



Automobile Association (AA) of Kenya (Through Jinaro Kipkemoi Kibet-Chairman Milcah Mugo- Vice Chairman Erastus Mwongera- Secretary David Kinyua- Treasurer) v Juma (Employment and Labour Relations Appeal E033 of 2023) [2025] KEELRC 760 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 760 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E033 OF 2023**

AN MWAURE, J

MARCH 7, 2025

BETWEEN

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

AND

PIUS MARANI JUMA RESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable K. Kibelion, Principal Magistrate delivered on 28th September 2023 in Nakuru MCELRC No. 103 OF 2020)

JUDGMENT

1. The Appellant, being dissatisfied by the judgment and decree of the Honourable Principal Magistrate K. Kibelion, filed this appeal vide a Memorandum of Appeal dated 25th October 2023 on the grounds that: -
 - a. The learned trial magistrate erred in law and in fact in by 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.574,515.00 in respect thereof.
 - b. The learned trial magistrate erred in law and, in fact, in finding that the Respondent had been employed under contract after retirement when there was neither pleading nor evidence to that effect.
 - c. The learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent was not entitled to loyalty service pay under the 2016/2017 CBA as at the time of his retirement



the Appellant and the relevant union had commenced negotiations on a fresh CBA under which the clause in respect of loyalty service pay had not been agreed upon.

- d. The Learned Magistrate erred in law and in fact in finding that the parties did not made available what was agreed on conciliation when in fact the Appellant's case was that when the Respondent retired and evidence to that effect was produced.
 - e. 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.
 - f. The Learned Magistrate erred in law in entering judgment in favour of the Respondent against the Appellant for the sum of Kshs.574,515.00
 - g. 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 28th 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 clause 32 of the CBA for 2017/2018 provided as follows:
- “This agreement shall be effective from 1st January 2016 and shall remain in force for a period of 24 months. Thereafter, the agreement shall continue in force until it is amended, provided that the party desiring to amend gives one month's prior notice, setting out in details all the amendments required for each year.”
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 there was a new CBA for the year 2018/2019, and being a union member, he is bound by those terms of the said CBA for the year 2018/2019. The said CBA was to be effective on 1st January, 2018 and did not include the loyalty service pay clause as it was under negotiated; thus, the Respondent was not entitled to it. 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 misdirected himself in holding that clause 13 and 29(f) of the 2018/2019 CBA were applicable despite evidence showing that the clause about loyalty service pay was removed and was still under conciliation. Additionally, the Appellant contended that it was improper for the magistrate to conclude that the parties had not provided the agreed-upon conciliation terms, as the process was still ongoing.
9. The Appellant urged this Honourable Court to allow the appeal as prayed.

Respondent's submissions

10. The Respondent submitted that he did not make any claim for the period after retirement, pension or severance pay. The Respondent submitted that he was no longer a member of the union when he retired; hence, he ceased being a member of the union, and the CBA for 2018/2019 was not applicable to him. The Respondent relied on the case of Kenya Union of Sugar Plantation and Allied Workers V West Kenya Sugar Company Limited (2022) eKLR, where the court agreed with the Claimant's stance that the relevant Collective Bargaining Agreement (CBA) is the one in effect during the periods in question. A CBA is only valid during its designated period and is not retroactive unless both parties explicitly agree otherwise.
11. The Respondent submitted that the record of appeal was incomplete as the judgment was filed entirely as there were missing pages and urged this Honourable Court to dismiss the appeal with costs.

Analysis and determination

12. 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.
13. 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.”



14. Upon perusing the record of appeal, the Respondent worked for the Appellant as a driver instructor from 1987 to March 2018, when he went for retirement. He was a union member of the Kenya Long Distance Truck Drivers and Allied Workers Union, which had entered into CBA with the Appellant.
15. The Respondent was therefore covered by the 2016 CBA and clauses 13 and 29 of the CBA it provided for payment of loyalty. The parties are bound to their contract as set out in National Bank of Kenya Ltd V Pipe Plastic Samkolit (K) Ltd(supra). In James Njuguna Muchiri V Armed Forces Canteen Organization (AFCO) [2016] KECA 833 (KLR), where the Court of Appeal held that the Appellant was entitled to his terminal and retirement benefits from 1983 to June 2006.
16. Appellant left employment in March 2018 before the new CBA was finalised and registered. The 2018 CBA does not apply to the Appellant as it was not in force by the time he retired. The Appellant was therefore under the conditions of 2016 CBA.

On that basis the court holds the trial magistrate was justified in awarding the Respondent his loyalty at Kshs.574,515/=

The appeal is therefore upheld and costs are awarded to the Respondent both for the lower court proceedings and of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH 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.

