REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 684(B) OF 2014

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS,

HOSPITALS AND ALLIED WORKERS (KUDHEIHA) …… CLAIMANT

VERSUS

BRITISH ARMY TRAINING UNIT KENYA ……..……. RESPONDENT

JUDGEMENT

Issues in dispute;

1. Refusal the management to sign recognition agreement contrary to section 54 of the Labour Relations Act
2. Refusal by management to deduct and remit union dues contrary to section 19 of Employment Act and section 48 of the Labour Relations Act
3. Intimidation and harassment of employees.

1. On 29th April 2014, the Claimant union filed their Notice of Motion seeking for urgent orders and seeking for restraining orders against the Respondent on the basis that their members were being harassed and intimidated with terminations for unionisation; that the respondents should be directed to deduct and remit union dues based on submitted check off lists; and that the Claimant be granted recognition. With the application, the Claimant filed a Memorandum of Claim seeking similar orders together with a claim for recognition and that the Respondent be directed to commence negotiations towards a collective agreement with the claimants.

2. On 27th May 2014 the Respondent filed their defence and admitted that they are not opposed to unionisation of their employees subject to the Claimant adhering to the applicable law and confirmation that there exists a simple majority of the unionisable employees in the employment of the respondent. On 8th July 2014, the Claimant filed a reply thereto noting 50% of all unionisable employees had singed check off lists ad hence the legal minimum had been attained and recognition should be granted.

3. On 17th July 2014, both parties entered consent and agreed to undertake a joint verification exercise to determine whether the valiant had attained simple majority. The verification exercise was confirmed by the Court subject to the Labour Officer being present. the Verification Report was filed on 19th February 2015 by the Labour Officer Ms Emily O Mukanga.

4. On 19th February 2015, both parties agreed to file their written submissions on the application and

main claim and to mention the matter on 18th May 2015 for directions on the judgment date. The Respondent filed written submissions on 18th May 2015 and the Claimant on 26th March 2015.

5. The claim is that the Claimant being a registered trade union represents employees in both private and public training institutions as under its constitution. The Respondent is an international training institution incorporated in Kenya. The Claimant recruited 226 out of 399 employees of the Respondent which is 57% well above the simple majority and proceeded to serve check off lists to the respondent. The Claimant requested the Respondent for a meeting for the purpose of signing recognition agreement and remittance of union dues which has not been granted. The failure to sign recognition agreement is thus an interference with the claimant's member's right of association, intimidation and an effort to influence their withdrawal of union membership.

6. The Claimant is seeking for orders that the Respondent be directed to deduct and remit union dues; to enter recognition and commence negotiations of a collective agreement; and costs of the suit.

7. In defence, the respondent's case is that they are an arm of the Department of Defence in the Ministry of Defence of the United Kingdom. They provide logistical and related support to Ministry of Defence Forces visiting Kenya for training. On 13th March 2014 the Claimant sent a draft recognition agreement and proposed a meeting on 19th March 2014 for purposes of signing it. Previously the Claimant had sent 5 checks off lists dated 11th March 2014, with a list of employees said to have authorised deductions on union dues that totals to 140 employees but some had not singed the list. In a reply to the claimant, the Respondent noted that;

> Only 132 of the employees on the list were confirmed being 31%
>
> Some employees had not signed on the list;
>
> 2 employees had since left the respondent; and
>
> Some names were duplicated.

8. The Claimant also wrote seeking to hold a meeting at the Respondent premises for sensitisation of the workers on their rights and the Respondent by reply asked for more information with regard to the Claimant mandate. The Respondent was also keen to comply with the provisions of section 5491) of the Labour Relations Act. The union did not have a simple majority of members from the unionisable employees in the Respondent employment to warrant recognition. However the Respondent was not opposed to the unionisation of its employees subject to compliance with applicable law and condition that such employees were drawn from locally engaged civilians. The Respondent conducted a human resource administration exercise to confirm the details of unionisable employees before effecting deductions; this was meant for confirmation of consent and not for intimidation, harassment or threats of termination. The Respondent is based within a military facility that requires security checks to everyone visiting the premises which includes the claimant. Clearance is therefore required prior to the visit. Unionisation is a right but should be from unionisable employees and once simple majority is attained, recognition can follow. The Respondent has not violated any rights of its employees.

Submissions

9. Only the Respondent filed written submissions. The Respondent thus submitted that in the claim the Claimant allege to have recruited **266** out of the **399** employees of the Respondent this being 57%. In the check off lists submitted only **140** employees were noted out of whom some had not singed; some had duplicated names several times; and others had already left the Respondent employment thus a total of 31% had joined the claimant. Later the Claimant recruited more/additional employees and it is not disputed that they have attained the 50% [50% +1] threshold. This was confirmed by the joint verification report singed by all parties. However, the Claimant is not the right or proper union to be recognised by the Respondent despite them attaining the numbers threshold.

10. The Respondent also submitted that the Claimant has introduced new evidence contrary to the provisions of section 20 of the Industrial Court Act, 2014 Amendments and failed to comply to the Evidence Act and thus denied the Respondent the opportunity to respondent. Such evidence should have been produced by way of affidavit for the Respondent to be able to reply thereto. The evidence irregularly produced should be disregarded as held in **Grace Achieng Ogot versus Sukari Co-operative Credit Society Ltd [2013] eKLR.**

11. The Respondent also submitted that the legal requirements for unionisation have not been met by the Claimant as under **section 48(2)** of the Labour Relations Act which provides that where more than 5 members have been recruited, the employer shall deduct union dues and remit which is spate from having recognition agreement. The Respondent has been deducting and remitting union dues tot eh Claimant despite not having a recognition agreement as these are two separate legal requirements. **Section 54(1)** requires an employer to recognise a union that has attained a simple majority of all unionisable employees and to determine who the *unionisable employees* are; the Constitution of the union must be availed to the employer. As a show of intention for recognition, the union must be willing to share its Constitution for this purpose. The Claimant has adamantly refused to share this primary document of engagement. The Respondent relied on **Banking Insurance & Finance (K) versus Kenya Revenue Authority [2008] eKLR.** The Court looked at the union Constitution to determine eligibility of employees before determining whether the legal requirements had been met and made reference to **Kenya union of Domestic, Hotels, Educational Institutions and Allied Workers versus Commissioner of higher Education [2013] eKLR.** that in this case, it is important for the Court to determine the mandate of the union in order to confirm whether or not the employees are eligible to join the union.

12. The Respondent also submitted that they have recognised their employees' right to associate and unionise but the right to association and recognition of the union do not operate in a vacuum. There is limitation in law as held in **Fondo Kalama & 19 Others versus Anderson M Mtalaki & 3 Others [2013] eKLR.** The intention of section 54 of the Labour Relations Act was clear, not any union can be recognised – the union that most represents the interests of the employee is the one to be recognised. The Respondent employees cannot be said to fall in any of the categories under clause 3 of the Claimant constitution. The Respondent is an arm of the Department of Defence in the Ministry of Defence of the United Kingdom and provides logistical and related support to the Ministry of Defence Forces visiting Kenya for training and the employees the Claimant is seeking to recruit are the locally sourced employees. The British soldiers with the Respondent are not part of its human resource are they are employees of the British Military trained by fellow British soldiers and Kenya defence Forces soldiers. The training offered is to the soldiers and the Respondent cannot therefore be classified as an educational institution as outlined in the Claimant constitution. To be deemed as an educational institution would go contrary to the provisions of Article 24(5) (d) of the Constitution and section 52 of the Kenya Defence Forces Act.

> ***54****.(1) 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.*
>
> *(2) A group of employers, or an employers' organisation**, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organisation within a sector.*

13. In this case it is important to determine if the employees are eligible to join a particular union in order to have their needs well represented as the Respondent employees are not eligible to be part of the Claimant union and there is no legal basis for the Respondent to recognise it.

14. In response the Claimant submitted that the Respondent is bound to recognise the Claimant as the union most representative of its employees based on the Memorandum of Understanding (MOU) between the United Kingdom of Great Britain and Northern Ireland with the Government of the republic of Kenya in 21st May 2010 within article 2(6) of the Constitution recognising cooperation. The MOU recognises

that all the visiting forces will abstain from infringing the laws of the host nation and ensure the implementation of the MOU in conformity with domestic law. The Respondent is a training unit operating in Kenya under the MOU and thus bound to respect domestic laws. Local staffs engaged by the Respondent in various capacities have a right to fair labour relations; fair remuneration; reasonable working conditions and the right to unionise.

15.The Claimant union being dully registered in January 2014 recruited 265 members out of 427 employees but the Respondent refused to effect the check off by making deductions and remittance of union dues. The Respondent also refused to sign the recognition agreement forwarded to them on the reasons that the Claimant did not have simple majority. The Respondent then embarked on an exercise of asking their employees to state if they wanted a deduction of their salaries to be remitted to the union in disregard of the check off lists served. This resulted in intimidation despite the fact that the Claimant is only seeking to recruit local staff employed by the respondent.

16. In this case the Respondent has no right to demand the Constitution of the Claimant as joining a union is a right under article 41 of the Constitution read together with section 4(2) of the Labour Relations Act and the MOU between the Respondent and the government of Kenya. There is good rationale as to why the Claimant should be recognised as having met the simple majority rule and being the appropriate union in the sector the Respondent operates under.

Determination

17. Following a Verification exercise undertaken by the parties herein by consent, at the time of filing suit the Claimant had recruited 211 employees out of 421. This was barely half the total workforce. On the date of verification exercise, the Claimant had recruited more members increasing such to 265 out of the total workforce then at 427. This then went beyond the 50%+1 simple majority rule being 62% of the total workforce. This is however achieved after the event of filing suit. However, the purpose of fair labour relations is to ensure industrial peace; unionisation of employees; and the right to join a union of their choice and having achieved the required percentage, the Claimant has met one condition for recognition.

18. The question of deduction of union dues and that of recognition of the union by an employer are separated in law. Under section 48 of the Labour Relations Act, an employer is bound to remit all union dues deducted tot eh union account irrespective of recognition as under this part, where there are more than 5 employees in the membership of a union, the employer should make deductions and remit to the union. The deduction and remittance of union dues from employees who have acknowledged union membership should be based on the Minister for Labour making an appropriate order through Kenya Gazette indicating the account to which such union dues should be remitted. It does not require a recognition agreement between a union and an employer. The duty on the union is to submit to the employer the names and identity card numbers of the employees through the check-off forms. This is not contested as the Respondent has complied in this regard.

19. On the other hand, recognition of a union is regulated as under part VII of the Labour Relations Act. A union should establish that it has complied with section 54 of the Labour Relations Act in order to be entitled to recognition by an employer. The union must demonstrate that it represents more than a simple majority.

20. Section 54(1) creates a fundamental distinction thus;

> ***54****.(1) 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.*

21. Recognition' is qualified here. 'Recognition' of a union 'for purposes of collective bargaining' is on condition that such a union; first represents the simple majority and secondly; such majority is from unionisable employees. The two must work together but can be separated in that even where the union is

able to get a simple majority, such a majority may not comprise a unionisable groups or that there is a unionisable group that fails to meet a simple majority.

22. Where there is a challenge as to the question of which the *unionisable* employees are, the subject union Constitution comes into focus. The Respondent has challenged the Claimant that they are not the right union. It was therefore incumbent upon the Claimant to move to Court to demonstrate that it had complied with the provisions of the applicable law and ask to be granted recognition.

23. The Claimant submitted that the Respondent is a training institution and from the locally engaged civilians they have recruited a simple majority into their membership and should be recognised for collective bargaining. That the Claimant union Constitution covers all training institutions and the Respondent is one such institution where they train the locally recruited staff. Under Rule 3 of the Claimant Constitution on membership it sets out who the members of the union should comprise as;

> *All persons employed or engaged as subordinate and professionals in private homes … hotels … private and public educational institutions and organisations including primary, secondary, post-primary institutions, tertiary institutions, polytechnics, colleges, public universities (group I – IV) an university colleges, centres of higher education, mass media, radio and television stations, recording colleges and all relation educational institutions engaged in educating and training of human resources.*

24. That outlined, the Claimant also submitted the Respondent MOU whose aims is outlined as;

> *1.1 The aim of this Memorandum of Understanding is to enhance <u>defence cooperation</u> by identifying a framework for the exchange of experience and knowledge for the use of mutual benefit of the parties.* [Emphasis added].

25. At section 3 of the MOU the forms of cooperation are set out as;

a. *mutual visits by delegations of high- ranking representatives from the defence sector;*
b. *staff talks and technical meetings;*
c. *meeting between equivalent defence institutions;*
d. *exchange of teaching and training personnel as well as student from military training institutions;*
e. *participation in training courses, practical training, seminars, round-table discussions and symposia;*
f. *visits by service personnel, warships and other government ships and aircrafts; and*
g. *Military exercises.*

26. Can the Claimant then be said to be the particular union with the undertaking or undertakings that best represents the various forms of cooperation aims of the respondent? It is clear from the above extract, especially the Claimant Constitution that they spread large and wide in *public educational institutions and organisations* both at primary and higher level and in institutions that are engaged in educating and training human resource, but the Respondent has a specific mandate of *enhancing defence cooperation.* This is achieved through various aims and my scanning of the Claimant constitution; I do not find such a mandate however creative.

27. Should recognition therefore be granted to the Claimant having met the simple majority rule and not met the other for having *unionisable members* within the Respondent for purposes of recognition? I find the provisions of section 54 of the Labour Relations clear, the facts herein speak for themselves that the Respondent does not fall under the purview of the Claimant Constitution and hence lacks the requisite standing to seek recognition by the Respondent on the basis that the *unionisable* employees are well removed from its mandate.

I find no basis for recognition of the Claimant by the Respondent. Such directions are declined. Each party shall bear their own costs.

Delivered in open Court , dated and signed in Nairobi on this 10th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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