



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 104 OF 2015**

**KUDHEIHA WORKERS.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT, UNYAA PRIMARY SCHOOL... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 28<sup>th</sup> October, 2016)

**JUDGMENT**

The claimant union filed the memorandum of claim on 26.06.2015 alleging the unfair termination of its member one Beatrice Kamene Wambua, the grievant. The claimant prayed for judgment against the respondent for:

- (a) 3 months pay in lieu of termination notice Kshs. 24, 663.60.
- (b) Underpayment of Kshs.42, 222.00.
- (c) Pay in lieu of annual leave for 3 years and 10 months Kshs.20, 584.60.
- (d) Service pay Kshs.12, 333.30.
- (e) House allowance Kshs. 12, 333.30.
- (f) 12 months' wages compensation for unfair termination Kshs.98, 652.00.
- (g) Total claim for Kshs. 210, 788.80.

The memorandum of response was filed on 03.11.2015 through F.O. Makori , Litigation Counsel, for the Attorney General. The respondent prayed that the memorandum of claim be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether the claimant has the standing to sue the respondent. The respondent has pleaded that the claimant lacks standing because at all material times the grievant was not a member of the claimant union. The grievant's case was that she was employed by the respondent as a cook effective 05.06.2009. It was her further testimony that after a theft at the school on 07.01.2013 and about which she knew nothing, the respondent decided that the claimant together with one Sabina, a cook; the matron; and the school watchman pay the school Kshs. 21, 000.00 being the value of the stolen items. The claimant testified that she told the school head teacher that she could not pay up and, she was told by the head teacher that she had been fired in view of her position that she was not going to pay up. The claimant then testified that she joined the union about 14.04.2013 and she confirmed to have joined the

union after she had been fired.

The respondent submitted that the court should follow **Kudheha Workers –Versus- Board of Management, Kihumbu Ini Secondary School [2015]eKLR** where the court held that the claimant union lacked standing because the grievant had failed to show that she had been a member of the union at all material times prior to the dismissal. In the present case it is clear that the grievant was not a member of the union prior to the alleged termination. In the opinion of this court, if an employee is a member of a trade union during the subsistence of the contract of employment, even in absence of the recognition or collective agreement between the union and the employer, such union can sue on behalf of the employee on account of the contract of employment. Thus, as submitted for the claimant, under section 52 of the Labour Relations Act, 2007, nothing prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorized by the constitution of the trade union directly to the trade union. By reason of that provision, such a member would be entitled to full representation by the union including representation in court proceedings. In the court's view, the only chain is that such member must have joined the union during subsistence of the contract of service for such member to enjoy such representation. Indeed, section 54 of the Act envisages recruitment of members prior to recognition and it is only just and fair that such recruited members enjoy some trade union representation pending satisfaction of the conditions for recognition and conclusion of the recognition and collective agreements as provided in the Act. If recruited employees fail to be accorded such union representation pending attainment of the recognition and collective agreements, then, in the opinion of the court, the role of the trade union would become seriously compromised and therefore undermined.

In the present case, the grievant has confirmed that throughout the subsistence of the alleged contract of employment she was not a member of the claimant trade union. Accordingly, the court returns that the respondent lacked the relevant standing to sue the respondent on behalf of the grievant upon the collective agreement binding the parties or upon the alleged contract of service between the grievant and the respondent. The suit will therefore fail on that account alone.

In conclusion the claimant's suit is hereby dismissed with costs.

**Signed, dated and delivered in court at Nyeri this Friday, 28<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**