



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 49 OF 2018 CONSOLIDATED WITH PETITION NO. 123 OF 2018

CHARLES WAWERU KIMANI.....1ST PETITIONER

ABEDNEGO MUTUA.....2ND PETITIONER

CHARLES OLUOCH.....3RD PETITIONER

PETERSON SAGWE OGAMBA.....4TH PETITIONER

KITHEMBE KYALE.....5TH PETITIONER

DANIEL MAILU.....6TH PETITIONER

DANIEL MWASYA.....7TH PETITIONER

ELLY MURATENYI VITA.....8TH PETITIONER

JOASH OTWOMA BOSIRE.....9TH PETITIONER

ANTONY MWANGI KINYUA.....10TH PETITIONER

- VERSUS -

KENYA KAZI SERVICES LIMITED..... RESPONDENT

- AND -

KENYA PRIVATE UNIVERSITIES

WORKERS UNION.....1ST INTERESTED PARTY

KENYA NATIONAL PRIVATE SECURITY

WORKERS UNION.....2ND INTERESTED PARTY

CENTRAL ORGANISATION OF

TRADE UNIONS.....3RD INTERESTED PARTY

CONSOLIDATED WITH

ISAAC G.M ANDABWA (THE NATIONAL GENERAL

SECRETARY KENYA NATIONAL PRIVATE

SECURITY WORKERS UNION).....PETITIONER

- VERSUS -

KENYA PRIVATE UNIVERSITY

WORKERS UNION.....1ST RESPONDENT

KENYA KAZI SECURITY LIMITED.....2ND RESPONDENT

CHARLES WAWERU KIMANI.....3RD RESPONDENT

ABEDNEGO MUTUA.....4TH RESPONDENT

CHARLES OLUOCH.....5TH RESPONDENT

PETERSON SAGWE OGAMBA.....6TH RESPONDENT

KITHEMBE KYALE.....7TH RESPONDENT

DANIEL MAILU.....8TH RESPONDENT

DANIEL MWASYA.....9TH RESPONDENT

ELLY MURATENYI VITA.....10TH RESPONDENT

JOASH OTWOMWA BOSIRE.....11TH RESPONDENT

ANTONY MWANGI KINYUA.....12TH RESPONDENT

JAIRUS KATERE SHIAMALA.....13TH RESPONDENT

- AND -

CENTRAL ORGANISATION OF

TRADE UNIONS (K).....1ST INTERESTED PARTY

REGISTRAR OF TRADE UNIONS.....2ND INTERESTED PARTY

PRIVATE SECURITY

REGULATORY AUTHORITY.....3RD INTERESTED PARTY

THE HONOURABLE

ATTORNEY GENERAL.....4TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2019)

JUDGMENT

The petitioners in petition 49 of 2018 filed the petition on 30.05.2018 through Naikuni, Ngaah & Miencha Company Advocates. The petition was stated to be under Articles 1, 2, 3, 10, 22, 36, 47, 50, 258, & 259 of the Constitution of Kenya. It was titled to be in the matter of the alleged contravention of fundamental rights and freedoms as enshrined under Articles 1, 2, 3, 10, 19, 201, 21, 22, 23, 24, 27, 36, 41(1), 47, 50 of the Constitution of Kenya, 2010; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; the Fiar Administrative Action Act, 2015; sections 3 & 12 of the Employment & Labour Relations Court Act, 2014; sections 7 & 17 of the Employment and Labour Relations Court (Procedure) Rules 2016; and sections 4(1) and 54 (1, 2, 3, 4, 5, 6, 7) of the Labour Relations Act, 2007.

The petitioners case is that Article 41 (2) (c) of the Constitution of Kenya gives every worker the right to form, join or participate in the activities and programmes of a trade union; section 54 of the Labour Relations Act, 2007 on recognition of trade unions by employers provides that an employer, including an employer in the public sector, shall recognize a trade union for purposes of collective bargaining, if that union represents the simple majority of unionisable employees; and section 46 (c) (d) (e) and (f) of the Employment Act, 2007 provides that participation in union activities does not constitute a good ground for dismissal or for imposition of a disciplinary penalty. The

petitioners urge that an employer is bound to recognise a union if the union represents a simple majority of the unionisable employees of the employer in question.

The petitioner's further case is as follows:

a) The petitioners are appointed as representatives of the respondent's KK-US Embassy Guard Force (hereafter simply Embassy Guard Force) who are a special, distinct, autonomous Guard Force specifically meant for a special project of the respondent. The Guard Force is made up of 1,060 guards situated across Kenya whose main purpose is to provide security services for the United States Embassy offices in Kenya and to the official residence of the US diplomats in Kenya. The respondent was contracted to provide the guarding services sometimes in 2002.

b) In 2007 the guards in Embassy Guarding Force joined the Kenya National Private Security Workers Union (KPSWU). The respondent urged that the KPSWU could not register a separate collective bargaining agreement (CBA) with respect to the Embassy Guarding Force from that registered for other guards in commercial sector such as supermarkets. The dispute went to Court and on 06.12.2011 the Court (Rika J) in **KNPSWU –Versus-Kenya Kazi Services Limited Cause 1449 of 2011at Nairobi** found that the Embassy Guarding Force is a special, autonomous and distinct entity and a stand-alone project of the respondent. The petitioner's case is that despite the 2nd award in in **KNPSWU –Versus-Kenya Kazi Services Limited Cause 1449 of 2011at Nairobi** the KNPSWU went ahead and negotiated a substandard CBA with the respondent The petitioners were therefore disappointed and they lost faith in the ability of the KNPSWU to represent their interests in labour relations matters.

c) The KNPSWU was unable to negotiate a new CBA with the respondent especially that its officials are in a dispute in Cause No. 769 of 2015 at Nairobi about issues ranging from allegations of officials having been compromised, divided, misled and enticed by the respondent to cause their acceptance of a sub-standard CBA.

d) On 31.12.2016 the members serving in the Embassy Guarding Force became dissatisfied with the services and relationship with the KNPSWU and they unanimously resolved to formally and legally leave that trade union and to form its Special Purpose Vehicle (SPV) to deal with all employment and labour relations matters including CBA and recognition between them, the respondent, and the US Embassy. The decision was based upon the KNPSWU lacking capacity to adequately represent the employees before the respondent; and the integrity issues the leaders of the KNPSWU were facing.

e) On 03.01.2017 the members serving in the Embassy Guarding Force through their duly appointed workers' representatives issued a formal notice of withdrawal from their former union KNPSWU and they have accordingly ceased to be members of that union.

f) The registration of SPV was taking time and there were legal challenges to labour representation of the members of the Embassy Guarding Force and they pursued a tentative arrangement with the Kenya Private Universities Workers Union (KPUWU). On 13.01.2018 the representatives of the Embassy Guarding Force and KPUWU entered into a formal arrangement that would enable KPUWU to represent the Embassy Guarding Force members and the two concluded a memorandum of understanding (MOU). The petitioners' case is that the MOU also established operational modalities for their cooperation within Kenya in empowering workers of the respondent and their families in their struggle for just and humane conditions of work to improve the quality of their lives and to attain social justice and sustainable development in an atmosphere of democracy. The arrangement is within the provisions of International Labour Conventions Kenya is party to and the provisions of the Constitution of Kenya, 2010.

g) On 23.03.2018 the representatives of the Embassy Guarding Force members and the officials of the KPUWU together with their advocates presented to the respondent a letter forwarding a draft recognition agreement for amendments and subsequent adoption. The KPUWU approached the respondent for recognition on the grounds that it had been approached by the guards working in the US Embassy Guarding Force for representation, had recruited more than 50% +1 of the unionisable guards as its members and a super majority of the guards had been recruited by the KPUWU; the union was the sole and rightful or appropriate one to represent the interests of the unionisable employees of the respondent on matters pertaining terms and conditions; and there was no revival union claiming representation or recognition.

h) The KPUWU served the respondent with check-off forms signed by its employees for the deduction of union dues and also suggested that parties meet in 14 days thereof in order to sign the recognition agreement.

i) The respondent refused to sign the recognition agreement despite numerous efforts by the petitioners, its legal representatives and the officials of the KPUWU.

j) The petitioners consider the refusal by the respondent to recognise the union of their choice as a violation of their fundamental rights and freedoms.

The petitioners filed the present petition 49 of 2018 and they prayed for judgment against the respondent for:

- 1) The matter be certified as urgent and the service of the petition be dispensed with in the first instance.
- 2) The Honourable Court be pleased to make an order of declaration that the petitioners and workers in Kenya have a constitutional and fundamental right to leave and join a union of their own choice.
- 3) An order compelling the respondent company to recognise the Kenya Private University Workers Union as the guard force's union of choice and to sign the recognition agreement with the said union.

4) Costs of the application be provided for.

To oppose the petition the respondent filed grounds of opposition on 14.06.2018 through Hamilton Harrison & Mathews Advocates and Mr. Makori Advocate appeared throughout in that behalf. The respondent also filed on 14.06.2018 the replying affidavit of Farah Esmail, the Group Human Resource and Legal Director of the Respondent. The grounds and facts in opposition to the petition were as follows:

a) The respondent employees over 10, 400 employees in its various departments and parts of Kenya and out of which about 8, 986 are guards.

b) The respondent offers services in the private security sector.

c) The 10 petitioners are employed by the respondent as guards and are assigned duties at the Embassy of the United States of America, one of the respondent's customers. That group of employees serving at the Embassy are not special, autonomous or distinct entity as alleged for petitioners and there is no entity in the respondent's establishment known as KK-US Embassy Guard Force (also referred to in this judgment as simply, Embassy Guard Force).

d) The respondent has a contract to provide security services to the Embassy of the United States of America as it does have contracts with all of its clients. The current contract with the Embassy was signed in 2017 and will lapse in 2022.

e) The respondent has a recognition agreement with the KNPSWU which is the union registered to represent unionisable employees in the sector of private security services. The respondent recognises the KNPSWU as the sole union for all employees of the respondent as per section 2 of the recognition agreement. The respondent has also signed a CBA with the KNPSWU and which was registered in Court on 08.05.2018. Earlier in 2013 the respondent concluded a CBA with KNPSWU to cover staff working for the Embassy and who continues to enjoy those terms of service.

f) In January 2017 the petitioners and other guards deployed at the Embassy informed the respondent that they had withdrawn membership in KNPSWU and they had instructed their advocates Naikuni Ngaah & Miencha Company Advocates to act as their union for purposes of collective bargaining. The respondent replied to the Advocates' letters by stating that they were not available for negotiations and that the petitioners could not collectively bargain through the petitioners' advocates.

g) By the letter dated 23.03.2018 the KPUWU conveyed to the respondent that 900 respondent's employees working at the Embassy had joined KPUWU. The KPUWU then forwarded the check-off forms together with a recognition agreement. The union sought deduction of union dues and a meeting to discuss recognition with the respondent.

h) The respondent met the representatives of the workers, their advocate and officials of KPUWU on 25.04.2018 and the respondent informed them that the constitution of KPUWU had been reviewed and upon legal advice, the respondent could not recognise KPUWU due to the following reasons:

- The KPUWU had not met the criteria for recognition under section 54 of the Labour Relations Act.
- The KPUWU represents all workers in private universities as such it is not the proper union to represent workers in the private security sector.
- The respondent has concluded a recognition agreement and a CBA with the KNPSWU and which is the union representing unionisable employees in the private security sector.
- The respondent has 8, 986 employees employed as guards and being unionisable but the KPUWU had recruited only 900 which was way below the statutory provision of 50% +1 majority of the unionisable workers.
- The KNPSWU had recruited a total of 7, 000 employees out of the 8, 986 unionisable guards in the respondent's employment.
- There was no basis for the respondent as a single employer to enter numerous recognition and CBAs based on the employees assigned at its various clients as guards.
- An employer could not recognise two unions with respect to the same category of staff.

i) The respondent's advocates wrote to the petitioners' advocates the letter dated 27.04.2018 confirming that as discussed in the meeting of 25.04.2018 the respondent would not recognise KPUWU for purposes of collective bargaining due to the reasons set out above.

j) On 27.04.2018 the respondent's advocates sought guidance from the Registrar of Trade Unions on the matter and on 15.05.2018 the Registrar replied that the KNPSWU represented workers employed in private security firms and that the KPUWU represented all workers in private universities. The Registrar has provided the constitution of the KNPSWU and confirmed that it is the correct sector union for private security services.

k) The petitioners had failed to report a trade dispute but the respondent had reported a dispute to the labour officer but no conciliator had been appointed. Further the Registrar had made her decision in the matter and no appeal had been preferred.

l) The petitioners and their workmates who had joined the KPUWU were beneficiaries of the CBA negotiated by the KNPSWU. The petitioners cannot be allowed to stop the KNPSWU from representing the employees in the sector it is registered to operate.

The petition 123 of 2018 was filed on 09.11.2018 through D.B.Wati & Company Advocates. The Petitioner prayed for:

- a) A stay of the order of 19.07.2018 in ELRC Petition No. 49 of 2018.
- b) An injunction restraining the 1st, 3rd to 13th respondents, their servants or agents from encroaching, inciting, intimidating, verbally abusing, posting or publishing defamatory statements against the petitioner and the interested parties on social media or on any other platform.
- c) Directing the petitioners' union dues to be paid to the 1st respondent herein.
- d) An order for the petitioners and the 2nd respondent to conclude a CBA for the American Embassy Project and all other Diplomatic Organisations and payment of the arrears of commuter allowance to employees in American Embassy Project whether retired, dead or alive.
- e) An order for the 1st respondent to vacate private security industry.
- f) A declaration that the petitioner has been deprived of the right to be heard and to fair labour practices as enshrined in Articles 24, 50(1) and 41 of the Constitution respectively.
- g) Pay back to the petitioner and 1st interested parties the deducted but diverted union dues.
- h) Costs.

The petitioner urged that its rights under Articles 24, 41 and 50 (1) had been violated when the petitioner in petition 49 of 2018 resisted that the KNPSWU should not be enjoined therein as an interested party yet KNPSWU had serious stakes in that petition 49 of 2018 because it was the proper union in the private security services sector and its interests such as diverting of its union dues had been adversely affected.

The 2nd interested party the Registrar of Trade Unions one Elizabeth N. Gicheha filed a replying affidavit on 11.01.2019. She confirmed that as per clause 3 of the constitution of the KNPSWU, the KPSWU is the proper trade union for persons employed in the sector of private security services. She further confirmed that the KPUWU is the proper union for teaching and non-teaching staff in private universities as stated in Article 5 of the union's constitution. Her further position was that Articles 36 and 41 of the Constitution entitled every person to form, join, or participate in activities of and programmes of a trade union but the provisions are subject to limitations as may be imposed under Article 24 of the Constitution. Further section 8 of the Labour Relations Act provides that every trade union has the right, subject to provisions of the Act, to determine its own constitution and rules - the KPUWU and KNPSWU had done so and they were bound accordingly.

The 2nd respondent Kenya Kazi Security Limited filed the replying affidavit of Farah Esmail on 21.01.2019 and repeated the contents of the affidavit filed in Petition 49 of 2018. The commuter allowance had been fully settled. The 2nd respondent urged that it was not true that it had diverted union dues meant for KNPSWU to KPSWU because the workers involved had conveyed to the 2nd respondent that they had resigned from KNPSWU.

The parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows:

First, Petition 49 of 2018 must fail because of the following reason. The Court finds that the evidence is that KNPSWU is the proper sector union for private security services and the constitution of the KPUWU does not permit it to enter and operate in the private security services' sector. Section 54 (1) and (2) of the Labour Relations Act, 2007 prescribes the precondition for an employer to recognise a union as recruitment of the simple majority of the unionisable employees in a sector. Section 54 (8) of the Act then provides that when determining a dispute under the section the Court shall take into account the sector in which the employer operates. Taking into account the sector of private security services in which the respondent operated, the Court returns that the proper union in the case to be recognised by the respondent was not KPUWU and that the respondent had correctly concluded a recognition agreement and a CBA with the KNPSWU. On that account alone the Court returns that the petitioners in petition 49 of 2018 have failed to establish how their respective rights and freedoms had been violated in that regard. For avoidance of doubt and as urged for the Registrar of Trade Unions, the provisions of section 54 of the Act amounted to a legitimate limitation to rights and freedoms in Articles 36 and 41 of the Constitution.

The Court further returns that KPUWU must have known that it was not the sector union and therefore, as submitted for the respondent, KPUWU never invoked the provisions of the Labour Relations Act, 2007 towards reporting a trade dispute for conciliation in view of the purported refusal of deduction of union dues and then refusal of recognition. The Court hold that it was inconsistent with provisions of the Act when the petitioners concluded the MOU as a basis for the respondent to recognise the KPUWU in circumstances whereby KPUWU was not the proper trade union to represent workers in the sector of private security services. The Court finds that the petitioners acted in the most misconceived manner and there may be no mitigation to spare them from paying the costs the respondent has incurred in answering the petition.

Second, petition 123 of 2018 is determined with partial success that the petitioner therein is the proper sector union as already found in determining petition 49 of 2018. As submitted for the employer, once the employees resigned from the petitioner trade union, the petitioner could not validly claim the union dues previously deducted and remitted to the petitioner. The Court further finds that the employees who

resigned from the KNPSWU and joined the KPUWU instructed the employer to deduct and remit union dues to KPUWU and until the impropriety of the KPUWU was established and determined, the union dues were properly deducted and remitted to KPUWU. In any event the petitioner did not plead the specific amounts claimed and the same being in the nature of special damages, the Court returns that the same was not properly pleaded and proved as required. The Court finds accordingly.

Third, the Court has considered the parties' margins of success and returns that the petitioners in petition 49 of 2018 will pay the costs of the proceedings for the respondent therein and all other parties shall bear their own costs of the proceedings.

Fourth, there were objections about the consent that was filed in court but disputed by the KPUWU on account of doubtful execution of the consent by its representative and the Court considers that any emerging matters in that regard can be handled under the criminal justice system. In any event the consent was not recorded as an order of the Court and it remains open for parties to take steps towards the fate of the consent as may be appropriate. The Court further returns that the issue of the alleged non-existence of the KNPSWU was unfounded in view of the Registrar's confirmation that the union was duly registered.

Fifth, the petitioner in petition 123 of 2018 failed to justify the prayers in the petition except to the extent that it was the proper union for the sector of private security services. The Court finds that violation of the rights and freedoms as alleged was not established or that it was a misconception that the rights had been violated because once the petition was filed, the petitioner thereby accessed the Court in accordance with the prevailing law and procedures.

In conclusion, petition 49 of 2018 as consolidated with petition 123 of 2019 are hereby determined with orders:

a) Petition 49 of 2018 is dismissed.

b) A permanent injunction is hereby issued against the Kenya Private University Workers Union by itself, its officials, its employees or otherwise its agents from encroaching on the sector of private security services which is properly within the operation of the Kenya National Private Security Workers Union; and for avoidance of doubt the employer shall henceforth not deduct and remit union dues to the Kenya Private University Workers Union.

c) The petitioners in petition 49 of 2019 to pay the respondent's costs of the proceedings therein, and other parties to bear their own costs of the proceedings in both petitions.

Signed, dated and delivered in court at **Nairobi** this **Friday 28th June, 2019**.

BYRAM ONGAYA

JUDGE