



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1356 of 2012

KENYA RAILWAYS AND ALLIED WORKERS UNION..... CLAIMANT

VERSUS

NU PLAN ENGINEERING & DESIGN LTD..... RESPONDENT

JUDGMENT

The issue in dispute before court is refusal by the management of Nu Plan Engineering and Design Ltd to recognize Kenya Railways and Allied Workers Union and refusal to effect check-off.

In its memorandum of claim dated 6th August 2012, and filed before this court on 9th August, 2012, the claimant contend that they are a Registered Trade Union representing all unionisable employees in the Railway Industry which includes Magadi Railways Company Ltd and the Respondent Nu-Plan Engineering and Design Ltd have been contracted to maintain the Railway Track by the Principal, Magadi Railways Ltd. The claimant contend that they have recruited 39 workers from Nu-Plan Engineering and Design Ltd and on submission of check off forms, the management of the Respondent have remained adamant and refused to effect the check off deductions. The claimant attached Appendix 1 as proof of this recruitment. The claimant further avers that they attempted to discuss this matter with the Respondent who remained adamant. This prompted the claimant to report a dispute to the Minister for Labour. A conciliator was appointed who made a report marked Appendix II. Despite this report, the Respondent has failed to submit the Union dues and to pave way for recognition and negotiation of a Collective Bargaining Agreement.

The claimant therefore prays that the Respondent be ordered to recover and remit the dues to the Union and to recognize the claimant Union herein.

The Respondents filed their memorandum of Reply on 25th September, 2012 through the firm of Ndeda and Company Advocates. The Respondents contend that in 2006 they were contracted by Magadi Soda Company Ltd to do maintenance of the railway truck for a period on one year. This contract was renewed again for a period of 2 years which expired in August 2009. From then, the contract between the Respondent and Magadi is from month to month. The Respondent indicate that Magadi Soda Company Ltd has since been taken over by Tata Chemicals of India who are in the process of evaluating systems. Therefore there is no guarantee that the contract will be renewed or even outsourced. In the circumstances the Respondents aver that they can hardly be considered as employer within the definition contemplated under the Labour Relations Act.

The Respondent further avers that there is no recognition agreement between them and the claimant and the proper body with whom to take up this issue is Magadi Railways. That also states that the workers being in casual employment effecting their check off will be an uphill task.

The Respondent have further submitted that given the nature of their engagement the claimant members are not those for whom payment of remission to the claimants can be effected. The Respondents submit that they are a casual contractor within the railway industry providing various services and that the claimant's casual employees were not entitled to monthly salaries as their engagement is on need basis.

Having considered the evidence from both sides coupled with the submissions made, the issues for determination are:-

1. Whether the Respondent is an employer in terms of the Employment Act, 2007 and the Labour Relations Act, 2007.
2. The nature of the employment relationship between the claimant members and Respondent.
3. Any remedies the claimant is entitled to.

To start with Section 2 of the Employment Act 2007 defines an employer as follows:-

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”.

The definition of Employer under the Labour Relations Act 2007 is the same as the one under the employment Act 2007.

An employee on the other hand is defined under the Employment Act 2007 as follows:

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner”.

The Respondent have contended that they cannot be considered as employer under the arrangement existing between themselves and the claimant's members. They actually insist that the employer here is Magadi Railway Ltd. However from the reading of this definition the Respondents have a relationship of agent for Magadi Railway Ltd and this relationship however temporary cannot exclude the Respondent from the obligations under this sort of contract. The Respondent had submitted that the claimant's members are employed as casuals and therefore even remitting the union dues will be difficult. It is true that the claimant's union members may be casual labourers but that notwithstanding, they are paid some wages. What claimant seeks is payment of a percentage of these wages into the Union account as union dues. If the members work for a few days every month, the payments of their dues will be prorated to the actual number of days worked and be paid into the union account.

In fact Section 52 of the Labour Relations Act even allows the individual member to submit their dues directly to the Union. The provision is as follows:

“Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by the constitution of the trade union directly to the trade union”.

The implication of this is that when the individual members are not working for a particular employer, they may choose to remit union dues directly. The issue of remittances being difficult does not arise.

The next is the nature of the employment relationship between the claimant members and the Respondent are in a contract relationship with their Principal Magadi Railways Ltd. The nature of this contract is that the Respondent provides maintenance services to the Principal. With this relationship in place the Claimant Union's members have been engaged by the Respondent to do the maintenance work. The Magadi Railway Ltd have outsourced this service of maintenance to the respondent.

Are the principal company Magadi Railways Ltd still in a position to sign a recognition Agreement for

workers they have not engaged directly? The answer is No. The relationship of employer/employee exists between the Respondent and the claimant's members. The nature of this contract may be casual in nature but still that employer/employee relationship exists away from it.

What remedies are the claimants entitled to? Given the nature of the employer/employee relationship in existence, the claimants have a right as envisaged under Article 41 of the Constitution to join and participate in the activities of a trade union. I therefore find for claimant and order that:

1. The employer be ordered to recover and remit the dues to the Union.
2. The Respondent do recognize the claimants for purposes of Collective Bargaining and negotiations to this end be commenced.
3. Respondents to pay costs of this cause.

Signed, dated and delivered in court at Nairobi this 10th day of December, 2012.

HELLEN WASILWA

JUDGE

Appearances:

Mr. Kaunga	for Claimant Union
Ndenda & Company Advocates	for Respondent
David Kipsang	Court Clerk