



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA.

(Coram: Charles P. Chemmutut, J.,

A.K. Kerich & H.B.N. Gicheru, Members.)

CAUSE NO.30 OF 2001.

KENYA SHIPPING, CLEARING & WAREHOUSES WORKERS UNION.....Claimants.

VERSUS

JIHAN FREIGHTERS LTD.....Respondents.

Issue in Dispute:

“Recognition Agreement.”

James Tongi, Assistant General Secretary, for the Claimants (hereinafter called the Union).

Jacob M. Munyalo, Accountant, for the Respondents (hereinafter called the Company).

INTERIM A W A R D.

The Minister for Labour referred this dispute to the Court for consideration and determination on 16th March 2001 in exercise of the powers vested on him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (hereinafter referred to as the Act). The reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14(9) (e) and (f) of the Act, were received by the Court on 22nd March 2001. The dispute was listed for mention on 2nd May 2001, and the parties were notified to attend. On this occasion, Mr. James Tongi appeared for the Union while Mr. Jacob M. Munyalo appeared for the Company. The parties were directed to submit or file their respective memoranda or statements on or before 23rd May, 2001 and 13th June, 2001 respectively, and the dispute was fixed for hearing on 24th July, 2001. The Union submitted its memorandum on 13th June, 2001 and the Company filed its reply statement on 2nd July, 2001, and the dispute was rescheduled for hearing on 23rd October, 2001.

In its memorandum, the Union stated that it began active recruitment of the Company's unionisable employees in September 1999, and that it recruited 70 members out of the Company's 80 unionisable employees, which constituted 80% simple majority, and in November, 1999 it approached the Company for a recognition agreement. But despite having attained more than a simple majority, the Company declined to meet the Union, thus forcing the Union to report the existence of a trade dispute to the Minister for Labour on 29th March 2000. The Minister accepted the dispute and appointed Mr. S.M. Mbae of Ministry of Labour Headquarters to act as the Investigator; and in his report, which was released to the parties on 12th October 2000, the Minister found that the Company had twenty one (21) permanent employees, that the Union was the right one to represent the interests of the unionisable employees of the Company in accordance with the provisions of its registered Constitution and that there was no any other rival union claiming representation or recognition. The Minister found further that the parties had actually met at their own level but the management of the Company categorically refused to sign the recognition agreement although the Union had managed to recruit well over 51% simple majority in that out of the 17 unionisable employees it had recruited 11 of them. The Company was also found to have been arrogant and anti-union, contrary to the labour laws of the land and ILO Conventions. In the circumstances, the Minister recommended that the Company accord formal recognition to the Union.

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of this dispute. The Union accepted the recommendation, but the Company rejected it on the ground that it had no information about who, among its unionisable employees, had been recruited by the Union as its members.

In reply, the Company stated that on 28th April 2000, it received a letter from the Union requesting that the parties should have a meeting on 4th May 2000 for the purpose of discussing and signing a recognition agreement. The parties met, but when the Company demanded documentary proof to show that the Union had actually recruited its employees as members no such proof was forthcoming. There was no further communication from the Union until the Company received the Minister's letter dated 29th May 2000, appointing Mr. Mbae of Ministry of Labour Headquarters to act as the Investigator. The Minister requested both parties to submit their respective memoranda within seven (7) days from the date thereof. Both parties submitted their memoranda as requested, but the Union again failed to forward to the Company the list of the unionisable employees it had recruited as members.

By its letter, dated 2nd November 2000, the Company requested the Union to serve it with documentary proof, showing who among its unionisable employees were union members, but the Union refused to comply as evidenced by its reply of 6th November 2000. However, in order not to appear as anti-union, the Company deducted union dues from all its employees' salaries during the months of December 2000 and January 2001, but the employees strongly opposed it. In the circumstances, the Company stopped making further deductions of the union dues from the employees' salaries.

In conclusion, the Company confirmed its resolve to accord recognition to the Union as soon as the Union was able to prove that it had attained a simple majority by showing who among its unionisable employees were its members.

On careful perusal of the parties submissions, I find that the Union have a strong case for recognition by the Company; but, on demand and contrary to the provisions of Section 46(1) of the Act, it refused to serve the check-off forms upon the Company for fear of victimisation of the unionisable employees who became Union members. In the circumstances, the Court deems it fit or proper to find out the exact and true wishes of the unionisable employees regarding their Union membership and whether or not the Union has *bona fide* members among them; and the best way to do this is by giving the unionisable employees an opportunity to express their wishes through a secret ballot.

Accordingly, the Court directs Mr. J.N. Macharia of the Economic Planning Division (EPD) to undertake this exercise and find out through a secret ballot and with reasonable access to the unionisable employees, in the presence of both parties' representatives, whether or not the unionisable employees wish to belong to the Union. The exercise should be completed within one month from the date of this interim award, and the Court will make its final decision immediately on receipt of the results of the secret ballot.

Both members of the Court agree.

DATED and delivered at Nairobi this 23rd day of May, 2003.

Charles P. Chemmutut,

JUDGE.