



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 573 OF 2012

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

MUTONGUNI SECONDARY SCHOOLRESPONDENT

JUDGMENT

1. The Claimant is a trade union registered to represent employees in several sectors including non-teaching staff of educational institutions. By a memorandum of claim dated 4th April 2012 and filed on even date, the claimant seeks the following orders against the respondent:-

- a) Start deducting union dues and remit the same to the claimant
- b) Sign Recognition Agreement with the claimant within 60 days.
- c) To negotiate and conclude C.B.A. with the claimant within the preceding 60 days from signing Recognition Agreement
- d) Costs of the Court.
- e) To order the respondent to pay the penalty for non-compliance of the Law as per section – 82(3) of Labour Relations Act.
- f) To order the respondent to pay the claimant union dues calculated as from November 2011 upto and until the court determination the dispute.

2. The Respondent filed a memorandum of reply dated 7th January 2013 and filed on 9th January 2013. In the Memorandum of reply the Respondent admits that the claimant recruited some of its employees but denies that the employees recruited were 51% as alleged by the claimant. The Respondent states that after some time the recruited employees voluntarily resigned from membership of the union by letter dated 25th July 2012, a copy of which is attached to the Respondent's Reply. The Respondent states that it remitted union dues up to the date that the employees resigned when it stopped further remittances.

3. The Respondent avers that the claimant does not have any members in its employment and is not entitled to recognition.

4. At the hearing both parties proceeded by way of oral submissions by consent. Mr. Tonge Yoya who appeared for the claimant submitted that the Claimant recruited members as reflected in the check off

forms at appendix 2 of the Claim, which were duly brought to the attention of the Respondent. The Claimant further sent to the Respondent a draft copy of recognition agreement which the respondent refused to sign. The union thereafter reported a dispute to the Minister for Labour and a conciliator was appointed but there was no agreement. The Conciliator issued a certificate of disagreement of allowing the parties to move to this Court.

5. Mr. Tonge Yoya submitted that the Claimant recruited 85% of the Respondent's workforce and is entitled to recognition by the Respondent which is a statutory responsibility of the Respondent so that parties can commence collective bargaining in the best interest of Respondent's employees.

6. With respect to the response to the claim filed by the Respondent Mr. Tonge Yoya submitted that the respondent admitted that the claimant recruited its employees but did not achieve a simple majority. With regard to the letter of resignation from membership by the employees Mr. Yoya submitted that unanimous and joint resignation from union membership does not conform with section 48(6), (7) and (8) of the Labour Relations Act. He submitted that the requirement of the law is that the letter should be done to the employer to forward to the union. Mr. Yoya submitted that the way letter is framed suggests that there was undue influence or coercion. He submitted that the Respondent cannot rely on the letter.

7. Mr. Yoya prayed that the court compels the Respondent to sign recognition agreement within 60 days and commences deduction and remittance of union dues. He further prayed for costs of the suit.

8. Ms. Mutimbo who appeared for the Respondent submitted that the letter of resignation from union membership was addressed to the union and copied to Board of Governors of the school. On the issue of membership, she submitted that the Respondent is not disputing that the Claimant recruited 85% of its employees but that the employees withdrew from membership. She submitted that the resignation letter was freely written by 15 employees, which is the total number recruited by the Claimant. She submitted that the respondent had 19 employees out of which 15 were recruited and all the 15 signed the resignation letter. She stated that the reason for the resignation was that the employees had not seen any benefits of association.

9. Ms. Mutimbo submitted that some of the employees recruited have since left employment of the Respondent and cannot therefore be forced to pay union dues. She relied on Articles 36(2) of the Constitution. She submitted that the Claimant's demand for dues from the respondent is an interpretation that they are forcing membership while it is clear that the employees left membership.

10. Ms. Mutimbo prayed that the claim be dismissed with costs.

11. In a brief rejoinder Mr. Yoya invited the court to look at the provisions of section 48 of the Labour Relations Act. He submitted that Article 36 does not override Article 41 of the Constitution. He submitted that Article 41 gives employees the right to form, join and participate in union activities. He submitted that the workers signed check-off forms to join membership of the union. He urged the court to grant the orders as prayed in the memorandum of claim.

Determination

12. I have considered the pleadings and submissions of the parties. It is not disputed that the Claimant recruited 15 out of 19 eligible employees of the Respondent into its membership. The Respondent admits that it even made deductions and remittance of union dues to the claimant until the employees voluntarily withdrew from union membership by letter dated 25th July 2012. The number recruited constitutes more than the simple majority required for purposes of recognition of a trade union.

13. The only issue for determination is therefore whether there was valid withdrawal from union membership by the employees.

14. According to section 48 of the Labour Relations Act, the procedure for withdrawal from union membership is as follows-

(i) *An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union.*

(ii) *A notice of resignation referred to in subsection (6) takes effect from the month following the month in which it is given.*

(iii) *An employer shall forward a copy of any notice of resignation he received to the trade union.*

15. The suit herein was filed on 4th April 2012. The letter of withdrawal is dated 25th July 2012 and is signed by only 9 employees out of the 15 recruited. The Respondent's Memorandum of Reply is filed on 9th January 2013. It therefore means that the alleged withdrawal occurred after this suit was filed in court. The reason given for the withdrawal is that the employees had not seen the benefit of union membership. I find the timing and the procedure of the withdrawal from membership of the union to be suspect. As at the time this claim was filed the employees were in the membership of the union but withdrew en masse soon after, between the date of filing of the claim and the date of filing of the Response.

16. Qualification for recognition is reckoned as at the time the Claimant sought the signing of the recognition agreement. This was on 23rd September 2010 when the Claimant sent a copy of the recognition agreement to the Respondent by letter of that date asking it to sign and return one copy to the Claimant. At that time the union had in its membership more than 85% of unionisable employees.

17. Section 54(1) of the Labour Relations Act provides that- *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.*

18. The wording is mandatory and signifies that at the point when a trade union has achieved recruitment of a simple majority of employees an employer is under a statutory duty to recognise the trade union for purposes of collective bargaining. Any acts of the employer to reduce that simple majority after the claimant has sought recognition and filed suit will be frowned upon by the courts and be considered as derogation from the statutory duty of the employer to recognise the union as well as infringement of the employees' right of association as enshrined in both Article 41 of the Constitution and section 4 of the Labour Relations Act.

19. Article 41 provides as follows-

(1) *Every person has the right to fair labour practices*

(2) *Every worker has the right:-*

a) *to fair remuneration*

b) *to reasonable working conditions;*

c) *to form join or participate in the activities and programmes of a trade union; and*

d) *to go on strike.*

(3) *Every employer has the right:-*

e) *to form and join an employers organization; and*

f) *to participate in the activities and programmes of an employers organization*

(4) *Every trade union and every employers' organization has the right:-*

a) *to determine its own administration, programmes and activities;*

- b) to organize; and*
- c) to form and join a federation.*

(5) Every trade union, employers' organization and employer has the right to engage in collective bargaining.

20. Section 4 of Labour Relations Act provides-

(1) Every employee has the right to-

- a) participate in forming a trade union or federation of trade union*
- b) join a trade union; or*
- c) leave a trade union*

(2) Every member of a trade union has the right, subject to the constitution of that trade union to-

- a) participate in its lawful activities*
- b) participate in the election of its officials and representatives;*
- c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and*
- d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement.*

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to-

- a) participate in its lawful activities;*
- b) participate in the election any of its office bearers or officials, and*
- c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office.*

Conclusion

21. From the foregoing I find that the Claimant had achieved a simple majority at the time it sought recognition by the Respondent on 23rd September 2010. I further find that the withdrawal from membership of the employees of the respondent does not affect the right of the Claimant to recognition as it occurred after the suit was filed and further did not comply with the statutory provisions in section 48(6), (7) and (8) of the Labour Relations Act.

22. For these reasons I find that the Claimant has proved its case against the Respondent and order as follows-

- a) The Respondent shall commence deduction and remittance of union dues from its employees who are members of the Claimant with effect from May 2017.*
- b) The Respondent shall sign recognition agreement with the Claimant within 30 days from the date of this award.*

- c) The prayers seeking an order to compel the Respondent to negotiate a collective bargaining agreement is premature as the right to collective bargaining accrues after recognition. The prayer is dismissed.
- d) The prayer for Respondent to pay a penalty is criminal and cannot be granted in civil proceedings. The prayer is thus also rejected.
- e) The prayer to order the Respondent to pay union dues from 2011 is not capable of implementation as no union dues were deducted. The prayer is therefore rejected.
- f) There shall be no orders for costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT

THIS 7TH DAY OF APRIL, 2017

MAUREEN ONYANGO

JUDGE