



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE 1539 OF 2010

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS..... CLAIMANT

VERSUS

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

JUDGMENT

The Claimant has filed a claim on behalf of her members who are all employees of the Respondent praying this court to enter an award in respect of the following:-

- (1) General Wages Increment (salary) at 45% in the first year and 45% in the second year of their Collective Bargaining Agreement (CBA).
- (2) House Allowance as follows:-

<u>Job Group</u>	<u>Kshs. As New Rate</u>
K.17 – K.16	8,000/-
K.15 – K.14	10,000/-
K.13 – K.12	12,000/-
K.11	15,000/-
K.10	17,500/-
K.9 – K.8	27,000/-
- (3) Commuter Allowances at the rate of Kshs.5,000/- per month across the board.
- (4) All the unionisable employees to be paid leave traveling allowance of one month's basic salary subject to a maximum of Kshs.60,000/-
- (5) That the Respondent be ordered to sign the CBA for the year 2009 to 2011 as soon as possible taking into account all other issues in the negotiated CBA.
- (6) That costs be paid to the Claimant.

The Respondent has opposed the claim vide a Memorandum of Defence dated 5-4-2012. The gist of the response is that the Respondent does not agree to any salary increment whatsoever due to

financial deficit

and also because there is no approved budgetary allocation from the Government.

This being an economic case, the parties to the dispute agreed to have an Economic Report filed in court by the Economic Planning Division of the Ministry of Labour to assist this court on deciding on the dispute.

The Report was filed in court on 20-4-2012 and it is dated 18-4-2012. The author of the Report, Mr. Okwayo appeared before the court on 24-4-2012 to explain his findings and opinion on the dispute. In a brief statement, he told the Court that there should be no increase in salary. In his report, he argued that the Claimant's demand had cost implications on the Respondent who was operating on a deficit. The report, however, indicates that the consumer price index (CPI) had increased by 34.6% from the period between July 2007 and June 2009. The report also shows that productivity improved during the period.

Neither Mr. Mwabili for the Claimant nor Mr. Okeche for the Respondent had any questions to Mr. Okwayo. Instead they embarked on submissions in support of their client's case.

Mr. Mwabili submitted that the parties to this dispute had negotiated all the terms to be included in the 2009-2011 CBA save for the four (4) issues in this dispute, items:-

- (a) Salaries
- (b) House Allowance
- (c) Commuter Allowance
- (d) Leave Travelling Allowance

On the issue of salaries he relied on the wages guidelines. He submitted that salary is a basic human need for any work and it was not negotiable. He did not substantiate the foregoing but only referred to Clause 2 of the EPD Report on page 3.

On the second issue of House Allowance, he submitted that House Allowance should be increased from Kshs.4,300 – 8,000/=. He based his argument on the rent rates within or around the hospital estates.

Regarding claim for commuter allowance, Mr. Mwabili submitted that Kshs.5,000/- across the board be granted.

He then concluded his submission with the issue of Leave Travelling Allowance for the staff and family members. He based his submissions on Section 12(xiii) of the Labour Relations Act. The Claimants are seeking refund of the said Leave Traveling Expenses.

The Respondents were ably represented by the Learned Counsel, Mr. Okeche. In his submission, Mr. Okeche heavily relied on the EPD report and the annexures to the Memorandum of Response.

He conceded that there were only four issues in dispute in the CBA covering 2009 – 2011 period. The rest of the terms and conditions in the said CBA had been agreed upon that the reasons for the disagreement on the said 4 issues were:-

- (a) the financial position of the Respondent.
- (b) the circular letter from the Office of the President marked as Annexure 2.a in the Respondent's Memorandum of Response.

According to him the Respondent was only a referral hospital depending on grants from the Government

to fund its operations. That it receives Kshs.3.4 billion grants annually which is expended as per the EPD's Report page 7, table 3. That the grants received plus fees collected by the Respondent only results in deficit due to wage cost. He referred to the EPD report page 8.

He then made specific submissions for each issue as follows:-

(a) Salaries

On this issue, he submitted that the claimant has insisted on the demand for increase at the rate of 45% for the first year and 45% for the second year. He however, saw no justification for such increment and referred to Table 4 in the EPD report to show that the increase in cost of living was 9.9% per year, which translates to 18% for the two years, 2009 – 2011.

He maintained that if the court allowed the 45% increase per year, the total wage cost would increase by Kshs.1,494,356,945/-. But according to the EPD Report recorded increase of 9.9% per year the increase for the two years would be Kshs.482,025,285/-.

According to him, both the Claimant's demanded rate and the EPD'S recommended rate should not be considered by the court because the Respondent was already on a huge deficit of Kshs.282,239,772/-. He was, however, quicker to say that his submissions did not mean that the employees did not deserve salary increment. The problem was that the Respondent who depends mainly on Government grants could not at the moment sustain any salary increment.

(b) House Allowance

He referred to the Claimant's demand in the Memorandum of claim and the EPD Report which show the demand for review for the lowest grade K.17 & K.16 from Kshs.8,000/- while the highest grade K.9 & K.8 from Kshs.21,000/- to Kshs.27,000.

He submitted that the current House Allowance was reasonable at Kshs.4,300/- for the lower grade and Kshs.27,000/- for the highest grade. He referred to table 5 in the EPD Report. He noted that the house rent in the estates around the hospital was about Kshs.10,000/- but still submitted for zero increment of rent.

He further submitted that the guidelines for reviewing House Allowance were to the effect that the increase should be at the rate of half of whatever rate of increment is given to the salary. He referred the Court to Appendix 15B in the Memorandum of claim guideline No.2.

According to him, the main question to ask and answer was whether the Respondent would afford any review of the House Allowance as proposed.

He concluded that the Respondent could not afford to pay the increment and proposed zero increase.

(c) Commuter Allowance

He referred to page 6 of the Claim and page 8 of the EPD report. The Claimant's demands Kshs.5,000/- across the board per month. He submitted by relying on the EPD Report page 12 paragraph 4 that the Government had reviewed Commuter Allowances and the Court needed not to interfere. According to the EPD Report, the rates were now Kshs.3,000/- for the lowest grade and Kshs.8,000/- for the highest grade of unionisable staff. He referred to Appendix 5A in the Memorandum of Claim which is a Circular on review of the Public Service Allowances which is more recent than the 2009 – 2011 CBA.

He submitted that the employees had already spent the money and the claim is already overtaken by events and no pay should be backdated. He requested the Court to adopt the rates contained in the said Government Circular under guideline number 5 which provides that the Government will not honour any wage review which is not provided for in the budget.

(d) Leave Travelling Allowance

Mr. Okeche submitted that the purposes of this allowance was to aid an employee when commuting to the upcountry home during leave. The Claimant demands for an award of Leave Allowance equal to one month's basic salary subject to a maximum of Kshs.60,000/- as opposed to the current allowance of between Kshs.4,000 and Kshs.7,200/- that the guiding principle was cost of travel per distance by road.

That the EPD report page 11, last paragraph had explained that a return ticket during normal periods of the year was between Kshs.3,000/- and Kshs.4,000/- per person excluding meals taken enroute, further cost of transport costs from the principal town of destination and transport of other family members and belongings. He urged the Court to retrain the current Allowances of between Kshs.4,000/- and Kshs.7,200/- because it was reasonable.

Before conclusion, he referred to the Appendix 2A in the Claimant's Memorandum of Claim which is a circular dated 25-5-2011. The gist of the said circular was to bar any review of remuneration or negotiations for the same pending the issuance of guidelines by the Salaries and Remuneration Commission. He also referred to a new Circular dated 4-7-2012 which has since cancelled Appendix 2A. He ended by urging the Court to order the *status quo* to be maintained on the Salary and Allowances as per the previous CBA.

In reply to Mr. Okeche's submissions, Mr. Mwabili for the Claimant argued that this claim was in court before the circular dated 25-5-2011. He also cited this court's wide discretion under Section 12 of the Labour Institutions Act in dealing with Labour disputes.

He insisted that his claim was based on the wage guidelines in Appendix 15B dated 23-11-2005. That the demand for wage increase at the rate of 45% for the 1st and 2nd year was well within the said wage guidelines and therefore lawful. That the Respondent was funded by the State and it will always get money so long as the CBA is in place. He blamed the lack of funds to the delay in signing the CBA by the Respondent.

On the issue of Commuter Allowance, he insisted that it should be reviewed to Kshs.5,000/- per month across the board and backdated to the effective date which is 1-7-2009 upto 30-6-2011. Similarly, he urged the Court to award the Leave Allowance which was an annual pay. He insisted that this allowance should cover the employee's family members.

He ended by urging the Court to award the Claimant all the prayers for review of salary and allowances to be effected retrogressively to 1-7-2009.

The Court has read in detail both the Amended Memorandum of Claim and Response filed by the parties to the dispute and also the EPD Report dated 18-4-2012 from the Ministry of Labour. I have also considered the submissions made at the close of the hearing by the Claimant and the Respondent. I am satisfied that I have jurisdiction under the Industrial Court Act and Article 162(2)(a) of the Constitution of Kenya. In addition, the parties have voluntarily consented to have the disputed clauses of their CBA covering 2009 – 2011 determined by this Court.

Several questions arise from the dispute before this Court:-

- (a) whether the claimant's demand for increment of salary and allowances is deserving?
- (b) If the answer to (a) above is yes, what rate should be applied?
- (c) Whether there are compelling reasons to withhold any increment for salary and allowances until a further date?

The first question is answered by various considerations. Firstly, Mr.

Okeche for the Respondent has admitted in his submissions that the Claimant's members deserve an increment of salary and allowances. Secondly, the EPD's Report on page 5, 6, 10, 11 and 12 has indicated that

the cost of living, housing and transport has increased during the period under review. This necessitates an increase in salary and allowances. I will deal with this report later in this award.

Thirdly, the Municipal and International Law applicable in Kenya supports the view that an employee has a right to just and favourable remuneration, ensuring for himself and his family and existence worthy of human dignity.

On a balance of probability and upon the foregoing consideration, I am convinced that the Claimant's demand for increment of salary and allowances is warranted.

The second question for determination is in regard to the rate to be applied in awarding the demanded increment of salary and Allowances. I will deal with this issue on item by item basis.

(a) Salary

The Claimant has proposed an increment at the rate of 45% for the first year and 45% for the second year under the period under review. In so doing the Claimant has based her demand on three concepts, namely Consumer Price Index (CPI), wage differential and the productivity concept. CPI indicates the change in cost of living in order to assess compensation to employees. Wage differential concept deals with the gap between the Management and the Unionisable employees which should not exceed 50% as per the Wage Guidelines. This is calculated by considering the 3 categories of the lowest paid Management Employees and 3 categories of the Highest paid Unionisable employees.

Productivity concept deals with the sharing equally of the outcome of the productivity achieved by the employees whether in Management or file and rank employees. Hence, the Management gets half and the Unionisable employees gets half, which is awarded in salary negotiations package in percentage form.

The EPD Report on the other hand, has referred to the same three (3) major factors to be considered in compensating employees by way of salary increment, namely; the rise in the Cost of Living, the Improved Labour Productivity and Wage Differential.

On the first factor, the report explains that objective is to restore the purchasing power of basic consumer goods and services which has been eroded by inflation over the life-span of an out-going CBA. The CBA in dispute is for the period 1st July 2009 – 30th June 2011, hence compensation for the rise in the cost of living covers the period of the out-going CBA for the 1st July 2007 – 30th June, 2009. To calculate the rate of compensation, the EPD Report has used the CPI concept in Table 2 on page 5 of the Report. The Kenyan CPI changed from 103.83 in July, 2007 to 139.77 in June, 2009 posting an increase of 34.6% (calculate:

$\frac{139.77 - 103.83}{103.83} \times 100 = 34.6$). This translates to 17.3% for each year

103.83

during the two year period of the CBA for the Lower Income Group.

On the second factor of improved Labour productivity, further compensation would arise from quantum Labour productivity of workers in the employer's organization since workers are entitled to a share of wealth improvements they have helped the employer create during the period of compensation.

The question in my mind is what happens in a case like the present one where the employer is not a profit making enterprise. The EPD Report has explained that the Respondent depends on exchequer

grants for personal emoluments while the fees they charge patients are used in purchasing medicines.

The EPD Report has nevertheless confirmed that there has been improved productivity from their employees during the period under review. The question in my mind is what was the quantum of that improvement? Could it be assessed in percentage form? Why didn't the EPD report merely state there was improved productivity without any details? Was it impossible to get any data to demonstrate the allegations?

The Court takes great exception to the foregoing omission. I will not ignore the uncontraverted averments by the Claimant that during a workshop, referred to in Appendix 10 in the Claimant's Amended Memorandum of Claim held on 2nd – 3rd September, 2009 the Respondent announced a 48% improvement in general productivity. This fact was never challenged in evidence and is corroborated by the EPD Report. The EPD report at page 6 cites to Guideline No.2 which states that productivity forms a major factor for any additional wage compensation consideration. According to the Claimant, they are entitled to share half of the improved productivity which is 24%.

On the third compensation factor, the EPD Report is in agreement with the Claimant on the 50% wage differential gap. The Report, however has failed to provide any data from the Respondent on wage gap between the Management and the Unionisable employees. It means therefore that the only information available is the one by the Claimant in his Appendix 7 of the claim which works to 73% wage gap between the Management and the unionisable employees. This figure translates to 23% compensation above the 50% differential allowed under Wage Guideline No.1.

This Court is persuaded on a balance of probability by the Claimant's claim. I will nevertheless not award the 45% annual increment as pleaded and submitted by the Claimant, but I will re-assess the percentage. In assessing the rate of increment to award, I will take judicial notice of the socio-political and economic factors for the period between July 2007 – June 2009, on the one hand and July 2009 – June 2011. During the first span, Kenya experienced drastic socio-political changes which led to economic instability and inflation. These may not be blamed on either the Respondent or Claimant's members.

I have also considered the submission by Mr. Okeche for the Respondent and the opinion by the EPD Report dated 18-4-2012. I have also considered the Circular from the Office of the President dated 25-5-2011 and 4-7-2012. The EPD Report proposes annual salary increment at the rate of 17.3% each year to sum up to 34.6% for the period under review on the basis of CPI. In my view an additional 5.7% to take care of productivity factor to the EPD proposal per year to a maximum of 23% per year is reasonable. The total salary review for the two year period i.e. 1st July 2009 to 30th June 2011 is hereby assessed at 46%.

(b) Housing Allowance.

In deciding on this issue, I have considered the EPD Report and the submissions by both parties to this case. In view of my foregoing decision on the issue of salary, I will not go to the details of submissions. The Claimants proposed rates are aimed at enabling her members afford decent houses befitting human dignity which they cannot afford without utilizing part of their salary. The alternative to the foregoing is live in slums. The EPD Report has confirmed that one bed-roomed house is Kshs.10,000/- per month in the middle class estates around the Respondent where the employees live. The EPD Report, however assessed increment for Housing Allowance at 17.3% for the two years which is a half of the salary increment proposal. This is in line with the Wages Guideline No.2(1) which translates to Kshs.744/- compensation to the lowest Job Group who currently get Kshs.4,300/-. This proposal puts the minimum house allowance to Kshs.5,044/-

I will be guided by the above formula to award an increment of a half of the increment I have awarded on salary of 46% for the two years. This translates to 23% increment for the two years i.e. 1st July 2009 – 30th June 2011 to put the lowest house allowance to Kshs.4,300/- + 989 which sum up to Kshs.5,289/-

(c) Leave Travelling Allowance

The Claimant is asking for one month's basic salary subject to a maximum of Kshs.60,000/- to cater for the employees and their families. The Respondent vehemently objected to this demand arguing that the claim has been overtaken by events and should not be backdated. The Respondent also argues that the law contemplates the transport for the employee alone and not his family. The EPD Report has confirmed that Kshs.3,000/- to Kshs.4,000/- per person is the average fare per person outside the peak times like Easter or Christmas times. This figure however excludes subsistence and fare from the major town to the final destinations upcountry.

I agree with the Respondent that Leave Travelling Allowance contemplates the employee alone. The Claimant has not provided any evidence to the contrary.

I, however do not agree with the Respondent on the argument that there be zero increment. I will therefore, award Kshs.2,000/-, Kshs.1,500 and Kshs.1,000/- increment to Job Group K.17-11; K.10 & K.9; and K.8 respectively. This will translate to Kshs.6,000/-; Kshs.7,500/- and Kshs.8,200/- to Job Group K.17-11; K.10 & 9 and K.8 respectively. This increment will mitigate the traveling cost and subsistence to the final destination upcountry once per year. Without such award, it will mean that the employee will use his/her salary to meet the fare for the final destination after reaching major towns.

(d) Commuter Allowance

The Claimant is demanding for a commuter allowance of Kshs.5,000/- across board per month. This is to enable them attend work and return home with ease and on time.

The Respondent has vehemently opposed this demand alleging that the same is overtaken by events since the money has already been spent and should not be backdated. The Respondent argues that the claim should not be included in the CBA because the Government has already dealt with the issue by granting a figure of between Kshs.3,000/- and 8,000/- for the Civil Servants which cover the Claimant's members and that the said scheme is already in force.

The question which comes to my mind is whether the Respondent lacks the juristic personality to incur obligation *vis a vis* her employees? Why would it not negotiate her obligations directly as a Body Corporate? I believe this can be dealt with in subsequent CBAs. The other question bothering me is if the scheme of between Kshs.3,000/- and 8,000/- is already in place, what effect does granting the demanded amount of Kshs.5,000/- across board have on the workers who already are entitled to more than Kshs.5,000/-? Will this not mean taking a right which has already been granted? The obvious answer to this would be in the affirmative. This court will not take away the right of getting more than Kshs.5,000/- from those who already have it.

I will not interfere with the Government Scheme of Kshs.3000 – 8,000/- per month which is in force. This does not however bar the parties from negotiating for a different scheme during the next CBAs subject to any other relevant legal guidelines.

The upshot of this foregoing findings is that the Claimant will have and is **awarded**:-

- (a) Salary Increment of 46% for the period of 1st July 2009 – 30th June, 2011 CBA.**
- (b) House Allowance increment of 23% for the same period in (a) above.**
- (c) Leave Traveling Allowance of Kshs.2,000, 1,500, and 1,000/- to Job Groups, K.17-11; K.10-9 and K.8 respectively.**
- (d) Commuter Allowance will remain as per the government scheme of between Kshs.3,000 – 8,000 per month until the next CBA after the one under review i.e. July 2009 – June, 2011.**

The last question to be answered is whether there are any compelling reasons for suspending the above award?

The Respondent has put up a spirited fight to urge the court not to effect any demanded increment to salary and allowances. Two grounds were relied upon.

Firstly, the Respondent's financial position was so weak during the CBA period under review that the respondent operated on a deficit running to Kshs.282 million.

Secondly, the Respondent cannot increase salaries and allowances because the same must first be given a budgetary approval from the exchequer who provides the grant for wage bill. That the Government has frozen all negotiations on salary reviews until guidelines are provided by the Salaries and Remuneration Commission created under the Kenya Constitution 2010. I have also been referred to the Circular from the Office of the President dated 2-7-2012. The EPD Report has echoed the above sentiments by the Respondent but fell short of advising the Court not to exercise the jurisdiction to make an award of increment.

According to the Claimant, the Respondent's employees are suffering due to hard economic times; that they have been forced to dig deeper into their pockets to afford basic needs like food, education, housing and transport.

I have considered the arguments by the parties and also the EPD Report. A few questions arise in my mind. Will the Respondent collapse due to the indented increments to the Wage bill? Who is responsible for pursuing a budget approval and what efforts have been done? Will justice be served by withholding increments. To answer the first question, I have considered the EPD Report table 4 and 5. The current wage bill for the Claimant's members is Kshs.1,255,425,800/- and if 45% increment is granted as demanded there will be an increase of Kshs.609,941,610/-. The Respondent has offered zero increment while the EPD recommends 17.3% per year which if granted works to additional bill of Kshs.211,028,663/-.

If my award of 23% annual increase is effected, the wage bill will reasonably be below the average between the figure demanded by the Claimant and the EPD proposal. I find the zero offer by the Respondent unreasonable and against the spirit of the Labour Relations Charter. I also find it unreasonable and insensitive to the plight of the employees who according to the EPD Report Clause F are over-worked due to high ration between staff and patients. An employee who is described as "overworked" shall not fail to catch the ear of this court especially where the employer is turning a deaf ear on the employee.

I now turn to the issue of who is responsible for budget proposals and who should pursue the exchequer on the same on behalf of the employers. The Claimant has asked me to consider the fact that the Respondent is a Body Corporate with the capacity to acquire rights and incur obligations. The EPD and the Respondent did not say anything much to dispute this fact. I have referred to the Legal Notice No.109 published in the Kenya Gazette No.23 of 10-4-1987 which established the Respondent as a State Corporation with the status of a Body Corporate. Section 4 of the Legal Notice confers that the full mandate to the Respondent to administer its affairs and to acquire Rights and incur obligations independent from the state.

In this regard, I find the position taken by the Respondent not to negotiate terms of employment on salaries and allowances not good enough in law. In my view, the exchequer is only facilitative due to the nature of the services rendered by the Respondent which is not profit making. This does not take away the independence of personality in the Respondent. The buck must stop with the Respondent.

The Respondent is the one responsible for preparing its own budget and also seeking the approval of the exchequer or the donors that be. Nothing was adduced to show that such budget proposal has been made with the Claimant's demands in mind and rejected. I have not been shown that the exchequer has been put on notice of the stalled negotiations and that some efforts have been taken to persuade the

Government to solve the deadlock. I blame the Respondent for taking the proceedings herein for granted.

I have perused the Circular from the Office of the President dated 25-5-2011 and 2-7-2012. Nothing in these circulars have taken away the rights of the employees to agitate for better recommendation. In any case the rights were acquired before the said circulars and they cannot be taken away. The issue here is compensation for specific period which has already lapsed. The grievants' salary was last reviewed in 2007. They should not suffer due to law passed after their right to review salary has long accrued. They should also not suffer due to the indolence of the employer to seek budget approvals.

In my considered view, the Respondent should have discussed the matter with the Claimant on the understanding that the decision reached would be subject to approval by the Government. That would have shown some good progress and good faith.

Considering all the matters above, and the submissions by the parties and the EPD Report, I do not see any compelling reasons to stay the awarded salary review. I do not foresee the death of the goose that lays the eggs. Instead, I foresee further delay in conclusion of the next CBA as directed under the Office of the President Circular dated 2-7-2012 if this matter remains in abeyance. I also foresee industrial unrest and disruptions of essential services in the Respondent's hospital.

I, therefore, direct the parties to conclude the signing of the Collective Bargaining Agreement for the period 1st July, 2009 – 30th June, 2011 within forty five (45) days of this judgment incorporating the salary and allowances awarded above.

Ordered accordingly.

DATED and DELIVERED at Nairobi this 17th day of September, 2012.

Onesmus N. Makau
JUDGE