



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1515 OF 2011**

**KENYA HOTELS & ALLIED WORKERS UNION (KHAU).....CLAIMANT**

*VERSUS*

**KENYA ASSOCIATION OF HOTEL KEEPERS & CATERERS....1<sup>ST</sup> RESPONDENT**

Mr. Simiyu for claimant

M/S Guserwa for respondent

**JUDGMENT**

1. The memorandum of claim filed on 7/9/2011 raises two issues;

- (i) Illegal deduction from the members of applicant;
- (ii) Refusal by the respondent to recognize the claimant union.

2. The issue of illegal deductions was determined in **Petition No. 5 of 2013, KHAWU vs. The Attorney General & 3 others [2015] eKLR**. Only the issue of recognition is pending.

3. The claimant relies on the affidavit of Mr. Joanes Owino Okotch on the material facts, the averments in the memorandum of claim and annexures thereof. No oral evidence was adduced in this matter.

The facts relied upon are as follows;

4. This is an old dispute in which the claimant had reported trade disputes with 82 Hotels. Matter was investigated and a report of the minister made on 11<sup>th</sup> February 2002.

5. The minister recommended *inter alia*, that;

*“Hotels and restaurants which are members of the Hotel keepers and caterers association to negotiate individual agreements with the union that has fulfilled the simple majority rule.”*

6. This recommendation did not end the disputes in the industry, with the erstwhile Industrial Court making conflicting decisions on the matter.

7. The two competing views are as follows;

(i) Hotel keepers and caterers association has the freedom of association with the individual hotels who comprise its membership, and the association has the freedom to negotiate a Collective Bargaining on behalf of all its members to ensure consistency and uniformity of terms and conditions of service in the hotel industry. That it would be a violation of freedom of association to force individual hotels to leave the association which negotiates on their behalf uniform terms and conditions of service.

(ii) The competing argument is that the rival union KHAWU, is at liberty to recruit employees of the hotels which comprise membership of Hotel keepers and catering Association. That once KHAWU recruits a simple majority of the employees in any given hotel, that Hotel is bound to leave the Association and negotiate a Recognition and Collective Bargaining Agreement with KHAWU.

**8.** A three Judge Bench comprising Nduma, Maureen Onyango and Ndolo JJ, delivered a majority decision upholding the right of the Hotel Keepers and Caterers Association to recruit members and conclude a recognition agreement with a union of choice, in this case Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers (KUDHEIHA) and continue to negotiate terms and conditions of service on behalf of its members and conclude Collective Bargaining Agreement, thereof with KUDHEIHA. See **Petition No. 5 of 2013, KHAWU Vs. The Attorney General & 3 others [2015] eKLR.**

**9.** The claimant in this matter seeks to have the Hotel Keepers and Caterers Association to recognize it, instead of KUDHEIHA as the union with the mandate to negotiate terms and conditions of service for all members of the Hotel Keepers and Caterers Association on the basis that it has now recruited simple majority (50 + 1) employees in a majority of the members of the Association.

### **Determination**

The issue for determination is as follows;

**10.** Has KHAWU recruited a simple majority of employees in over 50% of Hotels that comprise the membership of Hotel Keepers and Caterers Association so as to oust KUDHEIHA from the position it currently holds with the Association?

**11.** This is a question of both facts and law. The erstwhile Industrial Court awards in Cause No. 39 of 2007 and Cause No. 48 of 2007 per Rika J and Cause No. 30 of 2005 per E. K. Mukunya J and Cause No. 8 of 2003 per Chemmutut J. had ousted the jurisdiction of KUDHEIHA from the Hotel Industry and directed that KUDHEIHA amends its constitution so as to remove Rule 3 by deleting words “*Hotels, Restaurants, Casinos, Catering and similar establishments providing lodging, food, beverages or both and further categories of related establishment providing tourism services*” were subsequently overtaken by the decision of the three Judge Bench in Petition No. 5 of 2013. (supra).

**12.** Accordingly, both unions, KHAWU and KUDHEIHA are free to operate in the hotel industry provided each union does not interfere with the freedom of association of the other as provided under Article 41 of the Constitution of Kenya 2010 as read with section 5 of the Labour Relations Act, 2005.

**13.** In this suit, the claimant has not demonstrated that it has fulfilled the requirement of section 54(1), of the Labour Relations Act, 2007, by recruiting a simple majority (50 + 1) of all unionsable employees employed by the hotels who have a recognition agreement with the respondent, the Kenya Association of Hotel Keepers and Caterers, so as to warrant a termination of the existing Recognition Agreement, and Collective Agreement that presently govern the labour relations, and the terms and conditions of Employment, respectively between members of the Kenya Association of Hotel Keepers and Caterers and KUDHEIHA.

**14.** KHAWU cannot enjoy any superior right of association in the hotel industry to that enjoyed by the respondent.

**15.** However, the claimant union is entitled to union dues from all its members whether they are employed by hotels that are members of the Kenya hotel Keepers and Caterers Association or not. These employees will also be subject to payment of Agency fees provided they continue to enjoy terms and conditions of service contained in Collective Bargaining Agreement (CBA) negotiated between KUDHEIHA and the Kenya Hotels and Caterers Association in terms of section 49 (1) of the Labour Relations Act, 2007.

**16.** These employees must make an informed decision for their own benefit. This must in no way be construed to curtail their freedom of association. They cannot have their cake and eat it at the same time.

**17.** Equally, the claimant is free to conclude recognition agreements with the many hotels which are not members of the respondent. None of the unions enjoy in terms of the law exclusive existence in the hotel Industry. The performance of each will determine their growth and prosperity in the hotel Industry.

**18.** Accordingly, the suit is dismissed with costs for lack of sound basis.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**