



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 526 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 18<sup>th</sup> January, 2017)**

**KENYA UNION OF COMMERCIAL FOOD**

**& ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**JADE COLLECTION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed their claim on 2.4.2014 through their Secretary General. The issue in dispute was refusal to sign a recognition agreement.
2. The Claimant's case is that they are a Trade Union in the Sector within which the Respondents operate. They annexed their Constitution Appendix 1 as proof of this. They aver that at the time of recruitment, the Respondent had employed 49 unionisable employees.
3. In March and early April 2013 the Claimant managed to recruit 31 of the unionisable staff members which formed more than 51% simple majority as required by law. They annexed their Appendix 2 as exhibits.
4. The Claimant aver that on 1.4.2013 they addressed the Respondent that their unionisable employees had exercised their right of Freedom of Association and registered their union membership as provided under Section 4 and 54 of the Labour Relations Act 2007 and Article 41 (c) of the Constitution.
5. They also requested for a meeting on 10<sup>th</sup> April 2013 to sign a draft copy of the Model Recognition Agreement which had been attached (Appendix 3). That upon receipt of the Claimant's letter on 4<sup>th</sup> April 2013, the Respondents convened a meeting of all employees and demanded that they confirm by a show of hands whether or not they had joined the Union. 17 of the members confirmed their members and were all suspended immediately and eventually verbally terminated. The Union made efforts to have issue resolved but failed.
6. The Union then referred the issue of victimization of employees on account of Union Membership to the Minister on 10<sup>th</sup> April 2013. The Minister acted as per Appendix 7, 8 and 9 and the matter is still pending in Court as Cause No. 1342/2013.

7. In the meantime, the Claimant avers that the Respondents refused to grant audience to the Claimant to discuss and sign recognition agreement on 10<sup>th</sup> April 2013 and on 17<sup>th</sup> April 2013 as requested. Another trade dispute was reported on 25<sup>th</sup> April 2013 on refusal to sign recognition agreement. The Minister appointed a Conciliator on 7<sup>th</sup> May 2013 (Appendix 11).
8. The conciliation efforts by the Minister did not resolve the issue in dispute. Consequently the Conciliator issued a Certificate of Conciliation under Section 69 of Labour Relations Act (Appendix 12).
9. The Claimants want this Court to order the Respondent to sign the Model Recognition Agreement and stop further victimization of the employees on account of Union Membership.
10. The Respondents on their part only filed a replying affidavit on 25/4/2017 through the firm of Tim Okwaro Associates. Thereafter the firm of Kimandu & Ndegwa came on record on 17.12.2015 after filing Notice of Change of Advocates. No defence was filed however. The Respondents also filed their submissions on 5.10.2016 and a list of documents on the same day.
11. In their replying affidavit deponed to by Charity Ngatia, The Respondent's HR Manager, the Respondent deny the Claimants contention of recruiting 20 employees to the Union on 26.3.2013 because their 10 employees were recruited on 29<sup>th</sup> and 30<sup>th</sup> March 2013 and others on 2.4.2014.
12. They aver that if any recruitment was ever done, this was done clandestinely without following the law and that the Claimants acts are annuity.
13. They ask the Court to dismiss the Claimant's Application.
14. In their submissions, the Respondents reiterate their averments in the affidavit. They also state that the Claimants do not represent the simple majority of unionisable employees.
15. They refer Court to Employment and Labour Relations Court (ELRC) Case No. 1342/2013 page 16 of the Judgment where Judgment was entered against the Respondents for 12 out of 17 employees whose claim was that they were suspended from employment on 1.4.2013.
16. That on 22<sup>nd</sup> December 2015, the Respondent moved Court for review of the Judgment. The Respondents filed the Application for review on 21.1.2016 but Judgment was delivered on 23.11.2015. To date they have not presented the review application.
17. I have considered the evidence and averments of both parties, plus their respective submissions. The Claimant annexed Appendix 17 which are check offs forms for 31 employees all signed on 26<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> March and April 2013 and 2 on 2.4.2013. The letters annexed as Appendix 18 dated 18.4.2013 from Respondent's Counsel shows that some of these employees who appear on check off forms had been suspended and were so informed by Respondent's Counsel.
18. These employees filed a case Cause No. 1342/2013 on 21/8/2013 seeking relief of being victimized on account of Union Membership. Vide a Judgment of Hon. J. Nzioki Wa Makau dated 23.11.2015, they were awarded Judgment for unfair termination and given various reliefs.
19. The Judgment still stands todate and there is no appeal that has been filed against the Judgment and the review application filed has not been presented todate.
20. The Respondents denied all the Claimants averments but they didn't adduce any evidence to counter the Claimants allegation. Their response was a mere denial.
21. Under Section 54 of Labour Relations Act, 2007 states as follows:

**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 recognize 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."*

22. Article 41(c) of the Constitution also provide that:

***"to form, join or participate in the activities and programmes of a trade union".***

23. The Claimants have proven that they recruited their members to the Union. The Court confirmed they were unfairly terminated.

24. The Respondents have not submitted a list of their employees to counter Claimant's averments.

25. In view of this, it is this Court's finding that as at 2.4.2014, when the application and claim was filed, the Claimant had recruited a simple majority of Respondents unionisable employees and as per Section 54(1) of Labour Relations Act, they should be recognized by the Respondent.

26. I therefore find that Claimants have established their case as required and I order the Respondents to proceed and recognize the Claimants within 30 days.

27. The Respondents are further prohibited from victimizing and harassing any employee on account of their Union Membership.

28. The Respondents will pay costs of this claim.

Read in open Court this 18<sup>th</sup> day of January, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Numba for Claimant – Present

Kimandu & Ndegwa for Respondent – Absent