



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 17 OF 2013

(Original Nairobi No. 516/2012)

(Before Hon. Justice Hellen Wasilwa on 14th November, 2013)

KUDHEIHA WORKERSCLAIMANT

VS

ST. MARY'S MISSION HOSPITAL MUMIAS.....RESPONDENT

JUDGMENT

This claim was filed by Kenya Union of Domestic, Hotels, Education, Institutions, Hospitals and Allied Workers Union (KUDHEIHA) on behalf of their members Rita Kibisu, Phaustine Kweyu, Margaret Nyarotso, Sadik Akulima, Grace Wekesa, Jedidah Awinja and Mary Shikanda on 28/3/2012. The Claimants contention is that they had a good working relationship with the Respondents on matters related to implementation of the concluded and signed CBA between specified Churches and Institutions. However the Respondent turned round and disowned Letters of appointments that had been drawn to their members introducing new contracts on 1st April 2004 without involving them. That the Respondent came up with a new version of terms and conditions diverting from the set conditions between Churches and Claimants as per their CBA of 7th June 1990 which was in force then. This caused the Claimant's members to withdraw from membership of the union which they learnt from their payslips.

The grievants had been employed on diverse dates as follows:

- | | |
|----------------------|-------------|
| 1. Rita Kibisu | - Not given |
| 2. Phaustine Kweyu | - 1975 |
| 3. Margaret Nyarotso | - 1984 |
| 4. Sadik Akulima | - Not given |
| 5. Grace Wekesa | - 1985 |
| 6. Jedida Awinja | - Not given |
| 7. Mary Shikanda | - 1981 |

Claims for the 1st, 4th and 6th grievants were withdrawn by the claimant union when they didn't turn up to court. The other grievants gave evidence in court and stated that upon employment on diverse dates they worked well until 2004 when they were made to sign a new Contract with their employer for 3 years. Each of the grievants contend that they were never paid their terminal dues when they were forced to retire in 2007 at the end of the contract which they had signed in 2004. They contend that they had been members of their union and were forced to leave the Union and were refunded their union dues. They also contend that they were never paid their house allowance. The grievants agree they served on contract from time to time and by 2007, they had reached retirement age.

After the grievants were terminated on 10th May 2007, they reported to the claimant who in turn reported the dispute to the minister pursuant to Section 62(1) of the Labour Relation Act 2007.

A Conciliator was appointed to resolve the issue. The Conciliator convened two meetings on 1st March 2011 and 22nd March 2011 but an amicable solution was not arrived at.

It is the Claimant's contention that the Respondents refused to honour provisions of the CBA they had entered into with them –especially Clause 1(c) which provided that no negotiation on salary for Union members could be done without involving the Union.

The Claimants now pray that they be paid as follows:

Phaustine Kweyu

1. Underpayments w.e.f. 1st January 2007 to

30th April 2007 –Kshs 5685 – 5340 = 1380 X 4 Months = 5520/=

2. House Allowance w.e.f. January 2004 to December 2005=

945 – 801 = 144 x 24 Months = 3456

w.e.f. January 2006 to 30th March 2009 =1005 - 801= 204 X 15 Months = 1224.

3. Payment in lieu of notice as per Clause 16(9)(iii)= Kshs 5685 X 4 Months = 22,740/=.

4. Long Service Increment Clause 20

Kshs 200 X 12 Months X 2 Years = 4800

5. Service Gratuity on retirement

5685 X 31/30 years X 15 days = 87,885/=

6. 12 Months Compensation for loss of service and X 5685 = 68220/=

Less Paid 194,645/=

Balance 64,645/=

Margaret Nyarotso - 88,008/=

Grace Wekesa - 319,882/=

Mary Shikanda - 544,926/=

The breakdown of these figures are itemized in Claimants Statement of Claim.

The Respondents filed their Memorandum of response on 31.5.2012 through the firm of M/s Gabriel Fwaya Advocates. They also called three witnesses. The Respondents defence is that the grievants were paid all their dues upon reaching retirement age and that they are owed nothing. The Respondent's first witness who is the Vicar General of Kakamega Catholic Diocese under which the Respondents falls told Court that the Respondent had a relationship with the Union KUDHEIHA until 1990. The CBA signed was between KUDHEIHA and the Church and not St. Mary's Hospital. He further stated that there was no other CBA in force after 1990. He says in 1976 there was a CBA between KUDHEIHA and Respondents.

The second Witness who is the administrator of the Respondent, joined the Respondent in January 2013 also told Court that there was no CBA between the Respondents and KUDHEIHA.

RW3 told Court that the grievants worked for the Respondent and were paid their gratuity at the end of the Contract under which they served for Phaustine, she pointed out that she was paid as per APP JW15 Kshs 11,397/=. The document in question is however not signed by the said Phaustine Kweyu. For other grievants, RW3 said they were paid their gratuity when the contract ended but she did not point out, how they were paid this gratuity.

I have heard all evidence from both parties and also considered the Submissions of the Claimants. The issues for determination are as follows:-

1. ***Whether the Union (Claimants) and Respondents had any CBA signed between them in the period under contention.***
2. ***Whether the rights of the grievants if any under the CBA was flouted***
3. ***Whether the grievants were entitled to any of the prayers sought.***

On the first issue, the Claimants exhibited Appendix 1, a CBA signed between National Council of Churches of Kenya and the Claimants dated 7th June 1990. The NCCCK part was signed by the Secretary General on behalf of Churches and Institutions Associated to them. That the Respondent St. Mary's Hospital Mumias was an Institution associated with the NCCCK, In this case Diocese of Kakamega is evidenced from the Appointment Letter given to the grievants which emanated from the Diocese of Kakamega as per Appendix 1. When their Contracts ended in 2007, they were informed that it had been decided that their ***“Contract with the Diocese of Kakamega will not be renewed”***. It is also evident that the grievants were members of the Claimant Union and on 16.3.2004, Phaustine Kweyu was paid her Union dues totalling 94,967/=. All other grievants were also paid and have admitted receiving their Union benefits. What these Union benefits were, was however not explained to the grievants and it is assumed it was what they had remitted to the Union over the time they were in the Union.

I have looked at the Provisions of the 1990 CBA which the Claimant and Respondent agree was valid states at Clause 4 that

“This agreement shall come into force on the 7th day of 1990 and shall continue in force for a minimum period of one. Thereafter the agreement shall continue in force until amended or terminated”.

There is no indication that this agreement was amended or terminated. The only other related CBA is the one dated 4.9.2007 and this was after the grievants had already ceased working for the Respondents and is therefore not relevant for the period under contention. It follows therefore, that there was a CBA in force between the Claimants and Respondents and it is the one dated 7th June 1990.

That then leads me to the next issue. It is the Claimants Contention that the grievants were forced to cease being members of the Union when the Respondents forced them into fresh Contracts in 2004 without reference to the Union. Issue of Membership to the Union is a right in labour relations –Clause 2(a) of the CBA states as follows: _

“The employee affords full recognition to the Union as a properly constituted and representative body and the sole labour organization representing the interests of the workers who are in the employment of the employer in all negotiable matters concerning rates of pay, overtime, hours of work, method of and Salary/Payment; paid leave, duration of employment, benefits, principles of Promotion, terms of redundancy and all other negotiable conditions of employment for all employees who are in the employment of the employer as defined from time to time by Government -----”

It is apparent that the Respondent went ahead and signed with the grievants fresh Contracts in the year 2004 without involving the Union, which was against the spirit and letter of the CBA and thus

disadvantaging the grievants. This was done without consideration of the rights of the grievants to be members of a Union and in contravention of sound Labour relations. It is therefore my finding that the rights of the grievants were flouted in 2004 when they entered fresh Contracts with the Respondent without involving their Union.

The grievants have sought for various prayers. They have prayed for payments of salary for which they were underpaid. However none has exhibited before this Court their respective Payslips for the periods worked against the minimum wages as declared for their category over the time and therefore that prayer has not been proved and cannot be awarded.

Other Prayers were for house allowance underpayments which also have not been proved, and therefore cannot be awarded. The grievants asked for payment of 1month salary in lieu of notice. My understanding is that the Contracts the grievants were serving on came to an end and at the same time the grievants had reached their retirement age and so the issue of notice does not arise. However there is no indication that the grievants were paid their terminal dues or gratuity as the case may be at the end of their long service with the Respondents. I therefore find that they are all entitled to their gratuity which I award as follows:-

1. **Phaustine Kweyu**

Kshs 5,685 X 31 years X 15 days = 87,885/=

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2. **Margaret Nyarotso**

5,685 X 23years X 15 days = 65, 377.50/=

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3. **Grace Wekesa**

6,556 X 22YEARS x 15 days = 70,940/=

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4. **Mary Shikanda**

12,543 X 26 YEARS X 15 days = 163,020/=

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The Respondents will meet costs of this case.

HELLEN S. WASILWA

JUDGE

14.11.2013

Appearances

Joseph Okwach for claimants – present

N/A for Respondent

CC. Wamache