



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1134 OF 2018

CONSOLIDATED WITH

CAUSE NO.573 OF 2019

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

GRAVITY TRADING COMPANY LIMITED 1ST RESPONDENT

AND

CENTRAL ORGANISATION OF TRADE UNIONS (KENYA).....INTERESTED PARTY

JUDGEMENT

Issue in dispute – recognition agreement and deduction and remittance of union dues.

The claimant is a registered trade union in the sector of commercial, food and allied workers and the respondent is a limited liability company mainly dealing with selling commodities through retail outlets.

On 5th to 8th January, 2018 the claimant recruited all unionisable employees of the respondent as its members. On 26th January, 2018 the claimant forwarded the check off forms to the respondent and a draft recognition agreement and further seeking deduction and remittance of trade union dues but refused to oblige.

The claimant reported a dispute to the ministry and a conciliator was appointed but on 16th May, 2018 the respondent summoned all employees and directed them to sign a ready written letter disowning membership with the claimant. The employees wrote to the claimant on the intimidation and harassment and the matter was reported to the Minister but the respondent refused to attend.

The claimant has reached the threshold for recognition and the respondent should be directed to sign the recognition agreement.

The claim is also that in January, 2018 the claimant recruited 12 employees of the respondent as members. The signed check off forms were forwarded to the respondent on 29th January, 2018 but refused to effect trade union deductions and remittance to the claimant who reported a dispute to the Minister on 17th April, 2018 but no conciliator was appointed.

There exists no other trade union within the respondent employees. The claim is that the respondent violated the claimant's rights by refusing to deduct and remit trade union dues. This is in disobedience of the law, the constitution and the ILO conventions.

The claim is that the respondent should be found to engage in unfair and unlawful practice and directed by the court to pay from their accounts and remit to the claimant the sum of Ksh.4,400 monthly not deducted and remitted from each employee and member of the claimant and moving forward such deductions and remittances be effected monthly.

No response was filed by the respondent, save I reply to the claimant's application dated 29th August, 2019 the respondent filed a Replying Affidavit sworn by Pradip N Mashru a director and who avers that the respondent employed 10 employees and the terms and conditions of employment did not include a deduction or remittance of trade union dues. Under section 48(2) of the Labour Relations Act (LRA) requires the claimant to first obtain an Order from the Minister before directing the employer to deduct or remit trade union dues and no order or union account details were forwarded to the respondent by the claimant. There is no published Gazette Notice in this regard.

Mr Mashru also avers that a deduction from the wages of an employee without an Order of the Minister is unlawful and contrary to section 19

of the Employment Act.

Both parties attended court on 13th May, 2021 and agreed to address the claim by way of written submissions. Only the claimant complied.

The claimant filed submissions with regard to ELRC No.102 of 2020 and relating to *London Distillers (K) Limited* and relating to recruitment of employees from the Galot Estate and thus unrelated to the consolidated files herein.

Determination

By consent dated 12th October, 2020 and adopted as the order of the court on 13th October, 2020 the parties agreed that the respondent was to commence deduction and remittance of union dues to the claimant from August, 2020 and that the respondent was to commence the trade union dues deductions from employees who had joined the membership of the claimant and signed the check off forms and that the issue of recognition to proceed for hearing.

Thus the only issue identified as pending was the issue of recognition of the claimant by the respondent.

Recognition of a trade union by an employer is regulated under section 54 of the LRA.

54. Recognition of trade union by employer

1. 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 unionisable employees.

2. A group of employers, or an employers' organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.

3. An employer, a group of employers or an employer's organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers' organisation recognises a trade union.

4. The Minister may, after consultation with the Board, publish a model recognition agreement.

5. An employer, group of employers or employers' association may apply to the Board to terminate or revoke a recognition agreement.

6. If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

7. If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.

8. When determining a dispute under this section, the Industrial Court shall take into account the sector in which the employer operates and the model recognition agreement published by the Minister.

For a union to qualify for recognition by an employer it ought to prove that it has recruited a simple majority of the employees of the respondent, where the employer is a single entity or a simple majority of employees of members of an association, where the union seeks to be recognised by an association. This is the first qualification which is contained in subsection (1), (2) and (3) of Section 54.

The second qualification is at subsection (8), that the court will take into account the sector in which the employer operates.

The rationale is found under Article 41 of the Constitution, 2010 which give the right to unionise under a trade union of one's choice. An employee is allowed to enjoy such right by being organised under a collective, trade union of his/her choice.

The right to unionise is further given force under section 17(11) of the Employment Act directing employers not to limit the right of an employee to dispose of his income in the manner s/he deems fit that;

No employer shall limit or attempt to limit the right of an employee to dispose of his wages in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a portion thereof in a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

In the case of **Kenya Petroleum Oil Workers Union v Kenol Mahavir Service Station and Another [2017] eKLR** where the court held that:-

Section 54 provides for the threshold for recognition of a trade union being recruitment of a simple majority of members and taking into account the sector in which the employer operates. In the present case it is unfortunate that the Claimant has not supplied a

copy of its constitution to the court for the court to determine the sectors that it is authorised to cover.

And in the case of **Kenya Chemical & Allied Workers Union v Strategic Industries Limited [2016] eKLR** where the Court held thus:-

Recognition is a matter of verifiable numbers and in the absence of tangible evidence of recruitment of a simple majority the Court has no basis to order recognition.

In this case, the claimant has submitted a check off form with 12 members in the employment of the respondent.

In the Replying Affidavit of Mr Mshru dated 4th October, 2019 he avers that the respondent employed 10 employees and issued them with letters of appointment.

The numbers of recruited employees being 12 and the letters of appointment issued by the respondent being 10, the variance should not affect the recognition of the claimant by the respondent. Such is a legal requirement where the sector and mandate of the claimant is not contested.

Section 19(1) (f) and (g) of the Employment Act, 2007 obliges an employer to deduct from the employees’ wages;

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

The claimant forwarded the check off forms attached to the Memorandum of Claim and the reverse copy gives the details of the Minister’s Order pursuant to Kenya Gazette Notice No.11153 of 8th August, 2013 and pursuant to section 48(2) and (3) of the LRA the claimant has complied and has reached the threshold for recognition by the respondent.

Accordingly, judgement is hereby entered for the claimant and the following orders issued;

- (a) The respondent is directed to recognise the claimant union with 30 days;**
- (b) The respondent is directed to deduct and remit union dues of all employees currently in its employment who have signed check off forms and pursuant to terms agreed upon vide consent adopted by the court on 13th October, 2020; and;**
- (c) Each party shall bear own costs.**

DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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