



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA

APPEAL NO. 1 OF 2019

SOLOMON WANJALA AND 6 OTHERS.....APPELLANTS

(Suing On Behalf Of The Proposed, Kenya National Union of

Breakdowns Recovery, Commuters & Freight Agency Workers)

VERSUS

REGISTRAR OF TRADE UNIONS.....RESPONDENT

JUDGEMENT

1. This is an appeal under Section 30 of the Labour Relations Act against the decision of the Registrar of Trade Unions refusal to register the Kenya National Union of Breakdowns Recovery, Commuters & Freight Agency Workers.

2. The decision of the Registrar is vide the communication contained in form D (Refusal certificate dated 14th May, 2019 executed pursuant to Section 20 of LRA 2007). The grounds for refusal stated in the form D are as follows:-

“ The targeted sector of coverage being employees in employment of road rescues, touring and recovery, automobile, tax and freight agents and other related sectors are already represented by other registered unions in the transport sector. The Transport Workers Union specifically represents any workman in the transport industry. This incorporates a narrow sector/industry basis and not on craft basis. The targeted scope of representation is a narrow segment and is already represented by the Transport Workers Union. The labour Relations Act under 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 interest in respect of which the applicant’s seek registration”

3. It is this decision of 14th May 2019 that the Appellant has appealed against. The Appellant in the Memorandum of Appeal dated 13th June, 2019 raised several grounds. In a nutshell, that the Appellant has complied with all the registration processes and been issued with certificate of promotion dated 27th March 2017 under Section 12 of the Labour Relations Act.

4. The Appellant’s application for registration was opposed by objector Transport Workers Union, which is referred to in the Refusal Certificate (form D) being that the said Union represents any workman in the transport industry and that the segment sought to be represented by the Union is already represented by the said union namely the Transport Workers union.

5. The Appellant faults the decision of the Registrar on several grounds as stated in the Memorandum of Appeal in summary being that the Appellant had satisfied the provisions of Section 12 of the Labour Relations Act and proved the industries they had sought representation are visible, viable and not represented at all or are insufficiently represented by the Transport Workers Union or any other Union, that the Registrar had not provided empirical evidence of sufficiency of representation by the Transport Workers Union like recognition agreements and/or collective bargaining agreements signed between breakdown recoveries, vehicle recoveries entities and any other Public transport entities pursuant to Sections 18 (3) & 4 of the Labour Relations Act, That the Registrar failed to appreciate the expansion of the economic Sector since the 60’s when the Transport Workers Union was registered and the said union cannot allege to have full control of the entire transport sector as alleged under its constitution, that the Registrar failed to appreciate that other employees initially under the Transport workers Union have since left and formed other Unions like the Aviation and Airport Services Workers Union, Kenya Aviation of Workers Union, Matatu Operators and matatu workers Union and long distance Workers Union and the Registrar has failed to direct Transport Workers Union to amend its constitution to remove from its objectives those sectors and employees covered by other Unions. That the Registrar erred in law and fact when she failed to interpret “ sufficiency” to apply to mean majority as opposed to mere existence of Transport Workers Union and others in the sector for which appellant sought registration while noting only Transport Workers Union

objected.

6. The Appellant states that the rejection decision is in violation of the Appellants rights under Article 36 and 41 of the Constitution of Kenya, 2010 and in breach of Section 12, 14, 18 and 19 of the Labour Relations Act and in further breach of Sections 17,4,18 and 19 of the Labour Relations Act 2007 and similarly the Respondent acted in breach of the statutory mandate conferred upon her office to discharge duties fairly, reasonable and not whimsically, capriciously, frivolously and callously. In a nutshell, that the Appellants submit that they have fully complied with provisions of Sections 12,13,14,18 & 19 of the Labour Relations Act 2007.

7. The Respondent in submissions states that there was no need to file response as court directed the matter to proceed by way of submissions. This was not an excused not to file response. The appeal was filed in 2019. The court in making its determinations considered the appeal and Rejection decision of the Respondent and the written submissions by parties.

8. The Respondent's submissions are dated 5th November 2021 and agrees that the Appellant applied for registration of Kenya National Union of Breakdown Recovery, commuters & Freight Agency Workers as a trade Union and the Appellant's application underwent all the processes as provided for under the Labour Relations Act 2007.

9. The Respondent further submits that it sought the Advice of the National Labour Board on the registration as provided for under the Provisions of Section 31 (3) of the Labour Institutions Act during the Board's meeting held on 10th to 11th May, 2019 and the Board advised against the registration of the proposed Union. The court finds that without the productions of the said minutes the submission carries no weight in this case as the Respondent did not file an affidavit. The only justification of her decision is contained in the form D produced by the Appellant which does not mention the said Board. The directions on the submissions did not prevent the filing of Affidavit to produce the minutes or decisions of the Board or to make the averment.

10. The Respondent submits that she communicated the decision of refusal to register the Appellant's proposed Union vide the letter dated 14th May, 2019 and grounds of refusal are in the attached form D copies attached to Memorandum of appeal at pages 48 to 49. The court will consider the merit of the decision .

11. The Respondent submits that the Appellants are represented by Transport Worker Union and no evidence was produced that they are not sufficiently represented. That the Respondent appreciates the dynamism of the transport sector and submits even though there are other registered Unions in the transport sector like the Matatu Workers unions and others, the said unions are sector based and not segments/and/or divisional of a specific sector as the case with the Appellants. That the Appellant did not produce any evidence that their members work for the sector they seek to represent, hence the Respondent did not breach the fundamental rights and freedoms of the Appellants as provided for under the provisions of Section 4 of the Labour Relations Act and Article 41 (2) C of the constitution of Kenya,2010 . The court finds that the issues of evidence of membership employment was not one of the reasons for refusal to register the Appellant proposed union under form D.

12. The Respondent further submits that it is not automatic right that a proposed union that has sought registration it must be registered. That the Industrial Relations Charter of 1980 provides for re-organization of trade Unions along sector lines to avoid duplication and encroachment of recruitment in other rival unions. The rights under Article 41 of the Constitution can be limited under Article 24 of the constitution.

The Determination

13. The court has identified issues for determination of the Appeal as follows:-

- i. Did the Appellants satisfy all the Statutory requirements for the registration of Union?
- ii. Was the Registrar of Union justified to find that the Transport Workers Union was sufficiently representative of the whole or substantial proportion of the interest of the proposed Union in Breakdown Recovery Commuters freight Agency Workers and therefore a new Union was not warranted.
- iii. Was there justifiable reason in terms of Articles 24 (1) of the Constitution of Kenya , 2010 in the circumstances of the case so as to limit the Appellant's rights to form, join or participate in the activities under programs of the Union.

14. The above issues are informed by the Supreme court decision cited by the Appellants being Supreme court of Kenya at Nairobi Petition No. 4 of 2018 reported as : Kenya Plantation & Agricultural Workers Union -vs The Kenya Export Floriculture, Horticulture and Allied Workers Union (KEFLIAU) represented by its Promoters David Benedict Omulama & 8 others and the Registrar of Unions (2020) Eklr - paragraph 34 where the court held:-

“ it is clear in our minds that once application for the registration of trade Unions has been made and the same is compliant with the aforesaid sections (12, 13 & 14 of the Labour Relations Act) and the Constitution, the Registrar of Trade Unions has no choice but to register the same. The only reason for refusal of registration is where there is another trade Union sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Applicant seek registration as provided under section 14 (1) (d) of the same Act”.

i. Whether the Appellant satisfied all the statutory requirements from the Registration of the Union.

15. It is not in dispute that the Appellant complied with the provisions of Sections 12 and was issued with certificate dated 27th March, 2017 certifying that the proposed Kenya National Union of Breakdowns Recovery, Commuters and Freight Agency Workers was authorized to “undertake lawful activities in order to establish a trade union and that an application for the registration of the trade union shall be made to the Registrar within six months of the date thereof”.

16. It is also not dispute that the Appellants lodged application for registration in terms of Section 18 of the Labour relations Act and had satisfied all requirements under Section 18 (1) a, b & c and 18 (2) in that the prescribe fee was paid, copies of constitution of the Trade Union was attached, attendance register and minutes of the meeting at which the trade Union was established were attached to the application. It is also not in doubt that the provisions of Section 18 (2) were satisfied in that 7 members of the proposed trade Union signed the application and all these documents are attached to the memorandum of appeal.

17. The court notes that the Registrar of Unions on receipt of the application did not in terms of Section 18 (3) (a) & (b) call for further information with the purposes of evaluating the Application nor did they request the proposed name to be altered in terms of Section 18 (4) (a).

18. The Respondent being satisfied with the compliance with formal requirements of the application for registration caused Gazette Notice No. 5277 dated 21st November, 2017 under the Labour Relations Act to be issued notifying pursuant to Sections 14, 15 and 17 of the Act all trade Unions Federation of Trade Unions employers organizations or Federations of the receipt of application for registration of Kenya Union of Breakdown, Recovery, Commuters And Freight Agency workers and notice was given to the following registered Unions being Transport Workers Union, Public Transporters Operators Union and Matatu Workers Union to submit such objection against the Appellant union within twenty one (21) days of publication of the Notice dated 21.11.2017. The notice was signed by EN Gicheru Registrar of Trade Union.

The question is therefore unanswered in the affirmative.

ii. Was the Registrar of Unions justified to find that there were another registered trade Union namely the Transport Workers Union sufficiently representation.

19. The constitution of the proposed Union defines the scope of the union in Clause 1.3 to be Road rescue, touring & recovery, mobile garages, home movers, tax and freight agents and other sectors with the scope of the Union.

20. At page 52 the Appellant appeal is annexure of the Annual returns of the Transport Workers Union where it indicates, its members are employed in general transport/Haulage/Road/Air Transport, Tour operations, Travel agents, passenger (Bus) Matatu Transport, Courier/Parcel Services, Driving School, Petrol/Service Station and Allied Industries.

21. Both parties have disclosed to the court that the Registrar has registered other Unions in the transport Sector like the Kenya Aviation Workers Union, Long distance Track Drivers Workers Union, Public Transport Workers union, Matatu Workers Union, Tax Operators Workers Union among others. These Unions have been registered while the Transport Workers union was in existence. That means that the Registrar appreciated that the Union did not sufficiently cater for all employees in the Transport Industry. Why then deny the Registration of the Appellant’s proposed Union under Section 14 (1) (d) after it had met all conditions for Application Registration as a Union? The court noted there was an objection by the Transport Workers Union dated 6.8.2018 and the Appellant was given opportunity to respond and did so vide a letter to the Respondent dated 24th August, 2018. It would appear the Registrar was persuaded by the objection in finding that the Transport workers union represented the workers targeted by the Appellant, sufficiently.

22. Section 14 (1) (d) of the Labour Relations Act States:-

(14) A trade Union may apply for registration if-

(d) No other trade Union already registered is -

(i) In the case of a trade union of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the Applicant seeks registration”.

This is the provision relied on by the Registrar to refuse the registration.

22. However, Section 14 (2) of the Labour Relations Act reads:-

“ Notwithstanding the provisions of sub section 1 (d) the Registrar may register a trade Union consisting of persons working in more than one Sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote respective sectoral interests of employees. The membership of the proposed union consists of workers on Road rescue, touring and recovery, mobile garages, freight agents home movers and related sectors. Therefore in terms of Section 14 (2) of the Labour Relations Act the registrar in exercise of his/her discretion to register or not had to consider the constitution of the proposed Union to determine it contained suitable safeguards to protect and promote the “representative sectoral interests of the employees”.

23. It is doubtful from reading of the Rejection certificate that the Registrar addressed her mind and applied the above outlised provisions of Section 14 (2) of the Labour Relations Act. Section 4 (c) of the Labour Relations Act provides that every employee has a right to :-

a. Participate in forming a trade union

b. Join a trade Union or

c. Leave a trade Union.

24. The 2010 constitution upheld the Appellant's rights under section 4 of the Labour Relations act under Article 41(2) that "every worker has a right :-

a. Form, join or participate in the activities and programs of trade union."

25. The Registrar had a statutory duty to consider the above provisions of the statutory law and the Constitution before making a decision to deny the appellants their constitutional right.

26. It is further submitted by the Respondent that the industrial Relations charter of 1980 provided for reorganization of trade unions along Sector lines to avoid duplications and encroachments to other rival unions. That the Appellants did not provide any evidence that they work for the sector they wish to represent. This submission is not reflected in the notification of refusal of registration as informing the decision. The Supreme court decision (supra) stated that once a Union has met the criteria for application the only outstanding issue to consider was section 14 (1) (d) as section 14 (2) provides for exception to register another union even where another one exists.

27. Applying provisions of section 14(2) of the Labour Relations Act, the Registrar may register another union where one already exists in the sector upon an examination of the Constitution of the Appellants for "suitable provisions to protect and promote the respective sectoral interests of the employees". The Registrar failed in this respect to the detriment of the Appellants.

28. Appellant submits on law of sufficiency under Section 14 (1) (d) (i) of the Labour Relations Act and relies on the *Supreme Court case Kenya Plantation & Agricultural workers Union (supra)*. The Appellant submits that the burden to prove the sufficiency test lay with the Registrar. To buttress their submissions the Appellant relies on decision by my brother Justice Mathews Nduma in *Nahason Nchamae & 9 others -vs - Registrar of Trade Unions (2017) Eklr* at paragraph "9" where the court stated:-

"In the present case, the Registrar of Unions in denying the Appellants a right to fundamental freedom under Article 30 & 41 of the constitution must demonstrate compelling reasons supported by tangible evidence that the Union that objects to the registration of a rival Union sufficiently represent the whole or substantial proportion of the interests of the sector in question."

29. The decision by the Registrar of Unions indicates that the proposed Union seeks to represent segment of sectors represented by Transport workers Union. The reason by Registrar of sufficiency under 14 (1) (d) is not supported by any evidence.

30. This court takes judicial notice that there are millions of employees in the transport sector and even in the areas proposed as target of the proposed union and there exists apparent substantial gap of representation such that without evidence to the contrary the court finds the decision of the Registrar is unsupported and without basis. The court takes notice of other unions registered under the Transport sector by the Registrar of Unions and enumerated earlier in this decision and in the submissions by both parties.

31. The word "Sector" under the Act is defined to mean an industry or service or part of an industry or service. Applying this definition then the argument that the denial is because the proposed Union workers are drawn from segment of sectors under the objector, transport workers Union, does not make sense. Indeed the definition of sector is too broad and vague to apply to justify refusal of a union because another one exists. As stated by the supreme court the only test is sufficiency test under Section 14(1) (d)(i) of the Labour Relations Act. From the foregoing the sufficiency test was not met the rejection of registration is not supported by the law and evidence.

iii. Whether the decision the Registrar is justifiable under the circumstances in terms of Article 24 (1) of the constitution so as to limit the Appellants right to form join or participate in the entities, and programs of a trade union.

32. Article 41 (2) (c) of the Constitution gives every worker a right form, join or participate in the activities and programs of a trade union. This right also exists under Section 4 (a) (b) & (c) of the Labour relations Act.

33. The Respondent submits that, notwithstanding the provisions of Article 41 of the Constitution it is not an automatic right that since a proposed trade Union has sought registration it must be registered and further submits that rights conferred under Article 41 of the Constitution can be limited under Article 24 of the constitution. I already referred to the Supreme Court decision in *Kenya Plantation & Agricultural Workers Union case* to effect that that once the applicant has met criteria of application for registration of a union the only issue on registration is compliance with section 14 (1) (d) (i) of the Labour Relations Act.

34. Article 24 of the Constitution of Kenya 2010 provides that a right or fundamental freedom under the bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic Society based on human dignity, equality and freedom taking into account factors stated therein.

35. Pursuant to Article (20) (3) (b) of Constitution of Kenya, 2010, a court is required to adopt the interpretation that most favours the enforcement of a right and fundamental freedom. The court has already found the decision of rejection was without basis for failure to meet the sufficiency test and for non-compliance with provisions of section 14 (2) of the Labour Relations Act to extend that the Registrar did not demonstrate that she factored the constitution of the proposed Union in rejecting its application on ground under 14(1)(d)(i) of the Labour Relations Act.

36. The court finds that the limitation of the rights to join and form a union of the Appellants by the Respondent is not reasonable or justified. The Respondent in referring the registration did not apply the principle of reasonableness and justification. The Appellants further

submit that there application was not presented to the National Labour Board as required under Section 19 of the Labour Relations Act and that under section 31 (3) the Registrar of unions is required to act on advise of the Board. The Appellant submits the Respondent made unilateral decision as she does not mention in Form A advice from the Board proceeding the rejection. The Respondent submits they sought Board position but without any evidence before the court, the court is inclined to agree with the Appellant.

37. The court finds there is precedence of Unions registered for members falling under the broad mandate of the Transport Workers Union and the form D issued to Appellants goes against that precedent. The court agrees with the Appellant's submission that having registered other several Unions under the Transport Sector, the only eligibility criteria to apply was section 14 (1) (d) (i) of the Labour Relations Act.

38. Considering the forgoing the court finds that the limitation of the right of the Appellant under article 41 of the Constitution was not thus justified in an open and democratic society.

CONCLUSION

39. Considering the court findings, inter alia, that the sufficiency test under section 14 (1) (d) (1) of Labour Relations Act was not justified, that the Registrar did not address herself on section 14(2) of the Labour Relations Act and the precedence set in registering other unions in the transport sector this Court finds the action by the Registrar of Unions to refuse the registration of the appellant union is not reasonable and justifiable in an open and democratic Society based on Human dignity, equality & freedom.

40. The court further finds the refusal by the Respondent to register Kenya National Union of Breakdowns recovery, Commuters & Freight Agency Workers upon satisfying the requirements of section 12 & 18 of the Labour Relations Act No. 14 of 2007 is contrary to Article 41 (2) of the Bill of rights under the Constitution of Kenya ,2010 and the decision is null and void ab initio.

ACCORDINGLY THE COURT:-

a. Directs the Registrar of Unions to register the Kenya National Union of Breakdown Recovery, Commuters & Freight Agency Workers and issue it with a certificate of Registration in Form B set out in second schedule to the Labour Relations Act No. 14 of 2007 within 14 days from today's date.

b. That each party bears its own costs of this suit.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN BUNGOMA THIS 14TH DAY OF DECEMBER, 2021

J. W. KELI

JUDGE

Read in open court in the Presence of:-

Court Assistant: Brenda Wesonga

Parties appearing Online

For : Appellant – Solomon Wanjala

For: Respondent: Adwar holding brief for Tarus