



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1060 OF 2014**

**BENSON OYUGI AMBUNI.....CLAIMANT**

**v**

**UNION OF KENYA CIVIL SERVANTS.....RESPONDENT**

**JUDGMENT**

1. Benson Oyugi Ambuni (Claimant) was employed by the Public Service Commission of Kenya and deployed to the Ministry of Co-Operatives in 1989.
2. In the course of time, the Claimant joined the *Union of Kenya Civil Servants* (the Union) and on 21 November 2008, he was elected as the 1<sup>st</sup> Deputy Secretary-General.
3. About 5 months later, on 6 April 2009, the Claimant sent a Memo to the Secretary-General of the Union requesting that the Secretary-General formally seek permission from the Permanent Secretary, Public Works to grant him (Claimant) official leave of absence to enable him to perform his trade union duties without fear of reprisals (the Secretary-General did not respond to the request).
4. On 11 August 2011, the Permanent Secretary, Ministry of Public Works issued a *show cause* to the Claimant to explain within 21 days why disciplinary action should not be taken against him. The *show-cause* also informed the Claimant that his salary had been suspended.
5. The allegation leading to the *show cause* was that the Claimant had deserted duty from December 2008, about a month after his election as 1<sup>st</sup> Deputy Secretary-General.
6. The Claimant responded to the *show cause* on 27 September 2011 and the next day wrote to the Secretary-General of the Union to inform him of the *show cause* and to ask for financial and legal assistance. The Secretary-General stamped in acknowledgment on a copy of the letter seeking assistance.
7. On 29 November 2011, the Claimant wrote to the Permanent Secretary, Ministry Public Works informing that the withholding of his salary had rendered him incapable of meeting his financial commitments and requesting that on humanitarian grounds his disciplinary case be expedited.
8. On 8 December 2011, the Permanent Secretary, Public Works wrote to the Claimant to notify him of his dismissal from service and on 27 December 2011, the Claimant wrote another letter to the Permanent Secretary.
9. Upon receipt of the dismissal letter, the Claimant forwarded the dismissal letter to the Secretary-General on 12 January 2012. He sought the intervention of the Secretary-General. The Secretary-General did not respond.
10. On the same day, the Claimant appealed to the *Public Service Commission* against the dismissal.
11. On 20 February 2012, the Claimant wrote to the Secretary-General of the Union to request for financial assistance and followed it up with another letter dated 10 April 2012 addressed to the *National Executive Board* seeking financial assistance (the Claimant got some Kshs 6,000/- as a result).
12. On 22 May 2013, the *Public Service Commission* informed the Claimant that his appeal for review was not successful and that it considered the matter closed.
13. Consequently, the Claimant moved the Court on 25 June 2014 alleging that the Union had failed in its mandate by not extending to him financial and legal help during and after the disciplinary process.

14. In its *Response* filed on 24 July 2014, the Union contended that it had no obligation to represent a member who had authored his own misfortune. The Union also denied that the Claimant had informed it of his disciplinary case.
15. The Union further contended that it was the responsibility of the Claimant to secure permission from his employer to attend to union activities.
16. The Cause was heard on 1 December 2017 by Nzioki wa Makau J, and by this Court on 21 February 2019 and on 14 October 2019.
17. The Claimant and the 1<sup>st</sup> Deputy Secretary-General of the Union testified.
18. The Claimant filed his submissions on 25 October 2019 while the Union's submissions were not on file by this morning.
19. The Court has considered the pleadings, evidence and submissions and come to the view that there are only 2 primary issues for determination
  - (i) Whether the Union owed/breached any duty to Claimant, and if so,
  - (ii) Appropriate remedies.

### **Evaluation**

20. A trade union has certain obligations towards its membership. These obligations include extending to a member legal assistance during disciplinary processes.
21. The obligation is well addressed in clause 3(1)(d) of the Union's constitution where it is provided that amongst the objectives of the Union is the representation/defence of members in disputes with the employer which arise in the course of employment.
22. In providing legal assistance or representation to a member facing a disciplinary action, it is widely accepted globally that the Union owes the member a *duty of fair representation* (see the discussion in *Kenya National Union of Nurses v Chief Officer, Public Service Management, County Government of Uasin Gishu & Ors* (2017) eKLR).
23. Under the *duty of fair representation*, a trade union should not act in bad faith. It should act fairly, impartially and should not discriminate.
24. In this regard, a trade union should take reasonable steps to investigate a grievance by a member and to extend legal assistance to the member and/or represent the member during disciplinary processes as the circumstances may require.
25. The Claimant herein reported to the Union when he was issued with a *show-cause notice* on 28 September 2011.
26. In the report, the Claimant sought for both financial and legal assistance.
27. The Union received the request and stamped in acknowledgment. Despite acknowledging the request, the Union did not bother to respond in any formal manner to the request.
28. The Claimant was therefore left to defend himself during the disciplinary process without the participation (or representation) of the Union.
29. The Claimant was thereafter dismissed from employment after the disciplinary process.
30. On 12 January 2012, the Claimant wrote to the Union seeking for urgent intervention. The letter was received by the Union.
31. The Union did not take any action or attempt to intervene. Such an intervention could have included extending legal assistance on an appeal lodged by the Claimant.
32. The Union cannot deny as it has contended that it was not aware of the disciplinary process against the Claimant and the subsequent dismissal. Its argument that it had no obligation to extend assistance to the Claimant because he allegedly authored his own misfortune was without any merit. It was callous of it considering one of its constitutional objectives.
33. The Court has no hesitation in finding that the Union was in breach of its *duty of fair representation* to the Claimant.

### **Appropriate remedies**

#### **Compensation under section 39 of the Labour Relations Act**

34. The Claimant sought an array of remedies from the Respondent including

(i) compensation for loss of employment in terms of section 39(e) & (f) of the Labour Relations Act of Kshs 8,065,215/-

(ii) compensation amounting to Kshs 88,055/- for funeral expenses

(iii) lost income of Kshs 4,312,968/-.

35. The Court has looked at section 39 of the Labour Relations Act. It permits a trade union to apply its fund to compensate a member for losses arising out of trade disputes.

36. In the view of the Court, a union member desiring to benefit from the section should establish through cogent evidence a factual and legal nexus between the losses suffered as a result of a trade dispute and the trade union.

37. It cannot be that the Claimant sustained funeral expenses as a result of the disciplinary process or inaction on the part of the Union.

38. The Claimant did not demonstrate any evidential nexus between the conduct of the Union and his loss of income or employment. The obligation of the Union was representation during disciplinary proceedings regardless of the outcome.

39. The Court also finds that lost income or compensation for loss of employment are not appropriate remedies under the aforesaid provision of law.

### **General damages**

40. The Claimant also sought general damages.

41. The Claimant drew the attention of the Court to the case of *Seth Panyako v Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers* (2013) eKLR wherein the Court held that a Union would be liable in damages if it failed to perform its mandate of representing a member and an award of Kshs 850,000/- was made.

42. The Court has concluded that the Union was in breach of its duty of *fair representation* to the Claimant.

43. The Union failed in its *duty of fair representation* to the Claimant. It is of no moment that the Claimant would still have been dismissed with Union representation or that the Claimant's alleged misconduct was egregious.

44. The wrongful act of the Union requires to be vindicated by an appropriate order.

45. The Court is of the view that *general damages* would be effective and appropriate.

46. The Claimant lost his employment. It is not clear whether he secured alternative employment.

47. The Court, in the circumstances, is of the opinion that Kshs 900,000/- as general damages would be appropriate.

### **Conclusion and Orders**

48. The Court finds and declares that the Union was in breach of its *duty of fair representation* to the Claimant and awards him

(a) General damages     **Kshs 900,000/-**

49. The Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of November 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Mburu instructed by Munguru Mburu & Associates Advocates

For Respondent Mr. Onjoro instructed by Rachier & Amollo Advocates

Court Assistant Lindsey