



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1292 OF 2011

BETWEEN

SETH PANYAKO..... CLAIMANT

VERSUS

THE KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS AND

ALLIED WORKERS..... RESPONDENT

Rika J

CC Leah Muthaka

Mr. Seth Panyako appearing in Person

Ms. Guserwa instructed by J.A.Guserwa & Company Advocates for the Respondent

ISSUE IN DISPUTE: FAILURE BY THE TRADE UNION TO AVAIL FINANCIAL AND LEGAL ASSISTANCE

TO ITS MEMBER AND CHIEF SHOP STEWARD

AWARD

1. This Claim is brought by a former Member and Chief Shop Steward of the Respondent Trade Union.
2. Seth Panyako who is a well known Trade Unionist in Kenya, having doggedly agitated for the registration of the Nurses Union, and recently achieved that end, initiated this Claim by way of a Memorandum of Claim filed on 2nd August 2011. He subsequently filed an Amended Claim on 29th September 2011.
3. The Respondent filed a Notice of Preliminary Objection on 8th August 2011, alleging the Claim to be *res judicata*. The Respondent also filed its Reply to the Amended Claim on 11th October 2011. This preliminary challenge was disposed of in a ruling dated 26th October 2012. The Claim was heard and closed on 14th May 2013.

4. Mr. Seth Panyako told the Court he was an employee of the Kenyatta National Hospital. He worked as a Nursing Officer. He holds a B.sc. degree in Nursing. He was, while so employed, recruited by the Respondent Union as its Member. He joined the Union on 16th February 2010. At the time, the Respondent represented the Nurses, the Nurses Union having not attained registration. Panyako was elected the Chief Shop Steward. He aggressively agitated for the Labour Rights of all employees, Members of the Respondent at the Shop Floor Level. The Respondent however did not appreciate Panyako's efforts, but instead colluded with the Kenyatta National Hospital, to have the Claimant summarily dismissed from employment.

5. Panyako seeks the Court to find that the Respondent Trade Union failed to discharge its obligation to him as a Member; it did not protect him as an employee and employee's representative from the victimization of the employer; the Respondent breached its own constitutional obligation to its Member by abdication of its obligation; the Respondent did not initiate the process of conciliation or arbitration to resolve the dispute leading to the Claimant's loss of employment; the Respondent failed to avail the Claimant legal services; the Respondent did not use its funds to assist the Claimant in any way as required by its constitution; and the Claimant suffered damages in consequence of that abdication. Panyako wrote to his Union seeking assistance, but none was forthcoming. Section 39 of the Labour Relations Act 2007 and Rule 13 [e] of the Union constitution allow the Union to use its funds in defending its Members' rights and interests. Both the Act and the Union Constitution were violated. The Respondent Union was required by the Labour Relations Act to report the dispute to the Minister within 90 days of termination; this was not done. The Respondent, according to the Claimant, admitted at paragraph 9 of its Statement of Reply that the Claimant requested for legal and financial assistance. The Claimant denied that he was offered legal representation through the Respondent's retainer Advocates, but declined, insisting on having an Advocate of his choice. The Respondent did not supply the Court with details of such assistance. It was not true as alleged by the Respondent, and no evidence was given showing, that the Claimant lost his job for engaging in illegalities. His career was damaged forever. Panyako submitted that he lost his father and his daughter, and suffered immensely as a result of the Respondent's abandonment. The Claimant seeks the following remedies:-

[a] Special Maximum Compensation for unfair, unlawful, un-procedural interdiction, wrongful termination and dismissal at 12 months' gross salary of Kshs. 1,065,168;

[b] General Damages for wrongful dismissal and deprivation of the right to work for 23 years the Claimant would have gone on working to the retirement age of 60 years; for professional damage and denial of the opportunity for further studies; for social and family embarrassment; and for emotional breakdown- all calculated at the rate of the monthly salary of Kshs. 54,364 for 23 years adding up to Kshs. 51,891,323.69. In total the Claimant prays for a sum of Kshs. 52,956,491.69;

[c] A declaration that the Respondent failure to represent the Claimant was in contravention of the Respondent's constitution, bad in law and fact, and an illegal abdication of their leadership responsibilities;

[d] An order to issue for payment of the entire Claimant's Terminal Benefits, Special and General Damages;

[e] An Order convicting the Respondent to pay a fine of Kshs. 40,000 for contravening section 39 of the Labour Relations Act;

[f] Costs be paid by the Respondent; and,

[g] Any other relief the Court may deem suitable to grant.

6. Ms. Guserwa, Advocate for the Respondent admitted the Claim by Mr. Panyako is unique. She brought it to the attention of the Court that although Mr. Panyako feels very strongly about the circumstances under which he lost employment, he is today the CEO of the Nurses Union which he founded. The Respondent submitted that in determining the dispute, the Court must draw a line between

an individual's personal commitments and the obligations of an association. The Claimant did not inform the Court what happened so that he lost his job at Kenyatta National Hospital. That issue is the subject matter of separate litigation which does not involve the Respondent.

7. The Respondent stated it offered the Claimant legal assistance during the termination of employment process; he declined assistance, insisting legal assistance had to be in monetary terms. The Union seeks legal advice in matters that affect it. The Claimant issued public statements about his employer. The Respondent could not do anything more in the circumstances, beyond the offer made for legal assistance to the Claimant which he rebuffed. At no time did the Respondent collaborate with the Kenyatta National Hospital to have the Claimant's employment terminated. The Respondent did not in any way play a part in the dismissal of the Claimant from employment. The prayers by the Claimant are overly ambitious and misplaced. The Claimant acted in excess of his mandate as the Chief Shop Steward of the Respondent, and had only himself to blame for what befell him.

8. The Claimant was not an employee of the Respondent, and his claim that his fundamental rights were violated by the Respondent did not arise. The application of trade union funds is regulated by the trade union trustees. There was no justifiable ground for the Respondent to expend funds in the mode suggested by Panyako. The Respondent had no further part to play in the problems encountered by Panyako, once he rejected the Advocates availed to him by the Respondent. The Respondent was satisfied with the reasons given by the Hospital in dismissing the Claimant. No provision of the law, or the Respondent's constitution was violated. There is no basis for the action. Ms. Guserwa urged the Court to find the Claim to be based on emotion rather than fact, and dismiss it with costs to the Respondent.

The Court Finds and Awards:-

9. The Claim raises the issue whether trade unions have actionable obligations to their Members, and in particular Members who have been elected as Shop Stewards at the shop floor level; and whether damages are awardable to Members who allege violation of such obligation.

10. The uncontroverted facts are that Seth Panyako, a holder of a first Degree in Nursing, was employed by the pre-eminent Kenyatta National Hospital as a Nursing Officer on 2nd June 2006. He was promoted to Nursing Officer 1, Job Group K 8, effective from 22nd February 2010. On 10th February 2010, he was elected the Chief Shop Steward by members of the Respondent Union working at Kenyatta National Hospital to represent them. It is not disputed that on 10th June 2010 he addressed the public through Capital F.M. Radio on matters relating to the workplace namely: payment of locum for Nurses, an issue he alleged had led to closure of 12 theatres; corruption in recruitment and promotion of staff at the Hospital; sexploitation at the workplace; implementation of the staff scheme of service; and appointment by the President of the Chairman to the Board of Management.

11. This address was deemed by the Hospital Management to be in contravention of the Hospital Terms and Conditions of Service Section 15 Part 3 [2] which states,

“ an employee who wishes to publish an article or deliver an address, the substance of which may subsequently be published or anything which may reasonably be regarded as being political or administrative nature, shall seek permission to do so from the Chief Executive Officer, a draft of the proposed article or address being submitted for approval.”

The Hospital further explained to Panyako that he may have flouted Section 15 Part 8 [13] of the same document which states,

“ an employee who conducts himself in a manner not acceptable to the Hospital, or in keeping with its good image and reputation or brings the hospital into ridicule or disrepute is liable to severe disciplinary action.”

The Claimant was consequently interdicted with effect from 11th June 2010. He was subsequently taken

through the disciplinary process, culminating in his dismissal from the Hospital on 4th January 2011. The Hospital justified its decision on the media briefing made by Panyako to Capital Radio F.M. which was deemed to amount to an act of gross misconduct. The propriety of the decision by the Hospital against the Claimant is the subject of a separate claim for unfair termination. This Court is not concerned with the Hospital's decision against the Claimant; the concern is on the role of the Claimant's Trade Union named as the Respondent herein, in the disciplinary process leading to the Claimant's loss of employment.

12. There is evidence that on 2nd December 2010 while on interdiction, Panyako wrote to the Respondent, informing the Respondent that he had filed suit against the Hospital to declare interdiction unlawful, and needed urgent legal representation. He prayed for financial assistance from the Respondent. On dismissal, he wrote once again to the Respondent, informing the Respondent of the decision made to dismiss him from employment, and asking for financial and legal support. There is no written response from the Respondent.

13. Panyako argued that as a Member and Chief Shop Steward of the Respondent Union, he was entitled to such assistance by virtue of the provisions contained in the Respondent's constitution. He drew the mind of the Court to Rule 2 [f] of this Union constitution which gives the objectives of the Union *inter alia* to be: *to seek and obtain legal advice and any other assistance on any matters affecting the Union, for protecting the rights of a member or members on matters arising out of the relations with their employers. Provided the National Executive Board shall have the sole right to decide whether or not the legal advice or assistance is in the best interest of the Union or its members.*'' He also pointed at Rule 13 which regulates the application of Respondent's Funds. Among the permitted objects in application of the funds is: *the prosecution or defence of any legal proceedings to which the Union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the Trade Union as such or any rights arising out of the relations of any member with his employer; the conduct of Trade Disputes on behalf of the Union or any member; the compensation of members for loss arising out of trade disputes; and such allowance to members or their dependants on account of death, old age, sickness, accidents, or unemployment as the National Executive Board may from time to time prescribe.*'' The Claimant argued that these objects in application of trade union funds, have anchorage in Section 39 of the Labour Relations Act Number 14 of 2007.

14. The Respondent's answer was that where a Member goes issuing public statements without the authorization of the Trade Union, there is little the Trade Union could do to help such a member in defending consequential action taken by the offended employer. The Respondent Union was satisfied that the decision made by the Hospital was fair and justifiable. The Claimant was offered legal representation by Advocates retained by the Respondent which he rejected. The Respondent's funds cannot be applied to any object without the authorization of the trustees.

15. There is ground to fault this explanation by KUDHEIHA. It is rare that a Trade Union will find termination of its Chief Shop Steward's contract of employment by an employer fair and lawful, and therefore undeserving of fair representation. Seth Panyako was not just an ordinary Member of KUDHEIHA who fell afoul of his employer, a National Referral Hospital, but an elected Chief Shop Steward representing a notable bargaining unit in the medical field. Although the Respondent submitted it found the action by the employer fair and justifiable, the initial response of its Chairperson Jared Conan on the Claimant's interdiction appeared not to support the conclusion. He was quoted in the media as saying of the interdiction, *' it has come to us as a surprise because we did not expect this and now since it has come, we shall follow the procedure laid down by the institution by answering to the letter, and we shall also inform the workers on what is happening because the letter is too harsh.'* At interdiction, the Respondent appears not to have agreed with the decision of the Hospital. There was an undertaking to engage the employer on the issue. Between interdiction and dismissal, the Respondent gave the Court nothing to show any single action taken in fair representation of the Claimant.

16. There was nothing to suggest that the Claimant just addressed the issues at the workplace for the fun of it. These were collective issues that concerned workers, and which fell within the Chief Shop Steward's mandate to address. It was not an address made by a lone ranger and rogue Trade Unionist with the intention of embarrassing his Trade Union and his Employer; they were collective issues close to the

heart of the Kenyatta National Hospital bargaining unit. Interdiction was condemned by one Zachary Were Odhul, who was quoted in the media as saying, “*interdiction of our Chief Shop Steward is not the right solution to this matter because he is the spokesperson in the committee, and what he says has been passed by the whole committee.*” After the Claimant was dismissed Odhul resigned as treasurer of the Works Committee and also resigned all together from KUDHEIHA, justifying his decision on the failure by KUDHEIHA to protect its Chief Shop Steward in his dispute with the Hospital.

17. The seriousness of the dismissal, and the delictual treatment of the Claimant by the Respondent, are captured in a report attributed to Mr. Francis Atwoli, Secretary General of the umbrella Central Trade Union Organization [COTU] on 10th January 2011. Mr. Atwoli called the decision unlawful and called on the Hospital to rescind its decision. COTU expressed the view that Panyako spoke as the representative of workers, and was only carrying out his duties as a Chief Shop Steward. The Respondent does not seem to have engaged in any fair representation of its Chief Shop Steward, and Panyako’s evidence was that the Respondent kept promising him a time would come for its assistance and active involvement; that time never came.

18. The reasons for Respondent’s delict may be discerned from the affidavit sworn by its Deputy Secretary General Simon Mwabili, on 10th May 2011. He explained rather cynically that the Claimant did not in any event, need the services of the Respondent, as the Claimant was busy setting up his own union to compete with the Respondent. The Respondent exhibited two documents originated from the Claimant, indicating the Claimant was in the process of establishing a Trade Union called KUMPAS, acronym for Kenya Union of Medical Professionals and Allied Staff. The letter from the Claimant to the Director of the Hospital announcing the existence of such Union however is dated 21st January 2011, after the interdiction and dismissal of the Claimant. There was nothing shown that the Claimant had repudiated the Respondent from the date of interdiction on 11th June 2010, to dismissal on 4th January 2011. KUMPAS appears to have resulted from the disaffection of the Kenyatta National Hospital bargaining unit with the manner in which KUDHEIHA handled their grievances and treated Panyako. There was obligation on the part of the Respondent, for as long as the Claimant was its Member, to avail to him the benefit of that Membership. It was wrong to leave him to his own devices for whatever reason, including the suspicion that he was perhaps scheming to establish another trade union.

19. The law does not intend that Trade Unions recruit Members, collect subscription fees, and act below the best professional standards, when it comes to fair representation of their Members. Once a Trade Union is registered, it acquires among other capacities, the capacity to sue and be sued in its own name. It attains the status of a quasi- corporation, capable of suing for wrongs done to itself and being sued for breaches of the contract of Membership, subject to statutory limitations. The position that Trade Unions are associations of employees, and it would not be possible for employees to sue themselves as an association, no longer holds sway in modern trade union law. Members have contract or mandate with their Trade Unions, and Trade Unions can be held liable if they breach it. KUDHEIHA had an obligation under its constitution to act honestly and diligently in managing the Claimant’s trade dispute. There is sufficient evidence that the Respondent committed breach of its mandate. When the Constitution of Kenya, the Labour Relations Act and the Internal Constitution of KUDHEIHA grant the mandate to recruit Members, there is a reciprocal obligation to act honestly and fairly, in representing recruited Members. When a Trade Union recruits Members and is granted organizational rights by the law, there is created a fiduciary duty to protect Members’ rights, act diligently and in good faith. Trade Unions must learn that they are as much accountable to their Members who are paying them monthly subscription fees, in much the same way Lawyers who are paid legal fees to represent their Clients are accountable. Trade Union Dues and agency fees are not paid to merely increase the material wealth of Trade Union Nabobs; they are paid to ensure Members are effectively represented at the various Industrial Relations Platforms.

20. The KUDHEIHA Constitution attracted the Claimant to join KUDHEIHA. He paid subscription fees, and sealed a contract of mandate with KUDHEIHA. He was elected a Chief Shop Steward, and the expectation was that the Respondent would protect him in performance of that role, as well as discharge its obligation to him as a Member faithfully, honestly, with care and diligence. In the case of ***Mead v. Clarke 1922 EDL 49 at 51***, the Court stated, “*when a man has expressly or tacitly professed to have business capability, he ought not to have undertaken an affair for which he is not qualified, and in which*

he ought to have known that his own lack of skill would be damaging to the interests of his principal. Though the law exacts no impossible things, it requires every man should know his own strength before he undertakes to do an act. If he deludes another by false pretension to skill, he shall be responsible for any injury that may be occasioned by such delusion.”

21. The Respondent like many other Trade Unions is recruiting Members, and professing business capability. The Respondent assumed the duty of fair representation of its Members at the workplace, in Court and at the Collective Bargaining Platforms. It owed the Claimant a duty of care, and is shown in very clear terms to have breached that duty by failing to fairly represent the Claimant on interdiction despite the promises made by Chairperson Jared Conan. There was no engagement with the employer even after the Claimant’s dismissal. The failure by the Respondent to skillfully represent the Claimant ended in a very unfair outcome. The Respondent’s Constitution mandated the Respondent to offer the Claimant legal and financial support. He lost his job in the course of representing Respondent’s Members. The Respondent’s Constitution allowed the Respondent to offer the Claimant both legal and financial support. There was no evidence that the National Executive Board of the Respondent ever met to consider any support in any form, to the Claimant. In the end he lost his job, incurred financial loss pursuing remedy against the employer, and experienced disruption in his social and family life. He alleges that he lost his daughter and father in the period. The Respondent was driven by bad faith, as shown in its position that the Claimant was establishing his own Trade Union to rival the Respondent, and therefore not deserving of assistance. There was not a single document to support the allegation that the Claimant was offered legal assistance by the Respondent’s retainer Advocates, which assistance he rejected. This line of response was further weakened by the Respondent’s submission that the Respondent was satisfied dismissal of the Claimant by the Hospital was fair and justifiable. It is incomprehensible that the Respondent would offer legal assistance while convinced dismissal was fair and justifiable.

22. Shop Stewards are the foundation of the Trade Union at the workplace. It is through them that the exercise of democracy and control of employees at the workplace are made possible. They are elected by the employees, and articulate the concerns of the employees. As seen in the sentiments of the COTU boss, the KUDHEIHA chairperson and the Work Committee’s Treasurer discussed above, Panyako was not speaking for himself when he addressed the media, but spoke with the mandate of the employees.

23. Article 1 of the ILO Workers Representatives Convention Number 135 of 1971 calls for the protection of Shop Stewards. It states, “*workers’ representatives shall enjoy effective protection against any act prejudicial to them including dismissal based on their status or activities.*” Section 55 of the Labour Relations Act requires employees to elect one of their own as a Trade Union Representative. This law defines the functions of the Trade Union representative to include representation of Members in grievances and disciplinary hearings at the workplace, and performance of other functions as may be given in the Recognition Agreement. Shop Stewards are not ordinary Members therefore, and deserve special protection particularly by their Trade Unions, in discharging their functions. Although Shop Stewards remain employees and subject to the direction and control of their employers, they enjoy special dispensation and are viewed as co-managers of the labour force at the workplace. Their Trade Union must be notified before any disciplinary processes are initiated against them. The Trade Union which they represent at the workplace must fully engage in ensuring Shop Stewards are not victimized for discharging their roles. The Respondent deliberately neglected to fulfill its mandate to the Claimant, contributing in no small measure to the problems that ensued after his media address.

24. As stated in the recent South African case of ***Food and Allied Workers’ Union v. Ngcobo [353/ 12] 2013 [ZASCA] 45 [28th March 2013]***, “*a trade union is liable for damages if it fails to perform the mandate which it accepted to represent its members.*” The quantum of damages should be just and equitable. The Court has taken into account that the Claimant is pursuing compensation for unfair termination against the Hospital in a separate claim, which may mitigate the overall effects of dismissal. In redressing the injury occasioned by the Trade Union however, the Court is concerned about bringing the Trade Union to account, and in making appropriate amends to the Claimant for breach of mandate. This remedy of damages against the Respondent cuts across delictual and contractual breaches, and ought to be just and equitable. It is important that Shop Stewards are protected by their Trade Unions, and equally important that Trade Unions understand the right to organize comes with a responsibility to fairly

represent. The Court is convinced that the Respondent acted in utmost bad faith, and did not give the Claimant the necessary legal or financial assistance, despite having recruited him as a Member and received monthly subscription fees from him for years. The Court does not agree with the Claimant's prayer for what he terms as maximum special compensation of 12 months' salary at Kshs. 1,065,168 for unfair termination; this is properly a remedy he ought to pursue against the hospital, and which perhaps he has done in the other claim. The Court does also not agree that he is entitled to damages based on his anticipated salaries for the remainder of 23 years he expected to work for the Hospital, calculated at a staggering Kshs. 51,891,323. This again is an unlikely remedy he should pursue from his former employer, not the Respondent. It is not proper that the Claimant comes to this Court and prays to be paid what he may have sought against his former employer before another forum. The prayer for imposition of fine is misplaced. The breach by the Respondent against the Claimant, as acknowledged by his filing of two separate Claims, is distinguishable from his cause of action against his former employer. ***The Court is however satisfied that it has the jurisdiction under the Industrial Court Act to remedy the injury suffered by the Claimant by a just and equitable Award of general damages, which the Court grants at Kshs. 850,000. The amount shall be paid to the Claimant by the Respondent, within 30 days of the delivery of this Award. The Parties shall bear their own costs.***

Dated and delivered at Nairobi this 10th day of December 2013

James Rika

Judge