



**Kenya Tertiary & School Workers' Union 'KETASWU' v Board of Management Khwisero Girls Secondary School (Cause 18 of 2021) [2022] KEELRC 13369 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13369 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**CAUSE 18 OF 2021**  
**JW KELLI, J**  
**DECEMBER 1, 2022**

**BETWEEN**

**KENYA TERTIARY & SCHOOL WORKERS' UNION 'KETASWU' CLAIMANT**

**AND**

**BOARD OF MANAGEMENT KHWISERO GIRLS SECONDARY SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The claimant brought the instant suit on behalf of the grievant, Carolyn Busolo, seeking the following reliefs:-
  - a. A declaration that the indefinite suspension of Mrs Carolyn Busolo, the grievant, herein from her employment services by the respondent was unlawful, unfair and illegal hence amounts to constructive dismissal.
  - b. Payment of the sum of monies claimed under paragraph 8 herein above under submissions, as damages from the loss of employment services of Mrs Carolyn Busolo, amounting to “kshs 1,087,69.20/- ( One Million Eighty Seven Thousand Seven Hundred Sixty Nine and Twenty Cents).
  - c. Costs of the suit be provided for by the respondent.
  - d. Interest on 2 and 3 hereinabove.
  - e. Issuance of certificate of service as duly envisioned under section 51 of the [Employment Act](#), no 11 of 2007, Laws of Kenya.
  - f. Any other and/or further better relief this Honourable court deems fit to grant.



2. Together with the claim on same date the claimant filed verifying affidavit of Japheth Anyira Agura, claimant's statement of Japheth Anyira Angura dated October 28, 2019, witness statement of Carolyne Busolo dated October 28, 2019, list of witnesses, List of documents dated October 28, 2019.
3. The respondent entered appearance through the law firm of Mukabi & Co Advocates and filed Response to statement of claim dated January 7, 2020, respondent's list of documents dated January 7, 2020 and the bundle of documents all filed on January 23, 2018.
4. The matter was first referred to conciliation before the ministry of labour officer. The parties were heard and a report dated April 29, 2019 prepared ( exhibit 5).

### **Hearing**

5. The claimant's case was heard on September 26, 2022 with the grievant as the witness of fact. The witness was cross- examined by Mr Mukabi counsel for the respondents. The respondents did not produce evidence in court and their advocate asked defence case to be closed which the court proceeded to do.
6. After the hearing parties took submissions directions. The claimant's written submissions drawn by Japheth Agura (SG) are dated October 17, 2022 and received in court on October 25, 2022.
7. The respondent's submissions drawn by Mukabi & Co Advocates are dated November 15, 2022 and filed in court on November 15, 2022.

### **Case in summary**

8. The claimant's case was that the grievant was employee of the respondent who was put on indefinite suspension contrary to the human resources policies and procedures manual of the public service, May 2016, with impunity. That the dispute was referred to the ministry of labour under section 69 (a) and 73 (i) of the *Labour Relations Act* for arbitration. That the grievant, a librarian, of the respondent employed on May 22, 2008 performed duties well until July 2017 when she fell ill that forced her to seek treatment in different hospitals with knowledge of the respondent. That the principle suspended her indefinitely for public interest (Exhibit 2).
9. That the grievant joined the union in 2017. That the grievant was paid salary of kshs.11,000/- per month without housing allowance below statutory minimum wages. The claimant produced the appointment letter, suspension letter and the conciliator report as their evidence.

### **Defence case**

10. The respondent did not appear in court to produce their evidence. The written response was to effect that the grievant absconded duties as a librarian duties and was guilty for insubordination , that she was invited for hearing by the board of management and appeared with one Benson Amuroro who claimed to be from the Kenya Tertiary and School Workers representing the grievant. That he did not produce credentials to prove that he was official of the union. That they had no recognition agreement with the union hence Benson Amuroro was not allowed in the proceedings. The grievant refused to be heard without her companion. That the school had no recognition agreement with the claimant and the employee was not known to be a member of the union, the claimant had no capacity to bring instant suit.
11. That the grievant was given a second opportunity to be heard but she never turned up. That they met the conciliator who prepared report dated April 24, 2019 and were willing to settle and issued two cheques but the claimant advised the grievant not to accept the cheques.



12. That the grievant was absent from duty from July 3 to September 4, 2017 without taking the requisite sick leave to the detriment of their students who were denied access to library. That they raise a preliminary objection that the claimant has no *locus standi*.

## **Determination**

### **Issues for determination**

13. The claimant in their submissions addressed the issue of unfair termination.
14. The respondent's in their written submissions addressed the following issues:-
- a. Whether the claimant had *locus standi* to file claim on behalf of the grievant.
  - b. Whether the grievant was unlawful, unfair and illegally suspended hence amounting to constructive dismissal .
  - c. Whether the claimant is entitled to the relief sought.
  - d. Who bears costs of the claim.
15. The court having heard the parties and read the pleadings of parties was of the considered opinion that the issues placed by the parties before it for determination of their dispute are as follows:-
1. Whether the claimant has locus standi to bring the suit on behalf of the grievant .
  2. Whether the suspension of the grievant amounted to constructive dismissal .
  3. If (2 above) is in affirmative, whether the dismissal was valid and fair .
  4. Whether the claimant is entitled to reliefs sought.

### **Whether the claimant had locus standi to bring claim on behalf of the grievant.**

16. The written defence stated that the grievant attended hearing with one Benson Amorono who claimed to be from the claimant but had no credentials to proof that and the grievant was not a member of the union and further they had no recognition agreement with the claimant hence the representation was not allowed.
17. The claimant pleaded under statement of Japheth Angura dated October 28, 2019 paragraph (5) that he was privy to the information that the grievant was their member having acknowledged her membership in October 2017. The grievant in her statement of even date paragraph 6 stated she joined the union having acknowledged her membership on their check off form. The said check off form was not produced in court.
18. During cross examination the grievant stated she was a private member of the union. The grievant stated that she attend the disciplinary hearing with Benson Amurono at the school who is their chairman but was rejected. That the said chairman was allowed participation by the ministry of labour.
19. The report of the ministry of labour conciliator was produced in court as "exhibit 5". On the findings, the conciliator found that Caroline Busolo was registered as a private member of the union without knowledge of the school and that no documentary evidence was availed.
20. The court finds no evidence before it that the claimant was paying dues for membership to the claimant or that she was their member.



21. The issue of membership having been raised in written defence and at the conciliation process the claimant was granted opportunity to prove membership.
22. The respondent submits that the claimant did not produce register to show grievant is their member and relies on trade union regulations no 13 which provides that every registered trade union shall bear a register of its members where it shall enter name, address and occupation of each member, the date on which each member is admitted, payments made by each member in respect of entrance fees subscriptions or any other monies and the date of such payment and the date in which any member ceases to be a member.
23. To buttress its submissions the respondent relies on the decision in *Kudheiba Workers vs Board of Management Kibumbini Secondary School* (2015) eKLR where the court held:-“ The claimant Union would not file the suit on behalf of the grievant because the grievant was not a member of the claimant Union.”.

### **Decision**

24. The court makes the following findings on the issue:-
  - i. The claimant has locus over its members only.
  - ii. The claimant cannot represent employees who are not registered in their register as their members under the Trade Union Rules number 13 (*supra*).
25. The claimant gave contradictory account on membership. In the statement of the grievant she acknowledged membership under check off form and in the oral evidence the grievant said she was a private member. That no documentary evidence was placed before court on the membership and a similar finding was made in the conciliation report ( exhibit 5).
26. The court finds that the instant claim is brought by a stranger to the respondent and cannot be sustained. The claimant has no *locus standi* to represent the grievant whom the court found no evidence she was their member. The court upholds the decision of the court in *Kudheiba Workers -vs- Board of Management Kibumbu-ini Secondary School* where Justice Byram Ongaya having found lack of proof of membership of the employee to the union dismissed the suit with costs. As the Justice Byram Ongaya found that the substantive dispute remain undetermined, the court do holds herein. It is unfortunate the claimant/grievant refused to collect the cheques under the conciliation award. In the upshot the claim dated October 28, 2019 is dismissed for lack of *locus standi* by the claimant.
27. On costs, the court considered the claimant refused to collect the cheques under the award of the conciliator and filed instant claim without locus standi on issue within their knowledge from the pleadings and the conciliator report. The claimant to pay costs of the suit to the respondent.
28. In the upshot the claim dated October 28, 2019 is ordered dismissed with costs to the respondent.
29. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 1<sup>ST</sup> DAY OF DECEMBER, 2022.**

**J W KELI,**

**JUDGE**

**Delivered in the presence of :**



**Court assistant : Brenda Wesonga**

**Claimant: Kennedy Okoto – Bungoma Branch Secretary**

**Respondent: Mulabi**

