



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 303 & 171 OF 2010**

**TRANSPORT & ALLIED WORKERS UNION.....CLAIMANT**

**Vs**

**KENATCO TAXIS LIMITED.....RESPONDENT**

**RULING**

The Ruling is in respect of two Causes consolidated and heard together. These are Cause No. 303 of 2010 (the parent file) and 171 of 2010. The Ruling shall apply to both cases.

What precipitated the dispute is the membership of the employees of the Respondent with the rival unions. There are two Claimants before me. One is Kenya Long Distance Truck Drivers & Allied Workers Union (hereafter referred to as “KLDTDAWU”) and the other Transport & Allied Workers Union (hereafter referred to as “TAWU”). The Respondent is Kenatco Taxis Ltd (hereafter “Kenatco”).

In the Notice of Motion Application dated 22nd March 2010 in Cause 303 of 2010, KLDTDAWU the Claimant/Applicant therein moved the Court under Section 12(1) and (4) of the Labour Institutions Act 2008; Sections 48(3), 50(8)(i) and 82 of the Labour Relations Act 2007 and Sections 17(11) and 19(1) (G), (4) and (6) of the Employment Act 2008 and all enabling provisions of the Law. It sought the following:

1. That the Respondent be compelled to obey the law in respect of Trade Union check-off deductions and pay the same to the Applicant/Claimant's designated bank Account number 003020018889 at K-Rep Bank, Kenyatta Avenue Branch, Nairobi without any further delay.
2. That this Honourable Court finds that the Respondents (sic) are in contravention of the law in respect of Trade Union check-off deductions and impose a fine on them in accordance with the law.
3. That this Honourable Court issue restraining orders to the Respondents (sic) not to harass or dismiss employees for exercising their right in joining a trade union of their choice and which union is relevant to their sector.
4. That costs of this application be provided for.
5. That any other orders this Honourable Court may deem expedient and necessary to grant.

The application was grounded on reasons on the face of it and was supported by the Affidavit of **Nicholas Mbugua** together with annexures NM1 to NM14.

The second matter is Cause No. 171 of 2010 where the Claimant TAWU brought two issues for

determination against Kenatco:

1. Refusal by the Employer to recognize the Union
2. Refusal by the Employer to effect Union dues deduction.

It is common ground that both KLDTDAWU and TAWU are tussling over members who are employed by Kenatco. The dispute was referred to the Ministry of Labour and the Labour Commissioner by a Court Order of 22nd October 2010 appointed as Conciliator. He made a report dated 28th March 2011. The report was produced in Court as Exhibit No. 1. The report condenses the dispute precisely.

On 26th July 2012, the parties appeared before the Court represented by Mr. Isaiah Kubai for the Interested Party KLDTDAWU and Mr. Nasib Makuwa for TAWU. Mr Okeche appeared for the Respondent. No witnesses were called and parties relied on documentation filed.

Mr. Kubai submitted that the Respondent refused to recognise the two Unions. He claimed that KLDTDAWU had simple majority of 52% of the members and thus should be recognised. He submitted the rival union only had 24% of the Members. He submitted that both TAWU and KLDTDAWU constitutions permitted recruiting of membership from the Respondent. He referred the Court to pages 80-81 of the Conciliator's report where his recommendation was captured.

In opposing this position Mr. Makuwa submitted that a simple majority cannot be the sole reason to seek recognition. He referred to the documents of 18th March 2010 and supplementary brief of 29th June 2011. He submitted there was a recognition agreement prior to the arrival of the rival union. He stated 'we were there first'. He called in aid Section 54(8) of the Labour Relations Act.

Mr. Okeche for the Respondent rightly conceded that it is the right of employees who qualify to join a Union of their choice. He stated that the key issue to be determined was whether the 2 Unions qualify to be recognised by the Respondent. He stated that the three determinants were:

1. Whether the union seeking recognition is the right union
2. Whether the union has obtained a simple majority
3. Whether there is a rival union with that employer

In order to determine which of the two rival Unions was the one the Respondent could deal with, he submitted that the constitutions of the 2 Unions be read. He referred to the TAWU constitution at page 39 of the Statement of Claim and in particular Clause 4. He also referred to the KLDTDAWU constitution attached as Appendix 3 and in particular Rules 4 and 3. At Appendix 3, the Interested party draws its membership from taxi, private car hire and travel. He stated that the Claimant has no case on that score as the Claimant draws its membership from long distance drivers. Mr. Okeche also referred to Section 54(2) of the Labour Relations Act where it is provided that the employer is bound to recognise the Union that has obtained the simple majority. He submitted that NONE of the two Unions had satisfied the threshold. He submitted that since there are only 336 employees, none of the 2 Unions met the simple majority. The Claimant had 154 as per Annexure 2 the letter dated 2nd September 2009 while the Interested Party had 129 as per Annexure 1.

The final issue was as to who was there first. Mr. Okeche submitted that the copies of Recognition Agreement availed by interested party which show that the Claimant Union was later in time but both fell into the same spot as the agreements lapsed.

He submitted that the 2 reports by Conciliators appointed by the Ministry of Labour should be disregarded as both did not consider the Constitution of both Unions. He referred to Sections 54(8) and 33(a) of Labour Relations Act

It is amply clear that the issues for determination are two:

1. Which of the two rival Unions is entitled to enjoy the Recognition Agreement with the Respondent?
2. What orders lie as regards the Check-offs?

The law is very clear. Section 14 of the Labour Relations Act provides as follows:-

14. (1) A trade union may apply for registration if—

- (a) the trade union has applied for registration in accordance with this Act;
- (b) the trade union has adopted a constitution that complies with the requirements of this Act, including the requirements set out in the First Schedule;
- (c) the trade union has an office and postal address within Kenya;
- (d) no other trade union already registered is—
  - (i) in the case of a trade union of employers or of employees, sufficiently representative of the whole or of a substantial proportion of the interests in respect of which the applicants

seek registration; or in the case of an association of trade unions, sufficiently representative of the whole or a substantial proportion of the trade unions eligible for membership thereof:

Provided that the Registrar shall, by notice in the Gazette and in one national daily newspaper with wide circulation, notify any registered trade union, federation of trade unions or employers' organisation which appear to him to represent the same interest as the applicants of the receipt of such application and shall invite the registered trade union federation of trade unions or employers' organisation concerned to submit in writing, within a period to be specified in the notice, any objections to the registration;

- (e) subject to subsection (2), only members in a sector specified in the constitution qualify for membership of the trade union;
- (f) the name of the trade union is not the same as that of an existing trade union, or sufficiently similar so as to mislead or cause confusion;
- (g) the decision to register the trade union was made at a meeting attended by the least fifty members of the trade union;
- (h) the trade union is independent from the control, either direct or indirect, of any employer or employers' organisations; and
- (i) the trade union's sole purpose is to pursue the activities of a trade union.

(2) Notwithstanding the provisions of subsection (1) (d), the Registrar may register a trade union consisting of persons working in more than one sector, if the Registrar is satisfied that the constitution contains suitable provisions to protect and promote the respective sectoral interests of the employees.

It would seem that in this case, the provisions of this Section have not been complied with. There are two rival Unions claiming the same pool of employees as its members. It would be instructive to note that the provisions of Section 14 (1)(d)(i) have been breached. There are no indications that the safeguards contemplated in the section were complied with by the Registrar under Section 14. It is not in dispute that where parties are fishing from the same pool, there could be overfishing or unfair practices.

The dilemma facing the Respondent is created by the two Unions. Both claim to have the numbers but

none presented a precise list of membership. There are disparities as to the composition of the two. KLDTDAWU in its constitution provides as follows:

**“4. MEMBERSHIP**

The membership of the Union shall be regulated as follows:-

a) Any person engaged in long distance truck driving and allied duties irrespective of sex creed, race, or colour, who is over 16 years of age, could become a member once he/she has filled up the application form for membership.”

TAWU on the other hand has exhibited a Court award by Saeed Cockar, Judge made in November 1982 in respect of a Recognition Agreement between TAWU and Kenatco. The Recognition Agreement is annexed as Appendix 2 of TAWU's Claim and a careful reading confirms the same was came into effect on 30th May 1988. No reason has been shown why the Court should resile from the decision of the said judge and no counter argument was put forward to suggest that this decision was unsound in any way.

Kenatco Taxis is a company engaged on the transport industry. It therefore represents a pool of employees who may be members of a Trade Union.

At the onset, the Union that will carry the day is the Union which has met the criterion for representation. In this case, Kenatco staff who qualify should be able to join a relevant Trade union of their choice in the transport sector.

The relevant portion of Article 4 of the KLDTDAWU Constitution provides that ***The membership of the Union shall be regulated as follows - Any person engaged in long distance truck driving and allied duties irrespective of sex creed, race, or colour, who is over 16 years of age, could become a member once he/she has filled up the application form for membership.***

The KLDTDAWU has not annexed the membership forms, no nexus has been laid between the Respondent and the Respondent other than the Interested party having successfully '\poached\' the members of the Claimant TAWU. Is there any lacunae between long distance and passenger transport and car hire services? No ambiguity can be discerned here. Long distance truck driving cannot be equated to passenger transport and car hire services. It is obvious that KLDTDAWU is encroaching on the territory of TAWU. I would answer issue 1 as follows: TAWU is entitled to enjoy the Recognition Agreement with Kenatco. The reasons abound from priority in time, to relevance as shown above.

Whereas no indications have been given as to the compliance by the Registrar of Trade Unions with the proviso to Section 14(1)(d)(ii) of the Labour Relations Act 2007.

On issue 2, the natural consequence or the Order that would flow from the answer to Issue 1 is that the Union dues (check-offs) should be payable to TAWU. I hereby order that the Respondent effects the same in favour of TAWU alone.

As regards the deductions already made, the losses will lie where they fell but effective this 19th Day of September 2012, only deductions for TAWU are valid for Respondent herein.

The successful party herein TAWU shall have costs payable in equal proportions by the Interested Party and Respondent.

It is so ordered.

**Dated and Delivered** at Nairobi this 19th day of September, 2012.

**Nzioki Wa Makau**  
**JUDGE**