



Kenya Hotels and Allied Workers Union v Hilton Hotel Nairobi (Civil Appeal 259 of 2016) [2022] KECA 69 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 69 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 259 OF 2016
AK MURGOR, M NGUGI & P NYAMWEYA, JJA
FEBRUARY 4, 2022**

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION APPELLANT

AND

HILTON HOTEL NAIROBI RESPONDENT

(Appeal from the Judgment and Orders of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated the 17th day of June 2016 in Cause No. 1394 of 2014)

JUDGMENT

1. By way of a Memorandum of Claim dated 18th August 2014 brought in the Employment and Labour Relations Court at Nairobi (hereinafter “the trial court”) by the appellant, Kenya Hotels and Allied Workers Union, against the respondent, Hilton Hotel Nairobi, the appellant claimed that the respondent had subjected its members to- a) intimidation and victimization on account of affiliation to the appellant union; b) unlawful deduction of agency fees and 0.5% service charge; and c) refused to sign a recognition agreement with the appellant.
2. The appellant’s case was that a difference had arisen between the parties which had culminated in a trade dispute which was registered as Industrial Court Cause No. 85 of 2004, and that the appellant’s determination to enforce the award thereunder was frustrated by the respondent’s union and had resulted in discouraging registration of membership with the appellant.
3. The appellant further claimed that by 30th July 2014, it had recruited 203 members out of the respondent’s 295 unionisable employees, thereby satisfying the threshold requirements of section 54 (1) of the *Labour Relations Act*, 2007 which enabled it enter into a recognition agreement with the respondent and therefore become the sole bargaining union for the respondent’s unionisable employees; that it wrote to the respondent seeking recognition and for deductions of union dues to be effected from its members and remitted to the union but the respondent declined to recognize it on the



premises that it belonged to an association of employers, namely the Association of Hotel Keepers and Caterers (the Association) which had already entered into a recognition agreement with Kenya Union of Domestic, Hotels, Education Institutions, Hospitals and Allied Workers (KUDHEIHA).

4. In affidavits in support of the appellant's claim sworn by Mr. Kevin Wakamila Murenjekha, Mr. Kennedy Njogu Ngugi and Joseph Kosima on 20th August 2014, the appellant claimed that the respondent had intimidated and victimized its members because of the appellant's union activities.
5. The appellant further claimed that the respondent was deducting agency fees from its members, but had failed to indicate the members' names to which the deductions related which was contrary to the requirements of the Act; that section 50 (2) of the *Labour Relations Act* provided that Gazette Notice No. 17449 of 2012 which revoked Gazette Notice No. 2911 should be revoked or suspended on grounds of misrepresentation and fraud and that **section 50 (3)** of the said Act requires that the appellant's members be refunded the agency fee erroneously deducted from their pay.
6. On the levying of 0.5% service charge, it was submitted that the agreement between the respondent and its union was that the amount would go towards the education of employees on their rights, but that no employee has benefited from the scheme, and therefore it was unfair for the respondent to continue deducting the amount from the appellant's members. It was asserted that the amount already deducted should be refunded to the employees and the deductions stopped.
7. By a replying affidavit sworn by Jebet Chesinya, the respondent's Director of Human Resources on 16th September 2014, the respondent deponed that a letter was received from the appellant requesting for a meeting on the 22nd July 2014 to sign a recognition agreement; that in response, the respondent informed the appellant that it was a member of the Association and as such could not individually sign a recognition agreement with the appellant; that on 23rd July 2014, the Association wrote to the appellant informing it that a valid recognition agreement had been signed with KUDHEIHA; that upon joining the Association, the respondent ceased to be a single employer for the purposes of collective-bargaining, and further, under Article 41 of the *Constitution* and section 6(1) of the Labor Relations Act, the respondent had the right to join and associate with other employer organizations and to participate in the organization's activities including collective bargaining; that the appellant's demand for individual recognition with the respondent was in total disregard of section 6 (1) of the *Labour Relations Act* and the respondent's agreement with other employers.
8. Turning to the employer's association, it was stated that section 54 (2) of the same Act allows for a group of employers, or any employers' organization, including an organization of employers in the public sector, to recognize a trade union for the purposes of collective bargaining if the trade union represents a simple majority of all unionisable employees employed by the group of employers or the employers who are members of the employers' organization within a sector. It was deponed that on this basis, recognition can only be granted by the Association and only after the threshold for recognition in respect of the Association was met, and not merely the respondent's employees as an individual member; that the appellant has not demonstrated that it represented a simple majority of unionisable employees employed by the Association so as to qualify for recognition. Seeking to compel the respondent to sign a recognition agreement with it was tantamount to depriving the respondent of the right to form, join and participate in the activities or programs with a trade union of its choice.
9. Regarding the allegation that the respondent had intimidated and victimized its employees who were members of the appellant, it was asserted that the allegations were unfounded and unproved.
10. The respondent averred that at the time of filing this suit, the appellant had recruited only 89 members out of 295 of its unionisable employees.



11. With respect to agency fees, it was further averred that the Gazette Notice No. 2911 was revoked and a subsequent order given in Gazette Notice No. 17449 of 28th November 2012 which directed the respondent to deduct agency fees from employees who were not members of KUDHEIHA but were nevertheless benefitting from the Collective Bargaining Agreement registered as RCA No. 137 of 2012; that the appellant was not entitled to an order restraining the respondent from deducting the agency fees unless it could demonstrate that the order was obtained by misrepresentation or fraud, or that the deductions were not being paid in to the designated account or that the money was being used for a purpose other than lawful union activities as provided for in section 50(2) of the *Labour Relations Act*; that furthermore, under section 50 (3) of the same Act, agency fees deducted by an employer in accordance with the Act may not be recovered from the employer by an employee, and therefore the appellant is not entitled to a refund of those fees.
12. In its judgment, the trial court dismissed the appellant's claims upon finding that a recognition agreement existed between the Association (to which the respondent was a member) and KUDHEIHA, and therefore the respondent could not be compelled to enter into another recognition agreement with individual unions as this would violate its rights of association. The court observed that the appellant would have to dislodge KUDHEIHA by recruiting a simple majority of unionisable employees of the members of the Association and then seek direct recognition with the Association and not with the respondent or another individual hotel.
13. The court also found that the appellant had not established a case on a balance of probability that the respondent had harassed, victimized or dismissed employees who had joined the appellant's union.
14. The appellant was dissatisfied with the trial court's decision, and filed an appeal against part of the decision on the grounds of the unlawful deduction of agency fee and 0.5% of service charge from the appellant's members by the respondent, and the respondent's refusal to sign recognition agreement with the appellant's union.
15. Both parties filed written submissions in support of their respective positions on the appeal. When the appeal came up before us for hearing, there was no appearance for the appellant despite having been served on 17th June 2021, while learned counsel Mr. D. Ouma appeared for the respondent. Counsel informed the Court that they would not be highlighting the submissions, but would adopt them in their entirety.
16. In its submissions, the appellant contended that the learned judge wrongly held that the respondent had a valid recognition agreement with KUDHEIHA because the agreement was revoked by a decision of a court of concurrent jurisdiction in Cause No. 39 of 2007; that the trial court's decision compelled the appellant's members to associate with KUDHEIHA against their will; that this impacted negatively on the appellant where it has already signed recognition agreement with members of the respondent's union. Relying on Civil Appeal No. 47 of 2013 and Civil Appeal No.67 of 2015, the appellant asserted that Article 41 (2) (c) of the Constitution guaranteed every worker the freedom of association and guaranteed them the right to form, join or participate in the activities and programs of a trade union.
17. The appellant further submitted that the respondent had levied agency fees on the appellant's members without following the procedures specified by section 49 of the *Labour Relations Act*; that contrary to Gazette Notice No. 17449 of 2012, the respondent had disguised agency fees as union dues and deducted Kshs. 300 agency fees without including the names of the employees.
18. On the service charge, it was submitted that the KUIDHEIHA Collective Bargaining Agreement authorised deduction of 0.5% service charge on the appellant's members in support of its program but that the appellant's members did not benefit from the deductions. The appellant cited the United



States Supreme Court cases of *Harris vs Quinn. Governor of Illinois (2014)* and *Knox vs Service Employees International Union, US 310* to support the proposition that levying compulsory agency fees was unlawful and amounts to forcing dissenting employees to finance and support ideologies and programs that they don't believe and this infringes on their voluntary freedom to join and leave unions.

19. In response, the respondent submitted that the learned trial judge rightly held that the appellant ought to have recruited a simple majority from the Association's membership and thereafter seek recognition from the Association and not from a single member of the Association, and that the appellant has not satisfied the requirement of section 54 (1) of the *Labour Relations Act*. Further, since the respondent was a member of the Association, its right to join an association or group of employers was well protected under the Constitution and section 6 (1) (b) of the *Labour Relations Act*. Reliance was also placed on section 54 (2) of the Act which stated that:

“A group or an employers' organization, including an organization of employers in the public sector, shall recognize a trade union for the purposes of collective bargaining in the trade union represents a simple majority of unionisable employees employed by the group of employers not the employers who are members of the employers' organization within a sector.”

20. It was further submitted that the fact that the respondent is a member of the Association was not denied or challenged by the appellant, and therefore the appellant ought to have recruited a simple majority from the Association's membership and seek recognition from the Association itself; that in any event, the Association already had a recognition agreement with KUDHEIHA. The case of *Kenya Hotels and Allied Workers Union vs Pangoni Beach Resort, ELRC Cause No. 380 of 2013* was cited to buttress this proposition.

21. The respondent concluded that the appellant has not satisfied the requirement of section 54 (2) of the Labor Relations Act and as a consequence was not entitled to have its agreement recognized.

22. This being a first appeal, Rule 29 of the Court of Appeal Rules requires this Court to re-appraise the evidence and draw inferences from the facts. This principle was emphasized in the oft-cited case of *Selle & Another v Associated Motor Boat Company Limited & Others (1968) EA 123* where it was stated:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this courtis by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”

23. Having considered the record and supplementary records of appeals, the parties' submissions and the law, we find that the issues for determination are:

- a. Whether the appellant was entitled to enter into a recognition agreement with the respondent.; and
- b. Whether deduction of agency fee and 0.5% service charge from the appellant members by the respondent is lawful.

24. As to whether the appellant was entitled to enter into a recognition agreement with the respondent, the appellant has argued that out of the respondents' 295 unionisable employees, it had recruited 203 employees, which was well in excess of the simple majority specified by **section 54 (2)** of the *Labour Relations Act*. The respondent's argument in response was that since it is a member of the



Association, which Association has already signed a recognition agreement with KUDHEIHA, the appellant can only be recognized if it were to register a simple majority of the unionisable employees of the members of the Association.

Section 6 (1) of the *Labour Relations Act* stipulates;

“Employer’s right to freedom of association

1. Every employer has the right to-
 - a. Participate in forming an employers’ organization or a federation of employers’ organizations; and
 - b. Subject to its constitution, join an employers’ organization or a federation of employers’ organizations.”

25. Essentially this would imply that in order to rely on the prerequisites of section 6 (1) of the *Labour Relations Act*, the respondent would have to prove that firstly, it was a member of the Association, and secondly, that the Association of which the respondent was a member had already signed a recognition agreement with a rival union.
26. A consideration of the respondent’s replying affidavit together with its annexures shows a letter dated 23rd July 2014, from Mike Macharia, the Chief Executive of the Association, and addressed to the appellant confirming that the respondent was one of its members and that the Association had entered into a Collective Bargaining Agreement with KUDHEIHA on 22nd June 2012. A copy of the Recognition Agreement was also attached. The record also disclosed that the Agreement was duly registered by the Industrial Court on 5th July 2012 as RCA No. 137 of 2012. This evidence is proof that the respondent was a member of the Association and that it had indeed signed a recognition agreement with KUDHEIHA.
27. Given these circumstances, section 6 (1) of the *Labour Relations Act* becomes applicable to the respondent’s circumstances. Upon joining the Association, the respondent ceased to be a single employer for the purposes of collective-bargaining, and under Article 41 of the Constitution and section 6(1) of the Labor Relations Act the respondent had the right to join an employer’s organization and participate in its activities including collective bargaining. In the circumstances, the appellant’s demand for individual recognition with the respondent was in total disregard of the respondent’s agreement with other employers.
28. As such, we are satisfied that the learned judge rightly concluded that for the appellant to be recognized, it would have had to be recognized by the Association and all its members. By demanding to be recognized by the respondent despite the existence of the Association which had already entered into a recognition agreement with a union of its choice, the appellant’s actions offended the provisions of the Constitution and section 6 (1) of the Act, and the respondent was entitled to decline the invitation to sign a recognition agreement with the appellant. The number of unionisable members that the appellant recruited from the respondent did not matter. As long as the appellant had not recruited a simple majority of the unionisable members of all the members of the Association, it failed to satisfy the threshold requirements of **section 54 (2)** of the Act with the result that it was not eligible for recognition by the Association.
29. The next issue for determination is whether deduction of agency fees and 0.5% service charge from the appellant members by the respondent was unlawful.



Concerning agency fees, *section 49 (1)* of the *Labour Relations Act* provides that:

“A trade union that has concluded a collective agreement registered by the Industrial Court with an employer, group of employers or an employers’ organization, setting terms and conditions of service for all unionisable employees covered by the agreement may request the Minister to issue an order requiring any employer bound by the collective agreement to deduct an agency fee from the wages of each unionisable employee covered by the collective agreement who is not a member of the trade union”.

30. Gazette Notice No. 17449 of 2012 which revoked Gazette Notice 911 states at Part (b) that:

“...the companies who are members of the Kenya Hotel Keepers and Caterers’ Association herein referred to as the “Association” to deduct from the wages of each employee who is not a member of the Kenya Union of Domestic Hotels Educational Institutions. Hospitals and Allied Workers herein referred to as the “Union” but is covered by Collective Bargaining Agreement registered as RCA No. 137 of 2012 signed between the union and the association, a sum of 2% subject to a maximum of kshs.300 of the employee’s salary per month.”**//

31. In other words, the Gazette Notice is clear that agency fees are deductible from all unionisable employees including those who are not members of the recognized union, in this case KUDHEIHA, so that the appellant’s complaint in respect of the deductions is unfounded.

32. On the levying of the 0.5% service charge, the appellant claimed that despite the amount being deducted for reasons of educating employees on their rights no employee has ever benefited from the scheme at the respondent’s premises, and therefore it was unfair to deduct it from the appellant’s members and should be stopped. No evidence, however, was presented before the trial court to support the appellant’s allegations. We therefore find it to be unsubstantiated and lacking in merit.

33. In sum, the appeal is unmerited and is dismissed with costs to the respondent.

34. It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P.N NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

