



REPUBLIC OF KENYA.

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI.

(Coram: Charles P. Chemmutut, J.,

J.M. Kilonzo & O.A. Wafula, Members.)

CAUSE NO. 83 OF 2006.

COMMUNICATION WORKERS UNION OF KENYA.....Claimants.

v.

TELCOM KENYA LTD.....Respondents.

Issue in Dispute:-

“ Transport/Commuter Allowance.”

Benson O. Okwaro, General Secretary, for the Claimants (hereinafter called the Union).

Andrew Wandabwa, Advocate, of M/S. Langat & Wandabwa, Advocates, for the Respondents (hereinafter called the Company).

A W A R D.

The Notification of Dispute, Form ‘A’, dated 13th March 2006, together with the statutory certificate from the Labour Commissioner under Section 14(7) and (9)(e) of the Trade Disputes Act, Cap. 234, Laws of Kenya (which is hereinafter referred to as the Act), were received by the Court on 31st August, 2006. The dispute was then listed for mention on 14th September, 2006, when Mr. John A. Ondiek and Ms. Okumu Sande, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 28th September and 12th October, 2006, and the dispute was fixed for hearing on 21st November, 2006. Mr. Okwaro submitted his memorandum, on behalf of the Union, on 27th September, 2006, and the learned counsel for the Company, Mr. Wandabwa, belatedly filed his reply statement thereto on 17th November, 2006. On 21st November, 2006, Mr. Okwaro applied for adjournment of the case to give him an opportunity to peruse the reply statement by the learned counsel for the Company. Mr. Wandabwa did not object to the application for adjournment, and the dispute was, therefore, rescheduled for hearing, and it was indeed heard, on 13th March, 2007.

The Union was registered as such under Section 11 of the Trade Unions Act, Cap. 233, Laws of Kenya, to represent unionisable employees in the communication sector; while the Company is a limited liability concern, incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya, and it engages in telecommunication and other related services.

In his introductory submission, Mr. Okwaro stated that the issue in dispute was referred to the Central Joint Council (CJC) for deliberation on 9th April, 2002, under item No. 17, re: “Car Allowance”, but a disagreement was recorded because the

Company did not tender an offer against the proposal by the Union of Kshs. 8,700/= per person per month (see App. I). Consequently, the employees resorted to a wild-cat strike and street demonstrations. The Ministry of Labour intervened and during their meetings held on 11th and 23rd August, 2004, the parties agreed on all the terms except on “Car Allowance”. Mr. Okwaro alleged that it was during this occasion that the parties agreed to change the issue from “Car Allowance” to “Transport/Commuter Allowance” (see App. 2 and 3). On 21st February, 2005, the Union reported a formal trade dispute on transport/commuter allowance to the Minister for Labour in accordance with Section 4 of the Act (see App. 4). The Minister accepted the dispute and appointed Mr. J.N. Ndiho of Ministry of Labour and Human Resource Development Headquarter to act as the Conciliator, but during their meeting held on 23rd January, 2006, the parties disagreed on the issue in dispute, namely, “Transport Commuter Allowance” (see App. 5).

Mr. Okwaro submitted that the unionisable employees in scales 11 to 8 are entitled and deserve this allowance, i.e. “Transport/Commuter Allowance”, to enable them meet the escalating cost of transport while traveling to and from duty during working days. He pointed out that the Company engages a total workforce of 7,400 employees, 6,000 of whom are unionisable. But only 1,500 of the unionisable employees receive car allowance of Kshs.2,000/= per person per month, while the management staff in scales 7-2 are entitled to unlimited car allowance, whether they own cars or not, i.e. across the board (see Apps. 6 and 7).

Mr. Okwaro contended that the current practice whereby a small number of unionisable employees who own cars are entitled to car allowance of Kshs. 2,000/= per person per month amounts to discrimination and unfair labour practice. He pointed out that the Company has the ability to pay because the workforce has dropped drastically as a result of the recent retrenchment which has enabled the Company to save about Kshs. 1 billion in revenue. In support of his case, Mr. Okwaro cited other concerns, e.g National Social Security Fund (NSSF), Kenya Airways and Nakumatt Supermarket, which pay this amenity to their unionisable employees.

In the circumstances, Mr. Okwaro prayed that, irrespective of the distance and although the initial demand by the Union was for Kshs.8,700/=, all the unionisable employees be paid a reasonable amount across the board of between Kshs. 2,000/= and Kshs.8,000/= per person per month, in respect of transport or commuter allowance.

The learned counsel, Mr. Wandabwa, strenuously opposed the demand mainly on the ground that during the parties negotiations, the Company did not agree to substitute “Car Allowance” of Kshs. 2,000/= per person per month, which is currently payable to the unionisable employees who own cars, with “Transport/Commuter Allowance” of Kshs. 8,700/= as initially demanded by the Union. He contended that the alleged allowance, i.e. “Transport/Commuter Allowance”, was not an issue in dispute in the parties’ collective agreement, but only a proposal for discussion, which has since ended in disagreement. Mr. Wandabwa pointed out that the demand by the Union was mischievous, unreasonable and economically unattainable in view of the fact that the Company was forced to lay off its employees due to financial constraints. In any case, he said, the element of transport allowance has already been factored in the employees’ salaries. Furthermore, the Company has always considered the welfare and interests of its employees by providing flexible car loan scheme whereby the employees are encouraged to take loans for the purchase of cars to enable them eligible for “car allowance” (see Ann. TKI).

In the light of the foregoing, the learned counsel, Mr. Wandabwa, urged the Court to find that the Company has at all times acted in good faith to ensure that the interests of its employees are paramount. He, therefore, prayed that the demand be dismissed or rejected for lack of merit.

The proposal by the Union to substitute “Car Allowance”, which is currently obtaining in the parties’ collective agreement, with “Transport/Commuter Allowance” is not in dispute. The Union consider the current practice of giving “car allowance” of Kshs. 2,000/= to only 1,500 unionisable employees, who own cars, out of 6,000 unionisable employees, as discriminatory and unfair labour practice, and therefore, demand that all the unionisable employees be paid a reasonable amount across the board of between Kshs. 2,000/= and Kshs. 8,700/= per person per month, irrespective of whether they own cars or not. On the other hand, the Company has urged the Court to reject the demand because it was unable to afford it due to financial constraints. There are no absolute rights in this matter, and it is ordinarily the employees’ duty to come to the place of their work and there is no obligation on the Company to provide them with transport. It is, however, common knowledge in this age of escalating transport costs that employees in general have to meet fairly heavy transport charges out of their modest wages to reach the pick-up points or their place of work. That is why some establishments include in their collective agreements a provision for transport or commuter allowance – e.g. under Clause 7.3 of their current collective agreement, the National Social Security Fund (NSSF) and the Kenya Union of Commercial, Food and Allied Workers provide that “every employee shall be paid a transport or commuter allowance of Kshs. 4,200.00 per month.” We, therefore, think it is only fair that part of the transport expenses paid by the unionisable employees should be contributed by the Company.

In the circumstances, and after very careful consideration of the parties’ submissions on this matter, we AWARD and ORDER that every unionisable employee, irrespective of whether he or she owns a car or not, be paid transport or commuter allowance of Kshs. 4,000/= per month, with effect from 31st October, 2007.

DATED and delivered at Nairobi this 18th day of September, 2007.

Charles P. Chemmutut, MBS.,

JUDGE.

J.M. Kilonzo,

MEMBER.

O.A. Wafula,

MEMBER.