



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 11 OF 2019

MICHAEL OUMA ODERO

GODFREY OGETO

LILIAN MATANU MUMWA

DANIEL OWINO WAMUNGA

ONYANGO OCHIENG RODGERS

JOHN OTIENO OTIENO

DAISY JERUTO

NDUTA KARANJA ESTHER

ELIZABETH BARBARA MWANIA

INNOCENT SITUMA WAFULA

MICHAEL BLESSING WAFULA

GRACE MICERE MARIA

(Suing as promoters of the proposed

KENYA UNION OF NUTRITIONISTS AND DIETICIANS.....APPELLANTS

VERSUS

THE REGISTRAR OF TRADE UNIONS.....RESPONDENT

(Appeal from the Notification of Refusal of Registration issued by the Registrar of Trade Unions on 14th May 2019)

JUDGMENT

1. The subject of this appeal is the refusal to register the proposed Kenya Union of Nutritionists and Dieticians as communicated by the Registrar of Trade Unions by notification dated 14th May 2019.

2. In their Memorandum of Appeal dated 12th June 2019 and filed in court on 13th June 2019, the Appellants cite the following grounds of appeal:

a) The Respondent erred in fact and in law by violating the Appellants' fundamental constitutional right to form a trade union and which right can only be limited by law, in this case Section 14(1) of the Labour Relations Act, 2007, if such an application has been made in contravention of Section 14(1) (d) (e) (f) (g) (h) and (j) which was not the case herein;

b) The Respondent erred in law and in fact by failing to consider the exclusivity of the powers conferred upon her by Section 31 of

the Labour Institutions Act, 2007 and Section 12(4) and (5) of the Labour Relations Act, 2007;

c) The Registrar of Trade Unions erred in fact and in law by failing to consider the public interest issues involved if the proposed trade union was formed, by denying a forum for nutritionists and dieticians that would have given a boost to promotion of a healthy nation, in terms of disease prevention and management, through scientific nutritional intervention to curb lifestyle and non-communicable diseases as well as disease management in general;

d) The fundamental right of association of the Appellants and members of the proposed trade union has been violated by the action of the Registrar of Trade Unions in contravention of ILO Conventions, Articles 36 and 41 of the Constitution of Kenya, 2010 and Section 4 of the Labour Relations Act;

e) The Registrar of Trade Unions erred in fact and in law by failing to appreciate that nutritionists and dieticians consist of qualified health workers in the medical field who work in hospitals, schools, prisons and NGOs among others with a bias in nutrition and health;

f) The Registrar of Trade Unions erred in fact and in law by failing to appreciate that there exists a difference between nutritionists and dieticians on the one hand and cooks, waiters, subordinate and domestic workers represented by KUDHEIHA and other unions on the other hand;

g. The Registrar of Trade Unions failed to appreciate the fact that nutritionists and dieticians like nurses, clinical officers and doctors are registered and regulated by a professional body established by law in this case the Kenya Nutritionists and Dieticians Institute (KNDI) which licenses them to offer professional services in nutrition assessment, counselling, nutrition education programs etc., after undergoing rigorous training programs in certificate, diploma, degree, masters and PhD levels and a mandatory one year internship program to be eligible to practice as such;

h. The Registrar of Trade Unions erred in fact and in law by failing to appreciate that the Salaries and Remuneration Commission does not categorise nutritionists and dieticians in the hospitality industry; rather these professionals are considered as medical practitioners particularly in preventive care;

i. The Registrar of Trade Unions erred in fact and in law by failing to appreciate the fact that KUDHEIHA does not represent any health professionals and it is a fact that all health professionals (nurses, clinical officers and doctors) have their own unions that represent their interests, except nutritionists and dieticians;

j. The Registrar of Trade Unions erred in fact and in law by failing to appreciate that there is no other union of employers and employees that is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Appellants seek registration.

3. The Appellants raise ten (10) grounds of appeal, all relating to the reason advanced for refusal of their application for registration of the proposed trade union.

4. The notification for refusal of registration dated 14th May 2019 states the following:

“The envisaged scope of representation being nutritionists and dieticians from both the private and public sectors, NGOs and institutions of higher learning is already represented by the existing registered union of Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA). KUDHEIHA represents all persons employed as subordinate staff, nurses and other medical professionals except doctors, in both public and private hospitals, nursing homes, dispensaries, clinics, chemists, pharmacists, medical training institutions, animal husbandry clinics and veterinary centres, research centres and other related institutions, providing medical care. Contrary to your assertion that KUDHEIHA only represents subordinate staff, the Union also represents even professionals in the medical sector.

It was also not lost to the National Labour Board that nutritionists and dieticians are also represented by other unions like the Union of Kenya Civil Servants, the Kenya County Government Workers Union and other unions, in the medical sector as their services are cross-cutting. The cadre of officers although specialized in their field, is only part of health workers and it is not tenable to allow all cadre of health workers to form unions based on their specialization. The Labour Relations Act under the provisions of Section 14(1)(d) provides that a trade union may apply for registration if no other trade union, already registered, is sufficiently representative of the whole or a substantial proportion of the interests in respect of which the applicants seek registration.”

5. In refusing to register the proposed Kenya Union of Nutritionists and Dieticians, the National Labour Board states that the interests which the proposed union seeks to represent are already covered by the Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers, the Union of Kenya Civil Servants and the Kenya County Government Workers Union.

6. Section 14(1)(d)(i) of the Labour Relations Act provides as follows:

14.(1) A trade union may apply for registration in accordance with this Act if-

(d) no other trade union already registered is-

(i) in the case of a trade union of employees or employers, sufficiently representative of the whole or of a

substantial proportion of the interests in respect of which the applicants seek registration;

7. According to the record, only KUDHEIHA Workers raised an objection to the registration of the proposed Kenya Union of Nutritionists and Dieticians. In its objection dated 9th May 2018, KUDHEIHA Workers contends that the proposed union seeks to represent the interests of nutritionists and dieticians working in the hospitality industry, over which KUDHEIHA lays a claim.

8. The proposed union responded to the objection by KUDHEIHA Workers by its letter dated 18th May 2018. Of note, the proposed union states that nutritionists and dieticians, whose interests the proposed union seeks to represent, operate in the health sector and not in the hospitality industry, as stated by KUDHEIHA Workers. The proposed union further states that KUDHEIHA Workers had not negotiated nor concluded any Collective Bargaining Agreement on behalf of nutritionists and dieticians.

9. From the record, KUDHEIHA Workers did not respond to any of the issues raised by the proposed union. More significantly, there was no evidence that KUDHEIHA was in fact the representative union for nutritionists and dieticians.

10. The right to associate is guaranteed by several international instruments such as the [ILO Declaration of Philadelphia](#) (1944), the [ILO Declaration on Fundamental Principles and Rights at Work](#) (1998), the [Universal Declaration of Human Rights](#) (1948), ILO Convention No 087 on Freedom of Association and Protection of the Right to Organize (1950) and ILO Convention No 098 (1964) on the Right to Organize and Collective Bargaining.

11. What is more, Articles 36 and 41(2)(c) of the Constitution of Kenya, 2010 provide for freedom of association and the right to form, join or participate in the activities and programmes of a trade union. The only limitation to this right is as allowed under Article 24 of the Constitution.

12. With regard to registration of a trade union, Section 14(1)(d)(i) of the Labour Relations Act sets out a single reason for limitation, being the existence of another representative trade union.

13. It follows therefore that in refusing to register a proposed union, the National Labour Board is required to demonstrate that it has observed the limitation criteria set out under Article 24 of the Constitution and Section 14(1) (d) (i) of the Labour Relations Act.

14. In the appeal now before me, there was no evidence of any such process having been followed. All the National Labour Board did was to make a broadside statement that the interests which the proposed trade union sought to represent were covered by other trade unions.

15. As held in ***Seth Panyako & 5 others v Attorney General & 2 others [2013] eKLR*** consideration of an application for registration of a trade union should entail a balance between the enjoyment of the right to form and join a trade union of choice with the prejudice, if any, the enjoyment of the right would occasion to others.

16. In the notification of refusal of registration of the proposed union, it is conceded that the cadre of officers to be represented by the proposed union is specialized. In its decision in ***Justus Aloo Ogeka & 6 others (as Interim officials of Kenya National Union of Cooperatives Staff) v Registrar of Trade Unions & 2 others [2016] eKLR*** this Court held that specialization in a sector is a positive factor to be considered in processing an application for registration of a proposed trade union.

17. The admission by the National Labour Board that nutritionists and dieticians fall within a specialized category of health workers, coupled with the fact that other professional groups within the health sector such as doctors, clinical officers and nurses have their own trade unions left the National Labour Board with no reason to decline registration of the proposed union.

18. This appeal is therefore allowed with the result that the decision by the National Labour Board declining the Appellants' application for registration of the Kenya Union of Nutritionists and Dieticians as communicated by the Registrar of Trade Unions by notification dated 14th May 2019 is set aside.

19. The Kenya Union of Nutritionists and Dieticians is hereby registered.

20. The Registrar of Trade Unions is directed to issue a certificate of registration to the said union and to enter its name and particulars in the appropriate register within the next fourteen (14) days from the date of this judgment.

21. The Appellants will have the costs of this appeal.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF FEBRUARY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment 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:

Mrs. Makuto for the Appellants

Mr. Mwandeje for the Respondent