



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1304 OF 2016**

(Before Hon. Lady Justice Maureen Onyango)

**KENYA NATIONAL PRIVATE SECURITY WORKERS' UNION....CLAIMANT**

*VERSUS*

**EVEREADY SECURITY GUARDS LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant herein is a duly registered trade union under section 19 of the Labour Relations Act, 2007 whose mandate is to represent the industrial interests of employees engaged and employed in the private Security industry.

The Claimant in its Claim avers that employees of the Respondent herein voluntarily joined membership of the union on diverse dates between 16<sup>th</sup> October 2015 and June 2016. Further that the recruited employee's membership was by means of check-off and was made within the mandatory provisions of Section 48 of the Labour Relations Act.

The Claimant further avers that the Respondent upon receipt of the check-off notices began victimising, harassing and intimidating its employees for joining the union in complete disregard to the provisions of Section 4 of the Labour Act and Articles 36 and 41(c) of the Constitution of Kenya, 2010.

As a result of the above the Claimant filed the instant Claim through which it prays for the following:

1. That the Respondent do deduct and remit Union dues from the date of the check-off forms were signed by the union members.
2. That the Respondent be ordered not to intimidate, victimize, harass and or sack any worker involved in union activities.
3. The Court do direct and order the Respondent to allow workers to be organised, engaged in Union of their choice.
4. The Respondent do meet the Costs of this cause.

The Respondent a duly registered Security Service provider instructed the firm of Muumbi and Company Advocates to enter appearance and file a Response to the Claimant's Memorandum of Claim on its behalf. In the response it avers that it had no knowledge of recruitment of any of its members by the Claimant union and that the same (if at all) was done without following due procedure.

The Respondent further avers that it already has a recognition Agreement with another union, Kenya Union of Commercial Food and Allied Workers Union for which it is deducting dues from its employees.

The Respondent contends that it is not capable of remitting union dues to the Claimant herein as it neither has a Recognition Agreement with it nor is it aware that the Union has recruited its employees.

The Respondent further contends that it has never victimised or harassed any of its employees on account of being Union members.

The Respondent urged the Court to dismiss the instant Claim in its entirety with costs to the Respondent.

This case was scheduled for hearing on 18<sup>th</sup> December 2018 when parties agreed to proceed by way of written Submissions.

## **Claimant's Submissions**

It is submitted on behalf of the Claimant union that the Respondent has adamantly refused to make deduction of union dues from its employees who willingly and voluntarily joined membership of the Claimant union in complete disregard to Section 48 of the Labour Relations Act and this Court's Order of 22<sup>nd</sup> July, 2016 directing the Respondent to deduct union dues from all unionisable employees.

It is further submitted that the Respondent is bound by the provisions of Section 48(2) of the Labour Relation Act to make deduction of union dues to a trade union that has more than 5 employees belonging to the said union.

The Claimant contends that each employee is protected by virtue of the provision of Section 5 of the Labour Relations Act from victimization for joining a trade union of their choice. It is further the Claimant's submission that the act of victimisation is contrary to the provisions of Article 36 and 41 of the Constitution of Kenya, 2010 and Sections 4,5,6 and 7 of the Labour Relations Act, 2007. the Claimant cited and relied on the Authority of ***Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) -V- British Army Training Unit Kenya (2015) eKLR.***

The Claimant urged the Court to allow the claim as drawn.

## **Respondent's Submissions**

The Respondent on the other hand has submitted that it has never been notified about the existence of the Claimant union's intention to recruit any of its members since there has never been a recognition agreement entered between itself and the Claimant union.

The Respondent further submitted that Section 48 of the Labour Relations Act ought not to be read in isolation but together with Section 54 of the Labour Relations Act, which requires that a trade union represents a simple majority of unionisable employees.

It is further submitted that the Claimant has failed to show that it has a simple majority by confirming the number of members it has recruited. The Respondent relied on the case of ***Abyssinia Iron & Steel Limited Vs Kenya Engineering Workers Union (2016) eKLR.***

The Respondent further submitted that the check-off forms allegedly signed by its employees relied upon by the Claimant union were never served upon them and relied on the cases of ***Kenya Union of Commercial, Food and Allied Workers Vs Nairobi Sports House Limited (2018)*** and ***Kenya Union of Hair and Beauty Salon Workers Vs Style Industries Limited and Another (2017) eKLR.***

It is further submitted that failure to serve the Respondent with the check-off forms as provided under Section 48 (3) of the Labour Relations Act, the Respondent had no basis for making the said deductions of union dues.

The Respondent contends that it is not bound to remit any union dues to the Claimant union as there is no Recognition Agreement between itself and the Claimant. It further contends that there is already in place a Recognition Agreement between itself and another union, Kenya Union of Commercial Food and Allied Workers Union for which it is deducting dues from its employees. The Respondent relied on the holding in the case of ***Kenya Union of Commercial, Food and Allied Workers Union Vs Ruthaka Farmers' Cooperative Society (2018) eKLR*** and the provision of Section 54 of the Labour Relations Act.

The Respondent further contends that Section 27 of the Civil Procedure Act, 2010 provides that costs are at the discretion of the Court and it urged that the Court in practicing its discretion awards them the costs.

In conclusion the Respondent urged the Court to dismiss the instant Claim with costs having demonstrated why it is not in a position to remit union dues to the Claimant herein.

## **The Law**

The law on union representation is Article 41 of the Constitution and section 4 and 5 of the Labour Relations Act which protect the right of employees to form, join and participate in activities of trade unions. The Employment Act also recognises participation in union activities and at section 46 protects employees participating in union activities from victimisation.

Section 48 of the labour Relations Act provides for deduction and remittance of trade union dues by employers through check-off while section 54 provides for recognition of trade unions by employers for purposes of collective bargaining.

## **Whether the Claimant has met the threshold for Recognition by the Respondent**

Section 54 of the Labour Relations Act provides for recognition of trade unions by employer provides as follows:

### **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.**

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 while Section 48 provides for deduction and remittance of union dues as follows:

**(2) A trade union may, in the prescribed form, request the Minister to issue an Order directing an employer of more than five employees belonging to the union to-**

**a. Deduct trade union dues from the wages of of its members; and**

**b. Pay monies so deducted –**

**i. Into a specified account of the trade union; or**

**ii. In specified proportions into specified accounts of a trade union and a federation of trade unions....”**

The Respondent's arguments appear to be that the claimant is not entitled to union dues until it has attained a simple majority of members and has signed a recognition agreement with the employer.

This is an erroneous position because membership gives an employee a right of representation by the union even when there is no recognition agreement while recognition is for the right to negotiate terms and conditions of employment.

Section 48(3) is clear that once an employer is served with forms (check-off form) the employer must commence deduction of union dues within 30 days. This section does not make any reference to Section 58 which only applies once the employees recruited by the union have reached a simple majority. Section 48 applies in respect of a trade union, which has recruited a minimum of five employees as stated in sub section (2) of section 48.

The respondent in this case has not denied that the claimant union has recruited at least five members from among the employees of the respondent.

The fact that there is another union which claims to represent the employees does not stop the employer from deducting and remitting union dues. That only becomes relevant for purposes of recognition agreement.

As is provided in Article 36(1), 41(2)(c) of the Constitution of Kenya, every employee has a right to join a union of his choice and the employer cannot limit that right. Further, Section 19(f) and (i) also authorises such deductions from wages of an employee.

The claimant herein has not prayed for recognition but for –

- a. That the respondent do deduct and remit union dues from the date the check-off forms were signed by the unionisable members.
- b. That the respondent be ordered not to intimidate, victimize, harass and or sack any worker involved in union activity.
- c. The court do direct and order respondent to allow workers to be organized, engaged in union of their choice.
- d. The respondent do meet the costs of this cause.

The respondent's arguments about recognition agreement or simple majority are therefore misplaced and irrelevant to the prayers of the

claimant in this claim.

It is evident from the check-off forms attached as appendices GM1 that the claimant union has recruited more than 5 members from among the respondent's employees. The check-off forms attached have a total of 167 names of employees who have signed the check off forms. The claimant union has further attached a gazette notice No. 10615 of 3<sup>rd</sup> August 2012 as proof that the Minister responsible for labour matters has authorised deduction of trade union dues as required under Section 48(2) of the Labour Relations Act.

It is in fact an offence for an employer to fail to deduct union dues that have been authorised by the Minister.

Further to the foregoing, the court in Cause No. 70 of 2002 held that Kenya Union of Commercial Food and Allied Workers amends Rules 3(a)(i) of the Constitution by deleting the words "*watchman organisations.*" This means that the union referred to by the respondent, the Kenya Union of Commercial Food and Allied Workers, is not the relevant union for purposes of representation of employees engaged by private security companies and that the claimant is the appropriate union for the private protective security sector.

I further note that there is an order in this suit dated 1<sup>st</sup> July 2016 directing the respondent to allow the claimant access to its premises for purposes of recruiting members among other orders.

### **Orders**

For the foregoing reason the claim herein succeeds and I accordingly make the following orders –

- a. That the respondent do deduct and remit union dues from August 2019 from the union members.**
- b. That the respondent be ordered not to intimidate, victimize, harass and or sack any worker involved in union activity.**
- c. The court do direct and order respondent to allow workers to be organized, engaged in a union of their choice.**
- d. There shall be no orders for costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**