



**Automobile Association (AA) of Kenya (Through Jinaro Kipkemoi Kibet-
Chairman Milcah Mugo- Vice Chairman Erastus Mwangera- Secretary David
Kinyua - Treasurer) v Njoroge (Employment and Labour Relations Appeal
E028 of 2023) [2025] KEELRC 823 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 823 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E028 OF 2023**

AN MWAURE, J

MARCH 14, 2025

BETWEEN

**AUTOMOBILE ASSOCIATION (AA) OF KENYA (THROUGH
JINARO KIPKEMOI KIBET-CHAIRMAN MILCAH MUGO- VICE
CHAIRMAN ERASTUS MWONGERA- SECRETARY DAVID KINYUA -
TREASURER) APPELLANT**

AND

MOSES NJOROGE RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Honourable K. Kibelion, Principal
Magistrate delivered on 21st September 2023 in Nakuru MCELRC No. 11 of 2020)*

JUDGMENT

1. The Appellant, being dissatisfied by the judgment and decree of Honourable Principal Magistrate K. Kibelion, filed this appeal vide a Memorandum of Appeal dated 11th October 2023 on the grounds that: -
 - a. The learned trial magistrate erred in law and in fact in failing and declaring that the Respondent was entitled to payment of loyalty service pay under the terms of the 2016/2017 CBA between the Appellant and Kenya Long Distance Truck Drivers and Allied Workers Union and awarding him the sum of Kshs.478,762.00 in respect thereof.
 - b. The learned Magistrate erred in law and in fact in finding that the Respondent had served for a period of over ten years thus entitling him to loyalty service pay while the Respondent had only three years and ten months under short term contract having gone on normal retirement in February 2014



- c. The Learned Magistrate erred in law and in fact failing to appreciate that the Respondent was not entitled to loyalty service pay under 2014/2014 CBA as he was employed under permanent and pensionable terms.
 - d. The Learned Magistrate erred in law and in fact in failing to appreciate that the reference to “All other terms and conditions of service remain as per earlier letter of appointment” contained in the Renewal of contract letter dated 18th February 2015 and 26th January 2017; and Extension of Contract letter dated 22nd August 2017 was to the Letter of Appointment dated 10th March 2014 and not the initial letter of employment.
 - e. The Learned Magistrate erred in law and in fact in failing to find that once the Respondent retired in February 2014 and received all his retirement dues, the period served up to retirement could not be included when determining qualification for loyalty service under 2016/2017 CBA.
 - f. The Learned Magistrate erred in law and in fact by failing to take into account submissions filed on behalf of the Applicant on the fact that the Respondent has retired in February 2014 and was working on short term contracts from 1st March 2014 to 31st January 2017.
 - g. The Learned Magistrate having made a finding of fact the Respondent admitted that the 2014/2015 CBA did not make provision of service pay and so erred in law and in fact in finding that he was entitled to payment of service pay for a period of twenty-five years which included the period served before retirement
 - h. The Learned Magistrate erred in law and in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant when making the awards in favour of the Respondent.
 - i. The Learned Magistrate erred in law in entering judgment in favour of the Respondent against the Appellant for the sum of Kshs.478,762.00.
 - j. The Learned Magistrate erred in law in awarding costs of the case to the Respondent.
2. The Appellant prays that:
- a. The Appeal be allowed
 - b. The Judgment delivered on 21st September 2023 in favour of the Respondent and against the Appellant be set aside and be substituted with a judgment dismissing the Claim against the Appellants.
 - c. The Respondent be ordered to pay the Appellant’s costs of this Appeal and in the lower court
3. This appeal was disposed of by way of written submissions.

Appellant’s submissions

4. The Appellant submitted that being the first appeal, this Honourable Court needs to analyze and re-evaluate the evidence to reach its own conclusion and relied on the case of Simon Waweru Mugo V Alice Mwangeli Munyao [2020] eKLR where the court stated:

“This being a first appeal, the role of the court in section 78 of the *Civil Procedure Act* is to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions though bearing in mind that it neither saw nor heard the witnesses testify. In addition, the



responsibility of the appellate court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. This was observed in Kenya Ports Authority V Kuston (Kenya) Limited [2009] 2 EA 212 CA.”

5. The Appellant submitted that the Respondent, as a union member, was bound to the 2014/2015 Collective Bargaining Agreement (CBA), effective from 1st January 2014. The Appellant contended that the Respondent retired in February 2014, and later applied for another job on a contractual basis through a letter dated 10th March 2014. The Appellant also submitted that under Clause 29(f) of 2016/2017, CBA ran from 1st March 2014 to 31st March 2017, which amounted to three years and ten months, during which the Respondent was not eligible for payment of service pay for loyalty. The Appellant maintained that the period of service before retirement could not be counted in the new contract.
6. The Appellant relied on Section 59(1), 59(3) and 59(5) of the Labour Relation Act which states that a collective agreement binds the parties involved, all unionisable employees of the employer, and employers who are or become members of the employers’ organization party to the agreement. The terms must be included in the employment contract of every covered employee. The agreement becomes enforceable and effective upon registration by the Employment and Labour Relations Court from the agreed date.
7. The Appellant submitted that the Respondent was bound to the terms of the contract of employment dated 10th March 2014 and the terms of the operative CBAs signed between his union and the Respondent. The Appellant submitted that it is well settled that parties are bound to their contract and relied on the case of National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows:

“A court of law cannot rewrite a contract between the parties. They are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
8. The Appellant submitted that the learned magistrate erred in interpreting the phrase “all other terms and conditions of service are per your earlier letter of appointment” in the contract renewal letter as referring to the Respondent’s initial employment before retirement. The Appellant contended and clarified that the reference was to read the “Appointment as an Instructor on Contract” letter dated 10th March 2014. Furthermore, the Appellant submitted that with a proper consideration of the referenced letters of contract renewal, dated 18th February 2015, 26th January 2017, and 22nd August 2017, the learned magistrate would have reached a different conclusion.
9. The Appellant urged this Honourable Court to allow the appeal as prayed.

Respondent’s submissions

10. The Respondent submitted that after retiring following over 18 years of service with the Appellant, he was re-engaged and entered into a new contract with the Appellant on a contractual basis under the same terms and conditions as per his prior permanent and pensionable role. His final contract ended on 31st December 2017, making his total continuous service with the Appellant approximately 22 years.
11. The Respondent submitted that even after retirement, the Appellant continued to deduct union dues from his salary under the renewed contract he had entered into with the Appellant. As a union member, the Respondent submitted that he is entitled to the benefits under the 2016/2017 CBA, including service pay. The Respondent also submitted that there was no clause in the 2016/2017 CBA excluding



retired employees from its provisions. Paragraph 29 of the CBA clearly stated that a retired employee shall be entitled to service pay to staff who have worked over 10 years and above for loyalty reward.

12. The Respondent submitted that he was eligible for service pay, having worked for the Appellant for over 10 years in total, including the period after retirement. The Respondent emphasized that his employment was continuous and union dues were consistently deducted throughout his tenure. The Respondent relied on Section 59(1), 59(2) and 59(3) of the Labour Relations Act in support of that proposition and it was applicable and incorporated to his renewed employment contract meaning that the terms of the CBA 2016/2017 are applicable to him even as the Appellant's retired employee.
13. The Respondent submitted that the 2016/2017 CBA superseded the 2014/2015 CBA, as his employment ended on 31st December 2017 while the newer CBA was in effect. He claimed that the phrase "all other terms and conditions of service are per your earlier letter of appointment" referred to his pre-retirement employment terms, except for gratuity upon contract termination. Additionally, the Respondent questioned the continued deduction of union dues by the Appellant if there was no intention for him to benefit under the 2016/2017 CBA. The Appellant did not dispute these continued deductions up to the end of the Respondent's last contract.
14. The Respondent submitted that the Labour Relations Act overrides any unfair contractual terms for union members. He maintained that the new contract did not reference the pre-retirement employment letter and that he was protected under both the 2016/2017 CBA and the Labour Relations Act, which did not support the Appellant's claim of "separation." The Respondent stated that his employment remained continuous until his final contract ended in December 2017.
15. The Respondent urged the Honourable Court to dismiss the appeal with costs.

Analysis and determination

16. Having considered the record of appeal, the memorandum of appeal, and the submissions, the issue for determination is whether the appeal before this Honourable Court is merited.
17. Being the first appellate court, this Honourable Court is cognisant of the principles enunciated in *Peters V Sunday Post Limited* [1958] EA 424, where the Court of Appeal held as follows:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."
18. Upon perusing the record of appeal, the Respondent was employed by the Appellant as a driving school instructor in 1995, and he retired in 2014. The Appellant re-engaged in the same position in a contract from 1st March 2014, and his contract was to expire on 31st December 2017. In the new contract, the Appellant had indicated that "all other terms and conditions of service are as per your earlier letter of appointment" were applicable. The Appellant had not paid the Respondent's loyalty service pay, thus filing a suit for compensation for the same.



19. The trial court held that the Respondent, though retired in 2014, was re-engaged in a new contract under similar terms to his initial contract, together with the same role. The Appellant referenced the initial terms of the 10th March 2014 contract by including this phrase, that “all other terms and conditions of service are per your earlier letter of appointment” were applicable and they continued deducting and remitting union dues. The court noted the existence of a valid 2016/2017 CBA, between the Appellant and the Respondent effective 1st January 2016, under which the current employees were entitled to loyalty service pay.
20. In the Locus Classicus case of National Bank of Kenya Ltd V Pipe Plastic Samkolits (K) Ltd (2002) 2 E.A. 503, (2011) eKLR, the Court of Appeal at page 507 stated as follows:

“ A court of law cannot rewrite a contract between the parties. They are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
21. In the 2016/2017 CBA between the Appellant and the Kenya Long Distance Truck Drivers and Allied Workers Union, clause 29(f) stated that a retired employee shall be entitled to service pay to staff who have worked over 10 years and above for loyalty reward.
22. The Respondent retired in February 2014. When one retires he cannot be entitled to benefits that were provided by the employer after retirement. This is quite obvious and the court cannot rule that a CBA that was entered into between the parties to run from 2016 to 2017 was applicable to a person who retired from his formal employment in 2014.

The court finds and holds that just as law cannot be applied retrospectively neither can benefits be bestowed on an employee after retirement. The trial court therefore erred in finding that the 2016-2017 applied to the Respondent who had retired in 2014.
23. The Respondent submit that since they were being deducted union dues then that was evidence that they were bound by the CBA. The court does not find that argument tenable and does not find that the Respondent was covered by a CBA that was entered into after his retirement.
24. The Respondent after retirement got a one year contract dated 10th March 2014. That contract did not provide anywhere that the terms of his earlier letter of appointment applied herein. This was an independent fixed term contract and it cannot be assumed it was tied up to the Respondent’s term of employment before his retirement.

The other fixed contracts dated 18th February 2015, 26th January 2017 and 22nd August 2017 now referred to the earlier contract which is obviously the fixed first contract dated 10th March 2014. The relevant Clause reads “All other terms and conditions of service remain as per your earlier letter of appointment.”
25. The court does not interpret that this clause referred to the letter of appointment before the retirement period but to the fixed contract after retirement.
26. Having said so the court finds the loyalty awarded to the Respondent by the trial court of Kshs.478,762/- is not deserved and is set aside.
27. The appellant however was entitled to 20 days pay of each year worked as per the 2014-2016 CBA which applied to the respondent. This is in the absence of the Pension Scheme. The court is ready to award him this “Severance pay” upto 2014 if the Respondent has no documents to prove there was Pension Scheme. But if there was a pension scheme then this award will not be awarded and the Appellant will be contented with his pension dues.



28. The upshot is that the trial court's award of loyalty amounting to Kshs.478,762/= is therefore set aside.
29. The costs of the lower court proceedings and of this appeal will be borne by the respective parties.
30. The case will be mentioned on 29th May 2025 for the Appellant to provide proof whether there were Pension fund in favour of the Respondent or not.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

