IN THE COURT OF APPEAL

AT KISUMU

[CORAM: OKWENGU, KIAGE & SICHALE, JJA]

CIVIL APPEAL NO. 6 OF 2017

BETWEEN

JUMBO FOAM MATTRESSES

INDUSTRIES LIMITED.....APPELLANT

AND

KENYA CHEMICAL AND ALLIED

WORKERS UNION.....RESPONDENT

(Being an appeal from the judgment of the Industrial Court of Kenya at Kisumu (Wasilwa, J) dated 14th March, 2014

IN

Kisumu Civil Cause No. 240 of 2013)

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JUDGMENT OF THE COURT

On **26th January, 2017**, **Jumbo Foam Mattresses Limited** filed an appeal against the judgment of **Wasilwa, J** dated **14th March, 2014**.

The appeal stems from a claim filed at the Industrial Court by **Kenya Chemical and Allied Workers Union** (the then claimant and the respondent herein) against **Jumbo Foam Industries Limited** (the then respondent and the appellant herein) in which the respondent blamed the appellant for refusal to sign a recognition agreement, to implement deductions of union members and for threats and intimidation of workers for joining the union. In its Memorandum of Claim filed at the Industrial Court on **20th August, 2013,** the responded contended that on **26th October, 2012**, it recruited workers of the appellant and forwarded a Recognition Agreement to the appellant for purposes of signing in order to formalize their relationship; that the appellant neither responded to nor acknowledged receipt of the Recognition Agreement; that the respondent sent several reminders to the appellant but the appellant did not respond to any of its letters; that the appellant's conduct prompted the respondent to report a Trade Dispute to the Minister for Labour on **14th December, 2012**; that thereafter, the Ministry of Labour appointed a Conciliator vide a letter dated **18th December, 2012**; that after several meetings with the Conciliator, it was agreed that the Conciliator visit the factory to ascertain union membership and prepare its report; that by the time the Conciliator released its report to the parties on **8th May, 2013**, the respondent had recruited 78 employees out of 132 employees of the appellant and this translated to 59% of the employees which number was above the required simple majority; that at the time of filing the claim, the respondent had recruited a total of 146 employees out of 230 employees of the appellant which was equivalent to 63% and that this was above the simple majority requirement for signing of a Recognition Agreement.

The respondent contended that the appellant had refused to sign the Recognition Agreement delivered to them on **1st November, 2012**; that they refused to implement deductions of union dues from the employees who had willingly become members of the respondent and that the appellants had instead resorted to threatening and intimidating employees to resign from the union and even dismissing some of them. The respondents urged the court to allow their claim and grant the orders sought by directing the appellant to recognize the union which by then had a total of 146 union membership representing 63% of the appellant's employees; by directing the appellant to implement deductions of union dues from the date contained in the check off system forms submitted to the appellant; by declaring that the appellants had committed an offence under Section 50(10) by breaching Section 50(8) of the Labour Relations Act; by directing the appellant to stop intimidating workers for joining the union as joining the union was a constitutional right of the employees and finally, to find in favour of the respondents

and condemn the appellants to pay costs of the suit.

In opposing the claim, the appellant filed written submissions on **7th February, 2014** denying the respondent's claim alleging that the persons named in the list submitted to them by the respondents were outsourced employees of **Norgen Enterprises Limited and Liberty Associates**; that contrary to their assertion, the respondents had not recruited a simple majority of its employees and that only 36 employees out of its total workforce of 280 employees had joined the union. The appellant stated that "***out of a total workforce of 280 employees, 170 were outsourced employees of Liberty Associates; that out of the remaining 110 employees who fall under the respondent 22 are management and not unionisable and that all the remaining 88 employees who are under the respondent, none are members of the union, 36 of the employees who fall under Liberty Associates are members***". The appellant contended further that the respondent could only seek recognition after clearly demonstrating that they have recruited a simple majority of its employees. They urged the court to dismiss the respondent's claim with costs.

The dispute between the parties was heard by **Wasilwa, J** who in a judgment delivered on **14th March, 2014** stated:

> ***"I find that claimants are entitled to prayers sought and I order as follows:***
>
> ***1. The respondent shall forthwith recognize the claimant union and enter negotiations leading to signing of a Collective Bargaining Agreement within 60 days.***
>
> ***2. The respondents shall forthwith and in any case not less than 30 days from the date of this judgment remit trade union dues to the claimants.***
>
> ***3. The respondent shall forthwith cease to intimidate or otherwise deal with the employees unfairly with the aim of defeating their right to freedom of Association.***
>
> ***4. The respondents shall meet costs of this suit".***

Being dissatisfied with the findings of the learned judge, the appellant filed a Memorandum of Appeal on **26th January, 2017** in which they faulted the trial judge for failing to find that the respondent had failed to demonstrate that they had recruited a simple majority of the appellant's employees to warrant the appellant to sign a recognition agreement; for failing to consider the documentary evidence contained in the appellant's Memorandum in response to the Respondent's Memorandum of Claim; for failing to find that the appellant had tendered sufficient evidence before the trial court with regard to the outsourced employees; for failing to consider the content and import of the appellant's submissions; for erroneously making a finding that the outsourcing agreement between the appellant and the outsourcing companies was a sham; for erroneously making a finding that the appellant had been intimidating or otherwise dealing with its employees unfairly without sufficient evidence to prove the same and finally, for failing to consider the weighty defence evidence.

The appeal came up for virtual hearing on **9th June, 2020. Mr. Wilberforce Wagonda,** learned counsel appeared for the appellant whilst **Mr. Nyabena,** learned counsel appeared for the respondent. **Mr. Wagonda** relied on the appellant's submissions dated **28th May, 2020** which were filed online. Counsel contended that the respondent failed to demonstrate that it had recruited a simple majority of 51% of unionisable employees for the appellant to sign the recognition agreement. Further, that in computing its figures the appellant had included outsourced employees of Norgen Enterprises Limited and Liberty Associates, these two being manpower and/or employment agencies. The appellant faulted the judge for finding that the outsourcing agreements between it and Norgen Enterprises Limited and Liberty Associates was a sham, and finally urged that there was no evidence that the appellant had sought either through threats or otherwise, to dissuade its employees from joining the union.

On behalf of the respondent, learned counsel **Mr. Nyabena** relied on their submissions filed online on **8th June, 2020**. Counsel pointed out that as the decree therein had been satisfied, the trade union dues have been deducted and submitted, the Collective Bargaining Agreement (CBA) renegotiated – covering terms and conditions of service, and new rights created with the employees, then the appeal is of academic value; that the judge was correct in finding that a simple majority had been attained by the recruitment of 156 out of a total workforce of 230, this being 67.8% of the unionisable employees of the appellant; that coercing members to withdraw from the union and the purported transfer of its employees as outsourced employees came after attainment of the simple majority and hence was inconsequential; that the purported outsourcing was a sham and finally, that the introduction of the Norgen Enterprises Limited and Liberty Associates was a vain attempt to derail the signing of the recognition agreement.

In a brief rejoinder **Mr. Wagondo** contended that the denial of stay of execution sought by the appellant did not render the appeal academic as in any event, the sums paid to the union is recoverable.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

The appeal before us is a first appeal. Our mandate as a first appellate court is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> ***"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.***
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> ***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".

We consider the facts of this matter to be fairly straight forward. The appellant's position is that the respondent had not recruited a simple majority of its employees to warrant the signing of a recognition agreement. This would be in line with Section 54 of the Labour and Relations Act, 2007 which provides:

"An employee including an employee in the public sector shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees".

The respondent had recruited a total of 156 members from a total workforce of 230 employees of the appellant, thus representing 67.8% of unionisable employees. This was clearly above the simple majority. Further, there being no proof that the employees had written contracts of employment with Norgen Enterprises Limited and Liberty Associates, the appellant's contention that these were outsourced employees was mischievous and we echo the words of the trial judge that ***"……the alleged outsourcing is a sham meant to defeat the quest for recognition"***

In our view, this appeal is devoid of merit. We also hasten to add that as pointed out by **Mr. Nyabena** for the respondent, the recognition agreement having been signed by the appellant, this appeal is merely academic.

It is in view of our above conclusions that we find no merit in this appeal.

It is hereby dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 9th Day of October, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR