



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 532 OF 2014

BETWEEN

1. GEOFFREY MAREKO
2. CLEMENT LIBUKO
3. JAMES MBWABI
4. BWORU BARISA
5. MARSHAL KHAYOYO..... CLAIMANTS

VERSUS

1. THE NATIONAL GENERAL SECRETARY,
DOCK WORKERS UNION
2. DOCK WORKERS UNION..... RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Ms. Mwadzoyo Mwanasha Rajab, Advocate, instructed by Kadima & Company Advocates for the Claimants

Mr. Leonard Ochieng', Executive Officer, instructed by the Respondents

ISSUE IN DISPUTE: ANNUAL CONFERENCE OF 18TH OCTOBER 2014

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. On 18th October 2014, the Dock Workers Union held its Special Conference. At the Conference, the Congregants adopted several resolutions, with far reaching ramifications for the Union. Among these, was the replacement of the Union's 2008 Constitution with a new Constitution. The new Constitution

affiliated the Dock Workers Union with the Trade Union Congress [TUC- Kenya]. This ended the longstanding affiliation with the Central Organization of Trade Unions [COTU –Kenya].

2. Dissatisfied with the resolution, the Claimants, who allege to be Members of the 2nd Respondent, filed this Claim. They seek against the Respondents the following Orders:-

- a) The Notice dated 16th September 2014 calling for the Annual Conference on 18th October 2014 be declared invalid, null and void and the proceedings/business conducted on the same date 18th October 2014 be declared a nullity.
- b) The Constitution which was proposed and reviewed at the meeting to replace the Union Constitution registered on the 23rd December 2008, and the resolutions passed proposing the same be declared a nullity, void for all purposes.
- c) Any changes effected at the Registrar of Trade Unions be deleted and the former state reverted.
- d) The purported [change in affiliation?] from COTU-K to TUC-K be nullified.
- e) Any advice to the Kenya Ports Authority to stop remittances to COTU-K and direct them to the un-registered TUC-Kenya be stopped and/ or nullified.
- f) Any other suitable remedy.
- g) Costs are borne by the Respondents.

3. The Respondents filed their Memorandum of Appearance on the 7th November 2014. They filed a Joint Statement of Response on the 18th March 2015. They state they adhered to the procedures regulating the Union in convention of the Special Conference and in conducting of business at the said Conference. They respected the Members' will. They state the Respondent was faced with other Claims filed by some of the Claimants at the same Court, relating to a Special Conference which was to be held on the 2nd August 2014. The same was thwarted by the Claimants through an Order of the Court. The Respondents state the Union has since had its new Constitution registered, and the Court can only interfere with the decision of Registrar of Trade Unions if made irrationally, unlawfully or *ultra vires*. The Claim has no merit and should be dismissed with costs to the Respondents.

4. Claimant No. 1 Mr. Geoffrey Mareko and Claimant No. 5. Mr. Marshal Khayoko testified on the 30th June 2015. The Respondents did not call Witnesses. They rely on their Pleadings, Documents and Submissions. Hearing therefore closed on the 30th June 2015. Parties confirmed the filing of their Closing Submissions at the last Court Mention on the 31st July 2015.

Claimant's evidence

5. Mareko testified he works for the Kenya Ports Authority as a Technician. He was employed in 1979. He is a Member of the Trade Union, and the 2nd Respondent an Official of the Union. Mareko testified he and other Members are dissatisfied with the Union Leadership. In Cause Number 348 of 2014, the Court ordered the General Secretary to convene the Annual Conference in accordance with the Union Constitution.

6. Contrary to the Court Order, the General Secretary issued a circular dated 16th September 2014, convening an Annual Conference on the 18th October 2014. The circular indicated before 10th October 2014, the agenda for the meeting would be circulated pursuant to Rule 8 C of the Union Constitution. The Union Constitution provides that the notice and agenda are given 4 weeks before the Conference.

7. The Conference is held every September, in accordance with Rule 7[a] of the Union Constitution. The

General Secretary called the Annual Conference in October. The Members were confused. They were notified in a circular dated 10th October 2014, that what would be held on 18th October 2014 was a Special Conference. The new notice was based on Rules 7, 8 and 23 of the Constitution. According to Mareko, Rule 7 and 8 could not be invoked at the same time in calling a meeting.

8. The circular contained a number of items as the agenda. Among them; review of the Union Constitution. The agenda was given to the Members at the gate of the venue. The Members were confused. Three forms of meetings - Special Conference, Annual General Conference and Standing Order Meeting – were mentioned. Rule 30 regulates amendment to the Constitution. There was no proposal circulated to the Members. At the meeting, the Shop Steward threatened Members. Journalists invited to cover the occasion by Mareko were roughed up. The Witness testified he and his Colleagues were not allowed to participate in the secret balloting. It was announced by the Master of Ceremony that the Congregants were to vote for the amendments. No objections were allowed. The Witness and other Members protested.

9. The meeting lacked quorum. Out of a total of about 5000 Members, only 500 attended. They registered on plain papers, which have not been availed by the Respondents to the Court. There was no proper register of Members. Participants signed their presence on plain papers. The Members' records produced by the Respondents relate to April 2014; in issue were the events of October 2014. Mareko did not sign any register. He testified the Claim is not made on behalf of COTU-K. The Members of Dock Workers Union have come to Court independently. The resolution of 18th October 2014 should be revoked. The Parties should revert to the Constitution in place before the resolution.

10. On cross-examination the Witness testified he was employed in 1979. He was aware if the Constitution was amended, an aggrieved Member could raise the issue with the Registrar of Trade Unions, under the Labour Relations Act. The Registrar had not been joined to the Claim. According to Mareko the new Union Constitution had not been gazetted. The Witness told the Court he is not an Official of the Union. He brings the Claim on behalf of Members.

11. He was not a Party in Cause Number 348 of 2014. There are processes that take place, before a Notice convening the Annual Conference is issued. The Ruling in Cause Number 348 of 2014 was delivered on 29th August 2014. The Annual Conference was supposed to take place within 4 weeks. This was the effect of the Ruling. The notice alluded to 3 forms of meetings. This question was raised by the dissenters at the meeting. Less than 500 attended the Conference. Mareko testified "my People counted the ones attending." The meeting was not a proper meeting. The Master of Ceremony just announced that certain resolutions needed to be passed. The agenda could be circulated in accordance with the Union Constitution. In their prayers, the Claimants state they wish their trade union deductions are made, and remitted in favour of COTU [K]. They state the Union should not affiliate with COTU [K]. COTU [K] has the ability to file a Claim independently.

12. Mareko was shown photographs of himself and COTU [K] Officials, while he addressed a Press Conference on the controversy. He explained he had a right to fraternize with the COTU [K] Officials. Shown the certificate of registration of the new Constitution, dated 15th June 2015, the Witness testified the certificate was obtained after the Claim herein, was already in Court. He had offered himself for election at the last Union elections in 2008 but later stepped down. He confirmed on redirection that the number of the Congregants on 18th September 2014 was quite low. There was no quorum. The Officials led by the General Secretary just went about dancing, then, resolutions were passed. The circular on the agenda referred to Special Conference; there was no reference to Annual Conference. The Union Constitution does not bar Members from associating with other Trade Unions and their Officials.

13. Marshal Khayoko testified he is a Senior Bunkering Supervisor at the Port. He described himself as a Senior Member of the Dock Workers Union. He associated himself with the evidence of Mareko. The Respondents violated the Union Constitution. Ruling in Cause Number 348 of 2014 required the General Secretary to call a Special Conference. The Court had concluded the circular calling a Special Conference was invalid, having not stated the venue and agenda of the proposed meeting. The Respondents were to

convene a Special Conference in accordance with the Union Constitution, and upon issue of a valid notice.

14. The General Secretary said he would give the agenda 10 days to the Conference. The Annual Conference is held in September in accordance with the Union Constitution. The 1st Respondent issued notice dated 16th September 2014, convening Annual Conference for 18th October 2014. The Members were confused why the Annual Conference was called for October, rather than September which is the month given under the Union Constitution.

15. Before the Members could understand what was happening, the General Secretary issued a circular calling for a Special Conference, to be held on 18th October 2014. The notice issued earlier was for Annual Conference. In the new circular, review of the Union Constitution was given as part of the agenda. The Union had never held 2 merged Conferences. Annual Conference requires a 4 week notice to issue. There was no debate on the change of the Constitution; just rubber-stamping. There was no quorum. About 500 Persons out of 5,000 Members were in attendance. Khayoko joined Mareko in asking the Court to reverse the proceedings of 18th October 2014, invalidate the resolutions made thereon, and revert the Union to the internal constitutional order in place before 18th October 2014. He did not know if the new Constitution has been registered.

16. Mr. Khayoko conceded on cross-examination that the role of the Special Conference and the Annual Conference is similar. The notice quoted Rule 7. It was meant to confuse Members. The Annual Conference is the Supreme Organ. Rule 8[a] deals with the Special Conference. It has the powers of an Annual Conference. The Rules are the same. The problem the Members had with the arrangement was that there was no agenda circulated in advance, in accordance with the Constitution. The Special Conference could be requisitioned by the Members or the General Secretary.

17. He signed somewhere upon attending the meeting of 18th October 2014. The lists attached to the Respondents' Bundle of Documents showed Members who had agreed to have deduction in favour of COTU stopped; they were not lists of those who attended the meeting of 18th October 2014. The Constitution of the Union could not be amended in a Special Conference. The Witness however agreed that the powers of the 2 Conferences were the same. He did not participate in the earlier amendment of the Constitution in 2008. He could not bring the dispute to Court on behalf of other Members; he came in his own right as a Member. The Claimants were not locked out of the Conference of 18th October 2014; they were barred from contributing to the debate leading to the resolutions. Police were called in the meeting. "What was the point? ," Khayoko posed. What was held, was a Special Conference, he concluded. The problem was in the confusion leading to the meeting. The Members exercise their rights within the Union. They determine who their Trade Union affiliates with. Lastly the Witness changed his evidence, stating contrary to his evidence-in-chief, that he was aware the new Constitution has been registered. He did not raise any objection with the Registrar of Trade Unions. He testified upon redirection however, that registration of the Constitution happened during the pendency of the Claim herein. Rule 8 [e] does not prohibit Annual Conference. All issues could not be disposed of at the Special Conference. The Members had the right to have an Annual Conference.

Submissions

18. The Claimants submit the issues for determination are:

a) Whether the Respondents contravened the Union's Constitution.

b) Whether the Claimants are entitled to the reliefs sought.

19. The Claimants hold the 1st Respondent issued a circular dated 16th September 2014, notifying Members on the Annual Conference to take place at Bandari College on 18th October 2014. The circular indicated the agenda would be circulated on or before the 10th October 2014 under Rule 8 [c] of the

Constitution. Rule 7A stipulated the Annual Conference is held every September. The October Conference was therefore irregular. The 1st Respondent issued a second circular on 10th October 2014. The meeting called was now referred to as a Special Conference. The Rules cited were Rules 7, 8 and 23 of the Union Constitution. The agenda was stated to be among other things, review of the Constitution. It is submitted that the meeting held on 18th October 2014 was neither a Special Conference, nor an Annual Conference. The agenda was supposed to be set by a standing orders committee and circulated 7 days before the Special Conference. This did not happen. Citing the cases of *James Kisaku & Another v. National General Secretary Dock Workers Union & Another [2014] e-KLR* and *Kadilo Mtwana & 80 Others v. Chairman Amalgamated Union of Kenya Metal Workers & 4 Others [2014] e-KLR*, the Claimants argue that the Court has the jurisdiction to intervene in the operations of the Trade Union where there are breaches of the Union Constitution. The Claimants submit that the Respondents breached the Union Constitution; violated Article 10 of the National Constitution on National Values and Principles; and violated the Claimants' right of fair labour practices.

20. The Respondents submit the 2nd Respondent through a resolution of its National Executive Board initially issued a notice of a Special Conference dated 12th July 2014, with the Conference scheduled for 2nd August 2014. The 3rd Claimant James Mbwabi among other Persons filed Cause Number 348 of 2014, stopping that Special Conference. The same Claimants in Cause Number 348 of 2014, through the same Law Firm, had earlier filed Cause Number 218 of 2014, which stopped the Special Conference scheduled for May 2014. The Court in Cause 348 of 2014 found the Notice for the Special Conference scheduled for 2nd August 2014 did not indicate the date and the venue. It ordered the Union was at liberty to hold a Special Conference upon giving a proper notice. The Respondents subsequently issued notice for the Special Conference to be held on 18th October 2014. The notice by error stated it was an Annual Conference, but this was corrected in the circular giving the agenda. Everything was done in accordance with the Union Constitution. Over 2400 Members gave written instructions to their Employer, to stop deductions made in favour of COTU [K]. They no longer wish to associate with COTU [K]. The Claimants have no mandate to speak for Members. The review of the Constitution was an ongoing agenda which had been discussed at the National Executive Committee, 3 months before the 18th October 2014. The Claimants neither substantiated their claims on intimidation against them at the meeting, nor showed there was lack of quorum. The Respondents lastly submit the Union's Constitution has already been registered with the Registrar of Trade Unions. The Claim has been overtaken by events.

Issues

21. The issues for determination are as framed by the Claimants at paragraph 18 above.

The Court Finds:-

22. The matters raised in this dispute are not new. The Players are not unfamiliar with each other. In Industrial Court at Mombasa Cause Number 218 of 2014 the same 2 Respondents herein, were named as the Respondents. The Claimants were James Kisaku and James Mbwabi. The latter is the 3rd Claimant in the present Claim.

23. The complaint in Cause Number 218 of 2014 was that the General Secretary had called a Special Conference on 2nd August 2014, without following the correct procedure. There were complaints that the notice calling the intended meeting was vague; the General Secretary was alleged to have intended to dupe Members; it was argued there was no need to call a Special Conference, while the Annual Conference was constitutionally supposed to be held in September of each year; and it was argued that the Respondents' intended meeting would be a recipe for chaos and occasion Members injustice. This Claim was presented by the same Law Firm having conduct of the present Claim.

24. Cause Number 218 of 2014 was still pending when the 2 Claimants filed a fresh Claim, Cause Number 348 of 2014. It is not clear to this Court why it was necessary to file this second Claim, which essentially sought the same order, stopping the Special Conference scheduled by the Respondents for 2nd

August 2014. The current status of these Claims all filed in 2014 was not made known to the Court. They could be part of what is unfairly characterized as caseload back-log in the Judiciary.

25. The Court heard the Claimants in Cause Number 348 of 2014 and stopped the Special Conference of 2nd August 2014. The Orders were confirmed after hearing both Parties, in the Ruling delivered on 29th August 2014. The Court Ordered:-

- The Circular convening the Special Conference was invalid for not stating the venue and time of the meeting.
- In lieu of issuing an injunctive order it was declared the circular convening the conference was invalid.
- The Union was at liberty to convene a Special Conference at such a time as it deemed fit, after giving valid notice with the agenda, date, venue and time.

26. This was the background against which the General Secretary issued a notice dated 16th September 2014, calling for an Annual Conference. The date for the event was given as 18th October 2014. The Venue was stated to be Bandari College. The specific hours during which the event would take place were stated in the notice.

27. The Agenda was dispersed in a subsequent notice dated 10th October 2014. This notice clarified that what was to take place on 18th October 2014, was the Special Conference, not an Annual Conference. This would accord with the Ruling of the Court on the holding of a Special Conference. Among the items listed on the Agenda was the review of the Constitution.

28. The Respondents state they stated the meeting was an Annual Conference in the first notice, by error. The Court does not see any prejudice occasioned to the Claimants by this error. It was always known from the time the Court made its Ruling that the Parties were to hold a Special Conference. The initial Court Proceedings were instigated by the Claimants to stop a Special Conference slated for 2nd August 2014. The notice of 10th October 2014 rectified what error was in the notice issued on 16th September 2014.

29. The Claimants did not stop the meeting scheduled for 18th October 2014. They participated in it. In his evidence on cross-examination, the 5th Claimant stated, "what was held was a Special Conference." This evidence should be enough to lead to the conclusion that Parties were never in doubt about what sort of a meeting they attended. The Witness testified the problem was not in nature of the meeting, but in the confusion leading to the meeting.

30. The only confusion that may have been occasioned as seen above was in the notice that referred to the Annual Conference. But this was corrected in the subsequent circular. The agenda was communicated. Parties had been engaged in Court in 3 Suits over the subject. The issues were clear. The meeting called was as a consequence of the Ruling involving the Parties.

31. The Claimants rightly, in any event, conceded in their evidence that a Special Conference has all the powers of an Annual Conference, and is governed by the same rules as the Annual Conference under Article 11 [7] of the Union Constitution then in force. The lack of clarity in the first notice, what the Claimants termed as confusion preceding the meeting of 18th October 2014, therefore did not have effect on the proceedings and outcome of the day.

32. The Claimants argue that the Respondents acted in violation of the Constitution, by calling the Conference in October, while the Constitution demands the Annual Conference is held in September every year. This position is flawed. The Claimants filed the Claim in Court, which culminated in a Ruling made on 29th August 2014. The Ruling was that the Union was at liberty, to convene a Special

Conference at such a time as it deemed fit. It would not call an Annual Conference in September 2014, while convening a Special Conference about the same time, in obedience to an order of the Court, to fulfill essentially the same objective. It would be unreasonable to have expected an Annual Conference to take place in September, while the Claims initiated in Court by the Claimants, had resulted in an order placing the Respondents at liberty to convene a Special Conference about the same time. The Claimants had prevented the previous Special Conferences from taking place. When the Special Conference did eventually take place, and resolutions contrary to the Claimants' wishes passed, they then found fault with the convention and outcome of the process. In the view of the Court, the Claimants did not wish to see the Union hold any Conference for fear certain positions would be validated, which was not in the interest of the Claimants. This can be the only explanation for the multiplicity of Claims instigated by the Claimants within 1 year.

33. The Agenda which was eventually discussed at the Special Conference was not generated at the gates of Bandari College on the day of Conference as suggested by one of the Claimants in their evidence; it was an item in the Agenda of the National Executive Committee meetings held as early as July 2014. It was communicated in the Notice dated 10th October 2014. The Minutes of the NEC availed to the Court by the Respondents indicate the Agenda originated from the NEC, and was generated and circulated in accordance with the Union Constitution.

34. Ultimately the Special Conference adopted a resolution severing the affiliation of the Dock Workers Union from COTU-K. The Constitution was amended to that end. The Union filed the relevant notices accompanied by the resolution of the Special Conference, with the Registrar of Trade Unions under **Section 27 of the Labour Relations Act**. The Registrar has since issued a certificate of change of the Constitution under **Section 27 [6] of the Labour Relations Act**. By invalidating the process and outcome of the Special Conference of 18th October 2014, the Court would be passing judgment on the decision of Registrar of Trade Unions, without hearing the Officer, who is not a Party to the Claim herein. It would amount to the Court making a Judgment under **Section 30 of the Labour Relations Act**, while no Appeal against the decision registering the new Constitution has been filed. Article 30 of the Union Constitution allowed the Union to amend its Constitution through the Annual Conference, or through a Special Conference. Article 30 [4] states that "*Amendments of the provisions of this Constitution, shall take effect on the day the amendments are registered by the Registrar of Trade Unions.*"

35. The Court is satisfied that a substantial number of the Dock Workers have expressed their desire, that their Trade Union, is no longer affiliated to COTU-K. Over 2000 Members, signed the Forms contained in the Respondent's List of Documents filed on 20th March 2015. They unequivocally state they do not wish to continue the association with COTU-K. This evidence was not contradicted by the Claimants. It is evidence which is at the core of the dispute. The Claimants throughout their evidence claimed to be speaking for Members, but offered nothing to guide the Court on the number of Members they speak for. They faulted the quorum at the Special Conference. They did not give specifics- on the number required and the number present, to validate the Conference. They did not bring and establish their dispute on quorum, within Article 30 of the Union Constitution. Mr. Mareko stated in his evidence that his People counted the numbers present. This number was not given to the Court, and similarly Mr. Mareko did not say who he meant by reference to 'my People.' The Claimants speculated that there were about 500 out of a total number of 5000 Members, present at the Special Conference. There were no documents to support these bare assertions. The Court was left unconvinced on the correctness of the Claimants' position that they have come to Court representing a good number of other disaffected Members.

36. The Labour Relations Act and the Constitution of Kenya guarantee Trade Unions and their Members the freedom of association. **Section 4 of the Act** allows Employees the right to participate in the forming of a Trade Union and Federation of Trade Unions. They have the freedom to join and leave the Trade Union. **Section 8** gives the Trade Union the right to determine its own Constitution and Rules; the right to participate in the forming of a Federation of Trade Unions; the right to join a Federation of Trade Unions; and the right to affiliate with or participate in the affairs of an International Workers Organization. The Dock Workers and their Trade Union have exercised these rights and freedoms which are enshrined in **the Bill of Rights under Articles 36 and 41 of the Constitution of Kenya**. It would be wrong for the Court to curtail them in the enjoyment of these rights, on the basis of a very weak Claim such as is filed

herein.

37. The Court observed in ***Industrial Court at Mombasa Cause Number 586 of 2014 between Michael Owino v. James Tong'i & 2 Others***, that it is important Trade Unions act democratically in exercising their mandates. Equally important, the Court observes, is that the Courts do not punish every minor infraction of the internal Rules and the Constitutions of the Trade Unions, which may take place in running of the Trade Unions' activities and programmes. Constant intervention by the Courts, reversing resolutions reached by the Trade Unions using their internal mechanisms, can have the effect of destabilizing the Unions. In this case, 3 Claims have been filed, all aimed at stalling a democratic process. The Union has an internal dispute resolution mechanism which has not been invoked at any one time by the Claimants. It is wrong to think that the Court can be drawn into active participation, in every internal dispute taking place within the Trade Union, with Parties seeking its aid in advancement of self-interest, even when such self-interest is clearly at variance with the democratic will of many Members. The Court must therefore exercise restraint in interfering with the internal processes of Trade Unions. The Claimants have not established ground for the Court to reverse the resolutions made on 18th October 2014.

38. Lastly the Claimants cannot seek to have the Employer Kenya Ports Authority stopped from remitting Trade Union dues to the Trade Union Congress-K. Those Employees have given written instructions to the Employer on the disposal of their salaries. The Court explained this position in its Ruling in yet another Claim involving the Parties, ***Cause Number 551 of 2015***, in which the Claimants sought similar orders stopping the payment of Trade Union Dues to TUC-Kenya. The Employees have given their instructions in exercise of their freedom of association. The Employer and the Court cannot stop this and direct that the Employees continue to pay trade union dues to COTU-K.

39. In the end the Court concludes that the Claimants have not shown ground for the Court to disturb the proceedings and result of the Special Conference held on 18th October 2014. There is a new Union Constitution in place, whose registration has not been challenged through an Appeal filed under Section 30 of the Labour Relations Act. The affiliation of the Dock Workers Union with the TUC-K is consummated. The new Union Constitution has taken effect. The severing of the affiliation with COTU-K has been confirmed.

IT IS ORDERED:-

The Claim is hereby dismissed with costs to the Respondents.

Dated and delivered at Mombasa this 2nd day of October, 2015

James Rika

Judge