



REPUBLIC OF KENYA



Kenya National Private Security Workers Union v Maseno University Retirement Benefits Scheme (Appeal E032 of 2022) [2024] KEELRC 149 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E032 OF 2022
CN BAARI, J
FEBRUARY 8, 2024**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION APPELLANT
AND
MASENO UNIVERSITY RETIREMENT BENEFITS SCHEME RESPONDENT**

(Being an appeal from the Ruling and Order of Hon. J. N. Wambilyanga (SPM) delivered on 28th July, 2022 in Kisumu CMELRC NO. 430 OF 2019)

JUDGMENT

1. This judgment relates to an appeal arising from a ruling rendered on 28th July, 2022, where the Trial Court in the ruling held that she had no jurisdiction to hear the matter on the basis that it is a trade dispute under the *Labour Relations Act*. The Trial Court further advised parties to seek the transfer of the suit to the Employment and Labour Relations Court for further directions.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on 26th August, 2022.
3. The appeal is premised on the grounds That:
 - a. The Learned Magistrate erred in law and fact in holding that the matter is a labour relations matter because the Claimant is a union.
 - b. The learned magistrate erred in law and fact in holding that the claim for unlawful termination, overtime, leave allowance, underpayment, house allowance and payment in lieu of notice claimed by the Appellant on behalf of the grievants is a labour relation dispute.
 - c. The learned magistrate erred in law and fact in holding that the court lacks jurisdiction and thus cannot write a judgment.



- d. That the learned magistrate erred in law and fact by failing to write a judgment
4. The Appellant prays that the appeal be allowed, and the ruling and order of the Learned Magistrate set aside with an order for the matter to proceed to its conclusion in the lower court. The Appellant further seeks that the costs of this appeal be borne by the Respondent.
5. Parties canvassed the appeal by way of written submissions, and submissions were filed for both parties.

The Appellant's Submissions

6. It is the Appellant's submission that the lower court has jurisdiction to hear and determine the case before it as the subject in dispute concerns unlawful termination and payment of the grievants' terminal dues by the Respondent herein. The Appellant further submits that the dispute was squarely between the grievants and the Respondent on their contractual obligations.
7. It is the Appellant's submission that it had a right to sue on behalf of the grievants, who are its members. The Appellant had reliance in the case of Nairobi Employment And Labour Relations Court Cause No. 377 of 2013 *Kenya National Private Security Workers Union v Lavington Security Limited* [2018] eKLR where the court held thus:

“I agree with that position but also reiterate the fact that there being no recognition agreement between the Claimant and the Respondent does not render the Claimant unfit to defend its members. The right to join a union is enshrined under Article 41 of the *Constitution* and the Respondent cannot take away this right due to there being no recognition agreement between them and the union”
8. It is the Appellant's submission that the fact that the Appellant is a union does not automatically make the case a trade dispute under the *Labour Relations Act*, as the claim was brought on behalf of the grievants who had a contractual dispute with the Respondent.
9. The Appellant further submits that the case is not a trade dispute under the *Labour Relations Act* as the case was on the dues of the grievants as employees of the Respondents emanating from their employment contract. It is its submission that the issues in dispute were unlawful termination, underpayment, house allowance, overtime, leave amongst other terminal dues.
10. The Appellant submits that the grievants were represented by counsel, they signed the verifying affidavits to the claim and testified in court.
11. It is the Appellant's submission that under Gazette notice no.6024 of 2018, the Magistrate Courts have jurisdiction to handle disputes arising from contracts of employment where an employee earns less than Kshs.80,000/-. It is its further submission that the dispute herein, was not between the union and the Respondent but the grievants and the Respondent, and the union only brought the suit on behalf of the grievants. Reliance was had to the decision in *Benta Achieng Odinyo v University of Nairobi* [2021] eKLR to buttress this position.
12. The Appellant finally submits that the case herein, was not about a collective bargaining agreement, but was basically on the contractual rights of the grievants as against the Respondent and the grievants were earning a salary of less than Kshs.80,000/-per month.



The Respondent's Submissions

13. The Respondent submits that throughout the pendency of the suit at the Magistrates' Court, the Appellant did not produce its members' contracts of employment seeking to have the said court examine the same vis-a-vis the Respondent's conduct in relation to the said members.
14. The Respondent further submits that from Gazette Notice No. 6024/18, the Chief Justice empowered Magistrates' Courts to hear matters relating to Employment and Labour Relations, and which jurisdiction is limited to disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007).
15. It is the Respondent's final submission that the trial court pronounced itself, and rightly so, that it is devoid of jurisdiction to entertain the claim brought before it, and prays that the appeal herein is dismissed with costs.

Analysis and Determination

16. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into just one, which is whether the trial court has jurisdiction to hear and determine the Appellant's claim.
17. The Court of Appeal in *Selle & Another v Associated Motor Boat Co Ltd* (1968) EA 123 set the guiding principle in dealing with a first appeal as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is 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 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...”
18. My role as a first Appellate Court in this matter is thus to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned Trial Court are to stand or not.
19. The ruling of the Trial Court, is that its jurisdiction to hear and determine the Appellant's matter before it, is ousted by Gazette Notice No. 6024/18, by reason of the claim before it being a labour dispute and not an ordinary employment claim.
20. Pursuant to Gazette Notice No. 6024 of 22nd June, 2018, Magistrates of the rank of Senior Resident Magistrates and above, were appointed by the Chief Justice as Special Magistrates designated to hear and determine disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees' gross monthly pay does not exceed KShs. 80,000.00 as commenced and continued in accordance with the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
21. Section 2 of the *Labour Relations Act*, 2007 defines a trade dispute as:

“trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment



matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union”

22. The issue then, is whether the Appellant’s claim, having been lodged by a trade union on behalf of its members – the grievants, is a trade dispute as to be removed from the jurisdiction of the trial court.
23. In *Benta Achieng Odinyo v University of Nairobi* [2021] eKLR, the court held thus: -,
“The distinction between this case and a trade dispute is that it is an individual claim founded on breach of employment contract under the *Employment Act*, while trade dispute is collective grievance between a Trade Union and an Employer or between an Employers’ Organisation and a Union regarding the terms of a CBA under the *Labour Relations Act* which exclusively falls within the jurisdiction of the ELRC.”
24. The Appellant’s members/grievants upon being terminated, registered a complaint with the County Labour Officer, who not only wrote a letter to the Respondent on the issue, but also held a meeting with it on the grievants’ complaint. The Court notes further, that the Labour Officer did make recommendations on the grievants’ entitlement to the Respondent.
25. The pleadings further indicate that it is the recommendation by the Labour Officer, that the Appellant is dissatisfied with, resulting in the filing of the claim before the lower court.
26. The chronology of events is evidence that the dispute between the parties herein, was conciliated and that it is the result of the conciliation that is in dispute.
27. Further, among the reliefs sought under the claim, is an order directed at the Labour Officer who handled the matter to appear in court, so as to explain how he arrived at his recommendation.
28. This being a dispute between a trade union and an employer, the issue in dispute having been a subject of a conciliation process and the Ministry of Labour through the County Labour Officer having been involved in the dispute between the parties to the point of issuing a certificate of final settlement, is confirmation that the claim qualifies as a trade dispute, and for which the Magistrate Courts does not have jurisdiction.
29. I thus conclude by upholding the decision of the Trial Court, and dismissing the appeal with no orders on costs.

Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 8TH DAY OF FEBRUARY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:-

Mr. Bagada present for the Appellant.

N/A for the Respondent.

Erwin Ongor - Court Assistant.

