reply that not all employees benefited. The Recognition Agreement is clear that only 4 categories of employees are excluded from the benefits of the CBA. The Respondents asked for details of the employees who were excluded. Those lists are on record. The Claimant seeks the following Orders:-

- a. Compelling the Respondents duty bound to obey and abide by the Provisions of the Registered CBA;
- b. Nullify the provisions of the Respondents' appointment letters that are in contravention of the Constitution of Kenya and the CBA;
- c. Compelling the 1<sup>st</sup> Respondent to quash and withdraw all the repugnant personal and confidential appointment letters issued to her employees;
- d. Compelling the Respondents to pay salary and anniversary increments to all unionisable employees; and,
- e. Pay costs of the Claim with interest.

5. The Nation Media Group's position is that the Claim is frivolous, incompetent, a nullity and an abuse of the process of the Court. The 1<sup>st</sup> Respondent has already implemented the CBA salary adjustments and anniversaries, with respect to Claimant's members. The Claimant could not purport to present a Claim on behalf of non-members. The CBA was concluded between the Respondents and the Kenya Union of Journalists, not the Claimant. The CBA could not apply to Management Staff, and Subordinate Staff who were not members of the Claimant. The letter dated 6<sup>th</sup> July 2010 from Legal Officer Mr. Owino, did not admit any liability; the 1<sup>st</sup> Respondent merely communicated its employees' displeasure at the 1% agency fee sought by the Claimant out of their salaries, while they were not benefiting from the CBA. They had freely opted not to be members of the Claimant Union. The Claim amounts to generalities, without any details of Claimant's members who have been denied the benefits of the CBA. No employee has been prevented from joining the Claimant Union. The letter of appointment issued in 2007 cannot be relevant

to a dispute brought under Labour Relations Act Number 14 of 2007, which was enacted after the letter issued. A new CBA is in place. The Claimant has not shown that it has *locus standi* to bring this Claim. The Claimant cannot seek to quash letters of employment of employees who are not its members. If the letters are quashed, it will have the effect of terminating the contracts of employees who are not members of the Claimant. It would be unconscionable. Prayers [c] and [d] are generalities; they do not give the details of employees. Mr. Nyaosi emphasized that the letter from the 1<sup>st</sup> Respondent's legal department was on agency fees. It related to employees in the editorial department who are non-unionisable. The lists relied on by the Claimant were generated by the Claimant. This was not evidence. The first employee named in the list of the 1<sup>st</sup> Respondent's employees who did not benefit was a Deputy Managing Editor. Others included Management Staff. They cannot be represented by the Claimant without their consent. The 1<sup>st</sup> Respondent asked the Court to dismiss the Claim with costs to the Respondents.

6. The 2<sup>nd</sup> Respondent associates itself fully with the position of the 1<sup>st</sup> Respondent. Only Claimant's members were beneficiaries under the CBA. The 2<sup>nd</sup> Respondent gave a list of 8 employees who are members of the Claimant. The reference to *all Journalists* in the CBA was made in reference to those Journalists *who are members of the Union*. The 2<sup>nd</sup> Respondent was not aware of an admission made by Mr. Owino from the 1<sup>st</sup> Respondent's Legal Department, on the subject. The Claimant is attempting to make the CBA forcefully applied to all employees, irrespective of their union status. The 2<sup>nd</sup> Respondent has not violated any provisions of the CBA. The Claim is brought in afterthought. The Claimant wishes to have unlawful deductions made on salaries of non-members. These non-members have negotiated their own individual contracts of employment. They do not receive the increments negotiated by the Claimant, but are bound by their respective individual contracts. These employees cannot be forced to join the Claimant. Salary and anniversary increments have been made with regard to Claimant's members. Mrs. Ochieng further submitted that the Claim is not founded on a verifying affidavit. The lists brought to Court by the Claimant comprise all employees, including Management Staff. The details are not backed by pay slips. It is not clear who prepared the lists. The amount claimed is about Kshs. 17 million. The Claimant had no justification in extending membership to non members. The 2<sup>nd</sup> Respondent prays the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

7. The Respondents appear to repeat the same argument, about the capacity of the trade union to present a claim on behalf of employees who are not its members. This issue was argued at length in the initial preliminary challenge, and a ruling made. The Court reached the following conclusions:-

- There is a tendency to view CBAs as regular commercial contracts where the doctrines of freedom and privity of contract are rigidly applied. This is a misperception of the special nature of the CBA;
- The question whether a registered CBA has been implemented in full, is not answered by showing it has been implemented with regard only to the Union Members;
- The Trade Union Co-Authors the CBA with Employers. The Trade Union has capacity stemming from various sources to seek the interpretation of the CBA from the Industrial Court, without restriction, on all matters arising under the CBA; and,
- The Trade Union is the Co-Author of the CBA. It is the Sole Collective Bargaining Agent. It comes to Court as a Co-Author of the CBA, a representative of its Members, and an agent for all eligible Members.

8. Section 59 of the Labour Relations Act states that:

[1] “ A *Collective Agreement binds for the period of the agreement-*

*[a] the parties to the agreement;*

[b] all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

[c] the employers who are, or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees;

[2] A Collective Agreement shall continue to be binding on an employer or employees who are parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association; and,

[3] The terms of the Collective Agreement shall be incorporated into the contract of employment of every employee covered by the Collective Agreement.”

This law amplifies the argument that CBAs are not like commercial contracts. Freedom and privity of contract are not always read in the CBAs. There are certain departures; CBAs bind beyond the parties to the agreement; members who resign from the trade union or the employers' association continue to be bound for the duration of the CBA; and the terms of the CBA are incorporated in the individual contracts of every employee covered by the CBA. If they are ordinary contracts, they would only bind the signatories; they would not continue to bind members who resign; and they would not be capable of imposing themselves on individual contracts of employment. Who is covered by the CBA? Under section 59[1] [b], the simple response to this question is *all unionisable employees employed by the employer*. This however does not settle the issue. There must be an explanation on the term ‘*unionisable*.’

9. Under Section 2 of the Labour Relations Act, *unionisable employee* means any employee, **eligible** for union membership. Recognition is granted to a trade union, as a representative of *unionisable employees*. Recognition is granted to trade unions as representatives of the **interests of any employee eligible for membership**. Recognition is not granted for trade unions to negotiate and collectively bargain, to the benefits of members alone; they are recognized by employers, in order to represent the interests of any employees eligible for trade union membership. They represent at the collective bargaining forum, the broad spectrum of *unionisable employees*. The focus is on eligibility.

10. This Court explained the special nature of the CBAs and trade union representation, in the ruling delivered in this dispute on 27<sup>th</sup> October 2011. This special nature is evident under Sections 48 and 49 of the Labour Relations Act. Section 48 requires trade union **members** to pay to the trade union a regular subscription, called the **trade union dues**. This is paid as a condition for continued membership. Section 49 states that “ *a trade union that has concluded a CBA and registered a CBA, setting terms and conditions of service for all employees, may request the Minister to issue an order for agency fee.*” This is deducted from the wages of each unionisable employee, covered by the agreement who is not a member of the union. This recognizes that the trade union is the sole collective bargaining agent at the workplace. The fee is not related to membership. The agency fee must not exceed the rate of the trade union dues under Section 48. The law places great weight on the role of trade unions as sole collective bargaining agents. **Even when an employee has revoked his trade union membership, he immediately upon such resignation, becomes liable to pay agency fee.** It is clear that trade union membership is not what determines the scope of the CBA application.

11. A Recognition Agreement gives to the trade union a single union deal. Effectively, the trade union becomes the sole collective bargaining agent. If the Kenyan Labour Law, the Standard Recognition Agreement contained in the Industrial Relations Charter intended otherwise, the term ‘**all unionisable**’ would be substituted with ‘**all unionized**’ or simply, ‘**members of the union.**’ It is argued very vociferously that the concept of agency fees, and the principle that employees who are not trade union members can be bound by a CBA concluded by the trade union, violates Constitutional and Contractual freedoms and rights. By being compelled to pay agency fees, an employee who is not a trade union member is not forced into membership. It cannot be said that one has been forced into an association, in violation of freedom of association. Agency fees aim at ensuring employers are not compelled to adopt multiple wages and benefits scales. Non-union members are not allowed to ride the collective bargaining train for free. The agency fees spread the benefits of trade union security and make it easier for employers

to have a collective answer, to a collective issue of labour management. The arrangement strengthens industrial relations, without compromising constitutional principles such as freedom of association and the right to work.

12. The Court suggested in the last ruling that some countries have adopted the concept of a **closed shop** to meet the problems posed by the role of the trade union as sole collective bargaining agents. In a closed shop, employers are required to employ people who are already trade union members. Employers recruit directly from persons who are already members of the relevant trade union. The employees are not required to pay agency fees once in employment, as their status as union members is clear, and any CBA would be clear on its scope of application. Some other countries go for the **union shop**. Under this category, the employer is free to employ non-union members. The employment contract however, sets the time limit within which the employee must, upon employment, join the relevant trade union. Thirdly, some jurisdictions adopt the **agency shop**. This requires non-union members to pay an agency fee to the trade union, in recognition of the trade union's role in collective bargaining. The last possible arrangement is the **open shop**. This does not require the employee to belong to a trade union, to be employed or to remain in employment. Employees who do not pay any fees to the trade union still benefit from the CBA. The Model Recognition Agreement adopted by the parties, and the wording of the CBA, suggest they endorsed the agency shop.

13. As opined at the preliminary ruling, the only **ineligible** employees, those outside the scope of the 2008-2010 CBA and the Recognition Agreement are staff in supervisory positions. These are stated to be: Editor/Editor in Chief, Deputy Editor/Managing Editor, News Editor/Chief Reporter and Chief Sub-Editor. The Claimant provided lists of employees who are said not to have benefitted from the CBA salary adjustments and anniversary payments. Unfortunately, the lists do not assist the Court in reaching a finding on the **eligibility** of the employees. They are just names. The Court was not told if they are in the job categorizations described as supervisory. The Claimant was challenged by the Respondents, that it just threw lists of all employees at the face of the Court. This is true. It is impossible to know if these employees were covered under the CBA in question. The list of employees said to be eligible contains names of Deputy Managing Editor; Managing Editor and News Editor. The Court framed the question to be answered in this dispute as *whether all employees eligible to be members of the trade union benefitted from the CBA*. The Claimant did not make any serious effort to assist the Court in answering this question in a manner favourable to the Claimant. The listed employees could have been called to tell their stories; they were not. Not even the numbers given in the lists were propped up by statements of pay advice relating to the period immediately, and after, the CBA was concluded. There is no sufficient evidence that would lead the Court to say that *eligible employees were left out in the implementation of the CBA*. It would have assisted the Claimant and the Court, if employees so affected were called to testify.

14. The letter from Mr. Owino dated 6<sup>th</sup> July 2010 does not help in resolving the issues in dispute. It seems to refer to a separate dispute between the parties at the Industrial Court, where orders on agency fees had already issued. The 2<sup>nd</sup> Respondent mentioned without much elaboration, Industrial Court Cause Number 545 [N] of 2004, involving the same parties. The Claimant did not say anything about this dispute. The 1<sup>st</sup> Respondent appears to have been grumbling about the orders issued in this Cause, not admitting that there were employees it had denied the benefits of any CBA. Notably this letter by Owino was written a week before the Claimant came to this Court under certificate of urgency. It appears the parties came to this Court in continuation of another dispute concluded here, perhaps desiring a different result. Other than rely on this correspondence to argue admission of the Claim by the 1<sup>st</sup> Respondent, the Claimant ought to have called the employees who were reported to have disowned the Claimant in the correspondence, to testify in Court and establish their **eligibility**, and show that they were denied the benefits under the CBA.

15. The letter of appointment issued to Michael Bwire Mugwang'a is dated 7<sup>th</sup> August 2007. It predated the CBA. It was not argued to be a current standard letter of employment at the Media Houses, or even the norm at the date the CBA in question was in force. It was not shown to have any nexus with the present dispute. The Court cannot take this as the standard letter of appointment, and order the Respondents to nullify all appointment letters as being in contravention of the Constitution. The

Respondents will however take note that, there can be no letters of appointment in the modern Kenyan Industrial Relations, which purport to bar a unionisable employee from trade union membership. Such a clause would be in clear violation of the Bill of Rights. The Respondents are Media Houses who are at the forefront of articulating Constitutional Rights. They know neither the old, nor the new Constitution of Kenya would envisage violation of associational freedoms. If there are such letters as displayed by the Claimant at any work place, it is time for the involved employers to bring themselves to conform with the new Constitutional Age, by shredding those letters and rewriting the terms and conditions of employment. There is however no reason shown by the Claimant why the Court should make any orders based on an appointment letter issued way back in 2007. The parties have had two cycles of CBA from then, and should have come up with an acceptable model appointment letter. The Court finds the Claimant has failed to establish its case to the required standard. ***There shall be an Award dismissing the Claim in its totality. No order on the costs.***

Dated and delivered at Nairobi this 26<sup>th</sup> day of April 2013

**James Rika**

**Judge**