



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 122/2013

(Before Hon. Justice Hellen Wasilwa on 26th November, 2013)

KENYA HOTELS & ALLIED WORKER'S UNIONCLAIMANTS

-VERSUS-

NEW VICTORIA HOTEL RESPONDENTS

JUDGMENT

The claimants herein Kenya Hotels & Allied Workers Union filed their Memo of Claim on 30.1.2013 through their Industrial Relation Officer Patrick N. Makale. The issue in dispute relates to the refusal by respondents' management to sign a recognition agreement with the claimants, refusal to deduct and remit union dues and victimization of the claimants' members on trade union activities/affiliation.

The claimants case is that they are a registered trade union having been registered under the Trade Union Act, (now repealed) and now the Labour Relations Act, 2007 Laws of Kenya and represent all unionisable employees in the Hotel Industry and related trades as envisaged in their registered Constitution Section 3.1 Article IV. It is the claimants' contention that the respondents is an employer and provides employment to management staff and 30 unionisable staff. The claimants stated that between July 2012, they recruited 27 unionisable employees to her membership who signed a check off form to allow remittance of their dues to the claimant. That this constituted 90% of the unionisable work force. However, respondent declined to effect union deductions in breach of Section 48 of the Labour Relations Act, 2007 Laws of Kenya. On 27.7.2012, the claimant union forwarded a recognition agreement and proposed to have a meeting of the parties on 7.8.2012 to sign the same on 7.8.2012. The respondents communicated to the claimants through their letter that they were not willing to sign the recognition agreement (App C4). The claimants opted to report a trade dispute to the Minister for Labour under S. 62 of the Labour Relations Act 2007. The trade dispute was accepted and a conciliator was appointed. The conciliator invited the parties to a joint meeting but respondents opted not to turn up in all the meetings. The matter was thereafter referred to this court for resolution.

It is the claimants case that they met all the requirements of the law to be accorded recognition. They therefore seek orders from this court that the respondents be ordered to sign a recognition agreement with them within the shortest time possible. They also seek orders that the respondent be ordered to comply with the mandatory provisions of the law – Section 48 of Labour Relations Act 2007 by deducting and remitting union dues to the claimants' union gazetted by the Minister.

The respondents on the other hand filed their reply to the memorandum on 17.9.2013 through the Federation of Kenya Employers. The respondents contention is that they have a recognition agreement with another union Kudheihia Workers dated 28.6.2000. They also have an existing Collective Bargaining Agreement registered with the Industrial Court under No. 184 of 2013 dated 4.7.2013 – App II. They

therefore submit that they cannot enter into another recognition agreement with the respondents for those reasons. They submit that the claimants have not demonstrated that they have fulfilled the requirements of law and that the list of members they have presented contained names of employees who are members of Kudheihā. They asked court to dismiss the claimants' application. In fact it is respondents contention that respondent has 48 employees and claimants check off has 20 only and so they have not recruited the majority of members.

In reply the claimants content that the Collective Bargaining Agreement registered with Kudheihā came in to defeat this case as it was registered 11 months after it's conclusion in contravention of the law and workers should not be forced by respondents to belong where they don't want.

Having heard the evidence of both parties and having considered their respective submissions, the issues for determination are as follows:-

1. **Whether the claimants have met the requirements of law to have them sign a recognition agreement with the respondents.**
2. **Whether the claimants can sign a recognition agreement when respondents have another existing recognition agreement with a rival union.**
3. **Whether claimants are entitled to the prayers they have sought.**

On the 1st issue, the claimants annexed a list of 27 members who had signed willing to join the claimants union (App C2a). This was sent to the respondents on 26.7.2012. There is also evidence of the same employees writing to the Secretary General of Kudheihā withdrawing from being members and the same is dated July, 2012 (App 2cb). The claimants contend that they recruited the 27 members out of the total 30. The respondents on the other hand contend that the claimants only managed to recruit 20 out of 48 employees. The Labour Relations Act 2007, at S. 54 deals with issues of recognition S. 54(1) states as follows:-

“An employer, including an employer in the public sector shall recognize a trade Union for purposes of collective bargaining if that trade Union represents the simple majority of unionisable employees”.

The key issue here is simple majority. The claimant have demonstrated that they registered 27 members out of 30. The respondents insist that their staff are 48. The claimants Exh C2a the check off system deduction show a list of 27 members. Whether then the respondents unionisable staff were 30 or 48 then the 27 members who requested to join the union and have their dues remitted make up over 50% which makes the union qualify for recognition with the respondents.

In answer to the second issue, the respondents content that they have a recognition agreement with Kudheihā a rival union and so cannot sign another agreement with the claimant. Under S. 54(6) of the Labour Relations Act 2007:-

“If there is a dispute as to the right of trade union to be recognize for the purposes of Collective Bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII”.

This is what the claimants did herein and the conciliation process did not bear any fruit. The contention by the respondents that there is another union with which they have signed a recognition does not hold much water because Article 41(2) of the Constitution provides that:-

“every worker has the right to form, join or participate in the activities and programmes of a trade union ...”

Because the workers have this right, it follows that the same workers have a right to leave or cease being members of a union. The workers cannot be compelled to remain in a particular union when they

choose not to. This is why Section 48(6) of the Labour Relations Act 2007 also provides that:-

“An employer may not make any deduction from an employee who has notified the employer in writing that the employee has resigned from the union”.

The members of the claimants union indeed resigned from Kudheihia and whether there is an existing Collective Bargaining Agreement (b) the respondent and Kudheihia, the individual employees who wish to join the new union cannot be prevented from doing so. The claimants indeed serves interests of workers in the hotel industry and are therefore a relevant union in the circumstances to sign a Collective Bargaining Agreement with the respondents.

The ILO's Committee of Experts on Freedom of Association in it's Digest of Decisions and Principles of Freedom of Association Committee Fifth (revised) edition, Comment No. 320 had this to say in relation to trade union unity and pluralism:-

“while it is generally to the advantage of workers and employers to avoid the proliferation of competing organization, a monopoly situation imposed by law is at variance with the principle of free choice of workers' and employers' organizations”.

Under comment 315, the Committee had this to say:-

“The right of workers to establish organizations of their own choosing implies in particular, the effective possibility to create - if the workers so choose – more than one workers' organization per enterprise”

And at comment No. 325, the committee stated:-

“The power to impose an obligation on all workers in the category concerned to pay contributions to the single national trade union, the establishment of which is permitted by branch of Industry and by region, is not compatible with the principle that workers should have the right to join organizations of their own choosing”. In these circumstances, it would seem that a legal obligation to pay contributions to that monopoly trade union, whether workers are members or not, represent a further consecration and strengthening of that monopoly”.

In this case, forcing the workers to remain members of Kudheihia when they have chosen to leave curtails their freedom of association and offends laid down principles and is therefore unacceptable. The quest by workers to join another union and therefore the need to have that union sign another recognition agreement with their employer is therefore in order.

Now in relation to the issue no. 3, I find the claimants have established their case and I order as follows:-

1. **The respondents do recognize the claimants and start negotiations leading to the signing of a Collective Bargaining Agreement within 90 days.**
2. **That the respondents do start immediate remittance of union dues to the claimants in respect of employees who have given their indication to join the claimants and in any case not less than 31st December 2013.**
3. **The respondents to meet costs of this case.**

HELLEN WASILWA

JUDGE

26/11/2013

Appearances:-

Jane Mwaka for the claimants present

Gideon Atito for respondents present

CC. Sammy Wamache.