



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E028 OF 2021

KENYA FOREIGN RECRUITMENT AND EMPLOYMENT

AGENCIES WORKERS UNION & 5 OTHERS.....APPELLANT

VERSUS

THE REGISTRAR OF TRADE UNION.....RESPONDENT

J U D G M E N T

1. The background facts which can be gathered from the documents presented to this court are as follows:-

a) the first appellant, Kenya Foreign Recruitment and Employment Agents Workers Union, is a proposed Trade Union which intends to represent workers from what the appellants refer to as a virgin industry.

b) the 2nd, 3rd, 4th, 5th and 6th appellants are employees/promoters working within the companies dealing with Foreign Recruitment and Employment Agencies.

c) on 20th October 2014, the promoters wrote to the Respondent seeking registration of the 1st appellant and were, vide the Respondent's letter dated 10th November 2014, allowed to undertake lawful activities in order to establish a Trade Union.

d) vide a letter dated 25th April 2016, the Respondent notified the appellants that the National Labour Board had sat on 7th to 8th April 2016 and had put the Appellant's application in abeyance because the industry was unstable.

e) vide the said letter dated 25th April 2016, the Respondent advised the Appellants that in view of a ban on registration of employment agencies, only a few of such agencies had been registered, and that it had been agreed that the appellant's matter would be determined once the issue of employment agencies was determined.

f) the Respondent wrote to the appellants on 19th October 2016 informing them that the National Labour Board sat on 12th October 2016 and the ban on registration of employment agencies had been partially lifted, and that it had been agreed that the appellant's application would only be considered once the issue of registration of employment agencies was determined.

g) on 30th October 2017, the Respondent wrote to the Appellants and notified them that the National Labour Board had deliberated on their matter and had deferred the same to enable the Director of National Employment Authority (NEA) to provide the number of employment bureaus which had been registered as at that date, and the number of employees working in the agencies.

h) following the appellants' letters to the Respondent dated 22nd November 2017 and 11th January 2018 respectively, the Respondent informed the appellants vide a letter dated 13th March 2018 that the Director of National Employment Authority had confirmed registration of fifty three (53) recruitment agencies, that registration was an ongoing process subject to the relevant legal provisions, and that the matter would be brought before the National Labour Board in its next meeting.

i) under cover of a letter dated 20th February 2020, the Respondent forwarded Form D (dated 18th February 2020) to the Appellants, notifying them that registration of the 1st Respondent as a Trade Union had been refused, and stated the grounds of refusal as follows:-

“the survey carried out by the National Employment Authority (NEA) as part of our due diligence showed that currently, there are about three hundred recruitment agencies authorized to operate in the country. Each of these agencies employs an average of three (3) workers only. In terms of duration of working at the agencies, the survey revealed that 64.2% of these workers work for less than one year in an agency. Consequently, due to the small membership of employees in each agency, the proposed trade union is therefore not in a position to recruit a simple majority of workers from each agency as envisaged under the provisions of Section 54(1) of the Labour Relations Act...”

2. The Appellants did not appeal against the Respondent’s said decision within thirty days pursuant to provisions of the Labour Relations Act, but rather filed a normal claim in this Court being Cause No. 19 of 2020, within which they filed a Notice of Motion (dated 18th March 2020) seeking leave to bring suit/appeal against the Respondent.

3. Vide its Ruling dated 29th April 2021, this Court allowed the Appellants to file and serve an appeal against refusal of registration of the proposed Trade Union within fourteen (14) days of the Ruling. The present appeal was subsequently filed on 11th May 2021.

4. In the appeal, the appellants are praying for:-

a) a declaration that the Respondent’s refused to register the 1st Respondent was unfair, unlawful and is against Article 36(1), 41(1) and (2) (c) of the Constitution of Kenya and ILO Convention No. 87.

b) an order compelling the Respondent to forthwith register the 1st Appellant as a Trade Union, to enter her name into the Register of Trade Unions and to issue them with a Certificate of Registration of a Trade Union.

c) costs be provided for.

5. As observed by the Court in the case of FELIX MUSYOKI SAMMY & 6 OTHERS –VS- REGISTRAR OF TRADE UNIONS & ANOTHER [2016] eKLR

“Appeals from the decisions of the Registrar of Trade Unions to this Court present considerable challenge since the Court is called upon to look afresh at the application together with the supporting documents and see if the Registrar made a sound decision in the circumstances...”

6. The import of the reasons given by the Registrar of Trade Unions for refusing to register the first Appellant as a trade union is that even if the proposed trade union is registered, the appellants would find it difficult to operate within the provisions of the Labour Relations Act and particularly Section 54(1) thereof, due to the instability and fluid nature of the industry.

7. One of the ways in which employees have traditionally ensured that employers have listened and responded to their concerns has been to combine together in groups and to allow for representatives to speak for them. This gives individual employees both influence, power and anonymity in engaging the employer over working conditions, wages, and means of combating unfairness at work. This is the philosophy behind trade unions and it presupposes the existence of a stable industry in any given field.

8. In her correspondence referred to in paragraph 1 of this Judgment, and which preceded refusal of registration, the Registrar of Trade Unions advised the appellants on the unstable nature of the industry, and actions that were being taken to regulate the same, including a ban on registration of recruiting agencies, partial lifting of such ban, the small numbers of employees in the existing recruiting agencies and the transient nature of such employees’ employment. The appellants never disputed these facts.

9. It can be discerned from the Registrar’s correspondence and reasons given for refusing to register the proposed trade union that the foreign recruitment industry is still fluid and unstable and therefore currently unripe for entry by trade unions.

10. Creation and regulation of a stable industry in any given field is, more often than not, based on both law and policy. The Registrar of Trade unions and the National Labour Board operate administratively within the parameters of the law and policy.

11. The appellants have called upon this Court to find and to declare that the Registrar’s refusal to register the proposed trade union was unlawful, unfair and against Article 36(1) and 41(1) (2) (c) of the Constitution of Kenya and ILO Convention No. 87; and to compel the Registrar of Trade Unions to register the proposed trade union. It must, however, be noted that although Articles 36 and 41 of the Constitution, read together, protect the freedom to form and to join a trade union of one’s choice, the exercise of such freedom is not absolute. It was held in the FELIX MUSYOKI CASE (supra) as follows:-

“it is therefore inappropriate to introduce constitutional arguments in dealing with what is purely policy and administration issues. It is, indeed, true that Article 36 and 41 of the Constitution read together protect the freedom to form and join a trade union of one’s choice. However the exercise of this freedom is not absolute. It must be exercised in cognizance and conformity with policies and best practices in the Labour movement. Limitation of the right to form and join a union of one’s choice in recognition of policies and best practices which have been tested over time is reasonable and justifiable in an open and democratic society.”

12. The law, and particularly Section 20 of the Labour Relations Act, does not bar the appellants from re-engaging the Registrar of Trade Unions through submission of a fresh application for registration of the proposed trade union once the industry in issue stabilizes.

13. In the absence of allegations of bias, illegality, discrimination, improper motive or others on the part of the Registrar (the Respondent), this Court declines to substitute its own view with that of the Registrar.

14. In sum, I find no merit in the appellants' appeal. The same is hereby dismissed. Each party will bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2021

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on 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.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Waga for Appellant

No appearance Respondent