



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.134 OF 2017

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

LAKE NAIVASHA SAWELA LODGE LIMITEDRESPONDENT

JUDGEMENT

Issues in dispute;

- a) Refusal to sign a recognition agreement
- b) Refusal to deduct and remit union dues
- c) Victimization and coercion of the claimant members because of union affiliation.

The claimant is a registered trade union with a mandate to represent employees within the hotel sector. The respondent is a company whose core economic activity is within the jurisdiction of the claimant.

The claim is that the claimant recruited 75 out of 100 unionisable employees of the respondent in November, 2015. The claimant served the respondent with a list of check off forms on 3rd December, 2015 in compliance with section 48 of the Labour Relations Act, 2007 but declined to deduct and remit union dues to the claimant.

On 3rd December, 2015 the claimant served the respondent with a copy of a recognition agreement proposing the same be signed but the respondent declined. The claimant invoked section 62 of the Labour Relations Act and reported a dispute with the minister where a conciliator was appointed and a meeting of the parties held but the conciliator has not released the report.

The respondent has now resulted into intimidation and victimisation of claimant members through redundancy following their membership with the claimant.

The claimant is seeking that the respondent be ordered to sign the recognition agreement, be restrained from victimising claimant members, and order for the deduction and remittance of union dues to the gazetted account and costs of the suit.

Defence

In response, the defence is that in November, 2015 the claimant represented check off forms purporting to have recruited some employees as members and required the respondent to effect union dues deductions and remit to the claimant. The claimant reported a dispute to the Minister on 11th December, 2015 and accused the respondent of refusing to sign a recognition agreement despite the claimant not having a simple majority of employees. Parties met for conciliation on 18th February, 2016.

The list presented by the claimant for the check off was alleged to have been done following recruitment of 75 employees of the respondent against a total workforce of 70 unionisable employees who by them had 100 employees. However 11 of such employees were unknown to the respondent.

In the year 2016 the claimant presented another check off list arguing that the members who had withdrawn their membership had returned but the subject employees maintained that they had never joined the claimant union.

In May, 2016 the claimant presented another check off at the labour office and upon going through the list of names presented it was discovered that 9 of the alleged employees who were alleged to have joined the union were in management positions, and 52 members had

voluntarily withdrawn from the union and 2 persons purported to be employees were unknown to the respondent.

The defence is also that the respondent being in the hotel industry which is seasonal and depending on the number of tourists who visit the country is not possible to maintain a permanent workforce and in order to keep the enterprise running and create employment the employees are issued with seasonal contracts. Upon the seasonal contract lapse they are either renewed or cease until availability of work.

The name of the former employees whose contract ended or terminated or resigned from the employment of the respondent still appear on the check off lists purported to be signed after separating with the respondent and thus not authentic. In April, 2016 the respondent's business was not picking up well due to various reasons and following mechanised laundry work which was previously operated manually, due process was followed with redundancy notification s required under the Employment Act.

When the claimant filed the matter in court the conciliation process was not complete. No certificate was issued by the conciliator.

The defence is also that the claimant has not met the threshold for recognition by the respondent for failing to recruit simple majority of all its unionisable employees. The withdrawal of membership from the claimant union is not a good basis to allege intimidation or victimisation as employees have the right to join a trade union of choice. Some employment contracts ended while others were declared redundant.

The claims made are without basis.

The parties addressed the matter by way of written submissions.

The claimant submitted that it is the right trade union to represent unionisable employees in the respondent business and in accordance with section 19 and 54 of the Labour Relations Act having been registered to represent employees in the hotel sector and has recruited over 95% of unionisable employees therein. Unionisation is a constitutional right as held in the case of **Abyssinia Iron & Steel Limited versus Kenya Engineering Workers Union & another Civil Appeal No.67 of 2015**.

There is no rival union representing the unionisable employees employed by the respondent. under section 48 of the Labour Relations Act, 2007 the respondent should deduct and remit trade union dues to the benefit of the claimant. The respondent has failed and refused to deduct and remit the trade union dues to the claimant.

The respondent has continued to victimise claimant members because of union affiliation contrary to section 4 of the Labour Relations Act and article 36 and 41 of the constitution, 2010. The orders sought should issue against the respondent.

The respondent submitted that section 54(1) of the Labour Relations Act, 2007 allow for the recruitment of union members and upon attaining a simple majority of the unionisable employees, the employer is required to recognise the trade union. The claimant has not met this threshold. The recruited employees withdrew membership with the claimant in accordance with section 48(6) and (7) of the Labour Relations Act.

The respondent cannot deduct and remit trade union dues from employees who have left the membership of the claimant union. Such would defeat the constitutional and legal rights to unionise with a trade union of one's choice.

The court is at liberty to apply the provisions of section 56(1) (d) of the Labour Relations Act to ascertain the actual position of the unionised employees with the claimant so as to justify its decision.

Determination

The issues for the court determination are as follows;

Whether the respondent should be ordered to sign the recognition agreement;

Whether the respondent should be directed to deduct and remit trade union dues to the claimant; and

Whether the respondent has unfair treated claimant members in its employment.

Starting with the last issue on the alleged victimisation and unfair treatment of claimant members in the employment of the respondent, despite the claimant making these claims, no specifics were given. In submissions the claimant has made general allegations without setting out which employee(s) has/have been victimised due to affiliation or following membership with the union.

The defence that the respondent's business is seasonal and has issued employees with seasonal contracts and that some of the claimant members recruited are no longer serving with the respondent is not challenged. Also the fact that the respondent has mechanised its laundry work and thus laid off the employees therefrom and issued redundancy notices attached to the defence was not challenged.

Such general allegations with regard to alleged victimisation of claimant members are without particulars. No specific member(s) is cited as evidence of unfair labour practice. such allegation is found without basis.

Section 54 of the Labour Relations Act, 2007 provides for the recognition of a trade union by an employer;

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.

For recognition to arise, the subject trade union must represent the simple majority of unionisable employees with a given employer. See **Kenya National Union of Nurses versus County Public Service Board Homabay [2018] eKLR.**

The claimant’s case is that it recruited 75 out of 100 unionisable employees in November, 2015 and re-affirmed the membership in April, 2015 with 78 out of 100 employees of the respondent.

The defence is that of the alleged total recruited 75 employees against a workforce of 770 employees, 30 were in management and 11 were unknown to the respondent. appendix 3 to the defence has categorised these employees as pleaded at paragraph 5 of the defence.

The defence is also that early in the year 2016 the claimant presented another check off alleging the employees who had withdrawn membership had returned to the union. The respondent has attached appendixes 4 with a list and letters from employees who have withdrawn from the claimant union all dated and ranging from January, to April, 2016. Some of these letters indicate the employees were included in the check off without their consent or their details are a forgery.

In this regard, the respondent has attached appendix Ute 6 being seasonal contracts with various employees. The duration of employment range from October, 2015 to March, 2016. Some go back to the year 2012 but all are fixed term contracts for a period not exceeding 6 months. The defence that the nature of the respondent’s business is seasonal and required employees for short periods is not challenged.

Such contracts as in tandem with Regulation 18 of the Regulation of Wages (Hotel and Catering Trade) Order which provides as that;

18 (1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.

(2) An employee on temporary or seasonal terms of employment shall be deemed to have been converted to regular terms of employment on completion of six months continuous service.

With the right to unionise in a trade union of choice secured under article 36 and 41 of the constitution, 2010, the claimant well aware of the nature of relations between its members and the respondent ought to have put the above into account. The fact of recruitment of members in the employment of the respondent was done in November, 2015. Such numbers so as to have a simple majority is challenged on the basis that of the 78 alleged recruited employees out of 100, of them 30 were in management making the balance 48 employees and of which 11 are stated to be unknown and thus reducing the numbers to 37 of the unionisable employees. Such number of 37 out of the possible 100 employee is far below the required threshold for recognition.

With such fluid work force and dictated by need and or season and which is allowed under the sector regulations, the claimant should go back to the drawing board and ascertain the exact number of its members in the employment of the respondent. even with seasonal contracts of employment at any given time, unionisation of such employees does not abet. Upon return to work and where unionisation is maintained the respondent is subject to the provisions of section 48 of the labour Relations Act, 2007 to ensure the deduction and remittance of union dues to the claimant where there is a membership of over five (5) employees.

With the facts given in the claim and noting the matters set out in defence, recognition shall not issue. Where conciliation process had been given a fair chance and time, parties ought to have resolved the issues set out above at that level and at the shop floor by ascertaining the current membership of the claimant. The court takes it that since the year 2016 and when the suit was filed on 25th may, 2016 the nature of relations has since changed.

Parties shall return to the shop floor and ascertain the nature of claimant membership. Where simple majority of the unionisable employees is achieved, the parties shall address as appropriate. Where the claimant has attained a membership of over 5 employees with the respondent, the provisions of section 48 shall be invoked. Nothing stops the parties from moving the court with regard to a dispute arising therefrom as otherwise the orders sought herein at this stage cannot issue.

Accordingly, the claims made are found without merit and suit is hereby dismissed. Each party shall bear own costs.

Delivered in open court at Nakuru this 11th July, 2019.

M. MBARU JUDGE

In the presence of:

Court Assistants: &

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