



Kenya National Union of Nurses v St. Mary's Hospital Mumias (Cause 16 of 2021) [2022] KEELRC 3787 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 3787 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 16 OF 2021**

**JW KELI, J
JULY 21, 2022**

BETWEEN
KENYA NATIONAL UNION OF NURSES CLAIMANT
AND
ST. MARY'S HOSPITAL MUMIAS RESPONDENT

JUDGMENT

1. The Claimant, a registered union within the Republic of Kenya filed a statement of claim against Respondent dated 22nd September 2020 seeking the following orders:-
 - a. An order directing the Respondent to pay to the Claimant from it's own funds the total sum of Kshs.621,000/- through A/C No. 011203095155200 being unremitted union dues for the last 27 months plus any other amount accruing upto the date of judgment herein,
 - b. An order directing the Respondent to pay to C.O.T.U (K) the total sum of Kshs.186,000/- through A/C No. 110898748 being unremitted C.O.T.U (K) dues at the time of filing this claim plus any other amount accruing up to the date of judgment herein,
 - c. An order directing the Respondent to sign a recognition agreement with the Claimant within 14 days of judgment herein
 - d. That the Respondent to pay costs of this suit.
2. In addition to the statement of claim the Claimant filed list of documents dated 22nd September 2020 and the bundle of the documents all received in Court on the 23rd September 2020.
3. The application by way of Notice of Motion dated 22nd September 2020 by the Claimant and lodged with the claim was dispensed by order of Justice Mattheews N. Nduma dated 29th September 2020.



4. The Claim is opposed. The Respondent entered appearance and appointed Makokha & Co. Advocates who filed statement of response to the claim and its list of documents and the bundle of documents all dated 16th October 2020 received in Court on the 19th October 2020.
5. The Respondent in addition filed witness statement of Fr. Columban W.O. Odhiambo received in Court on the 28th January 2021.
6. On the 9th February 2022 when the matter was scheduled for hearing the parties informed the Court they wished to canvass the claim by way of written submissions and the Court agreed and proceeded to give directions on filing of written submissions.
7. The Claimant's written submissions on the claim drawn by David Omulama are dated 13th May 2022 and received in Court on the 25th May 2022.
8. The Respondent's written submissions on the claim drawn by J.P. Makokha & Co. Advocates are dated 25th April 2022 and received in Court on the 26th April 2022.

The Claimant's case

9. The Claimant submits that being a registered trade union in the sector of nursing it has the mandate to represent nurses at both levels of government and also in private and mission hospitals.
10. That pursuant to its mandate, the Claimant submits that between April 2018 and may 2020 it recruited a total number of 46 employees working as nurses at the Respondent and that on the 29th August 2018 it submitted the Form 'S' duly signed by the members requesting the Respondent to deduct and remit union dues in accordance to Legal Notice No. 160 of 2018 which was also attached to the forwarding letter (Claimant's DOC.3). The Claimants also attached the said legal notice No. 160 of 2018(DOC. 5)
11. On the same date of 29th August 2018 the Claimant forwarded a draft recognition agreement to the Respondent requesting of a meeting to negotiate and sign the same(DOC 4)
12. That the Respondent did not respond and has declined to deduct the dues or sign the recognition agreement.
13. That the Claimant referred the dispute to the Cabinet for Labour and Social Protection under Section 62 of the *Labour Relations Act* leading to appointment of Margaret Oduori as conciliator of the dispute (at pages 45,46 and 47 of the Claimants' bundle of documents).
14. The conciliation process did not bear fruits as the Respondent did not submit itself to invitation to attend meetings and after 30 days the Claimant pursued justice in Court pursuant to the provisions of section 69(b) of the *Labour Relations Act*

The Respondent's case

15. The Respondent submits that her relationship with the employees is founded on clearly defined and binding contract. That a deduction of the dues from the employees as demanded by the Claimant unless provided for under the contracts would occasion a fundamental variation of the terms of employment as captured in the contracts. The Respondent also stated in response to the claim that some of the employees on the Claimant's membership list had left the institution by the time the Form 'S' was being presented and others left afterwards. Those who left had cleared and all their dues paid and produces their employment contracts, resignation letters and clearance forms under its list of documents.



16. In response to the conciliation, the Respondent admits to have attended the meetings but that the efforts deliberations could not have been concluded because of the contractual commitments in place that defined the relationship between the Respondent and her employees. The Respondent denies violating any law.

Determination

Issues for determination

17. The Claimant listed the following issues for determination under its written submissions:-
- a. Whether the Claimant is entitled to deduction and remittance of trade union dues by the Respondent
 - b. Whether the Claimant is entitled to payment in arrears of the deducted and undeducted union dues payable from the Respondent's own funds
 - c. Whether the Respondent ought to sign a recognition agreement
 - d. Whether the orders sought ought to be granted
18. The Respondent identified the following issues for determination under its submissions:-
- i. Whether the Claimant has satisfied the requirements of Section 54(1) of the *Labour Relations Act*, 2007 by recruiting a simple majority of the Respondent's unionisable employees to qualify for recognition.
 - ii. Whether the Claimant has met the requirements for deduction and remission of union dues
 - iii. Whether the Claimant is entitled to reliefs sought
 - iv. Who bears costs of the suit.
19. The main legal underpinning of the claim is under Section 48 of the *Labour Relations Act* and various provisions of *the Constitution* of Kenya and the ILO Convention No.87 on the Freedom of Association and Protection of the Rights to Organise on failure to deduct and remit union dues and section 54 of the *Labour Relations Act* on failure to sign recognition agreement. The Court then taking into consideration the law and issues addressed by the parties is of the considered opinion that the issues for determination in the suit are as follows:-
- a. Whether the Claimant has met the requirement of section 54 (1) of the *Labour Relations Act* for recognition by the Respondent.
 - b. Whether the Claimant has complied with the legal requirement for deduction and remittance of union dues
 - c. Whether the Claimant is entitled to reliefs sought

a. Whether the Claimant has met the requirement of Section 54 (1) of the *Labour Relations Act* for recognition by the Claimant.

20. Section 54(1) of the *Labour Relations Act* reads, ‘ 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 the unionisable employees’



21. The Claimant states that between April 2018 and May 2020, the Applicant recruited a total of 46 employees working as nurses at St. Mary’s Hospital. That on 29th August 2018 it forwarded a draft recognition agreement to the Respondent requesting for a meeting which the Respondent has refused to sign.
22. The Respondent in response vide witness statement of Fr. Columbian W.O. Odhiambo admits to receiving the draft recognition agreement and states that the issue of contention is that all their employees serve on contracts with defined terms. That some of the persons who signed the Claimant’s membership list forwarded to them were employees whose contracts had lapsed and not renewed, terminated and were due to lapse within a short period and relies on documents at pages 11,34,39,58,63, 70. The Respondent submits that from the list of 46, as at 29th August 2018, 30 of them had left service of the Respondent as reflected upto page 87 of its bundle of documents and those still in service at pages 88 to 110 of its bundle and are 16 in number.
23. The Respondent submits that the Claimant alleges to have recruited a total of 46 employees of the Respondent but does not state, plead and aver what percentage of the Respondent’s workforce the 46 represent. That the burden of proof lies with the Claimant.
24. The Respondent submits that simple majority under section 54(1) of the *Labour Relations Act* is 51% of unionisable employees and to buttress its submission relies on the decision in *Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union (2016)eKLR* where the Court of Appeal held; ‘ to be recognised as the representative trade union of the workers of a person or entity , section 54 of the *Labour Relations Act* stipulates that the minimum number of workers willing to join the Union must be a simple majority or 51% of the workforce’. The Respondent submits that as 16th October 2020 the names of employees under the Claimant’s membership list was 16 hence not meeting the 51% threshold for purposes of recognition.
25. The Claimant submits that it deserves the signing of recognition agreement with the Respondent after recruiting 46 nurses out of the 65 nurses in the employment of the Respondent as the Claimant’s membership then constituted a simple majority.
26. The Court finds that the Claimant did not state in the claim the number of unionisable employees under the employment of the Respondent. Under the submission it stated they are 65. Submissions are not pleadings. At the same time the Respondent does not disclose the number of potential unionisable employees under its workforce. There is evidence before the Court that out of the membership list presented by the Claimant only 16 are in employment of the Respondent.
27. The Court finds and determines that the Claimant having failed to declare the number of unionisable employees as at time of submitting the recognition agreement in the claim then it is not possible for the Court to make a decision as to whether the threshold under Section 54(1) of the *Labour Relations Act* is met. Submissions are not pleadings of facts hence the Court disregards ,the submission that the unionisable workforce of the Respondent 65. It is trite law that he who alleges must prove.
28. The Court determines that the Claimant did not discharge its burden of demonstrating it met the threshold under section 54(1) of the *Labour Relations Act* on recognition.

Whether the Claimant has complied with the requirement for deduction and remittance of union dues

29. The Claimant submits that it recruited 46 members and completed “Form S”and delivered to the Respondent for deduction in accordance with Legal Notice No. 160 of 2018. That the Respondent failed to make deductions and remit.



30. The Respondent in response vide witness statement of Fr. Columbian W.O.Odhiambo admits to receiving the draft recognition agreement and states that the issue of contention is that all their employees serve on contracts with defined terms. That some of the persons who signed the Claimant's membership list forwarded to them were employees whose contracts had lapsed and not renewed, terminated and were due to lapse within a short period. That in subsequent negotiated contracts the employees did not request the issue of union deductions to the union be captured.
31. The Respondent submits it is on the onus of the Claimant to have her members expressly agree to be varied contractual terms to enable check off.
32. The Claimant submits that deduction of union dues is not conditional to a provision in employment contract specifically allowing the employer to deduct and remit dues. That the resignation of employees is not a valid reason for not deducting union dues for the period they are still in employment and further that the Respondent did not inform the Claimant of the resignations. The Claimant submits that proper recruitment was done and they are entitled to deduction and remittance of trade union dues from the month following the month the check off forms were submitted to the Respondent.
33. The Claimant submits that under Section 19 of the Employment Act the employer may deduct from wages of his employee any amount due from the employee as a contribution to any scheme approved by commissioner of labour to which the employee has agreed to contribute. That failure to deduct and remit union dues by the Respondent is contrary to the law as the same was authorised by the Minister of Labour through Legal Notice No 160 of 2018 and further sanctioned by the employees through signing of Form "S" to signify membership.
34. The Court finds that it is not disputed that the Claimant submitted to the Respondent on the 4th June 2018 (as per hospital stamp on forward letter and on 29th august 2018) Form "S" signed by 46 nurses who were its employees to signify union membership.
35. The Court agrees with the Claimant's submissions that deduction of union dues is not conditional to a provision in employment contract specifically allowing the employer to deduct and remit dues. That the resignation of employees is not a valid reason for not deducting union dues for the period they are still in employment and further that the Respondent did not inform the Claimant of the resignation. The Claimant has attached the Legal Notice by the Minister dated 13th June 2018 allowing the deductions of dues from employees/members in the nursing sector. The submission by the Respondent that this was not the applicable Order is not valid as the Claimant sought authority as directed by the Respondent on the 29th August 2018 when they re submitted the Form "S".
36. The Court finds and determines that the Claimant complied with the requirements of section 48 of the Labour Relations Act on deductions of dues.
37. Section 48(3) of the Labour Relations Act requires an employer in respect of whom the Minister has issued an Order for deduction of wages to commence deducting the trade union dues 30 days of the trade union servicing notice in FORM "S" signed by the employees in respect of which the employer is required to make deductions.

Whether the Claimant is entitled to reliefs sought

38. The Claimant submits under Section 19 of the Employment Act that the employer shall pay from own funds such undeducted amounts which were not paid to the intended recipient.
39. The Claimant to buttress its case relies on the decision of Justice Monica Mbaru in *Banking, insurance & Finance Union (Kenya) v Maisab Bora Sacco Society Limited* (2016)eKLR holding in paragraph 44



to effect that where dues are not deducted and remitted as legally due, the employer shall pay such dues from its own funds and remit in accordance with the Order published by the Minister. Such uncollected dues from unionisable employees cannot be received from the employee as the employer is at fault and there is evidence of being served with check offs of more than 5 employees members of the Claimant's union. The Court held that this was the sanctity of the law and the Constitution with regard to giving effect to right to associate and unionise under articles 36 and 41 of the Constitution.

40. The Respondent submits that the employer pays dues from employee salary, that it was constrained by contractual obligations and lastly conciliation proceedings were ongoing. It relies on the authority in case of Kenya Union of Commercial Food And Allied Workers v Mitra Enterprises limited and another (2021)eKLR where the Court declined such prayer stating that an employer does not pay dues from own account but from the employee's salary. However, the Respondent notes in Kenya Union of Nurses v Muranga County Public Service Board & Another (2021)eKLR the Court allowed similar prayers for payment of union dues from employers own funds where it had been demonstrated the employer had used the non deduction of dues as a weapon to constrain union membership and activities.
41. The Respondent submits that it has been cooperative, attending conciliation meetings to discuss the issue, has not victimised the employees and save for contractual obligations the employer is willing to deduct and pay union dues.
42. The Court notes that there is no report by the conciliator that the process had failed. There is no evidence that the Respondent failed to attend the meetings. The Respondent states it was participating in the process.
43. The Court finds that Section 19 of the Employment Act relates to deducted and unremitted funds. The Court is not persuaded by the decisions of the court in Banking, insurance & Finance Union (Kenya) v Maisha Bora Sacco Society Limited (2016)eKLR and Kenya Union of Nurses v Muranga County Public Service Board & Another (2021)eKLR respectively that the employer be compelled to pay undeducted dues from its own funds. The said position has no basis in the law and is not provided for. This position is supported in other two decisions of different judges of the Court in Kenya Union Of Commercial Food And Allied Workers v Mitra Enterprises limited and another (2021)eKLR and Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) v Milly Fruit Processors Limited [2014] eKLR. In the later decision the judge sitting on review found as follows:-

'the Claimant did not address the Court on the legal basis of requiring the Respondent to take over the liability of payment of union dues that had not been deducted. The Labour Relations Act which provides for the deduction of union dues is silent on what the Claimant should in such an event.

Section 19 of the Employment Act which provides for deductions from wages of employees, which would include union dues does not provide for the employer to be penalized to make such deductions from its own funds.

Sub section 19(5) provides for the penalizing of an employer to pay only if the employer has deducted but failed to remit the amounts for deductions to the beneficiary thereof.

The prayer for review under this head is granted and I ordered the Court award adding thereto as follows;

"The Claimant's prayer that the Court directs the Respondent to pay from its kitty all the money it would have, except for its refusal/failure/negligence, deducted from its employees' wages and remitted to the trade union dues since the month



the employees first joined the Claimant is hereby dismissed for the following reasons;

i. The Claimant has not given justification for the prayers.”

44. The Court upholds the decision of the Court in *Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) v Milly Fruit Processors Limited* [2014] eKLR and finds that there is no legal basis to order the employer to remit undeducted union dues from its own funds. Consequently prayers 1 and 2 of the claim are dismissed.

45. The Court finds that the Claimant complied with the law on deduction of union dues under the check off list. The Respondent is under legal obligation to make the deductions for the employees who signed off. The Respondent submitted that 16 of the employees are still in service. The Respondent is ordered to deduct and remit the monies to the Claimant of the employees under the check off list as per the Order in Legal Notice No.160 of 2018 effective end of month of July 2022.

Order for signing of recognition agreement.

46. The Court found that the Respondent did not plead the number of unionisable employees in the claim or affidavit hence did not discharge the burden of proof that it met the threshold under section 54(1) of the *Labour Relations Act*. The prayer is disallowed.

Conclusion and disposal

47. The claim has succeeded partially and judgment is entered for the Claimant against the Respondent as follows:-

a. The Respondent is ordered to deduct and remit the monies of the unionisable employees currently in service and whose names appear under the submitted membership check off to the Claimant as per the Order of in legal notice NO. 160 of 2018 effective end of month of July 2022.

48. No order as to costs.

49. It is so ordered

DATED , SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF JULY 2022 AT BUNGOMA.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:-

Court Assistant : Brenda Wesonga

For Claimant :-Ms Wangari holding brief for Omulama

For Respondent :-Makokha

