Cello Thermoware Limited v Kenya Union of Commercial, Food and Allied Workers (Civil Appeal 120 of 2019) [2022] KECA 54 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 54 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 120 OF 2019

RN NAMBUYE, W KARANJA & AK MURGOR, JJA

FEBRUARY 4, 2022

BETWEEN

CELLO THERMOWARE LIMITED ..... APPELLANT

AND

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS ..... RESPONDENT

(Appeal from part of the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 31st July, 2019 in ELRC No. 354 of 2018)

JUDGMENT

1. By way of a Memorandum of Claim dated 30th May 2018, the respondent, Kenya Union of Commercial, Food and Allied Workers, claimed that though its Constitution and rules allowed for representation of the employees of the appellant, Cello Thermoware Limited, the appellant had declined to sign a Recognition Agreement with it, notwithstanding that it had fulfilled the requirements set out in section 54 (1) of the *Labour Relations Act*.

2. It was the respondent's case that between June and December 2016, it recruited as union members 30 of the appellant's unionisable employees, out of a total work force of 42 employees; that this resulted in the respondent attaining a 51% simple majority, and rendered it eligible to enter into a Recognition Agreement with the appellant.

3. The appellant stated that on 6th July 2016 it sought to have the Recognition Agreement signed on 20th July 2016, but when the respondent's officials visited the appellant's office to sign the agreement, they were denied access. This provoked the respondent to lodge a formal dispute with the Cabinet Secretary, Ministry of Labour whereupon a Conciliator was appointed to reconcile the parties. It was claimed that following a meeting with the Conciliator held on 16th March 2017, the appellant had reported

that it had effected payment of the union dues and that the parties had resolved to sign a Recognition Agreement and present it before the Conciliator on 29th of March 2017.

4. When no agreement was signed by 17th October 2017, the Conciliator issued a referral certificate under section 69 of the Labour Relation Act, to place the suit before the court for hearing and determination.

5. In its response, the appellant denied the respondent's claims that it had attained the legal threshold necessary for recognition since it did not represent a simple majority of the appellant's unionisable employees; that the respondent was notified of the shortcomings in its recruitment process whereupon the appellant undertook to carry on recruiting the appellant's unionisable members until it attained a simple majority; that when the dispute was referred to the Minister, on 3rd August 2016 the respondent had only recruited 16 out of the appellant's 50 unionisable employees and as a consequence, had not met the statutory requirement for recognition. It specified several reasons for this including, resignations, death, absconding, terms of contracts.

6. In determining the dispute, the learned judge relied on, and adopted the findings of the Conciliator's report that was contained in his letter dated 24th April 2017. The court found that the respondent had recruited the required number of employees, pursuant to section 54(1)(2) of the *Labour Relations Act*, to warrant recognition; that in particular, the court found that the parties had agreed to execute the Recognition Agreement and further held that there was no justification for the appellant's contention, that factors such as death, resignation, absconding and expiry of contracts, resulted in the respondent's failure to satisfy the simple majority requirement; that this was more particularly since, nothing was placed before the court to support this assertion; that furthermore, the numbers cited by the appellant were in response to the claim, and did not concern the period when the parties were before the Conciliator. In so finding, the learned judge ordered the parties to sign the Recognition Agreement.

7. The appellant was dissatisfied with the judgment and filed this appeal on grounds that; the learned judge was wrong in concluding that the respondent had met the statutory threshold requirements necessary for execution of a Recognition Agreement; in finding that the parties had agreed that the respondent had attained a simple majority and agreed to sign the Recognition Agreement when in fact there was no such agreement; in finding that the appellant did not produce any evidence of resignation of employees while in fact such evidence was produced; and in allowing the prayer for recognition.

8. Both parties filed written submission which were highlighted during the hearing of the appeal by Mr. Oluga, learned counsel for the appellant and Mr Nyumba, on behalf of the respondent.

9. The appellant submitted that the respondent did not attain the legal threshold specified by section 54 (1) of *Labour Relations Act*; and that the learned judge wrongly relied on the Conciliator's letter dated 24th April 2017 to arrive at the determination that the parties had agreed to execute the Recognition Agreement, yet no such agreement was reached; that this was made clear through a letter dated 30th January 2017 addressed to the Conciliator; that if the parties had agreed to sign the Recognition Agreement, the dispute would have been returned by the Conciliator as having been resolved, reduced into writing and signed by the Conciliator and both parties as provided for in section 68 of the *Labour Relations Act*.

10. It was further submitted that, the respondent had lodged two separate lists with the appellant which contained a total of 21 names of the respondent's members and since the total number of unionisable employees stood at 50, the respondent was required to have attained up to 26 members in order to be recognized. The appellant submitted that it had indicated the members on the respondent lists who had withdrawn from the union, but the court disregarded the evidence, and relied on the Conciliator's conclusions which were not binding on the court. The appellant relied on the case of

Kenneth Kipkemboi Settim & Another vs National Social Security Fund, Board of Trustees [2015] eKLR where the court held that it is not bound by the findings of the Conciliator and that the report of the conciliation was at best a tool to guide the court when a resolution of the matter was not reached.

11. On its part, the respondent submitted that at the time of lodging the suit on 30th May 2018, the appellant had 50 unionisable employees in its workforce; and that employment levels were never static; that it approached the court, on the 30th May 2018, after a simple majority recruitment had been realised, as evidenced by check off sheets before the court.

12. Regarding the Conciliator's letter, it was submitted that section 69 of the *Labour Relations Act*, 2007 requires the Conciliator to issue a Certificate of unresolved dispute; that this was done through the letter dated 17th October 2017 and the report communicated to the parties by the Conciliator's letter dated 24th April 2017.

13. With respect to attaining a simple majority, it was submitted that membership was established at the conciliation level and by the time of referring the matter to court on 30th May 2018, the respondent had attained a 60% membership. As such, it was submitted that the trial court rightly ordered the signing of the Recognition Agreement.

14. This appeal being the first appeal, the court's mandate as set out in *Selle vs Association of Motor Boat Co. of Kenya & Others* [1968] EA 123 stipulates that:

> " An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
>
> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs-Ali Mohamed Sholan (1955)22 EACA 270".

15. We have considered the record, the parties' submissions, and the law and are of the view that the issues for determination are;

    a. Whether or not the learned judge rightly found that the parties agreed to sign a Recognition Agreement; and

    b. Whether the learned judge rightly concluded that the respondent had attained the threshold requirements specified by section 54 (1) of the *Labour Relations Act*, and so, was entitled to be recognised by the appellant.

16. The appellant's complaint is that the learned judge relied on the Conciliator's letter of 24th April 2017 to reach a finding that the parties had agreed to sign a Recognition Agreement.

17. The impugned letter reads in pertinent part;

> " On the second issue, the matter was discussed and it was mutually agreed as per the recommendation of the conciliator that parties sign the recognition agreement as the union had recruited the required number of employees pursuant to section 54 (1) (2) of the *Labour*

Relations Act 2007 and that that said agreement be presented to the conciliator on 29th March 2017, but it is unfortunate that I have not received any communication from you."

18. It is clear from the above that though an intention to sign an agreement may have been expressed, no such agreement was ever signed. It is also evident that there was nothing in the letter that expressed that a simple majority of the appellant's unionisable employees had been met.

19. This notwithstanding the learned judge stated thus;

> "...The Conciliator indicates in his letter of 24th April 2017 that the Parties agreed to execute the Recognition Agreement."

20. The court further stated;

> "...Resistance to recognition based on these numbers, and the procedural issues raised by the respondent fade, in light of the agreement between the parties on the core substantive issue in dispute..."

21. In other words, the court was satisfied that the parties having agreed to sign an agreement meant that the simple majority requirement had been achieved. In our view, though the parties may have agreed to sign a recognition agreement, and no such agreement came in existence, would infer that the matter remained unresolved which is why it was referred to court. Without such agreement, and with nothing in the Conciliator's letter demonstrating that a simple majority was achieved, we find that no basis at all was established upon which the learned judge could conclude that a simple majority was met or to warrant the signing of a recognition agreement, and we so find.

22. Turning to whether the requirements of section 54 (1) of the *Labour Relations Act* were met, the judge had this to say;

> "There is no justification for the Respondent to submit that owing to factors such as death, resignation, absconding and expiry of contracts, the Claimant no longer has a simple majority of Unionisable Employee. There is no convincing evidence placed before the Court of dead employees, resigned Employees, dead Employees, absconding Employees, and Employees whose contracts expired. The numbers cited by the Respondent in its submissions refer to the time the response was filed, not the time Parties agreed before the Conciliator, that a simple majority had been attained. The numbers cited by the respondent are not relevant, and have not in any event being supported by employment records...".

23 The above excerpt of the judgment is clear that the learned judge relied on the Conciliator's conclusion to reach a finding that a simple majority was met. But a consideration of the Conciliator's letter discloses that there was nothing upon which the court could rely in order to reach that finding. Furthermore, there is also nothing to show that the learned judge interrogated the evidence to arrive at a computation demonstrative of a simple majority. As such, since the Conciliator's conclusions that a simple majority was reached was unsubstantiated, it followed that by relying on the Conciliator's letter without interrogating the evidence, the trial court misdirected itself in failing to take into account matters it ought to have taken into account, and by so doing reached the wrong decision.

24. Given these circumstances, we find it necessary to re-evaluate the evidence afresh so as to arrive at our own independent conclusion. See *Kenya Ports Authority vs Kuston (Kenya) Limited* [2009] 2 E. A 212.

25. In this regard, section 54 of the Labour Relation Act, 2007 is instructive. It provides that;

> "(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees."

26. In effect, whether or not a simple majority specified by section 54 (1) was achieved at a particular point in time is a matter of fact. This is because, the computation of a simple majority at a particular point in time is an arithmetical calculation, based on the total number of the appellant's unionisable employees against the total number of unionisable employees registered by the respondent.

27. To discern whether, the respondent had registered a simple majority of the appellant's unionisable members by the time the dispute was lodged, will require firstly, the total number of unionisable employees, that were registered by the time the dispute was lodged with the Ministry, and secondly, the number of members that were registered with the respondent, to be ascertained.

28. In the case of *Civicon Limited vs Amalgamated Union Of Kenya Metal Workers* [2016] eKLR this Court held that:

> "Unionisable employees must not be confused with the total work force engaged by the employer. Only members of staff who are eligible for membership (unionisable members) are targeted....It must be borne in mind that the trial court is only concerned with the numbers as at the time the claim is made. If verification has to be done it must relate to the number of employees stated in claim against that asserted by the employer."

29. With respect to the total unionisable membership, the respondent claimed that the total workforce comprised 42 employees, but this number was not supported by any records. While, in its memorandum of response and witness statement, the appellant contended that by the time the complaint was referred to the Ministry of Labour, it had 50 unionisable employees. This number was also not supported by any records.

30. At this point it is observed that, the parties having admitted their evidence by consent under rule 21 of the Employment and Labour Relations rules, with neither party controverting the evidence of the other as pertains to the total number of unionisable employees, would mean that both the appellant's total number of unionisable employees of 50 and the respondent's indicative number of 42 unionisable employees required to be taken into account to establish in each case, whether the simple majority was satisfied.

31. Turning to the number of unionisable members that were registered, it was the respondent's evidence, that by the time it lodged a claim between June and December 2016, the total number of unionisable employees was 42, and that of these, 30 employees were registered as its members. In support of their contention, they produced four notifications to the appellant, the first dated 10th June 2016 specifying 11 registered unionisable members, the second dated 19th July 2016 specifying 10 registered unionisable members, the third dated 13th September 2016 specifying 8 registered unionisable members, and the fourth dated 16th December 2016 specifying one registered unionisable members; that this would bring the number of registered members to over 70% of the appellant's employees.

32. On the other hand, the appellant contended that the total number of unionisable employees were 50, and that by the time of registration of the dispute, the respondent had only registered 16 unionisable employees; that initially, the respondent had registered 18 members but, two unionisable employees, Hassan Mohamed Matezo and Edward Katana resigned on 22nd July 2016 and 1st August 2016

respectively which reduced the respondent's membership to 16 members; that consequently a simple majority was not reached.

33. The dispute was lodged on 3rd August 2016. And when the respondent's notifications of recruitment are analysed, we find that, only two notifications were lodged at the time the dispute was registered. The other two notifications for September and December 2016 concerned registrations that were recorded after the dispute was lodged, and therefore, are not for consideration. This would bring the total unionisable employees registered by 3rd August 2016 to 21 members. Notably, the appellant did not provide any documents to support its contention that only 16 members were registered by the time the complaint was lodged, so that it is safe to conclude that the number of members registered as at the date the dispute was lodged was 21.

34. When the 21 registered members, are considered against the appellant's total number of unionisable employees of 50, it becomes clear that the computation falls far short of the simple majority, that being 26 members. In the alternative, when the number is computed against the respondent's total number of 42 unionisable employees, once again the simple majority requirement of 22 members is not met, because the respondent only managed to register 21 members at the time. Hence, in both instances, the statutory requirement set out in section 54 (1) was not achieved.

35. Having so found, it goes without saying that the learned judge was wrong in concluding that the requirements of section 54 (1) of the *Labour Relations Act* were satisfied, and as a consequence, the judge ought not to have ordered the parties to sign a Recognition Agreement or a Collective Bargaining Agreement.

36. In sum, the appeal is merited and is allowed. The order of 31st July 2019 directing the parties to execute a Recognition Agreement and to negotiate, execute and register a Collective Bargaining Agreement be and is hereby set aside with costs to the appellant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

R.N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR