



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 323 OF 2018

STEPHEN KABURIA RUTEERE.....CLAIMANT

- VERSUS -

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS

HOSPITAL WORKERS (KUDHEIHA WORKERS).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th May, 2019)

JUDGMENT

The claimant filed the statement of claim on 15.03.2011 in person. The claimant prayed for judgment against the respondent for orders:

- a. That the failure by the respondent to avail financial and legal advice to the claimant upon his termination was unconstitutional, unlawful, and unfair in its totality and intent hence null and void.
- b. That the respondent pays the claimant herein the sum of Kshs.4, 022, 000 as tabulated in paragraph 3.18(7) of the statement of claim.
- c. That the respondent pays interest on the total sum at Court rates.
- d. That the respondent herein pays a 20% interest on the award every month until settlement is cleared.
- e. Compensation for damages at Court rates.
- f. That the cost of the suit be borne by the respondent.

The respondent filed the statement of defence on 03.05.2018 through M/S J.A. Guserwa & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs as lacking in merit, legal grounds and filed in bad faith.

There is no dispute that the claimant was employed by the Kenyatta National Hospital from 01.03.1999 to 11.10.2017 when he was dismissed from employment. The claimant was a member of the respondent trade union but as at the time of dismissal, the evidence showed that he had joined another trade union. The claimant was employed as Nursing Officer III in the Hospital's Nursing Department. There is no dispute that at all material time the claimant was a member of the trade union, the respondent. There is also no dispute that the respondent and the Hospital had concluded binding recognition and collective agreements.

The claimant was interdicted from work by the Hospital by the letter dated 20.12.2013 upon allegations and report to the Hospital's management that the claimant had on 19.12.2013 between 8.00am and 10.00pm been spotted within the Hospital distributing undated leaflets urging the Hospital's health workers to join the strike by the county health workers which had already been declared illegal and unconstitutional by the courts. The interdiction was effective 20.12.2013 and on half basic salary plus full house, medical outpatient and transport allowances.

The claimant's case was that he was a fully paid up member of the respondent and he personally reported the interdiction to the union branch chairman of the works committee one Jared Konam seeking legal representation and financial assistance. The chairman failed to act on his promises to assist the claimant and the union head office advised the claimant to write to the Secretary General of the respondent. The claimant wrote the letter dated 10.09.2014 requesting for financial assistance towards having justice served in the matter in his favour. The

claimant's case is that he received no response to his letter for legal advice and financial assistance. In the circumstances, the claimant states that he engaged advocates who filed Cause No.181 of 2016 in the Employment and Labour Relations Court at Nairobi and a ruling was made in his favour but the main suit was pending for determination.

The claimant's further case is that the Hospital preferred a criminal complaint against him in Criminal Case No. 4192 of 2016 and he appointed advocates to act for him in the case which was pending determination.

Further that on 11.10.2017 he was unlawfully and unfairly terminated from employment and on 10.01.2018 the claimant wrote to the respondent requesting for financial assistance. The respondent replied by the letter dated 11.01.2018 acknowledging receipt of the claimant's letter of 10.01.2018 notifying dismissal and for assistance to hire a lawyer. The letter by the respondent stated that the claimant being a member of the union was not required to hire a lawyer because it was the union's responsibility to handle the matter and to provide free services to the claimant. The letter further stated that according to the recognition agreement and section 55 of the Labour Relations Act, 2007, the works committee members being members' representatives at the industrial level were required to handle the arising grievances first before they are reported to the union branch office and head office. The letter advised the claimant that his case not having been handled by the works committee, he was advised to present his claim or dispute to the shop-steward for appropriate action. The letter was copied to the chief shop-steward and works committee were fully informed. The claimant was advised to move with speed not to delay his dispute.

The claimant's further case was that by the letter dated 15.01.2018 his advocates, Eshiwani Ashubwe & Company Advocates required him to pay Kshs.1, 000, 000.00 within 30 days being outstanding legal fees and failing the legal services would cease. Thus on 16.01.2018 the claimant wrote to the respondent seeking financial assistance to pay the legal fees for continued representation and in view of the demand by his bank to pay the outstanding loan. The letter concluded, **"In view of the above scenario, I believe that your office will expeditiously consider my request for financial support to enable me sustain my daily subsistence as I embark on looking for alternative sources of livelihood."**

The respondent replied the claimant's letter of 16.01.2018 by the letter dated 18.01.2018. The union noted that instead of following the union's advice to follow due process of presenting his claim to the shop-steward and the works committee, the claimant was insisting to take the same to a lawyer. The letter further stated that it was the responsibility of the union to represent the claimant and if a lawyer was to be hired, it was the union to do so and not the individual member. The letter further stated that if a member hired a lawyer to act in a criminal case against the member then it was not the constitutional mandate of the union. The letter concluded, **"We once again advise you to present and handover your dispute to the Chief Shopsteward and the Works Committee of Kenyatta National Hospital for speed handling and may be amicable settlement."** The letter was signed by the respondent's Secretary General one Albert Njeru.

The claimant's case is that the respondent had an excellent opportunity and mandate to represent the claimant's interest in terms of sound advice, legal representation and financial assistance as per the Constitution of Kenya, 2010; the Labour Relations Act, 2007; and the respondent's registered constitution. Further, the claimant says that as at termination the claimant was a valid member of the respondent and was entitled to the representation and assistance as claimed. Further the claimant's case is that his claims are within Rule 13 of the respondent's constitution which provides that funds of the union may be applied for:

- a. The prosecution or defence of any legal proceedings to which the union officer or any member thereof is a party when such prosecution or defence is undertaken for purposes of securing or protecting any rights of the trade union as such or any rights arising out of the relations of any member with his employer.
- b. The conduct of trade dispute on behalf of the union or any member thereof.
- c. The compensation of members for loss arising out of trade disputes.
- d. Such allowances to members or their dependants on account of death, old age, sickness, accidents or unemployment as the National Executive Board may from time to time prescribe.

The claimant further states that the respondent failed to exercise in the claimant's favour the provisions in the collective agreement between the Hospital and the respondent on procedures for handling grievances between the Hospital and an employee such as the claimant who was a union member.

The claimant pleaded that he had suffered psychological torture, great loss and damage and was therefore entitled to general damages for failure by the respondent to avail financial and legal assistance and an abuse or negligence of the constitution of Kenya, the respondent's constitution and rules, the Labour Relations Act, 2007, and the collective agreement for the time being in force. He further claimed and prayed that the respondent pays him Kshs. 1, 550, 000.00 being the expense he used to pursue the civil suit he filed against the Hospital and the criminal case the Hospital preferred against him. He also prayed for special maximum compensation for non-representation and offer of legal assistance after the termination being Kshs 152, 000.00 x 12 making Kshs.1, 824, 000.00.

The respondent's case was as follows as per the defence:

- a. The respondent and the claimant were bound with the terms of the collective and recognition agreements between the Hospital and the respondent.
- b. Clause 17.6 of the collective bargaining agreement for 2011/2013 the interdiction was prescribed as was imposed against the claimant.
- c. The respondent did not ignore or refuse to represent the claimant but instead of appearing before the disciplinary meeting, he ignored the agreed and laid down procedures and bypassed the union by not reporting the interdiction and he went straight to engage

services of a lawyer without consulting the respondent.

d. The respondent was available to represent the claimant at the disciplinary committee and up to the Court but the claimant refused to be so represented by the union shop floor officials.

e. The claimant was advancing interests of the Kenya national Union of Nurses (KNUN) and the union filed petition 53 of 2014 to challenge the claimant's interdiction but the Court at Nairobi dismissed the application seeking to bar the Hospital from acting on the interdiction. Official search shows that the claimant is a registered official of KNUN.

f. The claimant ignored the respondent's advise that his case be handled by the chief shop-steward and the works committee at the Hospital.

g. Clause 3 of the recognition agreement provides about individual grievances that an individual employee of the Hospital wishing to raise a grievance with which he/she is directly and personally concerned shall first approach his immediate superior. In case settlement is reached he/she shall have the right to appeal to higher level of the Management as soon as possible in accordance with the established procedures. The employee shall at all stages be represented and accompanied by accredited Union Representative. Further, Clause 21 of the collective agreement provided that all disputes between the union and the Hospital shall be handled in accordance with the Labour Relations Act, 2007. The respondent's case is that the claimant acted in disregard of such binding and agreed provisions.

h. It was the respondent's National Executive Board that could hire advocates in a particular dispute as necessary and the claimant could not hire his advocates and then expect the respondent to meet the financial implications. Further the claimant had ignored the laid down procedures for handling workers grievances and instead unilaterally hired his advocates. Since the respondent never hired the advocates, it was not liable in any manner to pay as prayed. Further the respondent had not negotiated the legal fees subject of the suit and claims.

i. There was no basis for the respondent to pay the claimant Kshs.152, 000.00 monthly allowance or Kshs. 608, 000.00 from the time of dismissal as claimed because the claim is not justified.

j. There is no provision that trade union members can draw benefits from funds of a trade union as benefit to individual member like in a pension scheme.

The Court has considered the pleadings, the submissions and the evidence. The Court makes findings as follows:

1. The evidence is that the claimant did not present to the union at branch or head office levels his predicament about the interdiction. Accordingly, the claimant cannot find a valid liability that the respondent failed to render assistance in his favour in relation to the interdiction. In any event the claimant testified that upon interdiction he unilaterally hired a lawyer and he agreed to pay - and the union was not party to that decision.

2. The claimant testified that in the criminal case at Kibera Magistrate's Court he exclusively decided to hire a lawyer and the respondent was not a party to it and the union, the respondent, never approved that he hires the lawyer. The Court returns that the union is not liable.

3. Accordingly the Court returns that the claimant unilaterally hired advocates in the civil case to oppose the interdiction and in the criminal case to act for him. The Court finds that in so doing the claimant was acting alone without the authority of the respondent to hire and negotiate legal fees for the advocates he hired. The claimant has not established any basis that would make the respondent liable in that regard.

4. Maximum compensation of 12 months as prayed for is construed to be under section 49 of the Employment Act, 2007 as payable by an employer for unjustified or unfair termination. There was no employment relationship between the parties and the Court returns that the prayer was misconceived.

5. The claimant admitted that towards the end of 2014 he joined KNUN and he was charged in the criminal case sometimes in 2016. Further he was terminated or dismissed in 2017 at a time he had joined KNUN. The claimant admitted that he wrote in September, 2014 to resign from the respondent. While the Court finds that the claimant failed to invoke (as was advised by the respondent) the procedure of reporting his case to the chief shop-steward and going through the works committee at the Hospital and as was undisputedly the applicable and agreed procedure, the claimant as at dismissal on 30.10.2017 admitted to have already joined KNUN. The Court finds that it was misconceived that as at that time he could legitimately expect assistance from the respondent, KNUN, at the time being a union rivaling the respondent. The Court returns that at the material time, the claimant was not acting in good faith by making demands as was done against the respondent while knowing that he had moved to KNUN.

6. As submitted for the respondent and as held by Rika J. in **David Musyoki Watuku –Versus- Mabati Rolling Mills & Another [2009]eKLR**, stewards are the eyes and ears of the trade union at the shop-floor level. In the present case the claimant failed to comply with the shop-floor disciplinary procedure and he cannot therefore say the respondent failed to represent him.

In conclusion judgment is hereby entered for the respondent against the claimant for the dismissal of the claimant's statement of claim with costs.

Signed, dated and delivered in court at Nairobi this **Friday 24th May, 2019.**

BYRAM ONGAYA

JUDGE