



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers
v BOM–Lugulu Girls High School (Employment and Labour Relations Cause
8 of 2023) [2023] KEELRC 3153 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 8 OF 2023**

**JW KELL, J
NOVEMBER 29, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT**

AND

BOM–LUGULU GIRLS HIGH SCHOOL RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals and workers in the hotel industry.
2. The Claimant on the 6th June 2023 filed the Statement of Claim dated 9th May 2023 supported by the Verifying affidavit sworn on even date by the Claimant’s Branch Secretary Kakamega, Thomas Mboya.
3. The suit had been triggered by the failure of the Respondent to sign the recognition agreement and following the issuance by Certificate of unresolved dispute by the Conciliator. Vide the Statement of Claim, the Claimant sought for the following reliefs:
 - a. That the Honourable Court orders the Respondent to stop unfair labour practices.
 - b. That the Honourable Court compels the Respondent to sign the forwarded recognition agreement to allow for the negotiation of a Collective Bargaining agreement.
 - c. That the costs of this Application be awarded to the Claimant.
 - d. Any other relief the Court deems fit.



4. Also filed together with the Statement of Claim was the Claimant's list of witnesses dated 9th May 2023, a list of Documents of even date, and its bundle of documents.
5. The Respondent entered appearance through the law firm of Makokha Wattanga & Luyali Associates Advocates on 3rd July 2023 and filed a Memorandum of defence to the Claim dated 21st July 2023 and received in Court on the 24th July 2023 together with Respondent's list of witnesses of even date and witness statement of Nathan Wanjala Sipenji of even date.

Written submissions

6. The Court on 26th July 2023 directed that the claim be canvassed by way of written submissions. The Claimant's written submissions dated 10th September 2023 were filed by Justin Waningu Kamuye, a representative of the Claimant on 11th September 2023. The Respondent's submissions dated 27th October 2023 were filed by Makokha Wattanga & Luyali Associates Advocates.

Determination

Issues for determination

7. The Claimant addressed the following issues in its written submissions:-
 - a. Whether the Court should order the Respondent to stop unfair labour practices against the Claimant's members on account of union membership.
 - b. Whether the Respondent should sign the recognition agreement.
 - c. Cost
 - d. Any other relief.
8. The Respondent in its submissions addressed the following issues:-
 - a. Whether the Claimant is entitled to reliefs sought in the claim
 - b. Costs.
9. The Court having perused the claim and the defence and seen the issues identified by the parties was of the considered opinion that the issues placed by the parties for determination of the dispute were as follows:-
 - a. . Whether there was evidence of unfair labour practices meted on the Claimant's members.
 - b. Whether the Claimant met criteria for recognition agreement.
 - b. Whether the Claimant was entitled to reliefs sought.

A. Whether there was evidence of unfair labour practices meted on the Claimant's members

10. The Claimant in its paragraph 17 of the claim alleged that the Respondent the failure of the conciliation resorted to intimidation and harassment of its members warning them to quit the union or face the sack. That some of its members were currently on indefinite suspension whereas other case have not been resolved by the uncooperative Respondent .
11. In defence the Respondent denied this claim of unfair labour practice.



12. The Claimant submitted on the freedom from torture and cruel inhuman treatment or punishment, equality before the law and equal protection and benefit of the law , equality under Article 27, Article 29 right to freedom and security of persons, Article 36 on freedom of association and Article 41 on right to fair labour practice all of the Constitution of Kenya, 2010.
13. The defence in written submissions reiterated its defence to deny the claim of unfair labour practice as pleaded.

Decision on issue a.

14. It is trite law that he who alleges must prove. The Claimant did not attach evidence of the harassment in the claim. The Court noted the attached evidence in the submissions of the Claimant which it holds was irregular as submissions are not pleadings. Such allegations by members would have required to be rebutted by the defence by way of pleadings. In the conciliation report it was stated that a check off system was in place where the management deducts and remits union dues to the union wide cheques.
15. On a balance of probabilities, I found no prove of the claim of unfair labour practice meted out on the Claimant's members by the Respondent.

B. Whether the Claimant met criteria for recognition agreement

16. The Claimant in the claim paragraphs 4-6 pleaded that on various dates between 8th September 2021 to 1st march 2022 it recruited 47 employees of the Respondent s who willingly joined the union. That a check off form was filled by the members to that effect. The recruited workers translated to 76% of the total non- teaching staff of the Respondent (c-Exhibit APP2) That this surpassed the minimum threshold pursuant to section 54 of the Labour Relations Act. That the Claimant forwarded the authority to deduct and remit union dues to the Respondent (c-Exhibit APP3) who implemented remittance(App4).
17. The Claimant pleaded on the pursuit of recognition by the Respondent upto issuance of certificate of unresolved dispute by the conciliator.
18. The Respondent in its defence did not deny the claim by the Claimant having met the threshold for recognition. In the witness statement of Nathan Wanjala Sipenji in paragraph 7 it was stated:- "The school management believes in freedom of association and has no problem for its staff to join the union and will only facilitate the remittance of their dues and does not in any way intend to enter into a recognition agreement."
19. In its written submission the Claimant submits that it recruited 47 out of the 60 non- teaching staff who voluntary signed check off form and this membership was not denied by the Respondent . That they complied with the threshold for recognition as stated in section 54 of the Labour Relations Act to wit:- "54. Recognition of trade union by employer (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."
20. The Claimant submits that Kenya is a member of the International Labour Organisation (ILO) which has conventions no. 87 and no. 98 on protection of the right to organise and collective bargaining. The rights cannot be realised without a recognition agreement. That in 1993 the Minister of Education then through Gazette Legal notice No. 263 dated 26th august 1993 the Minister advised the individual boards of management to sign recognition agreements. That various s schools had since signed recognition agreements with the Claimant union.



21. The Respondent submits that Article 36(2) of the Constitution was to effect that a person shall not be compelled to join an association of any kind. That section 54 (1) of the Labour Relations Act contradicts provisions of Article 36 of the Constitution by providing for the employer to recognise the union. That the Respondent should not be compelled to join an association with the Claimant. That there was no evidence that other schools had signed a recognition agreement with the Claimant. That there was no evidence of legal notice for the school board of management to enter into recognition agreement with the Claimant union and if the same was provided it was unconstitutional and contrary to provisions of Article 36 (2) of the Constitution.

Decision on issue b

22. The facts are not in dispute. The Respondent was the employer of the members so the Claimant union. The Claimant had recruited 47 out the 60 non- teaching staff of the Respondent, that the said employees had signed check off and deduction forms sent to the Respondent which had deducted and made remittance. It was further not in dispute that the Claimant had sought for recognition thereafter and the Respondent had refused the same. Indeed, the witness statement was categorical that the school was not willing to enter into a recognition agreement with the Claimant union despite the membership of its employees.
23. Section 54 of the Labour Relations Act provides for recognition agreement as follows: “54. Recognition of trade union by employer (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.” It was undisputed fact that the Claimant had recruited 47 out of 60 then of the non- teaching staff of the Respondent and remittance of dues done pursuant to the check off forms and deduction authority (app2,app3, app4 by Claimant were the check off forms, deduction authority and sample cheque drawn by the Respondent of remittance of dues to union).
24. It is settled law that simple majority under section 54 of the Labour Relations Act means 50%+1. The Court holds that the Claimant met the threshold to be recognised by the Respondent and that is the only requirement for the recognition by an employer.
25. The Court holds that Section 54 of the Labour Relations Act does not in any way violate to right to association of the Respondent as stated under Article 36 of the Constitution to wit:- “1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind”; The Court holds that recognition is meant to facilitate the enjoyment of right to collective bargaining of terms and conditions of employment by union members as envisaged under Article 41 (5)of the Constitution which reads: “ 5) Every trade union, employers’ organization and employer has the right to engage in collective bargaining.”
26. The Court agreed with the Claimant that Kenya is a member of the International Labour Organisation (ILO) which has conventions no. 87 and no. 98 on protection of the right to organise and collective bargaining. The right to collective bargaining cannot be realised without a recognition agreement.
27. The Court recognizes the right of the employees to join union and to enjoy the benefits on unionization offered by the union which include representation at shop floor and collective bargaining. The right is anchored in international law, the Constitution and statutes. See Article 8 International Covenant on Economic, Social and Cultural Rights:- “1. The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order



or for the protection of the rights and freedoms of others;” ; The International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining: Convention 98 (1949); Article 41 of the Constitution to wit: ”1) Every person has the right to fair labour practices. (2) Every worker has the right— (a) to fair remuneration; (b) to reasonable working conditions; (c) to form, join or participate in the activities and programmes of a trade union; and (d) to go on strike. (3) Every employer has the right— (a) to form and join an employers organisation; and (b) to participate in the activities and programmes of an employers organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.” The Labour Relations Act section 4 to wit:-“ 4. Employee’s right to freedom of association (1) Every employee has the right to— (a) participate in forming a trade union or federation of trade unions; (b) join a trade union; or and section 5. “Protection of employees (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.”

28. The Court has obligation to enforce the foregoing rights in its interpretation of the law.
29. The Court in answer to claim that there is no legal notice requiring the recognition notes that legal notice No. 263 dated 26th August 1993 by the Minister of education then provided the education board of governors may enter into agreement of recognition with any trade union competent to negotiate terms and conditions of service for and on behalf of any section of the employees of the board and the Board shall sign such agreement on its own behalf. The Gazette notice is a public document which the Court may cite suo moto.
30. The Court finds that Claimant union has history of having had previously negotiated Collective Bargaining Agreement with the Ministry of Education for non teaching staff with the last one signed on 18th March 1986 which position was changed vide legal notice No. 263 dated 26th August 1993. The Court had opportunity to address the issue of the said CBA and the validity of the subsequent legal notice no, 263 in Industrial Court of Kenya Cause No. 26 of 2009 Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers v Ministry of Education delivered in 26th May 2010(un reported). The Court considered the purposes of Legal Notice No. 263(supra) and stated that among others the legal notice was to shift the task of negotiating terms and conditions of service of non-teaching staff of public schools to the Boards of Governors by allowing them to deal with the Claimant (KUDHEIHA) directly. The Court noted that the Claimant was mandated vide the legal notice to seek recognition agreement directly with the schools and negotiate individual collective bargaining agreements thus extinguishing the then Collective Bargaining Agreement lastly signed on 18th March 1986 by the Ministry of Education with the Claimant which was binding on all public schools. In the said decision the Court recognised that he Claimant had since signed recognition agreements with various schools.
31. The decision in Industrial Court of Kenya Cause No. 26 of 2009(supra) addressed the issues raised by the Respondent as to whether there was a Legal Notice authorising the Claimant to enter into recognition agreement with the public schools. In the opinion if the Court the Legal Notice No. 263 of 1993 is valid and consistent with the provisions of Articles 36 and 41 of the Constitution as it enforces the right of the union and employer to enter into collective bargaining agreement which rights have been recognised by the International Labour Organization Convention 87 (1948), Right to Organize and Collective Bargaining: Convention 98 (1949) and Article 8 of the International Covenant on Economic, Social and Cultural Rights all ratified by Kenya (supra).
32. The Court holds that Section 54 of the Labour Relations Act is the only threshold the Claimant was to meet to get a recognised by the Respondent . The Court found there was no dispute of the



Claimant having recruited 47 out of the then 60 non- teaching staff of the Respondent which above the simple majority recruitment threshold. The Court holds that the Respondent should sign the proposed recognition agreement.

C. Whether the Claimant is entitled to reliefs sought

33. The Claimant sought the following reliefs:-

- a. That the Honourable Court orders the Respondent to stop unfair labour practices. The Court held there was no prove of this claim and same is disallowed.
- b. That the Honourable Court compels the Respondent to sign the forwarded recognition agreement to allow for the negotiation of a Collective Bargaining agreement. The Court found the Claimant met the threshold of the section 54 of the Labour Relations Act by recruiting more than 50%+1 of the non- teaching staff of the Respondent and the Respondent deducted and remitted their dues. There was no valid reason for failure by the Respondent to sign the recognition agreement with the Claimant having met the statutory requirements. Once the union has met the threshold it is mandatory for the employer to recognize the union. The Court orders the Respondent to sign the recognition agreement with the Claimant within 30 days.
- c. That the costs of this application be awarded to the Claimant. The Court considered the relationship between the parties and ordered each party to bear own costs.
- d. Any other relief the Court deems fit- None was available.

Conclusion

34. The Court holds that the Claimant met the statutory threshold of the section 54 of the Labour Relations Act by recruiting simple majority (more than 50%+1) of the non- teaching staff of the Respondent and the Respondent deducted and remitted their dues. There was no valid reason for the failure to sign the proposed recognition agreement the Claimant having met the statutory requirements. Section is worded in mandatory terms thus:- "54. Recognition of trade union by employer (1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees." The Respondent has no choice but to comply with the law.

35. The Court orders the Respondent to sign the recognition agreement with the Claimant within 30 days.

36. Each party to bear own costs.

37. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 29TH NOVEMBER 2023.

JEMIMAH KELI

JUDGE

In the presence of:-

For Claimant : Kamuye

For Respondent :- Makokha Wattanga & Luyali Associates Advocates

