



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 127 OF 2013

(Before Hon. Justice Mathews N. Nduma)

KENYA NATIONAL PRIVATE

SECURITY WORKERS UNION.....CLAIMANT

=VERSUS=

WATCHDOG LIMITED.....RESPONDENT

J U D G M E N T

1. The dispute before court is the refusal by the Respondent to recognize the Claimant union in terms of Section 54(1) of the Labour Relations Act, 2007. The Claimant also alleges underpayment of wages contrary to minimum of wage order which at the time stipulated the minimum wage of Security Guards to be 12,221 and overtime allowance for extra hours worked, house allowance, medical cover and leave.

2. Wherefore the Claimant prays that:-

(i) Respondent signs a Recognition Agreement with the Claimant Union.

(ii) The Respondent deducts union dues for each employee in the check-off.

(iii) The Respondent to pay arrear union dues from the time, the employees became members.

(iv) The Respondent to pay minimum wage of Kshs.8,463 plus house allowance of Kshs.1,269 at 15% of the basic wage and overtime.

Facts of the Claim

3. On diverse dates between July and December 2011, the Claimant recruited employees of the Respondent as its members. The members signed a check-off form which was submitted to the Respondent to remit Union unions via the gazetted union account.

4. The claimant prepared a draft Recognition Agreement and on 5th, 7th and 23rd January 2012, invited in vain, the Respondent to a meeting to sign the Agreement.

5. A dispute was reported to the Ministry of Labour and a conciliator was appointed on 23rd March 2012, pursuant to section 65(1) of the Labour Relations Act, 2007. No agreement was reached and the conciliator referred the matter to the court for adjudication on 3rd September, 2012.

6. The Claim is premised on Articles 36 and 41 of the constitution and section 54 of the LRA, 2007.

Response

7. The Respondent filed a Memorandum of Defence to the claim on 15th March, 2013 in which the Respondent admits refusing to recognize the union on the basis that the union had not attained the simple majority membership of 50 + 1%. That it had a total of 121 employees out of whom 112 are unionisable and that the Claimant union has not demonstrated that it had recruited a simple majority of its unionisable

employees for the following reasons:-

- (a) Four (4) employees, namely Evans Masheti, Saul Opati, James Muthui and Francis Oganja appear twice of the list.
- (b) That twelve (12) named employees in paragraph 7 of the statement of defence had long left, its employment and therefore did not count for the purpose of computing a simple majority.
- (c) That three (3) employees namely, Evans Ndungu, Bonface Kheoya and Michael Vive Ngoru were none existent and thus could not count.

8. That places a total of seventeen (17) employees in the check-list in dispute.

Analysis of Facts

9. In the Memorandum of Claim, the Claimant does not state the number of employees it had recruited. However the Claimant has attached a check-off list dated 22nd February, 2012 with sixty two (62) names.

10. The Memorandum written to the conciliator by the General Secretary of the union Mr. G. M. Andabwa does not indicate how many employees had been recruited by the union vis a vis the total unionisable employees of the Respondent.

11. Indeed, no documentation by the Claimant informs the court how many members had been recruited to meet the simple majority of all unionisable employees of the Respondent.

12. The only figures available have been provided by the Respondent.

Underpayment of Wages

13. With regard to the claim for underpayment, the Memorandum of Claim does not disclose at all, how, and by how much, the employees of the Respondent have been under paid. A bare allegation has been made in the Memorandum of Claim that employees, who are members of the Claimant Union do not receive the minimum wage of Kshs.8,463 plus house allowance of Kshs.1,269 at 15% of the basic wage and that they are not paid overtime.

14. The Respondent has denied these allegations by the Claimant. Neither party adduced oral evidence in support of their respective claims but instead chose to file written submissions.

Determination

15. The issues for determination are:-

- (i) Whether the Claimant had met the simple majority of 50 + 1% of the unionisable employees to merit recognition by the Respondent.
- (ii) Whether the employees were being underpaid.

Issue (i) & (ii)

16. In terms of sections 106, 107, 108 and 109 of the Evidence Act, Cap 80 of the laws of Kenya, he who alleges must prove on a balance of probabilities the allegations to want the court to find in his/her favour.

17. The Claimant has in respect of both the Claim for recognition and underpayment failed to tender any tangible evidence to prove on a balance of probabilities that it had recruited a simple majority of 50 + 1% in terms of section 54(1) of the Labour Relations Act, 2007 to warrant recognition by the Respondent nor has it tendered any evidence to show that its members who are employees of the Respondent were being underpaid and were not paid overtime, when they worked beyond the regulated normal hours.

18. The result of the above is that both claims by the Claimant must fail for want of proof and the suit dismissed with costs to the Respondent. The court so finds.

Judgment Dated, Signed and delivered this 18th day of April, 2018

Mathews N. Nduma

Judge

Appearances:-

Mr. Onyancha for Claimant

Mr. Makokha for Respondent

Anne Njung'e – Court Clerk