



Kerio Valley Development Authority v Kipkorir (Employment and Labour Relations Appeal E018 of 2022) [2024] KEELRC 2262 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E018 OF 2022
MA ONYANGO, J
SEPTEMBER 20, 2024**

BETWEEN

KERIO VALLEY DEVELOPMENT AUTHORITY APPELLANT

AND

MARTIN KIPKORIR RESPONDENT

(Being an appeal from the whole Judgment of the Honourable Chief Magistrate L. Kassan delivered on 23rd March 2022 in Eldoret CMEL No. 41 of 2019)

JUDGMENT

1. The Appellant herein was the Respondent in the trial court in which it had been sued by the Claimant, (now the Respondent) seeking to be paid severance package as per the Appellant's offer on voluntary early retirement made on February 2018.
2. After hearing the parties, the trial court delivered its judgment on 23rd March 2022 in favour of the Claimant.
3. The Appellant being dissatisfied with the trial court judgment filed the instant appeal vide the Memorandum of Appeal dated 30th March 2022 on the following grounds:
 - a. That the learned magistrate erred in law and in fact in finding that the Collective Bargaining Agreement only applied to employees who expressly subscribed to be members of the trade union and not unionisable employees.
 - b. That the learned magistrate erred in law and in fact in finding that the Claimant was not bound by the consent order.
 - c. That the learned magistrate erred in law and in fact in finding that the Collective Bargaining Agreement was not binding on the Claimant.



- d. That the learned magistrate erred in law and in fact in awarding the tax waiver when the same had been paid to the Claimant.
 - e. The Appellant being dissatisfied with the Judgment of the Trial Magistrate seeks to set it aside on the following grounds as raised in its Memorandum of Appeal.
4. The Appellant seeks the following reliefs:
- a. The Appeal be allowed;
 - b. The Judgment of the subordinate court be set aside;
 - c. The Respondent pays the costs of this appeal and the costs in the Subordinate court.
5. The appeal was disposed of by way of written submissions pursuant to the directions of this court made on 8th June 2023. The Appellant's submissions were filed on 8th July 2023 while the Respondent filed its submissions on 25th July 2023.

Analysis

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. Vide his Statement of Claim dated 12th March 2019, the Respondent herein sued the Appellant seeking that an award be entered against the Appellant in the following terms:
 - a. The sum of Kshs. 511,895.57 being the amount in variance from the initial offer to the revised offer paid
 - b. Total amount of tax waived as per legal notice 234
 - c. Costs of the suit and interest at court rates from the time of filing suit until payment in full
 - d. Any other and/or further relief that this Honourable Court may deem just and fit to grant
8. In that Statements of Claim, the Claimant averred that he was employed by the Appellant as a senior driver on 1st November 1988 and worked until February 2018, when the Appellant gave him an offer to voluntarily retire early with an attachment spelling out the aforesaid Voluntary Early Retirement (V.E.R.) criteria and package.
9. The Claimant contended that the aforesaid criteria and package had a provision for severance pay to be calculated at 1.5 months for every year served which amounted to Kshs 765,183.94.
10. According to the Claimant, he immediately accepted the said offer to voluntarily retire but was later surprised when the terms thereof were varied and reviewed to only Kshs. 235,287.94 ostensibly arrived at 1.5 months' salary for the remaining years of service.
11. The Claimant therefore claimed against the Respondent the sum of Kshs 511,895.57 being the amount in variance from the initial offer arrived at based on the years served (29.66) and the amount later offered based on the remaining years of service (9.82)
12. The Claimant further averred that vide the initial Voluntary Early Retirement criteria and package, tax charged amounted to Kshs 174,379 and which amount was deducted from the Claimant's pay.



13. It was the Claimant's further contention that the Government gave a tax waiver of Kshs 174,379, which he also claims.
14. The Claimant also claimed for leave allowance for the financial period 2018/2019 and salaries for the months of August to 11th October 2018.
15. The Appellant on its part filed a statement of defence dated 12th June 2019 denying the Claimant's Claims. The Appellant specifically denied the existence of any agreement between itself and the Claimant and further averred that any offer (if any) was rejected by the Claimant's union and the same escalated into a dispute.
16. According to the Appellant, the Voluntary Early Retirement criteria and package applicable was derived from the Consent Order entered into between Kenya Plantations and Agricultural workers union (of which the claimant was a member) and the Respondent on 7th June 2018 at the Employment and Labour Relations Court at Nakuru Cause No. 68 of 2018.
17. It was the Appellant's case that the consent was entered into voluntarily by the union representing the employees of the Respondent among them the Claimant and as such, the Claimant was bound by the consent entered into as between the Claimant and itself. It is therefore averred that any prior offers (if any) were subsumed and compromised by the consent order entered into on 7th June 2018.
18. The Respondent stated that by the said Consent entered into on 7th June 2018 that it was ordered that every employee above fifty (50) years of age would receive one and half month's basic salary for the remaining years to retirement and that this was the criteria applied by the Respondent in paying the Claimant who was above fifty years of age at the time he voluntarily retired.
19. It was therefore the Appellant's case that terms were not varied as alleged by the Claimant and that the Consent Order was in full force and effect.
20. The Appellant maintained that the tax waiver was issued by the Government on 23rd November 2018 while the Respondent retired on 30th June 2018 before the tax waiver was issued and that in any case, the tax charged and waived has since been paid to the Claimant.
21. It was also contended that the Claimant was paid the outstanding leave days as captured in the Voluntary Early Retirement Individual Package statement and the consent order, and further, that upon his retirement on 30th June 2018, the Respondent was paid three month's salary in lieu of notice as evidenced by the Voluntary Early Retirement Individual Package statement and the terms of the consent order dated 7th June 2018.
22. The Appellant therefore stated that the subject matter had since been determined between the Union (acting on behalf of the Claimant) and Appellant at the Employment and Labour Relations Court at Nakuru vide Employment Cause No. 68 of 2018.
23. In a rejoinder through a Reply to the Respondent's statement of defence, the Claimant denied being a member of the Kenya Plantation and Agricultural Workers Union.
24. He maintained that he was not privy to any consent order and further, that he was not bound by the said consent order. He stated that the criteria adopted by the Respondent in awarding severance pay to employees above the age of 50 years based on the number of years of service remaining to retirement as opposed to number of years of service completed is discriminatory and illegal.



The Evidence Adduced

25. At trial the Respondent testified as CW1 and adopted his witness statement recorded on 12th March 2019 as his evidence in chief. He also relied on the documents he filed in court in support of his case. He reiterated the contents of his statement of claim.
26. On cross examination, the Claimant stated that he left employment in 2018 at the age of 51 years. He told the court that he was given an offer by the Respondent to voluntarily retire early and that after he had accepted the offer, he was paid less than he had been offered. The Claimant denied knowledge of the Collective Bargaining Agreement (CBA) between the Respondent and KPAWU and maintained that he was not a member of the said union. It was the Claimant's testimony that he was not aware of Nakuru Employment and Labour Relations Cause No. 68 of 2018 or the outcome thereof.
27. At re-examination, the Claimant stated that he was not party to Nakuru ELRC No. 68 of 2018 because he was not a member of KPAWU which was a party to the suit.
28. The Appellant on its part called its Human Resource Officer, Mr. Josphat Motende who testified as RW1. He stated that the Claimant left employment in June 2018 through the Voluntary Early Retirement program after applying for the same which application was accepted and he was given an offer for the program.
29. RW1 told the court that the Claimant was paid in accordance with the subsequent offer but not in accordance with the initial offer. That the union went to court to challenge the same in Nakuru ELRC No. 68 of 2018 and the parties subsequently adopted a consent which came up with a new criteria of computing severance pay.
30. Mr. Motende stated that the Claimant was paid based on the new criteria contained in the consent order and also, that the final payment to the Claimant had a provision for tax waiver issued by the Government of Kenya through the National Treasury which waiver the Claimant benefited from.
31. On cross examination, RW1 testified that the Claimant was offered an initial offer which was rejected by KPAWU. That the initial offer had a provision for severance pay of Kshs. 765,183.51/= in favour of the Claimant which was arrived at on the criteria of one and a half months' salary for every year served. That the Claimant had served 29.66 years. It was his testimony that the Respondent paid the Claimant Kshs. 256,233.32/= as severance pay which was arrived at on the criteria of one and a half month's salary for the remaining years of service. RW1 confirmed that the Claimant was not a member of KPAWU but stated that he was a unionisable employee of the Respondent. He also admitted that joining a union was a voluntary exercise.
32. RW1 testified that the Nakuru ELRC Cause No. 68 of 2018 in which KPAWU and the Appellant were parties applied to the Claimant since he was a unionisable employee of the Respondent and that the criteria of computing severance pay on the basis of the consent order also applied to the Claimant.
33. On re-examination, RW1 stated that the initial offer was challenged by KPAWU in court. A consent order was recorded and the said consent order has never been challenged in court.

The Appeal

The Appellant's Submissions

34. Counsel for the Appellant, Mr Kipkenda in his submissions dated 30th June 2024 framed the issues for determination to be:



- i. Whether the Respondent was unionisable and whether it was bound by the consent order
 - ii. Whether there was a valid Recognition between the Appellant and the Union and whether the CBA is binding
 - iii. Whether the Respondent is bound by his decision to retire under the Voluntary Early Retirement Program
 - iv. Whether the Appellant is entitled to the reliefs sought and
 - v. Who bears the costs of the Appeal
35. On that the first issue, the Appellant submits that the preamble to the CBA between the Appellant and the Union states that the terms and conditions of employment contained therein covered all unionisable employees of Kerio Valley Development Authority and that since the Respondent was the Appellant's driver, he was not excluded from unionization as stipulated by the Industrial Relations Charter, 1984, Clause B (11) and Appendix C. The Appellant submits that the Respondent was unionisable and therefore bound by the Union and his rights were protected in the Collective Bargaining Agreement between the Appellant and the Union.
36. The Appellant argued that it matters not whether the Respondent was not paying union dues and that all that matters is whether or not he was unionisable which he was. Reliance was placed on the case of *James Mutisya Nzokila & 8 others v Kenya Nut Company Limited (2019) eKLR*.
37. It is the Appellant's submission that the suit filed by the Union in Nakuru Employment and Labour Relations Court Cause No. 68 of 2018 which bore the consent was filed by the Union in a representative capacity on behalf of all unionisable employees of the Appellant, among the Respondent. That all the directions, consents and decisions on the matter were binding on the Union and all the unionisable employees of the Appellant.
38. The Appellant submitted that the court's finding that the consent order did not apply to the Respondent was therefore in error.
39. On the second issue whether there was a valid recognition between the Appellant and the Union and whether the CBA was binding, the Appellant submits that there was a valid Recognition Agreement between the Appellant and the Union and that the Union rightfully sued the Appellant where the parties recorded a consent which was adopted as an order of the court. It is the Appellant's argument that the Respondent was unionisable and is bound by the consent order between the union and the Appellant.
40. With regard to the third issue framed by the Appellant's counsel, it was submitted that the Union rejected the offer on Voluntary early retirement by the Appellant and that the dispute was referred to the court which gave rise to the consent order recorded and adopted by the court.
41. The Appellant submits that the order set out the criteria for computation of dues for employees who opted to retire under the program and that by the time the consent was adopted as an order of court, it was still open to the Respondent's 314 employees among them the Appellant to opt not to retire.
42. The Appellant stated that the consent was adopted as an order of the court on 7th June 2018 and that the Respondent proceeded to retire on 30th June 2018 under the Voluntary Early Retirement Programme.
43. The Appellant therefore submits that it was guided by the consent order in computing the Respondent's dues which the Respondent now disputes and wants to be paid on the terms of the initial offer by the Appellant which offer was subsumed by the consent and is now overtaken by events. In



support of this argument, the Appellant cited the unreported case which is similar to the instant case of *Kipkutol Wilson v Kerio Valley Development Authority Eldoret ELRC 12/2019*.

44. Lastly as to whether the Appellant is entitled to the reliefs sought, the Appellant has submitted that it has demonstrated that the Respondent a unionisable employee chose to retire under the Voluntary Early Retirement Program after the court order which order set out the payment terms for the Appellants' employees who chose to retire under Voluntary Early Retirement Program.

The Respondent's Submissions

45. Counsel for the Respondent, D.K Korir, in his submissions dated 24th July 2023 framed the issues for determination to be:
- i. Whether the Appellant was bound by the collective bargaining agreement
 - ii. Whether the Claimant was a member or unionisable member of the union
 - iii. Whether there was a valid recognition agreement between the Appellant and the union and whether the said issue was pleaded for the Honourable court to consider
 - iv. Whether the Respondent was bound by the consent order dated 8th June 2018 arising from Nakuru ELRC Cause No. 68 of 2018 entered into between the Appellant and the union
 - v. Whether the Respondent is bound by his decision to retire under the voluntary early retirement program
 - vi. Whether the appellant is entitled to the reliefs sought
46. On the first issue, it was submitted that the Respondent was not bound by the Collective Bargaining Agreement between the Appellant and Kenya Plantation and Agricultural Workers Union.
47. The Respondent states that the CBA in question is not enforceable and binding on the Respondent because the same was not registered with the Industrial Court as required by the provisions of section 59(5) of the *Labour Relations Act*. In support of this position, the Respondent placed reliance on the case of *Kenya Union of Commercial Food and Allied Workers v Kenya National Library Services (2016) eKLR* and *Kenafric Industrial Limited v Bakery Confectionary Food Manufacturing and Allied Workers Union (2014) eKLR*.
48. The Respondent submitted that the Learned Trial Court was right when he held that the CBA lacked legal standing and is thus not binding on the Respondent since no order confirming registration of the same was produced before him.
49. As to whether the Claimant was a member or unionisable member of the union, the Respondent avers that in the absence of an enforceable and binding CBA, the Respondent cannot be considered a member of the Union or a unionisable employee.
50. The Respondent avers that did not present any documentary evidence before the trial court to demonstrate that the Respondent was a member of the Union or a unionisable employee and that in the circumstances the union lacked locus standi to institute any claim and/or suit on behalf of the Claimant since he was not a member or a unionisable member.
51. On the third issue, the Respondent submits that there was no valid recognition agreement between the Appellant and the Union. It was submitted that the law requires that a Recognition Agreement should be in writing.



52. On the fourth issue, the Respondent submits that having demonstrated was not bound by the CBA, that he was neither a member of the Union nor unionisable employee and that there was no valid recognition agreement, he is not bound by the consent order dated 8th June 2018 arising from Nakuru ELRC Cause No. 68 of 2018 entered into between the Appellant and the Union. That he was therefore entitled to payment of the Voluntary Early Retirement package based on the initial offer and not the revised offer which arose from the consent order.
53. It is the Respondent's submission that he was not bound by the consent order which was the basis of the payment of the revised VER offer.
54. On whether the Respondent is bound by his decision to retire under the voluntary early retirement program, the Respondent submits that he accepted the offer to retire early based on the initial VER package. He submits that the decision to voluntarily retire early was made by the Respondent on 16th February 2018 and this fact is acknowledged by the Appellant in the letter to the Respondent dated 28th June 2018 which appears on page 11 of the record of appeal where the Appellant states at paragraph 1 thereof "this is to notify you that your application for the voluntary early retirement dated 16th February 2018 has been accepted". The consent order which was the basis of payment of the severance pay was issued on 7th June 2018.
55. The Respondent therefore submits that he tendered his application to retire early long before the consent order in Nakuru ELRC No. 68 of 2018 was adopted as an order of the court. He submits that he never accepted the revised offer; that he accepted the VER package based on the initial offer and proceeded for retirement on that basis.
56. In the end, the Respondent submits that he had demonstrated that he was not bound by the CBA, that he was not a member of the Union or an unionisable employee, that he was not bound by the consent order and that there was no valid Recognition Agreement between the Union and the Appellant.
57. Consequently, the court was urged to dismiss the appeal with costs

Determination

58. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issue that falls for my determination is whether the findings of the Trial Court are in conformity with the pleadings and evidence adduced before it. I will address the grounds of appeal in the order in which they have been set out in the Memorandum of Appeal.
59. In grounds 1, 2 and 3 of Appeal, the Appellant has faulted the trial magistrate for finding that the Collective Bargaining Agreement only applied to employees who expressly subscribed to be members of the trade union and not unionisable employees.
60. According to the Memorandum of Claim, the issue in dispute is whether the consent entered into in Nakuru ELRC No. 68 of 2018 was binding on the Respondent.
61. Section 2 of the *Labour Relations Act*, defines a unionisable employee as any employee, eligible for union membership.
62. Section 59(1) of the *Labour Relations Act* provides that;

- "(1) A collective agreement binds for the period of the agreement—
 - (a) the parties to the agreement;



- (b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or
- (c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees."

63. In the case of *Kenya Union of Journalists and Allied Workers vs Nation Media Group Limited & Another* (2013) eKLR the court observed:

"9. Under Section 2 of the *Labour Relations Act*, unionisable employee means any employee, eligible for union membership. Recognition is granted to a trade union, as a representative of unionisable employees. Recognition is granted to trade unions as representatives of the interests of any employee eligible for membership. Recognition is not granted for trade unions to negotiate and collectively bargain, to the benefits of members alone; they are recognized by employers, in order to represent the interests of any employees eligible for trade union membership. They represent at the collective bargaining forum, the broad spectrum of unionisable employees. The focus is on eligibility."

64. It is not contested that the Respondent was not a member of the Kenya Plantation and Agricultural Workers Union. It is further not contested that the Collective Bargaining Agreement between the Union and the Respondent was binding on all Unionisable employees as defined in section 2 of the *Labour Relations Act*.

65. The collective bargaining agreement was not the subject of the dispute before the court in Nakuru ELRC No. 68 of 2018. A copy of the collective bargaining agreement at pages 68 to 83 of the record of appeal further reflects that the issue of voluntary retirement is not provided for in the CBA.

66. In their submissions before this court the parties did not address the court on the circumstances under which the union went to court to contest the voluntary early retirement offered by the Appellant. What is clear from the record is that the parties recorded a consent on the issue that was the subject matter of the dispute being what was to be paid as VER package.

67. The Respondent informed the trial court that the original offer of VER was for payment of severance pay at 1.5 times of salary per completed year of service. The consent in Nakuru ELRC No. 68 of 2018 however divided the employees into 2 categories: those who were up to 50 years of age who were to be paid at the rate of 1.5 times months' salary per year of service and those who were above 50 years of age who were to be paid at the same rate of 1.5 times of monthly salary but based on the years remaining to retirement.

68. As has been submitted by the Respondent, he was not a member of the Union. It is therefore obvious that the union could not represent him in court.

69. Secondly, he had accepted the VER as proposed by the Appellant which offered all employees including him 1.5 months' salary per completed year of service. There is no evidence that the Respondent was aware of the said suit.

70. The Appellant did not make a fresh offer to the Respondent after the consent order. No evidence was adduced to demonstrate that the Appellant communicated to the Respondent the new package



payable based on the consent order at all. The Respondent could therefore not be bound by a consent that he was not party to or by VER terms that he did not agree with or sign for.

71. The law of contract on offer and acceptance is clear that a person cannot be deemed to have accepted an offer different from that which was presented to him. Where there is a new offer, it must be made and accepted to form the basis of the new contract. If no new offer is made, a party cannot be deemed to have accepted the terms of a new offer by virtue of the fact that he had accepted the original offer.
72. In the present case, a specific invitation was made to all employees on the VER. As stated by the Respondent, the invitation included a tabulation of the amount payable to each employee as the VER package. The Respondent made an offer to retire on the terms he was issued with which the Appellant accepted. The contract was concluded at that moment. No new offer was made to the Respondent.
73. What the Appellant paid was not what the Respondent offered to take or what the Appellant accepted. There was thus no new invitation to the Respondent other than the original invitation which the Respondent offered to take and the Appellant accepted.
74. Finally, the Respondent submitted that the consent was discriminatory. I agree with him. The parties CBA provides for severance pay based on years of service. The Employment Act also provides for severance pay at section 40 thereof based on years of service. The consent filed by the parties in court, which offered to pay severance based on the remaining years of service therefore had no basis in the law or the CBA.
75. The payment was also discriminatory because an employee like the Respondent would earn less than another employee who earned the same salary and had worked for a similar number of years but was below 50 years old. That consent was therefore an illegality and therefore voidable at the instance of any of the parties.
76. From the foregoing, I find that the trial court did not err in holding that the consent in Nakuru ELRC No. 68 of 2018 was not binding on the Respondent even though he arrived at the said decision based on different reasons from those in this judgment.
77. On the remedies, the Appellant stated that some payments had been made to the Respondent and therefore the award of the trial court may have contained double or duplicate payments to the Respondent. For this reason I will set aside the award of the trial Magistrate on payment of Kshs. 511,895.57 and in place thereof, order that the Appellant makes a fresh tabulation of the payments due to the Respondent based on the original offer of Voluntary Early Retirement and factoring therein the tax waiver and the payments already received by the Respondent. This is to be done within 30 days from the date of this judgment and shared with the Respondent before being filed in court.
78. The parties are to return to this court for confirmation of the amount payable to the Respondent. A mention date will be given at the time of delivery of this judgement.
79. The Appellant will bear the costs of the suit both in the appeal and in the trial court.
80. Interest shall accrue from the date of the judgement in the trial court.
81. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF SEPTEMBER, 2024.

MAUREEN ONYANGO

JUDGE

