



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 19 OF 2015

(Formerly Nakuru E & LRC Cause N0.538 of 2014)

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF DOMESTIC HOTELS, EDUCATION INSTITUTIONS,

HOSPITAL AND ALLIED WORKERSCLAIMANTS

-Versus-

LUKHOKHO SECONDARY SCHOOLRESPONDENT

J U D G E M E N T

This dispute was initially filed in the Industrial Court at Nakuru as Nakuru Cause No.538 of 2014. It was transferred to this court for hearing and determination on 8th December, 2014.

In the Memorandum of Claim dated 16th October, 2014 the Claimant states that it is a registered trade union that represents inter alia non-teaching staff engaged by Boards of Management in both private and Public Educational Institutions per Rule 3 of its registered constitution while the Respondent is a Public Educational Institution run by a duly constituted Board of Management under the Education Act. The Claimant states that by Legal Notice No.262 of 1993 the employment of non-teaching staff was transferred from the Ministry of Education to individual Boards of Governors (now Boards of Management) and by Legal Notice No.263 Boards of Management (BOM) were legally mandated to enter into recognition agreements with any trade union competent to negotiate terms and conditions of service for and on behalf of any section of employees of the Board through **The Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993** and **The Education (Board of Governors) (Amendment) order, 1993**, respectively.

The Claimant states that it organised and recruited eleven (11) employees out of twelve (12) unionisable employees of the Respondent, thus meeting the threshold of 50% + 1 necessary for recognition by the Respondent. The Claimant thereafter presented the list of names of the employees who had joined its membership to the Respondent together with authority to deduct union subscriptions and remit to the union with effect from October 2012 vide its letter dated 10th October, 2012. The Claimant further presented a Recognition Agreement Proposal to the Board vide its letter dated 29th October 2012 and requested for a meeting to sign the Recognition Agreement but the Respondent failed to respond. The Claimant consequently reported a dispute to the Minister for Labour who accepted the report of the dispute and appointed Mr. G. Abutto of Kakamega Labour Office to act as a conciliator. The conciliation did not field fruit resulting in the reference of the dispute to this court.

The Claimant submits that the Respondent violated section 48 of the Labour Relations Act by failing to

participate in the conciliation and section 19(1) (g) and (i) by failing to deduct and remit union dues in accordance with the check-off forms submitted by the union. The Claimant further submits that the Respondent failed to comply with section 54 of the Labour Relations Act by failing to sign the Recognition Agreement. It is further the Claimant's submission that the Respondent violated Article 41 of the Constitution by denying the Claimant and its members the freedom to enjoy their constitutional rights of freedom of association. The claimant prays for orders compelling the Respondent to sign recognition agreement and conclude a Collective Bargaining Agreement within 90 days and to deduct and remit union dues to the Claimant.

The Respondent entered appearance and filed a memorandum of Response through D.L. Were & Were Co. Advocates. In the Response the Respondent denied that the Claimant had recruited 11 out of its 12 employees. The Respondent avers that the list presented to it by the Claimant contains names of people who were not in its employment and one who died on 10th October, 2012 and who therefore could not have signed the check-off form authorising deduction of union dues.

The Respondent avers that it believes there is no dispute between it and the Claimants and it is willing to recognize the **Claimant if they rectify the anomalies.**

The Respondent states that the refusal to sign the recognition agreement was lawful and proper in the circumstances and that the claimant's actions led to the refusal and they must bear the responsibility of those actions. The Respondent states that it is a good employer who is concerned about the welfare of its employees and is willing to do anything in their best interests including signing the recognition agreement.

The case was fixed for hearing on 7th December, 2015 when the parties agreed to attempt an out of court settlement and to proceed by way of written submissions should they fail to agree.

Thereafter the matter came up in court on 28th January 2016 when both parties failed to attend court, and again on 9th March 2016 when the claimant attended court but the Respondent did not in spite of having been properly served. The Court on that date gave directions on filing of written submissions which the Claimant complied with but the Respondent did not. The Judgement has therefore been prepared after considering the Memorandum of Claim, the Memorandum of Response and the written submissions of the Claimant but without the benefit of the written submissions of the Respondent.

Findings and Determination

Article 41(2)(c) of the constitution of Kenya gives every worker the right to form, join or participate in the activities and programmes of a trade union while under Article 41(4) & (5) every trade union has a right to -

- (a) *to determine its own administration, programmes and activities;*
- (b) *to organise; and*
- (c) *to form and join a federation.*
- (5) *Every trade union has the right to engage in collective bargaining.*

The Employment Act also recognises the right of association of employees at section 46(c) (d) (e) and (f) which provide that participation in union activities does not constitute a ground for dismissal or for imposition of a disciplinary penalty. Section 46 provides as follows -

46. Reasons for termination or discipline

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

- (a) a female employee's pregnancy, or any reason connected with her pregnancy;
- (b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
- (c) an employee's membership or proposed membership of a trade union;
- (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
- (e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
- (f) an employee's refusal or proposed refusal to join or withdraw from a trade union;
- (g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
- (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or
- (i) an employee's participation in a lawful strike.

The right of association is further protected under Part II of the Labour Relations Act and specifically section 4, 5 and 6 of the Labour Relations Act, section 9 of the Act specifically provides that -

9. Provision may not be varied by agreement

A provision in any contract of employment or collective agreement, whether concluded before or after the commencement of this Act, that contradicts or limits any provision of this section is invalid, unless the contractual provision is expressly permitted by this Act.

Under section 48 of the Labour Relations Act an employer is under obligation to deduct and remit union dues from the wages of an employee to the Union. Section 48(2) and (3) provide as follows -

(2) A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to—

(a) deduct trade union dues from the wages of its members; and

(b) pay monies so deducted—

(i) into a specified account of the trade union; or

(ii) in specified proportions into specified accounts of a trade union and a federation of trade unions.

(3) An employer in respect of whom the Minister has issued an order under subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form S set out in the Third Schedule signed by the employees in respect of whom the employer is required to make a deduction.

It is therefore obligatory for an employer who has been served with Form S (commonly referred to as check-off form) to comply by deducting union dues from wages of employees who have signed the form and remitting the same to the union. Any employer who fails to do so is by virtue of section 50(10) guilty

of an offence.

With regard to recognition of trade unions for purposes of negotiation section 54(1) 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.

In its defence, the Respondent has stated that it is willing to recognise the claimant "if they rectify the anomalies" which in the opinion of the Respondent, is the inclusion of 3 names of employees no longer in the service of the Respondent, one having been terminated on 10th October 2012, another who died on 10th October 2012 and a third one who retired on 10th October, 2012.

The court does not consider the same as anomalies as a workforce is dynamic and changes are continuous. The Respondent does not deny that at the time of seeking recognition the claimant recruited a simple majority of 50% + 1 which is the threshold for recognition. The Respondent thus had no valid reason to refuse to sign recognition agreement, or to refuse to deduct and remit union dues from the employees who were still in its employment among those in the list submitted by the Claimant. The Respondent has also not explained why it refused and/or failed to participate in conciliation where such issues would have been explained by the conciliator.

From the foregoing I find and hold that the Claimant is the proper union for purposes of unionisation of employees of the Respondent, that the Claimant recruited the said employees and achieved a simple majority and therefore is qualified to be recognised by the Respondent.

I therefore make the following orders -

(1) The Respondent is directed to deduct and remit union dues from the wages of all employees whose names are in Form S submitted to the union and who are still in its employment from December 2016. For clarity this means that the deductions will be effected from the wages of December, 2016.

(2) The Respondent is directed to sign Recognition agreement with the Claimant within 30 days from date of Judgement to pave way for negotiation of collective bargaining agreement.

It is so ordered.

Judgement Dated, signed and delivered this 1st day of December, 2016

MAUREEN ONYANGO

JUDGE