



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 67 OF 2015

BETWEEN

ABYSSINIA IRON & STEEL LIMITED.....APPELLANT

AND

KENYA ENGINEERING WORKERS UNION.....1ST RESPONDENT

JOKALI HANDLING

SERVICES LIMITED.....2ND RESPONDENT

(Appeal against the judgment and decree of the Industrial Court of Kenya at Kisumu, Wasilwa, J.) dated 25th February 2014

in

Industrial Case. NO. 74 of 2013)

JUDGMENT OF THE COURT

In this appeal, the appellant seeks to set aside the judgment of the Industrial Court where Wasilwa, J. found that despite the claim by Abyssinia Iron and Steel Limited (*Abyssinia*), the appellant, that all its employees were outsourced to Jokali Handling Services Limited (*Jokali*), the 2nd respondent, no employees were outsourced and as such they remained the employees of Abyssinia, and were entitled to be recognized as such.

The matter concerned a trade dispute between Abyssinia and Kenya Engineering Workers Union, (*the Union*) the 1st respondent, where, the Union's case was that at all times they were the recognized union to represent the labour interests of the unionisable employees of Abyssinia. The Union claimed that despite attempts to enter into a recognition agreement with Abyssinia, their efforts were repeatedly thwarted, so that the agreement was never signed.

They further claimed that the dispute arose on 27th June 2012 soon after the Union recruited 259 unionisable employees of Abyssinia and submitted a check off system for payment to Abyssinia. On 29th

June 2012, the Union again submitted a check off system form in respect of a further 230 employees. In both cases Abyssinia failed and or refused to deduct and remit the contributions to the Union.

As a result, the Union reported a trade dispute to the Minister for Labour, and a conciliator was duly appointed on 16th July 2012 to reconcile the parties. Abyssinia was invited to two meetings both of which it failed to attend, forcing the conciliator to refer the dispute to the Industrial Court.

In opposition to the Union's claims, it was Abyssinia's contention that they have not prevented any employees from joining the Union. The only reservation they expressed was that they had outsourced all their employees to Jokali, and as such they no longer had employees for which a recognition agreement would require to be signed.

During the hearing before the Industrial Court, by agreement of the parties, the dispute was referred back to the conciliator to have Abyssinia's employment status verified. The report stated that initially Abyssinia had a total labour force of 740 employees. It was found that part of the company's operations were outsourced or transferred to Jokali and another company, Effex Company (Effex), and that 289 employees were transferred to Jokali and 80 employees to Effex. Abyssinia remained with a total of 371 employees working directly with it.

A poll was conducted at Abyssinia's premises which resulted in 261 employees opting to join the Union, while 25 voted not to join the Union, and 9 votes were spoilt. On 23rd January 2014, the parties confirmed the poll votes, and one Naresh Sutar, the General Manager, signed the results on behalf of Abyssinia's management, while Joseph Omolo and Tom Owuor signed it on behalf of the Union. Hellen Manano and Alphonse Matogo from the County Labour Offices witnessed it.

In her decision, the learned judge found that Abyssinia's claim of having outsourced all its employees to Jokali was false, and ordered Abyssinia to enter into negotiations with the Union within 30 days with a view to signing a recognition agreement. In default, execution was to issue.

Abyssinia, being dissatisfied with the decision, has appealed to this Court on the basis that, it was not proved that the Union had recruited a simple majority of employees in accordance with **section 54 (1) of the Labour Relations Act**; that the learned judge wrongly found that there was no evidence to prove that the employees were outsourced, and that Abyssinia falsely used outsourcing as a means to circumvent recognition of the Union; and finally that the court in failing to consider Abyssinia's submissions, reached the wrong conclusion that the Union was entitled to recognition.

Mr. Wawire, learned counsel for Abyssinia, submitted that the Union had failed to prove that a simple majority had been attained to enable the recognition agreement to be signed; that the polls concluded that 371 employees were working under Abyssinia at the time. Counsel faulted the court for relying on the number of employees indicated in the check off forms submitted by the Union to Abyssinia. In his view, had the court interrogated the forms it would have found that there were discrepancies, including repetition of names, and differences in the signatures appearing against the same names. Furthermore, identity card numbers were not included against the names of each employee in the check off lists.

Counsel further submitted that the poll conducted were not credible as the Union did not provide lists of employees who voted to join the Union, and since Jokali was not present, it was not possible to confirm which employees had been outsourced.

Regarding the outsourced employees, counsel stated that Jokali had taken over non core functions of Abyssinia such as twisting, bending, carrying and loading; that a list of the employees who voluntarily joined Jokali was presented in court, that was supported by discharge agreements and employment contracts with Jokali. The terms of the contract included 6 months' employment at the rate of Kshs. 414/- per day. Jokali was responsible for their NHIF and NSSF contributions together with a top up.

It was evident that this arrangement pointed to the fact that the outsourced employees were under Jokali's control and direction.

Counsel's final complaint was that the court did not consider Abyssinia's further submissions filed after presentation of the conciliator's report, and had it done so, it would have arrived at a different conclusion.

There was no appearance for Jokali despite their having been served on 7th January 2016.

Mr. Yogo, learned counsel for the Union, opposed the appeal. Counsel begun by stating that the court took into account both the appellant's and the respondent's submission, and in so doing arrived at the right conclusion. Counsel submitted that, the court ordered the conciliator appointed by the Minister to ascertain whether the requirement of a simple majority of employees was met for the Union to be recognized by Abyssinia. After the polling exercise the conciliator's report was signed by the parties and adopted by consent. It was found that 371 employees were working with Abyssinia and of this number 261 employees had chosen to join the Union.

On the issue of outsourcing, counsel argued that there was nothing to show that the employees working under Abyssinia were under the control and direction of Jokali. Counsel questioned whether outsourcing was capable of depriving an employee of their constitutional right to join a trade union. The case of **Cable & Wireless Plc vs P. Muscat [2006] EWCA Civ 220** was relied upon to support the proposition that, provided an employee's remuneration was being provided by the employer, it matters not that it was paid directly but through some other arrangement made by the employer.

In his rejoinder, Mr. Wawire took the position that the **Cable & Wireless Plc vs P. Muscat case (supra)** was not applicable to the circumstances of this case as that dispute was concerned with multiple outsourcing contracts.

We have considered the appeal, the pleadings, the evidence and the submissions of counsel and it is our view that the issues for our consideration are:

- i. *Whether outsourcing vitiates an employee's constitutional right to join a union;*
- ii. *Whether outsourcing of employees was proved;*
- iii. *Whether a simple majority of employees was attained to entitle the Union to enter into a recognition agreement with Abyssinia.*

Our duty as a first appellate court is to reexamine and reevaluate the evidence and material tendered before the court below and to reach our own independent conclusions. We must bear in mind that since we have not seen or heard the witnesses so as to be able to ascertain their credibility we should exercise caution before interfering with the decision of the trial court, see **Selle vs Associated Motor Boat Company Limited [1968] EA 123**, and **Williamson Diamonds Ltd. vs Brown [1970] EA 1**.

The crux of the dispute as we understand it is whether, for reasons that the workers were outsourced, the employer was entitled to decline to recognize a trade union as the employees' representative.

Article 41 (2) (c) of the **Constitution** guarantees the right of every worker to form or join a trade union. It is specified that every worker has the ***"...right to form and, join and participate in the activities and programmes of a trade union"***.

Section 54 of the **Labour Relations Act** is concerned with the recognition of trade unions by the employer, and provides that;

"An employer, including an employer 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."

From the above, it goes without saying that save for the limitations specified under **Article 24** of the **Constitution**, it is a constitutional right for every worker, even those who are outsourced, to be part of a union, and in view of the circumstances of the instant case, an employer is obliged to recognize a union where it represents a simple majority of the unionisable employees of the person or entity in question.

Bearing this in mind, we will begin by determining whether Abyssinia proved that all its employees were outsourced.

“**Outsourcing**” as defined by *BusinessDictionary.com* means,

“The contracting or subcontracting of noncore activities to free up cash, personnel, time, and facilities for activities in which a company holds competitive advantage. Companies having strengths in other areas may contract out data processing, legal, manufacturing, marketing, payroll accounting, or other aspects of their businesses to concentrate on what they do best and thus reduce average unit cost. Outsourcing is often an integral part of downsizing or reengineering. Also called contracting out.”

In *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*, this Court was satisfied that outsourced services was an accepted business strategy. In the same case, Murgor, JA. observed that;

“Outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands. It is not designed to deprive Kenyans of their jobs.”

In principle therefore, outsourcing of employees is not illegal or untoward, provided it is carried out in accordance with fair labour practices, and the process adopted is not aimed at rendering an employee redundant.

In the instant case Abyssinia claimed that all its employees were paid off in December of 2012, and were thereafter recruited by Jokali who then became their employer. Vouchers discharging Abyssinia from its employment obligations with these employees, and the employment contracts entered into with Jokali were produced to show the transmission of the individual employees from Abyssinia to Jokali. It reasoned that, since the employees had already been transferred to Jokali, the Union would have to seek recognition from the new employer, Jokali.

According to *Section 2* of the *Employment Act* an “employee” means “a person employed for wages or a salary and includes an apprentice and indentured learner.”

The same provision specifies that an “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.*”

Section 9 of the Act sets out the prerequisites for an employment relationship. *Section 9 (1)* stipulates,

A contract of service—

- a. ***for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or***
- b. ***which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.***

From the evidence, we can discern that Abyssinia had a total workforce of 760 employees, all of whom it declared were transferred to Jokali. Our analysis of the signed Discharge Vouchers establishes that indeed, certain employees confirmed that upon payment of their terminal dues, they were no longer employees of Abyssinia.

Simultaneously with the discharge of Abyssinia, these employees entered into employment contracts with Jokali. The contracts provided, *inter alia*, that Jokali would be responsible for their remuneration, insurance, the provision of protective clothing and equipment, payment of NSSF, NHIF, contributions,

amongst other obligations. The evidence of Neresh Sutar was that Abyssinia would pay Jokali who in turn would pay the employees. It was further stated that Jokali that was responsible for supervising the employees assigned to Abyssinia. This evidence was not in any way controverted.

The discharges and contractual agreements make it evident that some of Abyssinia's employees were outsourced to Jokali from Abyssinia. The new employment contracts bear all the hallmarks of valid contractual arrangements, thereby creating a different employer/employee relationship between Jokali and those employees. We can find nothing to show that these employees were irregularly or improperly outsourced to Jokali. Given the validity of the discharges and the existing employment contracts, we are satisfied that the concerned employees were effectively and legally outsourced to Jokali.

As to who between the old and new employer is the legitimate recognised employer of the outsourced employees, in the case of ***Elizabeth Washeke & 62 Others vs Airtel Networks (K) Limited & Another [2013] eKLR*** the High Court stated;

“In comparative jurisdiction where the subject of outsourcing and transfer has been extensively gone into, I note the context of the United Kingdom as outlined by the 2nd respondent. TUPE (Transfer of Undertakings (Protection of Employment) Regulations, 2006) Directive provides that;

“Upon a transfer of an undertaking, business or any part thereof to another employer by reason of a measure or legal transfer, the rights and obligations arising from that contract of employment shall be transferred to the new employer”.

We agree with the learned judge there, that these are good practices that form the basis of effective and legitimate outsourcing of distinct business components of an enterprise. With this in mind, we take the view that ***Cable & Wireless Plc vs P.Muscat case (supra)*** can be distinguished from the circumstances of this case, as there, following Mr. Muscat's discharge from employment, he agreed to offer his services to the employer as a sole 'contractor', and was paid for his services through a third party company.

In the instant case, the outsourced employees entered into express contractual relationships with Jokali, which in turn contracted with Abyssinia to provide employees to perform various duties. The employees, though working in Abyssinia's premises, remained under Jokali's management and control. Faced with these facts, we find that, bar the fulfillment of the mandatory legal requirements, it was Jokali, and not Abyssinia, that was obliged to recognise the Union in respect of Jokali's employees. We therefore disagree with the learned judge that the employees outsourced to Jokali remained employees of Abyssinia.

Abyssinia having satisfactorily demonstrated that some of its employees were outsourced, we turn next to consider how many employees, if any, remained working with it, and if there were, whether a simple majority of employees was attained to entitle the Union to enter into a recognition agreement with Abyssinia.

The Union asserts that on 27th June 2012, 259 unionisable employees of Abyssinia joined the Union, and it submitted a check off system form in respect of these employees. On 29th June 2012, a further 230 unionisable employees joined the Union, and another check off form was submitted for the employees. The Union argued that with a total of 489 employees opting to join the Union, Abyssinia was compelled to comply with **section 54** of the ***Labour Relations Act*** and to enter into a Recognition Agreement with it.

Abyssinia on the other hand disputes the number of employees joining the Union, maintaining that all its employees were outsourced to Jokali.

On 20th January 2014, the conciliator appointed by the Minister was ordered by the court to carry out a fact finding mission at Abyssinia with a view to ascertaining the number of workers engaged there, and the number of workers desirous of joining the Union.

A poll was conducted where the conciliator's report that was produced in court showed that at the time, there were 371 employees working under Abyssinia. Of these, 295 employees took part in the polling exercise, with the result that 261 employees voted in support of joining the Union, while 25 voted against. There were 9 spoilt votes. It was acknowledged that the employees of Jokali did not participate in the polling exercise.

To be recognized as the representative trade union of the workers of a person or entity, **Section 54** of the **Labour Relations Act** stipulates that the minimum number of workers willing to join the union must be a simple majority or 51% of the work force. In this case 51% of the employees of Abyssinia that voted would translate into 190 employees. The number of employees that voted to join the Union was 261, which was in excess of the simple majority necessary, so that the decision to join the Union is what carried the day.

The Union has argued that, according to its check off system forms 489 employees ought to have joined the Union. This number was disputed by Abyssinia, which necessitated the conduct of the polls. The poll results showed that at the time it took place, Abyssinia's workforce comprised 371 employees. All the parties involved acceded to the results. We find that, the verified and agreed number of employees engaged at Abyssinia was 371 employees, and it was upon this basis that recognition of the Union was to be ascertained.

In accordance with this finding, since 261 employees of Abyssinia voted to join the Union, the threshold requirements of **section 54** of the **Labour Relations Act** were met, and we further find, as did the learned judge, that Abyssinia is liable to sign a recognition Agreement with the Union in respect of its employees, and that, it is to these employees in particular to which the check off system contributions would apply.

Accordingly, the appeal is dismissed. We order that Abyssinia do enter into a Recognition Agreement with the Union in respect of 261 employees within 30 days from the date hereof. The respondents shall have the cost of this appeal.

Dated and delivered at Kisumu this 31st day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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.

DEPUTY REGISTRAR