



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**APPEAL NUMBER 4 OF 2016**

**BETWEEN**

- 1. DOMINIC NGOLO**
- 2. CARILLUS OGELLO**
- 3. ANTHONY ADIKA**
- 4. BRIDGET WANYONYI NYARKO**
- 5. MUSA MOHAMED**
- 6. SUSAN WANJIRU AYOYI**
- 7. CHRISPINE OPONDO**
- 8. EZEKIEL OTIENO OMAMO**

**[Suing on their behalf and on behalf of the proposed  
KENYA BODABODA, TUKTUK and TAXI WORKERS UNION]....APPELLANTS**

**VERSUS**

**THE REGISTRAR OF TRADE UNIONS.....RESPONDENT**

***Rika J***

***Court Assistant: Benjamin Kombe***

***Ms. Bridget Cynthia Wanyonyi, Interim General Secretary for the Appellants***

***Attorney General for the Respondent***

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**JUDGMENT**

**BACKGROUND**

1. The Appellants are Promoters and Interim Officials of the proposed KENYA BODABODA, TUKTUK and TAXI WORKERS UNION. TUKTUK is a three wheeler, auto rickshaw, a common form of urban transport, in use particularly at our Coast Region. BODABODA is a motorcycle, widely in use in urban as well as rural transport.
2. The Appellants held a meeting on 25<sup>th</sup> February 2015 at Mombasa, attended by over 50 Employees in the industry, and resolved to form and register their proposed Trade Union.
3. They approached the Respondent and were issued a Certificate under Section 12 of the Labour Relations Act Number 14 of 2007 [hereinafter the Act], enabling them to recruit Members for purposes of establishing their Trade Union.
4. Thereafter the Respondent issued Legal Notice Number 5917 on 14<sup>th</sup> August 2015 under Section 14[1] of the Act, inviting objections to the registration of the proposed Trade Union. No Trade Union, Federation of Trade Unions, or Employers' Organisation objected.
5. The Appellants presented all the requisite documents and paid the prescribed fee of Kshs. 15,000 to the Respondent.
6. The Respondent in turn, presented the application before the National Labour Board under Section 19 of the Act. The Board unfortunately did not give its approval to registration.
7. The Respondent gave a Notification of Refusal of Registration, dated 20<sup>th</sup> April 2016, under Section 20 of the Act. The Respondent told the Appellants that: there is no clear evidence provided on who the Employers in this sector are; your earlier explanation that there are individuals who employ Riders and Drivers does not apply under the Labour Relations Act, as you cannot sign Recognition Agreements and/or CBAs with individual persons; there were no clear terms of rights and conditions of service provided; and lastly, it was noted this sector would be better off forming an association.
8. This decision is the subject of the Appeal. The Appellants submit the Respondent misapprehended the law on registration of Trade Unions. The right to form a Trade Union is a fundamental right under the Constitution, which can only be restricted in accordance with the law.

### **The Appeal**

9. The Appellants submit the Respondent rejected their application based on the very reasons the Respondent had asked the Appellants to explain from the inception. The Respondent erred, by donating the powers conferred upon her by Section 31 of the Labour Institutions Act, to the National Labour Board. The powers conferred on the Registrar are exclusive, not to be shared with any other authority.
10. The Appellants submit the Respondent acted *ultra vires* her mandate, by prescribing to the Appellants to form an Association. The Respondent violated the Appellants' freedom of association under Articles 36 and 41 of the Constitution of Kenya, Section 4 of the Labour Relations Act and International Labour Organization Convention 87.
11. The Appellants rely on various Scholarly Articles and Judicial Authorities in support of the Appeal. They cite ***Okebiro Gilbert Nyakundi's 'MOTORCYCLE [BODABODA] AS EMERGING BUSINESS FOR THE POOR IN TRANSPORT INDUSTRY AND SUSTAINABLE DEVELOPMENT IN MODERN KENYA' [Kabarak University]*** which confirms Bodaboda as an emerging business which requires labour. They also rely on a Report of the ***International Transport Workers' Federation 'ORGANISING INFORMAL TRANSPORT WORKERS: GLOBAL RESEARCH PROJECT' by Chris Bonner, July 2006.*** The Report confirms there are Trade Unions in such countries as Benin, Zambia, and Philippines, devoted to organizing Transport Workers in the informal sector. Chris Bonner points out that over the past few years the issue of workers in the informal economy has become a serious one for the Trade Union Movement, and despite some resistance, it is now widely accepted that informal workers form a major part of the working poor. The Report advocates for inclusion of informal workers within the

reach of labour law and social protection.

12. Judicial Authorities relied upon include ***Industrial Court at Nairobi Appeal Number 10 of 2011 between Kenya Concrete, Structural, Ceramics Tiles, Wood Plys and Interior Designs Workers Union v. The Registrar of Trade Unions & Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union***, where it was ruled that although the law requires the Registrar to consult the Board in registration of Trade Unions, the ultimate responsibility in registration vests with the Registrar. The Court is urged to adopt the holding in ***Industrial Court at Nairobi, Appeal Number 50 of 2012 between Seth Panyako & 5 others v. The Attorney General & 3 others*** which was that, the decision of the Registrar must be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.

### **The Response**

13. The Attorney General boycotted the hearing of the Appeal on 6<sup>th</sup> December 2016. The Appellants proceeded in the absence of the Attorney General.

14. Nonetheless the Respondent filed Reply to the Memorandum of Appeal, on 3<sup>rd</sup> October 2016, and filed Submissions on the date of the hearing, albeit after the hearing, on 6<sup>th</sup> December 2016.

15. The Reply to the Memorandum of Appeal largely agrees with the Appellants on the history of the dispute. The Registrar states she forwarded the Appellants' application for registration to the National Labour Board for 'advice,' pursuant to Section 19 of the Act. The Board advised the application be rejected as it was not clear who the Employers in the sector were. The Transport Workers Union [TAWU] is already in existence and covers the sector the proposed Union wishes to draw Members from. TAWU's Constitution allows it to cover the whole spectrum sought to be represented by the Appellants. Registration would result in unhealthy competition and interfere with industrial stability.

16. In her Submissions the Respondent alludes at paragraph 5, to an Order of the Court, which compelled her to issue the Appellants Certificate of Recruitment. The Court has not been able to trace such a Court Order, and none is mentioned in the Reply to Memorandum of Appeal.

17. It is submitted the Board considered the Appellants' application and advised against registration. The area of representation was adequately represented by TAWU. The Appellants bear the burden of proving Employees in the sector are not sufficiently represented as held in the ***Seth Panyako Appeal*** cited above. The right to form a Trade Union under Section 4[1] of the Act, and under Article 41 of the Constitution, is not absolute. Article 24 allows limitation by law, of fundamental freedoms, to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors. The Court held Section 14 of the Act satisfies the requirements of Article 24 on limitation. There is justification in refusal to register a Trade Union which is intended for a sector that is adequately represented as held in ***Industrial Court at Nairobi, Petition Number 61 of 2014 between Wesley Tomno v Registrar of Trade Unions***. The Respondent prays for dismissal of the Appeal.

### **The Court Finds:-**

18. The Appellants satisfied the requirements for registration under Section 18 of the Act. They paid the prescribed fee, forwarded their application for registration, accompanied by a copy of their union constitution, and certified copy of attendance register and minutes of the meeting at which their Trade Union was established. They did all the law pertaining to registration of Trade Unions, particularly under Section 12 and 18 of the Act, bids them to do.

19. The Respondent on her part made enquiries about the proposed Trade Union. On 18<sup>th</sup> March 2015, she advised the Appellants that Trade Unions, are formed on sector basis, with the intention of protecting the rights of their members in the given sector. She was of the view that TUKTUKS, BODABODAS, and

some TAXIS are operated by individual entrepreneurs. The question posed by the Registrar to the Appellants was: whose interests do you intend to represent, and who are the Employers in this sector? The Registrar was concerned that the Appellants had not shown whose interests they intended to represent, and had not shown who the Employers they were going to have industrial relations with were.

20. The Appellants wrote to the Registrar on 26<sup>th</sup> March 2015. They stated they had researched and found majority of TUKTUKS, BODABODAS in urban areas are owned by Civil Servants. Associations such as Three Wheelers Association have been formed by owners of these businesses. Employers who own these businesses are organizing. Employees similarly need to be allowed to organize, to reap maximum benefit under the Constitution and the Act. The Registrar did not call for further clarification on the subject of Employers. The Registrar did however write to the Appellants on 2<sup>nd</sup> April 2015 asking about the Promoters' details, which the Appellants supplied in their reply of 10<sup>th</sup> April 2015. Having met the conditions imposed on Applicants for registration, the Appellants were granted Certificate to enable them recruit Members, under Section 12 of the Labour Relations Act.

21. A large number of Workers were recruited from as far as Kisumu in Western Kenya, but mostly from Mombasa. Names of recruited Members were forwarded to the Registrar through a letter dated 6<sup>th</sup> July 2015.

22. It is agreed that once the Appellants forwarded their application for registration, the Registrar called for objection from interested Trade Unions, through Legal Notice Number 5917 of 14<sup>th</sup> August 2015. There is nothing in the record to suggest that any objection was lodged from any Trade Union. There was no objection lodged by TAWU, or any other player in the transport industry.

23. The Respondent forwarded the Application to the National Labour Board under Section 19 of the Act. It is stated in her Reply to the Memorandum of Appeal, that the Board advised the application is rejected as it is not clear who the Employers in the sector are.

24. The grounds for refusal are stated in the Notification of Refusal of Registration, dated 20<sup>th</sup> April 2016. It is clear that the Registrar did not mention in the Notification, that the Appellants proposed Trade Union could not be registered because there was another Trade Union called TAWU, representing the sector. There was no mention of TAWU, either in the Notification, or the letter of the Registrar forwarding that Notification. TAWU was only mentioned in the Reply to the Memorandum of Appeal, and in the Submissions filed by the Attorney General on the date the Appeal was heard.

25. Registration was not denied because there is another Trade Union sufficiently representing the industry. It was denied on the grounds specified in the Notification of Refusal of Registration. It was not suggested that TAWU featured in the deliberations of the Board. It was a non-issue as far as the record shows. It should not have been an issue introduced by the Respondent later, at the point of appeal. TAWU and other Trade Unions interested in the industry were invited to make objections. None took up the invitation. Why then drag TAWU into the dispute while it does not claim to represent the area craved by the Appellants? The Court must entirely agree with the Submissions of the Appellants, that by bringing TAWU into the picture belatedly, the Registrar pivoted to the detriment of the Appellants. The Court is aware there are other transport Trade Unions registered after TAWU. More recently we have seen registration of Trade Unions representing the informal sector such was Matatu Workers Union and Public Transport Workers Union. Why then select TAWU as being sufficiently representative, and decline registration of the Appellants' proposed Trade Union, while other transport Unions have been registered after TAWU, and none, including TAWU objects to the Appellants' Trade Union?

26. There are other faults with the decision of the Registrar. First the Registrar appears to hold that it is the National Labour Board which is vested with the ultimate authority in determining whether a Trade Union should be registered or not.

27. The role of the National Labour Board is advisory under Section 7 [1] of the Act. It advises the Minister on all matters of policy concerning employment and labour. These include policy on the

registration, suspension and deregistration of Trade Unions and Employers' Organisations. It is an Advisory body, with no decisional or executive authority. It does not therefore decide if a Trade Union should be registered, suspended, or de-registered.

28. The decisional, and executive function in registration, suspension or deregistration of Trade Unions and Employers' Organisations vests with the Office of the Registrar of Trade Unions, created under Section 31 of the Labour Institutions Act Number 12 of 2007.

29. Section 19, of the Labour Relations Act, requires the Registrar to make an independent and impartial decision, upon consultation with the Board. The Board does not decide, but could perhaps offer the Registrar policy guidance. The decisional authority lies with the Registrar as concluded in ***Nairobi Appeal Number 10 of 2011***, referred to above. The Board does not exercise executive, decisional role; the Registrar exercises executive and decisional role, and has been held in a catena of Judicial Authorities, to exercise a quasi-judicial function. That is why the Registrar's decisions are appealable in the Employment and Labour Relations Court under Section 30 of the Labour Relations Act. While the Registrar is required to consult with the Board, the Registrar must not let the Board determine an application for registration of a Trade Union as appears to have happened in the Appeal filed herein.

30. Section 19 of the Labour Relations Act does not require registration is approved by the National Labour Board. It only requires the Registrar is satisfied, upon consulting the Board. In this Appeal, the Registrar informed the Appellants, on 20<sup>th</sup> April 2016 that the Board did not approve. The Board, not the Registrar made the decision. That is not the intention of the law, in requiring there is consultation between the Registrar and the Board.

31. The grounds given in the Notification of Refusal of Registration, whether the decision was made by the Respondent or the Board, are very weak and have no legal or policy justification.

32. Ground one was that the Appellants did not reveal who the Employers in the sector are. It is not required under the Act that an Applicant for registration, reveals who the specific Employer or Employers' Organisation, whose Employees the Applicant intends to represent, is. The Appellants are in the informal sector, and intend to represent informal workers. They were asked the same question in any case, by the Registrar and gave plausible answer in their letter of 6<sup>th</sup> March 2015. They mentioned that owners of TUKTUKS and BODABODAS are diverse; there are individual owners driving and riding these modes of transport. There are other modes owned by persons other than their drivers and riders. There are Employer groups in this area such as Three Wheelers Association. There are TAXI companies.

33. The Respondent did not fully appreciate the informal nature of the sector sought to be represented by the Appellants. It would be difficult to register Trade Unions intended to represent informal workers such as House Helps, Jua Kali Artisans or Hawkers, if registration is hinged on revealing who their Employers are. There are hidden and precarious employment relationships in the informal sector. The Court does not think it was right to expect the Appellants to disclose more material than they did in answering this query, and if such additional disclosure was required in any case, the Registrar should have called for it under Section 18 [3] [a] of the Labour Relations Act, before making a decision. The Appellants were not called by the Registrar or before the Board, and asked to give more evidence on, who the Employers in their desired area of representation are.

34. The Respondent erred by emphasizing preconditions which are not in the Labour Relations Act, and which ought not to be demanded of an informal economy. Studies such as those carried out by Bonner [see Appellants' Submissions] have concluded informal or precarious employment comprise between half and three quarters of non-agricultural employment in developing countries. In Kenya, the exponential growth of TUKTUK, BODABODA and TAXI business and its effect on the informal economy has opened the door for informal or precarious forms of labour. ***The International Labour Organization Resolution Concerning Decent Work and the Informal Economy adopted at the International Labour Conference in 2002*** recognized and increased awareness on the need to organize informal workers. More than half the world workers are in the informal economy. Formal employment has dwindled. Trade Union density has shriveled. It is therefore important, and in the interest of the Trade Union Movement, to have

more informal sector Trade Unions. There is no doubt that TUKTUKS, BODABODA and TAXIS, as argued by *Okebiro Gilbert Nyakundi* in his study cited by the Appellants above, comprise a sizeable portion of the Kenyan informal economy. If workers in this economy are to enjoy social protection, and recognition under our labour law regime, they must be encouraged to organize and have a common voice.

35. The Notification of Refusal of Registration also states that the Appellants did not show who the Employers in the sector are for purposes of signing Recognition and Collective Bargaining Agreement.

36. Trade Unions are established for many other reasons other than collective bargaining. Collective bargaining is a defining feature of trade unionism, but hardly the only feature. The Appellants' Trade Union Constitution was forwarded to the Registrar. Among the objects intended to be pursued by the proposed Union are these: secure organization of Members; protect interest of Members; regulate relations and settle disputes between Members; train Members; provide legal advice to Members; network with other Trade Unions including International Trade Unions; and promote the welfare of Members. Collective bargaining is just one of the myriad objects open for pursuit by a Trade Union. The view by the Registrar that the Appellants had not demonstrated who they were going to collectively bargain with, was a very restrictive view of freedom of association, and the right to organize. Trade Unions exist for much more than collective bargaining. They represent their Members in Court, and have associational standing under our Constitution to move the Courts on behalf of their Members. They influence labour policy and participate in legislative processes. When registered, they are able to enhance skills reproduction. They influence wage levels even while not engaged in collective bargaining, through their participation in Wage Councils under Section 44 [b] of the Labour Institutions Act. Their representations result in Wage Orders. They define the statutory minimum terms and conditions of employment. It was wrong therefore to refuse registration, on account of the challenges the Appellants were thought would have, in collective bargaining.

37. The last ground in declining registration was that there were no clear terms of rights and conditions of service provided. This ground is ambiguous. Which terms of rights and conditions of service? At no time did the Registrar mention terms of rights and conditions of service to the Appellants in the process leading to the lodging of the Application. Such terms of rights and conditions of service are not rooted on the Labour Relations Act. Whether persons desire to register a Trade Union, Sacco, Society, Trust, or an Association of other kind, is entirely at the discretion of such persons. It is an exercise of freedom of association, which is protected under the Constitution. The Registrar of Trade Unions plays no role whatsoever, in determining whether persons elect one mode of association over the other. Persons getting into these associations know best the most suitable vehicles to use in realization of their objectives. The advice that the Appellants form an unspecified Association, while at the same time declaring they do not qualify to establish an Association of Workers, was out of place.

38. The trend as shown in the studies of the ILO, the International Transport Workers Federation, and Labour Law Scholars availed to the Court by the Appellants, is to encourage organization of informal workers. The examples of Zambia, Philippines and Benin given in the ITF Report are just a few of the many jurisdictions where informal economy has taken root, occasioning new forms of employment and the need to organize for workers engaged in this economy. When workers in the informal economy organize, they benefit from their affiliation with such resourceful International Trade Unions, like the ITF. This association on the whole is beneficial to the national economy. To leave informal workers to their own devices, results in their exposure to the extortion of black-market organized gangs, and exploitation by cabals of informal business owners, such as was the case in the Matatu industry. Organization assists the informal workers in bridging the gap in terms of social protection, with the formal economy, while ensuring the informal economy which is driven by a grey labour market, does not slide into the clasp of a black- labour market.

39. The Court is satisfied the Appellants have shown they were denied registration without justification. They have met all the requirements of the law. There is not a yellow Trade Union. No Trade Union has come forward to object to registration. There is a large number of Members recruited. They straddle the breadth and width of this Country. Other Trade Unions in transport sector have not indicated they represent, or intend to represent TUKTUK, BODABODA and TAXI workers. The forms of employment

relationships are not decisive in determining whether to allow an informal sector Trade Union registration. Article 36 of the Constitution allows every Person the right to freedom of association. All workers including those in the informal economy, who are largely in hidden or precarious employment relationships; must not be denied their right to freedom of association. Article 41 enables Persons to come together and establish a Trade Union. Registration under Section 4 of the Act is not to be withheld unreasonably. The Appellants have shown they were not allowed to exercise their right to freedom of association, and their proposed Trade Union was denied registration unreasonably. The Appeal is allowed, and the following orders granted:-

*a. Appeal against the decision of the Registrar, contained in the Notification of Refusal of Registration dated 20<sup>th</sup> April 2016, is allowed.*

*b. The KENYA BODABODA, TUKTUK and TAXI WORKERS UNION, is hereby granted registration from the date of this Judgment.*

*c. The Registrar of Trade Unions shall enter the name and details of the Appellants' proposed Trade Union in the appropriate register forthwith.*

*d. No other orders.*

Dated and delivered at Mombasa this 16<sup>th</sup> day of December, 2016

**James Rika**

**Judge**