



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 45 OF 2019

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

VS

M/S BAI HONG CHENG.....RESPONDENT

RULING

1. On 8th August 2019, the Claimant Union filed a claim on behalf of Venerandah Evojo (the Grievant), seeking compensation for unfair termination of employment. The Respondent filed a Statement of Reply on 11th October 2019.
2. The matter proceeded for trial on 21st September 2020, when the Claimant's case was heard.
3. Defence hearing was slated for 1st December 2020, on which date Counsel for the Respondent sought an adjournment on the ground that the Respondent was out of the country and further that the Respondent had filed a notice of Preliminary Objection, challenging the Claimant's *locus standi* to sue on behalf of the Grievant.
4. The Respondent's notice of Preliminary Objection is dated 27th November 2020 and is based on the following grounds:
 - a) That the Claimant and the Grievant are strangers and they lack the *locus standi* to institute a suit against the Respondent;
 - b) That the Claimant lacks the *locus standi* to sue on behalf of the Grievant under Section 54 of the Labour Relations Act;
 - c) That the Grievant was not a member of the Trade Union at the time of the cause of action and therefore the Claimant lacks the *locus standi* to sue on her behalf.
5. In response to the Respondent's Preliminary Objection, the Claimant filed a replying affidavit sworn by Hezron Onwong'a on 9th December 2020.
6. Onwong'a states that he is an employee of the Claimant Union, holding the position of Industrial Relations Officer, having been appointed by the Secretary General under Section 2(e) of the Labour Relations Act.
7. In support of his assertion, Onwong'a filed a letter dated 17th January 2019 addressed to the Registrar of the Employment and Labour Relations Court, which letter was revised on 13th February 2020.
8. Onwong'a depones that the Grievant is a *bona fide* member of the Union. He produced copies of membership card and receipts to support this deponement.
9. Onwong'a denies that the claim offends the provisions of Sections 2, 54 and 73(3) of the Labour Relations Act.
10. He states 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.
11. The Preliminary Objection was urged by way of written submissions.
12. The Respondent submits that because there is neither a Recognition Agreement nor a Collective Bargaining Agreement between it and

the Claimant, the Claimant lacks the *locus standi* to sue on behalf of the Grievant.

13. The standing of trade unions to sue on behalf of its members is now well secured.

14. In its decision in *Kenya Shoe & Leather Workers Union v Modern Soap Factory [2018] eKLR* this Court stated 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. It follows therefore that for a trade union to sue on behalf of its member(s) it does not need to have a Recognition Agreement with the employer; the only requirement is that the Grievant be a member of the trade union.

17. And as regards the question of membership, the Court of Appeal in *Civil Appeal No 37 of 2019* (supra) determined that this is an issue of fact to be determined at trial and not a matter for Preliminary Objection.

18. As to whether, a trade union sues in its own name or in the name of the Grievant is a non-issue; what matters is that there is a proper Grievant on whose behalf the suit is brought.

19. That said, I find and hold that the Respondent’s Preliminary Objection is not well taken and proceed to overrule it with costs to the Claimant.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 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

Miss Achieng h/b Mr. Malombo for the Respondent