



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 29 OF 2019

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

VS

YUSUF SHUBI ABASHEI.....RESPONDENT

RULING

1. On 31st May 2019, the Claimant Union filed a Memorandum of Claim alleging unlawful termination of the employment of Rose AjikonLokeyo (the Grievant).The Respondent filed a Reply on 14th October 2019.
2. By a subsequent notice dated 9th November 2020, the Respondent raised a Preliminary Objection on the ground that the Claimant Union lacks the *locus standito* represent the Grievant in relation to the dispute by dint of the provisions of Sections 2, 54 and 73(3) of the Labour Relations Act.
3. The Claimant's response to the Respondent's Preliminary Objection is by way of a replying affidavit sworn by HezronOnwong'a on 27th November 2020.
4. Onwong'adepones that he is an employee of the Claimant Union, holding the position of Industrial Relations Officer.
5. He adds that he was appointed by the Secretary General under Section 2(e)of the Labour Relations Act vide letter dated 17th January 2019 which was revised on 13th February 2020.
6. Onwong'a goes on to depone that the Grievant is a *bona fide* member of the Claimant Union.
7. He points out that Article 22(2)(d) of the Constitution of Kenya, 2010 gives power to an association to act in the interest of one or more of its members.
8. In the written submissions filed in support of its Preliminary Objection, the Respondent raises two issues; first, thatHezronOnwong'ais not an authorised representative as defined in Section 2 of the Labour Relations, Act, for purposes of lodging a dispute in court as required under Section 73(3) of the Act. Second, that because there is no Recognition Agreement between the Claimant Union and the Respondent, the Union lacks the *locus standi* to bring a claim against the Respondent on behalf of the Grievant.
9. The Respondent submits that there is no letter of authority filed before the Court to show that HezronOnwong'a is the authorised representative of the Claimant as defined in Section 2 of the Labour Relations Act.
10. In his replying affidavit sworn on 27th November 2020, HezronOnwong'a attached two letters dated 17th January 2019 and 13th February 2020 from the Claimant's General Secretary, addressed to the Registrar of the Employment and Labour Relations Court, appointing Onwong'a among others, as court representatives.
11. It is therefore not in doubt that HezronOnwong'a was at all material times an authorised representative of the Claimant Union as defined in Section 2 of the Labour Relations Act.
12. In its supplementary submissions filed on 18th December 2020, the Respondent states that by attaching the two letters, the Claimant was introducing new documents that are not pleaded in the Memorandum of Claim. I will say two things on this submission; first, the issue of HezronOnwong'a's capacity to represent the Union is a matter of law that can be introduced at any stage in the proceedings and second, this issue had not been brought to the Claimant's attention prior to the notice of Preliminary Objection; the Claimant therefore, had no way of

knowing that Onwong'a's capacity to represent the Grievant in court was a contentious matter.

13. Regarding the second limb of the Preliminary Objection, being the issue of *locus standi* of the Claimant Union to bring a claim against the Respondent on behalf of the Grievant, in the absence of a Recognition Agreement, the law is now well settled.

14. In its decision in *Kenya Shoe & Leather Workers Union v Modern Soap Factory [2018] eKLR* this Court returned the following:

“...a trade union has many roles and although collective bargaining which is premised on recognition is a premiere one, the other roles such as association generally and representation in particular, are equally important. What is clear is that Section 45(1) of the Labour Relations Act creates no necessary nexus between recognition and representation.”

15. The matter went on appeal to the Court of Appeal and in its decision in *Modern Soap Factory v Kenya Shoe and Leather Workers Union (Civil Appeal No 37 of 2019)* the appellate court rendered itself thus:

“Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2)(d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention.....

We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection.....

A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct.”

16. In light of the foregoing, I find and hold that the Respondent's Preliminary Objection is without merit and is therefore overruled with costs to the Claimant.

17. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Onwong'a for the Claimant

Mr. Mutubia for the Respondent